

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011335
)
JOHN A. PORRECA AND) Date Issued: August 23, 2018
DEBORAH A. PORRECA)
)
_____)

OPINION

Representing the Parties:

For Appellant: Eddie Del Rio, CPA, Garcia & Ortiz, P.A.

For Respondent: Eric A. Yadao, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ appellants John A. Porreca and Deborah A. Porreca appeal from the Franchise Tax Board’s (FTB’s) deemed denial of appellants’ claim for refund of \$61,998 for the 2015 and 2016 tax years.²

ISSUE

Whether appellants are liable for penalties assessed under section 19011.5 for failing to make payments of taxes electronically.

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

² The amount listed on appellants’ claim for refund (Form 2917) for the 2015 tax year is \$61,998. However, FTB indicates the actual amount at issue is \$44,469.40, which is the sum of the three disputed electronic payment (e-pay) penalties, plus interest thereon, paid by appellants. FTB states most of the difference is due to appellants’ overpayment of the second penalty, which FTB applied to appellants’ 2015 tax liability. Further, while the parties indicate 2015 is the tax year at issue, FTB assessed one of the penalties in connection with an estimated payment for 2016.

FACTUAL FINDINGS

1. A Florida accounting firm, Garcia & Ortiz, P.A., has been preparing appellants' California income tax returns since it filed their 2010 return.
2. FTB has required appellants to make electronic payments (e-pay) since March 23, 2012, in accordance with section 19011.5.
3. On July 16, 2012, and August 9, 2013, FTB assessed penalties of \$16.66 and \$885.37, respectively, for appellants' failure to comply with the e-pay requirement (e-pay penalties). Appellants' liability for these penalties is not at issue in this appeal.
4. On January 15, 2016, appellants made a \$724,311 estimated tax payment for 2015 by check, again failing to comply with the e-pay requirement. FTB imposed the one percent e-pay penalty, plus applicable interest, and on January 25, 2016, issued a notice to pay the balance due (\$7,246.08) by February 9, 2016. When appellants failed to respond, FTB issued a second notice, dated March 9, 2016, demanding payment of the balance due by March 24, 2016. Appellants paid the amount due (\$7,272.26, due to additional interest) on April 4, 2016.
5. On April 15, 2016, appellants requested an extension of time to file their 2015 return and made another estimated tax payment (\$1,732,342) for 2015 by check, again failing to comply with the e-pay requirement. Accordingly, FTB imposed the e-pay penalty, plus applicable interest, and issued a May 10, 2016 notice to pay the penalty and interest (\$17,420.35) by May 25, 2016. Appellants paid the amount due on June 23, 2016.
6. By letter dated June 24, 2016, appellants requested abatement of the penalties paid on April 4, 2016, and June 23, 2016, on various grounds. Appellants stated that they (1) exercised reasonable care and prudence in making timely tax payments; (2) were not residents of California or aware of the requirement to e-pay taxes; (3) had a history of timely remitting taxes due; and (4) had not previously been penalized for failing to e-pay taxes.
7. On June 28, 2016, appellants made an estimated tax payment for 2016 by check for \$1,968,425, again failing to comply with the e-pay requirement. FTB imposed another e-pay penalty and issued a July 6, 2016 notice to pay \$37,195.85 by July 21, 2016. This amount included both the penalty imposed for the June 28, 2016 payment and the penalty imposed for the April 15, 2016 payment (with interest) because FTB had not yet posted

appellants' June 23, 2016 payment to appellants' tax account. Appellants nevertheless promptly paid the entire billed amount with some additional interest on July 15, 2016. FTB applied the payment first to the e-pay penalty (and interest) for the June 28, 2016 payment, and applied the remainder to appellant's 2015 taxes. Appellants do not object to FTB's application of the overpaid amount.

8. By letter dated August 9, 2016, appellants requested penalty abatement and claimed a refund of e-pay penalty payments totaling \$61,997.98, on various grounds.³ In addition to the grounds relied upon in their prior request (see paragraph 6, above), appellants stated that the tax preparation software and forms used by their accountants did not indicate that appellants were required to e-pay, and that appellants and their representatives were unaware of media coverage or FTB publications regarding California's mandatory e-pay requirements. Appellants also stated that their failures to comply with the mandatory e-pay requirement were not due to intentional neglect or reckless disregard. FTB did not act upon this claim for refund.
9. Because FTB failed to act upon appellant's August 9, 2016 claim for over six months, appellants chose to deem the claim denied and timely filed this appeal on February 16, 2017, with our predecessor, the State Board of Equalization.

DISCUSSION

Section 19011.5 requires certain individuals to submit their payments electronically, beginning on or after January 1, 2009, or be subject to a mandatory e-pay penalty. E-payments are required of individual taxpayers if they make an estimated tax or extension payment of more than \$20,000 on or after January 1, 2009, or if they file an original tax return with a tax liability over \$80,000 for any tax year beginning on or after that date. (Section 19011.5(a).) In addition, an individual who has become subject to the e-pay requirement must continue to make all future payments electronically, unless the taxpayer either meets the requirements of section 19011.5(b) and makes an election to discontinue e-pay, or the taxpayer requests and receives a waiver of the e-pay requirement pursuant to section 19011.5(d).⁴ Section 19011.5(c) imposes the one-percent e-pay penalty on a taxpayer who does not comply with this e-pay requirement unless the

³ As previously stated, FTB asserts the actual penalties and interest total \$44,469.40.

⁴ FTB Form 4107 may be used for an election or a waiver request.

taxpayer shows that the failure to make the e-payment was the result of reasonable cause and was not due to willful neglect.

