

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 230713814
C. MITCHELL)
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OPINION

Representing the Parties:

For Appellant: C. Mitchell

For Respondent: Alisa L. Pinarbasi, Attorney

For Office of Tax Appeals: William J. Stafford, Attorney

S. ELSOM, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Mitchell (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$733.34 for the 2021 tax year.¹

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

ISSUES

1. Whether appellant has demonstrated that the late payment penalty should be abated.
2. Whether OTA has jurisdiction to consider appellant’s truth in lending and constitutional arguments.

¹ FTB’s denial of appellant’s claim for refund includes a late payment penalty of \$616.48 plus applicable interest, for a total of \$733.34. At appeal, appellant states that the amount at issue is \$1,058.87, the total amount FTB intercepted from appellant’s lottery winnings. This includes the late payment penalty of \$616.48, a collection cost recovery fee of \$316, plus interest of \$126.39, for a total of \$1,058.87. Since appellant’s claim for refund only requested a refund of the late payment penalty and associated interest, Office of Tax Appeals (OTA) only has jurisdiction over the late payment penalty and interest on the late payment penalty. Additionally, appellant has not provided specific arguments with respect to the collection cost recovery fee or interest. Appellant also self-assessed and paid an underpayment of estimated tax penalty of \$140, which also is not at issue in this appeal. As a result, OTA does not address these issues (the collection cost recovery fee, underpayment of estimated tax penalty, or interest) further.

FACTUAL FINDINGS

1. Appellant filed a 2021 California Resident Income Tax Return on October 12, 2022, reporting total tax of \$10,835, withholdings of \$3,129, a self-assessed underpayment of estimated tax penalty of \$140, and a total amount due of \$7,846.
2. Appellant made a payment of \$7,846 on October 14, 2022.
3. On November 2, 2022, FTB sent appellant a State Income Tax Balance Due Notice, which imposed a late payment penalty of \$616.48, plus applicable interest, because appellant failed to pay the amount of tax due on his 2021 California return by the due date of April 15, 2022.
4. Subsequently, appellant sent FTB a letter dated November 30, 2022, wherein appellant requested that FTB abate the late payment penalty as part of FTB's first-time penalty abatement program and for reasonable cause due to the COVID-19 pandemic.
5. FTB treated appellant's letter dated November 30, 2022, as an unperfected claim for refund, as appellant had not paid the total amount due.
6. On December 14, 2022, FTB sent appellant an Income Tax Due Notice, which listed a balance due of \$735.08.²
7. Later, FTB issued a Final Notice Before Levy and Lien on February 17, 2023, which stated that FTB would take collection action against appellant and impose various fees if appellant did not pay the balance due by March 4, 2023.
8. On April 17, 2023, FTB sent appellant a notice stating that FTB had intercepted funds from the state lottery to satisfy appellant's outstanding amount due for the 2021 tax year.³
9. On May 4, 2023, FTB denied appellant's claim for refund.
10. In response, appellant filed this timely appeal.

² FTB continued its collection action related to the late payment penalty (and associated interest) despite appellant's request for abatement of the penalty because the penalty is "due and payable upon notice and demand by [FTB]." (R&TC, § 19132(a)(3).) There was no prepayment protest or appeal right for the late payment penalty imposed by FTB in this appeal.

³ FTB's interception of the lottery proceeds paid appellant's balance due for the 2021 tax year, resulting in the perfection of appellant's claim for refund. (See R&TC, § 19322.1(a).)

DISCUSSION

Issue 1: Whether appellant has demonstrated that the late payment penalty should be abated.

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due 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.) Here, the late payment penalty was properly imposed because appellant's 2021 tax liability was due on April 15, 2022, (R&TC, §§ 19001, 18566) but was not fully paid until October 14, 2022.

The late payment penalty may be abated if 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 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 Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinary intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*).

In general, every taxpayer has a personal, non-delegable duty to timely pay the amount due. (*Appeal of Summit Hosting LLC*, 2021-OTA-216P.) A taxpayer's reliance on an agent to respond on the taxpayer's behalf is not reasonable cause. (*U.S. v. Boyle* (1985) 469 U.S. 241.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Here, it is undisputed that appellant failed to fully pay his California tax liability for the 2021 tax year in a timely manner and that FTB properly imposed the late payment penalty. Appellant makes reasonable cause type arguments to abate the late payment penalty. First, appellant requests that FTB abate the late payment penalty pursuant to its first-time abatement program and contends that the COVID-19 pandemic establishes reasonable cause for appellant paying late. At appeal, appellant asserts that he was following the advice of his CPA and made his tax payment within the six-month extension period. Specifically, appellant asserts that his CPA informed appellant that the return's filing date was extended to October 15, 2022. Appellant makes no assertions regarding his CPA's advice relating to the payment deadline.

