

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	) OTA Case No. 18011118
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<b>KEN DUONG AND</b>	) Date Issued: September 18, 2018
<b>MIMI NGO</b>	)
	)
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**OPINION**

Representing the Parties:

For Appellant:	Ken Duong, Taxpayer Mimi Ngo, Taxpayer
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For Respondent:	Eric R. Brown, Tax Counsel III
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KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Ken Duong and Mimi Ngo (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants’ claim for refund in the amount of \$1,271.25 for the tax year ending December 31, 2015, consisting of a late-filing penalty. This matter is being decided based on the written record because appellants waived their right to an oral hearing.

**ISSUE**

Whether appellants established that the late-filing penalty is inapplicable because they timely filed their state tax return for 2015.

**FACTUAL FINDINGS**

1. Appellants, a married couple, hired a professional tax preparer, Son Nguyen, CPA, to prepare and file their 2015 state and federal tax returns. On September 10, 2016, appellants’ tax preparer attempted to electronically file appellants’ tax returns using Lacerte professional income tax preparation software.

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<sup>1</sup> Unless otherwise indicated, all section references are to the Revenue and Taxation Code.

2. Appellants' tax preparer printed a "2015 e-file Activity Report" using the tax preparation software, and furnished a copy to appellants. The activity report states that appellants' state and federal tax returns had been processed as follows: first, the returns "Passed validation"; second, the returns were "Ready to Send"; third, the returns were "Sent to Lacerte"; fourth, "09/10 Received at Lacerte"; fifth "Sent to California" and "Sent to the IRS," respectively; and finally, the "current status" of appellants' return submission was listed as: "CA – ACCEPTED 09/10/2016" and "US – ACCEPTED 09/10/2016." The activity report also indicates that appellants had a \$5,091 balance due to California.
3. According to FTB's records, on September 15, 2016, FTB accepted and processed a "RETURN PYMT" of \$5,091 from appellant-husband for the 2015 tax year.
4. FTB has no record of either rejecting, or accepting and processing, appellants' joint 2015 state tax return on or around the time of the attempted e-filing, September 10, 2016. Appellants' federal tax return also was either not accepted or not received by the Internal Revenue Service (IRS) at this time.
5. On May 30, 2017, FTB sent appellant-wife a Request for Tax Return, stating that FTB had no record of receiving a 2015 tax return from her. In response, on June 5, 2017, appellants electronically filed a joint tax return for 2015. The return reported a total amount due of \$5,091,<sup>2</sup> which was the amount appellants paid on September 15, 2016, in connection with the attempted e-filing.
6. FTB assessed a \$1,271.25 penalty for the late filing on June 5, 2017,<sup>3</sup> a \$5.63 underpayment of estimated tax penalty, plus accrued interest, which appellants paid in full on June 12, 2017.
7. On July 12, 2017, appellants requested abatement of a federal late-filing penalty imposed by the IRS. By letter dated July 31, 2017, the IRS waived the federal late-filing penalty, based on appellants' good filing history with the IRS. The letter also explains that decisions to remove any future penalties will be based on reasonable cause.

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<sup>2</sup> This amount included a self-assessed underpayment of estimated tax penalty in the amount of \$6.00. FTB later reduced this amount to \$5.63, and applied the \$0.37 difference as a payment towards appellants' 2015 liabilities.

<sup>3</sup> This amount represents 25 percent of the \$5,085 in tax that appellants reported was required to be paid with the return.

