

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

In the Matter of the Appeal of: ) OTA Case No. 19105402  
R. STRAUSS AND )  
L. STRAUSS )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Ronald S. Litvak, CPA

For Respondent: Kenneth Davis, Tax Counsel IV

For Office of Tax Appeals: Michelle Huh, Tax Counsel

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Strauss and L. Strauss (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund for the 2018 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 are liable for the mandatory electronic payment (e-pay) penalties imposed under R&TC section 19011.5.

**FACTUAL FINDINGS**

1. For over 10 years, appellants have retained the services of a California accounting firm to prepare their tax returns.

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<sup>1</sup> From the outset, we note that it is unclear whether the tax year at issue in this appeal is 2017 or 2018. Appellants indicate in their appeal letter that they are appealing the 2018 tax year. However, appellants attached to their appeal letter FTB’s September 25, 2019 claim for refund denial letter, which denied appellants’ claim for the 2017 tax year. Based on FTB’s denial letter, the Office of Tax Appeals acknowledged appellants’ appeal for the 2017 tax year. Nevertheless, we believe appellants’ appeal is properly for the 2018 tax year since FTB imposed the electronic payment penalties at issue for payments made during 2019 relating to the 2018 tax year, and appellants specifically filed a claim for refund for the 2018 tax year.

2. FTB has required appellants to make payments electronically, in accordance with R&TC section 19011.5, since at least 2014. FTB imposed e-pay penalties in April 2014, November 2015, and June 2016, for appellants' failure to comply with the e-pay requirement. Appellants paid the penalties, and appellants' liability for these penalties is not at issue in this appeal.
3. On March 29, 2019, appellants' accounting firm sent appellants an email providing instructions on how to submit their 2018 California Form 3519 Extension Payment Voucher (2018 extension payment voucher). The email provided appellants information for writing "a check in the amount of \$130,000 made payable to 'Franchise Tax Board' and mail[ing] it with the attached voucher on or before April 15, 2019" to FTB. (Emphasis in original.) The email informed appellants that, alternatively, the payment could be made online using the FTB website provided in the email.
4. On April 1, 2019, appellants made a \$130,000 extension payment by check, again failing to comply with the e-pay requirement. Included with appellants' payment was a 2018 extension payment voucher, which states, "CAUTION: you may be required to pay electronically. See instructions."
5. Subsequently, FTB issued appellants a Notice of State Income Tax Due, dated April 11, 2019, notifying them that FTB imposed a one percent e-pay penalty of \$1,300.00, plus interest. The notice provided payment options and indicated that if an individual is required to pay electronically, penalties would apply if the balance was not paid electronically.
6. Appellants paid the balance of \$1,301.07 by check, again failing to comply with the e-pay requirement. FTB imposed a second mandatory e-pay penalty on July 11, 2019, in the amount of \$13.01.
7. Appellants paid the second mandatory e-pay penalty amount of \$13.01 by check, again failing to comply with the e-pay requirement. FTB imposed a third mandatory e-pay penalty on July 23, 2019, in the amount of \$13.00, which appellants paid.
8. By letter dated August 16, 2019, appellants requested relief from the mandatory e-pay penalties, contending that their failure to make the payments electronically was an inadvertent clerical error. Appellants asserted that they have always complied with the e-pay requirement, and that they implemented procedures to ensure future compliance.

9. FTB treated appellants' letter as a claim for refund, which it denied.
10. Appellants filed this timely appeal.

### DISCUSSION

R&TC section 19011.5(a) requires individuals to remit all future payments electronically if they make an estimated tax or extension payment in excess of \$20,000 beginning on or after January 1, 2009, or if they file an original return with a tax liability over \$80,000 for a tax year beginning on or after January 1, 2009. Individuals who have become subject to the e-pay requirement must continue to make all future payments electronically, unless they either meet the requirements of R&TC section 19011.5(b) and make an election to discontinue e-pay, or they request and receive a waiver of the e-pay requirement pursuant to R&TC section 19011.5(d). R&TC section 19011.5(c) provides that individuals who do not comply with the e-pay requirement shall pay a penalty of one percent of the amount paid, unless it is shown that the failure to make the payment electronically as required was for reasonable cause and was not the result of willful neglect.

#### *FTB's Calculation of Appellants' Mandatory E-pay Penalties*

Appellants paid their 2018 extension payment of \$130,000 by check, thereby failing to comply with the e-pay requirement. There is no dispute that appellants were required to make this payment electronically. (R&TC, § 19011.5(a).) FTB properly imposed and calculated a mandatory e-pay penalty of \$1,300 (i.e., \$130,000 x 0.01), plus interest, on April 11, 2019. Appellants paid the outstanding balance of \$1,301.07 by check on July 11, 2019, again failing to comply with the e-pay requirement. FTB properly imposed and calculated a second mandatory e-pay penalty of \$13.01 (i.e., \$1,301.07 x 0.01) on July 11, 2019. Appellants paid the second mandatory e-pay penalty of \$13.01 by check on July 23, 2019, again failing to comply with the e-pay requirement. FTB imposed a third mandatory e-pay penalty amount of \$13.00 on July 23, 2019. However, while FTB's imposition of a third mandatory e-pay penalty was proper, FTB's calculation of the July 23, 2019 mandatory e-pay penalty was in error. The mandatory e-pay penalty is one percent of the amount paid. (R&TC, § 19011.5(c).) The July 23, 2019 mandatory e-pay penalty was based on appellants' payment of \$13.00 by check. As such, the third e-pay penalty should have been \$0.13 (i.e., \$13.01 x 0.01), as opposed to \$13.00. Thus, appellants are entitled to a refund of \$12.87 (i.e., \$13.00 - \$0.13), plus applicable interest.

