



FACTUAL FINDINGS

1. On April 26, 2021, the State Controller and FTB announced an extension of time from April 15, 2021, until May 17, 2021, for individual California taxpayers to file and pay taxes due for the 2020 tax year.<sup>1</sup>
2. Appellants self-prepared and timely filed a joint California Resident Income Tax Return (Form 540) for the 2020 tax year on May 15, 2021. The return was unsigned and undated.
3. On their 2020 California income tax return, appellants reported total tax of \$201,306, California income tax withheld (wage withholdings) of \$113,076, and tax due with the return of \$88,230.<sup>2</sup>
4. Appellants made the following timely payments for the tax reported due on their return: (1) \$10,000 on May 13, 2021; and (2) \$10,000 on May 14, 2021.
5. Appellants scheduled a payment for May 16, 2021, to satisfy the remaining tax (\$68,230); however, appellants' bank denied the draft due to insufficient funds.
6. By letter dated June 2, 2021, FTB assessed a 2-percent dishonored check fee of \$1,365 pursuant to R&TC section 19134, which appellants subsequently paid and is not at issue in this appeal. FTB also asserted a late-payment penalty of \$4,087.
7. On June 27, 2021, appellants paid \$68,230, the remainder of the tax due.
8. By letter dated August 29, 2021, appellants requested abatement of the late payment penalty.
9. By Final Notice Before Levy and Lien dated September 22, 2021, FTB informed appellants that the late payment penalty of \$4,087, plus interest thereon, remained unpaid, and demanded payment.

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<sup>1</sup> Regarding the due date, FTB cited to the following news release: <https://www.ftb.ca.gov/about-ftb/newsroom/2020-tax-year-extension-to-file-and-pay-individual.html>.

<sup>2</sup> The record indicates that appellants did not make any estimated tax payments or report the reason they were not required to make any estimated tax payments to FTB. FTB did not assess an underpayment of estimated tax penalty pursuant to R&TC section 19136(a). It is not clear from the record why the penalty is inapplicable. Appellants did not file an FTB Form 5505 (Underpayment of Estimated Tax by Individuals and Fiduciaries) to report why they were not required to make estimated tax payments.

10. By letter dated October 6, 2021, and received on October 11, 2021,<sup>3</sup> appellants filed a second request for abatement of the late payment penalty. In addition, appellants also paid the late payment penalty, plus \$260 in accrued interest, effective October 11, 2021.
11. FTB treated appellants' request to abate the late payment penalty as a claim for refund, which FTB denied via Notice of Action dated March 15, 2022.
12. Appellants timely appealed to OTA, requesting refund of \$4,347 (representing the late payment penalty plus interest) on the basis that appellants have a good filing history and would suffer financial hardship without the refund. Appellants also requested interest abatement due to the amount of time it took FTB to contact them about the tax payment.
13. By letter dated July 9, 2022, appellants stated that their tax payment was dishonored due to insufficient funds in their bank account, and explained they had fund transfer issues.

### DISCUSSION

#### Issue 1: Whether appellants established a basis for abatement of the late payment penalty imposed pursuant to R&TC section 19132.

California imposes a late payment penalty for a taxpayer's failure to pay the amount of tax shown on a return before the due date, unless it is established that the late payment was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) The late payment penalty is the sum of two figures that may not exceed 25 percent of the unpaid tax. (R&TC, § 19132(a)(2).) The first addend is five percent of the tax that remained unpaid as of the due date. (R&TC, § 19132(a)(2)(A).) The second addend is .5 percent of the unpaid tax balance per month for each month, or portion of a month, that the tax remains unpaid after the due date, not to exceed 40 months. (R&TC, § 19132(a)(2)(B).) For these purposes, the due date for payment of the tax is the due date for filing the return, determined without regard to any extension of time to file the return. (R&TC, § 19001.) FTB has authority to extend the date for payment of any franchise and income tax due under Division 2 of Part 10.2 of the R&TC for good cause. (R&TC, § 18567(c).)

Here, it is undisputed that FTB granted an extension of time to pay until May 17, 2021. It is further undisputed that appellants did not pay the remainder of the tax due (\$68,230) until

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<sup>3</sup> Although neither of appellants' abatement requests are in the written record, it is undisputed that appellants filed a document which was accepted as a valid and timely claim for refund.

June 27, 2021, approximately one month and 10 days after the extended payment due date. Therefore, a \$4,087 late payment penalty applies, which is the total penalty amount paid by appellants and subject to this refund claim. This amount is equal to five percent of the unpaid tax amount of \$68,230 (i.e., \$3,412), plus an additional .5 percent of the unpaid tax for each the monthly periods (or portions thereof) that the amount remained unpaid. FTB calculated the second addend to be \$675.<sup>4</sup> Appellants do not dispute the calculation of the penalty, and we find no correctible error in the computation of the penalty.

