

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

In the Matter of the Appeal of:

**PATRICK THOMAS AND JUDY THOMAS**

) OTA Case No. 19014258  
)  
) Date Issued: November 20, 2019  
)  
)

**OPINION**

Representing the Parties:

For Appellant: Gilda Walker, EA

For Respondent: Leoangelo C. Cristobal, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Patrick Thomas and Judy Thomas (appellants) appeal an action by the respondent Franchise Tax Board (FTB) denying appellants’ claims for refund totaling \$3,039.25 for tax years 2011, 2012, 2013, and 2015.<sup>1</sup>

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

**ISSUES**

1. Did appellants file timely claims for refund for 2011, 2012, 2013, and 2015?
2. Should the late-filing penalty for 2011 and 2015 be abated for reasonable cause?

**FACTUAL FINDINGS**

1. Appellants did not timely file returns for 2011, 2012, 2013, and 2015.
2. For tax years 2011, 2012, and 2013, FTB received information indicating appellants had sufficient income to require them to file a return. FTB sent appellants a Request for Tax Return (Request) for 2011 and a Demand for Tax Return (Demand) for 2012 and 2013.

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<sup>1</sup> There are four separate claims for refund at issue in the following amounts: \$191.50 (2011), \$1,180 (2012), \$1,049.50 (2013), and \$618.75 (2015). Appellants also filed a claim for refund for tax year 2014 in the amount of \$1,094.25, but it is not at issue because FTB granted the refund.

3. Appellants did not timely respond to the Request or Demands by filing a return, by providing evidence that a return was already filed, or by explaining why a return was not required for 2011, 2012, or 2013.
4. FTB issued a July 22, 2013 Notice of Proposed Assessment (NPA) for 2011 with a proposed tax liability of \$1,458 based on estimated income of \$49,338 (calculated on mortgage interest paid) that became final on September 20, 2013, because appellants did not file a return or protest the NPA.
5. FTB issued a March 17, 2014 NPA for 2012 with a proposed tax liability of \$1,247 based on estimated income of \$46,632 (based on mortgage interest paid) that became final on May 16, 2014, because appellants did not file a return or protest the NPA.
6. FTB issued a June 22, 2015 NPA for 2013 with a proposed tax liability of \$975 based on estimated income of \$43,800 (calculated on mortgage interest paid) that became final on August 21, 2015, because appellants did not file a return or protest the NPA.
7. On March 11, 2017, appellants filed a return for 2015.
8. On March 27, 2017, appellants filed returns for 2011, 2012, and 2013.
9. Following receipt of appellants' return for 2011, FTB imposed a late-filing penalty of \$191.50.
10. FTB issued to appellants an April 10, 2017 Notice of Tax Return Change – Revised Balance for 2012. Because appellants filed a late return and did not respond to FTB's Request, FTB imposed a late-filing penalty of \$1,180, and a demand penalty of \$311.75.
11. FTB also issued to appellants an April 10, 2017 Notice of Tax Return Change – Revised Balance for 2013. Because appellants filed a late return and did not respond to FTB's Request, FTB proposed a \$1,049.50 late-filing penalty, a \$243.75 demand penalty, and a \$76 filing enforcement fee.
12. FTB issued a March 20, 2017 Notice of Tax Return Change – Revised Balance to appellants proposing a \$618.75 late-filing penalty for 2015 after receiving appellants' 2015 return on March 27, 2017.
13. Appellants spoke to FTB on May 16, 2017, to determine the status of their recently filed returns. FTB accepted the returns and projected that appellants would owe approximately \$20,857.20 through July 14, 2017. Appellants paid \$20,857 on

- July 3, 2017. On July 7, 2017, FTB partially allocated this payment to liabilities for the following tax years: \$7,013.17 for 2012, \$4,456.62 for 2013, and \$2,475 for 2015.<sup>2</sup>
14. On August 22, 2017, FTB sent a Notice of State Income Tax Due for 2011 indicating that appellants had a balance due of \$1,133.83 for 2011. FTB received appellants' \$1,133.83 payment on the same day, August 22, 2017.
  15. On August 27, 2018, FTB received appellants' claims for refund for 2011, 2012, 2013, and 2015 requesting penalty abatement for each of these tax years. Each claim for refund depicted a signature date of August 18, 2018. There is no evidence in this record showing on what date the claims for refund were mailed by or on behalf of appellants.
  16. FTB denied appellants' claims for refund on the following dates: October 22, 2018 (2011), October 19, 2018 (2012 and 2013), and October 18, 2018 (2015).
  17. Appellants timely appealed the denial of their refund claims.

