

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

M. HETTINGER AND
A. HETTINGER

) OTA Case No. 20126988
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OPINION

Representing the Parties:

For Appellants: M. Hettinger and A. Hettinger

For Respondent: Anne Mazur, Specialist

For Office of Tax Appeals: Neha Garner, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Hettinger and A. Hettinger (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$8,049.00 for the 2006 tax year, \$19,370.00 for the 2007 tax year, \$314.00 plus a late filing penalty of \$100.00 for the 2009 tax year, and \$39,608.00 for the 2011 tax year, plus applicable interest.¹

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

¹ FTB notes that for the 2006 and 2007 tax years, the proposed late filing and accuracy-related penalties were discharged by appellants’ Chapter 7 bankruptcy filed on April 24, 2012. FTB will revise the Notices of Action to withdraw the late filing and accuracy-related penalties for the 2006 and 2007 tax years, but not the remaining liabilities for the 2006 and 2007 tax years which were not discharged. FTB also notes that for the 2009 tax year, the applicable ground of substantial understatement for an accuracy-related penalty no longer applies, and FTB will withdraw the accuracy-related penalty for the 2009 tax year. Lastly, for the 2010 tax year, the Notice of Proposed Assessment was not properly issued and FTB will withdraw its proposed assessment for the 2010 tax year.

ISSUES

1. Whether appellants have established error in FTB's proposed assessments of additional tax, which are based on federal adjustments, for the 2006, 2007, 2009 and 2011 tax years.
2. Whether appellants have established reasonable cause for failing to timely file their 2009 tax return.
3. Whether appellants have established a basis upon which interest can be abated.

FACTUAL FINDINGS

2006 Tax Year

1. Appellants filed their 2006 California tax return late on May 30, 2008. On October 29, 2013, FTB received information from the IRS regarding its examination of appellants' 2006 federal tax return. The IRS increased appellants' taxable income primarily relating to appellants' Schedule C business, and as a result, assessed additional tax and imposed a late filing penalty and an accuracy-related penalty.
2. Appellants did not report the federal changes to FTB. FTB followed the adjustments indicated on the federal report and issued a Notice of Proposed Assessment (NPA) on November 21, 2014. FTB increased appellants' income, proposed additional tax of \$19,863.00, and imposed a late filing and accuracy-related penalty.
3. Appellants timely protested the 2006 NPA stating they were working with the IRS on an audit reconsideration. FTB subsequently received information from the IRS indicating that the IRS had revised its assessment for the 2006 tax year.
4. According to the federal information received from the IRS, the IRS decreased appellants' taxable income upon audit reconsideration. On February 13, 2017, the IRS reduced the previously assessed tax and penalties accordingly. On November 12, 2020, FTB issued a Notice of Action (NOA) to make corresponding revisions to its previous assessment. The NOA revised the proposed additional tax assessment to \$8,049.00 and reduced both the late filing penalty and accuracy-related penalty.

2007 Tax Year

5. Appellants filed their 2007 California tax return late on April 15, 2011. On October 29, 2013, FTB received information from the IRS regarding its examination of appellants' 2007 federal return. The IRS increased appellants' taxable income primarily relating to appellants' Schedule C business and as a result, assessed additional tax and imposed a late filing penalty and an accuracy-related penalty.
6. FTB followed the adjustments indicated on the federal report and issued an NPA on March 24, 2015. FTB increased appellants' income and proposed additional tax of \$171,727.00, a late filing penalty, and an accuracy-related penalty.
7. Appellants timely protested the 2007 NPA stating that they were working with the IRS on an audit reconsideration. FTB subsequently received information from the IRS indicating that the IRS had revised its assessment for the 2007 tax year.
8. According to the federal information, the IRS decreased appellants' taxable income upon audit reconsideration. On February 13, 2017, the IRS reduced the previously assessed tax and penalties accordingly. On November 12, 2020, FTB issued an NOA to make corresponding revisions to its previous assessment. The NOA revised the proposed additional tax assessment to \$19,370.00 and reduced both the late filing penalty and accuracy-related penalty.

2009 Tax Year

9. Appellants filed their 2009 tax return late on March 15, 2011. On October 29, 2013, FTB received information from the IRS regarding its examination of appellants' 2009 federal return. The IRS increased appellants' taxable income primarily relating to appellants' Schedule C business, and as a result assessed additional tax and imposed a late filing penalty and an accuracy-related penalty.
10. FTB followed the adjustments indicated on the federal report and issued an NPA on November 21, 2014. FTB increased appellants' income and proposed additional tax of \$17,784.00, a late filing penalty, and an accuracy related penalty.
11. Appellants timely protested the 2009 NPA stating that they were working with the IRS on an audit reconsideration. FTB subsequently received information from the IRS indicating that the IRS had revised its assessment for the 2009 tax year.

12. According to the federal information, the IRS decreased appellants' taxable income upon audit reconsideration. On February 13, 2017, the IRS reduced the previously assessed tax and penalties accordingly. On November 12, 2020, FTB issued an NOA to make corresponding revisions to its previous assessment. The NOA revised the proposed additional tax assessment to \$314.00 and reduced both the late filing penalty and accuracy-related penalty.

