

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
T. SILVERMAN

) OTA Case No. 220510382
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)
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OPINION

Representing the Parties:

For Appellant: Janet Lim, Tax Appeals Assistance
Program (TAAP)¹
For Respondent: Eric R. Brown, Tax Counsel III

L. KATAGIHARA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, T. Silverman (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$4,123.08, plus applicable interest, for the 2019 tax year.

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

ISSUES

1. Whether appellant has established reasonable cause for failing to timely pay her tax liability.
2. Whether appellant has established a basis upon which interest can be abated.

FACTUAL FINDINGS

1. Appellant timely filed her California income tax return for the 2019 tax year but did not timely remit payment of her tax liability.
2. On September 15, 2020, FTB issued a State Income Tax Balance Due Notice (Balance Due Notice) informing appellant of her outstanding California tax liability and imposing

¹ Appellant filed her opening brief. Leon Levman of TAAP filed appellant’s reply brief.

- a late payment penalty and applicable interest.
3. Because appellant's tax liability remained outstanding, FTB issued an Income Tax Due Notice to appellant on November 6, 2020.
 4. On July 19, 2021, appellant paid her outstanding tax balance for the 2019 tax year.
 5. Appellant then filed a timely claim for refund for the late payment penalty (amounting to \$4,123.08) and applicable interest.
 6. FTB denied appellant's claim for refund and this timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause for failing to timely pay her tax liability.

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.) Here, it is undisputed that appellant failed to timely pay her tax liability, and therefore, the penalty was properly imposed and computed.

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 was not due to willful neglect.² (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 occurred despite the exercise of ordinary business care and prudence. (*Appeal of Rougeau*, 2021-OTA-335P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Illness may establish reasonable cause where the taxpayer presents credible and competent proof that the circumstances of the illness prevented the taxpayer from complying with the law. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) However, if the difficulties simply cause the 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.*; *Appeal of Head and Feliciano*, 2020-OTA-127P.)

² FTB has not asserted that appellant's failure to make a timely payment of tax was due to willful neglect.

Here, appellant asserts that reasonable cause exists because appellant suffered from mental health disorders as a result of domestic abuse, divorce, the passing of her mother, and/or a back injury. In support of this contention, appellant submitted, among other documents described below, a visit summary from appellant’s telemedicine³ appointment on June 11, 2021 (visit summary); a letter confirming appellant received psychotherapy from May 2006, to January 2007, as a result of post-traumatic stress disorder (PTSD) caused by domestic abuse; a medical report dated March 28, 2017, documenting lower back pain experienced by appellant as a result of an injury sustained in September 2016; her mother’s death certificate; and a letter from her doctor dated June 11, 2021, indicating that appellant “is currently undergoing a period of significant medical hardship” and was last seen in the doctor’s office on June 8, 2021 (June 2021 letter).

The aforementioned documents support a finding that appellant has suffered physical and emotional trauma. Although OTA sympathizes with appellant, the documents do not constitute credible and competent proof that the mental health disorders resulting from that trauma prevented appellant from making a timely payment of her taxes between July 15, 2020 (when payment was due),⁴ and July 19, 2021 (when appellant ultimately paid her taxes). For example, the June 2021 letter reveals that appellant was “currently undergoing a period of medical hardship” and was being treated for “grief reaction and recurrence of depression” but does not indicate the specific dates of hardship or treatment, other than to say appellant was seen in the doctor’s office on June 8, 2021. Moreover, despite appellant requesting that her doctor provide her a “letter for [FTB] about current medical conditions to try to get [*sic*] delay or decrease in taxes due,” the June 2021 letter does not indicate that at any time between July 15, 2020, and July 19, 2021, appellant’s medical issues prevented her from complying with the law.

Similarly, appellant has not provided any evidence that her PTSD, December 2015 diagnosis of depression (as noted in the visit summary), or September 2016 back injury prevented her from making a timely payment of taxes. FTB, on the other hand, provided a list of

³ Exhibit 1 indicates that appellant was seen by her doctor via videoconference, and therefore, is referred to in the exhibit as being a “telemedicine” or “telehealth” appointment.

⁴ Due to the COVID-19 pandemic, FTB postponed the original filing and payment deadline for all 2019 tax returns to July 15, 2020. (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>.)

the income tax returns or amended income tax returns appellant filed with FTB between 1995 and 2022.⁵ That list proves that appellant was capable of filing her 2015, 2016, and 2018 income tax returns after being diagnosed with depression in December 2015 and/or sustaining her back injury in September 2016. Appellant’s psychotherapy treatment for PTSD concluded in January 2007 – years before appellant’s 2019 tax payment became due.