### DISCUSSION

#### Issue 1. Did appellants file timely claims for refund for 2011, 2012, 2013, and 2015?

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. FTB* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. FTB* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley* (82-SBE-154) 1982 WL 11831.) California Code of Regulations, title 18, section 30705, subdivision (c) states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."<sup>3</sup>

Before there can be an analysis of whether any taxes, penalties or interest are owed for 2011, 2012, 2013, and 2015, there must first be a determination whether appellants' claim for refund is timely. A taxpayer's failure to file a claim for refund within the statute of limitations, for any reason, bars them from later claiming a refund. (*Appeal of Earl and Marion Matthiessen* (85-SBE-077) 1985 WL 15856; *Estate of Barbara D. Gillespie (dec'd)* (2018-OTA-052P).)

The general statute of limitations for filing a refund claim is set forth in R&TC section 19306. Under that statute, the last day to file a claim for refund is the later of: (1) four

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<sup>2</sup> Additionally, FTB allocated \$6,145.52 to 2014. There is no explanation in this record why the \$20,857.20 payment was not partially applied to the 2011.

<sup>3</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

years from the date the return is filed, if filed within the extended due date, (2) four years from the due date of the return, without regard to extensions, or (3) one year from the date of the overpayment.

#### Tax Year 2011

Appellants filed their 2011 return on March 27, 2017. The 2011 return was due on April 15, 2012 (but would be treated as timely if received by April 17, 2012, due to a holiday and weekend days),<sup>4</sup> with an extended due date of October 15, 2012. Because the 2011 return was not filed on the due date or within the extended time to file a return, the first test for timeliness does not apply. The second test for timeliness requires appellants to file their 2011 claim for refund within four years of the due date, or April 15, 2016, a deadline that appellants did not meet since they filed their 2011 claim for refund on August 27, 2018.

The final allowable period to file a claim for refund is one year from the date of the overpayment. The claimed overpayment occurred on August 22, 2017, and appellants' claim for refund was received by FTB on August 27, 2018, more than one year from the payment. Appellants have not shown with other evidence that they filed their 2011 claim for refund timely. As such, we find that appellants' 2011 claim for refund did not meet the third test for timeliness.

#### Tax Year 2012

Appellants filed their 2012 return on March 27, 2017. The 2012 return was due on April 15, 2013, with an extended due date of October 15, 2013. Appellants' payment of \$20,857 was received by FTB on July 3, 2017. On July 7, 2017, appellants' payment was applied to outstanding 2012 liabilities, which included the late-filing and demand penalties. Appellants' claim for refund was received by FTB on August 27, 2018.

Because appellants' return was not filed on the due date or within the extended time to file a return, the first test for timeliness cannot be met. The second requirement necessitates that a claim for refund be filed within four years from the due date without regard to extensions or by April 15, 2016. Clearly, the second test for timeliness has not been met. To satisfy the third test for timeliness, the claim for refund must be made within one year of the overpayment. Appellants' payment for 2012 was credited against 2012 liabilities on July 7, 2017. To be

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<sup>4</sup>The IRS extended the deadline to April 17, 2012, because April 15, 2012, fell on a weekend and the following Monday was a holiday. California conformed by treating returns received by April 17, 2012 as timely.

timely, appellants' claim for refund should have been filed by July 7, 2018; however, the date FTB received the claim for refund was August 27, 2018. Thus, appellants have not shown that their claim for refund for 2012 was timely.

#### Tax Year 2013

Appellants filed their 2013 return on March 27, 2017. The 2013 return was due on April 15, 2014, with an extended due date of October 15, 2014. Appellants' payment of \$20,857 was received by FTB on July 3, 2017. On July 7, 2017, appellants' payment was applied to outstanding 2013 liabilities, which include the late-filing and demand penalties in addition to the \$76 filing enforcement fee. Appellants' claim for refund was received by FTB on August 27, 2018.

