

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010930
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PON NYONG YI) Date Issued: December 13, 2018
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OPINION

Representing the Parties:

For Appellant: Pon Nyong Yi

For Respondent: David Kowalczyk, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Pon Nyong Yi (appellant) appeals the denial by the Franchise Tax Board (FTB or respondent) of appellant’s claim for refund of a \$3,762.50 late-filing penalty imposed for the 2015 tax year.

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

ISSUE

Whether appellant established that his failure to timely file a tax return for the 2015 tax year was due to reasonable cause and not due to willful neglect.

FACTUAL FINDINGS

1. Appellant failed to timely file a 2015 California personal income tax return. On April 15, 2016, appellant made a \$500 tax payment for tax year 2015. On October 14, 2016,

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

- appellant enclosed a \$500 check dated October 15, 2016, and a 2014 payment voucher that had the effect of applying the payment to appellant's 2014 tax liability.²
2. On April 15, 2017, appellant enclosed a \$4,000 check dated April 17, 2017, and a 2016 payment voucher (received on April 15, 2017) that had the effect of applying the payment to appellant's 2016 tax liability.³
 3. On April 18, 2017, FTB issued a Request for Tax Return because FTB did not have a record of receiving appellant's 2015 tax return. By response letter dated April 22, 2017, appellant stated that he was unable to pay his tax liability because of severe losses in the stock market in January 2016.
 4. On May 26, 2017, appellant filed a 2015 California Resident Income Tax Return (Form 540), reporting a tax liability of \$15,538 and claiming tax payments totaling \$5,000, for a balance due of \$10,538. Appellant also enclosed a payment for the balance due.
 5. FTB accepted the tax return and issued a Notice of Tax Return Change that, as herein relevant, increased the tax liability by \$12, from \$15,538 to \$15,550, applied the \$500 received by April 15, 2016, and imposed a \$3,762.50 late-filing penalty. Appellant subsequently paid the liability in full and timely filed a claim for refund of the penalty, asserting that he had been unable to pay his 2015 tax liability because of his stock market losses, and that FTB erroneously calculated the penalty amount. Appellant also asserted that the Internal Revenue Service (IRS) abated the late-filing penalty.
 6. FTB denied the claim, and this timely appeal followed.

DISCUSSION

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (§ 19131.) The penalty is computed at five percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is

² Subsequently, after communicating with appellant during the course of this appeal, FTB applied the \$500 payment to the 2015 tax year, using the same October 15, 2016 effective date.

³ Subsequently, after communicating with appellant during the course of this appeal, FTB applied the \$4,000 payment to the 2015 tax year, using the April 17, 2017 effective date.

reduced by any timely tax payments, and any credits against the tax which may be claimed on the return. (§ 19131(c).)

A taxpayer has the burden of establishing reasonable cause to abate a penalty. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers*, 2001-SBE-001, May 31, 2001.)⁴ As a general matter, in order for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)

We first note that FTB correctly calculated the amount of the penalty. Specifically, as explained above, the penalty amount is computed based on 25 percent of the amount of tax required to be shown on the return, after allowing for *timely* payments. (§ 19131(c).) Here, FTB correctly used a tax amount of \$15,050, which is the amount of tax due after allowing for appellant's timely \$500 payment on April 15, 2016. (\$15,550 - \$500.) None of appellant's remaining payments were timely, and do not reduce the tax amount for purposes of computing the late-filing penalty. FTB then multiplied the amount of tax required to be shown on the return by 25 percent to correctly compute the \$3,762.50 penalty amount (\$15,050 x 25 percent). Because appellant did not file his return until more than a year after the filing due date, the maximum 25 percent penalty was properly applied.

Next, appellant has not made any specific arguments regarding his failure to file a 2015 tax return. Appellant states only that he was unable to pay the tax liability. However, the penalty in question was imposed because appellant did not file a timely return, not because appellant failed to pay his tax liability. Furthermore, the law is clear that one is not excused from timely filing a return even if one is unable to pay the amount due. (*Nasir v. Commissioner*, T.C. Memo. 2011-283.) Therefore, appellant has not established reasonable cause for his failure to file his 2015 personal income tax return on time.

Finally, we acknowledge that the IRS may abate a federal late-filing penalty pursuant to an IRS policy called First Time Abate, under which the IRS may administratively abate penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the

⁴ State Board of Equalization (BOE) precedential opinions are viewable on BOE's website: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.


past three years. Neither the California Legislature nor FTB have adopted a comparable penalty abatement program, so the IRS penalty abatement and appellant’s history of timely filing and paying California taxes cannot be used as a basis for abatement of the late-payment penalty at issue here. Instead, appellant must establish that his failure to timely file his tax return was due to reasonable cause and not due to willful neglect, which he has failed to do.

HOLDING


Appellant failed to establish that his failure to timely file a personal income tax return for the 2015 tax year was due to reasonable cause and not willful neglect.

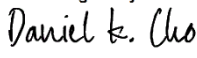
DISPOSITION

Respondent’s action is sustained.

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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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Daniel K. Cho
Administrative Law Judge