

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

In the Matter of the Appeal of:	)	OTA Case No. 18103915
	)	
<b>RUSSELL J. JONES AND</b>	)	Date Issued: October 23, 2019
<b>WENDI E. JONES</b>	)	
	)	
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**OPINION**

Representing the Parties:

For Appellants:	Mitchell Jaeggi, Phoenix Financial Group Daniel Daly, Phoenix Financial Group
For Respondent:	Andrew Amara, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Russell J. Jones and Wendi E. Jones (appellants) appeal an action by respondent Franchise Tax Board (FTB) in denying appellants’ claims for refund of: (1) a late-payment penalty of \$736.75 and an underpayment of estimated tax (estimated tax) penalty of \$53.37 for the 2011 tax year; (2) a late-payment penalty of \$955.25 and an estimated tax penalty of \$43.66 for the 2012 tax year; and (3) a late-filing penalty of \$379.50, a notice and demand (demand) penalty of \$2,408.25, and an estimated tax penalty of \$9.78 for the 2013 tax year.

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

**ISSUES**

1. Whether appellants have established reasonable cause for the late payment of tax for 2011 and 2012.
2. Whether appellants have established reasonable cause for the late filing of their tax return for 2013.
3. Whether appellants have shown that the demand penalty should be abated for 2013.

4. Whether appellants have shown that the estimated tax penalties for 2011, 2012, and 2013, should be abated.

#### FACTUAL FINDINGS

1. Appellants timely filed a 2011 California income tax return, reporting wages of \$156,880 and a balance due of \$2,947.
2. Because appellants did not include a payment with their filing, FTB imposed a late-payment penalty of \$736.75. FTB also determined an estimated tax penalty of \$53.37.
3. Appellants timely filed a 2012 California income tax return, reporting wages of \$179,461 and a balance due of \$3,821.
4. Because appellants did not include a payment with their filing, FTB imposed a late-payment penalty of \$955.25. FTB also determined an estimated tax penalty of \$43.66.
5. FTB obtained third-party payor information indicating that appellants earned sufficient income to trigger a return filing requirement for 2013.
6. Because FTB's records indicated that appellants had not filed a 2013 return, FTB issued a Demand for Tax Return (Demand). The Demand stated that appellants had a filing requirement and that appellants should respond to the Demand by the due date provided.
7. Appellants did not timely respond to the Demand. Therefore, FTB issued a Notice of Proposed Assessment (NPA) for 2013 on July 20, 2015, which estimated appellants' income and proposed to assess additional tax, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus interest.
8. Appellants untimely filed a 2013 California income tax return on December 30, 2015, reporting wages of \$177,671 and a balance due of \$1,518.
9. FTB accepted the tax liability as shown on the return and modified the late-filing and demand penalty amounts to correspond with the tax liability change. As such, FTB imposed a late-filing penalty of \$379.50, a demand penalty of \$2,408.25, and an estimated tax penalty of \$9.78.
10. Appellants subsequently paid the liabilities for 2011 through 2013 and filed claims for refund of the penalties, which FTB denied.<sup>1</sup>
11. Appellants bring this timely appeal from FTB's denial of their claims for refund.

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<sup>1</sup> Because appellants only filed claims for refund of the penalties, we will not address any tax, fee, or interest.

## DISCUSSION

### Late-Payment Penalties and Late-Filing Penalty

R&TC section 19001 provides that the 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 provides that a late-payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. 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 a penalty of 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).) Here it is undisputed that appellants failed to timely pay tax for 2011 and 2012 and, therefore, the penalties were properly imposed.

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 five (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(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely paid tax amounts, and any credits against the tax which may be claimed on the return. (R&TC, § 19131(c).) Appellants agree that the 2013 return was untimely filed and, therefore, FTB properly imposed the late-filing penalty.

The late-payment and late-filing penalties may be abated if a taxpayer shows that the failure to make a timely payment of tax and to timely file was due to reasonable cause and not due to willful neglect. (R&TC, §§ 19131(a), 19132(a).) To establish reasonable cause, a taxpayer must show that his or her failure to timely file or pay tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783; *Appeal of Sleight* (83-SBE-244) 1983 WL 15615.)

Appellants argue that they have reasonable cause due to circumstances including declining health, deaths of family/friends, job layoffs, and several other hardships. Appellants provide a timeline listing the events that caused them substantial hardship. While illness or other personal difficulties that prevent a taxpayer from filing a timely return or paying tax can be considered reasonable cause in some cases, the taxpayer must present credible and competent evidence that the circumstances of the difficulties continuously prevented the taxpayer from

filing a timely return or paying tax. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) Appellants' timeline lists events that took place from 2002 to 2011, before the due dates for the returns at issue here. The hardships in the timeline do not coincide with the periods at issue, and appellants have not shown how the hardships continuously prevented them from being able to file their tax returns for the years at issue.

