

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 19085184
H. LAU AND)	
B. LAU)	
_____)	

OPINION

Representing the Parties:

For Appellants: Kevin J. Moore, Esq.

For Respondent: Kenneth A. Davis, Tax Counsel IV

For Office of Tax Appeals: Steven Kim, Tax Counsel

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, H. Lau and B. Lau (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$12,884.50 for the 2017 tax year.¹

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

ISSUES

1. Whether appellants have established that their late filing was due to reasonable cause and not due to willful neglect.
2. Whether appellants have established that the estimated tax penalty should be abated.

¹ In its acknowledgment letter, Office of Tax Appeals (OTA) listed the amount on appeal as \$12,200.50, which is the amount listed in FTB’s refund claim denial letter. The correct amount at issue, however, is \$12,884.50, which consists of a late-filing penalty of \$12,200.50 and an underpayment of estimated tax penalty (estimated tax penalty) of \$684. Appellants concede that they are liable for interest and fees totaling \$2,013.35, and therefore we will not discuss this amount further.

FACTUAL FINDINGS

1. FTB did not receive appellants' California resident income tax return for the 2017 tax year by the April 15, 2018 deadline.
2. FTB issued appellants a Request for Tax Return dated December 27, 2018, notifying appellants that FTB had not received appellants' 2017 return.
3. In a January 2019 letter, appellants informed FTB that they timely mailed their 2017 return with payment to FTB in early April 2018 and submitted a carbon copy of check #3907 that was insufficiently funded at the time it was allegedly sent to FTB. Appellants also submitted a copy of their 2017 return, which is signed and dated March 29, 2018, reporting tax due of \$48,802 and a check dated January 11, 2019, payable to FTB in the amount of \$48,802.
4. FTB issued appellants a Notice of Tax Return Change in February 2019, showing a balance due of \$14,897.85, including a late-filing penalty of \$12,200.50 and an estimated tax penalty of \$684.
5. In a letter dated that same month, appellants informed FTB that they had filed federal and California 2017 returns and remitted checks for payment of taxes with each of the returns through the United States Postal Service (USPS) on March 29, 2018, using the same post office. Appellants asserted that the check for the federal tax was paid by their bank on April 16, 2018, but that USPS had lost or failed to deliver their mailing to FTB. Thus, appellants requested a waiver of the late-filing penalty and the estimated tax penalty. Appellants noted that they did not use certified mail or request a return receipt.
6. In March 2019, FTB issued appellants a letter, denying appellants' request for waiver of the late-filing penalty and the estimated tax penalty. Shortly thereafter, appellants remitted payment for the balance due for the 2017 tax year, which included the late-filing penalty and the estimated tax penalty.
7. The following month appellants submitted a claim for refund of \$12,884.50 for the late-filing penalty and estimated tax penalty.

8. FTB issued a letter dated May 22, 2019, denying appellants' claim for refund of \$12,200.50, plus interest.²
9. Appellants timely filed this appeal.

DISCUSSION

Issue 1. Whether appellants have established that their late filing was due to reasonable cause and not due to willful neglect.

R&TC section 19131 provides that a late-filing penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. FTB's determination is presumed to be correct, and the taxpayer bears the burden of establishing reasonable cause by credible and competent evidence for the failure to timely file a return. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) 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 such cause existed as would prompt an ordinar[ily] intelligent and prudent business[person] to have so acted under similar circumstances." (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Whether a taxpayer timely mailed a return and payment and, if not, whether the failure to do so was due to reasonable cause and not to willful neglect, are questions of fact on which taxpayer has the burden of proof. (*Appeal of La Salle Hotel Company* (66-SBE-071) 1966 WL 1412.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellants argue reasonable cause exists to abate the late-filing penalty. They assert that they timely mailed the 2017 return and payment of tax to FTB on March 29, 2018, and FTB did not receive the return because USPS lost or failed to deliver the mailing. Appellants claim that they were not aware FTB did not receive the 2017 return and accompanying payment until appellants received FTB's December 27, 2018 Request for Tax Return. Appellants concede that they did not use certified mail or request a return receipt when they purportedly first mailed the 2017 return on March 29, 2018. Appellants also note that their credit card statement shows a

² On appeal, FTB states that the refund denial letter should have also included the estimated tax penalty of \$684. (See *ante*, fn. 1.)

\$10.83 USPS charge processed on March 29, 2018, which they assert was for the cost of postage to mail their 2017 federal and California returns to the Internal Revenue Service (IRS) and FTB, respectively. Appellants also submitted a carbon copy of check #3907, dated April 10, 2018, showing FTB as the payee. Furthermore, appellants argue that they promptly responded to FTB's request for their return, promptly paid the penalty and interest upon FTB's denial of their requested waiver, and, subsequently, timely filed a claim for refund.

