

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 22039970
L. THORSON AND)
J. THORSON)
_____)

OPINION

Representing the Parties:

For Appellants: Cearra Clark, Tax Appeals Assistance Program (TAAP)¹

For Respondent: Eric R. Brown, Attorney
Eric Yadao, Attorney

For Office of Tax Appeals: Steven Kim, Attorney

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, L. Thorson and J. Thorson (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,208.58, plus any applicable interest, for the 2020 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Lauren Katagihara, Ovsep Akopchikyan, and Keith T. Long held an oral hearing for this matter electronically on July 20, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUES

1. Whether appellants have established that the late payment penalty should be abated.
2. Whether appellants have established that the underpayment of estimated tax (estimated tax) penalty should be abated.

¹ Itender Badesha and Zige Que of TAAP also submitted briefing in this appeal.

3. Whether appellants have established that interest should be abated for the period July 13, 2021, through October 15, 2021.

FACTUAL FINDINGS

1. Appellants timely filed a California Resident Income Tax Return for the 2020 tax year, reporting total tax of \$46,061. After applying withholding credits of \$4,754 and estimated tax payments of \$40,000, appellants reported tax due of \$1,307. Appellants also self-assessed an estimated tax penalty of \$139. Appellants paid their reported liability on May 15, 2021.
2. Prior to filing their 2020 tax return, appellants made or attempted to make the following estimated payments: on July 10, 2020, appellants submitted a check for \$20,000 in an attempt to make estimated payment of tax, which was dishonored; and on December 29, 2020, appellants submitted a check for estimated payment of \$20,000, which was successfully posted.
3. On July 13, 2021, FTB issued a Notice of Tax Return Change – Revised Balance, stating that appellants had only made estimated payments of \$20,000.00, not \$40,000.00. FTB issued a subsequent notice on August 25, 2021, reflecting a tax due of \$20,000.00, a late payment penalty of \$1,390.27,² an estimated tax penalty of \$719.00, and applicable interest.
4. On October 15, 2021, appellants submitted a payment of \$22,319.85, satisfying the liability. Appellants also filed a claim for refund for \$2,208.58, requesting abatement of the penalties and interest based on reasonable cause.
5. On February 10, 2022, FTB denied the claim for refund stating that appellants had not shown reasonable cause for their failure to timely pay tax such that the penalties should be abated. FTB also noted that there is no reasonable cause exception for the abatement of interest.
6. This timely appeal followed.

² The late payment penalty has two parts. The first part is five percent of the unpaid tax. (R&TC, § 19132(a)(2)(A).) The second part is a penalty of one-half percent per month, or portion of a month, not to exceed 40 months, calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).) As a result, the late payment penalty increases over time and had increased to \$1,489.58 at the time of payment.

DISCUSSION

Issue 1: Whether appellants have established that the late payment penalty should be abated.

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, FTB properly imposed the late payment penalty because the payment due date was May 17, 2021,³ and appellants did not satisfy their 2020 tax liability until October 15, 2021.

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 due to 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 Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

On appeal, appellants argue that they made a good faith attempt to make an estimated tax payment but inadvertently used obsolete checks. As an explanation, appellants assert that the following events contributed to the error. First, appellants assert that in November 2018 they were displaced from their home by the Woolsey Fire. At the oral hearing, appellant L. Thorson testified that the displacement lasted “eight or nine months,” after which time, appellants returned to their home where they lived throughout the remaining relevant periods. Next, appellants contend that their bank issued a new set of checks for their brokerage account (the account from which they made or attempted to make their estimated tax payments) due to fraud concerns in July 2019 (while they were still displaced). Appellants assert that these events led directly to their use of an obsolete check and therefore, establishes reasonable cause for their failure to make a timely payment.

Here, OTA recognizes that appellants faced a series of personal hardships. Personal difficulties may be considered reasonable cause if the taxpayers present credible and competent

³ The statutory due date was April 15, 2021. However, in response to COVID-19, FTB postponed the due dates, for individuals, for returns and payments to May 17, 2021. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

proof that they were continuously prevented from paying the tax. (See *Appeal of Head and Feliciano*, 2020-OTA-127P [involving the late filing penalty].) However, appellants have not established how the events that occurred in 2018 and 2019 continuously prevented appellants from making a timely payment of tax throughout 2020. There is no dispute that appellants mistakenly used an invalid check for their attempted July 2020 estimated payment. Appellants' failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.)

