

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

J. EDDY AND
S. EDDY (DEC'D)

) OTA Case No. 20096619
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OPINION

Representing the Parties:

For Appellants: David C. Dodge, Attorney

For Respondent: Gi Jung Nam, Tax Counsel

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Eddy (appellant-wife) and S. Eddy (Dec'd) (appellant-husband) (collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing \$12,323.00 of additional tax, a late-filing penalty of \$3,080.75, a notice and demand penalty (demand penalty) of \$3,825.25, and a filing enforcement cost recover fee (filing enforcement fee) of \$93.00, plus applicable interest, for the 2017 tax year.

Appellants waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellants have established reasonable cause for failing to timely file their 2017 tax return.
2. Whether appellants are liable for the demand penalty.
3. Whether appellants have shown that the filing enforcement fee should be abated.
4. Whether appellants have established a legal basis to abate interest.

FACTUAL FINDINGS

1. Appellants did not file a timely California tax return for the 2017 tax year.
2. Through its Integrated Non-Filer Compliance Program, FTB obtained information indicating that appellant-husband received income sufficient to trigger a filing requirement for the 2017 tax year.
3. On February 22, 2019, appellant-husband passed away. According to his Last Will and Testament, dated February 19, 2019, appellant-husband named appellant-wife personal representative of his estate.¹
4. On April 23, 2019, FTB issued appellant-husband a Demand for Tax Return (Demand), which required that he reply no later than May 29, 2019, by either filing his tax return for 2017, providing evidence showing he already filed his return, or explaining why he did not have a filing obligation for the 2017 tax year. The Demand notified appellant-husband that if he did not timely respond to the Demand in the manner prescribed, FTB would assess a demand penalty, a late-filing penalty, and a filing enforcement fee.
5. When FTB did not receive a response to the Demand, FTB issued appellant-husband a Notice of Proposed Assessment (NPA) on July 29, 2019. The NPA estimated appellant-husband's income based on third party information, and proposed total tax of \$15,301.00, less tax withheld of \$2,978.00, for tax due of \$12,323.00, a late-filing penalty of \$3,080.75, a demand penalty of \$3,825.25, and a filing enforcement fee of \$93.00, plus applicable interest.
6. Appellants filed a timely protest with FTB, contending reasonable cause for abatement of the penalties, and that the estimated taxable income and tax liability, as proposed on the NPA, was incorrect. Appellants attached to the protest a copy of appellant-husband's Last Will and Testament, dated February 19, 2019.
7. FTB responded by letters dated January 22, 2020, and February 27, 2020, informing appellants that the taxable income, as estimated in the NPA, would be upheld unless appellants filed a tax return, and requested appellants gather all information pertaining to their positions and to contact FTB.

¹ Appellant-husband's Last Will and Testament states that "the term 'Personal Representative' shall include 'Executor'" Appellant-wife signed the power of attorney on behalf of the estate as its "Executor," and appellants' briefs refer to her as executor of the estate. For ease of refence and to comport with appellant-wife's self-representation, the Office of Tax Appeals will refer to her position as executor of appellant-husband's estate.

8. When appellants did not respond to the letters, FTB issued appellants a Notice of Action on July 22, 2020, affirming the NPA.
9. On August 15, 2020, appellants untimely filed their 2017 joint California Resident Income Tax Return, reporting total tax of \$5,937 and tax due of \$2,959, after subtracting tax withheld of \$2,978. Appellants did not self-assess penalties or interest.
10. This timely appeal followed.
11. On appeal, FTB issued appellants a Notice of Tax Return Change–Revised Balance on September 1, 2020, accepting the self-assessed 2017 total tax of \$5,937.00, and notifying appellants that FTB imposed a revised late-filing penalty of \$739.75, and a revised demand penalty of \$1,484.25, plus interest and fees.
12. As relevant here, FTB previously issued: (1) appellant-husband an NPA dated July 6, 2015, which was issued after appellant-husband did not respond to FTB’s Demand, dated May 5, 2015, for appellant-husband’s 2013 tax return; (2) appellant-husband an NPA dated June 30, 2016, which was issued after appellant-husband did not respond to FTB’s Demand, dated April 19, 2016, for appellant-husband’s 2014 tax return; (3) appellant-husband an NPA dated July 31, 2017, which was issued after appellant-husband did not respond to FTB’s Demand, dated May 30, 2017, for appellant-husband’s 2015 tax return; and (4) appellant-husband an NPA dated July 9, 2018, which was issued after appellant-husband did not respond to FTB’s Demand, dated May 8, 2018, for appellant-husband’s 2016 tax return.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause for failing to timely file their 2017 tax return.

