

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  <b>KAMBIZ GHOJEHVAND &amp; MONA O.</b>  <b>TEHRANI</b>	) ) ) ) ) )	OTA Case No. 18042637  Date Issued: February 22, 2019
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**OPINION**

Representing the Parties:

For Appellants:	Kambiz Ghojevand Mona Omidvar Tehrani
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For Respondent:	Eric A. Yadao, Tax Counsel III
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N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324<sup>1</sup>, Kambiz Ghojevand and Mona O. Tehrani (appellants) appeal an action by the Franchise Tax Board (FTB) denying appellants’ claim for refund of \$633.30 for 2016.

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

**ISSUE**

Should the late payment penalty imposed against appellant for tax year 2016 be abated for reasonable cause?

**FACTUAL FINDINGS**

1. Appellants timely filed their 2016 return that reported a tax due of \$10,555.
2. Appellants did not pay the tax due on or before the April 15, 2017 due date.
3. FTB issued a Notice of State Income Tax Due on May 31, 2017, advising appellants to pay \$11,244.31, which included the tax due, a late payment penalty of \$633.30, and statutory interest.

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

4. Appellants called FTB on June 7, 2017, and advised it that they had timely paid the tax due and would fax a copy of the check evidencing the payment of \$10,555 for tax year 2016 to FTB.
5. On June 7, 2017, appellants faxed to FTB several cancelled checks payable to FTB. However, those checks all had been applied, per appellants' instructions, to a different taxpayer or to a tax year other than the one at issue in this appeal.
6. On June 14, 2017, appellants paid FTB \$10,611 for tax and interest due for 2016, but not the late payment penalty.
7. On August 22, 2017, FTB issued a Final Notice Before Levy and Lien advising appellants that collection efforts would commence if the balance due was not paid by September 6, 2017.
8. On August 23, 2017, appellants paid the balance due and timely filed a claim for refund. In their claim, appellants alleged that they had instructed their tax return preparer to electronically withdraw their California tax liability from their bank account but due to an error the funds were not paid. Appellants allege the error was not their fault. They claim it was the fault of their return preparer, the software used to try to make the payment, or the FTB. Appellants produced a partial print-out of a document suggesting appellant attempted to schedule an electronic payment of the tax due for 2016 to be made on February 22, 2017.
9. FTB denied the claim and this timely appeal followed.

#### DISCUSSION

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley*, 82-SBE-154, July 26, 1982.) California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."<sup>2</sup>

In accordance with section 19132, a late payment penalty will be imposed unless it is shown that the failure to timely pay tax was due to reasonable cause and not due to willful

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<sup>2</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

neglect.<sup>3</sup> The penalty is computed and imposed at the rate of five percent of the unpaid amount plus 0.5 percent of the unpaid amount for each additional month or fraction of a month the payment is late, up to 40 months. The burden of proof is on the taxpayer to show that reasonable cause exists to support the abatement of the late payment penalty. To establish reasonable cause, a taxpayer must show that the failure to timely pay occurred despite the exercise of ordinary business care and prudence. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

Appellants allege that their tax preparer utilized tax preparation software to authorize FTB to withdraw appellant's 2016 tax liability directly from their bank account. In support of this argument, appellants provided FTB with a portion of a document reflecting the electronic payment instructions entered by appellant's return preparer. The document indicates that the return preparer attempted to schedule February 22, 2017, as the date payment would be made of the tax balance due for 2016. For reasons that are unclear from the record before us, however, that payment was not made.

We accept appellants' contention that they thought their return preparer had made the necessary arrangements to timely pay their 2016 tax. However, appellants' reliance on their tax preparer does not excuse them from the penalty when it turns out the payment was not timely made. In *United States v. Boyle* (1985) 469 U.S. 241, the U.S. Supreme Court determined that a taxpayer had not established reasonable cause for filing late when he relied upon his agent, a tax professional, to file the return on the taxpayer's behalf. There is a personal and nondelegable duty to file returns on time. This reasoning was applied to late payment penalties in the *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986.

Appellants have not shown due diligence in attempting to verify payment of their 2016 tax. Appellants acted only after FTB notified them that the tax reported as due on appellants' 2016 return had not been paid. There is no evidence that appellants checked their bank account records or contacted the FTB prior to the due date of the payment to determine whether their attempted electronic payments had been successful. Accordingly, they have not established reasonable cause sufficient to abate the late payment penalty.

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<sup>3</sup> The FTB does not contend that appellants' late payment was attributable to willful neglect. Accordingly, this opinion is limited to whether appellant has shown reasonable cause for failing to pay tax timely.

HOLDING

Appellants have not established that the late payment penalty imposed against them for 2016 should be abated.

DISPOSITION

FTB's action is sustained in full.

DocuSigned by:  
*Neil Robinson*  
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Neil Robinson  
Administrative Law Judge

We concur:

DocuSigned by:  
*Jeffrey I. Margolis*  
5E9822FB1BA41B...  
Jeffrey Margolis  
Administrative Law Judge

DocuSigned by:  
*Andrew J. Kwee*  
3CAD402FB4864CB...  
Andrew J. Kwee  
Administrative Law Judge