

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ANTHONY W. ROBERTS))))))	OTA Case No. 18011748 Date Issued: August 30, 2018
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OPINION

Representing the Parties:

For Appellant:	Anthony W. Roberts
For Respondent:	Michael R. Laisne, Tax Counsel

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Anthony W. Roberts (appellant) appeals an action by the Franchise Tax Board (FTB) denying appellant’s claim for refund of a late-filing penalty in the amount of \$133 for the 2014 tax year.

Appellant waived his right to an oral hearing. Therefore, we decide the matter based on the written record.

ISSUE

Whether appellant is liable for the late-filing penalty.

FACTUAL FINDINGS

1. FTB received information from an insurance company and others indicating appellant received California income in amounts that would have required him to file a personal income tax return for the 2014 tax year, but FTB had no record that appellant had filed a 2014 return.
2. On February 2, 2016, FTB sent appellant a “Request for Tax Return,” which informed appellant about the income information that FTB received and instructed appellant to

¹ Unless otherwise indicated, all statutory (“section” or “§”) references are to the Revenue and Taxation Code.

respond by March 9, 2016, by filing his 2014 income tax return, providing evidence that he had filed that return, or showing that he was not required to file a 2014 return.

Appellant did not respond.

3. FTB sent appellant a Notice of Proposed Assessment (NPA) dated April 4, 2016. The NPA informed appellant that, based on income reported by third parties, FTB proposed to assess additional tax of \$455, a late-filing penalty of \$135, and applicable interest. The NPA also informed appellant that the amount was due on June 3, 2016, unless he filed a timely protest.
4. Appellant filed a 2014 California Nonresident or Part-Year Resident Income Tax Return (Long Form 540NR) dated May 16, 2016. In that return, he states he was a resident of Florida from January 1, 2014, through August 31, 2014, and a resident of California from September 1, 2014, through December 31, 2014. The return reports only \$133 tax due, from an early distribution from a Roth individual retirement account.
5. On August 18, 2016, FTB sent appellant a “Notice of Tax Return Change,” which indicated FTB accepted the return and appellant owed \$133 tax, a \$133 late-filing penalty, and applicable interest.
6. Appellant paid the amount due on February 24, 2017, and filed a timely claim for refund dated August 28, 2017. The claim states that appellant timely filed his return and paid his taxes due, and it asks FTB to refund the \$133 penalty for reasonable cause.
7. The Internal Revenue Service (IRS) transcript of appellant’s federal income tax account states the IRS received appellant’s 2014 federal income tax return on May 19, 2016.
8. FTB denied appellant’s claim for refund by notice dated September 29, 2017. Appellant filed this timely appeal.

DISCUSSION

With certain limitations not relevant here, section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file a return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. FTB may grant a taxpayer up to six more months to file a tax return (§18567(a)), and the corresponding regulation (Cal. Code Regs., tit. 18, § 18567) provides for an automatic six-month extension without a written request. However, if a taxpayer does not file his or her return within six months of the original due date, in this case by October 15, 2015, no valid extension exists and

the late-filing penalty amount is computed by reference to the original due date of the return. (*Ibid.*) If an individual or a fiduciary does not file a return within 60 days of the extended due date, in this case by December 14, 2015, the penalty may not be less than the lesser of \$135 or the amount of tax due. (§19131(b).)

The FTB's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Whether appellant timely mailed his return and payment and, if he did not, whether his failure to do so was due to reasonable cause and not to his willful neglect, are questions of fact on which appellant has the burden of proof. (*Appeal of La Salle Hotel Company*, 66-SBE-071, Nov. 23, 1966.) 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.)

Here, appellant states he mailed his return and check for the tax due before the due date, and that his tax accountant can confirm this. He argues that FTB lost his return and payment, and that FTB should not penalize him for FTB's error. FTB states it did not receive a 2014 return from appellant until May 2016. It argues there is no credible evidence to support appellant's argument that he timely filed his return and paid the tax.

There is no persuasive evidence before us to show that FTB received a 2014 return from appellant until it received the copy in May 2016. FTB states it did not receive the 2014 return prior to May 2016, and the undisputed evidence shows that appellant did not file his 2014 federal return until May 2016. Internal Revenue Code (IRC) section 7502 and Treasury Regulation section 301.7502-1 provide that, aside from proof of actual timely delivery, which we do not have here, a taxpayer can use a postmarked envelope or a postmarked registered or certified mailing receipt to prove the date a document was filed with the Internal Revenue Service. Section 21027 provides that Treasury Regulation section 301.7502-1 is also applicable to filings with FTB.² Some courts have strictly applied that law to limit the evidence to a postmarked envelope or a postmarked registered or certified mailing receipt. (See, e.g., *Weisman v. IRS* (S.D.N.Y. 1997) 972 F.Supp. 185, 188 -189.) However, our Ninth Circuit Court of Appeal has held that IRC section 7502 does not bar admission of other evidence. (*Anderson v. U.S.* (9th Cir. 1992) 966 F.2d 487, 491-492.) We take the less restrictive view of the type of evidence required

² Section 21027 also allows for delivery using a "designated delivery service."

to establish timely mailing of a return or payment. Nevertheless, where the only proof of timely mailing is the taxpayer's statement that the return or payment was timely mailed, and the taxing authority's records indicate no such return or payment was received, the evidence is insufficient.³ Accordingly, we find that appellant did not timely file his return or pay the taxes due.

Although appellant has not argued that his failure to timely file was due to reasonable cause and not due to his willful neglect, out of an abundance of caution, we will address that issue. To establish reasonable cause, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Appellant has not given us any evidence to explain why he failed to timely mail his return and check. Appellant also has not explained why it took three months to respond to FTB's February 2, 2016 request, and why he did not mention a timely return and payment when he first responded to the FTB's inquiry by providing the return dated May 16, 2016. Based on the evidence, we find that appellant has not shown that this late filing was due to reasonable cause and not due to his willful neglect. Consequently, FTB correctly imposed a penalty equal to the amount of tax owed.

We note that appellant states in his claim for refund that he is disabled, lives on "Social Security Disability," and "cannot afford this extra bill."⁴ These matters are beyond the scope of this appeal.

HOLDING

Appellant did not timely file his 2014 return, and he has failed to prove that this failure was due to reasonable cause and not due to his willful neglect. Consequently, appellant is liable for the late-filing penalty.

³ We give no weight to appellant's statement that an unidentified accountant confirmed (to him) that appellant timely mailed the return and check. Statements by a party about what a witness would say are inherently unreliable. Appellant has the burden of proof on the issue, and he should have at least provided an affidavit or sworn declaration from the accountant describing exactly what the accountant observed.

⁴ To be clear, appellant does not assert that his disability prevented him from filing his return on time.

DISPOSITION

We sustain FTB's denial of appellant's claim for refund of the late-filing penalty.

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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:

484A85964FFD4CE ...
John O. Johnson
Administrative Law Judge

DocuSigned by:

FD75A3138CB94C2 ...
Kenneth Gast
Administrative Law Judge