

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

DAVE C. HICKS AND
JULIE R. HICKS) OTA Case No. 19064897
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)**OPINION**

Representing the Parties:

For Appellants:

Dave C. Hicks

For Respondent:

Jean M. Cramer, Tax Counsel IV

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Dave C. Hicks and Julie R. Hicks (appellants) appeal an action by the respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$899.75 for the 2018 and 2019 taxable years.

We decide the matter based on the written record because appellants waived their right to an oral hearing.

ISSUE

Are appellants entitled to abatement of the dishonored check penalties?¹

FACTUAL FINDINGS

1. On April 15, 2019, appellants submitted two electronic fund transfer (EFT) requests using FTB's web-based payment system: a \$40,438 extension payment for the 2018 taxable year and a \$4,500 estimated tax payment for the 2019 taxable year. Both requests were dishonored.
2. It came to appellants' attention that the EFT requests were denied, and on April 30, 2019, and May 14, 2019, appellants successfully used FTB's web-based payment system to make the EFTs of \$40,438 and \$4,500.

¹ Here, the term "dishonored check" includes dishonored electronic fund transfer requests.

3. Also on April 30, 2019, FTB issued to appellants a “Notice of State Income Tax Due” in the amount of \$899.63, which consisted of a two-percent dishonored check penalty for each payment, plus interest on those amounts.
4. Appellants filed a “Reasonable Cause – Individual and Fiduciary Claim for Refund” dated May 1, 2019, requesting a refund of the dishonored check penalties and interest on those penalties totaling \$899.75.
5. On May 14, 2019, appellants paid the penalties and interest.
6. On May 23, 2019, FTB denied the claim for refund. This timely appeal followed.

DISCUSSION

Internal Revenue Code (IRC) section 6657 imposes a penalty whenever a taxpayer presents a check or money order in payment of tax that is subsequently dishonored. This section states that the penalty “shall not apply if the person tendered such instrument in good faith and with reasonable cause to believe that it would be duly paid.” The federal penalty is incorporated into California law by R&TC section 19134, which specifically states that it is also applicable to payments made by credit card or EFT. (R&TC, § 19134(b).) As relevant here, the amount of the penalty is two percent of the amount of the payment. (IRC, § 6657.)

The dishonored check penalty does not apply if the taxpayer tendered the payment in good faith and with reasonable cause to believe that it would be duly paid. (IRC, § 6657.) Once FTB has met its initial burden of showing that the proposed penalty has a reasonable and rational basis, usually by simply showing that the offending act or omission occurred (according to its records) and that the penalty was correctly calculated, it is presumed correct and the taxpayer has the burden of proving otherwise. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001- SBE- 001) 2001 WL 37126924.)

Here, Dave Hicks asserts that he has a specific recollection of entering the correct account and routing numbers for his account at U.S. Bank, and he has provided evidence to show that he had adequate funds in that account to cover the EFT requests. He argues that the fault lies with FTB’s payment system, which must have changed the routing and account numbers to another account that he had not used for years. Appellants also argue that, in any event, the penalty amount is excessive.

FTB provided copies of checks tendered by Dave Hicks in 2018 and drawn on the U.S. Bank account he alleges he used to make the EFTs that were dishonored. It also provided

evidence to show that appellants used an account at Fidelity Investments (Fidelity) to make EFTs on four occasions in 2017, and that the EFTs attempted on April 15, 2019, the two EFTs at issue here, were attempted from that same Fidelity account.

The evidence shows that FTB's payment system recorded the dishonored EFTs and that FTB thereafter correctly calculated and proposed imposition of the disputed dishonored check penalties. Appellants have the burden of proving the penalty should be abated. They have not met that burden. In order to find for appellants here, we would have to conclude from the evidence that appellants used FTB's payment system to request EFTs from the U.S. Bank account, but that system somehow substituted the Fidelity account information in its place. Dave Hick's statement that he requested the transfer from the U.S. Bank account is insufficient to overcome FTB's record that appellants entered the Fidelity account information. Furthermore, there is no evidence to support appellants theory that FTB's web-based payment system somehow substituted the Fidelity account information for the U.S. Bank account information. Based on the evidence, we find that appellants entered the incorrect bank information and took no action to insure there were sufficient funds in the Fidelity account to cover the EFT requests. On that basis, we conclude that appellants did not tender the payments in good faith and with reasonable cause to believe that the EFT requests would be duly honored and the amount would be paid to FTB.

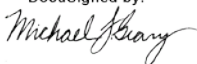
Regarding appellants' argument that the penalty is excessive, IRC section 6657 states that the penalty shall be two percent of the amount of the dishonored payment, and California adopted that language in R&TC section 19134. We have no authority to reduce the amount.

HOLDINGS

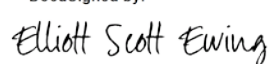
We find that appellants are not entitled to abatement or reduction of the dishonored check penalties.

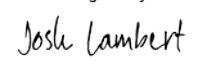
DISPOSITION

FTB's action is sustained.

DocuSigned by:

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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:

2D8DE82EB85E4A6
Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:

B90E40A720E3440
Josh Lambert
Administrative Law Judge

Date Issued: 2/5/2020