

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20035941
J. BAKER AND)
C. BAKER)
_____)

OPINION

Representing the Parties:

For Appellants: J. Baker and C. Baker

For Respondent: Pamela W. Bertani, Tax Counsel III

For Office of Tax Appeals: Michelle Huh, Tax Counsel

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Baker and C. Baker (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,118.07¹ for the 2018 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 shown that the failure to timely file their 2018 tax return was due to reasonable cause and not due to willful neglect.²

¹ Appellants requested this amount as the “Refund Amount” on their Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, and as the amount at issue in their appeal. This amount consists of the late-filing penalty of \$1,033.75 plus interest.

² Appellants’ refund claim includes interest. However, appellants do not provide a specific contention regarding interest abatement on appeal and we find no apparent grounds for interest relief under the facts. We therefore will not further discuss interest abatement.

FACTUAL FINDINGS

1. Appellants did not file their 2018 tax return (Form 540) until November 15, 2019, more than five months late.
2. FTB issued appellants a State Income Tax Balance Due Notice dated December 9, 2019, showing a balance due of \$1,118.07 for the 2018 taxable year. The balance due included a late-filing penalty of \$1,033.75, plus applicable interest.
3. Appellants completed and signed a Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, on December 13, 2019. On their Form 2917, appellants requested a refund of the penalty and interest assessed against them for the 2018 taxable year.
4. Appellants remitted a payment of \$1,118.07 to FTB on December 17, 2019.
5. FTB issued a letter dated January 14, 2020, denying appellants' claim for refund for the 2018 taxable year because appellants did not show reasonable cause for abatement of the late-filing penalty.

DISCUSSION

A personal income tax return is due on or before the 15th day of April following the close of the calendar year. (R&TC, § 18566.) FTB allows an automatic six-month extension if the return is filed within six months of the original due date. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.) If the taxpayers place a return in a United States mailbox before the statutory filing deadline and there is no record of that return being received, the taxpayers must offer evidence, such as a registered or certified mail receipt, that the return was timely filed. (Gov. Code, § 11003; Internal Revenue Code (IRC), § 7502; Cal. Code Regs., tit. 18, § 30219(a); *Appeal of La Salle Hotel Co.* (66-SBE-071) 1966 WL 1412.) The taxpayers “[assume] the risk that the postmark will bear a date on or before the last date ... prescribed for filing the [return],” and have the burden of proving the date of the postmark or the return was timely mailed. (Treas. Reg. § 301.7502-1(c)(1)(iii).)

IRC section 7502 and Treasury Regulation section 301.7502-1 provide that, aside from proof of actual timely delivery, which we do not have here, a taxpayer can use a postmarked envelope or a postmarked registered or certified mailing receipt to prove the date a document was filed with the Internal Revenue Service (IRS). R&TC section 21027 provides that Treasury

Regulation section 301.7502-1, as revised on January 10, 2001, is also applicable to filings with FTB.³ Some courts have held that IRC section 7502 provides exclusive exceptions to the physical-delivery rule and therefore displaces the common-law mailbox rule. (*Baldwin v. U.S.* (9th Cir. 2019) 921 F.3d 836, 841 (*Baldwin*), citing to *Miller v. U.S.* (6th Cir. 1986) 784 F.2d 728, 730-731, and *Deutsch v. Commissioner* (2nd Cir. 1979) 599 F.2d 44, 46.) However, the Ninth Circuit Court of Appeals has held that IRC section 7502 does not bar admission of other evidence. (*Baldwin, supra*, 921 F.23 at p. 841, citing *Anderson v. U.S.* (9th Cir. 1992) 966 F.2d 487, 491 [“we ‘declin[e] to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule’”].)⁴ Whether California adopted the less restrictive view of the type of evidence required to establish timely mailing of a return or payment is not pertinent here because we find appellants did not satisfy their burden of proving their return was timely filed.

Appellants’ Form 540 for the 2018 taxable year was due on April 15, 2019. FTB received appellants’ Form 540 on November 15, 2019, seven months after appellants’ statutory filing deadline. Appellants assumed the risk of mailing their 2018 Form 540 without a postmarked registered or certified mailing receipt and had the burden of proving that the return was timely mailed. Appellants did not satisfy their burden of proving their return was timely filed because they did not provide any evidence of a postmarked envelope, a postmarked registered or certified mailing receipt, or a confirmation of electronic filing. Thus, appellants did not timely file their 2018 Form 540 pursuant to R&TC section 18566.

When taxpayers do not timely file their return by the due date, California imposes a penalty for failing to file a valid return on or before the due date, unless the taxpayers show that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The late-filing penalty is calculated at five percent of the tax for each month or a fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax. (*Ibid.*) To establish reasonable cause, the taxpayers must show that the failure to file timely returns occurred despite

³ Effective January 1, 2002, California amended R&TC section 21027 to add subdivisions (a)(2) and (b) to conform with specific provisions in IRC section 7502 regarding “designated delivery service” and “electronic filing.” Aside from those specific provisions, R&TC section 21027 does not conform to IRC section 7502 in its entirety. (See R&TC, § 21027, as amended by Stats. 2001, ch. 543 (SB 1185), § 20, West’s Cal. Legis. Service.)

