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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **W. HANSEN, JR. AND** **M. HANSEN**	) OTA Case No. 20056156

OPINION

Representing the Parties:

For Appellants: Christopher A. Karachale

For Respondent: Joel M. Smith, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, W. Hansen, Jr., and M. Hansen (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants' claim for refund of $12,300 for the 2017 tax year.

This matter is being decided on the basis of the written record because appellants waived the right to an oral hearing.

ISSUES[1]

1. Should the late-filing penalty, which respondent imposed on appellants for their failure to timely file their income tax return for the 2017 tax year, be abated?
2. Should interest accrued and added to appellants' liability for the 2017 tax year, or any portion thereof, be abated?

[1] Respondent's records indicate that $3,475.85 of the amount referred to in the Notice of Tax Return Change – Revised Balance was for interest. At the time respondent issued that notice, the total of the late-filing penalty and interest was $12,299.85. Appellants' claim a refund filed with respondent requested a refund due of $12,300. Thus, it appears appellants also request abatement of paid interest. Although appellants' April 28, 2020 opening brief and December 21, 2020 reply brief identify penalty abatement as the sole issue, absent a specific written waiver, and out of an abundance of caution, we will address the interest abatement issue below.

FACTUAL FINDINGS

1. Prior to June 2019, W. Hansen, Jr. (appellant husband) was a member of the faculty of a school of dentistry in California.
2. During the 24 tax years 1994 through 2017, inclusive, appellant husband filed no California income tax returns for six tax years, timely returns for two tax years, and late returns for 16 tax years.[2] Fifteen of those late returns were over a year late. Four of those 15 were over two years late, and one was over three years late.[3]
3. Appellants did not file their 2017 joint income tax return by the October 15, 2018, extended due date.
4. On April 24, 2019, respondent issued to appellant husband a Demand for Tax Return, which instructed appellant husband to respond by May 29, 2019, by filing a 2017 tax return, providing a copy of that year's tax return, if already filed, or explaining why he was not required to file a 2017 tax return.
5. Appellants subsequently filed their 2017 California Resident Income Tax Return late, reporting unpaid tax, plus $5,962 in interest and unspecified penalties. Appellants did not pay the balance due with their return.
6. On November 14, 2019, respondent issued to appellants a Notice of Tax Return Change – Revised Balance, informing appellants that the balance due included unpaid tax, a late-filing penalty of $8,825.00 and interest of $3,474.85.
7. On January 13, 2020, appellants paid their 2017 balance due and filed a Reasonable Cause – Individual and Fiduciary Claim for Refund of $12,300 for the 2017 tax year.[4]
8. Respondent denied the claim for refund on January 29, 2020.
9. This timely appeal followed.

[2] We cannot determine from the evidence that these were all joint returns filed with appellant wife.

[3] We would not usually refer to the filing history of a taxpayer as relevant to the question of why a taxpayer failed to timely file a return for the year(s) at issue. In this case, though, the history is relevant, as discussed below.

[4] This amount includes the late filing penalty of $8,825.00 and interest of $3,474.85, as reflected on the Notice of Tax Return Change – Revised Balance.

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DISCUSSION

Issue 1: Should the late-filing penalty, which respondent imposed on appellants for their failure to timely file their income tax return for the 2017 tax year, be abated?

R&TC section 19131 requires respondent to impose a late-filing penalty when a taxpayer does not file its return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. Reasonable cause for late filing is shown when the evidence establishes that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Head and Feliciano, 2020-OTA-127P*.) Willful neglect is defined as a "conscious, intentional failure or reckless indifference." (*Appeal of Triple Crown Baseball LLC*, *supra*; *United States v. Boyle* (1985) 469 U.S. 241, 245-246.[5])

When respondent imposes a late-filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to prove otherwise.[6] (*Appeal of Xie*, 2018-OTA-076P.) To prove that the late filing was due to reasonable cause and not willful neglect, and thus overcome the presumption of correctness, the taxpayer must provide credible and competent evidence. (*Ibid*.) That evidence must show the failure to timely file occurred despite the exercise of "ordinary business care and prudence." (*Appeal of Bieneman (82- SBE-148) 1982 WL 11825*.) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

A serious illness of a taxpayer or a member of a taxpayer's immediate family may establish reasonable cause for a failure to timely file a return. (*Appeal of Head and Feliciano*, *supra*; see also *United States v. Boyle*, *supra,* at p. 243, fn 1.) However, the illness and resulting disability must be sufficiently and continuously disruptive to have prevented both appellants from timely filing the joint return. (*Appeal of Head and Feliciano*, *supra*; see also *Estate of*

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[5] Section 19131 is based on Internal Revenue Code section 6651. The interpretation and effect given the federal provision by the federal courts and administrative agencies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Board* (1969) 275 Cal.App.2d 653, 658.)

