

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
S. KLEIN

) OTA Case No. 19115429
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OPINION

Representing the Parties:

For Appellant: S. Klein

For Respondent: Ellen L. Swain, Tax Counsel IV

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19324, S. Klein (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$6,945.22¹ for the 2016 tax year.

Appellant waived the right to an oral hearing; therefore, Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUES

1. Whether appellant has established that reasonable cause exists to abate the late-filing penalty.
2. Whether appellant has established that reasonable cause exists to abate the demand penalty.
3. Whether FTB properly imposed the collection cost recovery fee.
4. Whether FTB properly imposed the filing enforcement cost recovery fee.
5. Whether appellant has established that a basis exists to abate interest.

¹ While FTB’s claim denial indicated that the amount at issue was \$6,544.22, FTB concedes on appeal that the proper amount at issue in this appeal is \$6,945.22. This amount consists of the following: a late-filing penalty in the amount of \$2,673.25, a demand penalty in the amount of \$2,673.25, a filing enforcement cost recovery fee of \$84, a collection cost recovery fee of \$317, and interest in the amount of \$1,197.72.

FACTUAL FINDINGS

1. On March 22, 2018, FTB issued to appellant, a Demand for Tax Return (Demand) because its records indicated that appellant's 2016 California resident income tax return had not been filed, and appellant had received sufficient income to trigger a filing obligation. The 2016 Demand required appellant to respond by April 25, 2018, by either filing a 2016 tax return, providing evidence that a return had already been filed, or providing information on why she was not required to file a return. Appellant did not respond.
2. Subsequently, FTB issued a Notice of Proposed Assessment (NPA) on May 21, 2018, which proposed to assess tax, a demand penalty, a late-filing penalty, a filing enforcement cost recovery fee, and interest. Appellant did not protest the NPA, and the assessment became due and payable.
3. FTB sent appellant a Notice of State Income Tax Due on August 20, 2018, an Income Tax Due Notice on October 17, 2018, and a Final Notice Before Levy and Lien on November 21, 2018.
4. Appellant ultimately filed a 2016 California resident income tax return, with married filing jointly status,² on February 15, 2019, reporting tax due. FTB accepted and processed the 2016 tax return and reduced the late filing and demand penalties to \$2,673.25 each. FTB also imposed a filing enforcement cost recovery fee of \$84, a collection cost recovery fee of \$317, and applicable interest.
5. Appellant made a payment for the 2016 tax liability, which was credited to her account on February 20, 2019. Since appellant had only paid the tax liability and not the penalties, fees, and interest, FTB issued an additional Notice of State Income Tax Due on April 22, 2019. Appellant then made a payment for the penalties, fees, and interest totaling \$6,945.22 on May 3, 2019.
6. Appellant subsequently filed a claim for refund seeking abatement of penalties, fees, and interest, which FTB denied. This timely appeal followed.
7. As relevant here, FTB had previously issued a Request for Tax Return (Request) dated May 26, 2015, to appellant and her husband, for their 2012 tax year. After appellant and

² Appellant filed a joint return for the tax year in question but appears to have filed this appeal on her own behalf, only.

her husband failed to respond, FTB issued an NPA dated July 27, 2015. FTB also sent appellant a Request for the 2015 tax year on June 27, 2017. When appellant failed to respond to this Request, FTB issued an NPA on August 28, 2017.

8. Appellant's husband passed away in March 2017.
9. Between the time appellant's husband passed away in March 2017, and the date appellant filed her 2016 tax return on February 15, 2019, appellant made efforts to resume normalcy in her and her daughter's lives. She socialized, drove her daughter to work, and traveled to the east coast for wedding and anniversary parties, and for another memorial for her husband. She also spent a few weeks in July and August of 2017 on the east coast taking care of her brother when he was gravely ill.
10. Appellant became aware in 2018 that her CPA was very ill. Appellant communicated with her CPA several times between April 25, 2018, when she provided him with her tax information, through February 2019, when her 2016 tax return was filed. Her CPA assured her that he was handling the preparation of her 2016 tax return throughout that period.

DISCUSSION

Issue 1: Whether appellant has established that reasonable cause exists to abate the late-filing penalty.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness attached to the penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*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 cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

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. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) 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. (*Ibid.*) The taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Ibid*; *Watts v. Commissioner* (1999) T.C. Memo. 1999-416.) It is well established that each taxpayer has a personal, non-delegable obligation to ensure the timely filing of a tax return, and thus, reliance on an agent to perform this act does not constitute reasonable cause to abate a late-filing penalty. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*); *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.)

In this case, appellant's 2016 California tax return was due on April 15, 2017. (R&TC, § 18566.) The extended deadline to file the return was October 15, 2017. (R&TC, § 18567; Cal. Code Regs., tit 18, §18567.) Appellant argues that the death of her husband on March 2, 2017, and the challenge of creating normalcy in life again for both herself and her daughter constitute reasonable cause for failure to timely file her 2016 California tax return. She also points to caring for her sick brother during July and August of 2017, as well as her CPA becoming seriously ill, as reasons for her late filing. Appellant also contends that the extensive remodel of her home in 2015 and 2016 made it difficult to locate stored documents and this contributed to her delay in filing her California tax return.

