

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011716  
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**DAVID HOLLAND** ) Date Issued:  
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**OPINION**

Representing the Parties:

For Appellant: Deborshi Ghosh, Tax Appeals Assistance Program

For Respondent: Eric R. Brown, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> David Holland (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$892.29 for the 2014 tax year.

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

**ISSUES**

- 1. Is appellant liable for the late payment penalty?
- 2. Has appellant shown the imposition of the collection cost recovery fee was improper?

**FACTUAL FINDINGS**

- 1. Appellant filed a timely 2014 California income tax return (Form 540) on October 13, 2015, reporting federal adjusted gross income of \$455,288.00 and a tax balance due of \$7,135.00.
- 2. In addition to the unpaid tax balance, appellant’s return reported a late payment penalty

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

- and interest amount due totaling \$685.00, for a total amount due of \$7,820.00.
3. Respondent accepted appellant's return as filed, but did not receive payment with the return.
  4. On November 3, 2015, respondent sent a Return Information Notice (RIN) to appellant, indicating a balance due of \$7,861.48.
  5. By letter dated November 27, 2015, appellant responded to the RIN with a request to abate the late payment penalty.
  6. On December 7, 2015, appellant made a partial payment of \$7,255.
  7. On December 15, 2015, respondent sent an Income Tax Due Notice to appellant, reflecting a balance due of \$663.70.
  8. On December 19, 2015, appellant again requested abatement of the late payment penalty.
  9. On January 21, 2016, respondent sent "Final Notice Before Levy and Lien" reflecting an amount due of \$664.85.
  10. On February 19, 2016, respondent sent a Penalty Waiver Denial, denying appellant's request for penalty waiver and indicating a balance due of \$665.76.
  11. On February 23, 2016, respondent assessed against appellant a collection cost recovery fee of \$226.00.
  12. On March 1, 2016, appellant again requested abatement of the late payment penalty, and enclosed payment to FTB of \$665.76.
  13. On March 7, 2016 respondent issued an Earnings Withholding Order for Taxes (EWOT) to appellant's employer, ordering the employer to withhold and pay respondent \$892.29. This amount fails to take into account the \$665.76 payment appellant submitted on March 1, 2016. The true balance due, of approximately \$226.00, was on account of respondent's assessment of the collection cost recovery fee against appellant.
  14. Appellant contacted respondent objecting to the EWOT, claiming he had paid his 2014 tax year account in full.
  15. In response, respondent informed appellant that because he had not paid the amount due by the 30-day deadline set forth in respondent's Final Notice Before Levy and Lien, a collection cost recovery fee of \$226.00 had been imposed, so there was still a balance remaining due and owing of \$226.53.
  16. On May 12, 2016, respondent sent an Account Balance to appellant with a balance due of

\$226.53. On May 21, 2016, respondent sent a second Penalty Waiver denial. Thereafter, appellant remitted payment of \$226.53.

17. On August 18, 2016, respondent notified appellant that it denied his claim for refund.
18. This timely appeal followed.

### DISCUSSION

#### Issue 1 – Is appellant liable for the late payment penalty?

With respect to appellant's claim for refund of a late payment penalty, 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 thereof, calculated on the outstanding balance. (§ 19132(a)(2)(B).) The aggregate amount of the penalty may not exceed 25 percent of the total unpaid tax. (§ 19132(a)(3).) Appellant failed to make payment of the amount shown as due on his return by the April 15, 2015 due date, so, the penalty was properly imposed. The penalty amount appears to have been properly calculated, and appellant has not disputed the amount or the calculation method.

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (§ 19132(a)(1).) Reasonable cause exists if it is shown that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.<sup>2</sup>) When respondent imposes a penalty for the late payment of tax, the law presumes that the penalty was imposed correctly. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) The burden of proof is on the taxpayer to show that the failure to make a timely payment was the result of reasonable cause and not due to willful neglect, and the late payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Scott*, 82-SBE-249, Oct. 14, 1982.)

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<sup>2</sup> Pursuant to the Office of Tax Appeals Rules for Tax Appeals, section 30501(d)(3), precedential opinions of the BOE which 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 as part of a written opinion that the panel issues pursuant to this section. BOE opinions are generally available for viewing on the BOE's website: [www.boe.ca.gov](http://www.boe.ca.gov).

