

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19105340
D. STENGER AND)
A. STENGER)
_____)

OPINION

Representing the Parties:

For Appellants: Ashley Freitas, CPA

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Andrew Pence, Graduate Student Assistant

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Stenger and A. Stenger (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,209.63 for the 2017 taxable year.

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

ISSUE

Whether appellants have established reasonable cause for their late payment of tax for the 2017 taxable year.

FACTUAL FINDINGS

1. Appellants did not pay the \$12,046 amount due shown on their 2017 joint tax return until October 15, 2018, more than five months after the original due date of that return.
2. Consequently, FTB imposed a late payment penalty of \$963.68, plus interest.

3. On November 16, 2018, appellants paid the outstanding balance of \$1,209.63, which included the late payment penalty and interest on the late paid tax.
4. On April 15, 2019, appellants filed a claim for refund of the \$1,209.63.¹
5. FTB denied appellants' claim for refund on the ground that information provided by appellants did not constitute reasonable cause for abatement of the late payment penalty.
6. The Internal Revenue Service (IRS) waived appellants' federal late payment penalty under the IRS "First Time Abate" policy.
7. FTB issued a Notice of Action denying appellants' claim for refund after considering the information regarding the IRS's actions.

DISCUSSION

A late payment penalty is imposed if a taxpayer fails to pay the amount shown as due on the return on or before the original due date of the return. The penalty is five percent of the initial underpaid tax amount plus one-half of one percent of the outstanding liability for each subsequent month or fraction thereof for a maximum of 40 months. The late payment penalty will be abated if the taxpayer's failure to make a timely payment was due to reasonable cause and not willful neglect. (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 Moren*, 2019-OTA-176P (*Moren*), citing *Appeal of Curry* (86-SBE-048) 1986 WL 22783.) "The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances." (*Ibid.*, citing *Appeal of Scott* (83-SBE-094) 1983 WL 15480.) Willful neglect is defined as a "conscious, intentional failure or reckless indifference." (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860, citing *United States v. Boyle* (1985) 469 U.S. 241, 245-246.) When FTB imposes a penalty for late payment of tax, it is presumed that the penalty was imposed correctly unless the taxpayer can demonstrate that the late payment resulted from reasonable cause and not willful neglect. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P.)

¹ Appellants offer no reason(s) why interest should be abated, so interest will not be addressed further herein.

Here, appellants do not contest that they made a late payment for the 2017 taxable year. Instead, they argue that the penalty should be waived on the ground that their late payment was due to reasonable cause. In their refund claim, appellants cited appellant-husband's transition to retirement, hospital stays, and the fact they paid the additional amount due immediately after they were notified of the additional amount due. On appeal, appellants contend that the IRS waived penalties based on its determination that the late payment was not due to willful neglect as evidenced by tax withholdings and immediate remittance upon notification of the amount owed.

Appellants assert that the 2017 taxable year was unusual because appellants were transitioning to retirement. However, appellants provide no explanation or documentation to show how appellant-husband's retirement prevented them from timely paying their 2017 taxes. Appellants' retirement argument is not persuasive because they did not provide substantiation of efforts they made to timely pay, or evidence of how they were prevented from timely paying.

Appellants also allege that their hospital stays prevented them from making a timely payment. Illness may establish reasonable cause where the taxpayer presents credible and competent proof that the circumstances of the illness prevented compliance with the law. (*Triple Crown Baseball LLC, supra*, citing *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) Inability to pay the tax due to financial hardship may also establish reasonable cause. (*Ibid.*) "However, if the difficulties merely cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice." (*Ibid.*) Appellants provide no documentation or medical records showing how their hospital stays prevented them from timely paying their 2017 tax liability. Further, appellants provide no evidence other than their testimony that both spouses were unable to timely pay their 2017 taxes.

In their claim for refund and additional information sent to FTB via letter, appellants argue that the IRS abated similar federal penalties for the 2017 taxable year due to reasonable cause and ask that California "adhere to the same standard." In support of their position, appellants cite to IRS Topic No. 306 regarding the penalty for underpayment of estimated tax under Internal Revenue Code section 6654. No estimated tax penalty was imposed by FTB, so IRS Topic No. 306 does not apply here. Further, the federal estimated tax penalty was not abated by the IRS.

Appellants correctly note that the IRS abated their federal late payment penalty for the 2017 taxable year. However, the abatement was based on the IRS’s “First Time Abate” policy, not a finding of reasonable cause. Under the federal policy, the IRS may abate late payment penalties if a taxpayer has timely filed returns and paid taxes due for the past three years. Unlike the IRS, California does not have procedures for abating a late payment penalty based on the taxpayer’s good filing history. (See *Moren, supra*; *Appeal of Xie*, 2018-OTA-076P (*Xie*.) Moreover, California law requires that the penalty be imposed unless the taxpayer can show reasonable cause for the late payment of tax.² (R&TC, § 19132(a).) Therefore, neither the IRS penalty abatement nor appellants’ compliance history can be used as a basis for abatement of the late payment penalty.³ However, history of compliance by itself does not establish reasonable cause. (*Moren, supra*; *Xie, supra*.) FTB may only abate the penalty based upon evidence showing that appellants had reasonable cause for late payment in the year at issue, which appellants have failed to establish.

Therefore, we have no basis to reverse FTB’s action.

² The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for a taxpayer with a history of filing and payment compliance. (See, e.g., Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

³ There is no evidence showing whether appellants have a history of compliance with California tax laws. Furthermore, we will assume, for the sake of argument, that appellants have previously timely filed their California tax returns and paid California taxes.

HOLDING

Appellants have not established reasonable cause for their late payment of tax for the 2017 taxable year.

DISPOSITION

FTB’s action denying appellants’ claim for refund for the 2017 taxable year is sustained.

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Andrea L.H. Long
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Andrea L.H. Long
Administrative Law Judge

Date Issued: 1/25/2021