



a taxable income of \$317,658 and a tax liability of \$16,315. Appellants did not remit payment with their return.

2. FTB accepted the return as filed. FTB issued a Notice of State Income Tax Due on June 7, 2016, imposing a late payment penalty and applicable interest.
3. On June 22, 2016, appellant-husband called FTB and requested abatement of the penalty, interest, and some of the tax owed. FTB advised appellant-husband that it could not abate the penalty, interest, or tax, but advised appellant-husband that appellants could pay their balance through an installment agreement.
4. Appellants entered into a June 29, 2016 installment agreement where they agreed to begin making payments on July 21, 2016. However, appellants did not make any payments pursuant to the installment agreement and on August 3, 2016, FTB issued an Intent to Terminate Installment Agreement and Notice of State Income Tax Due.
5. On August 4, 2016, appellants sent FTB correspondence indicating that appellants had arranged with the Internal Revenue Service (IRS) for a payment suspension on an outstanding federal tax liability based on financial hardship. Appellants requested FTB give them the same consideration. Appellants stated that after appellant-husband was unemployed for five months in 2015, his new salary was less than his prior salary, and that they withdrew from appellant-husband's pension to help with increased mortgage costs due to changes in their mortgage terms.
6. FTB issued an October 7, 2016 Final Notice Before Levy and Lien, which again informed appellants of the availability of an installment agreement.
7. On November 30, 2016, FTB issued an Earnings Withholding Order for Taxes (EWOT) to appellant-husband's employer.
8. On December 7, 2016, appellant-husband called FTB and requested cancellation of the EWOT. Appellant-husband told FTB he would pay \$7,200 immediately and the remaining balance within 14 days. Appellant-husband again requested abatement of the late payment penalty, which FTB denied. FTB withdrew the EWOT based on appellant-husband's representations.
9. FTB received a payment of \$7,200 on December 12, 2016. When FTB received no additional payment by appellants, it issued a February 1, 2017 Intent to Offset Federal Payments to appellants.

10. On February 3, 2017, FTB issued a second EWOT to appellant-husband's employer. On February 8, 2017, appellant-husband called FTB and asserted that the 25-percent garnishment pursuant to the EWOT was a hardship for his family, and that they could pay \$175 per pay period. FTB issued a February 8, 2017 modification of the EWOT for that amount.
11. By letter dated February 15, 2017, appellants requested that they be taxed at a lower tax rate for the 2015 tax year. Appellants indicated that the pension distribution in 2015 increased their adjusted gross income (AGI), which resulted in appellants being taxed at a higher tax rate for the 2015 tax year.
12. On February 23, 2017, FTB transferred a payment of \$1,134 from appellants' 2016 tax account to their 2015 account.
13. When FTB received no additional payments pursuant to the modified EWOT, it issued a third EWOT on April 3, 2017. Appellant-husband again called FTB to modify the EWOT to \$175 per pay period. FTB issued a modification of the EWOT for that amount. FTB began receiving payments of \$175 on May 2, 2017.
14. On May 9, 2017, appellant-husband informed FTB that appellants had the funds to pay the balance in full, and would do so, if FTB would abate the late payment penalty. FTB informed appellant-husband of the procedure for penalty abatement based on reasonable cause.
15. On May 15, 2017, appellants submitted a Reasonable Cause Individual Claim for Refund (Form 2917), requesting that, based on appellants' financial hardship, FTB waive the late payment penalty and fees if appellants paid the remaining balance. FTB denied appellants' waiver request based on lack of reasonable cause.
16. On March 6, 2018, appellants filed a second claim for refund for \$1,973.72 (the late payment penalty of \$815.75 and the monthly underpayment penalty of \$1,157.97), claiming their financial hardship established that their late payment was due to reasonable cause. FTB denied appellants' claim for refund based on lack of reasonable cause.
17. Appellants filed this timely appeal.

### DISCUSSION

R&TC section 19001 provides that 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).” R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment of the tax. The late payment penalty has two parts. The first part is 5 percent of the unpaid tax. (R&TC, § 19132(a)(2)(A).) The second part is 0.5 percent per month, or a portion of a month, calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).) The aggregate amount of the penalty may not exceed 25 percent of the total unpaid tax. (R&TC, § 19132(a)(3).)

