

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
B. KENNEDY

) OTA Case No. 21129228
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OPINION

Representing the Parties:

For Appellant: B. Kennedy

For Respondent: Leoangelo C. Cristobal, Tax Counsel

For Office of Tax Appeals: Craig Okihara, Business Tax Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, B. J. Kennedy (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,399.66 plus applicable interest for the 2018 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established reasonable cause for the late payment of her taxes.
2. Whether appellant has established a basis to abate interest.

FACTUAL FINDINGS

1. Appellant timely filed her 2018 California income tax return on October 15, 2019,¹ reporting a total tax liability of \$12,560. However, appellant did not pay all of the tax owed by the April 15, 2019 due date. A reported tax balance of \$10,566 was due on that date. Appellant made a payment of \$5,566 with her October 15, 2019 tax return filing.
2. FTB sent appellant a State Income Tax Balance Due Notice dated November 5, 2019, reflecting tax of \$12,560, payments of \$6,678, late payment penalty of \$945.25, and interest of \$348.49 for a balance due of \$7,175.74. FTB sent additional notices restating the tax, and payment amounts, and providing updated late payment penalty and interest amounts.
3. Appellant made various payments from May 22, 2020, through April 19, 2021.
4. Appellant filed a claim for refund on April 15, 2021, requesting abatement of the late payment penalty and interest.
5. On May 31, 2021, appellant made a payment which satisfied the outstanding balance. In total, appellant paid tax of \$12,560, late payment penalty of \$1,399.66,² interest of \$783.16, and a collection cost recovery fee of \$317, totaling \$15,059.02.
6. On September 28, 2021, FTB issued a claim denial. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause for the late payment of her taxes.

A late payment penalty is imposed when a taxpayer fails to pay the tax shown on a return by the date prescribed for the payment of the tax. The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence, or that such

¹ The deadline for filing 2018 California income tax returns and payments was April 15, 2019. FTB grants an automatic six-month extension of time to file; therefore, 2018 tax returns were considered timely through October 15, 2019. However, the automatic six-month extension to file does not apply to payments that were due on April 15th.

² The late payment penalty is comprised of an underpayment penalty of \$572.40 and a monthly penalty of \$827.26. FTB notes in its opening brief a discrepancy in the monthly penalty. FTB computes that the monthly penalty should be \$825.72 which will be adjusted accordingly at the conclusion of the appeal.

cause existed as would prompt an “ordinarily intelligent and prudent” businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Here, FTB properly imposed the late payment penalty because the payment due date was April 15, 2019, and appellant did not fully satisfy her 2018 tax liability until May 31, 2021, approximately 25 months after the due date.

Appellant contends that after filing her 2018 tax return, she believed that the reported capital gain was possibly incorrect and based on advice from “an independent IRS agent” (consultant), she stopped making payments on the outstanding taxes, penalty, and interest while this consultant was to review the capital gain and prepare an amended return if necessary. Appellant asserts that the consultant failed to prepare an amended return and stopped responding to appellant’s inquiries. Appellant states she has had health issues including three surgeries and a lengthy stay in the hospital and nursing facility which prevented her from pursuing whether an amended return was needed to revise the reported capital gain. Appellant also states that due to mounting medical bills, she was forced to borrow money in order to pay the remaining balance due.

Reliance on a tax professional on a substantive question of law may be considered reasonable cause if certain elements are met. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*)). However, the taxpayer’s reliance on a professional to prepare their return does not abrogate their legal obligation to timely pay their tax liability because taxpayers have a personal and nondelegable duty to make required tax payments. (*Id.* at pp. 247 & 251.) The nondelegable duty principle applicable to the late filing penalty in *Boyle* also applies in the late payment penalty context. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.) The primary duty to timely pay the tax is with the taxpayer, and this duty cannot be delegated or excused by the failure of a third-party professional, including an accountant or an attorney. (*Ibid.*) It requires no special training or effort to ascertain a deadline and make sure that it is met. (*Boyle, supra*, at p. 252.) Appellant thus had a personal and non-delegable obligation to pay her requisite tax by the due date but did not do so. Regardless of the alleged bad advice appellant received from her consultant, appellant has not provided argument or evidence as to how the advice received some time after the October 15, 2019 filing caused appellant’s untimely payment of the self-assessed tax which was due several months beforehand (i.e., on April 15, 2019). As such, appellant has

not established reasonable cause for the failure to timely pay tax based on reliance on a tax preparer.

Finally, appellant contends that she has health issues and that she incurred “mounting medical bills.” Illness may establish reasonable cause only if the taxpayer presents credible and competent proof that the circumstances of the illness prevented the taxpayer from complying with the law. (*Appeal of Belcher*, 2021-OTA-284P.) Moreover, inability to pay the tax due to financial hardship may also establish reasonable cause to abate the late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) We note that appellant stated that the first of her surgeries occurred in February 2021, thus the health issues and resulting financial hardship would not have prevented her from paying their taxes timely on April 15, 2019.

