

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
D. ASSH AND ) OTA Case No. 220911455  
C. LEMAY )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: D. Assh  
For Respondent: Noel Garcia-Rosenblum, Attorney  
Bradley J. Coutinho, Attorney

O. AKOPCHIKYAN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Assh and C. Lemay (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$529.13 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, § 30209.05 et seq.) Office of Tax Appeals (OTA) Administrative Law Judge Ovsep Akopchikyan held an electronic oral hearing for this appeal on December 13, 2023. At the conclusion of the hearing, the record was closed and the case was submitted for a decision.

**ISSUES**

1. Whether appellants have established reasonable cause to abate the late payment penalty.
2. Whether appellants have established a basis to abate interest.

### FACTUAL FINDINGS

1. Appellants filed their 2021 California income tax return on July 19, 2022. Appellants claimed a Net Premium Assistance Subsidy (PAS) and requested a refund of \$7,497.
2. FTB issued a Notice of Tax Return Change – Revised Balance on July 26, 2022, denying the PAS in full. FTB determined that appellants owe \$7,636 in tax. FTB also imposed a late payment penalty of \$529.13 plus applicable interest.
3. Appellants paid the revised balance in full and filed a claim for refund on August 15, 2022, requesting abatement of the late payment penalty and interest due to reasonable cause.
4. FTB denied the refund claim and this timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellants have established reasonable cause to abate the late payment penalty.

Appellants contend that they made a mistake in determining that they qualified for the PAS, and that their mistake was due to reasonable cause and not willful neglect. Specifically, appellants contend that Part 1, Line 6, of Form 3849, *Premium Assistance Subsidy*, directs taxpayers to “Go to Worksheet 2 and Table 1-2 in the instructions to determine if [the taxpayer] should check Yes or No” as to whether the taxpayer is eligible for the PAS. Appellants contend that neither they nor their accountant were able to locate Worksheet 2 and Table 1-2 in the instructions to complete Form 3849. Appellants contend they found a draft version of the instructions, which showed they were not eligible for the PAS, but they did not use the draft instructions because it expressly said it was a draft copy subject to change. Appellants subsequently found the final version of the instructions, but they contend they could not find Worksheet 2 and Table 1-2 in Form 3849 or the instructions. Thus, appellants seem to contend that they instead determined their eligibility for the PAS using a federal form—IRS Form 8962, *Premium Tax Credit*. Appellants left the answer to Part 1, Line 6 blank on their return, and the tax software calculated a refund assuming they qualified for the PAS. Additionally, appellants contend that the penalty should be abated because they paid FTB’s revised determination as soon as they received it.

At the hearing in this appeal, appellant Assh testified that he asked and paid his accountant to look for Worksheet 2 and Table 1-2, and research whether appellants qualified for the PAS. He also testified that he believes his accountant did not actually look at the instructions for completing Form 3849 because “they knew how to fill out the form.” Thus, it seems that appellants’ accountant did not find Worksheet 2 and Table 1-2 because the accountant did not look at the instructions. “While good faith reliance on professional advice may provide a basis for a reasonable cause defense, it is not absolute. To establish that reasonable cause exists, a taxpayer must show that it reasonably relied on a tax professional for substantive tax advice as to whether a tax liability exists 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.” (*Appeal of Summit Hosting LLC*, 2021-OTA-216P, citations omitted.)

In this case, appellants’ reliance on their accountant does not provide a basis for reasonable cause. Appellants acknowledged at the hearing that Worksheet 2 and Table 1-2 were in the final instructions, and that their accountant did not look at the instructions, at least not closely enough. Part 1, Line 6, of Form 3849, *Premium Assistance Subsidy*, specifically directs taxpayers to “Go to Worksheet 2 and Table 1-2 in the instructions to determine if [the taxpayer] should check Yes or No” as to whether the taxpayer is eligible for the PAS. Appellants and their accountant did not review the instructions and, therefore, their determination that they qualified for the PAS was incorrect and is not a basis to abate the penalty in this case.

Issue 2: Whether appellants have established a basis to abate interest.

If any amount of tax is not paid by the due date, interest is imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer’s use of money which should have been paid to the state. (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) OTA has jurisdiction to determine whether appellants are entitled to the abatement of interest under R&TC sections 19104 and 21012. (*Ibid*.)

R&TC section 19104 does not apply here because appellants do not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply as FTB did not provide appellants with any requested written advice. Therefore, there is no basis to abate interest in this case.

HOLDINGS

1. Appellants have not established reasonable cause to abate the late payment penalty.
2. Appellants have not established a basis to abate interest.

DISPOSITION

FTB's action is sustained.

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*Ovsep Akopchikyan*

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Ovsep Akopchikyan  
Administrative Law Judge

Date Issued: 3/8/2024