

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of: SHIZUE ENDO <hr style="width: 40%; margin-left: 0;"/>))))))	OTA Case No. 18010824 Date Issued: November 29, 2018
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OPINION

Representing the Parties:

For Appellant:	Shizue Endo, Taxpayer
For Respondent:	Anne Mazur, Specialist

NEIL ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Shizue Endo (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant’s claim for refund of \$1,360.50 for the 2015 tax year.

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

ISSUE

Should the late payment penalty imposed against appellant for tax year 2015 be abated on the ground of reasonable cause?

FACTUAL FINDINGS

1. Appellant timely filed her 2015 return on April 11, 2016.
2. Appellant’s 2015 return reported a total amount due of \$19,087.²
3. Appellant paid \$10,000 towards the amount due on August 3, 2016, and monthly installments thereafter through March of 2017.

¹ Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

² Appellant’s return reported tax of \$18,730 plus an underpayment of estimated tax penalty of \$357 for a total amount due of \$19,087.

4. On March 28, 2017, appellant filed an amended return reporting a reduced taxable income and a reduced tax liability of \$17,890.³
5. After processing appellant's original and amended returns, FTB imposed a late payment penalty of \$1,360.58.
6. Appellant's payments exceeded the balance due and FTB refunded the excess.
7. Appellant filed a Reasonable Cause – Individual and Fiduciary Claim for Refund (FTB 2917) of \$1,542.65.⁴ Appellant alleges that she was ill and unemployed during 2015 and was unable to pay her mortgage and other bills. She withdrew \$180,000 from her 401K account so that she could pay her bills and to purchase a house for her son who had been evicted from his rented residence after he became unemployed. However, appellant did not have taxes withheld from her 401K distribution. Appellant was “shocked” by the size of her federal and state tax liabilities for 2015, which she failed to pay timely. Appellant states, “It was not my intention to pay my tax late. I simply couldn't pay by April 15, 2016.” Appellant alleges that she used up her savings and cashed out her stocks in order to pay off her tax liabilities “as quickly as possible.”

DISCUSSION

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Board* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley*, 82-SBE-154, July 26, 1982.) California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”⁵

³ Appellant's taxable income was reduced in the amended return because the initial return neglected to claim Schedule E depreciation expense for appellant's rental properties. FTB accepted the amended return and bases the late payment penalty on the tax owed as shown on the amended return.

⁴ The claim for refund inexplicably requests a refund for an amount in excess of the late payment penalty imposed by FTB. In her appeal letter, however, appellant only seeks a refund of the \$1,360.58 late payment penalty plus interest thereon. That is the amount at issue.

⁵ A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

In accordance with Section 19132, unless it is shown the failure is due to reasonable cause and not due to willful neglect,⁶ a late payment penalty will be imposed. The penalty is computed and imposed at the rate of five percent of the unpaid amount plus 0.5 percent of the unpaid amount for each additional month or fraction of a month the payment is late, up to 40 months. The burden of proof is on the taxpayer to show that reasonable cause exists to support the abatement of the late payment penalty. To establish reasonable cause, a taxpayer must show that the reason for failing to timely pay occurred despite the exercise of ordinary business care and prudence. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

“A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship . . . if he paid on the due date.” (Treas. Reg. § 301.6651-1(c)(1).) “Undue hardship” is defined by Treasury Regulation section 1.6161-1(b) which provides as follows:

The term ‘undue hardship’ means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension [paying tax after the due date] is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

The fact that a taxpayer’s assets are held in speculative or illiquid form and cannot readily be converted into cash generally will not excuse a taxpayer’s late payment of tax. However, reasonable cause may be established when a taxpayer shows he or she “made reasonable efforts to conserve sufficient assets in marketable form to satisfy tax liability” but was nonetheless unable to pay all or a portion of the tax when due. (Treas. Reg. § 301.6651-1(c)(1).)⁷

⁶ The FTB does not contend that appellant’s late payment was attributable to willful neglect. Accordingly, this opinion is limited to whether appellant has shown reasonable cause for failing to pay tax timely.

⁷ Section 19132 is modeled after the federal equivalent (the failure to pay penalty, imposed pursuant to Internal Revenue Code (IRC) section 6651(a)(1).) When a statute is patterned after federal legislation on the same subject, the interpretation given the federal statute by the courts and administrative bodies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Board* (1969) 275 Cal.App.2d 653, 658, *Rihn v. Franchise Tax Board* (1955) 131 Cal.App.2d 356, 360.)

Appellant alleges that she was unable to pay her 2015 tax when due. While unemployed with a serious illness, appellant was compelled to withdraw funds from her 401k account in the amount of \$180,000 to pay her mortgage and other unidentified bills. She also purchased a house for her son who had been evicted from his apartment after losing his job. Appellant's \$180,000 withdrawal from her 401k account generated most of her California adjusted gross income of \$219,495. Despite this, there is no evidence that appellant made any effort to conserve funds for the payment of tax. She did not have taxes withheld from the withdrawal. Furthermore, although appellant admits that she was able to pay her federal and state tax liabilities by early 2017 by closing out her savings accounts and selling her stocks, she failed to show that she could not have taken those actions earlier, so as to allow her to timely pay her taxes. Objectively, there is no evidence in this record showing that the appellant's choices to expend funds for the payment of debt and housing for her son are choices a prudent business person similarly situated would make rather than paying tax when due.

Finally, regarding appellant's reference to her history of compliance, we note that the Internal Revenue Service (IRS) 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 of a late payment penalty only on a showing of reasonable cause.

Although appellant's reasons for paying other debts rather than timely paying her taxes are understandable, they do not meet the requirements for reasonable cause such that the late-filing penalty may be abated.

HOLDING

Appellant failed to show that she is entitled to abatement of the late payment penalty.

DISPOSITION

We sustain FTB's denial of appellant's claim for refund.

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Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

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Michael F. Geary
Administrative Law Judge

DocuSigned by:

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Nguyen Dang
Administrative Law Judge