Appellants also assert that they experienced hardships in the form of medical problems that rendered them unable to timely file and pay tax. However, there is no evidence that appellants were continuously prevented from paying taxes or filing their return as a result of their medical issues. Appellants were able to work during the periods at issue, as they reported substantial wages on their tax returns. If illness or other personal difficulties simply cause a taxpayer to sacrifice the timeliness of one aspect of his or her affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640.) Therefore, as appellants were able to earn income during the periods at issue, it appears that appellants chose to pursue other aspects of their life instead of timely paying tax or filing their returns.

Appellants contend that they reasonably believed they had timely filed their 2013 return and should not, therefore, be liable for the late-filing penalty. In support, appellants provide an "Electronic Postmark – Certification of Electronic Filing" from Intuit stating that they filed their *federal* return for 2013 on April 15, 2014. Because the postmark is related to the federal return and not the California return, the postmark does not establish reasonable cause for the late filing of the California return. On the contrary, this evidence indicates that appellants were able to timely file their federal return despite their hardships. Such evidence further indicates that appellants were not continuously precluded from filing their California tax return.

Appellants argue that they would have been forced into bankruptcy had their tax obligations been met. Undue hardship or inability to pay may constitute reasonable cause to the extent that the taxpayer has made a satisfactory showing that he or she exercised ordinary business care and prudence in providing for payment of a liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he or she paid on the due date. (Treas. Reg. § 301.6651-1(c)(1).) The time to pay may not be extended based upon a general statement of hardship. (Treas. Reg. § 1.6161-1.) Appellants provide no support to show that they were unable to pay the tax due because of financial hardship, nor that they exercised ordinary business

care and prudence. As stated above, many of the hardships occurred several years before the due dates at issue, and appellants also have not shown how the hardships prevented them from making payments, considering they earned substantial income during the tax years on appeal. Therefore, appellants have not established reasonable cause for the late payments of tax and the late filing of their returns.

#### Demand Penalty

R&TC section 19133 provides that, if a taxpayer fails or refuses to make and file a return upon the receipt of a Demand from FTB, then, unless the failure is due to reasonable cause and not willful neglect, FTB may add a penalty of 25 percent of the amount of tax determined pursuant to R&TC section 19087. FTB will impose a demand penalty if the taxpayer fails to respond to a current Demand and FTB issued an NPA under the authority of R&TC section 19087(a) after the taxpayer failed to timely respond to a Request for Tax Return or a Demand at any time during the preceding four taxable years. (Cal. Code Regs., tit. 18, § 19133(b).) Here, FTB satisfied the regulatory prerequisite because it previously issued a Demand on January 12, 2012, for the 2010 tax year, and issued a 2010 NPA on March 12, 2012. Therefore, the demand penalty was properly imposed.

When FTB imposes a demand penalty, the burden of proof is on the taxpayer to show that reasonable cause exists for failing to file a return or otherwise timely respond to the Demand. (*Appeal of Findley* (86-SBE-091) 1986 WL 22761.) To establish reasonable cause, a taxpayer must show that the failure to reply to the Demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) The taxpayer's reason for failing to respond to the Demand must be such that an ordinary intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Findley, supra*, 1986 WL 22761.)

For the same reasons stated above, appellants have not presented any evidence of reasonable cause for failing to respond to the Demand or that they exercised ordinary business care and prudence. Thus, appellants have not shown reasonable cause for failing to respond to the Demand.

### Estimated Tax Penalties

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes a penalty for the underpayment of estimated tax where the taxpayers' installment tax payments are less than the amounts due at the end of the installment periods. For California purposes, installment tax payments are due on April 15, June 15, and January 15 of the following tax year. (R&TC, § 19136.1; IRC, 6654(c)(2).) Appellants argue they are entitled to a refund of the estimated tax penalties based on reasonable cause. However, there is no general reasonable cause exception to the estimated tax penalty.<sup>2</sup> (*Farhoumand v. Commissioner* (2012) T.C. Memo. 2012-131; *Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) Accordingly, appellants have failed to establish a basis on which to waive these penalties.

### HOLDINGS

1. Appellants have not established reasonable cause for the late payment of tax for 2011 and 2012.
2. Appellants have not established reasonable cause for the late filing of their tax return for 2013.
3. Appellants have not shown that the demand penalty should be abated for 2013.
4. Appellants have not shown that the estimated tax penalties for 2011, 2012, and 2013, should be abated.

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<sup>2</sup> Nevertheless, the estimated tax penalty will not apply if it is established that: the failure to timely pay the estimated tax payment was due to reasonable cause *and*, during the taxable year for which estimated tax payments were required to be made or in the preceding taxable year, (i) the taxpayer retired after reaching age 62, or (ii) the taxpayer became disabled. (IRC, § 6654(e)(3)(B).) Appellants have not alleged that they meet these conditions.

DISPOSITION

FTB's actions are sustained.

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Josh Lambert

Administrative Law Judge

We concur:

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Amanda Vassigh

Administrative Law Judge

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Teresa A. Stanley

Administrative Law Judge