

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

In the Matter of the Appeal of: )  
D. SCHICK AND ) OTA Case No. 220510454  
S. KEMENY )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Robert Sperber, CPA

For Respondent: Eric R. Brown, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Schick and S. Kemeny (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$114,421.50 and applicable interest for the 2018 tax year.<sup>1</sup>

Appellants waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides this matter based on the written record.

**ISSUES**

1. Whether appellants have shown reasonable cause for the late filing of their 2018 California tax return.
2. Whether the penalty for underpayment of estimated tax (estimated tax penalty) can be waived or abated.
3. Whether appellants have established grounds to abate the collection cost recovery fee (collection fee).

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<sup>1</sup> Appellants’ claim for refund requests the return of \$125,450.71, consisting of the late filing penalty of \$104,212.50, the underpayment of estimated tax penalty of \$9,893.00, and interest as of March 9, 2021. FTB also imposed a collection cost recovery fee of \$316.00. On appeal, appellants request a refund of their June 16, 2021 payment of \$126,697.11, which includes the disputed penalties, the collection fee, and interest as of June 7, 2021. The disputed penalties and collection fee total \$114,421.50 (\$104,212.50 + \$9,893.00 + \$316.00). FTB identifies the same amount of penalties and collection fee in dispute but includes in its figure \$94.52 of interest that accrued between June 7, 2021, the date of FTB’s billing notice, and June 16, 2021, when appellants paid the amount due.

4. Whether appellants are entitled to interest abatement.

#### FACTUAL FINDINGS

1. Appellants did not timely file their joint 2018 California Resident Income Tax Return (return).
2. Appellants were credited \$10 in withholding<sup>2</sup> and made a first quarter estimated tax payment of \$117,186 for the 2018 tax year. On April 26, 2019, appellants remitted a \$416,850 extension payment. FTB subsequently issued appellants a Payment Received – No Return on File notice (notice), informing appellants that it received an estimated tax payment but did not have a record of a return on file for appellants' 2018 tax year.
3. On November 4, 2020, appellants filed their joint 2018 return reporting overpaid tax.
4. FTB issued appellants a Notice of Tax Return Change – Revised Balance, explaining that there was no overpaid tax and that FTB imposed a late filing penalty of \$104,212.50, an estimated tax penalty of \$9,893.00, and applicable interest. FTB subsequently issued appellants an Income Tax Due Notice and a Final Notice Before Levy and Lien (collectively, collection notices). The collection notices informed appellants that if they did not timely pay the balance due, FTB may impose a collection fee. Appellants did not timely respond and FTB imposed a collection fee of \$316.
5. In a June 3, 2021 letter, appellants requested abatement of penalties and interest, asserting that their April 26, 2019 extension payment was timely made but reflected as late because of website technical issues. On June 16, 2021, appellants remitted a payment of \$126,697.11 to satisfy their liability. Appellants later submitted a claim for refund.
6. On February 24, 2022, FTB denied appellants' claim for refund.
7. This timely appeal followed.
8. On appeal, OTA requested that appellants address reasonable cause for the late filing of their 2018 return. Appellants did not provide additional information in their response.

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<sup>2</sup> Appellants owned an interest in a partnership that withheld \$10 on their behalf.

DISCUSSIONIssue 1: Whether appellants have shown reasonable cause for the late filing of their 2018 California tax return.

Absent an extension, personal income taxpayers who file on a calendar year basis are generally required to file their tax return by April 15 of the following year. (R&TC, § 18566.) Taxpayers may file their return on or before the automatic extended due date, which is six months after the original filing due date. (R&TC, § 18567.) However, if the return is not filed within six months of the original due date, no extension is allowed. (Cal. Code Regs., tit. 18, § 18567(a).)

R&TC section 19131 imposes a late filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect. Here, appellants concede that their 2018 return was filed late, on November 4, 2020, over a year and a half after the due date of April 15, 2019. They also concede that their tax liability was not paid in full by the April 15, 2019 due date. Appellants do not dispute FTB's calculations of the late filing penalty; rather, they request abatement of the late filing penalty due to fairness and equity considerations.<sup>3</sup>

When FTB imposes a late filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Cremel and Koepfel*, 2021-OTA-222P.) To establish reasonable cause, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence. (*Ibid.*)

Appellants claim that the required tax information, concerning unusual and nonrecurring capital gains reported on a Form 1099, was crucial to accurately calculating their 2018 tax liability and preparing their 2018 extension payment. Appellants assert that they made efforts to contact their financial accountant by email and phone and obtain the Form 1099 earlier. However, appellants claim that their efforts failed, and they received the Form 1099, reporting

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<sup>3</sup> The late filing penalty reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax. (R&TC, § 19131(c).) Appellants argue that they made a good faith attempt to timely pay their entire liability and therefore, the late filing penalty should be calculated as if their April 26, 2019 extension payment was paid by the April 15, 2019 due date. However, OTA is aware of no provision of law which allows a late payment to be considered timely for purposes of calculating the late filing penalty.

significant income, only on April 14, 2019, the day before the due date. Appellants assert that it was impossible for them to file a timely, accurate extension.

