

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
A. TANYA

) OTA Case No. 20066285
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OPINION

Representing the Parties:

For Appellant: A. Tanya

For Respondent: Phillip C. Klean, Tax Counsel III

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Tanya (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$4,098.06 for the 2018 tax year.

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

ISSUE

Whether appellant has established a basis to abate the \$4,098.06 underpayment and monthly penalty (late payment penalty).

FACTUAL FINDINGS

1. Appellant timely filed his 2018 California income tax return by the extension date of October 15, 2019. Appellant reported adjusted gross income, deductions, and taxable income. Appellant also reported other taxes, credit recapture, and withholdings for a total tax due of \$39,672. Appellant self-assessed an underpayment of estimated tax of \$841 for a total balance due of \$40,513.

2. On November 6, 2019, FTB sent appellant a Notice of Tax Return Change – Revised Balance indicating that appellant owed a balance of \$44,325.52 (unpaid reported tax, late payment penalty of \$3,372.12,¹ and interest).
3. FTB reports that appellant was advised to send a completed Form 3561 (Financial Statements) by December 4, 2019.
4. On December 3, 2019, appellant made a payment of \$4,500.
5. On December 14, 2019, appellant sent a completed Form 3561 with supporting financial statements. The Form 3561 reported approximately \$38,000 in liquid assets. On December 26, 2019, FTB determined that appellant was eligible for an installment agreement and sent appellant a contract request. FTB reports that appellant did not respond.
6. On March 10, 2020, FTB sent appellant a Final Notice Before Levy and Lien stating that he had a balance due of \$41,293.50.
7. On March 12, 2020, appellant made a payment of \$20,000. On March 13, 2020, appellant paid the remaining balance in full.
8. On March 26, 2020, appellant submitted a Reasonable Cause Individual and Fiduciary Claim for Refund.
9. On April 2, 2020, FTB denied appellant’s claim for refund because FTB determined that appellant had not demonstrated reasonable cause.
10. Appellant timely appealed to the Office of Tax Appeals (OTA).

DISCUSSION

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 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.)

When FTB imposes a penalty, it is presumed that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) However, the late payment penalty may be abated if the taxpayers 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 the

¹ The penalty later increased to the amount at issue.

late payment of tax, taxpayers must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.) Taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

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 the taxpayer must show the exercise of ordinary business care and prudence and that the taxpayer was either unable to pay the tax or would suffer an undue hardship by paying 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 the taxpayer's expenditures in light of the income (or other amounts) the taxpayer could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, a taxpayer can prove ordinary business care and prudence by showing reasonable efforts to conserve sufficient assets in marketable form to satisfy the tax liability. (*Appeal of Rougeau, supra.*) However, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of their tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay. (Treas. Reg. § 301.6651(c)(1).)

Appellant argues that he experienced severe financial hardships, personally and in his business. Appellant attributes the financial hardship to issues involving the sale of an investment home that was sold at a loss. In 2018, appellant claims that to meet his financial obligations he withdrew funds from his 401(k), which ultimately increased his tax obligation for 2018. Since the investment home was sold for a loss, appellant claims he could not cover his business and

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. (See *Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

personal liabilities including his 2018 tax liabilities. Appellant also cites generally to difficulties relating to the COVID-19 pandemic.

Here, appellant has not established reasonable cause because appellant has not shown that he made reasonable efforts to conserve sufficient assets to satisfy the tax liability. Regarding the tax liabilities associated with the 401(k) withdrawal, it is clear from appellant's arguments that appellant knew that a 401(k) withdrawal could result in additional taxes and penalties for that year if it were not timely repaid. Appellant has not provided evidence or argument to show that he tried to set aside or conserve sufficient assets to satisfy the tax liability associated with the early withdrawal. (See *Appeal of Rougeau, supra.*) Regarding the investment property, appellant has not provided evidence regarding the investment property such as loan documents, mortgage statements, escrow documents, or other financial statements showing that he attempted to preserve sufficient funds to satisfy his tax liability. Also, from appellant's argument, appellant sacrificed the timeliness of his tax payment in favor of his other obligations. (See *Appeal of Head and Feliciano, 2020-OTA-127P.*) Accordingly, OTA finds that appellant has failed to meet his burden of proof.

HOLDING

Appellant has not established reasonable cause to abate the late-payment penalty.

DISPOSITION

FTB’s denial of the claim for refund is sustained.

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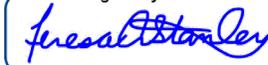


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Josh Aldrich
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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Eddy Y.H. Lam
Administrative Law Judge

Date Issued: 1/11/2023