

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
L. WEST

) OTA Case No. 21037385
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OPINION

Representing the Parties:

For Appellant:

L. West

For Respondent:

Eric R. Brown, Tax Counsel III

For Office of Tax Appeals

Casey Green, Tax Counsel III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, L. West (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$3,142.42 for the 2017 tax year.¹

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

ISSUES

1. Whether appellant has established reasonable cause for failing to timely file a 2017 California income tax return (2017 return).
2. Whether appellant has established reasonable cause for failing to timely make and file a 2017 return in response to FTB’s Demand for Tax Return (Demand).
3. Whether the filing enforcement cost recovery fee should be abated.
4. Whether appellant has established that interest should be abated.

¹ In his appeal to OTA, appellant claims a total refund amount of \$3,288.01. However, the actual amount is \$3,142.42, which comprises the following four disputed items: (1) a late-filing penalty of \$1,157.25; (2) a notice and demand penalty of \$1,170; (3) a filing enforcement cost recovery fee of \$93; and (4) interest of \$722.17. Appellant did not dispute his self-assessed California income tax liability.

FACTUAL FINDINGS

1. Appellant did not file a 2017 return by either the due date of April 15, 2018, or the automatic six-month extension deadline of October 15, 2018.
2. On April 23, 2019, FTB issued to appellant a Demand for his 2017 return with a response deadline of May 29, 2019. The Demand stated that if appellant did not timely respond, FTB would assess a late-filing penalty, a notice and demand penalty (demand penalty), a filing enforcement cost recovery fee, and applicable interest.
3. In May and August 2019, Appellant requested additional time to file his 2017 return because the Woolsey Fire, a wildfire that began on November 8, 2018, and burned in Los Angeles and Ventura Counties, had destroyed his house and tax records.
4. On October 21, 2019, FTB approved appellant's request for additional time, giving him until November 12, 2019, to file his 2017 return.
5. Appellant did not file his 2017 return by November 12, 2019.
6. On February 27, 2020, FTB issued to appellant a Notice of Proposed Assessment for the 2017 tax year.
7. On October 15, 2020, FTB received appellant's 2017 return. Although appellant self-assessed a tax liability, he did not remit payment with the 2017 return.
8. On November 9, 2020, FTB issued to appellant a State Income Tax Balance Due Notice. Appellant's balance included, in addition to his self-assessed tax liability, a late-filing penalty, a demand penalty, a filing enforcement cost recovery fee, and interest. This notice stated that if appellant paid the balance in full by November 24, 2020, he could avoid additional interest and penalties.
9. Appellant paid his balance in full by January 8, 2021.
10. Appellant submitted a timely claim for refund of the two penalties, the filing enforcement cost recovery fee, and interest.
11. FTB denied appellant's claim for refund.
12. This timely appeal followed.

DISCUSSIONIssue 1: Whether appellant has established reasonable cause for failing to timely file a 2017 return.

R&TC section 19131 imposes a late-filing penalty if a taxpayer fails to file a return on or before the return's due date or the due date as extended by FTB unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect.² When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Ibid.*) To establish reasonable cause, a taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

On appeal, appellant argues that he was unable to timely file his 2017 return because he lost his house and tax records in the Woolsey Fire, which began on November 8, 2018. Appellant also contends that the subsequent COVID-19 pandemic further delayed his efforts to reconstruct his records.

Here, appellant's due date to file his 2017 return was April 15, 2018, with an automatic extension deadline of October 15, 2018. Appellant has not explained why he failed to file a 2017 return by these two deadlines, which both predate the start of the Woolsey Fire on November 8, 2018, as well as the COVID-19 pandemic.³ And although FTB subsequently approved appellant's request for additional time to file his 2017 return, giving him until November 12, 2019, it is the April 15, 2018 due date and the October 15, 2018 automatic extension deadline that matter for purposes of imposing the late-filing penalty and determining whether reasonable cause exists to abate said penalty under R&TC section 19131. Thus, we conclude that appellant has not established reasonable cause for failing to timely file his 2017 return.

² There are no allegations of willful neglect, and appellant does not dispute the computation of the late-filing penalty. Thus, we focus on whether appellant has established reasonable cause.

³ 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.

Issue 2: Whether appellant has established reasonable cause for failing to timely make and file a 2017 return in response to FTB's Demand.

R&TC section 19133 provides that if a taxpayer fails to make and file a return upon notice and demand by FTB, then FTB may impose a demand penalty unless taxpayer's failure is due to reasonable cause. It is undisputed that the requirements for imposing the demand penalty for the 2017 tax year were satisfied here, so the issue is whether there is reasonable cause to abate the demand penalty.

On appeal, appellant reiterates his arguments from above: he was unable to timely file his 2017 return because he lost his house and tax records in the November 2018 Woolsey Fire, and the subsequent COVID-19 pandemic further delayed his efforts to reconstruct his tax records.