First, appellants request a first-time penalty abatement based on their timely filing history with FTB. Although we do not have a copy of appellants' filing history with FTB, submission thereof is not material to the analysis. The IRS may abate the federal late-filing penalty for purposes other than reasonable cause under its first-time abatement policy. OTA is a different entity from the IRS, and OTA lacks statutory authority to make discretionary adjustments based on policy, such as considering whether to waive the late-filing penalty based on appellants' prior timely filing history with the IRS or FTB.<sup>5</sup> (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert* (82-SBE-011) 1982 WL 11689 [no authority to make adjustments based on a taxpayer's ability to pay].) OTA's lack of authority in this matter is highlighted by the Legislature's passage of R&TC section 19132.5, which authorizes first-time abatement of state income taxes for certain individual filers, and which authority is statutorily limited to tax years starting on and after January 1, 2022. Here, the tax year at issue is the 2020 tax year. Therefore, appellants are not entitled to first-time abatement of the late-filing penalty.

Second, appellants assert reasonable cause as a basis for relief because they timely scheduled the \$68,230 tax payment; however, their bank declined to honor the payment due to insufficient funds. A taxpayer seeking to establish that a failure to act was due to reasonable cause, has the burden of proving that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Triple Crown Baseball, 2019-OTA-025P*; see also *United States v. Boyle*, 469 U.S. 241, 245.) Each taxpayer

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<sup>4</sup> The second addend is \$341 per monthly period or \$682 for both periods; however, FTB is only asserting \$675 for both periods. We do not question this \$7 difference because the lesser amount is in appellants' favor.

<sup>5</sup> The IRS adopted a first-time abatement policy in 2001 for certain taxpayers with a good filing history, as provided in Section 20.1.1.3.3.2.1 of the Internal Revenue Manual, and this policy applies regardless of whether a late filing was due to reasonable cause. FTB does not have a comparable abatement policy for the 2020 tax year.

has a personal and non-delegable obligation to pay tax by the due date. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224.) As the Supreme Court held in *United States v. Boyle, supra*, “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met.” In summary, tax payments which are dishonored due to taxpayer error, such as writing a check from a bank account with insufficient funds to honor the check, do not qualify as reasonable cause.

Third, appellants request abatement due to financial hardship. FTB contends that the taxable income of close to \$2 million does not support a claim of financial hardship. Here, appellants already paid the liability and OTA lacks authority to grant a refund based solely on financial hardship. (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert, supra*).<sup>6</sup>

Issue 2: Whether appellants established a basis for interest abatement.

If any amount of 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 also accrues as provided above on any unpaid penalty amount if the penalty is not paid within 15 days of any notice and demand for payment. (R&TC, § 19101(c)(2)(A).) Imposition of interest is mandatory and there is no reasonable cause exception to imposition of interest. (*Appeal of Yvonne M. Goodwin* (97-SBE-003) 1997 WL 258474; *Appeal of Amy M. Yamachi* (77-SBE-095) 1977 WL 3905.) FTB may abate interest related to a proposed deficiency to the extent the interest is attributable in whole or in part to: (1) an unreasonable error or delay (2) by an officer or employee of FTB (3) in performing a ministerial or managerial act (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed assessment, and provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1); *Appeal of Michael and Sonia Kishner* (99-SBE-007) 1999 WL 1080250.) OTA has jurisdiction to determine whether a failure by FTB to abate interest was an abuse of discretion, and OTA has the authority to abate interest in such cases. (R&TC, §§ 20(b), 19104(b)(2)(B).)

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<sup>6</sup> Likewise, appellants further propose paying half of the penalty as a compromise. Nevertheless, OTA similarly lacks jurisdiction to settle or compromise a tax appeal. Such negotiations must be directed to the tax agency and would be a basis for postponing the appeal before OTA because OTA is not involved in such negotiations. (See Cal. Code. Regs., tit. 18, § 30221.) As such, we do not address this contention.

Here, we understand that appellants are requesting interest abatement on the basis that FTB did not immediately inform them of the \$68,230 dishonored payment.<sup>7</sup> According to FTB's records, appellants' tax payment was received on May 16, 2021, their check was dishonored on May 26, 2021, and FTB notified appellants of the dishonored check (and the dishonored check fee) by notice dated June 2, 2021. Appellants thereafter paid the tax on June 27, 2021.

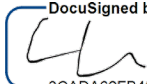
No interest may be abated for periods prior to FTB first contacting appellants in writing about the payment. (R&TC, § 19104(b)(1).) Here, FTB first contacted appellants about the dishonored check payment on June 2, 2021, and appellants are disputing the amount of time it took FTB to contact them (i.e., from May 16, 2021, until June 2, 2021). The law is clear that no portion of this period is eligible for interest abatement because there was no written contact with FTB about the deficiency resulting from the late payment until June 2, 2021. As such, we find that FTB did not abuse its discretion in disallowing interest abatement for this period. The remaining period is the amount of time it took appellants to pay the liability upon notice and discovery of the dishonored check payment. No portion of the 25-day time period that it took appellants to schedule the tax payment upon discovery of the dishonored check could reasonably be attributed to FTB.

#### HOLDING

1. Appellants failed to establish a basis to abate the late payment penalty.
2. Appellants failed to establish a basis for interest abatement.

#### DISPOSITION

FTB's action is sustained.

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Andrew J. Kwee  
Administrative Law Judge

Date Issued: 12/6/2022

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<sup>7</sup> Appellants' contention is: "In these days of instant communication, various organizations immediately alert us [of an issue.] Thus an impacted party can immediately take steps to rectify it. [We] unfortunately did not have the opportunity to do so."