

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
J. A. HOCHBERG AND) OTA Case No. 230413111
J. HOCHBERG)
_____)

OPINION

Representing the Parties:

For Appellants: Margarita Stone, Attorney
For Respondent: Christopher T. Tuttle, Attorney
Maria Brosterhous, Attorney Supervisor

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. A. Hochberg and J. Hochberg (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$9,320.09 for the 2021 tax year.

Office of Tax Appeals (OTA) Panel Members Eddy Y.H. Lam, John O. Johnson, and Asaf Kletter held a virtual oral hearing for this matter on January 22, 2025. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUES

1. Whether appellants have established reasonable cause to abate the late payment penalty.
2. Whether appellants have established grounds to abate the underpayment of estimated tax penalty (estimated tax penalty).
3. Whether appellants have established grounds to abate interest.

FACTUAL FINDINGS

1. Appellants filed a California Resident Income Tax Return (Form 540) for the 2021 tax year. Appellants reported tax due of \$71,082, interest and a late payment

- penalty totaling \$7,185, and an estimated tax penalty of \$2,295. Appellants paid the total amount due of \$80,562 in full on October 17, 2022.¹
2. Appellants thereafter requested a refund of \$9,480, which equals the sum of interest, the late payment penalty, and the estimated tax penalty reported on Form 540.
 3. FTB denied appellants' claim for refund. FTB determined that the correct amount of total penalties and interest is \$9,320.09,² consisting of a late payment penalty of \$5,935.47, an estimated tax penalty of \$2,295, and applicable interest of \$1,089.62.
 4. Appellants filed this timely appeal.
 5. On appeal, appellants provide a declaration of appellant J. A. Hochberg, which declared that appellants' CPA (the CPA) prepared the projections for estimated tax payments and that the CPA advised appellants to pay various taxing authorities. J. A. Hochberg also declared that "when preparing [appellants'] 2021 federal and state tax returns, it was discovered that there was bonus depreciation that needed to be added back and [appellants] were going to owe additional tax." Appellant J. A. Hochberg also declared that "[t]his was not a clerical error but substantive in which, [appellants], as a client would rely on a tax professional's expertise."
 6. Appellants also provided a declaration from the CPA. The CPA declared that "[w]hen preparing [appellants'] 2021 federal and state tax returns, it was discovered that there was bonus depreciation that needed to be added back and [appellants] were going to owe additional tax." The CPA declared that "this was not a clerical error but substantive in which a client would rely on their tax professional's expertise."

DISCUSSION

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

R&TC section 19132 imposes a penalty when taxpayers fail to pay the tax shown on a 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.) The due date for appellants' payment of tax for the 2021 tax year was

¹ After receiving appellants' Form 540, FTB issued a Notice of Tax Return Change based on a perceived discrepancy in the amount of withholding for the tax year; however, FTB was able to reconcile its records and ultimately allowed the amount as reported by appellants on the return.

² The difference between this amount and the \$9,480 amount originally claimed by appellants was refunded to appellants in December 2022 when FTB processed the Form 540. Accordingly, it is this lower amount of \$9,320.09 that is at issue on appeal.

April 15, 2022. While FTB allows an automatic six-month extension to file a return if the return is filed within six months of the original due date, an extension of time to file the return is not an extension of time to pay. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.) FTB imposed the late payment penalty because appellants did not remit full payment of their tax liability until October 17, 2022. The penalty is presumed correct unless the taxpayers can demonstrate that the late payment resulted from reasonable cause and not willful neglect. (R&TC, § 19132; *Appeal of Xie*, 2018-OTA-076P.)

To establish reasonable cause, the taxpayers must demonstrate that the failure to timely pay the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) The taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).)

Appellants do not contest that the late payment penalty was properly imposed or computed. Thus, the only issue is whether appellants have demonstrated reasonable cause for their failure to timely pay the required taxes in full. Appellants assert that reasonable cause exists to abate the late payment penalty because they relied on the advice of a tax professional.

It is well settled that a taxpayer's failure to make a timely payment or file a return is not excused by the taxpayer's reliance on a tax preparer because a taxpayer has a personal, non-delegable obligation to meet statutory deadlines. (See *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*); see also *Appeal of Rougeau*, 2021-OTA-335P [applying *Boyle*, a case involving a late filing penalty, to the late payment penalty].)

