

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18053237  
B. DAMICO )  
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## **OPINION**

## Representing the Parties:

For Appellant: Dehra Difiore-Moles, TAAP<sup>1</sup>  
Ruben Alvarez, TAAP

For Respondent: Veronica Long, Tax Counsel

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellant B. Damico appeals from the action of respondent Franchise Tax Board denying appellant's claim for refund of a late payment penalty for the 2012 tax year.<sup>2</sup>

Appellant waived her right to an oral hearing, so we decide this appeal based on the written record.

## ISSUE

Has appellant established a reasonable cause for the late payment of taxes for 2012?

<sup>1</sup> Appellant filed the opening brief. Subsequently, the following law students represented appellant consecutively through the Tax Appeals Assistance Program (TAAP): Shea O’Gara, Ruben Alvarez, and Dehra Difiore-Moles, who signed the most recent briefs.

<sup>2</sup> There is conflicting information regarding the amount of the penalty. Respondent's January 27, 2017 Income Tax Due Notice states that the penalty for 2012 was \$6,940.25, which is consistent with both claims for refund dated August 8, 2017, and February 23, 2018, and with the appeal letter to the Office of Tax Appeals. However, respondent states here that its records indicate that the amount of the late payment penalty actually collected from appellant was \$6,928.05.

## FACTUAL FINDINGS

1. During and prior to 2012, appellant owned a personal residence (Redwood City home) and a residential rental property (Newark property), both of which were heavily encumbered by mortgage debt.
2. Appellant fell into arrears on her mortgage obligations.
3. During 2012, the Newark property lender foreclosed on and took possession of the property. Appellant received nothing from the lender's eventual sale of the property, though the lender forgave approximately \$94,609 of the debt and filed an Internal Revenue Service (IRS) Form 1099-C (1099-C).<sup>3</sup>
4. Appellant hired H&R Block (Block) to prepare and file appellant's 2012 federal and California income tax returns. The timely filed federal return reported income totaling \$337,590, consisting of pension or annuity income of \$12,370, Social Security income of \$17,581, \$72 in dividends, and capital gains of \$307,567 from the "sale" of the Newark property.<sup>4</sup> The federal return also reported adjusted gross income of \$334,341, taxable income of \$323,141, and federal income tax owed of \$53,618. The timely filed California return reported taxable income of \$315,556 and tax due of \$27,761. Thus, on April 15, 2013, appellant owed \$81,379 in income taxes.
5. Appellant did not timely pay the income tax due, which caused respondent to impose the late payment penalty and file a tax lien against appellant's Redwood City home.
6. Sometime prior to August 18, 2015, appellant filed for bankruptcy protection under Chapter 13.<sup>5</sup>
7. Beginning in 2013 or earlier, appellant fell into arrears on her Redwood City home mortgage, which at sometime during that year had a balance due of \$630,000. Appellant sold her Redwood City home in 2017 for \$1,595,000.

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<sup>3</sup> According to the instructions that accompany the 2012 1099-C, the form is generally issued because a federal government agency or an applicable financial entity (a lender) discharged (canceled or forgave) a debt, or because an identifiable event occurred that either was or was deemed to be a discharge of a debt of \$600 or more.

<sup>4</sup> According to a letter from Block, the IRS Form 4797 (Sales of Business Property) used the debt amount as the sales price when calculating appellant's gain.

<sup>5</sup> Chapter 13 allows for adjustment of an individual's debts, similar to a reorganization for a corporate debtor. We do not know when the petition was filed or how it was resolved.

8. In May 2017, respondent demanded payment of its lien from the proceeds of the sale of appellant's Redwood City home.
9. Appellant made the following payments to respondent: \$599.27 in May 2016; \$321.58 in June 2016; and the entire amount remaining due on June 16, 2017. The final payment was made from an escrow account as part of the disbursement of the proceeds from the sale of appellant's Redwood City home.
10. In August 2017, appellant filed a request for abatement of the penalty and interest and a timely claim for refund in the amount of \$10,470.66.
11. By a letter dated August 22, 2017, respondent denied the claim for refund.
12. On February 23, 2018, appellant filed a request for abatement of the late payment penalty of \$6,940.28 and a claim for refund of that amount.
13. On May 10, 2018, respondent denied appellant's claim for refund. This timely appeal followed.

### DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return on or before the due date. Respondent contends that it correctly calculated and imposed the late payment penalty and that appellant has not established a basis for relief.

