

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
A. PARKER)
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OTA Case No. 230212514

OPINION

Representing the Parties:

For Appellant: Lesley H. Simmons, CPA

For Respondent: David Muradyan, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Parker (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$22,217.47¹ for the 2019 tax year.

Appellant 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 the penalty for underpayment of estimated tax (estimated tax penalty) can be waived or abated.
2. Whether appellant has shown reasonable cause to abate the late-payment penalty.

¹ The October 28, 2022 Notice of Action abated the late-filing penalty but imposed a late-payment penalty. The amount on appeal consists of an underpayment of estimated tax penalty (estimated tax penalty) of \$8,006, a late-payment penalty of \$13,869.04, plus interest. On appeal, appellant concedes the penalty for failing to make mandatory electronic payments. Appellant makes no specific argument concerning interest, and therefore, it will not be discussed further. On appeal, FTB concedes to a reduction of the estimated tax penalty by \$1,636.40, and the late-payment penalty by \$2,600.44, for total penalty reduction of \$4,236.84, and agreed to refund applicable interest.

FACTUAL FINDINGS

Appellant's Payments for the 2018 Tax Year and Refund

1. Appellant made the following payments for the 2018 tax year: a transfer of \$148,166 from appellant's 2017 tax year to the 2018 tax year account effective April 15, 2018, a second quarter estimated tax payment of \$80,000, and on March 15, 2019, an extension payment of \$90,000 (2018 extension payment). Appellant remitted the 2018 extension payment to FTB with a 2018 Form 3519 (PIT), Payment for Automatic Extension for Individuals (2018 Form 3519).
2. Appellant timely filed a 2018 California Nonresident or Part-Year Resident Income Tax Return² (2018 return) reporting total tax of \$177,653, total payments of \$228,166,³ and overpaid tax of \$50,513. The 2018 return omitted the 2018 extension payment. On the 2018 return, appellant elected to apply overpaid tax of \$50,513 to the first quarter 2019 estimated tax payment.
3. On May 5, 2020, FTB issued appellant a Notice of Tax Return Change – Refund, which revised appellant's estimated tax payments to include the 2018 extension payment, resulting in a refund of \$89,968.85,⁴ which is nearly all the 2018 extension payment. FTB refunded appellant on or around April 29, 2020. Appellant accepted the refund.

Appellant's Payments for the 2019 Tax Year, FTB's Imposition of Penalties, and Appellant's Claim for Refund and Appeal

4. Appellant made the following payments for the 2019 tax year: a transfer of \$50,513 from appellant's 2018 tax year to the 2019 tax year account effective April 15, 2018, a second quarter estimated tax payment of \$100,000, an extension payment of \$128,000 on March 24, 2020, and a return payment of \$180,000 on December 15, 2020.

² Appellant resided outside of the United States and timely filed the return by the extended due date of December 15. (See R&TC, § 18567, Cal. Code Regs., tit. 18, § 18567.)

³ Total payments on the 2018 return were comprised of the \$148,166 transfer from the 2017 tax year and the \$80,000 second quarter estimated tax payment (\$148,166 + \$80,000 = \$228,166).

⁴ FTB made adjustments to the 2018 return which are not at issue in this appeal.

5. Appellant timely filed a 2019 California Nonresident or Part-Year Resident Income Tax Return⁵ (2019 return), with a married filing separately status, reporting adjusted gross income (AGI) in excess of \$1 million, total tax of \$451,885, total payments of \$278,513,⁶ and tax due of \$173,372, which was satisfied by appellant's return payment. Appellant also self-assessed an estimated tax penalty of \$8,387.
6. On February 4, 2021, FTB issued appellant a Notice of Tax Return Change – Revised Balance (Notice) which, as relevant to this appeal, reduced the estimated tax penalty to \$8,006 and imposed a late-filing penalty and interest.⁷
7. Appellant later paid the amount due and filed a timely claim for refund to abate applicable penalties and interest.
8. On October 28, 2022, FTB issued a Notice of Action (NOA) denying appellant's claim for refund for the estimated tax penalty. The NOA also abated the late-filing penalty and imposed a late-payment penalty instead.
9. This timely appeal followed.