Next, appellants assert that they reasonably and prudently monitored their bank account with respect to the payment. Appellants assert that they attempted to make the estimated payment from a brokerage account, which has a fluctuating balance.⁴ At the hearing, appellant L. Thorson testified that she assumed the payment would clear because there were sufficient funds in appellants' brokerage account. Appellant L. Thorson also testified that appellants received no notice that the check was dishonored. However, reasonably prudent taxpayers exercising due care and diligence are expected to monitor their bank account to determine whether a payment was successfully made. (*Appeal of Friedman, supra.*) Thus, it was not enough for appellants to simply assume that the payment was made because there were sufficient funds. Instead, appellants were required to ascertain that the payment actually occurred.

At the oral hearing, appellants conceded that FTB was not required to notify them that the July 10, 2020 check was dishonored. Further, lack of notice from FTB of a failed payment does not negate a taxpayer's duty of prudence and due care to verify that a payment was successful. (*Appeal of Scanlon*, 2018-OTA-075P.) However, appellants argue that it would have been reasonable for FTB to inform them of the dishonored check and impose a two percent dishonored payment penalty as authorized by R&TC section 19134. By comparison, FTB argues that the dishonored payment penalty does not apply in this case. FTB contends that this penalty only applies when the attempted payment is made from a valid bank account and dishonored due to insufficient funds. FTB asserts that the penalty does not apply when a payment is dishonored because a taxpayer used a non-existent or closed account.

California imposes a penalty whenever a taxpayer, in payment of tax, presents a check that is subsequently dishonored. (R&TC, § 19134; see also Internal Revenue Code (IRC)

⁴ As opposed to a standard checking account.

section 6657.)⁵ The penalty is two percent of the amount of the check, except that for checks that are under \$1,250 the penalty is the lesser of \$25 or the amount of the check. (IRC, § 6657.) This penalty is specifically made “in addition to any other penalties provided by law.” (*Ibid.*)

In this case, FTB did not impose a dishonored payment penalty and OTA declines to discuss the specific situations in which this penalty should apply. Nevertheless, OTA notes that the dishonored payment penalty is in addition to any other penalties provided by law. (IRC, § 6657.) As such, even if the dishonored payment penalty was imposed on appellants, the late payment penalty would also apply to the extent that appellants did not make a timely payment. As conceded by appellants, FTB was not required to notify them of the failed payment. Instead, appellants had a duty of prudence and due care to verify that a payment was successful. (*Appeal of Scanlon, supra.*) Thus, appellants have not established reasonable cause to abate the late payment penalty.

Issue 2: Whether appellants have established that the estimated tax penalty should be abated.

Subject to certain exceptions not relevant to this appeal, R&TC section 19136 conforms to IRC section 6654 and imposes a penalty for the failure to timely make estimated income tax payments at the end of the installment periods. The estimated tax penalty is like an interest charge in that it is calculated by applying the applicable interest rate to the amount of the underpaid estimated tax from the due date of the estimated tax payment until the date it is paid. (See IRC, § 6654(a); *Appeal of Johnson*, 2018-OTA-119P.)

There is no provision in the IRC or R&TC that allows the estimated tax penalty to be abated based solely on a finding of reasonable cause, and therefore, the estimated tax penalty under IRC section 6654 is mandatory unless the taxpayer establishes that a statutory exception applies. (*Appeal of Johnson, supra.*) FTB may waive the estimated tax penalty in two circumstances: (1) it determines that by reason of casualty, disaster, or other unusual circumstances the imposition of the estimated tax penalty would be against equity and good conscience; or (2) it determines that the taxpayer’s failure to timely pay the estimated tax payment was due to reasonable cause, and the taxpayer either retired after reaching age 62, or became disabled, in the taxable year for which the estimated payments were required to be made or in the previous year. (IRC, § 6654(e)(3).) The phrase “casualty, disaster, or other unusual

⁵ R&TC section 19134 incorporates the federal penalty under IRC section 6657 relating to bad checks, except as otherwise provided.

circumstances” generally refers to unexpected events that cause hardship or loss such that it would be inequitable to impose the estimated tax penalty. (*Appeal of Johnson, supra.*)

On appeal, appellants argue that due to the Woolsey Fire on November 9, 2018, they experienced unexpected and severe casualty. Appellants argue that it would be against equity and good conscience to ask them to reorganize all their damaged property immediately upon returning to the property. However, the Woolsey fire and the resulting damage to appellants’ property occurred in November 2018, about 20 months before appellants attempted to make the July 10, 2020 estimated tax payment. Appellants have not explained how the Woolsey fire, which occurred in November 2018, caused hardship or loss such that they submitted a payment using an obsolete check 20 months later, in July 2020. Even if appellants were busy reorganizing their files and contents of their property throughout 2019 and 2020, the bank sent appellants new checks in July 2019, approximately one full year before the attempted payment. As such, appellants should have used the valid checks available to them when they made their July 2020 estimated tax payment. In light of the foregoing, OTA concludes that appellants have not established that the estimated tax penalty should be abated.

