

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
N. SESSA

) OTA Case No. 20116964
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OPINION

Representing the Parties:

For Appellant: Haley A. Ritter, Tax Appeals Assistance Program (TAAP)¹
For Respondent: Sarah J. Fassett, Tax Counsel

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, N. Sessa (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$748.46 for the 2019 tax year.²

Appellant waived his right to an oral hearing, so we are deciding this matter based on the written record.

ISSUES

1. Whether appellant has shown reasonable cause for paying his taxes late.
2. Whether waiving the underpayment-of-estimated-tax penalty (estimated tax penalty) is warranted.
3. Whether abating interest is warranted.

¹ N. Sessa (appellant) filed his opening brief. Carmen Vera of TAAP filed appellant’s reply brief. Conner E. McGettigan of TAAP filed appellant’s supplemental brief.

² Appellant’s claim for refund encompasses a late-payment penalty, an underpayment-of-estimated-tax penalty, and interest.

FACTUAL FINDINGS

1. On March 6, 2020, appellant timely filed his 2019 California income tax return (return), reporting a tax liability of \$9,832, an estimated tax penalty of \$71, and a total amount due of \$9,903.
2. On March 13, 2020, appellant requested an electronic payment of \$9,903 from his bank via FTB's online Web Pay system. That same day, FTB confirmed by automated email that it had received appellant's payment request.³ The automated email included the following caveat: "If ... the banking information you entered is incorrect ... your financial institution may reject your request." FTB's email further stated, "Allow up to 2 business days from the payment date for your bank account to reflect your payment. To confirm your payment has been cleared, review your bank account statement or contact your bank."
3. Appellant included incorrect bank account information with his Web Pay request.
4. Appellant's bank did not deduct any money from his bank account.
5. On March 23, 2020, per his cell phone records, appellant attempted to call FTB four times: once at 1:51 p.m.; twice at 1:56 p.m.; and once at 2:01 p.m. FTB's own records noted one incoming call from appellant on March 23, 2020, with the following details: appellant "called to question registering. [N]o account registered. [Appellant] will have to reregister for an account."
6. On March 25, 2020, appellant attempted to call FTB four more times: at 2:50 p.m.; at 2:51 p.m.; at 3:11 p.m.; and at 3:22 p.m. The records FTB submitted on appeal do not corroborate any incoming calls made by appellant on March 25, 2020, nor note any other incoming calls from appellant until September 24, 2020.
7. Appellant's \$9,832 tax liability remained unpaid through the applicable July 15, 2020 due date.⁴
8. On September 14, 2020, via a written State Income Tax Balance Due Notice (notice), FTB notified appellant that he had a tax balance due of \$10,360, interest of \$87.05, and

³ The subject line of FTB's March 13, 2020 automated email read, "Confirmation Web Pay Scheduled."

⁴ Due to the COVID-19 pandemic, FTB postponed the deadline for 2019 tax return payments until July 15, 2020, for all individuals and business entities.

payments and adjustments of \$520.⁵ FTB also imposed late-payment and estimated tax penalties totaling \$660.92. This notice indicated that if appellant paid the total balance of \$10,587.97 by September 29, 2020, he could avoid additional interest and penalties.

9. On September 24, 2020, FTB's records noted an incoming call from appellant regarding "Underpayment / Balance Due." That same day, appellant paid \$10,651.46 to FTB.
10. By letter dated September 24, 2020, appellant requested a refund of penalties and interest in the amount of \$748.46. FTB treated appellant's letter as a claim for refund.
11. FTB denied appellant's claim for refund.
12. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown reasonable cause for paying his taxes late.

A late-payment penalty is imposed if a taxpayer fails to pay the amount shown as tax on any return on or before the applicable due date. (R&TC, § 19132(a)(1)(A).)

Here, on March 13, 2020, via FTB's online Web Pay system, appellant requested electronic payment of the \$9,832 tax liability shown on his 2019 return. However, appellant included incorrect bank account information with his request, and appellant's \$9,832 tax liability remained unpaid through the applicable due date of July 15, 2020. Thus, the late-payment penalty was properly imposed. Appellant ultimately paid his tax liability late on September 24, 2020.