While we empathize with appellant’s medical and financial problems, she has not provided sufficient evidence to show that her late payment of tax was due to circumstances that constituted reasonable cause for abating the late payment penalty and not willful neglect. As the record shows that appellant’s failure to pay was not due to reasonable cause, there is no basis to abate the late payment penalty.

Issue 2: Whether appellant has established a basis to abate interest.

Tax is due on the original due date of the return without regard to any filing extension. (R&TC, § 19001.) If a taxpayer does not pay the tax by the original due date of the tax return, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for a taxpayer’s use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P (*Moy*)). There is no reasonable cause exception to the imposition of interest. (*Ibid.*) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 21012, 19104, or 19112.³ (*Ibid.*)

Under R&TC section 19104, FTB may abate interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by its officer or employee. “Ministerial act means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place.”

³ R&TC section 21012 is not relevant here, because FTB did not provide appellant with any written advice.

(Treas. Reg. § 301.6404-2(b)(2).)⁴ In contrast, a managerial act means, in part, “an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel.” (Treas. Reg. § 301.6404-2(b)(1).) Neither type of act involves a decision concerning the proper application of federal tax law (or other federal or state law). (Treas. Reg. § 301.6404-2(b)(1), (b)(2).) Any such unreasonable error or delay in the performance of a ministerial or managerial act “shall be taken into account only if no significant aspect of that error or delay can be attributed to the taxpayer . . . and after [FTB] has contacted the taxpayer in writing with respect to that deficiency or payment.” (R&TC, § 19104(b)(1).)

We review FTB’s interest abatement determinations only for abuse of discretion. (R&TC, § 19104(b)(2)(B); *Appeal of Gorin*, 2020-OTA-018P (*Gorin*).) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Ibid.*) “Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only ‘where failure to abate interest would be widely perceived as grossly unfair.’” (*Ibid.* [quoting *Lee v. Commissioner* (1999) 113 T.C. 145, 149].)

The mere passage of time does not establish error or delay in performing a managerial act. (*Gorin, supra.*) However, where a tax agency fails to provide evidence of its employees’ actions during a period and the record is silent, there may be no apparent basis to support the agency’s determination not to abate interest, and the unsupported determination therefore may constitute an abuse of discretion. (*Ibid.*)

On appeal, appellant makes the same arguments as discussed in Issue 1. First, appellant argues that she received bad advice from her consultant. However, an error attributable to appellant or appellant’s consultant is not grounds for abatement. Interest may only be abated under R&TC section 19104 if there has been an unreasonable error in the performance of a ministerial or managerial act by FTB’s officer or employee. Accordingly, we find no basis to support abatement of interest for this argument.

⁴ R&TC section 19104(a)(1) uses substantially identical language as IRC section 6404(e), which is the comparable federal statute authorizing interest abatement for unreasonable error or delay. Therefore, it is appropriate to look to federal authority for guidance. (*Douglas v. State of California* (1948) 48 Cal.App.2d 835, 838; *Appeal of Kishner* (99-SBE-007) 1999 WL 1080250.)

Second, appellant contends that she has health issues and that she incurred “mounting medical bills” and thus, payment of the penalties and interest is a financial hardship.

R&TC section 19112 states that FTB may waive interest if a taxpayer shows that the taxpayer’s inability to pay interest was solely due to extreme financial hardship caused by a significant disability or catastrophic circumstance. The relevant statute gives FTB the discretion to decide whether a taxpayer has shown extreme financial hardship caused solely by a significant disability or catastrophic circumstance.

An administrative agency’s authority to act is of limited jurisdiction and it “has no powers except such as the law of its creation has given it.” (*Moy, supra.*) There is no provision in R&TC section 19112 which would allow Office of Tax Appeals to review FTB’s interest determinations based on a claim of financial hardship. Accordingly, we have no jurisdiction to review FTB’s rejection of appellant’s claim for abatement of interest due to financial hardship.


Based on the evidence and appellant’s arguments, none of these statutory provisions apply. Therefore, appellant did not establish that she qualified for any waiver or abatement of interest.

HOLDINGS

1. Appellant has not established reasonable cause for the late payment of her taxes.
2. Appellant has not established a basis to abate interest.

DISPOSITION

FTB’s action is modified, as conceded upon appeal, to reduce the monthly penalty by \$1.54 from \$827.26 to \$825.72; thus, reducing the late payment penalty to \$1,398.12 (underpayment penalty of \$572.40 + monthly penalty of \$825.72). FTB’s action in denying appellant’s refund claim is otherwise sustained.

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Keith T. Long
Administrative Law Judge

Date Issued: 5/18/2022