[6] According to R&TC section 19131(a), the late-filing penalty is 5 percent of the tax for each month or fraction thereof elapsing between the due date of the return (determined without regard to any extension of time for filing) and the date on which the return is filed, with a maximum penalty equal to 25 percent of the tax. Appellants do not dispute the amount of the proposed penalty.

Stuller, et al. v. United States (7th Cir. 2016) 811 F.3d 890; *Williams v. Commissioner* (1951) 16 T.C. 893.)

Here, appellants argue that their physical disabilities, described below, and the unexpected retirement of their tax preparer made it practically impossible for appellants to timely file their return.[7] In support of their arguments, appellants provided documents pertaining to their plan to complete a tax-deferred exchange of rental properties pursuant to Internal Revenue Code (IRC) section 1031 (1031 exchange). On September 12, 2017, appellants relinquished their rental property, and an October 2, 2017 letter to appellants explained that the replacement property must be identified by October 27, 2017, and the exchange must be completed by March 9, 2018.[8] A final accounting indicates that appellants did not complete the exchange, which meant that they would owe additional tax measured by their capital gains realized from the sale.

In addition, appellants have provided various medical records pertaining to: appellant husband's stroke on or about January 30, 2018, resulting in impairments of attention, impaired ability to understand or express speech (aphasia), and lack of voluntary coordination of muscle movements on one side; appellant husband's February 26, 2018 hospital admission via the emergency room for evaluation of brief aphasia and facial droop while giving a standing lecture at work, with the aphasia resolved but the facial droop persisting; and appellant M. Hansen's (appellant wife's) heart catheterization and stent placement in mid-November 2018. These records include three letters from appellants' primary care physician: a March 18, 2020 letter, which describes appellant husband's "relatively benign" five-year history of Parkinson's disease that predated a May 2018 stroke, after which the patient "gradually returned to his normal schedule over the next several months," until he suffered a second mild stroke in June 2019, that one leading to his early retirement from his faculty position at the school of dentistry; a November 20, 2020 letter, which states that appellant husband suffered numerous strokes, which resulted in "memory loss, speech impairment, judgement, and other cognitive deficiencies, and caused his 2017 tax filing delinquency in 2018," and further states that a January 30, 2018

[7] Although the parties do not refer to "practical impossibility," the term fairly reflects what the law requires. (See *Appeal of Head and Feliciano* and *Estate of Stuller, et al. v. United States*, supra.) The evidence must show that neither joint filer, exercising ordinary business care and prudence, could have timely filed the return.

[8] IRC section 1031 requires that the replacement property be identified within 45 days of the date the taxpayer transfers the relinquished property and received within 180 days of that transfer.

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stroke required hospitalization and left appellant husband "with chronic debilitating difficulties requiring long-term therapy;" and a second November 20, 2020 letter, which states that appellant wife suffered facial fractures in a fall on October 24, 2018, followed shortly thereafter by surgical placement of a cardiac stent. The question that we must answer is whether the disabilities established by the evidence made it practically impossible for appellants to timely file their 2017 return.

The partial medical records indicate that appellant husband suffered a series of strokes beginning on or about January 30, 2018, but they do not prove that appellant husband could not have arranged for the timely filing of a return.[9] Although the primary care physician's March 8, 2020 letter states, "Confusion commonly seen in stroke victim has made it impossible for [appellant husband] to predictably stay [abreast] of deadlines," the doctor does not explain the factual basis for this opinion, which, even if correct, does not show that it was practically impossible for appellants to timely file their 2017 return. The doctor's opinion also seems inconsistent with the doctor's statement in that letter that appellant husband gradually returned to his normal schedule over the months following his first stroke. Medical records confirm appellant husband's return to teaching within a month, the late February incident (involving transitory aphasia and persistent facial droop) having occurred while appellant husband was giving a class lecture.[10] It was not until after the June 2019 event that appellant husband accepted the early retirement offer, which was eight months after the extended due date for the return.