8. On August 5, 2017, appellants filed a claim for refund in the amount of \$1,271.25, requesting a refund of the California late-filing penalty on the basis that they timely filed a joint tax return with FTB on September 10, 2016, and that the IRS had already waived the federal late-filing penalty based on their good filing history. In support, appellants attached the July 31, 2017 IRS letter.
9. On September 16, 2017, appellants filed a second claim for refund for the same amount, and based on the same issues as the August 5, 2017 claim for refund. In support, appellants attached a copy of the 2015 e-file Activity Report.
10. By letter dated October 2, 2017, FTB denied appellants' claim for refund on the basis that appellants failed to establish reasonable cause for the late filing.
11. Appellants timely appealed the refund denial on the basis that the 2015 e-file Activity Report constitutes proof of timely filing a joint tax return on September 10, 2016, and alternatively contending that the penalty should be abated because appellants had a good filing history with FTB. In support, appellants included a copy of the 2015 e-file Activity Report.
12. By opening brief dated March 21, 2018, FTB contends that the activity report does not establish timely filing because it was not issued by FTB. FTB also contends that it is FTB's policy to send an acknowledgement when a tax return is either accepted or rejected, along with an explanation for any rejection, and appellants' failure to follow up and obtain such a written confirmation from FTB is not the conduct of an ordinarily intelligent and prudent business person.<sup>4</sup>

### DISCUSSION

Section 19131 imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not willful neglect.

(§ 19131(a).) The amount of the late-filing penalty is five percent of the tax due, after allowing for timely payments, for every month or fraction of a month that the return is late, up to a maximum penalty of 25 percent. (§ 19131(a).)

A personal income tax return is due on or before the 15<sup>th</sup> day of the fourth month following the close of the tax year. (§ 18566(a).) FTB provides for an automatic six-month

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<sup>4</sup> The instructions to FTB Forms 8453 and 8879, California e-file Return Authorization for Individuals, for tax year 2015, state that the acknowledgement containing the date of acceptance for the return is the proof of filing.

extension of time to file; however, an extension is not allowed if a return is not filed within the extension period. (§ 18567(a)(1); Cal. Code Regs., tit. 18, § 18567(a).) With respect to payments, the due date for payments is determined without regard to any extension of time to file the return. (§ 19001.)

Section 21027 provides that IRS regulations promulgated “under the authority of Section 7502(c)(2) of the Internal Revenue Code [(IRC)] (relating to prima facie evidence of delivery and postmark date for electronic filing) shall be applicable for prima facie evidence of delivery and the postmark date for purposes of” income tax returns filed with FTB. (§ 21027(b).) Treasury Regulation section 301.7502-1(d) interprets and implements IRC section 7502(c)(2), and provides that a tax return filed electronically with an authorized electronic return transmitter is deemed filed on the date of the electronic postmark, even if it is not received until after the due date for the return. An electronic postmark means a record of the date and time, in the taxpayer’s particular time zone, that an authorized electronic return transmitter receives the transmission of a taxpayer’s electronically filed return on its host system. (Treas. Reg. § 301.7502-1(d)(1)(ii).) The IRS may prescribe the circumstances under which an electronic return transmitter is authorized to provide taxpayers with an electronic postmark. (Treas. Reg. § 301.7502-1(d)(2).) Under the specific circumstances prescribed by the IRS, when a return is rejected, an electronic postmark is not sufficient to establish that a return was deemed filed on the electronic postmark date unless the taxpayer files a corrected return in accordance with the rules for timely filing a corrected return after rejection of an electronic return.<sup>5</sup>

Here, appellants do not dispute the calculation of the late-filing penalty.<sup>6</sup> Instead, appellants contend that Lacerte’s “2015 e-file Activity Report” proves that they timely filed a 2015 tax return. We understand appellants to be arguing that the activity report constitutes an electronic postmark and, as such, their return is deemed to be timely filed on September 10, 2016. Appellants’ activity report, however, does not contain all of the technical requirements to constitute an “electronic postmark” because it does not specify either the time, or the particular

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<sup>5</sup> See IRS Publication 1345 (<https://www.irs.gov/pub/irs-pdf/p1345.pdf>); see also <https://www.irs.gov/e-file-providers/electronic-postmark>.

<sup>6</sup> If we find that the return was not filed on September 10, 2016, then this penalty was correctly calculated by applying the maximum rate of 25 percent (for returns filed five or more months late), because appellants did not file a return until June 5, 2017, approximately 14 months after the due date.

time zone, when the return was received by Lacerte's host system. (§ 21027(b);  
Treas. Reg. § 301.7502-1(d)(1)(ii).)