DISCUSSION

Issue 1: 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.⁸ 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 2019 tax year, appellant's AGI exceeded \$1 million and therefore the required annual

⁵ Appellant mailed the 2019 return to FTB on December 14, 2020, one day before the extended due date. See footnote 1, above. FTB received it on December 28, 2020.

⁶ Total payments on the 2019 return were comprised of the \$50,513 transfer of overpaid tax from the 2018 tax year account, the \$100,000 second quarter estimated tax payment, and the \$128,000 payment made with the return (\$50,513 + \$100,000 + \$128,000 = \$278,513.)

⁷ The Notice also reduced appellant's total tax by \$9 to \$451,876.

⁸ 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. (See also IRC, § 6654(c)(2) [Specifying required installment due dates].) For federal income tax purposes, an additional installment is also due by September 15 of the applicable tax year. (*Ibid.*)

payment was 90 percent of the tax shown on the 2019 return. (R&TC, § 19136.3; IRC, § 6654(d)(1)(B)(i).) Appellant's 2019 tax liability was \$451,876, and the required annual payment was therefore \$406,688.40. Appellant underpaid his first and second quarter 2019 estimated tax payments and made no fourth quarter 2019 estimated payment.^{9, 10} FTB therefore properly imposed an estimated tax penalty on these underpayments.¹¹

Appellant does not contest the imposition or computation of the estimated tax penalty. Instead, appellant presents arguments for waiver of the estimated tax penalty, discussed below. Appellant also cites the reasonable cause standards contained in Internal Revenue Manual (IRM) section 20.1.1.3.2, to show that he "exercised ordinary business care and prudence and made a good-faith effort to meet his tax obligations timely." However, there is no provision in the IRC or R&TC that allows the estimated tax penalty to be abated solely on a finding of reasonable cause. (*Appeal of Saltzman*, 2019-OTA-050P.) As a result, there is no general reasonable cause exception to the imposition of the estimated tax penalty; the penalty is mandatory unless the taxpayer establishes that a statutory exception applies. (*Ibid*; *Appeal of Scanlon*, 2018-OTA-075P.) A taxpayer's assertion of good faith and reasonableness is a reasonable cause argument, and the statute does not justify waiver on this basis. (See *Appeal of Saltzman*, *supra*.)

Appellant asserts IRC section 6654(e)(3)(B) justifies waiver of the estimated tax penalty. IRC section 6654(e)(3)(B) provides that a taxing agency may waive the estimated tax penalty where it determines that during the applicable tax year or the preceding tax year, the taxpayer either retired after having attained age 62, or became disabled, and that the underpayment was due to reasonable cause and not willful neglect. Reasonable cause is only relevant under IRC section 6654(e)(3)(B) if the taxpayer retired after having attained age 62 or became disabled during the applicable tax year or the preceding year. (*Appeal of Johnson*, *supra*.) Appellant has

⁹ The first quarter estimated tax payment installment is generally 30 percent of the required annual payment, here, \$122,006.52 ($\$406,688.40 \times 0.30 = \$122,006.52$). (R&TC, § 19136.1(a)(2)(A).) Appellant timely made a \$50,513 estimated tax payment for the first quarter 2019 estimated payment. Thus, appellant underpaid his first quarter 2019 estimated tax payment by \$71,493.52 ($\$122,006.52 - \$50,513 = \$71,493.52$).

