

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**CLIFFORD PERRY**

) OTA Case No. 18103864  
) Date Issued: September 24, 2019  
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)

**OPINION**

Representing the Parties:

For Appellant: Jeffery L. Joiner, CPA

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Ellen L. Swain, Tax Counsel

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Clifford Perry (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,398.28, plus interest, for the 2015 taxable year.

Appellant waived the right to an oral hearing; therefore, we decide the matter based on the written record.

**ISSUES**

- 1. Has appellant established that he is entitled to a refund of the late-filing penalty?
- 2. Is appellant entitled to abatement of interest paid?

**FACTUAL FINDINGS**

- 1. Appellant transferred a 2012 overpayment to his 2014 tax account on or about June 17, 2016, that resulted in a 2014 overpayment of \$11,073.
- 2. On August 28, 2017, appellant filed his 2015 non-resident income tax return (Form 540NR), more than one year after the due date of the return. The return reported a tax liability of \$4,419. On the same date, appellant filed his 2014 Form 540NR, reflecting

- the overpayment. On the return, appellant requested that his 2014 overpayment be applied to his 2015 tax liability.
3. FTB issued a Notice of Tax Return Change – Revised Balance on August 28, 2017, imposing a late-filing penalty of \$1,104.75, plus interest.
  4. FTB applied the funds transferred from 2014 to satisfy appellant's 2015 tax liability, the late-filing penalty, and interest of \$293.53.
  5. Appellant objected to the imposition of the late-filing penalty for 2015, which FTB treated as a claim for refund. FTB denied the claim for refund. Appellant filed this timely appeal.

### DISCUSSION

R&TC section 19131 imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date, unless a taxpayer demonstrates that the failure was due to reasonable cause and not willful neglect. The late-filing penalty may be abated when the taxpayer shows that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P; *Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) The law presumes FTB imposed the penalty correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) To overcome the presumption of correctness inherent in the imposition of a penalty, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause. (*Appeal of Xie, supra*; *Appeal of Walshe* (75-SBE-073) 1975 WL 3557.)

Here, appellant requests a refund in the amount of the late-filing penalty assessed by FTB. Appellant argues that the 2015 taxes were timely paid because there was an overpayment on his 2014 tax account.<sup>1</sup> The late-filing penalty is based on the amount of tax required to be shown on the return, reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax. (R&TC, § 19131(c).) Thus, the penalty is properly imposed unless appellant's transfer from taxable year 2014 resulted in a credit prior to the due date of the payment (April 15, 2016).

R&TC section 19383 states a credit for an overpayment in satisfaction of any tax liability shall be deemed to be a payment at the time the credit is allowed. FTB has not promulgated any

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<sup>1</sup> Appellant additionally contends that he is entitled to claim a refund of the penalty because he filed his return within four years of the due date of the return (within the statute of limitations for filing a refund). Appellant's claim for refund was made in a timely manner; however, timeliness of the claim for refund was not the reason for FTB's denial of appellant's claim.

regulation that would definitively determine the date a credit is allowed when a taxpayer files a delinquent tax return requesting that credit. The Internal Revenue Service, however, did consider the effective date of the credit of an overpayment to a subsequent year's estimated tax liability for purposes of computing interest due on a subsequently determined underpayment. (See Rev. Rul. 88-97, 1988-1 C.B. 355, Situation 3.) The Revenue Ruling concludes that where a taxpayer's election to credit an overpayment to a subsequent year's estimated tax is made on a delinquent return, the credit is effective on the date the delinquent return is filed. (*Ibid.*) Moreover, that conclusion is consistent with R&TC sections 19002 and 19383. The former states that a taxpayer may claim a refund for overpayment in a prior taxable year until such date as the overpayment *is claimed* as a credit for a succeeding taxable year. (R&TC, § 19002(e), emphasis added.) The latter states that credit of an overpayment to a tax liability is deemed to be paid at the time *the credit is allowed*. (R&TC, § 19383, emphasis added.) Lastly, the California State Board of Equalization (BOE) considered whether a prior year's overpayment by a corporation could be applied to later years' estimated tax liabilities. (*Appeal of Capitol Architectural Products Co. (CAP Co.)* (96-SBE-021) 1996 WL 780579.) As here, *CAP Co.* argued that the determinative date should be the one on which the payment was made to FTB, not on the date it filed delinquent returns and requested that the overpayments be transferred to future years' estimated taxes. (*Ibid.*) BOE concluded that payments that are transferred from another taxable year are credited as of the date the taxpayer requests that overpayments be transferred. (*Ibid.*)

The relevant timeframe, therefore, is when the transfer to another taxable year was requested. Here, appellant could have claimed a refund of his 2012 overpayment up until the time appellant requested it be credited to his 2014 tax year, on or about June 17, 2016.<sup>2</sup> Appellant's right to a refund for 2012 only ceased to exist on or about that date. Similarly, appellant did not choose to credit his 2014 overpayment to his 2015 tax liability until appellant filed his delinquent return on August 28, 2017. Consequently, the overpayment was not credited to appellant's 2015 tax liability until well after the date prescribed for payment of tax (April 15, 2016). Thus, the late-filing penalty was correctly imposed, and appellant has not disputed that it was properly calculated.

