

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

B. SALISBURY AND
J. FORERO

) OTA Case No. 21129348
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OPINION

Representing the Parties:

For Appellants: B. Salisbury
J. Forero

For Respondent: Joel Smith, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, B. Salisbury and J. Forero (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund for the 2019 tax year.

Appellants 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.) 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 make a timely payment of tax for the 2019 tax year.
2. Whether appellants have established a basis for the abatement of the underpayment of estimated tax penalty (estimated tax penalty).
3. Whether appellants have established that the collection cost recovery fee (collection fee) should be abated.
4. Whether appellants have established a legal basis to abate interest.

FACTUAL FINDINGS

1. On October 15, 2020, appellants timely filed their joint 2019 California income tax return within the automatic extension period. On the return, appellants reported tax due and self-assessed an estimated tax penalty of \$259. Appellants remitted payment with the filing of their return.
2. On November 11, 2020, FTB issued a State Income Tax Balance Due Notice, notifying appellants that FTB imposed a late payment penalty and an estimated tax penalty, plus applicable interest. The State Income Tax Balance Due Notice indicated a due date of the amount due.
3. When appellants failed to pay the outstanding liability, FTB issued an Income Tax Due Notice, notifying appellants that if the liability was not paid by the deadline, FTB may take collection action against appellants. Thereafter, FTB issued a Final Notice Before Levy and Lien on March 1, 2021, notifying appellants that if FTB did not receive full payment within 30 days of the notice, FTB intended to take collection action against appellants, which included imposition of a collection fee. When appellants failed to pay the outstanding liability by the deadline, FTB imposed a collection fee.
4. Appellants paid the outstanding liability on August 18, 2021, and filed a claim for refund, requesting abatement of the late payment penalty, the estimated tax penalty, the collection fee, and interest, which FTB denied.
5. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause for failing to make a timely payment of tax for the 2019 tax year.

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) Due to the COVID-19 pandemic, the payment

due date for the 2019 tax year was postponed to July 15, 2020.¹ Appellants did not remit payment until October 15, 2020; therefore, FTB properly imposed the late payment penalty.

The late payment penalty may be abated if appellants show 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)(1).) To establish reasonable cause for a late payment of tax, appellants must show that the failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scanlon*, 2018-OTA-075P.) Appellants bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Triple Crown Baseball*, 2019-OTA-025P.)

Appellants contend that they were unable to timely pay their 2019 tax liability due to the COVID-19 pandemic and, therefore, have reasonable cause for the late payment of tax based on financial hardship. Specifically, appellants assert that their business was closed for over a year, they were both unemployed, and they continue to struggle to pay their bills. In addition, appellants contend that imposition of penalties during “Covid times is outrageous.”

Financial hardship may constitute reasonable cause to excuse the late payment of tax. (*Appeal of Rougeau*, 2021-OTA-335P.) Reasonable cause based on financial hardship is explained in federal Treasury Regulation section 301.6651-1(c)(1), which provides that appellants must show the exercise of ordinary business care and prudence and that appellants either were unable to pay the tax or would suffer an undue hardship by paying the tax by the due date.² Treasury Regulation section 301.6651-1(c)(1) further provides that all the facts and circumstances will be considered, including the amount and nature of appellants’ expenditures in light of the income (or other amounts) appellants could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, appellants can prove ordinary business care and prudence by showing reasonable efforts to conserve sufficient assets in marketable form to satisfy the tax liability. Additionally, “undue

¹ See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.

² Although there are no FTB regulations interpreting R&TC section 19132, that section is patterned after Internal Revenue Code section 6651. Therefore, the interpretation and effect given the federal provision by the federal courts and administrative bodies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

hardship” is defined in Treasury Regulations section 1.16161-1(b) as not merely a “general hardship,” but rather “more than an inconvenience to” appellants.

Appellants have not introduced any evidence showing that on or before July 15, 2020, their financial difficulties prevented them from paying their 2019 tax liability, nor have they offered any detailed information about their financial circumstances on or before the payment deadline. Thus, the Office of Tax Appeals (OTA) has no evidence upon which to base a finding that undue hardship would have resulted from the timely payment of the tax owed. Therefore, OTA finds that appellants failed to meet their burden of proving reasonable cause for failing to make a timely payment of tax for the 2019 tax year.

