

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  <b>RICARDO HOFER AND</b>  <b>MARCIA L. HOFER</b> <hr style="width: 100%;"/>	) ) ) ) ) )	OTA Case No. 18032521  Date Issued: December 26, 2018
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**OPINION**

Representing the Parties:

For Appellant: Ricardo and Marcia Hofer

For Respondent: Jean M. Cramer, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Ricardo Hofer and Marcia L. Hofer (appellants) appeal an action by Franchise Tax Board (FTB or respondent) denying appellant’s claim for refund of \$534.86 for the 2016 taxable year.

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

**ISSUE**

Are appellants entitled to a refund of the late-payment penalty for taxable year 2016?

**FACTUAL FINDINGS**

1. Appellants filed a timely 2016 California Resident Income Tax Return (Form 540). On the form appellants reported \$10,911 total tax and \$2,000 of estimated tax or other payments. The tax balance owed totaled \$8,911. However, instead of paying that amount to FTB, appellants inadvertently requested a refund of \$8,911, by entering that amount, with their checking account information, in the “Refund and Direct Deposit” portion of their tax return.

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<sup>1</sup> Unless otherwise indicated, all “section” or “§” references are to sections of the California Revenue and Taxation Code.

2. On June 7, 2017, respondent issued a Notice of State Income Tax Due, adding a late-payment penalty of \$534.86 and interest.
3. Appellants paid the total amount due of \$9,500.36, which included the late-payment penalty, on June 15, 2017.
4. Appellants requested a refund of the late-payment penalty, by letter dated June 19, 2017. Appellants claimed that they inadvertently entered bank account information on the refund line, instead of making a payment.
5. On October 23, 2017, respondent denied appellants' claim for refund.
6. Appellants timely filed this appeal.

### 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 penalty was properly computed. There is no dispute that the tax liability of \$8,911 was paid late.

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. (§ 19132(a).) Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)<sup>2</sup> The taxpayer bears the burden of proving that reasonable cause existed. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.)

Appellants assert that the late payment was an inadvertent error; they put their bank account information on the refund line on the Form 540 instead of providing that same information in order to make a payment. Although we believe appellants made an honest

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<sup>2</sup> Published decisions of the Board of Equalization, designated by "SBE" in the citation, are available on that Board's website at: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

mistake, such a mistake does not constitute reasonable cause to abate the late-payment penalty. (See, e.g., *Appeal of Bryant*, 83-SBE-180, Aug. 17, 1983 [mistaken beliefs concerning tax obligations, even if held in good faith, do not constitute reasonable cause].)

Furthermore, a reasonably prudent taxpayer would have reviewed a tax return before filing it to make sure the proper amount of tax would be timely paid. Here, appellants indicated on their return that tax was due, but inadvertently placed the amount they should have paid on the line of the form that authorizes a direct deposit of a refund into appellants' checking account. A quick perusal of the Form 540 would have called the error to appellants' attention. A reasonably prudent person would have cross-checked a tax return to make sure that information was reported in the correct way, and that a payment was made. Moreover, an ordinarily prudent person would have realized the error by reviewing bank records that would have shown no withdrawal from their checking account for payment of the tax due. Appellants did not act as reasonably prudent persons. Therefore, the late-payment penalty was properly imposed, and appellants have failed to establish reasonable cause to abate it.

Appellants note that they have a decades-long history of paying their tax on time. While the Internal Revenue Service has an administrative program called "First Time Abate" in which it abates timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program.<sup>3</sup> We commend appellants for their previous diligence in filing and paying on time; however, under California law the late-payment penalty may only be abated if the failure to pay on time was due to reasonable cause.

#### HOLDING

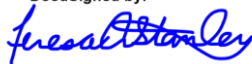
Appellants have not established reasonable cause to abate the late-payment penalty.

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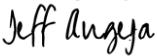
<sup>3</sup> The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

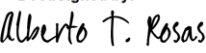
DISPOSITION

Respondent's denial of appellants' claim for refund is sustained.

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Teresa A. Stanley  
Administrative Law Judge

We concur:

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Jeffrey G. Angeja  
Administrative Law Judge

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Alberto T. Rosas  
Administrative Law Judge