

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
D. MESSINGER

) OTA Case No. 20076373
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OPINION

Representing the Parties:

For Appellant: Ernesto Fabela, Tax Advisor

For Respondent: Wenxi Zhao, Graduate Student Assistant

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Messinger (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,395.14, plus interest, for the 2019 tax year.

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

ISSUE

Whether appellant has demonstrated reasonable cause to abate the dishonored payment penalty.

FACTUAL FINDINGS

1. On April 15, 2020, appellant attempted to make an electronic payment towards her 2019 California tax liability from a Wells Fargo bank account ending in 99 (99 bank account). However, Wells Fargo dishonored the payment because approximately 10 months prior, in June 2019, the 99 bank account was closed.
2. On April 27, 2020, appellant made an untimely electronic payment towards her 2019 California tax liability from a Wells Fargo bank account ending in 68 (68 bank account).

3. On April 30, 2020, FTB issued appellant a State Income Tax Balance Due Notice, notifying appellant of a balance due, which consisted of a 2 percent dishonored payment penalty, plus interest.
4. Appellant paid the outstanding balance and filed a claim for refund. FTB denied the refund claim, and appellant filed this timely appeal.

DISCUSSION

Internal Revenue Code (IRC) section 6657 provides that whenever “any instrument in payment [of a tax liability] . . . is not duly paid, in addition to any other penalties provided by law, there shall be paid as a penalty by the person who tendered such instrument” This penalty is often referred to as the “dishonored payment penalty.” IRC section 6657 states that the dishonored payment penalty “shall not apply if the person tendered such instrument in good faith and with reasonable cause to believe that it would be duly paid.”¹ The federal penalty is incorporated into California law by R&TC section 19134, which specifically states that it is also applicable to payments made by credit card or electronic funds transfer. (R&TC, § 19134(b).) As relevant here, the amount of the penalty is 2 percent of the amount of the payment. (IRC, § 6657.)

As with other penalties containing a “reasonable cause” exception, the taxpayer bears the burden of proving the existence of reasonable cause. (See *Appeal of Xie*, 2018-OTA-076P.) The taxpayer must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman*, 2018-OTA-077P.) In the context of a dishonored payment penalty, the taxpayer must prove that he or she “tendered [the dishonored] instrument in good faith and with reasonable cause to believe that it would be duly paid.” (IRC, § 6657.)

Appellant asserts that the 68 bank account had sufficient funds available to pay her 2019 tax liability at the time she attempted to make payment with her closed 99 bank account, a bank

¹ Although IRC section 6657 does not define “reasonable cause,” when the same terms are used to describe the basis for relief of other penalties, it is appropriate to look to cases that discuss those penalties for guidance. (*Gregory v. U.S.* (6th Cir. 1999) 178 F.3d 1294, 1999 WL 220127 [unpublished].)

account which she previously used for several years to make tax payments.² Appellant contends she acted reasonably when she attempted payment from an account she was accustomed to using for several years. Specifically, appellant contends that due to the atmosphere created by the Coronavirus (COVID-19) and because she was “dealing with many moving parts,” such as closing her daycare business after 20 years, selling her personal residence, moving out of state, and caring for her elderly mother, she was “too overwhelmed to make the connection she didn’t provide the proper account number.” Appellant further asserts that the atmosphere “of changing dates and delays” created by COVID-19 led to appellant reasonably concluding that the delay in the bank withdrawal was due to the pandemic, and upon realizing she was attempting payment from the closed 99 bank account, appellant made the April 27, 2020 payment³ from the 68 bank account before receiving notice from FTB regarding the dishonored payment.

However, appellant took affirmative action to close the 99 bank account in June 2019, and we are not persuaded by her explanations that it was reasonable for her to make the April 15, 2020 attempted payment from the closed account. While appellant may have been “dealing with many moving parts,” appellant should have nevertheless, prior to tendering payment, verified that she was using the proper account and that the account contained sufficient funds to make the payment. A taxpayer error attributable to an oversight, even an innocent oversight, generally will not constitute reasonable cause for penalty abatement purposes. (See generally *Appeal of Friedman, supra*; *Appeal of Risser* (84-SBE-044) 1984 WL 16123.) Under these circumstances, we cannot conclude that appellant exercised ordinary business care and

² Appellant contends that since the 68 bank account had sufficient funds available, “there was no economic gain” for her in delaying payment, and “[w]hether a taxpayer has something to gain in delaying payment is important in considering the reasons for granting penalty relief for dishonored payments” in section 20.1.10.7.4 of the Internal Revenue Manual (IRM). Appellant also contends that IRM section 20.1.10.7.4 is “stated in a subjective manner” to allow a taxpayer’s personal circumstances to be considered. However, IRM section 20.1.10.7.4 does not factor in whether a taxpayer “had something to gain” in delaying payment or whether a taxpayer had sufficient funds in another account. Furthermore, IRM section 20.1.10.7.4 is not stated in a “subjective manner” for relief. Rather, even reasonable cause, as noted by a United States District Court, “must include a determination whether the taxpayer’s actions were objectively reasonable.” (*Gregory v. U.S.* (W.D. Mich., Sept. 10, 1997, No. 1:96-CV-941) 1997 WL 718466, at *6, *affd.* (6th Cir. 1999) 178 F.3d 1294, *supra.*)

³ We note that the April 27, 2020 payment was untimely. R&TC section 19132 imposes a penalty when a taxpayer fails to pay the tax shown on a return by the original filing deadline. It provides that FTB shall impose a late-payment penalty of 5 percent of the initial underpaid tax amount plus 0.5 percent of the outstanding liability for each subsequent month or fraction thereof for a maximum of 40 months. (R&TC, § 19132(a)(2)(A) & (B).) Since FTB did not impose a late-payment penalty on appellant’s untimely payment, we will not discuss it further.

prudence which would satisfy the reasonable cause standard. Accordingly, we hold that appellant did not satisfy her burden of proving reasonable cause.

Furthermore, the amount of the penalty is set by statute, and the Office of Tax Appeals has no legal authority to abate it unless reasonable cause is shown. The penalty cannot be abated based on appellant’s history of tax compliance, no matter how commendable that may be.⁴

HOLDING

Appellant has not demonstrated reasonable cause to abate the dishonored payment penalty.

DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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Richard Tay
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Richard Tay
Administrative Law Judge

DocuSigned by:
E. S. Ewing
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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 4/6/2021

⁴ We note that section 20.1.1.3.6.1 of the IRM allows the Internal Revenue Service (IRS) to administratively waive the federal dishonored payment penalty, under the IRS’s First Time Abate program, for federal taxpayers who have no prior penalties or taxes due. There is no equivalent provision in California law. The Office of Tax Appeals has no authority to waive this California penalty on the basis of a taxpayer’s good filing history.