Although section 19011.5 does not tell us what circumstances will establish “reasonable cause” or a lack of “willful neglect,” and there are no e-pay cases to provide guidance in this regard, the same terms are used to describe the bases for relief of other penalties (e.g., the late-filing and late-payment penalties of sections 19131 and 19132, respectively) and it is appropriate to look to cases that discuss those penalties for guidance. In order to demonstrate reasonable cause in the context of late-filing penalties, the taxpayer must show the failure to file timely returns occurred despite the exercise of ordinary business care and prudence. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)⁵ The taxpayer bears the burden of proving reasonable cause to excuse the penalty. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, Apr. 22, 1975.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Ignorance of the law is not reasonable cause for failure to comply with statutory requirements. (*Appeal of Diebold, Inc.*, 83-SBE-002, Jan. 3, 1983.) A taxpayer does not exercise ordinary business care and prudence when he fails to acquaint himself with the requirements of California tax law. (*Ibid.*) Willful neglect is a conscious, intentional failure to do something that is required or to avoid doing something that is prohibited, or a reckless indifference to the requirement or prohibition. (*United States v. Boyle* (1985) 469 U.S. 241, 245.)

Appellants did not file an election under section 19011.5(b), and there was no waiver under section 19011.5(d).⁶ They argue their failures to comply with the e-pay requirement were due to reasonable cause and not due to willful neglect as evidenced by the following alleged facts. Appellants are Florida residents whose California-source income is pass-through income from an S Corporation. Since at least 2011, they have relied on Florida accountants to prepare their California tax returns. While appellants acknowledge that FTB informed them regarding the e-pay requirement before they made any of the payments at issue here, they state that they had had no California income tax due for 2013 or 2014 and were not “consistently reminded” of the e-pay requirement. Appellants allege their accountants used Lacerte tax software that

⁵ Formal and memorandum opinions issued by the Board of Equalization can be seen on the Board’s website at <http://www.boe.ca.gov/legal/legalopcont.htm>.

⁶ Even if appellants had filed an election, they were still required to make the subject payments electronically because the amount of each payment exceeded the statutory threshold.

instructs taxpayers to “mail” their estimated tax payments, and the California tax return forms that they signed did not refer to the mandatory e-pay requirement. Appellants further argue their accountants were not aware of the e-pay requirement, that the e-pay obligation is an unconstitutional violation of their privacy (by requiring the disclosure of private bank information), and that the penalties are excessive fines and unconstitutional. They also contend that they filed their return and paid their taxes on time and have a long history of such compliance, and that their sole error was failing to pay electronically.

It is undisputed that FTB informed appellants in March 2012 that they must e-pay their taxes. There is nothing in the law that indicates this requirement is suspended if the taxpayer is not required to make a payment for an intervening period. On the contrary, section 19011.5 states that, once the e-pay requirement is triggered, *all* payments required by an individual, regardless of the taxable year to which the payments apply, must be electronically remitted in the form and manner prescribed by FTB. FTB is not required to remind a taxpayer of the requirement.

As stated above, ignorance of the law is not reasonable cause. Moreover, the evidence shows that appellants, at least, were not ignorant of the law. FTB has assessed five e-payment penalties, two of them occurring before the first penalty that is a subject of this appeal. It penalized appellants a third time, the first that is at issue here, on January 25, 2016, and less than a month after appellants paid that penalty, they failed to e-pay again. FTB assessed another e-pay penalty, the fourth, which appellants paid in late June 2016. Before the end of that month, appellants again failed to comply with the e-pay requirement, and FTB assessed the fifth penalty. This is evidence of willful neglect.

We are not persuaded by appellants’ argument that their accountants’ tax software or the forms generated by it somehow misled them into making payments by check rather than making e-payments. Appellants were aware of the e-pay requirement. We also note that the 2015 California nonresident return instructions published by FTB for the guidance of taxpayers and practitioners contain at least three detailed references to mandatory e-payments, each of which states the substance of section 19011.5. Finally, we have insufficient evidence to establish what appellants’ software indicated about mandatory e-payment; but, regardless, it would not have been reasonable for appellants to rely on their tax preparation software (or tax forms produced by that software) when that information was inconsistent with the law, explicit FTB instructions,

and the clearly stated notices to appellants.

Regarding appellants' argument that the penalties are excessive fines and unconstitutional, California law sets the amount of the penalty.⁷ We have no authority to change it. Appellants also ask us to declare section 19011.5 unconstitutional. Article III, section 3.5 of the California Constitution prohibits the Office of Tax Appeals from declaring a statute to be unconstitutional or refusing to enforce a statute on the basis that it is unconstitutional unless an appellate court has already determined that such statute is unconstitutional. There has been no such determination. Consequently, we have no authority to declare section 19011.5 unconstitutional.

Finally, regarding appellants' reference to their history of compliance, we note that the Internal Revenue Service administers a program called "First Time Abate" through which the IRS abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years. However, FTB has no such program, and, as previously stated, California law allows abatement only on a showing that the failure to e-pay was due to reasonable cause and not due to willful neglect.⁸ As the evidence shows that appellants' failure to e-pay was not due to reasonable cause and in fact was due to willful neglect, there is no basis to abate the penalty.

HOLDING

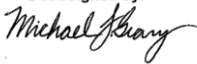
Appellants failed to show that their failure to make e-payments was due to reasonable cause and not willful neglect. Therefore, appellants are liable for the assessed penalties and interest.

⁷ Section 19011.5 provides for a one-percent penalty.


⁸ The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.))

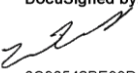
DISPOSITION

We sustain FTB's deemed denial of appellants' claim for refund of the penalties and interest paid.

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Michael F. Geary
Administrative Law Judge

We concur:

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Grant S. Thompson
Administrative Law Judge

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Tommy Leung
Administrative Law Judge