Appellant does not dispute respondent's calculation of the penalty amount or that the taxes were not timely paid. Rather, appellant argues, first, that respondent was not required to impose the penalty, and, second that appellant's failure to timely pay the taxes should be excused, and the penalty should be abated, for reasonable cause. In this latter regard, appellant asserts that she is a disabled senior citizen who has always paid her taxes on time, and that her inability to do the same in this instance was due to a perfect storm of unpredictable and tragic circumstances. These alleged circumstances included that appellant's lender had foreclosed on the Newark property in 2012, resulting in substantial capital gains taxes that appellant could not have anticipated and could not pay due to the fact that appellant was then and remained disabled,

living on a fixed income of Social Security benefits and a small pension with no substantial, liquid assets.<sup>6</sup>

Appellant cites *Coastside Fishing Club v. California Fish & Game Commission* (2013) 215 Cal.App.4th 397, in support of the argument that imposition of the penalty was permissive, not mandatory, and that respondent could have chosen to not impose the penalty. Even if the cited case was applicable here, which it is not, a generous interpretation of the argument would be that appellant wants us to grant the requested relief on the grounds that respondent abused its discretion. There is no legal authority that allows review on that basis. Therefore, we turn to appellant’s argument that she could not pay the tax liabilities due to lack of funds.

A late payment penalty may be abated if the taxpayer demonstrates that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect.<sup>7</sup> (R&TC, § 19132(a).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Friedman*, 2018-OTA-077P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) The Office of Tax Appeals’ Rules for Tax Appeals state that unless there is an exception provided by law, the burden of proof requires proof by a preponderance of the evidence.<sup>8</sup> (Cal. Code Regs., tit.18, § 30219.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.) A failure to pay will be considered due to reasonable cause if the evidence establishes that the taxpayer exercised ordinary business care and prudence in providing for the payment of the tax liability but was either unable to pay the tax when due or was able to pay it when due only by suffering undue hardship. (Treas. Reg. § 301.6651-1(c)(1);

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<sup>6</sup> Appellant does not appear to assert that her physical disability prevented her from paying the tax when due, and in any event, the evidence would not support such a claim. (See *Estate of Stuller v. United States* (7th Cir. 2016) 811 F.3d 890.)

<sup>7</sup> Respondent does not assert, and the evidence does not show, that appellant’s failure to pay the tax due was the result of willful neglect, so the issue is whether appellant has established reasonable cause for the late payment.

<sup>8</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.)

*Appeal of Friedman, supra.*) Thus, we look to the evidence to determine whether appellant was able to pay the taxes (without suffering undue hardship) on April 15, 2013.

The evidence paints a somewhat incomplete but nonetheless sympathetic picture of appellant’s financial situation. It appears from the evidence that appellant acquired the Newark property in 1965.<sup>9</sup> During all the several years prior to April 15, 2013, and until its sale in 2017, appellant lived at her Redwood City home. Appellant used the Newark property to produce rental income. Appellant had been disabled, unemployed, and on a limited fixed income since long before April 15, 2013. Appellant depended upon the income from the Newark property to make ends meet. For unknown reasons, the Newark property was not rented for much of 2010 and 2011, and, as a result, appellant could not meet all of her mortgage obligations. The lender on the Newark property foreclosed and took possession. We do not know whether or when the lender sold the Newark property, but appellant received a 1099-C regarding the \$94,609 debt forgiveness. Aside from the limited income, appellant had the Redwood City home, on which the mortgage was already in arrears,<sup>10</sup> and an unknown amount of cash in her checking account when the taxes became due.<sup>11</sup> When appellant had her 2012 taxes done by Block, she learned that she owed over \$81,000 in federal and state taxes.

In its final brief, respondent concedes that appellant did not have substantial income during 2012 and that she received no money from the foreclosure of the Newark property. It argues that appellant did not disclose her ownership of the Redwood City home and residential property located in Lincoln, California (the Lincoln property) in her 2014 and 2016 applications for installment payment agreements (IPAs). Providing a few pages of appellant’s 2017 income tax return, which showed that appellant reported a gain on the sale of the Redwood City home of almost \$236,000, respondent at least implies that appellant could have sold or further encumbered one of those properties to generate the required funds. Finally, respondent contends

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<sup>9</sup> According to the evidence, appellant was barely 19 years old at the time.

<sup>10</sup> Appellant provided documents that refer to a \$630,000 debt secured by the Redwood City home, a possible application for a loan modification, and a suspended August 23, 2013 auction sale of that home. Appellant’s financial statements, which she submitted in support of her requests for installment payments agreements in September 2014 and September 2016, indicate that appellant was not making payments against her Redwood City home mortgage.

<sup>11</sup> While appellant provided some (incomplete) bank account records, those were for the period between December 20, 2011, and December 31, 2012, and do not contain the information most relevant to our inquiry: the amount in the account on and during the months immediately preceding April 15, 2013.

that appellant had not (at that time) provided bank records or other evidence to show the “totality of her financial circumstances at the time the taxes were due.”