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<sup>2</sup> It is not clear from the record when or how appellant requested this transfer; e.g., in a late-filed 2012 return or otherwise. The date used herein is the date that the transfer was actually made.

The penalty may be abated, however, when a taxpayer shows that there is reasonable cause for filing a return late. Appellant has not provided any evidence of circumstances that prevented him from filing a timely return. Therefore, appellant has not met his burden to establish that he acted with ordinary business care and prudence when he did not file a 2015 return until August 28, 2017, more than a year after the filing deadline.

Although the late-filing penalty was properly imposed in this case, FTB improperly collected interest associated with the 2015 tax liability. Interest is assessed on tax that is not paid on or before the last date prescribed for payment, from the date the payment is due through the date that it is paid. (R&TC, § 19101.) Interest may not be assessed on a deficiency for the period of time subsequent to the date an overpayment was made. (R&TC, § 19108(a).) The purpose of imposing interest is to compensate for the time a taxpayer “had the use of funds which rightfully should have been in the possession of the [tax agency].” (*Manning v. Seeley Tube & Box Co. of New Jersey (Seeley Tube)* (1950) 338 U.S. 561, 566; *Avon Products, Inc. v. U.S. (Avon Products)* (1978) 588 F.2d 342.)<sup>3</sup> Interest is not a penalty, but rather mere compensation for the use of money. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) Amounts deducted or withheld for the 2012 taxable year are deemed to have been paid on the last day prescribed for filing the return; i.e., April 15, 2013. (R&TC, § 19002(c)(1).)

Appellant had no use of the overpaid funds remitted for the 2012 taxable year, while FTB did for at least 4 years. Under the decisions in *Seeley Tube* and *Avon Products, supra*, the “use of the money” principle allows the government to charge interest “to compensate the government for funds which it did not possess but which it rightfully should have possessed.” (*May Dept. Stores Co. and Subsidiaries v. U.S.* (Fed.Cl. 1996) 35 Fed.Cl. 680, 689.) Subsequent to the issuance of that decision, the Internal Revenue Code (IRC) provisions relating to interest on overpayments and deficiencies were modified. (See IRC, §§ 6601(f) and 6611(b)(1).) In *FleetBoston Financial Corp. v. U.S. (FleetBoston)* (Fed.Cir. 2007) 483 F.3d 1345, the court limited the “use of money” principle because it found that “nothing in the statutes or regulations suggests that a credit elect overpayment can be considered as never having moved to a different year's tax account for the purpose of calculating deficiency interest.” In *FleetBoston*,

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<sup>3</sup> We distinguish the imposition of interest on a retroactive offset of an outstanding tax liability, from the actual overpayment of a tax liability in the prior year that occurred here. (See *Seeley Tube*, at p. 565.) In the first instance, the government did not have use of funds because the liability remained unpaid and was only later extinguished.

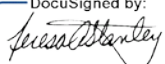
an overpayment by the taxpayer was transferred to a future year’s tax account. When a deficiency arose for the taxable year from which the overpayment was transferred, the money in the hands of the government had been applied to a different taxable year and thus was no longer available to satisfy the deficiency account. Thus, the court held that interest accrued to the taxpayer on the deficiency amount. *FleetBoston*’s facts are distinguishable from the facts on appeal here. Here, there was no deficiency determination for either 2012 or 2014 when overpayments were applied to subsequent tax years (2014 and 2015, respectively). Thus, there was never a point during which FTB did not have use of the appellant’s overpaid funds. Furthermore, had appellant filed a claim for refund instead of electing to credit the overpayment to a future year, appellant may have been entitled to be paid interest on the overpayments retroactive to the date of filing the return for the year the overpayment was made. (See R&TC, §§ 19340, 19341(d).) In finding that appellant is entitled to a refund of interest paid on his 2015 tax liability, we distinguish between the date that a transferred overpayment may be deemed credited to a subsequent liability, and the date the overpayment is actually made.