¹⁰ The second quarter estimated tax payment installment is generally 40 percent of the required annual payment, here, \$162,675.36 ($\$406,688.40 \times 0.40 = \$162,675.36$). (R&TC, § 19136.1(a)(2)(B).) Appellant timely made a \$100,000 second quarter 2019 estimated tax payment; however, FTB applied \$71,493.52 as a late payment of appellant's first quarter 2019 estimated tax payment, and the remainder of \$28,506.48 was applied as a timely payment of his second quarter 2019 estimated tax payment. Thus, appellant underpaid his second quarter 2019 estimated tax payment by \$134,168.88 ($\$162,675.36 - \$28,506.48 = \$134,168.88$).

¹¹ Individuals with uneven income during the year may use an annualized income installment method in lieu of making four equal payments. (R&TC, § 19136.1(b)(1); IRC, § 6654(d)(2).) FTB's concession uses this method.

not alleged, and the record does not show, that he retired or became disabled during 2019, the applicable tax year, or in 2018, the preceding year. Thus, there is no basis for waiver of the estimated tax penalty under IRC section 6654(e)(3)(B).

Appellant also asserts that IRC section 6654(e)(3)(A) justifies waiver of the estimated tax penalty. IRC section 6654(e)(3)(A) provides that a 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.” 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*.)

Several cases have considered whether unusual circumstances warranted waiver under IRC section 6654(e)(3)(A). In *Farhoumand v. Commissioner*, T.C. Memo. 2012-131, the tax court determined that stock market volatility resulting in a higher tax liability was not an unusual circumstance justifying waiver of the estimated tax penalty. In *Appeal of Johnson*, *supra*, OTA held that unexpectedly high income from the profitable sale of real property was not an unusual circumstance justifying waiver of the estimated tax penalty. In *Appeal of Mazdyasni*, *supra*, OTA held that difficulty in estimating partnership income from the profitable sale of a taxpayer’s partnership interest is not an unusual circumstance justifying waiver. Finally, in *Appeal of Saltzman*, *supra*, OTA held that a partner’s unexpected receipt of a guaranteed payment from a partnership is not an unusual circumstance.

Here, appellant asserts that the COVID-19 pandemic was an unusual circumstance that caused appellant’s tax preparer to fall behind and to be unable to accurately forecast appellant’s income for the 2019 tax year. Appellant claims his tax preparer relied on historical data, but that appellant ultimately had much higher income, more of which was California source income. However, the applicable statute, IRC section 6654(d)(2)(B)(i) provides that the estimated tax penalty is determined by reference to the actual taxable income, rather than the amount that can be reasonably estimated. (*Appeal of Saltzman*, *supra*.) Moreover, difficulty in estimating the tax is not an unusual circumstance for purposes of penalty abatement within the meaning of IRC section 6654(e). (*Appeal of Mazdyasni*, *supra*.) Here, appellant has not established why he

would have no reason or ability to know about the amount or source of his income for the 2019 tax year, or that he had insufficient time to calculate and pay with reasonable accuracy his estimated tax payments. (*Ibid.*) While the record does not reveal the source of appellant's income or increased tax liability, the decisions set forth above indicate that unexpectedly high income or a higher tax liability than normal is not an unusual circumstance warranting waiver of the estimated tax penalty. (*Ibid; Appeal of Saltzman, supra; Appeal of Johnson, supra.*) Rather than suffering an unexpected hardship or loss, appellant received substantial income. (*Appeal of Saltzman, supra.*) Thus, imposing an interest charge on the tax due on the income appellant received does not offend "equity and good conscience." (*Ibid.*)

Appellant also asserts that a "glitch" in tax preparation caused the underpayment of estimated tax, because appellant's tax preparer failed to include the 2018 extension payment in the total payments listed on the 2018 return, and as a result, FTB refunded appellant nearly all the payment, rather than applying it to appellant's 2019 tax liability as he intended. However, the 2018 extension payment was made on a 2018 Form 3519, which specifically instructs FTB to apply the payment to the 2018 tax year. Moreover, on the 2018 return, appellant's tax preparer failed to include the 2018 extension payment in the total payments and failed to request that it be applied as a first quarter 2019 estimated tax payment. Thus, appellant failed to instruct FTB to apply the 2018 extension payment to the 2019 tax year.