While appellant did not disclose her ownership of the Redwood City home in her 2014 application for an IPA, we do not believe that she was attempting to mislead respondent, or that respondent was thereby misled. Respondent knew that the Redwood City home had been appellant’s residence for years. We also note that, while appellant did not expressly describe her ownership of the Redwood City home on the 2016 application, she did indicate there that she had not been paying her mortgage payments, and that was the only property she owned at the time. We also find that respondent’s statement that appellant also owned the Lincoln property when she applied for IPAs in 2014 and 2016 is not supported by the evidence. The public records information, upon which both parties rely, appears to indicate that appellant purchased the Lincoln property in 2018, approximately seven months after appellant sold the Redwood City home. Thus, we are left with respondent’s argument that appellant had substantial equity in her home, which could have been liquidated to pay the taxes, and its argument that she could have had other, undisclosed assets with which to timely pay the taxes.

Regarding the equity argument, appellant’s \$630,000 loan on the Redwood City home was already in arrears, and the real estate recovery from the subprime lending crisis was barely underway when the taxes were due. Given all the circumstances, we do not believe a lender would have loaned at least \$81,000 to appellant, who was already in default on the existing loan. Based on the evidence, we find that appellant could not have sold or further encumbered the Redwood City home without suffering undue hardship.

Regarding appellant’s overall financial condition, we do have some lingering questions about whether appellant could have done something to pay the taxes. Some of appellant’s evidence is incomplete. The bank records show unexplained deposits that are inconsistent with appellant’s descriptions of her limited income. For example, it does not appear that appellant deposited her pension income into the account for which appellant provided records, and appellant has not explained that anomaly.<sup>12</sup> The bank records also show unexplained deposits in excess of appellant’s alleged limited income. Between February 18, 2012, and March 19, 2012,

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<sup>12</sup> According to appellant’s August 18, 2015 declaration in the bankruptcy matter, she had been receiving a \$1,030.83 monthly pension benefit since 2011 and a \$1,594 Social Security benefit since 2012. We see a monthly deposit of a Social Security benefit beginning by August 2012, at the latest, but we see nothing that corresponds to the pension benefit, and appellant offers no explanation. Deposits between March 20, 2012, and April 18, 2012 totaled \$11,951.75. Deposits between April 19, 2012, and May 17, 2012, totaled \$41,389.73.

deposits totaled \$10,927; between March 20, 2012, and April 18, 2012, deposits totaled \$11,951.75; deposits between April 19, 2012, and May 17, 2012, totaled \$41,389.73; and there were at least two other months during which deposits exceeded \$5,000 and included unexplained \$2,000 deposits.<sup>13</sup> Finally, as already mentioned, the bank records do not cover the critical period between January 1, 2013, and April 15, 2015.

The evidence shows that appellant might have been unable to pay the taxes when due without suffering undue hardship. But our findings cannot be based on what might have been. Appellant has the burden and her effort has fallen short. There are too many gaps in the evidence and too few explanations for the inconsistencies. We conducted a telephone conference months ago, as a result of which we allowed appellant to submit additional briefing and evidence to show that she could not pay the taxes when due. Appellant knew the due date for the tax payment but provided no bank records for 2013. Based on the evidence, we must find that appellant has not established that she was unable to pay the taxes due on April 15, 2013, without suffering undue hardship. Consequently, we conclude that appellant has not established reasonable cause for the failure to pay the taxes when due.

Regarding appellant's references to her commendable filing and payment history and the IRS's abatement of the federal late payment penalty for the same period on the basis of her good history of filing and paying federal taxes over the years, we note that the IRS administers a "First Time Abate" program that allows it to waive various first-time penalties if a taxpayer has timely filed returns and paid taxes for the preceding three years.<sup>14</sup> California law does not include any similar provision that would allow respondent (or the Office of Tax Appeals) to abate a late payment penalty on the basis of a taxpayer's good filing history. As explained above, California law requires a showing of reasonable cause for the penalty to be abated.

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<sup>13</sup> Although the records show the balance in the account was returned to near zero by the end of each statement period during which unexplained deposits were made, we have no information regarding where the money went because appellant did not provide complete copies of those pages of the bank statements.

<sup>14</sup> The IRS First Time Abate program is discussed in Internal Revenue Manual Penalty Handbook section 20.1.1.3.6.1.

**HOLDING**

Appellant has not established reasonable cause for the late payment of taxes for 2012.

**DISPOSITION**

Respondent's denial of appellant's claim for refund is sustained.

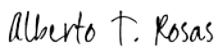
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Michael F. Geary  
Administrative Law Judge

We concur:

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Administrative Law Judge

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Suzanne B. Brown  
Administrative Law Judge

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