

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21047606
 S. NGUYEN)
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OPINION

Representing the Parties:

For Appellant: S. Nguyen, Appellant

For Respondent: Nathan H. Hall, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellant S. Nguyen appeals respondent Franchise Tax Board’s action in denying appellant’s claim for refund of \$2,075.83 for tax year 2016.¹ 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 2016 was due to reasonable cause.

FACTUAL FINDINGS

1. On April 15, 2017, appellant and his spouse timely filed a 2016 California Resident Income Tax Return, showing a tax due of \$12,715. Appellant and his spouse did not remit full payment with the return.

¹ Although appellant’s appeal letter states that the appeal is in “the amount of \$2075.83 plus applicable interest,” appellant does not make any arguments specific to interest abatement. Generally, to obtain waiver of interest, taxpayers must qualify under R&TC sections 19104, 19112, or 21012. However, OTA lacks jurisdiction for interest abatement under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Appellant does not allege that any of the three statutory provisions are applicable to the facts of this case; and based on the arguments and evidence, we conclude that none of these provisions apply. Therefore, we focus our decision on appellant’s request for penalty abatement. But as respondent indicates, to the extent the late-payment penalty is abated in whole or in part, any accrued interest that may be related to the penalty would be abated accordingly.

2. Respondent imposed a late-payment penalty of \$2,075.83. Respondent also corrected the amount of appellant's estimated tax and other payments made, because appellant's return did not reflect appellant and his spouse's current amount of payments.
3. Appellant, his spouse, and respondent entered into an installment agreement.² Respondent imposed a \$34 installment agreement fee. The balance for the 2016 tax year was paid in full, except for a balance due of six cents, which respondent wrote off.
4. On October 15, 2020, appellant filed a refund claim for \$2,110, which included the late-payment penalty (rounded up to \$2,076) plus the \$34 installment agreement fee.
5. On January 27, 2021, respondent denied appellant's claim for refund. Appellant then filed this timely appeal, seeking a refund of the \$2,075.83 late-payment penalty, plus interest. This appeal does not include the \$34 installment agreement fee.³

DISCUSSION

Because appellant failed to timely pay the tax liability for tax year 2016, respondent imposed a late-payment penalty of \$2,075.83. 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.

“Generally the taxpayer bears the burden of proof when disputing tax liabilities with the [government].” (*Matter of Carlson* (7th Cir. 1997) 126 F.3d 915, 921.) To establish reasonable cause, the taxpayer must demonstrate that the 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

² Although appellant contends that he alone paid the balance due for the 2016 tax year, both appellant and his spouse were joint parties to the installment agreement.

³ Appellant's October 15, 2020 refund claim submitted to respondent included the \$34 installment agreement fee; however, appellant's appeal does not include this \$34 fee. Respondent indicates that, for purposes of completeness, it addressed in its brief whether appellant is entitled to a refund of the fee, concluding that once respondent imposes the fee per RT&C section 19591(a)(1), there is no provision in California law to abate or waive an installment agreement fee. We commend respondent's thoroughness, but because appellant did not include the installment agreement fee as part of this appeal, we do not consider this issue to be in dispute, and, thus, we will not discuss it further.

ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Moren*, 2019-OTA-176P.)

On the issue of the late-payment penalty, a taxpayer meets the reasonable cause exception upon demonstrating that he or she “exercised ordinary business care and prudence in providing for payment of his [or her] tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship.” (Treas. Reg. § 301.6651–1(c)(1).) This determination is factual, and the burden of proof is on the taxpayer. (*Merriam v. Commissioner*, T.C. Memo. 1995–432 at p. *13, *affd.* without published opinion, 107 F.3d 877 (9th Cir. 1997).) “Undue hardship” must be more than an “inconvenience” to the taxpayer; it requires that the taxpayer had the “risk of a substantial financial loss resulting from making the tax payment on time.” (*Ibid.*; Treas. Reg. § 1.6161–1(b).) “In considering whether a taxpayer exercised ordinary business care and prudence, a court should consider all facts and circumstances of the taxpayer’s situation, including the amount and nature of expenditures in light of income received prior to the date payment was due.” (*Matter of Carlson, supra*, 126 F.3d at p. 921.)

Appellant alleges that respondent’s agent told appellant that once the total liability was paid, appellant could apply for and would be granted a refund of the penalty. Appellant also alleges that he suffered financial hardship in 2017 and was therefore unable to pay the full liability. But these are mere arguments. 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.) While we seek to consider all facts and circumstances of appellant’s situation, these arguments are not proven facts or circumstances because appellant has not met the applicable standard of proof.

The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) When it comes to establishing reasonable cause, the taxpayer has the burden of proof by a preponderance of the evidence. (See, e.g., *Estate of Ridenour v. U.S.* (S.D. Ohio 2006) 468 F.Supp.2d 941, 952; *Pac. Wallboard & Plaster Co. v. U.S.* (D.Or. 2004) 319 F.Supp.2d 1187, 1188; and *Newsome v. U.S.* (S.D. Texas 1968) 301 F.Supp. 757, 762.) The preponderance of the evidence standard means that 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 Cal., Inc. v. Construction*

Laborers Pension Trust for So. Cal. (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 presents no evidence to show, or tend to show, that his failure to timely pay his tax liability was due to reasonable cause. Instead, appellant offers unsupported assertions. 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.) To be clear, it is not our position that financial hardship or reliance on a government agent’s advice may never establish reasonable cause. Court cases and administrative regulations contain many examples of circumstances constituting reasonable cause sufficient to avoid the additions to tax for failures to timely file or pay. (See, e.g., *U.S. v. Boyle* (1985) 469 U.S. 241, 243 n.1; *McMahan v. Commissioner* (2d Cir.1997) 114 F.3d 366, 369, affg. T.C. Memo. 1995–547; *Ruggeri v. Commissioner*, T.C. Memo. 2008–300.) One such example concerns a case showing that evidence establishing a substantial financial hardship may include evidence of loss due to the sale of property at a sacrifice price. (*Matter of Carlson, supra*, 126 F.3d at p. 921.) Another example concerns a taxpayer’s reliance on the erroneous information of an Internal Revenue Service officer or employee. (See, e.g., *U.S. v. Boyle, supra*, 469 U.S. at p. 243 n.1.)

Here, we base our conclusion on the lack of evidence, and we conclude that appellant did not meet the applicable standard of proof—the preponderance of the evidence. In other words, appellant did not establish by documentation or other evidence that the circumstances he asserts in this appeal are more likely than not to be correct. Due to the lack of evidence and appellant’s inability to meet his burden of proof, we find that appellant did not establish that the late payment was due to reasonable cause.

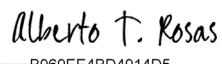
In addition to the lack of evidence, we also want to briefly address appellant’s claim that he was unaware that his early withdraw in 2016 from a retirement account was taxable. A taxpayer’s mistake as to or ignorance of the law, however, does not amount to reasonable cause. (*Appeal of Porreca*, 2018-OTA-059.) Thus, appellant’s lack of awareness of the taxability of an early withdraw from a retirement account does not establish that the late payment was due to reasonable cause, and it does not affect our decision.

HOLDING

Appellant did not show that the failure to timely pay his tax liability for tax year 2016 was due to reasonable cause.


DISPOSITION

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

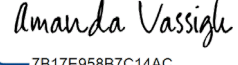
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Alberto T. Rosas
Administrative Law Judge

We concur:

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Cheryl L. Akin
Administrative Law Judge

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Amanda Vassigh
Administrative Law Judge

Date Issued: 9/14/2021