The late-payment penalty may be abated if the taxpayer shows that the late payment of tax was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause, a taxpayer must show that his failure to timely pay tax occurred despite exercising ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) The reason for paying late must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Ibid.*)

On appeal, appellant argues that he had reasonable cause to pay his tax liability late and that his failure to timely pay tax occurred despite exercising ordinary business care and

⁵ FTB later determined that the actual amount of these credits was \$528, not \$520.

prudence.⁶ Specifically, appellant argues that, following his attempt to timely pay his tax liability on March 13, 2020, he monitored his bank account for the withdrawal of funds, and, after his account did not reflect payment after three days, he attempted to contact both FTB and his bank about why. Appellant also contends that he registered for an online FTB account to monitor his payments, but could not sign-in to this account because of an alleged address discrepancy that resulted from moving. Additionally, appellant notes that he attempted to pay his tax liability at the onset of the COVID-19 global pandemic, which he claims was an unprecedented obstacle in determining and resolving his payment issues.

Regarding his contact with FTB, appellant contends that he attempted to call FTB several times a day, several times a week, between March and September 2020, to complete payment.⁷ Regarding his contact with his bank, appellant claims that, during an April 1, 2020 phone call, his bank informed him that FTB had the option to withdraw funds from his bank account at FTB's discretion and FTB could take up to six months to do so following his electronic payment request. Appellant also alleges that sometime after this April 1, 2020 phone call, he again called FTB about the status of his payment. According to an affidavit appellant submitted on appeal, "FTB's answers to my questions left me with the impression that there were no issues with my attempted tax payment on March 13, 2020," and that he had not erred. Appellant alleges that he did not make further attempts to remit payment.⁸ Appellant argues that his reliance on both his bank and FTB's representations was reasonable, and his ensuing inaction is how an ordinarily intelligent and prudent businessperson would have acted under the circumstances.

In response, FTB argues that appellant failed to exercise ordinary business care and prudence, which led to the late payment of his taxes. FTB identifies three times appellant's actions (or inaction) diverged from what it expected from an ordinarily intelligent and prudent

⁶ Appellant also argued that abating the late-payment penalty was warranted based on both policy grounds and his 40-plus-year history of timely compliance. However, per R&TC section 19132(a)(1), we may only abate the late-payment penalty upon a taxpayer's showing of reasonable cause. Accordingly, we will not address appellant's policy and compliance-history arguments any further.

⁷ Specifically regarding his March 23, 2020 phone call with FTB, appellant argues that, at that time, it should have been obvious to FTB that appellant had no knowledge that his payment request was unsuccessful, implying that FTB had a duty to inform him of that fact, but did not. However, lack of notice from FTB of a failed payment does not negate a taxpayer's own duty of prudence and care to verify that his scheduled payment was successful. (*Appeal of Scanlon*, 2018-OTA-075P.) Accordingly, we conclude that appellant's duty/lack-of-notice argument regarding his March 23, 2020 phone call lacks merit, and we will not address it further.

⁸ We note that this assertion appears to contradict appellant's earlier contention on appeal that he attempted to call FTB several times a day, several times a week, between March and September 2020, to complete payment.

businessperson. First, FTB contends that appellant did not ensure that his bank account information was correct before submitting his electronic payment request via Web Pay on March 13, 2020. Second, FTB contends that, during appellant's March 23, 2020 phone call with FTB to discuss registering for an online FTB account, appellant failed to mention that his March 13, 2020 requested payment had not yet cleared his bank account. Third, FTB contends that, after March 2020, through the applicable July 15, 2020 payment deadline (and even until appellant's September 24, 2020 late payment), there is no evidence in the record showing that appellant took any action to ensure payment of his taxes.

As a preliminary matter, we note that appellant's late tax payment was initially precipitated by his failure to include correct bank account information with his March 13, 2020 Web Pay request. The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.) Rather, we would expect a reasonably prudent taxpayer exercising due care and diligence to monitor his bank account and quickly ascertain whether a scheduled electronic payment from his account to FTB was in fact paid. (*Appeal of Scanlon*, 2018-OTA-075P.)

