

4. Respondent issued a Notice of Tax Return Change – Revised Balance indicating a balance due of \$621.72¹, which appellants paid on November 1, 2019. Appellants subsequently filed a claim for refund, dated December 2, 2019, which respondent denied on January 9, 2020, for lack of reasonable cause to abate the late payment penalty.
5. Appellants filed this timely appeal, requesting a refund in the amount of \$497.64.

DISCUSSION

R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. The late payment penalty may be abated if the taxpayer can show that the failure to make a timely tax payment was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) It is well established that a presumption of correctness attends FTB's determinations of fact and that taxpayers have the burden of proving such determinations erroneous. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) To overcome the presumed correctness of FTB's finding as to issues of fact, taxpayers must introduce credible evidence to support their assertions, and if they do not support their assertions with such evidence, FTB's determinations must be upheld. (*Ibid.*) FTB's determination that an exclusion should be disallowed is presumed correct and taxpayers must prove their entitlement to the claimed exclusion. (*Ibid.*)

The fact that tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer's burden of establishing reasonable cause. (*Appeal of Scott* (82- SBE-249) 1982 WL 11906; *Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) A taxpayer's difficulty in determining income with exactitude does not negate the requirement that taxpayers make payments of tax based upon a reasonably accurate estimate of their tax liability. (*Appeal of Scott, supra*; *Appeal of Sleight, supra*.) A taxpayer must establish that he could not have acquired the information necessary to make an estimate of his tax liability. (*Appeal of Moren*, 2019-OTA-176P.) An assertion that records were difficult to obtain without any substantiation of efforts made to retrieve those records or otherwise showing that they were unobtainable is not sufficient to show reasonable cause. (*Ibid.*)

¹Consisting of the late payment penalty of \$758.11, less appellants' overpayment of \$159, plus applicable interest.

It is undisputed that appellants paid part of their 2018 tax liability late. In their opening brief, appellants request that they be refunded \$497.64, which they assert represents the portion of the penalty related to the April 16, 2019 payment. Appellants contend they showed reasonable cause for abatement of this portion of the late payment penalty because although they had difficulty calculating their capital gains for 2018, due to several transfers of large securities between different banks and sales of some of these securities, they paid the liability only one day late on April 16, 2019. Appellants assert that they were informed by their tax preparer on April 11, 2019, that they had a state tax balance of \$9,048. Appellants argue that they immediately sold stock to pay the tax liability. The sale of stock took three days to clear, and they were able to pay the \$9,048 tax liability only one day late on April 16, 2019. Appellants indicate that they are a family of three with a one-year-old child and received a total tax bill of \$25,931 (consisting of both their state and federal tax liability), which they were able to pay within five days, thus showing that they exercised “ordinary business care and prudence.”² Appellants concede that their tax preparer should have prepared an estimate sooner, but acknowledges that the preparer failed to do so. Although we do not have the exact dates that appellants engaged in these transactions, the transactions were concluded during 2018 and appellant should have had the information necessary to compute the gain realized from the sales of securities long before the April 15, 2019 deadline. The mere fact that appellants’ accountant did not compute that gain until four days before the due date does not constitute reasonable cause for the late payment of appellants’ 2018 tax liability. (*Appeal of Scott, supra.*)

Here appellants have failed to establish that they exercised ordinary business care and prudence. Appellants engaged in several transfers and sales of securities and should have anticipated that these transactions would trigger taxable capital gains. Although appellants note that they did not have \$25,931 readily available to send out in less than three business days, appellants were aware that they engaged in these transactions and should have anticipated that engaging in these transactions would trigger large taxable gains. A taxpayer will be considered

² Appellants also argue that a \$497.64 “fine” for being one day late appears to violate the Section 17 of the California Constitution. We note that OTA is prohibited by Article III, section 3.5 of the California Constitution from declaring a statute to be unconstitutional or refusing to enforce a statute on the basis that it is unconstitutional unless an appellate court has already determined that such statute is unconstitutional. Therefore, we will not discuss this issue any further.

to have exercised ordinary business care and prudence if the taxpayer made reasonable efforts to conserve sufficient assets in a marketable form to satisfy a tax liability and nevertheless was unable to pay all or a portion of the tax when it became due. (Treas. Reg. § 301.6651-1(c)(1).)³ Here, appellants have not shown that they took sufficient efforts, if any, to prepare for the potential tax liability or to conserve sufficient assets in a marketable form to satisfy the tax liability.

HOLDING

Appellants have not established reasonable cause for the late payment of tax to support an abatement of the late payment penalty.

DISPOSITION

Respondent’s action in denying appellants’ claim for refund for 2018 is sustained in full.

DocuSigned by:
Natasha Ralston

Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Cheryl Akin

Cheryl L. Akin
Administrative Law Judge

DocuSigned by:
Huy "Mike" Le

Huy "Mike" Le
Administrative Law Judge

Date Issued: 12/9/2020

³ Because R&TC section 19132 is patterned after Internal Revenue Code section 6651, the interpretation and effect given the federal provision by the federal courts and administrative agencies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658.)