However, the late filing penalty is imposed on taxpayers who fail to timely file their returns, not their extensions. Despite being given the opportunity, appellants neither provide any evidence of steps taken to timely file their return, nor have they shown that the failure to timely file their 2018 return occurred despite the exercise of ordinary business care and prudence. (See *Appeal of Cremel and Koepfel, supra.*) Appellants fail to explain why they did not file their 2018 return until November 4, 2020, over a year and a half after the April 15, 2019 due date, and over a year after the October 15, 2019 extended due date. Thus, appellants have not demonstrated reasonable cause for the late filing of their 2018 return.<sup>4</sup>

Issue 2: Whether the estimated tax penalty can be waived or abated.

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes an addition to tax, which is treated as and often referred to as a penalty, where taxpayers fail to timely pay estimated tax.<sup>5</sup> The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpaid estimated tax. (See IRC, § 6654(a); R&TC, § 19136(b); *Appeal of Johnson*, 2018-OTA-119P.)

For the 2018 tax year, appellants' AGI exceeded \$1 million and therefore the required annual payment was 90 percent of the tax shown on the current year return. (R&TC, § 19136.3.) Appellants' tax liability shown on the 2018 tax return was \$534,046.00, and the required annual payment was therefore \$480,641.40. Appellants underpaid their first quarter estimated payment and made no second or fourth quarter estimate payments.<sup>6</sup> FTB therefore properly imposed an estimated tax penalty of \$9,893.00 on these underpayments.

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<sup>4</sup> Appellants' argument that it is unfair that the late filing penalty is based on their tax liability as of April 15, 2019, when they paid their tax liability a few days later, does not demonstrate reasonable cause. OTA may only abate the late filing penalty based on reasonable cause.

<sup>5</sup> Where estimated tax payments are due, R&TC section 19136.1(a)(2) generally requires, for California income tax purposes, that the payments be made in installments on or prior to April 15 and June 15 of the applicable tax year, and January 15 of the subsequent tax year. For federal income tax purposes, an additional installment is also due by September 15 of the applicable tax year.

<sup>6</sup> The first quarter estimated tax payment installment is generally 30 percent of the tax liability, here, \$144,192.42 ( $\$480,641.40 \times 0.30 = \$144,192.42$ ). (R&TC, § 19136.1(a)(2)(B).) Appellants were credited \$3 in withholding and made \$117,186 in estimated payments for the first quarter. Thus, appellants underpaid their first quarter estimate by \$27,003.42 ( $\$144,192.42 - \$3 - \$117,186$ ). For their second and fourth quarter estimates, appellants were credited \$7 in withholding.

Appellants do not contest the imposition or computation of the estimated tax penalty. Instead, appellants present reasonable cause arguments for abatement of the estimated tax penalty. However, 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. (*Appeal of Saltzman*, 2019-OTA-070P.) As a result, there is no general reasonable cause exception to the imposition of the estimated tax penalty, and the estimated tax penalty imposed under IRC section 6654 is mandatory unless taxpayers establish that a statutory exception applies. (*Ibid.*; *Appeal of Scanlon*, 2018-OTA-075P.) IRC section 6654(e)(3)(A) provides that the taxing agency may waive the estimated tax penalty if 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.”<sup>7</sup> The exception for unusual circumstances is considerably narrower than reasonable cause. (*Appeal of Mazdyasni*, 2018-OTA-049P.)

