

2. Appellants filed their 2021 Form 540 on time, but did not pay the amount due as shown on their return until April 20, 2022. The original due date for the 2021 Form 540 was April 18, 2022, which was also the due date for the payment of tax. Consequently, respondent imposed a late payment penalty, plus interest.
3. Appellants paid the penalty and interest, and filed a refund claim therefor on reasonable cause grounds, which respondent denied. There is no dispute regarding the calculation of the penalty.
4. The IRS abated appellants' 2021 late payment penalty under its First Time Abate program.

DISCUSSION

Issue 1: Should the late payment penalty be abated?

The late payment penalty may be abated where the failure to make a timely payment was due to reasonable cause and not 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 occurred despite the exercise of ordinary business care and prudence. (*Appeal of Rougeau*, 2021-OTA-335P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Inability to pay the tax due to financial hardship may also establish reasonable cause to abate the late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P; see Internal Revenue Code (IRC), § 6651; Treas. Reg. § 301.6651-1(c).) 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.¹ Treasury Regulation section 301.6651-1(c)(1) further provides that all the facts and circumstances will be considered, including the amount and nature of the taxpayer's

¹ Although there are no FTB regulations interpreting R&TC section 19132, that section is patterned after Internal Revenue Code 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. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360; *Appeal of Rougeau*, *supra*.)

expenditures in light of the income (or other amounts) the taxpayer could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, 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).) Additionally, “undue hardship” is defined in Treasury Regulation section 1.6161-1(b) as meaning “more than an inconvenience to the taxpayer.”

Additionally, although the IRS has a “First Time Abate” program through which the IRS abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years, California had no comparable program for the 2021 taxable year for abating late filing penalties based solely on a prior good filing history.² (*Appeal of Xie*, 2018-OTA-076P.) Instead, for the 2021 taxable year, the law provided that the California late filing penalty shall apply unless reasonable cause is shown. (*Ibid.*)

Appellants claim the late payment was due to their tax preparer completing their 2021 Form 540 on the evening of Friday, April 15, 2022, and informing them of the amount of tax due at that time. Appellants then needed to liquidate some stock in order to pay the tax due. At the hearing, appellants indicated that the increase in their 2021 income was attributable to their stocks performing well.

The law provides that taxpayers have a non-delegable obligation to pay their taxes by the due date; thus, a taxpayer’s reliance on an agent, such as an accountant, to pay by the due date is not reasonable cause. (See *United States v. Boyle* (1985) 469 U.S. 241, 252; *Appeal of Triple Crown Baseball, LLC, supra.*) Undoubtedly, by providing appellants their completed Form 540 along with the amount of tax due on the evening of April 15, 2022, their CPA contributed to appellants’ inability to pay on time. However, because appellants knew their stocks performed well by the time 2021 closed and that tax would be due on these gains, ordinary business care and prudence could have been shown if appellants reserved sufficient cash or made other arrangements, such as making estimated tax payments or having taxes withheld from their stock transactions, before the tax payment deadline to ensure timely payment. (See Treas. Reg. § 301.6651-1(c)(1).) Because appellants did not take such measures, the late payment penalty cannot be abated.

² R&TC section 19132.5(a), effective for taxable years beginning on or after January 1, 2022, allows an individual taxpayer to request a one-time abatement of a timeliness penalty. As the 2021 taxable year is at issue here, this newly enacted law is inapplicable.

Issue 2: Should interest be abated?


The imposition of interest is mandatory and accrues on a tax deficiency regardless of the reason for the underpayment. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) Therefore, to obtain interest relief appellant must qualify under R&TC section 19104 (pertaining to unreasonable error or delay by respondent in the performance of a ministerial or managerial act), 19112 (pertaining to extreme financial hardship caused by significant disability or other catastrophic circumstance), or 21012 (pertaining to reasonable reliance on the written advice of respondent). (*Ibid.*) Appellants do not allege, and the record does not reflect, that any of these waiver provisions are applicable here. Therefore, there is no basis for abating interest.

HOLDINGS

1. The late payment penalty cannot be abated.
2. Interest cannot be abated.

DISPOSITION

Respondent's action is sustained.

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Tommy Leung
Administrative Law Judge

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