

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011207  
 )  
**SIDNEY G. FRIEDMAN AND** ) Date Issued: July 20, 2018  
 )  
**ELLEN FRIEDMAN** )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Jerry Solomon, CPA

For Respondent: Andrew Amara, Tax Counsel III

J. JOHNSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> Sidney G. Friedman and Ellen Friedman (appellants) appeal an action by the Franchise Tax Board (respondent) in denying their claim for refund in the amount of \$16,817.01 for the 2015 tax year.

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

**ISSUE**

Have appellants shown that the late payment penalty should be abated?<sup>2</sup>

<sup>1</sup> All further statutory references are to “Sections” of the Revenue and Taxation Code unless otherwise stated.

<sup>2</sup> Appellants filed a claim for refund for \$16,817.01, which includes the late payment penalty (i.e., \$14,036.16) and an increase in a self-reported underpayment of estimated tax penalty (i.e., \$2,780.85). In their claim for refund, and on appeal of the denial of that claim, appellants only raise arguments as to the late payment penalty. As such, the only issue discussed on appeal is the issue of whether the late payment penalty is properly imposed.

## FACTUAL FINDINGS

1. Appellants attempted to make an estimated tax payment of \$200,000 through respondent's electronic Web Pay system in January 2016. Appellants did not successfully complete the process, and the payment was not remitted.
2. Appellants' tax payment was due on April 15, 2016. As of that date, appellants had made payments of \$22,530, in the form of withholdings, against their liability of \$170,279, leaving an outstanding tax liability due of \$147,749.
3. Appellants filed their 2015 California income tax return on October 11, 2016. On their return, appellants reported their tax liability of \$170,279, withholdings of \$22,530, and the estimated payment of \$200,000 (which was not actually remitted). The return thus reported an overpayment amount of \$52,251.
4. Respondent sent appellants a Notice of Tax Return Change (Notice) on November 23, 2016. The Notice informed appellants that respondent adjusted appellants' return because an error was found on their return (i.e., the estimated tax payment reported on their return was not paid). The Notice calculated a revised balance due that included the imposition of a late payment penalty and an increase in appellants' self-reported underpayment of estimated tax penalty.
5. Appellants submitted a request for abatement of "the late fees and penalties" on December 2, 2016, and paid the outstanding balance on December 27, 2016. Respondent issued a notice of action on May 23, 2017, denying appellants' claim for refund of the penalty amounts. This timely appeal followed.

## DISCUSSION

### Issue – Have appellants shown that the late payment penalty should be abated?

Section 19001 generally provides that the personal income tax imposed "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 is imposed when taxpayers fail to pay the amount shown as due on the return on or before the due date of the return. The late payment penalty will be abated if the taxpayers show that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect.

(§ 19132(a).) The taxpayers bear the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.)

To establish reasonable cause for the late payment of tax, taxpayers must show that their failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Roger W. Sleight*, 83-SBE-244, *supra*; *Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.) The taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Robert T. and M.R. Curry*, 86-SBE-048, *supra*; see also *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) A failure to pay will be considered due to reasonable cause if the taxpayers make a satisfactory showing that they exercised ordinary business care and prudence in providing for the payment of their tax liability and were nevertheless either unable to pay the tax or would suffer undue hardship if they paid on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Comm’r*, T.C. Memo. 2011-283.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.)

Appellants initiated the process for making an estimated tax payment through respondent’s Web Pay service in January 2016. Appellants provide a printout of a screen from the Web Pay service that lists their information and indicates that a payment of \$200,000 tentatively was to be applied on January 15, 2016, to their 2015 tax year account. This page bears the title of “Web Pay – Review Your Request,” and the short paragraph directly under the title informs users that, if the information looks correct and they agree to the authorization statement on that page, they are to “check the agreement box, and click the ‘Submit’ button only once.” Appellants apparently did not complete these final steps to submit their payment, and assert that they believed this review screen was instead a confirmation screen. Appellants assert that their attempt to remit the estimated tax payment shows good faith, and was done with due care and diligence, and constitutes reasonable cause for the late payment of tax sufficient to abate the late payment penalty.

Appellants also assert that they exercised due diligence because, once they received respondent’s Notice informing them of the tax balance due and that the estimated tax payment was not received, they immediately paid the balance due. Appellants contend that this was their first time using the Web Pay service, that they had sufficient funds available to make the

attempted payment, and that they successfully made a similarly sized estimated tax payment to the Internal Revenue Service on January 15, 2016.<sup>3</sup> Appellants state that they “did not reconcile their bank statements to observe the payment to [respondent] had not cleared the bank.”

The issue before this panel is whether appellants had reasonable cause for the late payment of the relevant portion of their tax liability. The more specific question is whether appellants’ attempt to make a \$200,000 estimated tax payment in January 2016, which would have satisfied their tax liability, satisfies the standard of reasonable cause and not willful neglect for purposes of Section 19132. We find it does not.

Appellants began the payment process, but they never completed it nor confirmed whether it was successful. The instructions on the Web Pay - Review Your Request screen consist of three sentences of simple instructions that an ordinarily intelligent and prudent businessperson would understand as requiring an additional step to complete the payment process. Furthermore, exercising ordinary business care and prudence would entail ensuring the payment was actually submitted. The attempted \$200,000 estimated tax payment was the only estimated tax payment appellants attempted for the 2015 tax year, and it was intended to comprise the majority of their tax payments for that year. Yet, appellants indicate that they did not check their bank account to make sure that the payment was successfully made, either at the time of the scheduled attempt to pay or at any time prior to reporting the amount as being paid on their return.

Appellants’ error in not completing the Web Pay process, and not realizing that it had failed by checking their bank account balance, does not demonstrate due diligence, as would be exercised by an ordinarily intelligent and prudent businessperson. Instead, the evidence shows the underpayment was the result of an oversight and a lack of due diligence by appellants. The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, *supra*.) As stated in the *Appeal of Risser*, “While we sympathize with appellant[s’] unintentional error, these facts do not form a basis for granting relief from the penal[t]y.” (*Ibid.*)

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<sup>3</sup> These facts are not contested by respondent; however, even assuming these facts in appellants’ favor, they would not change the outcome of this appeal.

HOLDING

Appellants have not established that their failure to make a timely payment of tax for the 2015 tax year was due to reasonable cause and not willful neglect.

DISPOSITION

Respondent's action in denying appellants' claim for refund for the 2015 tax year is sustained.

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John O. Johnson  
Administrative Law Judge

We concur:

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Douglas Bramhall  
Administrative Law Judge

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Teresa A. Stanley  
Administrative Law Judge