Here, FTB's records confirm that appellant called FTB on March 23, 2020, but the subject of appellant's call was registering for an online FTB account, not why his payment request from 10 days prior had yet to clear. Exercising ordinary business care and prudence entails ensuring a tax payment was *actually submitted* (*Appeal of Friedman, supra*), and, on the facts before us, we believe that would mean inquiring with FTB about a potentially unsuccessful electronic payment request made through FTB's Web Pay system when on the phone with FTB itself. We conclude that appellant did not exercise ordinary business care and prudence with respect to his March 23, 2020 call with FTB.

Regarding appellant's contention that he attempted to call FTB several times a day, several times a week, between March and September 2020, to complete payment, we find that, except for calls appellant made to FTB on two days in March 2020, this contention is largely unsupported by the record. The record indicates that, aside from his call on March 23, 2020, appellant attempted to call FTB four more times on March 25, 2020, but there is no evidence that he actually spoke with anyone at FTB that day. Moreover, neither appellant nor FTB has submitted any evidence substantiating any calls from appellant to FTB during the period from

March 26, 2020 until September 24, 2020.⁹ The inquiry into whether there is reasonable cause for a late payment continues until actual payment is remitted (*Appeal of Moren*, 2019-OTA-176P; see also *Appeal of Triple Crown Baseball LLC*, *supra* [an acceptable reason for failing to pay taxes will excuse such failure only so long as the reason remains valid]). Because of the absence of evidence that appellant attempted to call FTB several times a day, several times a week, from March 26, 2020 until September 24, 2020 (i.e., the date appellant remitted actual payment), we find appellant's contention lacks merit.

Regarding appellant's reliance on his bank's alleged representation on an April 1, 2020 call that FTB had the option to withdraw funds at FTB's discretion and FTB could take up to six months to do so following appellant's electronic payment request, we find that appellant's reliance does not constitute the exercise of ordinary business care and prudence. Specifically, we do not believe that an ordinarily intelligent and prudent businessperson would rely upon his or her bank's representation about FTB's payment withdrawal processes or timeline without verifying it with FTB itself. Again, exercising ordinary business care and prudence entails ensuring a tax payment was actually submitted (*Appeal of Friedman*, *supra*), but appellant did not do so here.

Finally, regarding appellant's reliance on FTB's alleged representations that left him with the impression that there were no issues with his payment request and that he had not erred, there is no evidence in the record that the post-April 1, 2020 phone call on which FTB allegedly made such representations took place. As already noted, unlike with calls to FTB he attempted on March 23, 2020, and March 25, 2020, appellant has not submitted any phone records substantiating a post-April 1, 2020 phone call to FTB.¹⁰ Records submitted by FTB on appeal also do not evidence such a phone call. Even if such a phone call took place, the details of FTB's alleged representations are lacking. Appellant's affidavit only contains conclusory assertions as to appellant's subjective reaction to FTB's alleged representations, and contains no details about FTB's representations themselves. Because of the lack of information regarding FTB's representations, we cannot determine whether appellant's reliance and subsequent

⁹ On appeal, appellant provided his cell phone records for the period March 20, 2020, through April 10, 2020, but these records do not show any calls made by appellant to FTB after March 25, 2020.

¹⁰ See footnote 9, *ante*.

inaction were reasonable responses that constituted the exercise of ordinary business care and prudence.

For the above-stated reasons, we conclude that appellant has failed to show reasonable cause to abate the late-payment penalty.

Issue 2: Whether waiving the estimated tax penalty is warranted.

Subject to certain exceptions not relevant to the issues on appeal, California conforms to Internal Revenue Code (IRC) section 6654 and imposes an estimated tax penalty on individuals for failing to make timely estimated income tax payments. (R&TC, § 19136(a); IRC, § 6654.) The estimated tax penalty is similar to an interest charge and applies from the due date of the estimated tax payment until, as relevant here, the due date for full payment of tax.¹¹ (IRC, § 6654(b)(2).) Estimated tax payments are generally required to be paid by persons who owe more than \$500 in tax after applying income tax withholdings and credits. (R&TC, § 19136(c)(2).)

