

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

In the Matter of the Appeal of: )  
**P. HERZOG** ) OTA Case No. 230713839  
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**OPINION**

Representing the Parties:

For Appellant: P. Herzog

For Respondent: Vivian Ho, Attorney

For Office of Tax Appeals: Louis Ambrose, Attorney

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, P. Herzog (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$3,091.12<sup>1</sup> for the 2021 tax year.

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 reasonable cause for the late payment of tax.
2. Whether appellant has established a legal basis for abatement of interest.

**FACTUAL FINDINGS**

1. Appellant timely filed a 2021 California income tax return on March 24, 2022, reporting total tax of \$232,436 and withholding of \$186,416. Appellant also self-assessed an estimated tax penalty of \$483 and reported a total amount due of \$46,503. Appellant made an untimely payment of the total amount due on May 2, 2022.

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<sup>1</sup> This amount includes an underpayment of estimated tax penalty (estimated tax penalty) of \$483, which appellant self-assessed and paid. Appellant has not appealed this penalty, and it is not discussed further.

2. FTB issued a State Income Tax Balance Due Notice, indicating that FTB assessed a late payment penalty of \$3,014.10<sup>2</sup> and interest in the amount of \$77.02. Appellant paid the balance due.
3. Appellant requested abatement of the penalty and interest which FTB treated as a claim for refund and denied. Appellant filed this timely appeal.

### DISCUSSION

#### Issue 1: Whether appellant has established reasonable cause for the late payment of tax.

Here, it is undisputed that appellant failed to make timely payment of the tax and appellant does not dispute that the penalty was correctly calculated in accordance with the statute. The late payment penalty may be abated if the taxpayer shows that the failure to make timely payment was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) The taxpayer has the burden of proof to show that reasonable cause exists to support abatement of the late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) 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. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Bindley*, 2019-OTA-179P.)

Appellant seeks abatement of the late payment penalty because his CPA was hospitalized in March of 2021, went into a coma and passed away in May of 2021. Appellant states that he was unaware of the CPA's death and when he learned of the death critical dates had passed. Appellant states that "one of the issues that was not handled properly . . . was the application for extension of filing and the filing of the return on time . . ." <sup>3</sup> It is well settled that a taxpayer's reliance on an agent, such as a tax preparer, to fulfill tax obligations by the due date is not reasonable cause because a taxpayer has a personal, non-delegable obligation to meet statutory deadlines. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860; *U.S. v. Boyle* (1985) 469 U.S. 241, 252.) Moreover, appellant's CPA passed away in May of 2021, approximately

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<sup>2</sup> This amount includes the estimated tax penalty of \$483.

<sup>3</sup> It appears that appellant may have the mistaken belief that FTB imposed a late filing penalty rather than a late payment penalty. Nonetheless, as discussed, appellant has not established reasonable cause for the late tax payment.

11 months before the due date for the 2021 tax return payment of April 18, 2022, and appellant timely filed his 2021 tax return on March 24, 2022, reporting the tax amount due. Appellant has not explained how the late payment was attributable to the circumstances of the CPA's death in May of 2021, when appellant was aware of the tax amount due upon filing the return in March of 2022. As such, appellant has not shown that the failure to make timely payment occurred despite the exercise of ordinary care and prudence.

Issue 2: Whether appellant has established a legal basis for abatement of interest.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) 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.*) To obtain relief from interest, appellant must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Balch*, 2018-OTA-159P.)

R&TC section 19104 provides for abatement when the interest is attributable to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. These circumstances are neither alleged nor shown to be present here. The relief of interest under R&TC section 21012 is not relevant here, as FTB did not provide appellant with any written advice. R&TC section 19112 requires a taxpayer to make a showing of extreme financial hardship caused by a significant disability or other catastrophic circumstance. However, OTA has no jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC section 19112. (*Appeal of Moy, supra.*) Therefore, appellant has not demonstrated any grounds for the abatement of interest.

HOLDINGS

1. Appellant has not established reasonable cause for the late payment of tax.
2. Appellant has not established a legal basis for abatement of interest.

DISPOSITION

FTB’s action denying appellant’s claim for refund is sustained.

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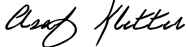


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Huy “Mike” Le  
Administrative Law Judge

We concur:

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Sara A. Hosey  
Administrative Law Judge

Date Issued: 8/21/2024