Issue 2: Whether appellants have established a basis for the abatement of the estimated tax penalty.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated and often referred to as a penalty, when an individual fails to pay timely estimated tax.³ For California purposes, estimated tax payments are due on April 15 of the current year (30 percent of the required annual payment), June 15 of the current year (40 percent of the required annual payment), and January 15 of the following year (30 percent of the required annual payment). (R&TC, § 19136.1.) The estimated tax penalty is similar to an interest charge and applies from the due date of the estimated tax payment until the date it is paid. (*Appeal of Saltzman*, 2019-OTA-070P.)

There is no provision in the R&TC or IRC allowing the estimated tax penalty to be abated based solely on a finding of reasonable cause. (*Appeal of Saltzman, supra.*) As a result, there is no reasonable cause exception to the imposition of the estimated tax penalty based on financial hardship, and the penalty is mandatory unless appellants establish a statutory exception applies. (*Ibid.*) One such exception, found at IRC section 6654(e)(3)(A), provides the taxing agency may waive the estimated tax penalty if it determines “by reason of casualty, disaster, or other unusual circumstances the imposition of [the estimated tax penalty] would be against equity and good conscience.”

Appellants self-assessed an estimated tax penalty of \$259 for the 2019 tax year. Appellants seek abatement of the estimated tax penalty for the same reason they seek abatement

³ Subject to several exceptions not relevant to this appeal, California incorporates IRC section 6654 at R&TC section 19136, meaning those relevant provisions of IRC section 6654 are California law.

of the late payment penalty; namely, reasonable cause based on financial hardship. As discussed above, there is no reasonable cause exception to the estimated tax penalty based on financial hardship, and the penalty therefore may not be abated on that basis. Furthermore, appellants have not submitted any evidence showing what casualty, disaster, or other unusual circumstances prevented them from making the estimated tax payments that were due on April 15 and June 15 in 2019, and the last estimated tax payment that was due by January 15, 2020.⁴ Appellants have therefore not established a basis warranting abatement of the estimated tax penalty.

Issue 3: Whether appellants have established that the collection fee should be abated.

R&TC section 19254(a)(1) requires FTB to impose a collection fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. Once properly imposed, there is no provision in the R&TC that would excuse FTB from imposing the fee under any circumstances, including reasonable cause. (R&TC, § 19254; *Appeal of Wright Capital Holdings, LLC*, 2019-OTA-21P.)

Here, FTB issued a Final Notice Before Levy and Lien dated March 1, 2021, notifying appellants that failure to pay the liability within 30 days of the notice may result in collection action and imposition of a collection fee. Appellants did not make the payment until August 18, 2021. Therefore, the collection fee was properly imposed and FTB is not authorized to abate or modify the fee. Accordingly, appellants are liable for the collection fee.

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

If any amount of the 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 compensation for the taxpayer's use of money which should have been paid to the state. (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch, supra.*) There is no reasonable cause exception to the imposition of interest. (*Appeal of May*, 2019-OTA-057P.) To obtain relief from interest, appellants must qualify under R&TC

⁴ On March 4, 2020, approximately two months after appellants' last estimated tax payment for the 2019 tax year was due, Governor Newsom proclaimed a State of Emergency to exist in California as a result of the threat of the COVID-19 pandemic. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.)

section 19104, 19112, or 21012; however, based on the evidence, none of these statutory provisions apply. Thus, appellants have not established any legal basis for interest abatement for the tax year at issue.

HOLDINGS

1. Appellants have not established reasonable cause for failing to make a timely payment of tax for the 2019 tax year.
2. Appellants have not established a basis for the abatement of the estimated tax penalty.
3. Appellants have not established that the collection fee should be abated.
4. Appellants have not established a legal basis to abate interest.

DISPOSITION

FTB’s action denying appellants’ claim for refund is sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 9/6/2022