The burden of proving reasonable cause for failing to file upon demand is on the taxpayer. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) To establish reasonable cause, a taxpayer must show that the failure to timely respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Jones*, 2021-OTA-144P.) The taxpayer's reason for failing to respond to a demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc.*, *supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Here, on April 23, 2019, FTB issued to appellant a Demand to file a 2017 return by May 29, 2019. In response, appellant requested additional time to file, and FTB approved appellant's request, deferring the deadline by almost six months, to November 12, 2019. However, appellant did not file his 2017 return until October 15, 2020, almost a year later. Assuming appellant did lose all his tax records in the November 2018 Woolsey Fire, appellant has not specified what tax records he needed to file his 2017 return or explained why he was unable to obtain copies of said tax records by the FTB-deferred deadline of November 12, 2019—a year after the Woolsey Fire began on November 8, 2018. (Presumably, individuals can request either hard or electronic copies of tax records directly from a financial institution or an employer.) And although appellant contends that the COVID-19 pandemic further delayed his efforts to reconstruct his tax records, appellant has not explained why, or substantiated how, this was so given that the pandemic began impacting California in

March 2020,⁴ over three months *after* the FTB-deferred deadline of November 12, 2019. Based on the foregoing, we find appellant has not established reasonable cause for failing to timely make and file a 2017 return in response to FTB's Demand.

Issue 3: Whether the filing enforcement cost recovery fee should be abated.

R&TC section 19254(a)(2) provides that if a taxpayer fails to make and file a tax return within 25 days after FTB mails to that person a formal legal demand to file the tax return, FTB will impose a filing enforcement cost recovery fee. Once properly imposed, there is no provision in the R&TC which would excuse FTB from imposing the filing enforcement cost recovery fee under any circumstances, including reasonable cause. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.)

Here, FTB informed appellant in the April 23, 2019 Demand that appellant would be subject to the filing enforcement cost recovery fee if appellant did not file a timely 2017 return. FTB did not receive the 2017 return from appellant by the date prescribed by the Demand. Therefore, FTB properly imposed the filing enforcement cost recovery fee, and we have no basis to abate it.

Issue 4: Whether appellant has established that interest should be abated.

R&TC section 19101 provides that taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). If tax is not paid by the original due date or if FTB assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due, compounded daily. (R&TC, § 19101.) Interest is not a penalty, but is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of GEF Operating, Inc., supra.*) There is no reasonable cause exception to the imposition of interest, and interest is mandatory except where abatement is authorized under the law. (*Appeal of Moy*, 2019-OTA-057P.)

Generally, to obtain relief from interest, taxpayers must qualify under one of the following three R&TC sections: 19104, 19112, or 21012. Under R&TC section 19104, FTB may abate all or a part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by FTB in the performance of a ministerial or managerial act. Under R&TC section 19112, FTB may waive interest for any

⁴ See footnote 3, ante, page 3.

period for which it determines that an individual or fiduciary demonstrates inability to pay that interest solely because of extreme financial hardship caused by significant disability or other catastrophic circumstance. Under R&TC section 21012, if a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from FTB, the person may be relieved of the taxes assessed or any interest, additions to tax, and penalties added thereto, subject to numerous conditions.

Appellant does not allege, and nothing in the record suggests, that any of these three statutory provisions for interest abatement apply. Therefore, appellant has not established that interest should be abated.

Appellant also appears to argue for interest relief based on equitable estoppel, alleging that an FTB employee told him on February 2, 2021, that FTB would relieve interest, which it ultimately did not.

Equitable estoppel is applied against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (*Appeal of Sedillo*, 2018-OTA-101P.) One of the elements of equitable estoppel is that a government agency (FTB) made an incorrect or inaccurate representation to the relying party (appellant). (*Ibid.*) The party asserting an estoppel (appellant) bears the burden of proof in establishing each of its elements. (*Ibid.*)


Here, appellant offers no evidence of any FTB communication stating that FTB would relieve interest, and we find none in the record. Accordingly, we conclude that appellant has not established that equitable estoppel applies in this case, and relieving interest on that basis is unwarranted.

HOLDINGS

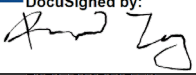
1. Appellant has not established reasonable cause for failing to timely file a 2017 tax return.
2. Appellant has not established reasonable cause for failing to make and file a 2017 tax return in response to a Demand.
3. There is no basis to abate the filing enforcement cost recovery fee.
4. Appellant has not established that interest should be abated.

DISPOSITION

We sustain FTB’s action.

DocuSigned by:

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 Andrew Wong
 Administrative Law Judge

We concur:

DocuSigned by:

 F8E81582726F448...
 Richard Tay
 Administrative Law Judge

DocuSigned by:
Kenneth Gast
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 Kenneth Gast
 Administrative Law Judge

Date Issued: 5/10/2022