Absent an extension, taxpayers who file on a calendar year basis are generally required to file their income tax returns by April 15 of the following year.² (R&TC, § 18566.) R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file their

²FTB may grant a taxpayer up to six more months to file a tax return and the corresponding regulation provides for an automatic six-month extension without a written request. (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567.) However, if the return is not filed within six months of the original due date, no valid extension exists, and the late-filing penalty amount is computed by reference to the original due date of the return. (Cal. Code Regs., tit. 18, § 18567.)

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. The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*United States v. Boyle* (1985) 469 U.S. 241, 246.)³ The taxpayer carries the burden of establishing that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) Unsupported assertions are not enough to satisfy a taxpayer’s burden of proof. (*Appeal of Gorin*, 2020-OTA-018P.)

To establish reasonable cause, the 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 prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) Illness or other personal difficulties may be considered reasonable cause if a taxpayer presents credible and competent proof that the taxpayer was continuously prevented from filing a tax return. (*Ibid.*) When a taxpayer alleges reasonable cause based on an incapacity due to illness, the duration of the incapacity must approximate that of the tax obligation deadline. (*Ibid.*; see also *Wright v. Commissioner*, T.C. Memo. 1998-224, citing *Hayes v. Commissioner*, T.C. Memo. 1967-80.) However, if the difficulties simply caused a taxpayer to sacrifice the timeliness of one aspect of the taxpayer’s affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Head and Feliciano*, *supra.*) Furthermore, when a joint return is filed by a married couple, each spouse has an obligation to ensure the timely filing of their joint return. (*Appeal of Head and Feliciano*, *supra.*; *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.)

Here, FTB did not receive appellants’ 2017 tax return until August 15, 2020; therefore, the return was more than two years late. Appellants assert reasonable cause, contending that appellant-husband, who was the primary income earner and handled the couple’s tax matters, suffered from medical and mental hardships which caused him to be not of sound mind and unable to attend to financial affairs, including timely filing appellants’ 2017 California tax return. Appellants also contend that appellant-husband intercepted FTB correspondence and never informed appellant-wife that the 2017 tax return was not filed, and only after he died that

³ Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts’ interpretation of the “reasonable cause” standard is persuasive authority in determining the proper construction of these California statutes. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rhin v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

she discovered the return had not been filed.

As noted above, the law presumes that the penalty was properly imposed, and the burden is on appellants to show that reasonable cause exists to abate the penalty. (*Appeal of Xie, supra*). In addition, appellants must show that reasonable cause existed until the return was filed. (*Appeal of Head and Feliciano, supra*.) Furthermore, as both spouses have an independent obligation to timely file and pay any tax liability associated with that joint return, reasonable cause must exist for both parties. (*Appeal of Head and Feliciano, supra; Appeal of Halaburka, supra*.) Here, appellants have failed to provide evidence substantiating that both appellant-husband and appellant-wife were continuously prevented from timely filing appellants' joint tax return. As for appellants' contentions that appellant-husband intercepted FTB correspondence and never informed appellant-wife that the 2017 tax return was not filed, the Office of Tax Appeals (OTA) finds that a reasonably prudent person would make inquires as to the status of a return and ensure the timely filing of a tax return. Appellants have failed to provide any evidence of such steps taken by appellant-wife to ensure the timely filing of appellants' 2017 joint tax return. Thus, appellants have failed to show that reasonable cause exists to abate the late-filing penalty.