HOLDINGS

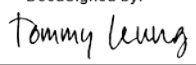
1. Appellant is not entitled to a refund of the late-filing penalty.
2. Appellant is entitled to a refund of interest paid.

DISPOSITION

FTB’s denial of appellant’s claim for refund of the late-filing penalty is sustained. FTB must refund interest paid by appellant.

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Teresa A. Stanley  
Administrative Law Judge

I concur:

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Tommy Leung  
Administrative Law Judge

J. JOHNSON, Concurring and Dissenting, in part:

I concur with the majority's denial of the refund of the late-filing penalty. I respectfully dissent from the majority's position granting the refund of interest. As cited in the majority's Opinion, *Manning v. Seeley Tube & Box Co. of New Jersey (Seely Tube)* (1950) 338 U.S. 561 provides that the government "is to have the possession and use of the lawful tax at the date it is properly due." (*Seeley Tube*, at p. 568.) The facts of *Seeley Tube* involved the net operating loss carryback provision, which was instituted to provide relief for war-time restrictions on claiming certain deductions for operating expenses by allowing those companies to retroactively apply deductions to those war-time years on subsequent years' tax returns. The court determined that, even though the carryback losses completely offset the outstanding tax liability for the previous years, "[t]he subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency." (*Id.* at p. 565.) In other words, even though the tax liability was extinguished, interest was still due for the period from the original due date of the return to the date of the act that extinguished the liability.

Holding true to that analysis, and for purposes of calculating interest, it is not enough to show that a taxpayer's tax obligation can be satisfied *effective* the date the return was due through the use of subsequent transfer of losses or payments. Rather, the tax liability must be actually satisfied as of that date to stop the accrual of interest. The majority's analysis draws a distinction between the date an overpayment is credited via transfer and the date an overpayment is made, but I find no such distinction in the law, and specifically when it comes to the analysis of interest accrual. The majority's reference to R&TC section 19002(c)(1) discusses the date withholding and estimated payments are deemed paid, but that date only applies with respect to the tax year for which they are made.

The analysis of whether the taxing authority has the "use of money" (for interest accrual purposes) is specific to the account (i.e., tax year) to which the payment is credited and as of the dates it is credited to that year and transferred to another year. (See Rev. Rul. 99-40.)<sup>1</sup> "[A] tax for a particular year is not paid by money generally held by [the taxing agency], but rather by money assigned as payment of the tax for that year." (*FleetBoston Financial Corp. v. United*

<sup>1</sup> Revenue Ruling 99-40 was created in response to *May Dept. Stores Co. and Subsidiaries v. U.S.* (Fed.Cl. 1996) 35 Fed.Cl. 680, 689. (See *Computervision Corp. v. U.S.* (Fed. Cl. 2004) 62 Fed.Cl. 299, 310, aff'd (Fed.Cir. 2006) 445 F.3d 1355, adhered to on denial of reh'g (Fed.Cir. 2006) 467 F.3d 1322.)

*States (FleetBoston)* (Fed. Cir. 2007) 483 F.3d 1345, 1350.) In *FleetBoston*, the court rejected an argument based on the “use of the money” theory that asserted a tax is considered paid, for purposes of stopping the accrual of interest, “not only by funds in the taxpayer’s account for that year, but also by any funds that the government holds interest-free in other tax accounts when those funds are not needed to satisfy the taxes associated with those accounts.” (*Id.* at p. 1349.) When discussing the transfer of overpayments, the majority’s earlier discussion is accurate when it states that credit of an overpayment to a tax liability is deemed to be paid at the time the credit is allowed, citing R&TC section 19383. The analysis of that timing is specific to each tax year account, for purposes of both the penalty and interest accrual.

Accordingly, I find that the date that the overpayment was “made,” credited, or considered as a “payment” for the year at issue to be the same date for purposes of both the late-filing penalty and interest abatement analyses. (see R&TC, §§ 19108(a) & 19383.) Here, that date is August 28, 2017, the date appellant filed his amended return for 2014 and requested that his overpayment for the 2014 tax year be applied to his 2015 tax year. Based on the above, to create different payment dates for purposes of the late-filing penalty versus the calculation of interest is a position I find to be unsupported. Therefore, interest was properly imposed for the period from the original due date of the return to the date the overpayment was credited to appellant’s 2015 tax year, and no interest abatement is warranted in this matter. Accordingly, I respectfully dissent from the majority holding as to the abatement of interest.

DocuSigned by:

*John O Johnson*

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John O. Johnson

Administrative Law Judge