Concerning the passing of appellant's husband, OTA acknowledges the magnitude of this loss in appellant's life. However, the law does not find reasonable cause where a taxpayer is able to engage in other aspects of the taxpayer's affairs but unable to perform the taxpayer's tax obligations. After appellant's husband's passing, appellant was able to travel to the east coast for weddings, anniversary parties, the Fourth of July, and Thanksgiving. Appellant was able to manage other aspects of her affairs such as returning her late husband's car to Honda, switching car and home insurance companies, and cementing her driveway. Thus, OTA concludes that appellant sacrificed the timeliness of gathering her tax documents and filing her return to pursue other priorities. Appellant also states that she acted as a caregiver for her brother for a few weeks during the summer of 2017, but the evidence does not show that she was continuously prevented from filing her tax return as a result. The fact that appellant had difficulty locating her

tax documents also does not establish reasonable cause, since the exercise of ordinary care and prudence would have required her to sort through her boxes to find the relevant tax information or request new copies of tax documents.

Additionally, as explained above, the fact that appellant relied on her tax preparer to file her return does not relieve her of her responsibility to ensure that it is timely filed.³ While OTA is sympathetic to appellant's situation, longstanding precedent on this issue compels OTA to conclude that appellant has not established reasonable cause for the late filing of her 2016 California return. For the reasons explained above, OTA finds that appellant has not shown that there is reasonable cause to abate the late-filing penalty.

Issue 2: Whether appellant has established that reasonable cause exists to abate the demand penalty.

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235.) R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. FTB will only impose a demand penalty if: (1) the taxpayer fails to timely respond to a current Demand, and (2) at any time during the four-taxable year period preceding the taxable year for the current demand, FTB issued an NPA following the taxpayer's failure to timely respond to a Request or a Demand for that tax year. (Cal. Code Regs., tit. 18, § 19133(b).) Both conditions have been met, as appellant did not file a 2016 tax return or otherwise respond to the 2016 Demand and FTB has shown it previously issued Requests and NPAs to appellant for the 2012 and the 2015 tax years. (*Appeal of Jones*, 2021-OTA-144P.) Thus, FTB properly imposed the demand penalty for the 2016 tax year.

To establish that reasonable cause exists to support abatement of the demand penalty, a taxpayer must show that the failure to timely respond to the Demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of GEF Operating, Inc.*, 2020-OTA-

³ Appellant did not provide her CPA with her tax documents until April 25, 2018, after the filing deadline had already passed. With regards to the further delay, while appellant contacted her CPA several times between April 25, 2018, and February 15, 2019, when her tax return was finally filed, this was not sufficient to timely meet her tax filing obligation. The record does not show that appellant took any action to find someone else to prepare her return, but instead chose to rely solely upon her CPA and wait more than nine months for him to complete her 2016 tax return.

057P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Jones, supra.*) An analysis of reasonable cause requires examining the taxpayer's actions leading up to the failure to timely respond, the timing of those actions, and whether they reflect ordinary business care and prudence such that an ordinarily intelligent and prudent businessperson would have acted similarly in the situation. (*Appeal of Moren, 2019-OTA-176P.*)⁴

Personal difficulties that prevent a taxpayer from responding to a Demand or a Request may be considered reasonable cause if the taxpayer presents credible and competent proof that the taxpayer was continuously prevented from responding to the Demand. (See *Appeal of Head and Feliciano, supra.*) Reasonable cause is not established if evidence shows that a taxpayer handled his or her business affairs while being selectively unable to timely manage his or her tax obligations. (*Ibid.*) When a taxpayer alleges reasonable cause based on incapacity due to illness, the duration of the incapacity must approximate that of the failure to timely respond to the Demand. (*Ibid*; see *Wright v. Commissioner*, T.C. Memo. 1998-224, citing *Hayes v. Commissioner*, T.C. Memo. 1967-80.)

The United States Tax Court (Tax Court) has found reasonable cause where the taxpayers have proven that they were unable to meet their filing obligation due to their own illness or that of a family member.⁵ Not only must taxpayers show that they were incapacitated to such a degree that they could not file the returns in question, but they must also show that they were *continuously* prevented from doing so during the relevant period.⁶ The courts have denied penalty abatement where taxpayers have failed to prove that medical problems or other

⁴ This Opinion cites to various cases involving reasonable cause in the context of either the late filing or late payment penalties; however, the same standards for reasonable cause are equally applicable to the demand penalty.

⁵ See, e.g., *Tabbi v. Commissioner*, T.C. Memo. 1995-463 [reasonable cause found where taxpayers' son had heart surgery, taxpayers spent four months continuously with him in the hospital and filed their tax return two months after his death]; and *Harris v. Commissioner*, T.C. Memo. 1969-49 [reasonable cause was found where the taxpayer's activities were severely restricted due to serious illness, and the taxpayer was in and out of hospitals due to stroke, paralysis, heart attack, bladder trouble and breast cancer].