Further, the "glitch" was an oversight by appellant's tax preparer and not substantive tax advice. In *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*), involving a late-filing penalty, the United States Supreme Court concluded that each taxpayer has a personal, non-delegable obligation to file a tax return by the due date and, as such, a taxpayer's reliance on a third party to timely file a federal return does not constitute reasonable cause for a late filing. (*Id.* at p. 252.) On the other hand, a taxpayer may reasonably rely on an accountant or attorney for substantive advice on a matter of tax law, such as whether a liability exists. (*Id.* at p. 251.) The tax preparer's failure to include the 2018 extension payment on the 2018 return is not substantive tax advice. Additionally, the reasonable cause standard at issue in *Boyle* is not the applicable standard of relief for the estimated tax penalty. (*Appeal of Mazdyasni, supra.*)

Moreover, upon receipt of the refunded 2018 extension payment on or around April 29, 2020, appellant deposited the refund check without further action. Appellant concedes that he should have written "void" on the check and returned it with an explanation. Appellant

cites no authority to justify waiver of the estimated tax penalty for such oversights. OTA does not find the “glitch” to be an unusual circumstance and does not find that imposing the estimated tax penalty offends “equity and good conscience.” (*Appeal of Saltzman, supra.*)

Issue 2: Whether appellant has shown reasonable cause to abate the late-payment penalty.

R&TC section 19132(a)(1)(A) imposes a late-payment penalty when a taxpayer fails to pay the amount shown as tax 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.) For individual filers, the 2019 return was due on July 15, 2020. (R&TC, §§ 18566, 18572.)¹² When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the taxpayer bears the burden of proof to establish otherwise. (*Appeal of Xie, 2018-OTA-076P.*)

Here, FTB imposed the late-payment penalty because July 15, 2020, was the payment due date for the 2019 tax year; yet appellant did not fully satisfy his 2019 tax liability until December 15, 2020. Appellant does not dispute FTB’s calculations; rather, appellant asserts reasonable cause to abate the late-payment penalty.

The late-payment penalty may be abated where 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. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of the tax, a taxpayer must show that 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 (Moren).*) The taxpayer bears 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 most important factor in determining reasonable cause and good faith is the extent of the taxpayer’s effort to assess his or her proper tax liability. (*Ibid.*) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) To overcome the presumption of correctness attached to the penalty, a taxpayer must provide

¹² In response to COVID-19, pursuant to R&TC section 18572(b), FTB postponed to July 15, 2020, the 2019 individual tax filing and payment due dates. (See *State Postpones Tax Deadlines Until July 15 Due to the COVID-19 Pandemic*, available at: <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>.)

credible and competent evidence supporting a claim of reasonable cause, otherwise, the penalty cannot be abated. (*Appeal of Xie, supra.*)

Here, as described previously, appellant asserts two primary reasonable cause grounds. First, appellant asserts that challenges during COVID-19 caused appellant's tax preparer to be unable to accurately forecast his income and to reasonably rely on historical data to determine appellant's income, and that appellant acted in good faith despite his ultimately having more income than expected. Appellant also cites his good compliance history to support reasonable cause. Second, appellant describes his tax preparer's failure to include the 2018 extension payment on the 2018 return, which caused FTB to refund the 2018 extension payment and, accordingly, caused appellant's 2019 tax to be underpaid.

Appellant cites the reasonable cause standards contained in IRM section 20.1.1.3.2 and describes the impacts of the COVID-19 pandemic on appellant's tax preparer and auditor, such as the inability to work in office and access records and needed information, delays in completion of accurate financial information and delays due to office shutdowns, and staffing issues with appellant's tax preparer and auditor. However, appellant fails to specifically apply the reasonable cause standards to his situation. Appellant has not explained the source of his income or why he would not have the necessary information to determine his tax liability. Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Moren, supra.*) If a taxpayer asserts that he or she does not have the information necessary to make a reasonably accurate estimate of his or her tax liability he or she must show the efforts made to acquire that information from the source that held it, and that difficulties in obtaining the necessary information led to the delay in payment. (*Ibid.*) Appellant fails to identify the information that he or his tax preparer were lacking and the source that held that information. Further, appellant has not described any of his own efforts to obtain that information from the source before the payment deadline.

