

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

In the Matter of the Consolidated Appeals of: ) OTA Case Nos. 19044577, 19044586  
JACOBUS M. VAN NIMWEGAN AND )  
GERARDA E. VAN NIMWEGAN ) Date Issued: October 10, 2019  
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**OPINION**

Representing the Parties:

For Appellants: J. Michael Hutton, CPA

For Respondent: Joel Smith, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Jacobus M. van Nimwegan and Gerarda E. van Nimwegan (appellants) each appeal an action by the Franchise Tax Board (FTB) denying appellants’ claims for refund of \$3,250.94 (each) for the 2013 tax year.<sup>1</sup>

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

**ISSUE**

Whether appellants have established reasonable cause for their late payment of tax for the 2013 tax year.

**FACTUAL FINDINGS**

1. Appellants, who were non-residents living abroad in 2013, timely filed their 2013 California non-resident tax returns on October 15, 2014. The returns reported tax due of \$34,165, self-imposed late-payment penalties of \$2,733, plus interest of \$544. In lieu of a Social Security Number (SSN) or Individual Taxpayer Identification Number (ITIN), appellants’ returns indicated “Applied for.”

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<sup>1</sup> On April 11, 2019, the Office of Tax Appeals consolidated these appeals.

2. Appellants paid the liabilities on October 15, 2014, when they filed their returns.
3. FTB accepted the returns, applied the payments, and issued refunds of \$26.18 in overpaid interest.
4. On October 15, 2018, FTB received appellants' timely claims for refund of late-payment penalties, which FTB denied. These timely appeals followed.

### DISCUSSION

As non-residents living abroad in 2013, appellants' tax returns for that year were due on June 15, 2014. (R&TC, § 18567, subd. (a)(2)(A).) Appellants' tax payments were due on the same date. (R&TC, § 19001.) Therefore, appellants paid their taxes four months late, and the late-payment penalties are applicable. (R&TC, § 19132.) Appellants computed penalty amounts of \$2,733.20 each, but the correct amount is \$2,391.55.<sup>2</sup> In its brief, FTB conceded that at the conclusion of this appeal, it will refund each appellant the difference of \$341.65, plus applicable interest.

The late-payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132, subd. (a)(1).)<sup>3</sup> Reasonable cause exists if it is shown that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) The burden of proof is on the taxpayer to show reasonable cause. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615; *Appeal of Scott* (82-SBE-249) 1982 WL 11906.)

On appeal, appellants claim their late payments were attributable to reasonable cause because they did not receive their ITIN's from the Internal Revenue Service (IRS). Appellants also state that the IRS abated the federal late-payment penalties.<sup>4</sup>

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<sup>2</sup> The late-payment penalty has two parts. The first part is 5 percent of the unpaid tax. (R&TC, § 19132, subd. (a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion thereof, calculated on the outstanding balance. (R&TC, § 19132, subd. (a)(2)(B).) Thus, the correct penalty amount is \$2,391.55 (( $\$34,165 \times .05 = \$1,708.25$ ) plus ( $\$34,165 \times .005 \times 4 \text{ months} = \$683.30$ )).

<sup>3</sup> FTB did not raise willful neglect as an issue in this appeal, so we address only the question of reasonable cause.

<sup>4</sup> In their opening briefs, appellants concede that the federal abatement was a "one time consideration" and "not for reasonable cause." Therefore, the federal abatement is not applicable to the determination of reasonable cause in this appeal.

First, reasonable cause does not include a taxpayer’s difficulty in obtaining necessary information (*Appeal of Campbell* (85-SBE-112) 1985 WL 4076), and therefore the absence of appellants’ SSN’s or ITIN’s does not constitute reasonable cause for their late payments of tax. Appellants could have timely paid the tax even without an SSN or ITIN, and they in fact did pay without listing SSN’s or ITIN’s on October 15, 2014.

Second, appellants assert that they filed their returns within the extension period provided for filing a return, and thereby assert that the penalties for late payment should be abated. However, the extension for filing is not an extension for the payment of tax (R&TC, § 19001), and, accordingly, their payments remitted on October 15, 2014, were still due on June 15, 2014, and were therefore late payments.

Thus, we conclude that appellants failed to meet their burden of proving that the failure to make timely payments was the result of reasonable cause, and that the late payments occurred despite the exercise of ordinary business care and prudence.

HOLDING

Appellants are liable for the late-payment penalties imposed for tax year 2013.

DISPOSITION

FTB’s action in conceding to refund each appellant \$341.65, plus applicable interest, but otherwise denying appellants’ claims for refund, is sustained.

DocuSigned by:  
*Jeff Angeja*  
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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

DocuSigned by:  
*Richard Tay*  
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Richard Tay  
Administrative Law Judge

DocuSigned by:  
*John O Johnson*  
873D9797B9E64E1...  
John O. Johnson  
Administrative Law Judge