

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 240315723
M. FAWCETT AND)
N. KHOURY)
_____)

OPINION

Representing the Parties:

For Appellants: M. Fawcett and N. Khoury

For Respondent: Shah H. Khan, Specialist I

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Fawcett and N. Khoury (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$20,680.20¹ for the 2021 tax year.

Appellants waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellants have established a basis to abate the late payment penalty.
2. Whether appellants have established a basis to abate the underpayment of estimated tax (estimated tax) penalty.
3. Whether appellants have established a basis to abate the collection cost recovery fee.
4. Whether appellants have established a basis to abate the lien fees.

¹ This amount includes a late payment penalty of \$16,469.20 and an underpayment of estimated tax penalty of \$4,211. Appellants assert that the amount at issue is \$27,212.58. Appellants' amount includes the penalties and other amounts, including fees and interest, which would be refunded to the extent applicable upon any refund of the penalties. While this Opinion considers interest as part of the claim for refund, appellants do not provide argument or evidence specifically disputing interest. Therefore, it will not be addressed further.

FACTUAL FINDINGS

1. On July 13, 2020, appellants filed their 2019 California income tax return, reporting \$150,000 in estimated tax payments and a total amount due of \$50,438, which appellants paid.
2. FTB did not receive the reported \$150,000 in estimated tax payments. On September 22, 2020, FTB issued to appellants a Notice of Tax Return Change – Revised Balance imposing a late payment penalty of \$9,731.80 and an estimated tax penalty of \$4,211, plus interest.²
3. FTB also imposed a collection cost recovery fee of \$316 and lien fees of \$22 and \$34, as a result of collection actions.³
4. FTB's notices were sent to the address indicated on appellants' 2019 return.
5. Appellants paid the amount due on July 15, 2021, and filed a claim for refund,⁴ which FTB denied.
6. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants have established a basis to abate the late payment penalty.

R&TC section 19132(a) 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 tax. Generally, the date prescribed for the payment of tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the taxpayer has the burden of proof to show that reasonable cause exists to support abatement of the penalty. (*Appeal of Red Vision Systems, Inc.*, 2023-OTA-561P.) To establish reasonable cause for a late payment of tax, a

² FTB also issued to appellants Income Tax Due Notices on November 2, 2020, and November 20, 2020. These notices and the Notice of Tax Return Change – Revised Balance were sent to the same address as reported on appellants' 2019 return.

³ FTB issued to appellants a Final Notice before Levy or Lien on December 28, 2020; and an Intent to Record a Notice of State Tax Lien on February 22, 2021. FTB also issued a Notice of State Tax Lien, San Mateo dated March 30, 2021; and two Notices of State Tax Lien filed with San Francisco and San Mateo counties dated March 30, 2021; which state that "[f]urther interest and fees will accrue." FTB also issued an Earnings Withholding Order for Taxes dated May 21, 2021, showing the total amount due from appellants' employer. The Earnings Withholding Order for Taxes notices include a copy that states, "employee's copy" and "deliver to employee." The above-mentioned notices indicate the same address as reported on appellants' 2019 return.

⁴ Appellants' claim for refund asserts that their tax preparer incorrectly advised them as to the amount due because of a "miscalculation."

taxpayer must show that the failure to make a timely payment occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

Appellants do not argue that the penalty was improperly calculated or imposed. Appellants contend that there is reasonable cause for the late payment because their tax preparer incorrectly advised them that they owed only \$50,438 and they were unaware they owed an additional \$150,000 until June 2021 when their employers notified them of levies on their wages. Each taxpayer has a personal, non-delegable duty to timely pay the amount of tax due. (*Appeal of Fisher*, 2022-OTA-337P;⁵ see also *U.S. v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*).) A taxpayer's reliance on a tax preparer or agent to timely pay tax does not constitute reasonable cause. (See *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P; see also *Boyle, supra*, 469 U.S. at pp. 249-251.) However, reasonable cause may be found when a taxpayer relies on substantive advice from an accountant or attorney on a matter of tax law. (*Boyle, supra*, 469 U.S. at p. 251.) A taxpayer's reliance on a tax adviser must involve reliance on substantive tax advice and not on simple clerical duties. (*Appeal of Mauritzson*, 2021-OTA-198P.)

Here, appellants assert that their tax preparer informed them of the incorrect amount due as the result of a "miscalculation." Appellants do not provide any evidence establishing advice given by their tax preparer or that they were advised by their tax preparer as to a substantive matter of tax law. In addition, the amount of tax was properly calculated and reported on the return. At least by the time the return was filed in July 2020, appellants were on notice that payments of \$150,000 were reported to have been made on their return. To the extent appellants did not verify the payments reported on their return were made, appellants failed to act as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. Reasonably prudent taxpayers exercising ordinary business care and prudence are expected to monitor their bank account and quickly ascertain whether a scheduled payment to FTB was properly paid, especially in the case of a substantial amount of \$150,000. (*Appeal of Scanlon*, 2018-OTA-075P.) The record does not include further information from which it can be determined why the \$150,000 estimated tax payments were untimely or to establish that appellants had reasonable cause for the failure to timely make those payments.