Because appellants' return was not filed on the due date or within the extended time to file a return, the first test for timeliness cannot be met. The second test for timeliness necessitates that a claim for refund be filed within four years from the filing due date, without regard to extensions, or by April 15, 2018. Appellants' claim was filed on August 27, 2018, beyond the four-year period. To satisfy the third test for timeliness, the claim for refund must be made within one year of the overpayment. Appellants' payment for 2013, as stated above, was credited against 2013 liabilities on July 7, 2017. To be timely, appellants' claim for refund should have been filed by July 7, 2018; however, the date FTB received the claim for refund was August 27, 2018. Thus, appellants have not shown that their claim for refund for 2013 was timely.

#### Tax Year 2015

FTB acknowledged receipt of appellants' 2015 return on March 11, 2017. Appellants filed their claim for refund for 2015 on August 27, 2018. Appellants' most recent payment for 2015 liabilities was made on July 3, 2017. On March 20, 2017, FTB issued to appellants a Notice of Tax Return Change – Revised Balance to taxpayers. Because appellants' 2015 return was filed late, FTB proposed a \$618.75 late-filing penalty.

The second test for timeliness requires appellants' claim for refund to be filed within four years of the original due date for 2015, or by April 15, 2020. Clearly the August 27, 2018 claim for refund is timely.

Absent congressional authorization, courts do not have general authority to abrogate the statute of limitations for equitable reasons. (*United States v. Brockamp* (1997) 519 U.S. 347.) Allowing courts to apply equity to allow taxpayers the opportunity to file refund claims late would adversely impact a very large tax administration system that processes millions of refund claims. (*Id.* at 352.) “The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system.” (*Id.* at 352-353.) Applying similar reasoning, the United States Supreme Court in *United States v. Dalm* (1990) 494 U.S. 596, concluded that the untimely filing of a claim bars a suit for refund regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected. These same considerations apply to California claims for refund as expressed in *Estate of Barbara D. Gillespie* (*dec’d*), *supra*.

Appellants’ 2011, 2012, and 2013 claims for refund were not filed timely, and thus, there is no legal basis to abate penalties associated with these tax years.

Issue 2. Should the late-filing penalty for 2011 and 2015 be abated for reasonable cause?

In our analysis above, we have concluded that appellant’s claim for refund for 2011 was not timely filed, and thus appellants’ claim that the late-filing penalty ought to be abated must fail. However, because the time that the alleged overpayment occurred and the running of the one year limitations period for filing a claim for refund is so close to the time that appellants claimed a refund, we will nonetheless analyze whether FTB properly proposed the late-payment penalty for 2011. For 2011, FTB received appellants’ return on March 27, 2017, well past the due date of April 17, 2012. Thus, FTB’s proposed assessment of the late-filing penalty was proper.

For 2015, FTB received appellants’ return on March 11, 2017 when the due date was April 15, 2016. This late filed return caused FTB to propose a late-filing penalty of \$618.75, which is the subject of the claim for refund for 2015.

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect.<sup>5</sup> (R&TC, § 19131.) The penalty is computed at five (5) percent of the tax due, after allowing for

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<sup>5</sup> Since there is no argument or evidence showing that willful neglect is at issue, we will only analyze whether appellant has shown reasonable cause to abate the late-filing penalties.

timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a).) Appellants do not dispute FTB’s calculation of the penalty, but rather contend they are entitled to penalty abatement because they had reasonable cause to file late.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M Scott* (82-SBE-249) 1982 WL 11906.) To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent business [person] 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.) Every taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241.) Ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of J. Morris and Leila G. Forbes* (67-SBE- 042) 1967 WL 1384.) Furthermore, to establish reasonable cause based on circumstances of an illness or other personal difficulty, taxpayer must show that such circumstances *continuously* prevented the taxpayer from timely compliance. (See *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.)