Issue 2: Whether appellants are liable for the demand penalty.

California imposes a penalty on taxpayers for failing to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from complying with the Demand. (R&TC, § 19133.) A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to timely respond to a current Demand, and (2) at any time during the preceding four tax years, FTB issued an NPA following the taxpayer's failure to timely respond to a Request or a Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

The first requirement is met because FTB issued a Demand for the 2017 tax year to appellant-husband on April 23, 2019, but did not receive a response.⁴ The second requirement is also met because appellant-husband failed to respond to prior demands for tax return for the 2013, 2014, 2015, and 2016 tax years, which FTB thereafter issued an NPA for each tax year. Therefore, FTB properly imposed the demand penalty for the 2017 tax year. (See *Appeal of*

⁴ OTA notes that appellant-husband died on February 22, 2019, before the April 23, 2019 Demand was issued. However, appellant-wife, as executor of appellant-husband's estate, failed to timely respond to the Demand on behalf of appellant-husband's estate.

Jones, 2021-OTA-144P.)

When a demand penalty is properly imposed, the burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely responding to the Demand. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) To establish reasonable cause, a taxpayer must show that the failure to respond to the Demand occurred despite the exercise of ordinary business care or that the reason for failing to respond would prompt an ordinarily intelligent and prudent businessperson to act similarly under the circumstances. (*Ibid.*)

Appellants argue the same reasonable cause arguments as for the late-filing penalty, including that appellant-husband was unable to attend to financial affairs, and that he intercepted FTB correspondence from appellant-wife. However, appellant-husband died before FTB mailed the Demand. Appellants have proffered no arguments or evidence substantiating reasonable cause as to why appellant-wife, as executor of appellant-husband's estate, failed to timely respond to the Demand. Thus, appellants have failed to show that reasonable cause exists to abate the Demand penalty.

Issue 3: Whether appellants have shown that the filing enforcement fee should be abated.

R&TC section 19254(a)(2) provides if a person fails or refuses to make and file a tax return within 25 days after formal legal demand to file the tax return is mailed to that person by FTB, then FTB shall impose a filing enforcement fee, which is adjusted annually to reflect actual costs as reflected in the annual Budget Act. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254.)

Here, FTB informed appellant-husband in the Demand that the fee may be assessed if he did not timely respond.⁵ FTB properly imposed the fee after it did not receive a response within the prescribed period set forth in the Demand. Since the fee was properly imposed, there is no authority for the abatement of this fee; therefore, OTA cannot abate the filing enforcement fee.

Issue 4: Whether appellants have established a legal basis to abate interest.

The imposition of interest on a tax deficiency is mandatory and must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) Interest is not

⁵ OTA notes that appellant-husband died on February 22, 2019, before the April 23, 2019 Demand was issued. However, appellant-wife, as executor of appellant-husband's estate, failed to timely respond to the Demand on behalf of appellant-husband's estate.

a penalty but is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Gorin, supra.*) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC sections 19104, 19112 or 21012. Appellants have not alleged, and no evidence in the record indicates, that any of these statutory provisions apply. Therefore, appellants have not established a basis for abatement of interest.

HOLDINGS

1. Appellants have not established reasonable cause for failing to timely file their 2017 tax return.
2. Appellants are liable for the demand penalty.
3. Appellants have not shown that the filing enforcement fee should be abated.
4. Appellants have not established a legal basis to abate interest.

DISPOSITION

We modify FTB's action per its concession on appeal.⁶ Otherwise, FTB's action is sustained.

DocuSigned by:

Sheriene Anne Ridenour

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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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Sara A. Hosey

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Sara A. Hosey
Administrative Law Judge

DocuSigned by:

Asaf Kletter

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Asaf Kletter
Administrative Law Judge

Date Issued: 7/5/2022

⁶ As reflected on the Notice of Tax Return Change–Revised Balance that FTB issued on September 1, 2020.