Nevertheless, if reliable, the Lacerte e-file activity report may still be relevant as evidence of whether or not appellants received an electronic postmark and, if so, the date of the postmark. The activity report states that appellants' return was "received at Lacerte" on September 10, 2016. FTB does not dispute that Lacerte was an electronic return transmitter or that Lacerte was authorized to electronically transmit appellants' 2015 tax return to FTB. FTB also does not dispute the authenticity of this report and, to the contrary, FTB concedes that this document came "from the software company utilized by [appellants'] preparer." This indicates to us that the activity report is reliable as evidence that Lacerte received appellants' tax return on September 10, 2016.

Additionally, appellants' actions are also consistent with their claim and their belief that Lacerte received their return on September 10, 2016, which further indicates to us that the activity report is reliable in this regard. For example, appellants promptly paid the \$5,091 reflected on the activity report to FTB on September 15, 2016, five days after the purported e-filing. Furthermore, when FTB first contacted appellants regarding the alleged non-filing on May 30, 2017, appellants promptly, within a week, electronically filed a joint return on June 5, 2017, which also reported a balance due of \$5,091. Therefore, we find that Lacerte received appellants' 2015 tax return on the date printed on Lacerte's activity report: September 10, 2016.

While the report also indicates that Lacerte electronically transmitted the return to FTB, and that FTB "accepted" the return, FTB contends that it has no record of receiving appellants' tax return. We do not find it necessary to resolve this dispute. As an authorized electronic return transmitter, Lacerte would have issued an electronic postmark to appellants at the time it received appellants' return. Therefore, it is reasonable to infer, in the absence of evidence to the contrary, that Lacerte generated an electronic postmark upon receipt of appellants' return on September 10, 2016.

Next, there is no indication on the activity report that FTB rejected appellants' return, which would be a basis for disregarding an electronic postmark. FTB also offers no documentary evidence to indicate that FTB notified appellants that it had rejected the return, or otherwise contacted appellants regarding the alleged non-filing until May 30, 2017. Therefore,

based on the available evidence, we would have no reason to disregard an electronic postmark date.

Based on the foregoing, we find that, more likely than not,<sup>7</sup> Lacerte separately generated an electronic postmark for appellants' 2015 tax filing at the time their return was "received at Lacerte" and that appellants' 2015 state tax return is deemed to have been timely filed on September 10, 2016.<sup>8</sup> In summary, our finding is based on the following evidence: the activity report stating that the return was "received" at Lacerte on September 10, 2016; our finding that appellants actions indicate both they and the activity report are credible; FTB's admission that the activity report is authentic; and FTB's failure to provide evidence indicating that FTB notified either appellants or their preparer that it had rejected the return.<sup>9</sup>

HOLDING

Appellants established that their 2015 tax return was deemed to be timely filed with FTB.

DISPOSITION

FTB's action in denying appellants' claim for refund is reversed. Appellants' claim for refund is granted in the amount of the late-filing penalty paid by appellants plus applicable interest.

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Andrew J. Kwee  
Administrative Law Judge

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<sup>7</sup> As relevant, the burden of proof is on appellants, and requires proof by a preponderance of the evidence. (See Cal. Code of Regs., tit. 18, § 30705.)

<sup>8</sup> Based on our finding that Lacerte generated an electronic postmark on September 10, 2016, separate and independent of the activity report, we do not address the issue of whether a document, such as the activity report, containing substantially all of the elements of an electronic postmark, might itself constitute an electronic postmark for California tax purposes.

<sup>9</sup> Based on our finding that appellants timely filed the 2015 tax return, we do not address whether appellants established reasonable cause and lack of willful neglect as a basis for abatement of the late-filing penalty.

We concur:

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Nguyen Dang  
Administrative Law Judge

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*Daniel Cho*  
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Daniel K. Cho  
Administrative Law Judge