

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011154
)
DALE R. DONOHOE AND TAMARA K.) Date Issued: July 25, 2018
)
DONOHOE)
_____)

OPINION

Representing the Parties:

For Appellants: Josh Kaufman, CPA
For Respondent: Eric Yadao, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Dale R. Donohoe and Tamara K. Donohoe (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants’ claim for refund in the amount of \$18,558.47 for the 2015 tax year.

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

ISSUE

Whether appellants have shown reasonable cause for the late payment of tax.

FACTUAL FINDINGS

1. On April 16, 2016, appellants timely submitted Form 3519 (Payment Voucher for Automatic Extension for Individuals). Concurrently therewith, appellants’ accountants used a third-party software provider (Prosystem FX) to schedule a \$92,046 direct debit payment from appellants’ bank account to FTB as an extension payment, along with a

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code. Section 19324 states that taxpayers have 90 days to appeal FTB’s action upon a taxpayer’s protest to the board (Board of Equalization). As relevant, Section 20(b) provides that for appeals transferred to the Office of Tax Appeals on or after January 1, 2018: “Unless the context requires otherwise, as used in this code or any other code, ‘board,’ with respect to an appeal, means the Office of Tax Appeals.”

\$105,085 extension payment to the Internal Revenue Service (IRS). In July 2016, appellants' accountants discovered that neither of the extension payments were paid. Thereafter, appellants paid FTB the amounts of \$174,761 and \$105,000 on August 10, 2016, and on August 26, 2016, respectively.

2. On September 6, 2016, appellants filed a timely joint 2015 California income tax return within the automatic extension period. Appellants reported a total tax liability of \$408,618 and added a self-assessed late payment penalty of \$20,758. Appellants reported total payments of \$430,282 and requested that an overpayment amount of \$906 be applied as an estimated tax payment for 2016. FTB accepted the return, and after certain adjustments not relevant here, FTB reduced the late payment penalty to \$18,558.47.
3. On September 12, 2016, appellants filed a claim for refund of the late payment penalty. In their claim, appellants assert that their underpayment resulted from two errors. First, they state that they reasonably relied on their accountants' tax preparation software to directly debit a payment of \$92,046 to FTB from their account. Appellants assert that they have a history of timely payments to FTB, and this is the first time they have made a late payment to FTB. Second, appellants' accountants admit that they "inadvertently prepared the extension estimate using the 2014 W-2 instead of the 2015 W-2 which the taxpayer had previously provided."²
4. On March 9, 2017, FTB denied appellants' claim for refund. This timely appeal followed.

DISCUSSION

Issue - 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.

² A review of both forms indicates that while appellants' incomes were similar for both years, the tax withholding for 2015 (\$238,938) was less than the withholding for 2014 (\$590,445) by \$351,507.

(Section 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.

(Section 19132(a)(2)(B).) The late payment penalty will 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. (Section 19132(a).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

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, supra*.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Id.*) The fact that tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer's burden of establishing reasonable cause. (*Appeal of Scott*, 82-SBE-249, Oct. 14, 1982.)

Appellants claim that they relied on their accountants to properly estimate their tax liability and transmit their tax payment to FTB. However, a taxpayer's reliance on an agent, such as an accountant, to file a return or to make timely payment of tax is not reasonable cause because those obligations are non-delegable. (*U.S. v Boyle* (1985) 469 U.S. 241, 251.) Here, appellants not only failed to make a proper estimate of their unpaid tax liability for the year at issue (by incorrectly using the prior year's Form 1099 income and withholding information, thereby overstating the amount of their withholdings by approximately \$351,000), they also failed to timely pay the amount they believed they needed to pay to the FTB in connection with their extension request, \$92,046, in a timely fashion. Although appellants rectified this problem promptly after it came to their accountants' attention, this did not occur until four months after appellants' taxes were required to have been paid. We would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled direct debit payment from their account to the FTB was in fact paid, especially a payment of such magnitude (i.e., \$92,046). Accordingly, we find appellants have not established reasonable cause for failing to timely pay their proper California tax liability.

Finally, we acknowledge that appellants have a history of timely tax payments and note that the IRS abated the federal late payment penalty that it initially had imposed against them. The IRS abated the federal late payment penalty pursuant to an IRS 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 not due to willful neglect, which they have failed to do.

HOLDING

Appellants have failed to establish reasonable cause for the late payment of tax.

DISPOSITION

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

DocuSigned by:
Jeff Angeja
Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Sara A. Hosey
Sara A. Hosey
Administrative Law Judge

DocuSigned by:
Tommy Leung
Tommy Leung
Administrative Law Judge