

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21057890
M. MCCONNELL AND)
S. BLANKENSHIP)
_____)

OPINION

Representing the Parties:

For Appellants: Thomas Lynden, CPA

For Respondent: Joel M. Smith, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. McConnell and S. Blankenship (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants’ claim for refund of \$1,140.27 for the 2019 tax year.

This matter is being decided based on the written record because appellants waived the right to an oral hearing.

ISSUE¹

Are appellants entitled to abatement of the late-payment penalty?

FACTUAL FINDINGS

1. For the tax year in question, appellants made estimated tax payments on April 15 and June 15, 2019, and on January 15, 2020, and an extension payment on July 15, 2020.

¹ As discussed below, the claim amount (\$1,140.27) is the amount of the final payment made by appellants on April 20, 2021. That amount is \$324.18 greater than the late-payment penalty (\$815.43) and must have included the collection cost recovery fee (CCRF) of \$316.00 and a few dollars in interest. However, it does not appear from the file that appellants dispute the CCRF or interest, neither of which is subject to abatement upon a showing of reasonable cause, which is the only argument appellants make here. (*Auburn Old Town Gallery, LLC*, 2019-OTA-319P [no reasonable cause exception to the imposition of a CCRF]; *Appeal of Gorin*, 2020-OTA-018P [no reasonable cause exception to the imposition of interest].) For these reasons, we conclude that appellants present this sole issue for our consideration.

2. Appellants jointly filed their 2019 California personal income tax return on October 14, 2020, reporting \$12,545 tax due and remitting that amount with the return.
3. On November 18, 2020, respondent issued a Notice of Tax Return Change - Revised Balance, which indicated an additional balance due of \$977.74, consisting of a \$815.43 late-payment penalty and applicable interest.²
4. In a December 2, 2020 document entitled “FTB Informal Claim,” appellants asked respondent to waive the late-payment penalty on the grounds that they had not received information regarding their share of reportable income from one or more partnerships in time to calculate and timely pay their tax when due. Appellants included a partial payment of \$163.31 with this document.
5. On January 27, 2021, respondent issued an Income Tax Due Notice, demanding payment of \$819.94.
6. On March 3, 2021, respondent issued a Final Notice Before Levy and Lien, which stated that \$821.76 was still due for 2019 and that failure to pay the amount due within 30 days of the notice date (or by April 2, 2021), could result in the imposition of a collection fee.
7. After appellants did not pay the balance due by April 2, 2021, respondent imposed a \$316 collection fee.
8. By letter dated April 7, 2021, appellants again asked respondent to abate the late-payment penalty.
9. On April 20, 2021, appellants paid the balance due of \$1,140.27 and filed their claim for refund of that same amount.
10. On May 4, 2021, respondent denied the claim for refund. This timely appeal followed.

DISCUSSION

Individuals, including those filing jointly, must pay their taxes by the original due date of their return. (R&TC, § 19001.) For calendar year filers, that date is usually April 15 following

² This notice, and all notices referred to in these Factual Findings, were issued to appellants.

the close of the taxable year.³ (R&TC, § 18566.) However, due to the COVID-19 pandemic, the payment date for the 2019 tax year was postponed to July 15, 2020.⁴

A late-payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. (R&TC, § 19132.) However, a late-payment penalty will be abated if the taxpayer shows that the late payment was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a).) Generally, to establish reasonable cause, the taxpayer must show that the failure to timely pay occurred despite the exercise of “ordinary business care and prudence.” (*Appeal of Moren*, 2019-OTA-176P (*Moren*)).

A taxpayer’s claim that a late payment was due to a lack of documentation or information, or difficulty calculating a tax liability, does not establish reasonable cause for the late payment. (*Moren, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) A determination of whether there is reasonable cause for a late payment on these bases requires an analysis of what the taxpayers knew or should have known as the payment due date approached and what they did or failed to do to obtain the required information. (*Ibid.*) Ultimately, we must decide whether, considering all the circumstances established by the evidence, the taxpayers exercised ordinary business care and prudence of the type that would have been exercised by an ordinarily intelligent and prudent businessperson under those circumstances. (*Ibid.*)

Appellants argue that their income is primarily from one or more partnerships, which report distributive shares of income to the partners on Schedules K-1 (Partner’s Share of Income, Deductions, Credits, etc.), and that their Schedule K-1 for the 2019 tax year was not available by the payment due date for that tax year due to COVID-19, which required appellants to estimate their income. Appellants assert that their actual income, which was not determined until their 2019 return was completed and filed by the October 15, 2020 extended return due date, was more than they had paid in estimated tax and extension payments.

³ An extension of time to file a return under R&TC section 18567(b) is not an extension to pay the taxes due.

⁴ R&TC section 18572, which incorporates Internal Revenue Code section 7508A, gives respondent the authority to postpone time sensitive acts.

In addition, appellants note that their Schedules K-1 for prior years had always been timely received and that, to the best of their knowledge, appellants had always timely filed and paid the taxes due.⁵

Here, we have no independent evidence to establish what appellants knew or did not know or what they did or failed to do to accurately determine their tax due and timely pay that amount. We have only the unsupported assertion that appellants' exact income for 2019 was not known by July 15, 2020, because one or more Schedules K-1 were not available. As explained in some detail in the Office of Tax Appeals' precedential Opinion in *Moren*, above, the burden of proving that a late payment was due to reasonable cause and not due to willful neglect rests with appellants, who may be able to carry that burden by providing evidence to at least show what they did to obtain the necessary information before the payment due date, when they obtained the necessary information, and what they did with the information when they received it.⁶ In essence, appellants have done nothing to carry their burden of proof. On that basis, we find that the evidence does not establish that the late payment was due to reasonable cause and was not due to willful neglect. Consequently, we conclude that appellants are not entitled to abatement of the late-payment penalty.

⁵ It is unclear whether appellants argue that they are entitled to relief on the basis of their good filing and payment history. However, although the IRS has an administrative program under which it will abate timeliness penalties if the taxpayer has timely filed returns and paid taxes during the preceding three years, respondent has no comparable program. Therefore, we will not discuss this argument further.

⁶ Although it does not appear from the evidence that respondent informed appellants regarding the *Moren* Opinion, its August 6, 2021 opening brief in this appeal did cite *Appeal of Sleight* (83-SBE-244) 1983 WL 15615, which is cited in *Moren* and which explains how important it is for a taxpayer to provide credible evidence to show how and why the taxpayer could not timely file a return or pay tax that was due.

HOLDING

Appellants are not entitled to abatement of the late-payment penalty.

DISPOSITION

Respondent’s action denying appellants’ claim for refund is sustained.

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Michael F. Geary

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Michael F. Geary
Administrative Law Judge

We concur:

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Kenneth Gast

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Kenneth Gast
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour

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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 12/22/2021