

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18042650
)
JIANING HU AND NI ZHU) Date Issued: February 5, 2019
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_____)

OPINION

Representing the Parties:

For Appellants: William T. Melton, Jr., CPA

For Franchise Tax Board (FTB): Eric R. Brown, Tax Counsel III

G. THOMPSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ appellants Jianing Hu and Ni Zhu (appellants) appeal an action by FTB denying their claim for refund in the amount of \$14,655 for the 2016 tax year.

At appellants’ request, we are deciding this appeal based on the written record and without an oral hearing.

ISSUE

Have appellants shown that the late payment penalty should be abated?

FACTUAL FINDINGS

1. On January 12, 2017, appellants’ investment advisor, UBS Financial Services, Inc. (UBS) attempted to schedule a 2016 fourth quarter estimated tax payment of \$245,000 using FTB’s electronic Web Pay system. The Web Pay system provided a confirmation page showing the time and date of the payment request, the amount of the payment, and related information. The confirmation page states that two business days should be allowed for the payment to be debited from the bank account. However, the scheduled

¹ All further statutory (“section” or “§”) references are to sections of the Revenue and Taxation Code unless otherwise stated.

- payment did not occur because UBS entered an incorrect bank account number.
2. On April 14, 2017, appellants filed a timely 2016 California Resident Income Tax Return. On the return, appellants reported that they had made the tax payment of \$245,000. However, as noted above, the payment had not occurred.
 3. On June 6, 2017, FTB sent appellants a Notice of Tax Return Change showing that \$245,000 of tax was due and imposing a late payment penalty of \$14,655.²
 4. After paying the amounts due, appellants filed a claim for refund of the \$14,655 late payment penalty. In their refund claim, appellants argued that they did not realize that UBS used an incomplete or incorrect account number when it attempted to schedule a web payment. Appellants argued that FTB did not notify them of the error. Appellants further argued that they had sufficient funds to make the payment and would have done so if FTB had notified them of the failed payment. Appellants provided a letter from UBS in which UBS stated that the error was due to an administrative error by one of its employees.
 5. On November 7, 2017, FTB issued a notice of action denying appellant's claim for refund. This timely appeal followed.

DISCUSSION

Section 19001 generally provides that the personal income tax imposed “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 is 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 will be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (§ 19132(a).) Taxpayers bear the burden of proving that both conditions existed. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983 (*Sleight*).)

To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Sleight, supra*; *Appeal of Curry*, 86-SBE-048, Mar. 4, 1986 (*Curry*).) The taxpayer bears the burden of proving that an ordinarily intelligent and

² The notice also reflected accrued interest and an estimated tax penalty. These amounts are not contested on appeal.

prudent businessperson would have acted similarly under the circumstances. (*Curry, supra.*) 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 Risser*, 84-SBE-044, Feb. 28, 1984 (*Risser*).)

In addition, each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*).) A taxpayer's reliance on an agent to timely file a federal return does not constitute reasonable cause for filing late. (*Id.*) The courts have applied *Boyle* to late payments, even in circumstances where a taxpayer acted prudently in dealing with its agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136, 1144-1146 [finding that reliance on payroll service to make payments was not sufficient to establish reasonable cause under *Boyle*]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [finding that reliance on taxpayer's controller to make payments was not sufficient to establish reasonable cause].)

On appeal, appellants reiterate the arguments made in their refund claim. In addition, appellants note that Section 19011.5 required them to make the estimated tax payment by Web Pay and argue that, if the payment had been by check, the payment would have been processed.³

Unfortunately, appellant's agent, UBS, provided erroneous bank account information so that the payment never occurred. As noted above, the United States Supreme Court, in *Boyle, supra*, held that reliance on an agent to ensure timely payment does not constitute reasonable cause. Moreover, a taxpayer's oversight, even if understandable, does not demonstrate the exercise of ordinary business care and prudence. (*Risser, supra.*) Accordingly, the error of UBS in entering incorrect bank account information does not constitute reasonable cause.

We believe an ordinarily intelligent and prudent business person would confirm that a requested payment of \$245,000 occurred and, if there was a delay in the payment, would have taken steps to correct any problems. There is no evidence that any such steps were taken here. Also, there is no indication that appellants checked their bank account to determine whether the payment occurred prior to signing a tax return erroneously stating that the payment had occurred.

Appellants argue that they and UBS relied on the Web Pay confirmation. Even if this is so, the Web Pay confirmation page does not confirm that the payment has been made; it only confirms that the request to debit a bank account has been made.

³ Section 19011.5 requires that, in some circumstances, tax payments must be made electronically.

Appellants also argue that reasonable cause exists because FTB did not notify them of the failed payment. However, it was appellants' responsibility to confirm that the payment occurred, and we believe an ordinarily intelligent and prudent business person would have done so, rather than assuming that the scheduled payment had occurred.⁴

Appellants appear to assert that the statutory requirement that they make electronic payments caused the late payment. However, we cannot change the applicable statutory requirements. It is appellants' responsibility to ensure that they comply with the statutory requirements.

HOLDING

Appellants have not established that their failure to make a timely payment of tax for the 2016 tax year was due to reasonable cause.

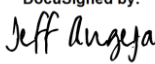
DISPOSITION


FTB's action denying appellant's claim for refund for the 2016 tax year is sustained.

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Grant S. Thompson
Administrative Law Judge

⁴ Appellants further argue that ordinary business care requires that FTB include more express language in its Web Pay confirmation noting that the confirmation confirms only the request for payment, rather than confirming that payment has been made. However, the Web Pay confirmation already notes that two business days should be allowed for scheduled payments to occur. Moreover, the Web Pay confirmation page appears at the end of the online payment request process, and a reasonable business person would not think that the payment immediately occurred when they completed the request for electronic payment. Also, as noted by FTB, its website provides additional explanation and guidance making clear, among other things, that if banking information is incorrect, the payment will not occur. Most important, the legal issue here is whether appellants have demonstrated that they exercised ordinary business care and prudence; it is not whether, as a policy matter, FTB might be able to improve its processes and procedures.

We concur:

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Jeffrey G. Angeja
Administrative Law Judge

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Alberto T. Rosas
Administrative Law Judge