

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
J. MCCARTHY AND ) OTA Case No. 21068024  
S. MCCARTHY )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: J. McCarthy  
S. McCarthy

For Respondent: Bradley J. Coutinho, Tax Counsel III

O. AKOPCHIKYAN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. McCarthy and S. McCarthy (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,201.40 for the 2019 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Suzanne B. Brown, and Ovsep Akopchikyan held an electronic oral hearing for this matter on February 23, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

**ISSUES<sup>1</sup>**

1. Whether OTA has jurisdiction to decide this appeal.
2. Whether appellants have established a basis to abate the late payment penalty.
3. Whether appellants have established a basis to abate the estimated tax penalty.

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<sup>1</sup> Appellants requested abatement of interest during the briefing process. However, at the oral hearing, appellants indicated that they no longer request abatement of interest. Therefore, this Opinion does not address whether appellants have established a basis to abate interest.

### FACTUAL FINDINGS

1. Appellants timely filed their 2019 California tax return. They reported tax due of \$58,790.00 and tax payments of \$60,596.00.
2. FTB's records reflected total payments of \$37,961.00, not \$60,596.00, for the 2019 tax year. The discrepancy relates to appellants' estimated tax payment of \$22,635.00 on June 15, 2019, which was rejected due to an incorrect routing number. As a result of the underpayment, FTB imposed a late payment penalty of \$1,249.74, an estimated tax penalty of \$779.00, and applicable interest.
3. Appellants paid the outstanding tax, penalties, and interest on September 14, 2020, and requested a refund of the penalties and interest on the basis that (1) FTB's Web Pay confirmation for the June 15, 2019 payment did not indicate an error in the routing number, (2) appellants received an email from FTB shortly after their June 15, 2019 payment confirming FTB received their payment request, (3) FTB did not notify appellants of the error until more than one year later, (4) around the time of the payment, appellants lost their bookkeeper, who would have alerted them that the payment was not processed, and (5) this was the first time appellants paid their taxes late.
4. FTB issued a Notice of Action (NOA) dated February 9, 2021, denying the refund claim.
5. Appellants filed a request for appeal with OTA dated February 7, 2021. The date on the request for appeal is two days before the date on the NOA. OTA received the request for appeal on June 15, 2021.
6. OTA informed appellants on July 23, 2021, that OTA does not have jurisdiction to decide this appeal because OTA received the appeal more than 90 days after the NOA.
7. OTA accepted the appeal on October 28, 2021, and asked the parties to address whether OTA has jurisdiction to hear this appeal.

### DISCUSSION

#### Issue 1: Whether OTA has jurisdiction to decide this appeal.

Once FTB sends out a notice denying a taxpayer's claim for refund, a taxpayer who wants to challenge it must file an appeal with OTA within 90 days. (R&TC, § 19324(a).) Time limits for submitting an appeal are strictly construed and neither party has the power to waive or extend the time limits. (*Appeal of Avril* (78-SBE-072) 1978 WL 3545.)

Appellant J. McCarthy testified at the oral hearing that (1) shortly after receiving the NOA, but on a date uncertain, he timely mailed appellants' request for appeal to OTA, (2) the request for appeal was returned to their address as undeliverable, and (3) upon receiving the undelivered request for appeal, he asked their regular United States Postal Service mail carrier to re-send the appeal to OTA. The record contains a sworn statement from appellants' regular USPS mail carrier stating that appellant J. McCarthy asked the mail carrier about a returned mail on a date uncertain in the beginning of February 2021, and the mail carrier re-sent the letter by placing it in her vehicle and dropping it off at the Post Office for re-delivery.

Based on the credible testimony of appellant J. McCarthy and the mail carrier's sworn statement, OTA finds that appellants timely re-filed their appeal with OTA after receiving the NOA. Accordingly, OTA has jurisdiction to decide this appeal.

Issue 2: Whether appellants have established a basis to abate the late payment penalty.

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.) However, for the 2019 tax year, the original filing and payment due date was postponed from April 15, 2020, to July 15, 2020, due to COVID-19. Appellants remitted their final 2019 tax payment on September 14, 2020, after the payment due date. Thus, FTB properly imposed the late payment penalty.

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for a late payment of tax, a taxpayer 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 Scanlon*, 2018-OTA-075P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman*, 2018-OTA-077P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon, supra.*)

Appellants contend that the late payment penalty should be abated because (1) FTB's Web Pay confirmation for the June 15, 2019 estimated tax payment did not indicate an error in the routing number, (2) appellants received an email from FTB shortly after their June 15, 2019

payment confirming FTB received their payment request, (3) FTB did not notify appellants of the error until more than one year later, and (4) around the time of the payment, appellants lost their bookkeeper, who would have alerted appellants that the payment was not processed.

While OTA is sympathetic to appellants' situation, OTA precedent dictates the outcome of this appeal. *Appeal of Scanlon, supra*, held that reasonably prudent taxpayers exercising due care and diligence are expected to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid. *Appeal of Friedman, supra*, held that taxpayers' error in not completing the Web Pay process, and their failure to check their bank account balance to determine if funds were paid to FTB, does not demonstrate the type of due diligence that would be exercised by an ordinarily intelligent and prudent businessperson. Accordingly, OTA finds that the circumstances here do not establish reasonable cause.

Appellants also contend that the late payment penalty should be abated based on their good history of timely paying their taxes. However, California law does not automatically abate late payment penalties based on a history of timely compliance. (See *Appeal of Xie*, 2018-OTA-076P.) While a history of timely compliance may support a taxpayer's credibility and intent, a history of timely compliance does not, by itself, establish reasonable cause. (*Ibid.*)<sup>2</sup>

Accordingly, appellants have not established reasonable cause to abate the late payment penalty for the 2019 tax year.

### Issue 3: Whether appellants have established a basis to abate the estimated tax penalty.

California conforms to Internal Revenue Code (IRC) section 6654 and imposes an estimated tax penalty for the failure to timely make estimated income tax payments. (R&TC, § 19136(a); IRC, § 6654.) 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. (IRC, § 6654(b)(2).)

Appellants do not protest the imposition or computation of the estimated tax penalty. Appellants instead argue that the penalty should be abated based on reasonable cause or under a first-time abatement theory, as described above. However, there is no reasonable cause abatement of an estimated tax penalty. (*Appeal of Scanlon, supra.*) Moreover, R&TC section 19132.5 does not apply to estimated tax penalties or penalties imposed for taxable years

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<sup>2</sup> Although R&TC section 19132.5 authorizes first-time abatement of a late payment penalty for certain filers, that section only applies to tax years starting on and after January 1, 2022, and thus is not applicable here.

prior to 2022. Therefore, appellants have not established a basis to abate the estimated tax penalty.

HOLDINGS

1. OTA has jurisdiction to decide this appeal.
2. Appellants have not established a basis to abate the late payment penalty.
3. Appellants have not established a basis to abate the estimated tax penalty.

DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:  
*Ovsep Akopchikyan*  
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Ovsep Akopchikyan  
Administrative Law Judge

We concur:

DocuSigned by:  
*Suzanne B. Brown*  
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Suzanne B. Brown  
Administrative Law Judge

DocuSigned by:  
*Andrew J. Kwee*  
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Andrew J. Kwee  
Administrative Law Judge

Date Issued: 5/16/2023