

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011736
)
MICHAEL SCANLON AND DEVON) Date Issued: July 25, 2018
SCANLON)
)
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_____)

OPINION

Representing the Parties:

For Appellants: Brad Wagner, CPA
For Respondent: Jean Cramer, Tax Counsel IV

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Michael Scanlon and Devon Scanlon (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants’ claim for refund in the amount of \$805.79 for the 2016 tax year.

Appellants waived their right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellants have shown reasonable cause to abate the late payment of tax penalty imposed under section 19132.
2. Whether appellants have established that the underpayment of estimated tax penalty imposed under section 19136 should be abated.

FACTUAL FINDINGS

1. On September 14, 2016, appellants attempted to make an electronic funds transfer (EFT) on FTB’s EFT Web Pay system in the amount of \$5,000 for the 2016 tax year.

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

Appellants made an error when inputting their bank account number, and as a result FTB could not process appellants' payment. Appellants previously made the same type of error on September 14, 2012, when they entered incorrect bank information with respect to an \$11,000 EFT payment on FTB's Web Pay system. FTB was unable to process that payment, and appellants received a \$20.23 penalty for underpayment of estimated tax.

2. Appellants filed a timely, joint nonresident tax return (Form 540NR) for the 2016 tax year, claiming estimated tax payments of \$49,173 and reporting a balance due of \$7,572. On April 6, 2017, appellants attempted to make an EFT payment on FTB's EFT Web Pay system in the amount of \$7,572. Appellants again made an error when inputting their bank account number, and as a result FTB could not process appellants' payment. On May 5, 2017, in response to a telephonic inquiry from appellants' representative, FTB advised that the April 6, 2017 payment had not been processed because of the above-described error. On May 6, 2017, appellants successfully made an EFT payment of \$7,572.
3. On June 5, 2017, FTB issued a Notice of Tax Return Change – Revised Balance, advising appellants of an unpaid balance due in the amount of \$5,805.78, consisting of unpaid tax of \$5,000 (resulting from the above-described dishonored September 16, 2016 estimated tax payment), a late payment penalty of \$716.46, an estimated tax penalty of \$40.27, and interest in the amount of \$49.05.
4. On that same date, appellants paid the balance and filed a claim for refund of the penalties based on reasonable cause. Appellants claim that they were unaware that FTB did not accept the 3rd quarter estimated tax payment, and they assert that they paid the full balance owed as soon as they learned of the discrepancy. Appellants also state that they take their tax obligation seriously and they have a history of timely filing and payments since 2007.
5. On March 31, 2017, FTB denied appellants' claim for refund. This timely appeal followed.

DISCUSSION

Issue 1 - Whether appellants have shown reasonable cause to abate the late payment penalty.

Section 19001 provides that the personal income tax “shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).” Section 19132 provides that a late payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. The late payment penalty has two parts. The first part is 5 percent of the unpaid tax. (§ 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (§ 19132(a)(2)(B).) Here it is undisputed that appellants failed to timely pay tax in the amount of \$12,572, and therefore the penalty was properly imposed.

The late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (§ 19132(a).) To establish reasonable cause for a late payment of tax, a taxpayer must show that his or her failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.)² Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

Here, although appellants promptly paid the balance due after it came to their attention, this did not occur until almost eight months after appellants’ September 16, 2016 estimated tax payment was due, and almost one month after the April 17, 2017 tax payment was due. We would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid. We also note that appellants previously made the same type of error on September 14, 2012, when they entered incorrect bank information on FTB’s Web Pay system. FTB was unable to process that payment, and appellants received a \$20.23 penalty for their underpayment of estimated tax. In light of their actual knowledge of their prior error in 2012, we

² Pursuant California Code of Regulations, title 18, section 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE’s precedential opinions are viewable on BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

would expect appellants to have been especially diligent regarding their electronic payments in 2016. Likewise, lack of notice from the FTB of a failed payment does not negate appellants' duty of prudence and due care to verify that their scheduled payments were successful.³ Accordingly, we find that appellants have not established reasonable cause to abate the late payment penalty.

Finally, we acknowledge that appellants appear to have a history of timely tax payments (with the exception noted above for 2012) and note that the IRS has a penalty abatement program called First Time Abate, under which the IRS may administratively abate penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the past three years. Neither the California Legislature nor FTB have adopted a comparable penalty abatement program, so the IRS penalty abatement and appellants' history of timely filing and paying California taxes cannot be used as a basis for abatement of the late payment penalty at issue here. Instead, appellants must establish that their failure to timely pay their taxes was due to reasonable cause and not due to willful neglect, which they have failed to do.

Issue 2 - Whether appellants have established that the underpayment of estimated tax penalty imposed under Section 19136 should be abated.

California conforms to IRC section 6654, and imposes an estimated tax penalty for the failure to timely make estimated income tax payments. (§ 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).) For the 2016 tax year, appellants were required to pay 110% of the prior year's tax in estimated tax payments. (§ 19136(a), IRC, § 6654(d)(1)(C)(i).) Appellant's prior year tax was \$43,825, and accordingly appellants were required to pay \$48,207.50 in estimated tax payments ($\$43,825 \times 110\% = \$48,207.50$). Here, appellants only paid \$44,173 in estimated tax payments during 2016. As a result, when their April 6, 2017 payment of \$7,572 was dishonored, appellants had underpaid their 2016 tax liability by \$12,572, and as a result FTB properly imposed an underpayment of estimated tax penalty of \$40.27.

Appellants do not protest the imposition or computation of the penalty. Instead, appellants argue that the penalty amount should be refunded based on reasonable cause.

³ FTB advises that it only sends notices regarding payments when the correct account information is entered and there are insufficient funds or the account is closed.

However, there is no general reasonable cause exception to the estimated tax penalty.⁴ (*Estate of Ruben v. Commissioner* (1960) 33 T.C. 1071, 1072; *Farhoumand v. Commissioner* (2012) T.C. Memo. 2012-131; *Appeal of Weaver Equipment Company*, 80-SBE-048, May 21, 1980.) Accordingly, appellants have failed to establish a basis on which to abate the penalty for underpayment of estimated tax.

HOLDING

1. Appellants have failed to show reasonable cause to abate the late payment of tax penalty imposed under section 19132.
2. Appellants are not entitled to abatement of the estimated tax penalty imposed under section 19136.

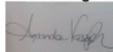
DISPOSITION

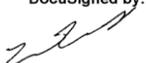
Respondent’s action in denying appellants’ claim for refund is sustained.

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 Jeffrey G. Angeja
 Administrative Law Judge

We concur:

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 Amanda Vassigh
 Administrative Law Judge

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 Tommy Leung
 Administrative Law Judge

⁴ Nevertheless, the estimated tax penalty will not apply if it is established that either: the failure to timely pay the estimated tax payment was due to reasonable cause *and* the taxpayer retired after reaching age 62; or the taxpayer became disabled in the taxable year for which the estimated payments were required to be made or in the previous year. (IRC, § 6654(e)(3)(B).) Appellants have not alleged disability or that they are over age 62; therefore, we do not discuss this further.