⁶ In *Williams v. Commissioner*, (1951) 16 T.C. 893, the Tax Court did not find reasonable cause where the evidence did not show that the taxpayer's impairment due to a series of strokes was continuous, and did not show that his spouse was prevented from filing their returns.

circumstances directly led to the taxpayer's inability to file the return.⁷ The "selective inability" to file tax returns while attending to other responsibilities does not demonstrate reasonable cause. (*Wright v. Commissioner, supra*, at p. *5.)

Appellant argues that reasonable cause exists to support abatement of the demand penalty for the 2016 tax year. Appellant points to events taking place as far back as 2016; however, much of appellant's arguments and evidence do not pertain to her ability to respond to the Demand during the relevant period between March 22, 2018, when FTB issued the Demand, and April 25, 2018, the deadline appellant was given to respond. In following the applicable law cited above, OTA must focus its attention on circumstances that took place or were endured through the relevant period.

Appellant does not provide OTA with much information about the relevant period. The record indicates that appellant provided her 2016 tax information to her CPA on April 25, 2018. OTA acknowledges that appellant was still dealing with grief during the relevant period, but the situation does not meet a level that establishes that she was continuously prevented from being able to timely respond to the Demand, especially as she had been traveling for family parties and engaging in other aspects of life between her husband passing away and finally filing her return on February 15, 2019. The exercise of ordinary business care and prudence required appellant to set the time aside to timely respond to the Demand. When difficulties cause taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, the taxpayers bear the consequences of that choice. (*Appeal of Head & Feliciano, supra*.) Further, appellant's reliance on her CPA does not release her from her non-delegable duty to file her return in a timely manner.

The evidence appellant has provided that pertains to the relevant period does not show that appellant was continuously prevented from responding to the Demand. Appellant has failed to demonstrate that she exercised ordinary business care and prudence, and as such has not established reasonable cause to support abatement of the demand penalty.

⁷ For instance, in *Ramirez v. Commissioner*, T.C. Memo. 2005–179, the Tax Court did not find reasonable cause, despite taxpayer's prior illness and surgery, because the taxpayer was able to continue his legal practice, pay business expenses, manage two rental properties, and care for two minor children. In another case, the Tax Court did not find reasonable cause where the taxpayer had the capacity to attend to matters other than filing tax returns despite his mother's traumatic disappearance and death, and the taxpayer's failure to file returns continued beyond the duration of these events. (*Wright v. Commissioner, supra*, affd. without published opinion (2d Cir. 1999) 173 F.3d 848.)

Issue 3: Whether FTB properly imposed the collection cost recovery fee.

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery 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 FTB properly imposes the fee, there is no language in the statute that would excuse the fee for any reason, including reasonable cause. (See *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Here, FTB mailed appellant a Notice of State Income Tax Due dated August 20, 2018,⁸ which informed appellant that the failure to pay the liability within 30 days of the notice may result in collection action and the imposition of a collection cost recovery fee. Since appellant failed to pay the liability after receiving notice that continued failure to pay the liability may result in imposition of the fee, imposition of the collection cost recovery fee was required under R&TC section 19254(a)(1). OTA has no authority to abate or modify this fee. Therefore, OTA sustains FTB's imposition of the collection cost recovery fee.

Issue 4: Whether FTB properly imposed the filing enforcement cost recovery fee.

R&TC section 19254(a)(2) provides if a person fails or refuses 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, then FTB shall impose a filing enforcement cost recovery fee. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; *Appeal of Wright Capital Holdings, LLC*, 2019-OTA-219P.)

Here, FTB informed appellant in the Demand that the fee may be assessed if she did not timely respond. 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 sustains FTB's imposition of the filing enforcement cost recovery fee.

⁸ FTB refers to a notice dated May 26, 2015, in its opening brief. The evidentiary record does not include a notice dated May 26, 2015, and OTA relies on the notice provided as an exhibit in this appeal, which is dated August 20, 2018.

Issue 5: Whether appellant has established that a basis exists 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.) 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 19104, 19112, or 21012.⁹ (*Ibid.*) In this case, appellant only provides reasonable cause type arguments for the abatement of interest. Appellant has not shown that she qualifies for waiver or abatement of interest under the provisions of R&TC sections 19104, 19112 or 21012.


⁹ Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of ministerial or managerial act by an employee of FTB. R&TC section 21012 may apply where there has been reliance on written advice requested of FTB. Appellant does not allege any unreasonable error or delay by FTB or that she relied upon written advice from FTB. Finally, OTA does not have jurisdiction over R&TC section 19112 relating to extreme financial hardship. (*Appeal of Moy, supra.*)

HOLDINGS

1. Appellant has not established that reasonable cause exists to abate the late-filing penalty.
2. Appellant has not established that reasonable cause exists to abate the demand penalty.
3. FTB properly imposed the collection cost recovery fee.
4. FTB properly imposed the filing enforcement cost recovery fee.
5. Appellant has not established a basis to abate interest.


DISPOSITION

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

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 Amanda Vassigh
 Administrative Law Judge

We concur:

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 Richard Tay
 Administrative Law Judge

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 Daniel K. Cho
 Administrative Law Judge

Date Issued: 11/15/2022