The phrase “casualty, disaster, or other unusual circumstances” generally refers to unexpected events that cause a hardship or loss such that, due to the circumstances, it would be “against equity and good conscience” to impose the estimated tax penalty. (*Appeal of Saltzman*, *supra*.) The IRS has waived the estimated tax penalty in situations where a tax law change, disaster, required accounting method change, or Government action or inaction, caused extreme difficulty in estimating the tax. (*Appeal of Mazdyasni*, *supra*.) In *Appeal of Johnson*, *supra*, OTA held that unexpected real estate capital gains income from the sale of property was not an unusual circumstance justifying waiver of the estimated tax penalty. In *Appeal of Mazdyasni*, *supra*, and *Appeal of Saltzman*, *supra*, OTA held that neither difficulty in estimating partnership income, nor the unexpected receipt of partnership payment were unusual circumstances justifying waiver of the estimated tax penalty. Each one of these cases consistently held that the taxpayer’s good faith effort to timely pay, or that the taxpayer acted reasonably under the circumstances, are not relevant circumstances to waiver under IRC section 6654(e)(3)(B) because that section does not permit abatement of the estimated tax penalty solely based on reasonable cause.

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<sup>7</sup> IRC section 6654(e)(3)(B) provides that FTB may waive the tax where it determines that (i) during the tax year for which the estimated payments were required to be made, or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, and (ii) the underpayment was due to reasonable cause and not willful neglect. Appellants have not alleged that this exception applies; therefore, this Opinion will not discuss the exception further.

Appellants do not specifically address the estimated tax penalty, relying on general reasonable cause, fairness, and equity. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Porreca*, 2018-OTA-095P.) Receipt of unusual or nonrecurring investment or capital gains income does not constitute an unusual circumstance justifying waiver of the estimated tax penalty. (*Appeal of Mazdyasni, supra*; *Appeal of Saltzman, supra*.) The taxpayer's good faith effort to timely pay or that the taxpayer acted reasonably under the circumstances is not relevant to waiver under IRC section 6654(e)(3)(B) where the other requirements of IRC section 6654(e)(3)(B) are not met. (*Appeal of Mazdyasni, supra*; *Appeal of Saltzman, supra*.)

As described above, the estimated tax penalty is similar to an interest charge and compensates the government for the time value of the tax that is due but not paid until a later date. OTA does not consider the estimated tax penalty to be imposed inequitably under appellants' circumstances. Thus, the estimated tax penalty may not be waived or abated.

Issue 3: Whether appellants have established grounds to abate the collection fee.

R&TC section 19254(a)(1) requires FTB to impose a collection fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. The amount of the fee is adjusted annually to reflect actual enforcement costs.<sup>8</sup> There is no reasonable cause defense to the imposition of the fee; thus, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the collection cost recovery fee. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Here, FTB issued appellants collection notices which informed appellants that the continued failure to pay the liability may result in imposition of a collection fee. Appellants did not timely pay.<sup>9</sup> As a result, the collection cost recovery fee was properly imposed.

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<sup>8</sup> FTB annually adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act. (R&TC, § 19254(b).)

<sup>9</sup> Appellants state that they responded to one of the collection notices by letter on June 3, 2021, requesting penalty abatement. The collection fee is imposed on the failure to make payment. Appellants' response is irrelevant as no payment was remitted with it. Appellants' response was also after the deadlines set by the collection notices.

Issue 4: Whether appellants are entitled to interest abatement.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposing interest is mandatory; it is not a penalty, but it is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*) Generally, to obtain relief from interest, taxpayers must qualify under R&TC section 19104 or 21012.<sup>10</sup> (*Ibid.*) On appeal, appellants do not specifically address interest. Appellants do not allege, and the evidence does not show that either statutory provision for interest abatement apply to the facts of this appeal. R&TC section 19104 does not apply here because appellants do not allege, and the evidence does not show that the interest is attributable, in whole or in part, to any unreasonable error or delay by an FTB employee. R&TC section 21012 does not apply because FTB did not provide appellants with any requested written advice. Therefore, FTB properly imposed interest and OTA has no basis to abate it.

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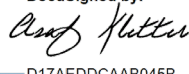
<sup>10</sup> Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual has extreme financial hardship. However, OTA does not have authority to review extreme financial hardship determinations. (See *Appeal of Moy*, *supra*.)

HOLDINGS

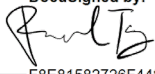
1. Appellants have not shown reasonable cause for the late filing of their 2018 California tax return.
2. The estimated tax penalty cannot be waived or abated.
3. Appellants have not established grounds to abate the collection fee.
4. Appellants are not entitled to interest abatement.


DISPOSITION

FTB’s action in denying appellants’ claim for refund is sustained.

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 Asaf Kletter  
 Administrative Law Judge

We concur:

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 Richard Tay  
 Administrative Law Judge

DocuSigned by:  
  
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 Josh Lambert  
 Administrative Law Judge

Date Issued: 10/3/2023