

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

In the Matter of the Appeal of: ) OTA Case No. 18042763  
STANLEY W. LI AND NHI T. HUYNH ) Date Issued: May 15, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Stanley W. Li and Nhi T. Huynh  
For Respondent: Eric R. Brown, Tax Counsel III  
For Office of Tax Appeals: Philip Wahlquist, Graduate Student Assistant

P. KUSIAK, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Stanley W. Li and Nhi T. Huynh (appellants) appeal an action by the respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$310 for the 2015 tax year.

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

**ISSUE**

Did appellants establish that the late filing of their return for the 2015 tax year was due to reasonable cause and not due to willful neglect?

**FACTUAL FINDINGS**

1. Appellants' California Resident Income Tax Return (Form 540) for the 2015 tax year had an original due date of April 15, 2016.
2. Appellants untimely filed their 2015 Form 540, consisting of 137 pages, on April 15, 2017. They reported taxable income of \$91,371 and total tax of \$2,713. Appellants self-

- assessed a \$21 underpayment of estimated tax penalty, and reported a balance due of \$1,261. Appellants remitted payment of \$1,261 on April 15, 2017.
3. On May 11, 2017, FTB sent a Notice of Tax Return Change to appellants, in which FTB imposed a late-filing penalty of \$310, plus interest. On May 12, 2017, FTB transferred \$341.72 from appellants' tax year 2014 to satisfy the balance due for 2015.
  4. On May 26, 2017, FTB received appellants' claim for refund of the late-filing penalty based on reasonable cause. Appellants asserted that because of a home burglary in January 2015, they could not timely file their 2015 Form 540.
  5. Appellants also claim that because the Internal Revenue Service (IRS) abated a federal late-filing penalty that it had imposed against appellants, FTB should similarly abate appellants' California late-filing penalty.
  6. Appellants' federal account transcript for 2015 indicates the IRS abated the late-filing penalty, but there is no indication the penalty was abated for reasonable cause.
  7. On October 5, 2017, FTB denied appellants' claim for refund.
  8. This timely appeal followed.

### DISCUSSION

Taxpayers have a personal, non-delegable obligation to file their income tax return by the due date. (*Appeal of Thomas K. and Gail G. Boehme* (85-SBE-134) 1979 WL 4224.) 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 due to willful neglect. (R&TC, § 19131.) The penalty is computed at 5 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. (R&TC, § 19131, subd. (a).)

When the FTB imposes a late-filing penalty, it is presumed that the penalty was imposed correctly, and the burden of proof is on the taxpayer to show that reasonable cause for the late filing of the tax return exists. (*Appeal of David A. and Barbara L. Beadling* (77-SBE-021) 1977 WL 3831; see generally *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) 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.)

To establish reasonable cause, a taxpayer must show that the failure to file the return 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 Stephen C. Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) The taxpayer must provide credible and competent evidence to support the claim of reasonable cause; otherwise the penalty will not be abated. (*Appeal of David A. and Barbara L. Beadling, supra.*)

Generally, a taxpayer's inability to file a return by the due date because of lack of necessary information or documents is not considered reasonable cause. (*Appeal of William T. and Joy P. Orr* (68-SBE-010) 1968 WL 1640.) The fact that tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer's burden of establishing reasonable cause. (*Appeal of Stephen C. Bieneman, supra*; *Appeal of Elmer R. and Barbara Malakoff* (83-SBE-140) 1983 WL 15525; *Appeal of Roger W. Sleight* (83-SBE-244) 1983 WL 15615.) To establish reasonable cause, the taxpayer must establish why a timely return could not have been filed without the missing information.

Personal difficulties which prevent a taxpayer from filing a timely return may be considered reasonable cause. (*Appeal of W.L Bryant* (83-SBE-180) 2019 WL 1187161; *Appeal of William T. and Joy P. Orr, supra.*) However, the law requires the taxpayer to provide credible and competent proof that the circumstances of the personal difficulty completely prevented the taxpayer from filing a timely return. (*Appeal of Michael J. and Diane M. Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of Allen L and Jacqueline M. Seaman* (75-SBE-080) 1975 WL 3564; *Appeal of Kerry and Cheryl James* (83-SBE-009) 1983 WL 15396.)

Appellants argue they were unable to timely file their 2015 return because their home was "burglarized and completely ransacked" in January 2015. They contend that because of the burglary, it took a long time to gather the financial records necessary to file their 2015 return. But appellants have failed to offer any further explanation as to how the burglary in January 2015 prevented them from filing a timely return more than a year later—by the due date of April 15, 2016 (or by the extended due date of October 15, 2016).<sup>1</sup> Moreover, appellants have not offered any information about efforts they made to obtain the information needed to timely file their return. A similar situation was presented in *Appeal of Elmer R. and Barbara Malakoff, supra*. In that case, the taxpayers contended that the penalty imposed against them for failing to file their 1978 return promptly upon FTB notice and demand should be abated because they had

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<sup>1</sup> Appellants also have not shown why it took them until the following year, 2017, to finally file their 2015 return.

reasonable cause for the late filing. Appellants alleged they were unable to timely file upon FTB's demand because they had experienced a burglary in 1978 that resulted in a loss of tax records (appellant-husband's checkbook), and because of the intense work pressures upon appellant-husband, an attorney. Our predecessor, the State Board of Equalization (SBE), rejected the taxpayers' claim in *Malakoff* because the taxpayers' evidence was not sufficient to sustain their burden of proof. The SBE stated: "appellants have offered no evidence to show that the circumstances of Mr. Malakoff's work pressures or the theft of the checkbook were such to prevent filing after notice and demand." That is also the situation here.

Appellants assert that the IRS abated the late-filing penalty, and suggest that FTB should do the same. If the IRS abated the late-filing penalty on the basis of reasonable cause, FTB would normally abate a late-filing penalty for the same year. However, the IRS will also abate a late-filing penalty under its First Time Penalty Abatement program, where a taxpayer may be relieved of a federal late-filing penalty based on previous good filing behavior, rather than reasonable cause. Neither the California Legislature nor the FTB have adopted a comparable first-time penalty abatement program. In the present case, the record shows that the IRS did abate the late-filing penalty for 2015, but not based on reasonable cause. Therefore, an IRS decision to abate a federal late-filing penalty that is not based on a finding of reasonable cause, does not constitute grounds for abating the California late-filing penalty, even if appellants had a good California filing history.

#### HOLDING

Appellants have not established that the late filing of their tax return for the 2015 tax year was due to reasonable cause and not due to willful neglect.

DISPOSITION

Based on the foregoing, FTB's action is sustained.

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Patrick J. Kusiak  
Administrative Law Judge

We concur:

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Jeffrey I. Margolis  
Administrative Law Judge

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Michael F. Geary  
Administrative Law Judge