Although the doctor's second letter dated November 20, 2020, refers to "chronic debilitating difficulties requiring long-term therapy" and opines that appellant husband was "unable to attend to his personal business affairs due to serious medical issues throughout 2018" and that his health issues "contributed to the delinquency in tax filing," these are conclusory statements and, again, the doctor does not explain what those difficulties were or how they prevented appellant husband from hiring someone to file the return. We do not doubt that appellant husband suffered ill effects, even serious ones, but the effects evidenced in the medical

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[9] There is no evidence before us to suggest that either appellant was disabled before approximately January 30, 2018.

[10] We note that the letter refers to a May 2018 stroke, which is not otherwise evident in the medical records provided, and we believe that the doctor intended to reference the January 30, 2018, event.

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records do not appear to have been sufficiently and continuously disruptive to have prevented compliance with the law.

Furthermore, regardless of the evidence of appellant husband's disability, there is no evidence that appellant wife was incapable of arranging for the timely filing of a return at any time prior to the October 15, 2018, extended due date. According to the medical records, she sustained facial injuries in a fall on October 28, 2018, and thereafter underwent heart catheterization in November, both occurring after the extended filing date.

In their first brief, appellants state that they have always filed their return on time. In their reply brief, appellants provide information regarding the planned like-kind exchange pursuant to IRC section 1031. It appears that their intent is to show that prior to their medical disabilities in 2018, appellants were able to "regularly attend to their personal financial and business affairs," at least implying that, but for their disabilities, they would have timely filed the return. However, the evidence indicates just the opposite. As noted above, appellants rarely filed timely returns, at least since 1994. Furthermore, the evidence that appellants did not complete their planned 1031 exchange by the March 9, 2018 deadline does not establish that neither appellant was able to make arrangements for the timely filing of a return.

We find that appellants have not shown that the late filing was due to reasonable cause and not due to willful neglect as required by R&TC section 19131. Consequently, the late-filing penalty, which respondent imposed on appellants for their failure to timely file their income tax return for the 2017 tax year, should not be abated.

Issue 2: Should interest accrued and added to appellants' liability for the 2017 tax year, or any portion thereof, be abated?

Taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). (R&TC, § 19101.) If tax is not paid by the original due date or if respondent assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due. (*Ibid*.) Interest is not a penalty but is merely compensation for a taxpayer's use of the money. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Appellants allege only that their failure to timely file the 2017 return was due to reasonable cause and not to willful neglect. There is no reasonable cause exception to the imposition of interest. (*Appeal of GEF Operating, Inc.*, *supra*.) Therefore, we find that

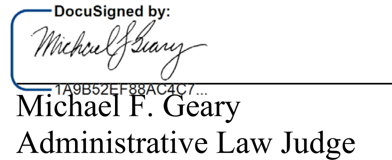
appellants have not established a basis for abatement of interest. We conclude that interest accrued and added to appellants' liability for the 2017 tax year should not be abated.

HOLDINGS

1. The late-filing penalty, which respondent imposed on appellants for their failure to timely file their income tax return for the 2017 tax year, should not be abated.
2. Interest accrued and added to appellants' liability for the 2017 tax year should not be abated.

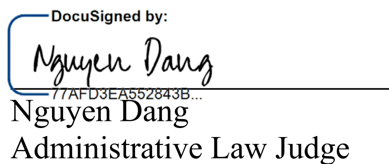
DISPOSITION

Respondent's action is sustained.

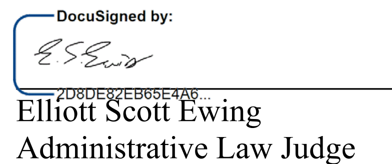


Michael F. Geary
Administrative Law Judge

We concur:



Nguyen Dang
Administrative Law Judge



Elliott Scott Ewing
Administrative Law Judge

Date Issued: 7/16/2021