There does not appear to be any argument or evidence disputing that appellants’ 2011 and 2015 returns were untimely filed on March 27, 2017. Appellants contend that they were unable to timely file their 2011 and 2015 returns due to appellant-husband’s serious medical condition. Appellants’ son, to whom appellants delegated their filing responsibilities, was also seriously impaired by illness. In appellants’ opening brief, it is alleged that appellant-husband began having symptoms of “depression and by 2014 Mr. Thomas’s disease was classified as Severe Major Depression.” Appellants contend that appellant-husband was not diagnosed with depression until 2012 while being treated by a psychiatrist and his use of various medications were not efficacious to alleviate the effects of his disease. The evidence, however, is not so clear.

Appellant-wife had to assume appellant-husband’s responsibilities running a farm and managing rental properties while appellant-husband was experiencing reduced functioning due to depression. Appellants contend that by the end of 2010, neither appellant-husband nor appellant-wife were able to take care of their business affairs. In January 2010, appellants’ 29-year-old son

was given the responsibility to carry on appellants' business responsibilities; however, this delegation turned out to be ineffective. Appellants alleged that appellants' son underwent his first back surgery in April of 2010. At the end of 2011, appellants' son was diagnosed with a ruptured disc necessitating the need for another surgery that occurred in September 2013. In January 2014, appellants' son required a spinal fusion. Appellants' representative argues that appellants exercised business care and prudence by delegating their business affairs to their son.

Appellants submitted doctor's reports as evidence of their unfortunate impairment. Appellant-husband's psychiatrist, contrary to assertions made in appellants opening brief, began treating appellant-husband in November of 2005.<sup>6</sup> The three reports that were prepared on behalf of appellant-husband, between July 2013 and February 2016, all indicated that he was totally disabled from his normal job and for "any other job," due to major depression, low energy, poor concentration, chronic pain and financial stress. Although appellants assert that appellant-husband was diagnosed with depression in 2012, documentation to support this assertion is not available in this record.

Appellant-wife similarly submitted medical records indicating that she has had long-standing "mixed anxiety and depressive disorder" for which she was prescribed medications. The four records documenting this, and other medical conditions, range in date from March 2013 through June 2015. These records do not demonstrate occupational or other impairment.

Despite appellants' difficulties, appellants have not shown they had reasonable cause to excuse the late filing of their returns. Appellants' medical records do not support the contention that *both* appellants were *continuously* incapable of handling their financial and tax filing responsibilities. Even if we presume that appellant-husband had sufficient disability to cause him an inability to file returns, clearly there is no evidence in this record demonstrating that appellant-wife was similarly disabled during any of the tax years in question. Appellant-wife has not presented evidence of impairment sufficient to relieve her from the responsibility to timely file tax forms.

Also, although we agree that it was prudent to enlist the services of appellants' son to help with their financial affairs, his own alleged medical conditions (of which we do not have

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<sup>6</sup> Referencing the physician's reports in FTB's exhibit V, there are several reports from a psychiatrist that document appellant-husband's ongoing medical condition and disability. These reports are on forms provided to the doctor by "Assurity Life Insurance Company" and are labeled, "Attending Physician's Statement, Continued Waiver of Premium Claim." There are three of these reports, dated July 22, 2013, October 7, 2014, and February 3, 2016.



direct evidence to substantiate, but rely on appellants’ allegations) prevented him from serving his parents effectively. We find that such reliance is contrary to ordinary business prudence. It is unlikely that appellants did not know or could not have known about their son’s serious illnesses and impairment sufficient to inform them that he was not meeting their tax filing obligations. Thus, a prudent businessperson would have delegated responsibility to file returns to a dedicated tax professional.


Although appellants were suffering from serious medical conditions, there is insufficient evidence in this record to conclude that those difficulties prevented appellants from filing timely returns. Appellants have not shown reasonable cause, and without it, we cannot grant appellants’ claims for refund for 2011 and 2015.

HOLDINGS


1. Appellants’ claims for refund for 2011, 2012, and 2013 were not timely filed.
2. Appellants’ claims for refund for 2011 and 2015 are denied.


DISPOSITION

FTB’s action in denying appellants’ claims for refund are sustained in full.

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 Neil Robinson  
 Administrative Law Judge

We concur:

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 Richard Tay  
 Administrative Law Judge

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 Tommy Leung  
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