

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

In the Matter of the Appeal of: ) OTA Case No. 230112469  
F. MIFSUD AND )  
D. MIFSUD )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: F. Mifsud

For Respondent: Christopher T. Tuttle, Tax Counsel III

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, F. Mifsud and D. Mifsud (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,322.77 for the 2021 tax year.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellants waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUES**

1. Whether appellants have established reasonable cause for failing to make a timely payment of tax.
2. Whether appellants have established a basis for interest abatement.

**FACTUAL FINDINGS**

1. On April 15, 2022, appellants timely filed a joint 2021 California income tax return reporting a tax liability of \$22,906.
2. On May 15, 2022, FTB processed a check for \$22,906 from appellants. It appears that the check was initially dated April 14, 2021, and then amended to read May 14, 2021. The date change appears to have been initialed by D. Mifsud, who also signed the check.

3. FTB accepted appellants' 2021 return as filed. On June 20, 2022, FTB issued appellants a State Income Tax Balance Due Notice imposing a late payment penalty of \$1,259.83, plus interest of \$62.94.
4. On July 5, 2022, appellants submitted a payment of \$1,322.77 and filed a claim for refund seeking abatement of the late payment penalty and interest abatement. Attached to appellants' claim for refund is a copy of the check described above.
5. FTB denied appellants' claim for refund, and this timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellants have established reasonable cause for failing to make a timely payment of tax.

California imposes a penalty when a taxpayer fails to pay the amount of tax shown on a return on or before the due date, unless it is due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) Generally, the date prescribed for payment of tax is the due date of the return without regard to extensions of time for filing. (R&TC, §§ 18567(b), 19001; Cal. Code Regs., tit. 18, § 18567(a).) Returns filed by individuals are due on or before April 15th following the close of the calendar year. (R&TC, § 18566.)

To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.) A taxpayer making an untimely payment of tax due to an oversight is not, by itself, reasonable cause to abate a late payment penalty. (*Appeal of Friedman*, 2018-OTA-077P.) Every taxpayer has a personal, non-delegable obligation to pay taxes when due and it does not require tax expertise to know that tax returns have fixed filing dates and that taxes must be paid when they are due. (*United States v. Boyle* (1985) 469 U.S. 241, 251.)

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Ibid.*) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*) If a taxpayer places a tax payment in a United States mailbox before the statutory

filing deadline and there is no record of the payment being received, the taxpayer must offer convincing evidence, such as a registered or certified mail receipt, that the payment was timely filed. (Gov. Code, § 11003; *Appeal of Fisher*, 2022-OTA-337P.) However, “[a] postdated check is not a check immediately payable but it is a promise to pay on the date shown. It is not a promise to pay presently, and it does not mature until the date of its date [...]” (*Griffin v. Commissioner* (1967) 49 T.C. 253, 261.)

Appellants contend they timely paid the tax liability because they mailed a check satisfying their tax liability on April 14, 2021, prior to the deadline, and that appellants should not be penalized for FTB’s delay in processing their payment. However, appellants have not provided evidence to support their contention. It appears that appellants’ check was originally dated for April 14, 2021, and the check date was then amended to read May 14, 2021, by D. Mifsud. Thus, it appears that appellants submitted a postdated check which is effective as of the date written on the check, and not on the date it was mailed. (*Griffin v. Commissioner, supra.*) Regardless of the date it was mailed by appellants, the postdated check was effective on the date of the check, May 14, 2021, after the due date of April 18, 2021. Based on this, OTA must conclude that appellants have not demonstrated error in FTB’ imposition of the late payment penalty.

Appellants reference their long history of timely payment as support for their assertion that they timely paid the tax due in the tax year at issue. While a long history of timely payment is laudable,<sup>1</sup> OTA lacks the authority to abate the penalty on these grounds. OTA’s lack of authority in this matter is highlighted by the passage of R&TC section 19132.5, which authorizes first-time abatement of a timeliness penalty 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 2021 tax year. Therefore, OTA is not able to grant abatement on the grounds of appellants’ filing history.

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

Taxes are due and payable on the original due date of the taxpayer’s return (without regard to any filing extension). (R&TC, § 19001.) If any amount of tax is not paid by the original due date or if FTB assesses additional tax, the law provides for charging interest on the

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<sup>1</sup> Although we do not have a copy of appellants’ filing history with FTB, OTA has no reason to doubt the appellants’ veracity and submission thereof is not material to the analysis.

resulting balance due. (R&TC, § 19101.) Imposition of interest is mandatory. (*Appeal of Moy*, 2019-OTA-057P.) Interest is not a penalty but is merely compensation for a taxpayer's use of money that should have been paid to the state. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

Under R&TC section 19104, FTB may abate interest on a deficiency or related to a proposed deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by an employee of FTB in the performance of a ministerial or managerial act. (R&TC, § 19104(a)(1).) An error or delay shall only be considered when no significant aspect of the error or delay is attributable to the appellant and after FTB has contacted the appellant in writing with respect to the deficiency or payment.<sup>2</sup> (R&TC, § 19104(b)(1).)

Office of Tax Appeal has jurisdiction to determine whether FTB's failure to abate interest under R&TC section 19104 was an abuse of discretion. (R&TC, § 19104(b)(2)(B).) To show an abuse of discretion, an appellant must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, 2020-OTA-018P.)

Nothing in the record indicates there was a ministerial or managerial act that led to an unreasonable error or delay causing additional interest to accrue. The evidence shows that on or about April 15, 2022, appellants remitted to FTB a check dated May 14, 2022, which FTB processed and credited to appellants' account on May 14, 2022. FTB has not abused its discretion in refusing to abate interest. Further, there is no reasonable cause exception to the imposition of interest. (*Appeal of GEF Operating, supra.*) Accordingly, there is no basis for interest abatement.

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<sup>2</sup> In addition, the relief of interest under R&TC section 21012 is not relevant here, because FTB did not provide appellants with any written advice.

HOLDINGS

1. Appellants have not established reasonable cause for failing to make a timely payment of tax.
2. Appellants have not established a basis for interest abatement.

DISPOSITION

FTB's action is sustained.

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*Veronica I. Long*  
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Veronica I. Long  
Administrative Law Judge

Date Issued: 7/21/2023