The estimated tax penalty is mandatory unless the taxpayer establishes that at least one of two statutory exceptions applies. (*Appeal of Johnson*, 2018-OTA-119P; *Appeal of Saltzman*, 2019-OTA-070P.) The first exception is found in IRC section 6654(e)(3)(A), which provides that the taxing agency may waive the estimated tax penalty if it determines that, “by reason of casualty, disaster, or other unusual circumstances the imposition of [the estimated tax penalty] would be against equity and good conscience.” The exception for unusual circumstances is considerably narrower than that for reasonable cause. (IRS Field Service Advisory (June 2, 1994) 1994 WL 1725487.) The IRS has waived the estimated tax penalty in the following specific situations: a significant change in the tax law; a natural disaster; a required change in accounting method; or a government action or inaction that caused extreme difficulty in estimating the tax. (*Ibid.*)

The second exception is found in IRC section 6654(e)(3)(B), which provides that the taxing agency may waive the estimated tax penalty if it determines that (i) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62 or became disabled, and (ii) the underpayment was due to “reasonable cause” and not due to willful neglect.

¹¹ Where estimated tax payments are due, R&TC section 19136.1(a)(2) generally requires, for California income tax purposes, that the payments be made in installments on or prior to April 15 and June 15 of the applicable tax year, and January 15 of the subsequent tax year.

On appeal, appellant requests a refund of the estimated tax penalty. Appellant contends that he has never heard of estimated tax payments, implying that such payments and the related estimated tax penalty must not exist or merely serve as a pretext for FTB's denial of his refund request.¹² Appellant also notes the difficulty he had in contacting FTB to resolve the payments issue due to the COVID-19 pandemic, as well as his history of timely tax payments.

Here, appellant did not pay his required estimated tax payments for the 2019 tax year by the appropriate deadlines (i.e., April 15, 2019, June 15, 2019, and January 15, 2020), so imposing the estimated tax penalty was mandatory. In fact, appellant, himself, reported owing the estimated tax penalty in the amount of \$71 on his 2019 return, which he timely filed on March 6, 2020.¹³

Regarding the two statutory exceptions to imposing the estimated tax penalty, appellant has not established that either applies. As relevant to the first statutory exception, the COVID-19 pandemic *may* constitute an “unusual circumstance.” However, appellant has not explained why the pandemic would have caused him to fail to make timely estimated tax payments due on April 15, 2019, June 15, 2019, and January 15, 2020, dates that all appear to predate the spread of COVID-19 in California.¹⁴ As relevant to the second statutory exception, appellant has neither asserted nor established that he retired or became disabled in the 2019 tax year (or the preceding year), which is a requirement of this exception. Accordingly, we find that appellant has not established that he qualified for either statutory exception to imposing the estimated tax penalty, and conclude that waiving the estimated tax penalty is not warranted.

Issue 3: Whether abating interest is warranted.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) 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.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

¹² R&TC section 19136, which we described earlier in this section, authorizes the estimated tax penalty. We find that appellant's argument questioning the existence of estimated tax payments and the estimated tax penalty lacks merit and will not address it further.

¹³ A third-party tax preparer prepared appellant's return.

¹⁴ We note that, as part of California's response to the outbreak of COVID-19, the Governor declared a State of Emergency on March 4, 2020, and issued a stay-at-home order to slow the spread of COVID-19 on March 19, 2020.

Rather, to have interest abated, a taxpayer must show that the taxpayer qualifies under one of the waiver provisions of R&TC sections 19104, 19112, or 21012.


On appeal, appellant appears to request the abatement of interest, but has not identified any basis to do so. Because appellant has failed to identify a basis for abating interest, we deny appellant’s request.

HOLDINGS


1. Appellant has not shown reasonable cause for paying his taxes late.
2. Waiving the estimated tax penalty is not warranted.
3. Abating interest is not warranted.

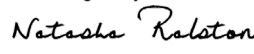
DISPOSITION

We sustain FTB’s denial of appellant’s claim for refund.

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 Andrew Wong
 Administrative Law Judge

We concur:

DocuSigned by:

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 Tommy Leung
 Administrative Law Judge

DocuSigned by:

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 Natasha Ralston
 Administrative Law Judge

Date Issued: 1/3/2022