In addition, FTB submitted a report of appellant’s California wages and withholding details for the 2020 tax year. The report shows appellant earned wages during the third and fourth quarters of 2020. Given that appellant’s mental health disorders and injury did not render her incapable of working when the tax payment became due, appellant should have exercised ordinary business care and prudence by timely paying her outstanding tax liability.

Nor does the remainder of appellant’s submitted evidence (i.e., a letter from the IRS relieving the failure-to-pay penalty imposed by the IRS upon appellant’s 2019 federal tax filing (IRS letter), a letter from appellant’s tax advisors indicating that appellant provided all of the necessary tax documentation to file appellant’s 2019 tax return between February 2020, and May 2020 (tax advisor letter), the first page of appellant’s 2019 California income tax return, and the Balance Due Notice) support appellant’s contention that her mental health disorders prevented her from making a timely payment of her taxes. The IRS letter specifically indicates that the IRS removed the federal failure-to-pay penalty “*solely* on the fact that [appellant had] a good history of timely filing and timely paying” her federal taxes. (Emphasis added.) The tax advisor letter does not reference the pertinent timeframe at issue (i.e., between July 15, 2020, and July 19, 2021). Appellant’s 2019 California income tax return and the Balance Due Notice were offered by appellant to support facts that are undisputed.

Appellant also claims financial hardship as a basis to abate the late payment penalty. Inability to pay the tax due to financial hardship may also establish reasonable cause to abate the late payment penalty. (*Appeal of Triple Crown Baseball LLC, supra*; see Internal Revenue Code (IRC), § 6651; Treas. Reg. § 301.6651-1(c).) 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

⁵ The list includes returns for the following tax years: 1995, 2006, 2007, 2009 to 2011, 2014 to 2016, and 2018 to 2022.

was either unable to pay the tax or would suffer an undue hardship by paying by the due date.⁶ Taxpayers can prove ordinary business care and prudence by showing reasonable efforts were made to conserve sufficient assets in marketable form to satisfy the tax liability. (Treas. Reg. § 301.6651-1(c)(1).)

Appellant has not offered any evidence to support her claim. Appellant has not provided any documentation regarding her financial circumstances at the time her tax payment was due, or how she arrived at those circumstances. Nor has appellant shown that she made an effort to conserve enough funds to pay the tax by the due date. Appellant's unsupported assertions are not sufficient to satisfy her burden of proof. (*Appeal of Scanlon, supra.*)

For these reasons, appellant has failed to establish reasonable cause for failing to timely pay her tax liability.

Issue 2: Whether appellant has established a basis upon which interest can be abated.

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is also charged on penalties. (R&TC, § 19101(c)(2).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state, and it can only be abated in certain limited situations when authorized by law. (*Appeal of Moy, 2019-OTA-057P.*) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

To obtain interest abatement, appellant must qualify under either R&TC section 19104 or 21012.⁷ First, R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. Second, R&TC section 21012 does not apply because appellant does not allege, and the evidence does not show, FTB provided appellant with any requested written advice. Accordingly, appellant has not established a basis upon which interest can be abated.

⁶ Although there are no FTB regulations interpreting R&TC section 19132, that section is patterned after IRC section 6651. Therefore, the interpretations of, and effect given to, the federal provision by the federal courts and administrative bodies are relevant in determining the proper construction of the California statute. (*Appeal of Rougeau, supra; Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

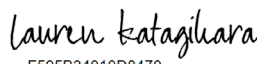
⁷ Pursuant to R&TC section 19112, FTB also has discretion to waive interest based on an extreme financial hardship caused by a significant disability or other catastrophic circumstance, but OTA does not have jurisdiction to review FTB's exercise of such discretion. (See *Appeal of Moy, supra.*)

HOLDINGS

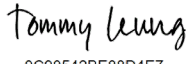
1. Appellant has not established reasonable cause for failing to timely pay her tax liability.
2. Appellant has not established a basis upon which interest can be abated.


DISPOSITION

FTB’s action is sustained in full.

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 Lauren Katagihara
 Administrative Law Judge

We concur:

DocuSigned by:

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 Tommy Leung
 Administrative Law Judge

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 John O. Johnson
 Administrative Law Judge

Date Issued: 6/12/2023