In *Moren*, the taxpayer received distributions from an estate, without the necessary information to determine his tax liability before the payment due date. The estate, the source that held it, kept the records of the taxable amount of the distributions, and appellant was denied access. The necessary information, the taxable amount of the distributions, was unknown and could not be determined through other investigative methods. The taxpayer's co-beneficiary copied the taxpayer on an email to the estate's accountant asking for clarification prior to the

payment due date, but no response was timely received. On these facts, OTA concluded that the taxpayer's actions prior to the payment due date demonstrated reasonable cause. (*Moren, supra.*)

Here, appellant describes general impacts of the COVID-19 pandemic on his auditor and tax preparer but fails to provide credible and competent evidence of reasonable cause. Appellant fails to show that he attempted to obtain the information necessary to properly compute his 2019 tax liability from the source that held it but was nevertheless prevented from timely accessing the necessary information before the payment due date. (*Moren, supra; see Appeal of Xie, supra.*) Thus, appellant has not shown reasonable cause based on impacts of the COVID-19 pandemic.

Concerning appellant's good compliance history, while the IRS has a penalty abatement program called First Time Abate, neither the California legislature nor FTB adopted a comparable penalty abatement program for the 2019 tax year at issue.¹³ A taxpayer's history of compliance does not, by itself, show reasonable cause. (*Moren, supra.*) Thus, OTA finds that appellant's asserted good compliance history, without more, does not show reasonable cause.

Appellant also asserts that his tax preparer is at fault for a portion of the underpaid tax because the tax preparer failed to include the 2018 estimated payment on the 2018 return. Reliance on a tax adviser must involve reliance on substantive tax advice and not on simple clerical duties. (*Appeal of Summit Hosting LLC, 2021-OTA-216P; U.S. v Boyle, supra,* at p. 250.) Here, appellant remitted the 2018 extension payment on a 2018 Form 3519. Appellant's tax preparer made an inadvertent oversight in failing to include the 2018 extension payment in the total payments listed on the 2018 return. FTB refunded appellant nearly all the 2018 extension payment on or around April 19, 2020, before the July 15, 2020 payment due date for the 2019 tax year. As described under the first issue above, appellant could have returned the refund or taken other action; instead, appellant accepted the refund and did not make any subsequent payments for the 2019 tax year before the payment due date. Under these facts, OTA finds that appellant has not shown reasonable cause to abate the late-payment penalty because appellant's reliance on his tax advisor concerned simple clerical duties, and because appellant did not act as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Summit Hosting, supra; Moren, supra.*)


¹³ R&TC section 19132.5, effective for tax years beginning on or after January 1, 2022, allows a taxpayer to request a one-time abatement of a timeliness penalty. This provision is inapplicable to the 2019 tax year at issue.

HOLDINGS

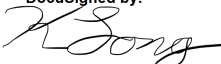
1. The estimated tax penalty cannot be waived or abated.
2. Appellant has not shown reasonable cause to abate the late-payment penalty.

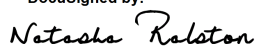
DISPOSITION

FTB’s action denying appellant’s claim for refund is sustained, as modified by FTB’s concession on appeal to reduce the estimated tax penalty by \$1,636.40, and the late-payment penalty by \$2,600.44, plus applicable interest.

DocuSigned by:

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 Asaf Kletter
 Administrative Law Judge

We concur:

DocuSigned by:

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 Keith T. Long
 Administrative Law Judge

DocuSigned by:

 25F8FE08FF56478...
 Natasha Ralston
 Administrative Law Judge

Date Issued: 2/23/2024