⁴ In *Baldwin, supra*, 921 F.3d at p. 841, the Ninth Circuit Court of Appeals noted that Treasury Regulation section 301.7502-1 was amended in 2011 to resolve the circuit split.

the exercise of ordinary business care and prudence, or that such cause existed as would prompt an “ordinary intelligent and prudent” businessperson to have so acted under similar circumstances. (*See Appeal of GEF Operating, Inc.*, 2020-OTA-057P, quoting from *Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Whether a taxpayer timely mailed a return and payment and, if not, whether the failure to do so was due to reasonable cause and not to willful neglect, are questions of fact on which a taxpayer has the burden of proof. (*Appeal of La Salle Hotel Co.* (66-SBE-071) 1966 WL 1412.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Here, FTB properly imposed the late-filing penalty because appellants failed to file their 2018 Form 540 on or before the filing deadline. Appellants do not contend that FTB erred in the computation of the late-filing penalty, but assert that they had reasonable cause for untimely filing their 2018 Form 540.

According to appellants, they used TurboTax software to prepare their 2018 federal and state tax returns in March 2019. Appellants assert that they mailed their Form 540 and a check in the amount of \$4,229 (check #3723) to FTB, also in March 2019. Appellants state that they opted to mail their 2018 Form 540 and check #3723 to FTB using “standard US mail” because filing their state return electronically was an additional and significant cost. When appellants noticed that FTB did not process check #3723, appellants attempted to access their MyFTB account several times after receiving their Personal Identification Number from FTB. Once appellants were able to access their MyFTB account, they noticed their Form 540 was not received by FTB and contacted FTB to speak with an FTB representative over the phone. The FTB representative recommended that appellants submit another copy of their 2018 Form 540 to FTB. Prior to mailing their 2018 Form 540, appellants labelled their return as “possible duplicate” and wrote that “taxes mailed in with payment (check #3723) in March 2019 but no record of arriving at FTB (check #3723 not cleared).” Appellants mailed their 2018 Form 540 and another check in the amount of \$4,229 (check #3736) on November 7, 2019, which FTB received on November 15, 2019.

Appellants asserted that they were unaware of FTB’s non-receipt of their 2018 Form 540 and payment because they prepared and mailed the Form 540 and payment of \$4,229 in

March 2019.⁵ Appellants also argued that they have a long history of paying income taxes in California on time and in full. They stated that “it would make no sense to pay estimated taxes if [they] had not yet filed [their] 2018 return.” Appellants argued that all evidence leads to a reasonable conclusion that their return was filed on time and that they should not be subject to penalties for circumstances well beyond their control.

Appellants concede that they do not “have ... proof of what became of [their 2018 Form 540] after dropping [it] off at the post office,” but they have evidence that they prepared and mailed their 2018 Form 540 in a timely manner.⁶ Appellants contend that they should not be penalized so severely for circumstances beyond their control.

Appellants had a responsibility to ensure the timely filing of their 2018 Form 540. (See *United States v. Boyle* (1985) 469 U.S. 241, 247.) If appellants exercised ordinary business care and prudence and were nevertheless unable to file their 2018 Form 540 within the prescribed time, then their delay would be due to reasonable cause. (See Treas. Reg. § 301.6651-1(c).) However, appellants’ delay in filing their 2018 Form 540 was not due to reasonable cause because they did not exercise ordinary business care and prudence when they filed their 2018 Form 540. Reasonably prudent taxpayers exercising due care and diligence would have monitored their bank account to determine whether check #3723 had cleared around the April 15 payment due date. (See *Appeal of Scanlon*, 2018-OTA-075P.) Furthermore, appellants had the opportunity to file their return on or before October 15, 2019, if they had failed to file it by the original filing deadline. Although appellants made repeated efforts in trying to access their MyFTB account to obtain information on the submission of their 2018 Form 540, appellants still submitted their Form 540 seven months late. Appellants’ extrinsic evidence of the TurboTax

⁵ Appellants incorrectly list the year “2018” throughout their statement for the “Reasonable Cause Explanation” section of their Form 2917. The correct year should be “2019,” the year when they submitted copies of the original and duplicate tax returns for the 2018 taxable year to FTB.

⁶ Appellants enclosed copies of the following images in support of their Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund:

- A screenshot showing the date when their Form 540 was created;
- A photo of a check register showing the issuance of check #3723 in the amount of \$4,229 dated March 12;
- A photo of a check register showing the issuance of check #3736 in the amount of \$4,229, dated November 7;
- A screenshot of their bank statement showing dates for checks that cleared after check #3723; and
- A screenshot of their bank statement showing the date when check #3736 cleared.

screenshot, check registers, and bank statements shows that appellants prepared their 2018 Form 540 and wrote check #3723 in March 2019 but does not show that appellants exercised ordinary business care and prudence in timely filing their 2018 Form 540. Thus, appellants failed to establish that they exercised ordinary business care and prudence and, therefore, have not shown that their delay in filing their 2018 Form 540 was attributable to reasonable cause.

While appellants point to their good filing and payment history, it does not rise to the level of reasonable cause. We acknowledge that the IRS has enacted a program called First Time Abate, under which it abates federal penalties for failing to timely file or pay a single return if the taxpayers have timely filed returns and paid taxes due for the previous three years. However, there is no corollary program in California law. Neither the California Legislature nor FTB has adopted a comparable penalty abatement program. Therefore, appellants' history of timely filing their California returns and timely paying their California taxes cannot be used as a basis for abatement of appellants' late-filing penalty and is not reasonable cause for failing to timely file their 2018 tax return.

HOLDING

Appellants have not shown that the failure to timely file their 2018 tax return was due to reasonable cause and not due to willful neglect.

DISPOSITION

FTB's action denying appellants' claim for refund is sustained.

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Tommy Leung
Administrative Law Judge

We concur:

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Elliott Scott Ewing
Administrative Law Judge

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John O. Johnson
Administrative Law Judge

Date Issued: 2/17/2021