Some examples of circumstances that have been found *not* to constitute reasonable cause for purposes of penalty abatement include: a taxpayer's discovery of reportable income after the original due date (*Appeal of Elixir Industries*, 83-SBE-248, Dec. 14, 1983), a taxpayer's difficulty in obtaining necessary information (*Appeal of Campbell, supra*), the complexity of the tax computations necessary to complete a return (*Appeal of Incom International, Inc.*, 82-SBE-053, Mar. 31, 1982), a taxpayer's difficulty in resolving accounting problems (*Appeal of Cerwin-Vega International*, 78-SBE-070, Aug. 15, 1978), a taxpayer's difficulty in determining or estimating income with exactitude (*Appeal of Sleight, supra*; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979), a taxpayer's unresolved business matters (*Appeal of Bild Industries, Inc.*, 82-SBE-212, Sept. 21, 1982), and the failure of the taxpayer's accountant to properly account for income in a timely manner (*Appeal of Scott, supra*).

Appellant claims his late payment was attributable to reasonable cause and not due to willful neglect. In his letters to the FTB and filings in this appeal, appellant advanced several reasons that he contended amounted to reasonable cause for his late payment: (1) he has a history of good filing and payment; (2) the Internal Revenue Service (IRS) abated the late payment penalty assessed in connection with his federal tax liability for 2014; (3) he had a temporary employment relocation that "require[ed] a further analysis of tax due"; (4) he experienced an unanticipated increase in his 2014 income from a severance payment; (5) he had "several family situations including a death that [he] was dealing with at the time of the tax filings"; and (6) he ultimately made a full payment of tax, interest and penalties.

While appellant's good filing and payment history is commendable, it does not meet the standard for penalty abatement under California law (namely, that reasonable cause and not willful neglect be established). We acknowledge that the IRS has enacted a program called First Time Abate, under which it abates penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the past three years.<sup>3</sup> Apparently, the IRS has abated the late payment penalty it imposed against appellant for the year at issue under this program. However, neither the California Legislature nor the FTB have 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 late payment penalty at

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<sup>3</sup> Internal Revenue Manual Penalty Handbook section 20.1.1.3.6.1.

issue here. Instead, appellant must establish that his failure to timely pay his 2014 taxes was due to reasonable cause and not due to willful neglect.

Appellant has not shown how his other allegations establish reasonable cause for his late payment either. A taxpayer's difficulty in determining or estimating income with exactitude is not sufficient to negate the requirement that taxpayers make payments of tax based upon a reasonably accurate estimate of their tax liability. (*Appeal of Sleight, supra; Appeal of Avco Financial Services, Inc., supra; Appeal of Campbell, supra.*) And while we are sympathetic to appellant's claim that "several family situations including a death" caused him great distress, appellant has not submitted any evidence in support of his allegations nor has he explained how his family "situations" prevented him from accurately estimating and timely paying his tax liability. In this regard, we note that appellant earned a considerable amount of income during the year at issue, yet even when appellant filed his tax return, he still did not pay the full amount of tax shown as due on that return.

Unsupported assertions are not sufficient to overcome the presumption of correctness of the penalty. Appellant has failed to meet his burden of proof to show that the failure to make a timely payment was the result of reasonable cause and not due to willful neglect, and that the late payment occurred despite the exercise of ordinary business care and prudence.

Issue 2 – Has appellant shown the collection cost recovery fee was improper?

Section 19254 provides that the FTB shall impose a collection cost recovery fee if FTB mails a notice to the taxpayer requesting payment of tax, penalty and interest, which has not been timely paid, and that notice advises that continued failure to pay the amount due may result in continued collection action, including the imposition of the collection cost recovery fee. FTB imposed the collection cost recovery fee on February 23, 2016, after the Income Tax Due Notice required payment by January 15, 2016, and the Final Notice Before Levy and Lien containing information regarding the fee and required payment by February 21, 2016. Appellant, however, did not make payment until March 2016. The FTB has no authority to waive or modify this fee and the taxpayer has not shown that the fee was for any reason invalid or improper.<sup>4</sup> Accordingly, we uphold the FTB's imposition of the collection cost recovery fee.

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<sup>4</sup> Appellant does not appear to dispute the amount of the fee either, which is set by the Legislature in the annual Budget Act. (§ 19254(a)(2)(B)(b).)

HOLDING

1. Appellant is liable for the late payment penalty for the 2014 tax year.
2. Appellant has failed to show the imposition of the collection cost recovery fee was improper.

DISPOSITION

For the reasons set forth above, the FTB's action in denying appellant's claim for refund is sustained.

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Sara A. Hosey  
Administrative Law Judge

We concur:

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Teresa A. Stanley  
Administrative Law Judge

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Jeffrey G. Angeja  
Administrative Law Judge