

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
S. MARTON

) OTA Case No. 230112346
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OPINION

Representing the Parties:

For Appellant: S. Marton

For Respondent: Tristen Thalhuber, Attorney

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, S. Marton (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$757.83 for the 2021 tax year.¹

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 a basis to abate the late payment penalty.
- 2. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

- 1. On June 23, 2022, appellant timely filed his 2021 California Resident Income Tax Return (return), which reported a tax due of \$9,650. Appellant did not timely pay the tax due.
- 2. On July 14, 2022, FTB issued appellant a Notice of Tax Return Change – Revised Balance, which imposed a late payment penalty and interest.
- 3. On July 27, 2022, appellant remitted payment in the amount of \$9,650. The penalty and interest assessed on July 14, 2022, remained unpaid.

¹ This amount is comprised of a late payment penalty of \$675.50 and applicable interest of \$82.33.

4. On September 8, 2022, FTB issued appellant an Income Tax Due Notice showing a balance due of \$757.83.
5. On September 15, 2022, FTB received appellant's Form FTB-2917 entitled Reasonable Cause Claim for Refund.
6. On September 28, 2022, appellant remitted payment of the outstanding balance.
7. On October 24, 2022, FTB issued a Claim for Refund Denied Notice.
8. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has 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 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 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.*) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 194.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Inability to pay the tax due to financial hardship may establish reasonable cause to abate the late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

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 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).)

Reasonable cause may exist if a taxpayer reasonably relies on the advice of an accountant with respect to substantive matters of tax law, even when such advice turned out to have been mistaken. (*U.S. v. Boyle* (1985) 469 U.S. 241, pp. 250-251 (*Boyle*).) To establish that reasonable cause exists based on reliance on a tax advisor, a taxpayer must show that it reasonably relied on a tax professional for substantive tax advice and that the following conditions are met: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law; and (2) the tax professional's advice is based on the taxpayer's full disclosure of relevant facts and documents. (See *Appeal of Summit Hosting LLC*, 2021-OTA-216P.)

Appellant argues that he cannot afford the penalty and interest because he is a single parent who has experienced hardship from the COVID-19 pandemic. Appellant explains that he utilized a home equity line of credit (HELOC) to pay his taxes, which took 45 days. Appellant claims that he was misinformed that the full tax balance was paid on time by his tax preparer. Appellant states that "I had all the right intentions of paying my taxes and my bank did pay them."

Here, appellant acknowledges that the tax payment was untimely, but attributes the tardiness to the HELOC process or his tax preparer. Although OTA sympathizes with appellant, OTA would expect a reasonably prudent taxpayer to make financial arrangements that would comply with the payment deadlines prescribed by the R&TC. Appellant has not provided any documentation regarding his financial circumstances at the time his tax payment was due. Regarding financial hardship, appellant has not established reasonable cause because appellant has not shown what, if any, efforts he took to conserve sufficient assets in marketable form to

² 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*, 2021-OTA-335P; *Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

satisfy the tax liability.³ Furthermore, while reliance on advice from a tax preparer may establish reasonable cause, appellant has not provided any evidence of the advice provided or the disclosures that appellant made to the tax preparer. Thus, appellant's claimed reliance is unsupported by the written record. Moreover, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra*, 469 U.S. at p. 251.)

Based on the foregoing, appellant has failed to establish reasonable cause for failing to timely pay his tax liability.

Issue 2: Whether appellant is entitled to interest abatement.

Imposing interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra*.) Interest accrues on a deficiency assessment regardless of the reason for the assessment. (*Ibid.*) Generally, to obtain relief from interest, taxpayers must qualify under R&TC section 19104, 19112, or 21012.⁴ (*Ibid.*) Appellant does not allege that R&TC section 19104 or R&TC section 19112 are applicable here. OTA concludes based on the evidence in the record that none of these statutory provisions apply. Therefore, FTB properly imposed interest, and OTA has no basis to abate it.

³ Although R&TC section 19132.5 authorizes first-time abatement of a late payment penalty for certain filers, that section applies only to tax years starting on and after January 1, 2022, and thus is not applicable in this appeal.

⁴ Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an FTB employee. Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual has extreme financial hardship. OTA does not have authority to review extreme financial hardship determinations. (See *Appeal of Moy*, 2019-OTA-057P.) Under R&TC section 21012, a person may be relieved from interest if that person reasonably relies on written advice from FTB in response to a written request.

HOLDINGS

1. Appellant has not established a basis to abate the late payment penalty.
2. Appellant is not entitled to interest abatement.

DISPOSITION

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

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Josh Aldrich

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Josh Aldrich
Administrative Law Judge

We concur:

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Ovsep Akopchikyan

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Ovsep Akopchikyan
Administrative Law Judge

DocuSigned by:

Huy "Mike" Le

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Huy "Mike" Le
Administrative Law Judge

Date Issued: 9/6/2023