Here, appellants have not met their burden of establishing that they timely filed their 2017 return. Although appellants' credit card statement shows a USPS credit card charge on March 29, 2018,³ the statement itself provides no indication that the return was mailed and properly addressed to FTB. Similarly, appellants' carbon copy of their check #3907, insufficiently funded⁴ and dated 12 days after the return was purportedly mailed,⁵ also does not establish the return was timely filed. Internal Revenue Code (IRC) section 7502 and Treasury Regulation section 301.7502-1 provide that, aside from proof of actual timely delivery, which we do not have here, a taxpayer can use a postmarked envelope or a postmarked registered or certified mailing receipt to prove the date a document was filed with the IRS.

R&TC section 21027 provides that Treasury Regulation section 301.7502-1, as revised on January 10, 2001, is also applicable to filings with FTB. Some courts have strictly applied that law to limit the evidence to a postmarked envelope or a postmarked registered or certified mailing receipt. (See, e.g., *Weisman v. IRS* (S.D.N.Y. 1997) 972 F.Supp. 185, 188-189.) However, the Ninth Circuit Court of Appeals has held that IRC section 7502 does not bar

³ Appellants previously informed FTB that the return was sent in early April 2018 but now assert the return was sent on March 29, 2018.

⁴ Appellants had insufficient funds in their bank account in April 2018 to support the check amount of \$48,802. Although appellants submitted a letter from their bank manager stating all of their accounts are liquid and they have access to transfer between their accounts at any time, appellants appear to not have done so in April 2018 to sufficiently fund the #3907 check. Also, it appears FTB previously requested proof of an automatic bank overdraft protection for up to \$50,000, but no such document was provided to OTA. Appellants did provide a document titled "Overdraft and Overdraft Fee Information for Your Chase Checking Account," but it states, "We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, your transaction will be declined."

⁵ Appellants note that both the FTB and IRS checks were dated April 10, 2018, to enable payment before the April 15, 2018 deadline, but appellants provide no explanation as to why a check dated when signed on March 29, 2018, or earlier would not enable payment before the April 15, 2018 deadline.

admission of other evidence. (*Anderson v. U.S.* (9th Cir. 1992) 966 F.2d 487, 491-492.)⁶

Although we take the less restrictive view of the type of evidence required to establish timely mailing of a return or payment, we nevertheless find appellants did not satisfy their burden of proving their return was timely filed.

Appellants also have not shown their late filing was due to reasonable cause and not due to willful neglect. Appellants assert that they were unaware that FTB did not receive the 2017 return or payment until they received FTB's December 27, 2018 letter. However, reasonably prudent taxpayers exercising due care and diligence would monitor their bank account to determine whether a check to FTB for taxes of \$48,802 had cleared around the April 15 payment due date. (See *Appeal of Scanlon*, 2018-OTA-075P.) Appellants further assert that they promptly responded to FTB's request for their return, promptly paid the penalty and interest upon FTB's denial of their requested waiver, and, subsequently, timely filed a claim for refund. However, reasonable cause and the absence of willful neglect are gauged at the time that a return is due. (*Morrissey v. Commissioner*, T.C. Memo. 1998-443.) Accordingly, appellants are liable for the late-filing penalty.

Issue 2. Whether appellants have established that the estimated tax penalty should be abated.

Except as otherwise provided, R&TC section 19136 conforms to IRC section 6654, which imposes a penalty for the underpayment of estimated tax when a taxpayer's installment payments are less than the amounts due at the end of the installment periods. There is no provision in the R&TC (or the IRC incorporated by the R&TC) that allows the estimated tax penalty to be abated based solely on a finding of reasonable cause. As a result, there is no general reasonable cause exception to the imposition of the estimated tax penalty. (*Appeal of Johnson*, 2018-OTA-119P; *Adams v. Commissioner*, T.C. Memo. 2013-7.) Although IRC section 6654(e)(3)(A) and (B) provide for waiver of the penalty under certain limited, specific situations, appellants have not presented any arguments suggesting that any of those situations apply to them.

Here, appellants assert that there was reasonable cause for their underpayment of estimated tax. However, there is no general reasonable cause exception to the estimated tax

⁶ In *Baldwin v. United States* (9th Cir. 2019) 921 F.3d 836, the Ninth Circuit Court of Appeals noted that Treasury Regulation section 301.7502-1 was amended in 2011 to resolve the circuit split. However, since R&TC section 21027 conforms to this Treasury Regulation as revised on January 10, 2001, the 2011 amendment is inapplicable in California.


penalty. Accordingly, we find that appellants have failed to establish that the estimated tax penalty should be abated.

HOLDINGS


1. Appellants have not established that their late filing was due to reasonable cause and not due to willful neglect.
2. Appellants have not established that the estimated tax penalty should be abated.


DISPOSITION

FTB’s action denying appellants’ claim for refund is sustained.

DocuSigned by:

 Huy "Mike" Le
 Administrative Law Judge

We concur:

DocuSigned by:

 Andrea L.H. Long
 Administrative Law Judge

DocuSigned by:

 Alberto T. Rosas
 Administrative Law Judge

Date Issued: 8/12/2020