

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

In the Matter of the Appeal of:  
**MATTHEW MARKOVICH**

) OTA Case No. 18011014  
)  
) Date Issued: November 25, 2019  
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)

**OPINION**

Representing the Parties:

For Appellant: Matthew Markovich

For Respondent: Eric A. Yadao, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> Matthew Markovich (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund for a late-payment penalty and interest of \$377.04 for the 2016 tax year.

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

**ISSUE**

Has appellant shown that his failure to timely pay his 2016 tax liability was due to reasonable cause and not willful neglect?

**FACTUAL FINDINGS**

1. Appellant filed his 2016 California income tax return<sup>2</sup> on April 13, 2017. He reported a total tax liability of \$11,592, tax withheld of \$5,308, and a balance due of \$6,284.
2. Appellant attempted to make a payment with his return, but the payment was dishonored.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code.

<sup>2</sup> Appellant filed his return as married filing joint filing status, but appellant’s spouse has not joined this appeal.

3. On May 25, 2017, appellant made a successful payment of the balance due. However, FTB had not yet recognized the first payment attempt as invalid, and refunded the second payment as an overpayment on June 1, 2017.
4. FTB issued a Notice of State Income Tax Due on June 20, 2017, advising appellant to pay \$6,704.11, which included a late-payment penalty of \$377.04, plus interest of \$43.07.
5. On June 30, 2017, appellant paid the balance in full, and filed a claim for refund of the late-payment penalty (plus interest paid thereon). Appellant argued that there was reasonable cause for his late payment in that he erroneously checked the incorrect account type from which his funds were to be withdrawn in setting up his electronic funds withdrawal. This caused the payment to be dishonored. FTB denied appellant's claim.
6. This timely appeal followed.

#### DISCUSSION

Section 19001 generally provides that the personal income tax imposed “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).” Section 19132 provides that a late-payment penalty is 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 will 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(a).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight* (83-SBE-244) 1983 WL 15615.)

To establish reasonable cause for the late payment of tax, a taxpayer must show that their failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Roger W. Sleight, supra*; *Appeal of Robert T. and M.R. Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Robert T. and M.R. Curry, supra*; see also *Appeal of M.B. and G.M. Scott* (82-SBE-249) 1982 WL 11906.) A failure to timely pay will be considered due to reasonable cause if the taxpayer makes a satisfactory showing that he or she exercised ordinary business care and prudence in providing for the payment of their tax liability and was nevertheless either unable to pay the tax or would have suffered undue hardship if payment had

been made on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Commissioner*, T.C. Memo. 2011-283.) However, the failure to timely remit the balance due on a tax liability on account of an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser* (84-SBE-044) 1984 WL 16123.)

Appellant argues that he attempted to pay his 2016 taxes and “due to a combination of clerical and bureaucratic errors” was compelled to pay a late-payment penalty and interest. Appellant states that after he e-filed his return on April 13 he “soon noticed” that the funds had not been withdrawn. He then allegedly attempted to call FTB when he realized the funds for payment of his 2016 tax liability still had not been withdrawn from his account, but failed to reach anyone. However, he did not attempt again until May 25, 2017.

Appellant’s second attempted payment, on May 25, 2017, was successful. However, FTB refunded the amount paid to appellant. This occurred before appellant had received FTB’s June 20, 2017 notice, notifying appellant that his first attempted payment was unsuccessful, and imposing a late-payment penalty and interest. At some point in time, FTB informed appellant that his initially attempted payment had been unsuccessful because he had selected the incorrect account type from which the funds were to be drawn. Appellant contends that the penalties are unreasonably punitive given his efforts to find and correct the error in a timely fashion.

Appellant attempted to make a timely payment of his 2016 tax liability, but failed to confirm that his payment had been successfully transmitted until after the due date had passed. Exercising ordinary business care and prudence would have entailed appellant ensuring the payment was actually transmitted on or before the date that the payment was due. Appellant knew, or could have known, that the funds had not been removed from his bank account, but waited until May 25,<sup>3</sup> six weeks later, to attempt a second payment. FTB notes that the Internal Revenue Service (IRS) also imposed a late-payment penalty after appellant’s attempted payment failed. Appellant made a successful payment of the IRS liability on April 24, 2017, only 11 days after the first attempt. We also note that the IRS did not abate the penalty.

Appellant’s error in selecting the incorrect account type, and his failure to ensure payment was timely submitted on or before the due date, does not demonstrate due diligence, as would be exercised by an ordinarily intelligent and prudent businessperson. Instead, the

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<sup>3</sup> Although FTB refunded this payment to appellant on June 1, 2017, and appellant did not completely pay his liability until June 30, 2017, FTB calculated the late-payment penalty up until the May 25, 2017 payment.

evidence shows the late payment was the result of an oversight and a lack of due diligence by appellant. As stated in *Appeal of Risser, supra*, “While we sympathize with appellant’s unintentional error, these facts do not form a basis for granting relief from the penalt[y].” (*Ibid.*)

HOLDING

Appellant has not established that his failure to make a timely payment of tax for the 2016 tax year was due to reasonable cause and not willful neglect.

DISPOSITION

FTB’s action in denying appellant’s claim for refund for the 2016 tax year is sustained.

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*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge

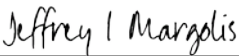
I concur:

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

J. MARGOLIS, dissenting:

I find that appellant has shown reasonable cause, and the absence of willful neglect, for his late payment. Appellant explained the steps he took to confirm whether his timely attempted payment was successful. Those steps show he acted diligently in attempting to comply with his tax obligations. Furthermore, when appellant learned that his attempted payment had not been successful, he promptly rectified the problem. Appellant's explanation is corroborated, in large part, by the documentary record. Accordingly, I dissent.

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Jeffrey I. Margolis

Administrative Law Judge