Appellants assert that they have reasonable cause for failing to timely pay the tax due because they submitted their tax information to the CPA and relied on the CPA's advice to timely make the correct payments for the 2021 California tax liability. Appellants provide declarations from appellant J. A. Hochberg and the CPA to support their assertions that appellants did not learn that they had underpaid their California tax liability until the CPA realized that there was a bonus depreciation addition required to compute appellants' California taxable income. During the oral hearing, appellants contend that the bonus depreciation was from income reported on a Form K-1 that was received for the first time in September 2022. As a result, appellants contend that they were unaware of the necessary California adjustments based on the historical activity of the entity that generated the Form K-1. Furthermore, appellants assert that the particular Form K-1 was not prepared until September 2022.

Therefore, appellants contend that the CPA was not aware of the bonus depreciation addition adjustment, which resulted in the late payment of tax.

Here, while the record does not clearly indicate what information appellants possessed by the April 15, 2022 due date for timely payment of taxes, the record lacks evidence that appellants exercised ordinary business care and prudence to verify whether all California adjustments were accounted for when reasonably estimating a tax liability. This is especially significant because appellants' investments included both new and existing holdings. Although appellants contend that the Form K-1 at issue was prepared and received for the first time in September 2022, reasonably estimating a tax liability requires that a minimum level of information be available to the taxpayer, whether from their own records or from information available upon request. (See *Appeal of Moren, supra.*) Appellants have not shown that they exercised ordinary business care and prudence in requesting and acquiring all the necessary information, including information with regards to the new investment reported on Form K-1, to estimate their tax liability by the April 15, 2022 deadline. Instead, evidence in the record shows that appellants entirely relied on their CPA to compute their tax liability and to make tax payments in full by the April 15, 2022 due date. Reliance on the CPA, on its own, does not establish reasonable cause.

Issue 2: Whether appellants have established grounds to abate the estimated tax penalty.

California conforms to Internal Revenue Code (IRC) section 6654 and imposes an estimated tax penalty for the failure to timely make estimated income tax payments. (R&TC, § 19136(a); IRC, § 6654.) The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (See IRC, § 6654(b)(2).) The estimated tax penalty is mandatory unless the taxpayers establish that a statutory exception applies.³ (*Appeal of Johnson, 2018-OTA-119P.*)

Appellants do not contest that the estimated tax penalty was properly imposed or computed. Instead, appellants make the same reasonable cause argument to abate the estimated tax penalty as they do for the late payment penalty. However, unlike the late payment penalty, there is no authority to abate the estimated tax penalty based solely on

³ Under IRC section 6654(e)(3)(A), the IRS (or here, FTB) may waive the addition to tax, i.e., estimated tax penalty, if it determines that, "by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." Second, under IRC section 6654(e)(3)(B), the addition to tax may be waived if the IRS (or here, FTB) determines that (i) during the applicable tax year or the preceding tax year, the taxpayer either retired after having attained age 62, or became disabled, and (ii) the underpayment was due to reasonable cause and not due to willful neglect. However, appellants do not argue or provide evidence that either of these provisions are applicable. Therefore, OTA does not address them further.

reasonable cause. (See *Appeal of Scanlon*, 2018-OTA-075P.) Accordingly, appellants have failed to establish a basis on which to abate the estimated tax penalty.

Issue 3: Whether appellants have established grounds for abatement of interest.

Tax is due on the original due date of the return without regard to any filing extension. (R&TC, § 19001.) If taxpayers do not pay the tax by the original due date of the tax return, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for a taxpayers' 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. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Moy, supra.*)

In this case, appellants only provide reasonable cause type arguments for interest abatement. Appellants have not shown that they qualify for waiver or abatement of interest under the provisions of R&TC sections 19104, 19112, or 21012.⁴ Additionally, there is no reasonable cause exception to the imposition of interest. (*Appeal of GEF Operating, Inc., supra.*) Consequently, OTA concludes that appellants are not entitled to interest abatement.

⁴ OTA does not have jurisdiction to review FTB's interest abatement determination under R&TC section 19112. (*Appeal of Moy, supra.*)

HOLDINGS

1. Appellants have not established a reasonable cause to abate the late payment penalty.
2. Appellants have not established grounds to abate the estimated tax penalty.
3. Appellants have not established grounds to abate interest.

DISPOSITION

FTB's action denying appellants' claim for refund is sustained.

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Eddy Y. H. Lam

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Eddy Y.H. Lam
Administrative Law Judge

We concur:

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John O. Johnson

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John O. Johnson
Administrative Law Judge

DocuSigned by:

Asaf Kletter

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Asaf Kletter
Administrative Law Judge

Date Issued: 3/7/2025