⁵ Although this and other cases cited may concern the late filing penalty, the reasonable cause analysis for the late filing penalty is substantially the same as to the late payment penalty; therefore, authorities persuasive or controlling in one analysis may be equally persuasive or controlling in the other. (*Appeal of Moren*, 2019-OTA-176P; *Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

Appellants also contend that they were not notified of the underpayment and that they did not receive FTB's notices of the penalty or collection actions, which they allege were sent to the incorrect address. However, FTB's notices were sent to appellants after they were already late on paying tax. In addition, FTB has no duty to notify appellants of a late payment, as taxpayers have a non-delegable duty to timely pay tax. (See *Appeal of Fisher, supra.*) Furthermore, FTB's notice of the penalty used the address indicated on appellants' most recently filed return, which is sufficient notice.⁶ (R&TC, § 18416; *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.)⁷ As a result, appellants' arguments as to the mailing of the notices does not establish a basis to abate the late payment penalty.

Issue 2: Whether appellants have established a basis 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, and applies from the due date of the estimated tax payment until the date it is paid. (IRC, § 6654(b)(2).)

Appellants do not dispute the computation or imposition of the estimated tax penalty. Instead, appellants provide the same reasoning to abate the estimated tax penalty as provided for the late payment penalty, including that there is reasonable cause for the late payments and that they did not receive notice of the penalty. FTB's notice of the penalty was sent to appellants' last-known address and, therefore, appellants were properly notified of the penalty.⁸ (R&TC, § 18416(c).) In addition, there is no general reasonable cause exception to the

⁶ See Notice of Tax Return Change – Revised Balance dated September 22, 2020; and Income Tax Due Notices dated November 2, 2020, and November 20, 2020.

⁷ The “last-known address” is the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to FTB clear and concise written or electronic notification of a different address, or FTB has an address that it has reason to believe is the most current address for the taxpayer. (R&TC, § 18416(c).)

⁸ See Notice of Tax Return Change – Revised Balance dated September 22, 2020; and Income Tax Due Notices dated November 2, 2020, and November 20, 2020.

estimated tax penalty.⁹ (*Appeal of Scanlon, supra.*) Therefore, appellants have not established a basis to abate the estimated tax penalty.

Issue 3: Whether appellants have established a basis to abate the collection cost recovery fee.

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. Appellants do not dispute the calculation or imposition of the collection cost recovery fee. Instead, appellants provide the same arguments for the fee as they did for the penalties, including that reasonable cause exists and that they did not receive notice of the fee. FTB sent appellants notices that informed them that a collection fee may be imposed.¹⁰ The notices were sent to appellants' last-known address and, therefore, appellants were properly notified of the fee. (R&TC, § 18416(c).) As such, the fee was properly imposed after appellants failed to pay the amount due. Once FTB properly imposes the fee, there is no language in the statute that would excuse the fee for any reason, including reasonable cause. (See *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Therefore, appellants have shown no basis to abate the fee.

Issue 4: Whether appellants have established a basis to abate the lien fees.

R&TC section 19221(a) states that when a taxpayer fails to pay a tax liability by the due date, "the amount thereof, (including any interest, additional amount, addition to tax, or penalty, together with any costs that may accrue in addition thereto) shall thereupon be a perfected and enforceable state tax lien." Government Code section 7174(d) authorizes FTB to collect the various fees associated with recording and releasing a state tax lien.

Appellants do not dispute the calculation or imposition of the fees, but rather provides the same arguments for the lien fees as they did for the penalties, including that reasonable cause exists and that they did not receive notice of the fees. As previously discussed, appellants were notified that fees may be imposed if they failed to pay the balance due.

⁹ IRC section 6654(e)(3) provides limited exceptions to waive the estimated tax penalty in two situations: (1) if, by reason of casualty, disaster, or other unusual circumstances, imposing the penalty would be against equity and good conscience; or (2) if the late payment was due to reasonable cause and not willful neglect, but only for individuals who retired after attaining the age of 62 in the taxable year or who became disabled in the taxable year. (IRC, § 6654(e)(3)(A)-(B).) Appellants do not argue, and the evidence does not show, that they meet the requirements of the exceptions provided in IRC section 6654(e)(3).

¹⁰ See the Income Tax Due Notices dated November 2, 2020, and the Final Notice before Levy or Lien dated December 28, 2020.


Appellants have not shown that any notices were sent to an incorrect address. FTB notified appellants that a lien may be filed and recorded against their property,¹¹ and the notices were sent to appellants' last-known address. (R&TC, § 18416(c).) In addition, once FTB properly imposes the lien fee, there is no language in R&TC section 19221 that will excuse the fee under any circumstances, including for reasonable cause. Therefore, appellants have not established a basis to abate the lien fees.

HOLDINGS

1. Appellants have not established a basis to abate the late payment penalty.
2. Appellants have not established a basis to abate the estimated tax penalty.
3. Appellants have not established a basis to abate the collection cost recovery fee.
4. Appellants have not established a basis to abate the lien fees.


DISPOSITION

FTB's action is sustained.


Signed by:

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 Josh Lambert
 Administrative Law Judge

We concur:

Signed by:

 C04CD432E3254FD...

 Seth Elsom
 Hearing Officer

DocuSigned by:

 8A4294817A67463...

 Andrew Wong
 Administrative Law Judge

Date Issued: 2/19/2025

¹¹ See Final Notice before Levy or Lien dated December 28, 2020; and Intent to Record a Notice of State Tax Lien dated February 22, 2021.