

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
FRANCINE MCKANNA

) OTA Case No. 18042872
)
) Date Issued: April 3, 2019
)
)
)

OPINION

Representing the Parties:

For Appellant: Brett Campbell, CPA

For Respondent: David Muradyan, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Francine McKanna (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$7,112.51 for the 2016 tax year.

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

ISSUE

Has appellant shown reasonable case to abate the late payment penalty?

FACTUAL FINDINGS

1. Appellant filed her 2016 California income tax return on April 18, 2017. Appellant reported a self-assessed tax liability of \$137,695 plus a mental health tax of \$2,772, for a total tax of \$140,467. Appellant also self-assessed an underpayment of estimated tax penalty of \$2,583. After accounting for withholding credits of \$12,595, the total amount due was \$130,455.

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

2. Appellant made a payment of \$111,963 on May 8, 2017, and another payment of \$18,492 on May 23, 2017. On May 30, 2017, there was a credit transfer of \$3,858.34 from the 2015 tax year applied to the 2016 tax year liability.
3. On June 15, 2017, FTB issued a Notice of State Income Tax Due that listed appellant's tax of \$140,467, applicable interest of \$379.87, a late payment penalty of \$7,112.51, as well as appellant's payments and adjustments totaling \$146,908.34, for a net balance due of \$1,051.04.
4. Appellant requested waiver of the late payment penalty from FTB because the late payment allegedly was due to an error with the tax software program, Ultra Tax, used by her tax preparer.
5. FTB sent appellant a Final Notice Before Levy and Lien, requesting payment of the outstanding balance. Appellant paid the remaining balance and her request for waiver of the late payment penalty was converted to a claim for refund. FTB denied the claim and this timely appeal followed.

DISCUSSION

California imposes a late payment penalty for a taxpayer's failure to pay the amount of tax shown on a return before the due date, unless it is established that the late payment was due to reasonable cause and not due to willful neglect. (§ 19132(a)(1).) The late payment penalty is the sum of two figures that may not exceed 25 percent of the unpaid tax. (§ 19132(a)(2).) The first addend is five percent of the tax that remained unpaid as of the due date. (§ 19132(a)(2)(A).) The second addend is 0.5 percent of the unpaid tax balance per month for each month, or portion of a month, that the tax remains unpaid after the due date, not to exceed 40 months. (§ 19132(a)(2)(B).) Appellant does not dispute that she paid late. Instead, appellant claims that she is entitled to abatement of the penalty because her late payment was due to reasonable cause.

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.)² The taxpayer bears the burden of proving that reasonable cause existed. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.)

Appellant argues that the late payment resulted from an error in her representative's tax preparation software. Appellant states that somehow the box directing payment did not work and was unchecked, which resulted in both her California and federal payments being late. FTB argues that appellant has not provided evidence from the software manufacturer acknowledging there was an error in its program. FTB contacted the software manufacturer, who was unable to locate an authorization for the electronic payment and found no record of the user contacting them to report an issue. FTB also notes that the Federal Account Transcript shows a payment to the Internal Revenue Service on April 22, 2017, four days after the filing of her federal return and two weeks before her California tax payment. Appellant incurred a \$500 late payment penalty at the federal level, which has not been abated. Thus, it appears that the failure to make the timely payment was attributable to an oversight by the taxpayer (or her return preparer) in connection with the attempted payment.

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.) Furthermore, an error in completing the process for making an electronic payment of taxes owed and failing to check one's bank account balance for confirmation that the payment was successfully made, does not demonstrate due diligence and is not sufficient to show reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P, July 20, 2018.)³ Appellant submitted her return timely, but did not take reasonable steps to ensure that her payment of tax was timely. Based on the foregoing, appellant has not shown reasonable cause to abate the late payment penalty.

Appellant also argues that she has a history of timely tax payments and returns. However, neither the California Legislature nor FTB have adopted a First Time Abate penalty abatement program, so 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

² Precedential 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>>.

³ The Office of Tax Appeals (OTA) opinions may be viewed at: <<https://ota.ca.gov/opinions>>.

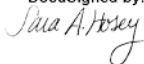
establish that her failure to timely pay her taxes was due to reasonable cause and not due to willful neglect, which she has failed to do.

HOLDING

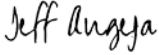
Appellant has not demonstrated reasonable cause for failing to timely pay her 2016 tax liability, and the late payment penalty was correctly assessed.


DISPOSITION

FTB's action is sustained.

DocuSigned by:

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Sara A. Hosey
Administrative Law Judge

We concur:

DocuSigned by:

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Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:

FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge