

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19125590  
N. LUCAS )  
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**OPINION**

Representing the Parties:

For Appellant: Samuel Ysusi, CPA  
Plante & Moran, PLLC

For Respondent: Sarah J. Fassett, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellant N. Lucas appeals respondent Franchise Tax Board’s action in denying appellant’s claim for refund of \$45,889.36, plus interest, for tax year 2018. Appellant waived the right to an oral hearing, and therefore we decide this matter based on the written record.

**ISSUE**

Whether appellant’s failure to timely pay his tax liability for tax year 2018 was due to reasonable cause.

**FACTUAL FINDINGS**

1. On April 13, 2019, appellant and his spouse timely filed a 2018 California Nonresident or Part-Year Resident Income Tax Return.<sup>1</sup> Appellant reported over \$7 million in California taxable income and total tax of \$934,352. He applied estimated tax payments of \$100,000 and self-assessed an underpayment of estimated tax penalty of \$24,676, for a total amount due of \$859,028, which appellant did not pay by the April 15, 2019 due date.

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<sup>1</sup> Although both appellant and his spouse filed using the married filing jointly status and filed a claim for refund, only appellant appeals respondent’s action in denying the claim for refund. Therefore, we refer only to appellant in this Opinion.

2. Several weeks later, in early May, while reviewing his bank account, appellant discovered that the attempted electronic payment of \$859,028 was unsuccessful. When appellant's representative called respondent on May 7, respondent informed the representative that the penalties to date included the late-payment penalty of \$45,889.36.
3. The next day, on May 8, appellant paid \$859,028, but did not pay the late-payment penalty. A few days later, appellant submitted an FTB Form 2917, a claim for refund requesting waiver of the late-payment penalty despite not yet paying it.
4. In early June 2019, respondent issued a notice that appellant still owed the late-payment penalty of \$45,889.36, plus interest. Appellant paid the balance in full by the end of the month. A few days later, appellant submitted a second FTB Form 2917, repeating the request for waiver of the late-payment penalty.
5. On September 20, 2019, respondent denied appellant's claim for refund. Appellant then filed this timely appeal.

#### DISCUSSION

Because appellant failed to timely pay the tax liability for tax year 2018 by April 15, 2019, respondent imposed a late-payment penalty of \$45,889.36. The penalty is presumed correct unless the taxpayer can demonstrate that the late payment resulted from reasonable cause and not willful neglect. (R&TC, § 19132.) Appellant does not dispute the late-payment penalty computation, and there are no allegations of willful neglect in this appeal; our sole focus here is on reasonable cause. To establish reasonable cause, the taxpayer must demonstrate that its failure to timely pay the proper amount of the tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P.) The reason for missing the deadline must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Moren*, 2019-OTA-176P (*Moren*).)

The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party 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.) This standard “ ‘means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily

in number of witnesses or quantity, but in its effect on those to whom it is addressed.’ ” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325, italics omitted, quoting *People v. Miller* (1916) 171 Cal. 649, 652.)

Appellant alleges the following: first, there were some oversights by his representative; and second, there were some errors with the tax preparation software. First, as to the alleged oversights, when an oversight causes appellant to untimely pay the tax due, this does not by itself constitute reasonable cause. (*Appeal of Friedman*, 2018-0TA-077P.) Appellant does not explain the alleged oversight by his representative. Respondent states that appellant’s representative acknowledged that the representative or someone else from the accounting firm had failed to enter appellant’s direct debit information on the tax return. These facts, if correct, would be similar to those in *Appeal of Scanlon*, 2018-0TA-075P (*Scanlon*), in which the taxpayers attempted a timely electronic payment but made an error when inputting their bank account number.

Second, as we understand it, appellant argues that his representatives tried to submit his California tax return a second time, but the second attempt failed because the California return had already been submitted and accepted. Appellant argues that due to a system issue, the tax preparation software omitted the second California return from the transmission without any notification. What we can decipher from the facts in evidence is that while appellant attempted to make a timely electronic payment, the payment did not go through by April 15, 2019—for whatever reason. “We would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid.” (*Scanlon, supra.*) In fact, a few weeks later in early May 2019, while monitoring his bank account, appellant discovered the error. Appellant’s representative called respondent on May 7, and the next day appellant submitted an electronic payment of \$859,028.

Some of appellant’s arguments suggest that he or his representatives knew or should have known that there was something wrong with the California return. After all, why attempt to transmit a second return unless there was knowledge that the first return contained an error. Even if it were proven that appellant’s representatives attempted to transmit a second return, such scenario would weigh against—not in favor of—appellant. Under such scenario, we believe an ordinarily intelligent and prudent businessperson would have been on heightened alert

and placed greater attention to monitoring his or her bank account in order to ascertain whether the second attempted transmission resulted in a successful electronic payment. But appellant did not monitor his bank account diligently, taking several weeks to ascertain the error.

Appellant presents no evidence to show, or tend to show, that the tax preparation software is to blame. From an evidentiary perspective, unsupported assertions are insufficient to satisfy the taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) It is well established that argument is not evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 734; *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552.) To be clear, it is not our position that technological or software issues may never establish reasonable cause. Rather, we conclude that appellant did not meet his burden of proof; he did not establish by documentation or other evidence that the circumstances he asserts in this appeal are more likely than not to be correct.

In addition to the lack of evidence, we also want to address appellant's reliance argument: appellant relied on his representative, who relied on the tax preparation software. As stated above, there is no evidence of error in the tax preparation software. When it comes to reliance on a representative, the U.S. Supreme Court established the non-delegable duty rule by stating that a taxpayer's reliance on a representative to timely file his or her return is not a substitute for compliance with an unambiguous statute. (*United States v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*.) The wording of this rule suggests that reliance may only be reasonable when a statute is ambiguous. (*Ibid.*) In accordance with *Boyle*, the Ninth Circuit concluded that filing deadlines were non-substantive. (*Knappe v. United States* (9th Cir. 2013) 713 F.3d 1164, 1173-75, *cert. denied*, 134 S. Ct. 422.) The Ninth Circuit justified its decision on the premise that categorizing certain deadlines as substantive would incentivize representatives to claim that they gave taxpayers erroneous advice. (*Id.* at p. 1774.) According to the Ninth Circuit, if taxpayers could delegate their duty, then representatives would accept the blame for missed deadlines to help taxpayers escape penalties. (*Ibid.*) Although these cases concern filing deadlines, the same reasoning applies to payment deadlines. (*Moren, supra*, at fn. 12.) Thus, appellant's reliance on a representative to submit timely payment is not a substitute for compliance with an unambiguous statute.

Due to the lack of evidence and appellant's inability to meet his burden of proof, we find that he did not establish that the late payment was due to reasonable cause.

HOLDING

Appellant did not show that the failure to timely pay his tax liability for tax year 2018 was due to reasonable cause.

DISPOSITION

We sustain respondent’s denial of the claim for refund.

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Alberto T. Rosas  
Administrative Law Judge

We concur:

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*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

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John O. Johnson  
Administrative Law Judge

Date Issued: 1/12/2021