*Abatement of the Mandatory E-pay Penalties*

Although R&TC section 19011.5 does not define “reasonable cause,” when the same terms are used to describe the basis for relief of other penalties, it is appropriate to look to cases that discuss those penalties for guidance. (*Appeal of Porreca*, 2018-OTA-095P.) To establish reasonable cause for the failure to timely file returns, taxpayers 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 businessperson to have so acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) The taxpayer bears the burden of proving reasonable cause. (*Appeal of Schwyhart* (75-SBE-035) 1975 WL 3519.) Ignorance of the law is not reasonable cause for failure to comply with statutory requirements. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) Taxpayers do not exercise ordinary business care and prudence when they fail to acquaint themselves with the requirements of California tax law. (*Ibid.*)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*), the United States Supreme Court held that a taxpayer’s reliance on a tax professional, such as an accountant or attorney, to timely file tax returns did not constitute reasonable cause because each taxpayer has a personal, nondelegable obligation to file timely tax returns. The Court stated that unlike substantive tax advice, it requires no special training or effort to ascertain a deadline and make sure that it is met, and that a taxpayer’s reliance on a tax professional cannot be a substitute for compliance with an unambiguous statute. (*Id.* at p. 251-252.) The bright-line rule as set forth in *Boyle*, a case involving a late-filing penalty, has also been applied to late payment penalty cases. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860; *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136.) We believe the bright-line rule is equally applicable to the mandatory e-pay penalty.

Appellants argue that their failures to comply with the e-pay requirement were due to reasonable cause and not willful neglect. Specifically, appellants contend that they reasonably relied on and followed incorrect instructions provided by their accounting firm on how to remit their 2018 extension payment. Under *Boyle*, reasonable cause may exist if a taxpayer relies on a tax professional for *substantive* tax advice, such as whether a taxpayer is liable for taxes under the tax code or due to a debatable tax position, not whether a taxpayer’s payment method meets statutory requirements. (*Boyle*, at p. 251.) Consequently, appellants’ reliance on *Boyle* is

misplaced in this instance. R&TC section 19011.5 clearly defines when taxpayers must submit payments electronically, as well as when a taxpayer can make an election under section 19011.5(b) or request a waiver under section 19011.5(d) to discontinue making e-payments. Additionally, R&TC section 19011.5(f) clearly specifies what “electronically remit” means for purposes of making a payment electronically. We find no ambiguity in R&TC section 19011.5 and, under *Boyle*, reliance on a tax professional cannot be a substitute for compliance with an unambiguous statute. Appellants had a personal, nondelegable obligation to ensure that their payments complied with the requirements of R&TC section 19011.5(a).

We also note that the 2018 extension payment voucher clearly cautioned taxpayers that they may be required to pay electronically. Appellants did not heed the caution, despite already having paid the e-pay penalty in April 2014, November 2015, and June 2016, for appellants’ past failures to comply with the e-pay requirement. Notwithstanding the voucher caution and having paid three e-pay penalties previously, appellants failed to comply with the e-pay requirement when they paid their 2018 extension payment, as well as two subsequent e-pay penalties, by check. We believe that an ordinarily intelligent and prudent businessperson, despite reliance on a tax professional, would make certain that future payments were properly made electronically after receiving notice that they were subject to the mandatory e-pay requirement, especially having already run afoul of the requirement at least once.

We find that appellants have not established that their failure to make payments electronically was due to reasonable cause. Accordingly, there is no basis to abate the penalties.

HOLDING

With the exception of \$12.87, plus applicable interest, caused by FTB’s error in calculating the July 23, 2019 mandatory e-pay penalty amount, appellants are liable for the mandatory e-pay penalties imposed under R&TC section 19011.5.

DISPOSITION

Appellants’ claim for refund in the amount of \$12.87, plus applicable interest, is granted. FTB’s denial of appellants’ claim for refund is otherwise sustained.

DocuSigned by:  
*Sheriene Anne Ridenour*  
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Sheriene Anne Ridenour  
Administrative Law Judge

We concur:

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*Huy “Mike” Le*  
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Huy “Mike” Le  
Administrative Law Judge

DocuSigned by:  
*Natasha Ralston*  
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Natasha Ralston  
Administrative Law Judge

Date Issued: 8/18/2020