Issue 3: Whether appellants have established that interest should be abated for the period July 13, 2021, through October 15, 2021.

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 is not a penalty but is merely compensation for a taxpayer’s use of money after it should have been paid to the state. (*Appeal of GEF Operating, Inc., 2020-OTA-057P.*) FTB may abate all or part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by FTB in the performance of a ministerial or managerial act. (R&TC, § 19104(a)(1).) An error or delay can only be considered when no significant aspect of the error or delay is attributable to appellant and after FTB has contacted appellant in writing with respect to the deficiency or payment. (R&TC, § 19104(b)(1).) OTA may only review FTB’s determination to not abate interest for an abuse of discretion. (R&TC, § 19104(b)(2)(B).) To show an abuse of discretion, 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 GEF Operating, Inc., supra.*)

Appellants argue that, upon receiving notice of a balance due on July 13, 2021, they immediately contacted FTB and requested information regarding the deficiency. Appellants assert that they spoke to an FTB employee in July 2021, who incorrectly informed appellants that the December 29, 2020 estimated tax payment was at issue. Appellants argue that because of FTB's alleged mistake, they spent time trying to resolve any issues with the December 2020 payment and did not know the July 2020 payment was at issue. Thus, appellants contend that under the doctrine of equitable estoppel, they are entitled to interest abatement from July 13, 2021, through October 15, 2021, when they paid off their tax liability.

Generally, equitable estoppel may be raised against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (*Appeal of Sedillo*, 2018-OTA-101P.) The four elements of equitable estoppel are: (1) the government agency must be shown to have been aware of the actual facts; (2) the government agency must be shown to have made an incorrect or inaccurate representation to the relying party and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party must be shown to have been ignorant of the actual facts; and (4) the relying party must be shown to have detrimentally relied on upon the representations or conduct of the government agency. (*Ibid.*) The party asserting estoppel bears the burden of proof and, thus, appellant must establish each of these four elements. (*Ibid.*)

In support of their contentions, appellants submitted a declaration signed under penalty of perjury from their neighbor E. Sarmiento. The declaration asserts that on July 13, 2021, appellant L. Thorson received a telephone call from an FTB employee. E. Sarmiento states that she “could hear a male agent speaking with [appellant L. Thorson] and looking into her file.” The declaration does not, however, indicate that E. Sarmiento heard FTB reference the December 2020 payment to appellant L. Thorson. In fact, E. Sarmiento only obtained details of the call from appellant L. Thorson's recount of the conversation. Thus, E. Sarmiento's declaration does not establish that FTB told appellant L. Thorson that the December 2020 payment was at issue.

FTB also submitted declarations from two of their employees explaining that FTB's call center employees generally record detailed notes of calls with taxpayers. However, FTB's records do not show any evidence of calls or communications with appellants during July 2021.

The only record of any communication between FTB and appellants regarding the dishonored estimated tax payment occurred on October 12, 2021, and October 13, 2021.⁶ In addition, appellants acknowledge that they were unable to obtain their own call records as evidence of a July 2021 telephone call.

Based on the foregoing, there is insufficient evidence to find that FTB provided inaccurate information regarding the dishonored estimated tax payment. Accordingly, appellants have not met their burden of proving all of the elements of equitable estoppel. Therefore, OTA concludes that FTB did not abuse its discretion in denying appellants' request for interest abatement, and that appellants have not established that they are entitled to interest abatement for the period July 13, 2021, through October 15, 2021.

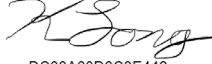
⁶ FTB's telephone records also indicate that it spoke with appellants regarding an installment agreement on August 31, 2021. This appears to be unrelated to the dishonored payment. However, even if this telephone conversation was related to appellants' dishonored payment, it is not evidence that a telephone call occurred in July 2021.

HOLDINGS

1. Appellants have not established that the late payment penalty should be abated.
2. Appellants have not established that the estimated tax penalty should be abated.
3. Appellants have not established that interest should be abated for the period July 13, 2021, through October 15, 2021.

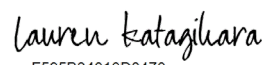
DISPOSITION

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


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Keith T. Long
 Administrative Law Judge

We concur:

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Lauren Katagihara
 Administrative Law Judge

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Ovsep Akopchikyan
 Administrative Law Judge

Date Issued: 9/26/2023