Here, appellants did not timely pay their 2015 tax liability, thus, FTB properly imposed a late payment penalty. The penalty amount appears to have been properly calculated, and appellants have not disputed the amount or the calculation method.

The late payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect.<sup>2</sup> (R&TC, § 19132(a).) The taxpayer bears the burden of proving both conditions have been met. (*Appeal of Roger W. Sleight* (83-SBE-244) 1983 WL 15615.) To establish “reasonable cause” for the late payment of tax, the taxpayer must show that the failure to timely pay the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.)

Undue hardship or inability to pay may constitute reasonable cause “to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in [Treas. Reg. § 1.6161-1(b)]) if he paid on the due date.” (Treas. Reg. § 301.6651-1(c)(1).)<sup>3</sup> A taxpayer’s inability “to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability” will be determined based on a consideration of “all the facts and circumstances of the taxpayer’s financial situation, including the amount and nature of the taxpayer’s expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to

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<sup>2</sup> FTB has not alleged and has not produced evidence that appellants engaged in willful neglect. Thus, this analysis shall only address whether appellants have shown reasonable cause to abate the proposed late payment penalty.

<sup>3</sup> R&TC section 19132 is patterned after Internal Revenue code (IRC) section 6651. The interpretation and effect given the federal provision by the federal courts and administrative agencies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658.)

receive prior to the date prescribed for the payment of the tax.” (*Ibid.*) A taxpayer who “made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due” will be deemed to have exercised ordinary business care and prudence. (*Ibid.*)

Treasury Regulation section 1.6161-1(b) defines the term “undue hardship.” This regulation requires that the taxpayer show that payment of the tax on the due date would have imposed “undue hardship,” which requires more than merely inconveniencing the taxpayer. “It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date . . . .” (Treas. Reg. § 1.6161-1(b).)

In their correspondence to FTB and filings in this appeal, appellants advanced several reasons for their late payment: (1) appellant-husband was laid off from his job and was unemployed for five months in 2015, which caused a financial hardship on the family; (2) they used the retirement distributions to pay down their mortgage and to provide for the family’s needs during appellant-husband’s unemployment; (3) the retirement distributions caused appellants’ income to be taxed at a higher rate for 2015; (4) appellant-husband secured new employment but his new salary was approximately \$11,000 less than his previous salary; (5) the IRS abated appellants’ 2015 federal late payment penalty; and (6) they ultimately made a full payment of tax, penalties, and applicable interest.

Whether payment of the tax would result in undue hardship is determined as of the due date for the tax. Thus, for appellants to demonstrate that due to financial difficulties they had reasonable cause for their late payment of tax, they must show that they made reasonable efforts to conserve enough funds to pay the tax by April 15, 2016, but were nevertheless unable to pay the tax by that date without suffering undue hardship.

Here, although appellants make a claim of financial hardship, they have not offered any evidence to support their claim. They have not provided any documentation regarding their financial circumstances at the time their tax payment was due, or how they arrived at those circumstances. Appellants have only presented general statements of hardship. However, the focus here is upon appellants’ financial circumstances at the time their tax payment was due in April of 2016, and appellants have not shown the facts and circumstances concerning their financial situation at that time. More importantly, appellants have not shown that they made any

effort, let alone reasonable efforts, to conserve enough funds to pay the tax by the due date. Therefore, appellants' financial hardships do not rise to the level of reasonable cause requiring the abatement of the late payment penalty.

We note that the IRS waived appellants' 2015 federal late payment penalty. However, the IRS did not abate the federal late payment penalty based on a finding of reasonable cause. Instead, it abated the penalty pursuant to an IRS administrative program called First Time Abate in which the IRS abates penalties if a taxpayer has timely filed returns and paid taxes due for the past three years. California law requires a finding of reasonable cause to abate the late payment penalty, and neither the California Legislature nor FTB have adopted a comparable penalty abatement program. As a result, the IRS waiver of the penalty does not provide grounds to abate the penalty under California law.

HOLDING

Appellants have not established that their failure to timely pay their 2015 California income tax was due to reasonable cause.

DISPOSITION

FTB's action in denying appellants' claim for refund is sustained.

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

We concur:

DocuSigned by:  
*Daniel K. Cho*  
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Daniel K. Cho  
Administrative Law Judge

DocuSigned by:  
*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge