

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ZACHARY KLEIN AND COURTNEY KLEIN <hr style="width: 100%;"/>))))))	OTA Case No. 18032474 Date Issued: January 22, 2019
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OPINION

Representing the Parties:

For Appellants:	David V. Miller
For Respondent:	Eric Yadao, Tax Counsel

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Zachary and Courtney Klein (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) denying appellants’ claim for refund of \$9,163.73 for the 2015 tax year.

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

ISSUE

Have appellants established reasonable cause and lack of willful neglect for the late payment of tax for tax year 2015?

FACTUAL FINDINGS

1. Appellants filed their tax year 2015 return on July 5, 2016, reporting a total tax of \$182,221, income tax withheld of \$8,820, timely payments of \$154,337, and a tax due of \$19,064. Appellants also self-assessed an amount of \$1,364 on line 112 of that return for interest and/or penalties and paid the resulting balance of \$20,428 on July 15, 2016.

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

2. On July 25, 2016, FTB issued a Notice of Tax Return Change imposing a late payment penalty² since, according to respondent's records, appellants had only made timely payments of \$21,157.³
3. On September 8, 2016, FTB issued an Income Tax Due Notice advising appellants to pay a balance due of \$9,161.47 no later than September 23, 2016, in order to avoid collection action.
4. Appellants and respondent communicated by telephone three separate times on September 22, 2016. Appellant-husband initially called to question the imposition of the late payment penalty as he claimed he made a payment in April of 2016. Respondent advised appellant-husband that the payment was not received until June 7, 2016. Appellant-husband claimed that the penalty was incorrect because appellants had mailed payment in April 2016 and FTB returned the check because they had omitted a word on the check.⁴ Appellant-husband also claimed that FTB assured them in a letter that no penalty would apply if they resubmitted payment.⁵
5. On October 14, 2016, FTB issued a Final Notice Before Levy or Lien advising appellants to pay the balance of \$9,163.73 no later than October 29, 2016, and in the absence of payment, FTB would pursue collection action including imposing a collection cost recovery fee.
6. Appellants replied by letter dated November 1, 2016, requesting abatement of the penalty based on reasonable cause, stating essentially the same position as reflected in the September 22, 2016 telephone conversations. FTB did not reply to this abatement request.
7. In December 2016, respondent issued subsequent notices to collect the balance due.

² The penalty amount at issue is \$9,163.73. It appears that appellants have not contested a \$200 collection cost recovery fee, or the amount of interest assessed. Further, it appears that appellants conceded the portion of the late payment penalty and interest attributable to their acknowledged late payment amount of \$19,064.

³ The timely payments consist of the withholding of \$8,820, a payment transfer from the 2014 tax year in the amount of \$8,837, and an estimated tax payment of \$3,500 on June 25, 2015.

⁴ According to appellants, the original check wording was one hundred forty-two dollars, but should have been one hundred forty-two *thousand* dollars. Appellants state that they do not have a copy of the allegedly returned check.

⁵ Appellants state that they do not have a copy of the alleged letter. Thus, neither the check nor FTB's letter in question was submitted.

8. Appellants made payment of \$9,163.73 on January 10, 2017.
9. A subsequent letter request for abatement along with Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, was filed with respondent on June 29, 2017, that incorporated appellants’ prior positions.
10. Respondent denied appellants’ claim by letter dated August 3, 2017.
11. This timely appeal was filed on November 1, 2017.

DISCUSSION

Section 19001 provides that the personal income tax “shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).” 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 of a month (not to exceed 40 months), calculated on the outstanding balance. (§ 19132(a)(2)(B).) Here, there is no dispute that the actual payment of \$142,000 in tax for 2015 was late nor that the penalty on the delinquent tax was properly computed.

The late payment penalty will be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect.⁶ (§ 19132(a).)

To establish reasonable cause for the late payment of tax, taxpayers must show that their failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.) The taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Robert T. and M.R. Curry*, *supra*.) A failure to pay will be considered due to reasonable cause if the taxpayers make a satisfactory showing that they exercised ordinary business care and prudence in providing for the payment of their tax liability and were nevertheless either unable to pay the tax or would suffer undue hardship if they paid on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Commissioner*, T.C. Memo. 2011-283.)

⁶Thus, in order to provide grounds for abating the penalty, the taxpayer must show both the existence of reasonable cause and the absence of willful neglect. As we find that appellants have not demonstrated the existence of reasonable cause, we do not address whether appellants have shown a lack of willful neglect.

The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.)

In support of their reasonable cause position, appellants have provided unsubstantiated assertions that they attempted to make a timely payment on April 10, 2016, but that their check accidentally contained a mistake in that the written words were one hundred forty-two dollars, rather than one hundred forty-two *thousand* dollars, while the dollar amount was correctly entered as \$142,000. Appellants further allege that FTB returned the check and, by written correspondence, assured appellants that no penalty would be assessed if prompt payment was made. A copy of this alleged correspondence is not in the record.

Respondent argues that appellants have failed to meet their burden of proof that reasonable cause exists for the late payment. FTB argues that appellants have provided no documentation to support their position, and that respondent has no documentation of such events in its records. Respondent also argues that “a reasonably prudent business person would have retained a copy of the correspondence regarding such an irregularity.” FTB further notes that returning a check with different written words and numbers is inconsistent with its check cashing policies. Pursuant to those policies, FTB would have submitted the check to appellants’ bank for payment in the amount of the written words, \$142, and not returned the check to appellants.

The issue before this panel is whether appellants had reasonable cause for the late payment of the relevant portion of their tax liability. Appellants have not substantiated their allegations of a returned check nor FTB’s alleged waiver of penalties.⁷ We find it unlikely such records would not be retained. Also, as noted above, FTB states it has no record of a returned check or any correspondence in which it agreed to waive penalties. Thus, we find that appellants did not timely pay their 2015 tax liability. Further, even if appellants substantiated an attempt to make a timely payment, appellants’ alleged error in incorrectly writing a check, and not checking their bank account balance to ensure receipt by FTB, would not demonstrate ordinary business care and prudence. Instead, such an error would show the underpayment was the result of an oversight and a lack of due diligence by appellants. As noted previously, the failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute

⁷ Because we find that appellants have failed to adequately substantiate their allegation that FTB assured them, in writing, that no penalties would be assessed if a corrected check was promptly submitted, we do not rule on the potential impact, if any, such correspondence would have had in this matter.

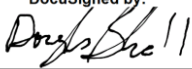
reasonable cause. (*Appeal of J. Ray Risser, supra.*) As stated in *Appeal of J. Ray Risser*, “While we sympathize with appellant[s]’ unintentional error, these facts do not form a basis for granting relief from the penalt[y].”

HOLDING

Appellants have not established that their failure to make a timely payment of tax for the 2015 tax year was due to reasonable cause and not willful neglect.


DISPOSITION

Respondent’s action in denying appellants’ refund for the 2015 tax year is sustained.

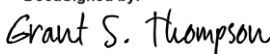
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Douglas Bramhall
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Grant S. Thompson
Administrative Law Judge