With respect to appellant's first argument, California does not have a first-time abatement program for the 2021 tax year. As of June 30, 2022, taxpayers are allowed a one-time

abatement of either the late filing penalty or late payment penalty; however, that provision does not apply to tax years before January 1, 2022.⁴ In addition, appellant has not stated how the COVID-19 pandemic prevented him from timely paying his 2021 California taxes or provided any information to prove this assertion.

With respect to appellant's second argument, appellant has not provided any information (e.g., letters, emails, declarations, etc.) to substantiate the CPA's advice. As noted above, unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc., supra.*) In addition, R&TC section 19001 clearly states that tax shall be paid at the time and placed fixed for filing the return "determined without regard to any extension of time for filing the return." Similarly, R&TC section 18567(b) specifically states that "[a]n extension of time granted pursuant to this section is not an extension of time for payment of tax" As a result, even if appellant had provided evidence showing that the CPA advised appellant that the payment date could be extended to October 15, 2022, reliance on the advice of an expert cannot function as a substitute for compliance with an unambiguous statute. (*Appeal of Summit Hosting LLC, supra.*)

Finally, appellant's apparent misunderstanding that the extension provision of R&TC section 18567 applies to the payment of tax does not establish reasonable cause. Ignorance of the law does not establish reasonable cause for the failure to comply with statutory requirements. (*Appeals of Cremel and Koeppel, 2021-OTA-222P.*) For the reasons above, appellant has not demonstrated the late payment penalty should be abated.

Issue 2: Whether OTA has jurisdiction to consider appellant's truth in lending and constitutional arguments.

Appellant raises several arguments to contest FTB's legal authority to collect payments from appellant or intercept and seize appellant's lottery winnings. Appellant first argues that the extension is effectively a loan, and that FTB's seizure of appellant's lottery proceeds violates truth in lending laws. Appellant then argues that FTB's seizure is also unlawful under the Fourth Amendment of the U.S. Constitution.

⁴ R&TC section 19132.5, effective for tax years beginning on or after January 1, 2022, allows an individual taxpayer to request a one-time abatement of a timeliness penalty. That provision, however, is inapplicable to the 2021 tax year. (R&TC, § 19132.5(f).)

As to appellant's first argument, OTA's function in the appeals process is to determine the correct amount of the taxpayer's California income tax liability.⁵ (*Appeal of Robinson*, 2018-OTA-059P.) Here, OTA's jurisdiction is generally limited to hearing appeals from an FTB determination denying a protest of a proposed tax deficiency, and from an FTB notice denying a taxpayer's tax refund claim. (*Appeal of Eric H. Liljestrand Irrevocable Trust*, 2019-OTA-012P.) Appellant filed an appeal of FTB's notice denying his claim for refund of the late payment penalty. As noted above, OTA determined that the penalty was properly imposed pursuant to R&TC section 19132, and that appellant had failed to establish reasonable cause (or other grounds) for the abatement of the penalty. Because OTA has determined that the penalty was properly imposed and may not be abated, OTA does not have jurisdiction to determine whether FTB's subsequent collection action, including its interception of appellant's lottery winnings, violates truth in lending laws.

Regarding appellant's second argument, Article III, section 3.5 of the California Constitution prohibits OTA from declaring a statute to be unconstitutional or refusing to enforce a statute on the basis that it is unconstitutional unless an appellate court has already determined that such statute is unconstitutional. There has been no such determination by an appellate court. Consequently, OTA has no authority to determine that FTB's imposition of the late payment penalty or subsequent collection action, including its interception of appellant's lottery winnings, are invalid or unenforceable based on appellant's constitutional arguments.

⁵ This includes determining correct amount of penalties, fees, and/or interest imposed by FTB where such penalties fees and/or interest are included in the jurisdictional notice such as the notice of action or claim denial. (See e.g., Cal. Code Regs., tit. 18, § 30103(a)(1), (3).)

HOLDINGS

1. Appellant has not demonstrated that the late payment penalty should be abated.
2. OTA does not have jurisdiction to consider appellant’s truth in lending and constitutional arguments.

DISPOSITION

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

Signed by:

Seth Elsom

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Seth Elsom
Hearing Officer

We concur:

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Huy “Mike” Le
Administrative Law Judge

DocuSigned by:

Teresa A. Stanley

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Teresa A. Stanley
Administrative Law Judge

Date Issued: 11/19/2024