2011 Tax Year

13. Appellants timely filed their 2011 tax return on March 21, 2012. On September 9, 2014, FTB received information from the IRS regarding its examination of appellants' 2011 federal return. The IRS increased appellants' taxable income primarily relating to appellants' Schedule C business, and as a result assessed additional tax.
14. FTB followed the adjustments indicated on the federal report and issued an NPA on January 15, 2015. FTB increased appellants' income and proposed additional tax of \$39,608.00.
15. Appellants timely protested the 2011 NPA stating that they were working with the IRS on an audit reconsideration. FTB subsequently received information from the IRS indicating that the IRS had not changed or revised its assessment for the 2011 tax year.
16. On November 12, 2020, FTB issued an NOA affirming its NPA.

Appellants' Appeal

17. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants have established error in FTB's proposed assessments of additional tax, which are based on federal adjustments, for the 2006, 2007, 2009 and 2011 tax years.

When the IRS changes or corrects a taxpayer's federal tax return, the taxpayer must either concede the accuracy of a federal determination or state how the determination is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal audit report is presumed to be correct and the taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Appellants' federal account transcripts indicate that the IRS assessed additional tax and penalties relating to adjustments to appellants' Schedule C business, which were reduced on audit reconsideration with the exception of the 2011 tax year. There is no indication that the IRS made further revisions to its assessments.

Appellants contend that that NOAs are based on assessments for which the IRS did not allow business expense deductions and that they do not owe the proposed additional tax. However, appellants have not provided any supporting evidence to show that the revised federal determination is erroneous, such as receipts for the claimed expenses or any subsequent or additional revisions by the IRS. As such, FTB's assessments of additional tax are upheld for the 2006, 2007, 2009 and 2011 tax years.²

Issue 2: Whether appellants have established reasonable cause for failing to timely file their 2009 tax return.

A late filing penalty will be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) The late filing penalty is calculated at 5 percent of the tax, for each month or a fraction thereof, that the return is late, with a maximum penalty of 25 percent of the tax. (*Ibid.*) When FTB imposes a late filing penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support abating the penalty. (*Ibid.*) Here, it is undisputed that FTB properly imposed and computed the late filing penalty. Additionally, neither party asserts the presence of willful neglect, and therefore the only issue here is whether appellants have established reasonable cause to abate the late filing penalty.

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.) Unsupported assertions are insufficient to satisfy the taxpayer's burden. (*Appeal of Gorin*, *supra*.)

Here, appellants have not addressed the late filing penalty or asserted any cause for their failure to file their 2009 tax return timely. There is no evidence in the record showing reasonable

² As previously mentioned, FTB will withdraw its proposed assessment for the 2010 tax year.

cause circumstances that would have prevented appellants from timely filing their return. Therefore, there is no basis to abate the late filing penalty.

Issue 3: Whether appellants have established a basis upon which interest can be abated.

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is also charged on penalties. (R&TC, § 19101(c)(2).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state, and it can only be abated in certain limited situations when authorized by law. (*Appeal of Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)


To obtain interest abatement or waiver, appellants must qualify under one of the following: R&TC section 19104, 21012, or 19112. First, R&TC section 19104 does not apply here because appellants do not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. Second, R&TC section 21012 does not apply because FTB did not provide appellants with any requested written advice. Lastly, the Office of Tax Appeals does not have jurisdiction to review FTB's denial of a waiver of interest under R&TC section 19112, which requires a showing of extreme financial hardship. (*See Appeal of Moy, supra.*) Accordingly, appellants have not established that they are entitled to interest abatement or waiver.

HOLDINGS

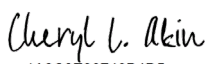
1. Appellants have not established error in FTB’s proposed assessments of additional tax, which are based on federal adjustments, for the 2006, 2007, 2009 and 2011 tax years.
2. Appellants have not established reasonable cause for failing to timely file their 2009 tax return.
3. Appellants have not established a basis upon which interest can be abated.

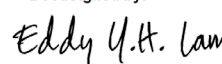
DISPOSITION

FTB will abate the late filing penalties for the 2006 and 2007 tax years in the amounts of \$2,012.25 and \$4,842.50, respectively, and the accuracy-related penalties for the 2006 and 2007 in the amounts of \$1,069.80 and \$3,874.00, respectively, because they were discharged by the entry of the order of bankruptcy discharge. FTB has conceded and will cancel the accuracy-related penalty for the 2009 tax year in the amount of \$62.80. FTB will withdraw the proposed assessment for the 2010 tax year in the amount of \$5,051.00. The remainder of FTB’s assessments are hereby sustained.

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 Sara A. Hosey
 Administrative Law Judge

We concur:

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 Cheryl L. Akin
 Administrative Law Judge

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 Eddy Y.H. Lam
 Administrative Law Judge

Date Issued: 9/26/2022