

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011220  
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**JEFFREY FONG** ) Date Issued: June 21, 2018  
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**OPINION**

Representing the Parties:

For Appellant: Jeffrey Fong  
For Respondent: Eric R. Brown, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> Jeffrey Fong (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant’s claim for refund for tax year 2014.<sup>2</sup>

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

**ISSUE**

Did appellant establish reasonable cause to abate the late filing penalty assessed for tax year 2014?

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

<sup>2</sup> Although appellant’s claim for refund totaled \$8,188.41, he notes in his appeal letter that “I understand that the interest portion of the claim cannot be refunded. Therefore, I am requesting ... the penalty portion of the claim which amounts to \$6,911.75.” We, therefore, address just the portion of the claim for refund related to the penalty.

## FACTUAL FINDINGS

1. Appellant filed his 2014 California tax return on June 13, 2016, reporting \$323,987 in taxable income and \$27,647 of tax due.
2. Appellant included six Forms 1099-R with his return, all for tax year 2014.<sup>3</sup>
3. On July 14, 2016, FTB sent appellant a Notice of Tax Return Change, which assessed a late filing penalty of \$6,911.75, plus interest and fees of \$1,247.85, and a balance due of \$8,159.60.
4. Respondent sent appellant an Income Tax Due Notice on August 26, 2016, with additional accrued interest bringing the total due to \$8,188.41.
5. On September 23, 2016, appellant paid the \$8,188.41 balance in full.
6. On September 27, 2016, appellant filed a form entitled “Reasonable Cause – Individual and Fiduciary Claim for Refund.” In it, appellant explained that 2014 was a very difficult time for him due to his father’s passing on February 27, 2014. He further stated that he “had to wait until the end of 2015 for probate courts to finalize documents.” He indicated he has owed no taxes since 2009 and plans to file and pay on time in the future.
7. A transcript of appellant’s federal tax liability for 2014 shows an abatement of the late filing penalty with no corresponding code showing the basis for the abatement.
8. On April 10, 2017, FTB issued a Notice of Action denying appellant’s claim for refund.
9. Appellant timely filed this appeal.

## DISCUSSION

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at 5 percent of the tax due for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) Here, the late filing penalty appears to have been correctly calculated, and appellant has not alleged any error in the computation method.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file a tax return. (*Appeal of Scott*, 82-SBE-249, Oct. 14, 1982.)<sup>4</sup> To establish reasonable cause, the

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<sup>3</sup> Forms 1099-R report taxable distributions from pensions, annuities, retirement or profit-sharing plans, IRAs, and insurance contracts, among other things.

<sup>4</sup> The Office of Tax Appeals (OTA) is the successor-in-interest to the California State Board of Equalization (BOE) with regard to income tax appeals. Therefore, precedential BOE opinions that were adopted

taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)

In this appeal, appellant filed his 2014 return more than a year late. He explained in his Claim for Refund that 2014 was a very difficult time for him due to his father’s passing on February 27, 2014. He further stated that he “had to wait until the end of 2015 for probate courts to finalize documents.” While it is understandable that appellant was having a very difficult time dealing with the death of his father, that tragedy occurred more than a year prior to the date his return was due. Appellant also claims that his ability to file on time was hampered by the closing of his father’s probate case, which did not occur until late 2015. It is clear, however, that the Forms 1099-R that reported the income upon which the FTB’s assessment was based were issued to appellant for distributions made in tax year 2014. Thus, it does not appear that appellant’s 2014 tax return was contingent on the completion of his father’s probate case in late 2015. Appellant received the reported income on the Forms 1099-R in tax year 2014. Appellant has not shown that his father’s death and an open probate case stopped him from filing his return by its due date in 2015. Thus, appellant’s delay in filing was not reasonable.

The evidence shows that the IRS abated the federal late filing penalty initially imposed against appellant. However, the ground upon which the IRS abated the federal late filing penalty is unclear. Appellant claims to have a history of timely tax filings, and it seems reasonable to conclude that the IRS abatement was made pursuant to an IRS program called First Time Abate, under which the IRS may administratively abate penalties for late filing if a taxpayer has timely filed returns and paid taxes due for the past three years. Neither the California Legislature nor the FTB has adopted a comparable penalty abatement program, so the IRS penalty abatement and appellant’s history of timely filing and paying California taxes cannot be used as a basis for abatement of the state late filing penalty at issue here. Instead, appellant must establish that his failure to timely file his tax return was due to reasonable cause and not due to willful neglect, which he has failed to do. Therefore, appellant is liable for the late filing penalty.

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prior to January 1, 2018, may be cited as precedential authority to OTA. (Cal. Code Regs., tit. 18, § 30501(d)(3).) BOE’s published precedential decisions, designated by “SBE,” may be found on the BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

HOLDING


Appellant is liable for the late filing penalty as determined by the FTB.

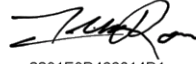
DISPOSITION

Respondent's action is sustained in full.

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Teresa A. Stanley  
Administrative Law Judge

We concur:

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John O. Johnson  
Administrative Law Judge

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Alberto T. Rosas  
Administrative Law Judge