

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of: CHARLES G. GOLDING AND GWENDALYN S. GOLDING <hr style="width: 100%;"/>))))))	OTA Case No. 18032366 Date Issued: December 21, 2018
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OPINION

Representing the Parties:

For Appellant:	Donald M. Stacy, Enrolled Agent
For Respondent:	David Kowalczyk, Tax Counsel

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Charles and Gwendalyn Golding (appellants) appeal an action by the Franchise Tax Board (FTB) denying appellants’ claim for refund of \$956.75 for the 2015 tax year.

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

ISSUE

Whether appellants are liable for the \$956.75 late-filing penalty for the 2015 tax year.

FACTUAL FINDINGS

1. Appellants’ representative, also their tax preparer used a third-party software to electronically file his clients’ documents with the Internal Revenue Service (IRS) and FTB. He attempted to file appellants’ 2015 federal and California income tax returns electronically before the due dates, but he was unsuccessful. The IRS and FTB rejected the returns,² and the tax preparer’s software promptly reported the rejection via a software error message.

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

² According to FTB, the returns were rejected because of a problem with the signature date.

2. By “Request for Tax Return” (Request) dated May 9, 2017, FTB informed appellants that it had no record of receipt of their 2015 return. The Request asked appellants to file their 2015 return, provide evidence that they had already filed it, or show that they were not required to file one. Appellants were not aware of the rejection of the 2015 returns until they received the Request.
3. On May 22, 2017, appellants’ tax preparer again attempted to electronically file their 2015 federal and California returns. This attempt was successful, and the IRS and FTB promptly acknowledged acceptance of the returns via a software message. By letter to FTB dated May 22, 2017, Appellants’ tax preparer confirmed he had just filed the 2015 income tax returns, which the IRS and FTB had accepted, and asked FTB to “abate late-filing penalties.”
4. By “Notice of Tax Return Change – Revised Balance” dated May 30, 2017, FTB informed appellants that there was an additional balance due, consisting of the \$956.75 late-filing penalty, a \$73.27 estimated tax penalty, and interest.
5. By letter dated June 5, 2017, appellants requested abatement of the late-filing penalty on the ground that appellants had a history of timely filing.³
6. FTB records show appellants’ 2015 tax liability of \$3,827 as of April 15, 2016, a \$3,900 “return payment” on October 15, 2016, and a September 15, 2017 payment of the balance due.⁴
7. Given appellant’s payment of the balance due, FTB treated the continuing protest as a claim for refund, and by letter dated October 18, 2017, FTB denied the claim. This timely appeal followed.

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

³ Although the letter does not specifically refer to the late-filing penalty, it appears from the context that this is the penalty appellants want FTB to abate.

⁴ There is a \$2.10 difference between the debit and credit columns and a redacted entry, but the amount is not material here.

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.*)

Whether a taxpayer timely mailed a return and payment and, if not, whether the failure to do so was due to reasonable cause and not to 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.)

Appellants argue that they believed their return was filed before the due date and that they did not discover otherwise until they received the May 9, 2017 notice from FTB. They contend that they have an excellent history of filing timely, as FTB has acknowledged, and that they timely paid their taxes by the automatic extension date. Finally, appellants assert that imposition of the late-filing penalty under these circumstances will serve no tax purpose.⁵

FTB contends that appellant's return was rejected by FTB's electronic filing system on April 10, 2016 and October 9, 2016, and that appellants were so informed. Citing FTB Publication 1345, FTB argues that it was the responsibility of appellants' e-filer to confirm acceptance of the return.⁶ FTB further argues that it correctly calculated and imposed the late-filing penalty, and that appellants have not established that their failure to file timely was due to reasonable cause and not willful neglect. Finally, FTB notes that, unlike the IRS, FTB does not have an automatic first-time abatement program that would allow FTB to excuse the late-filing based on appellants' history of timely filing their returns.⁷

⁵ Appellants do not argue that FTB improperly rejected the returns, and the circumstances indicate that their representative corrected whatever defect existed.

⁶ Section 4 of Publication 1345 includes the following language: "Returns acknowledged as 'rejected' are considered not filed. You must correct the errors and retransmit the return in order to complete the filing of the return. For help with rejected returns, contact your Transmitter or our e-Programs Customer Service for assistance. Your clients should not contact e-Programs Customer Service directly. If you are unable to resolve the errors and resubmit the return, you must take reasonable steps to notify the taxpayer with an explanation of the rejection within 24 hours. The taxpayer can choose to have the electronic portion of the return corrected and resubmitted, or can file a paper return."

⁷ FTB notes that appellants' IRS transcript shows that the IRS also imposed a late-filing penalty, which had not been abated as of the date of the transcript (March 8, 2018).

In this case, it is undisputed that appellants did not timely file their 2015 tax return. The evidence shows that appellants' 2015 return, which their representative attempted to file by October 15, 2016, was rejected by FTB and not filed. There is no evidence that FTB incorrectly calculated the late-filing penalty or improperly imposed it against them, and appellants do not allege otherwise. Since California law does not allow first-time abatement of penalties based on a taxpayer's good filing history, the only question is whether the evidence shows that appellants failure to file timely was due to reasonable cause and not willful neglect.⁸

The evidence does not show that the late filing was due to reasonable cause and not willful neglect. It is well settled that the duty to file a timely return is a nondelegable duty of the individual taxpayer, who cannot be relieved from that duty because of the mistake or negligence of a hired agent. (*United States v. Boyle* (1985) 469 U.S. 241, 252.) Relying on an agent to file the return on time is not considered reasonable cause for purposes of penalty abatement because taxpayers have a personal, non-delegable obligation to file their tax in a timely manner. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985.) In this case, FTB notified appellants' representative regarding the rejection of the defective return by a promptly delivered electronic message. While the representative states he was not aware of the rejection until after October 15, 2016, he does not deny that FTB sent an electronic notice of the rejection, and a summary of the electronic transactions undertaken on appellants' behalf shows notices of the status of the various filings, which notices were delivered electronically on the same day as the filings. Thus, if appellants' representative was not aware of the rejections of appellants' tax return, it was because he did not read the messages or otherwise follow-up to confirm acceptance of the return before the due date. That was willful neglect, which is attributable to appellants, who have a nondelegable duty to file their returns and pay their taxes when due. (*Ibid.*)

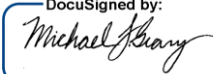
HOLDING

Having failed to show that the late filing of their 2015 California tax return was due to reasonable cause and not willful neglect, appellants are liable for the \$956.75 late-filing penalty for the 2015 tax year.

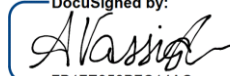
⁸The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See, for example, Assembly Bill No. 1777 (2013-2014 Reg. Sess.))

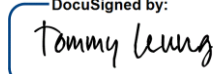
DISPOSITION

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

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Michael F. Geary
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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Tommy Leung
Administrative Law Judge