

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
V. FRACARO

) OTA Case No. 20096681
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OPINION

Representing the Parties:

For Appellant: Janet Lim, Tax Appeals Assistance
Program (TAAP)¹
For Respondent: Christopher Cook, Tax Counsel

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, V. Fracaro (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$17,829.86² for the 2018 tax year.

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

ISSUE³

Whether appellant has established reasonable cause for his failure to timely pay his 2018 tax liability.

¹ Appellant filed his request for appeal. Afterwards, Carmen Vera of TAAP filed appellant’s reply brief, and Sunny Zhu of TAAP filed appellant’s supplemental reply brief.

² This amount consists of a late-payment penalty of \$13,420.08 and interest of \$4,409.78.

³ Although appellant’s claim for refund includes an amount for interest, appellant has not raised any arguments requesting abatement of the accrued interest. Therefore, we find that this issue is not in dispute, and we do not address it further.

FACTUAL FINDINGS

1. Appellant did not pay his 2018 tax liability on or before April 15, 2019, the payment due date.
2. On September 23, 2019, appellant timely filed his 2018 California income tax return, which reported pass-through items from NAP LLC (NAP). Appellant was one of five active co-managers of NAP.
3. Respondent received appellant's payment of his tax on September 30, 2019.
4. Because appellant's tax payment was not received by the April 15, 2019 payment due date, respondent assessed a late-payment penalty of \$13,420.08 plus applicable interest.
5. Respondent notified appellant of the penalty and interest by Notice of Tax Return Change – Revised Balance dated October 14, 2019.
6. Appellant paid the balance due and then filed a claim for refund.
7. Respondent denied the claim for refund.
8. This timely appeal followed.

DISCUSSION

R&TC section 19132 imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) Here, respondent properly assessed the late-payment penalty because appellant did not satisfy his 2018 tax liability until September 30, 2019, which was approximately 5 months after the payment due date.

The late-payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) 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 Friedman*, 2018-OTA-077P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) The taxpayer must show that the delay in payment was due to more than a lack of documentation or difficulty in calculating the tax liability. (*Appeal of Moren*, 2019-OTA-176P.) Reasonable cause based on insufficient

information requires the taxpayer to demonstrate the efforts made to retrieve records from third parties or acquire the information necessary to determine the tax liability. (*Ibid.*) In addition, to establish that the late payment of tax was not due to willful neglect, the taxpayer must prove the absence of a conscious, intentional failure or reckless indifference in failing to make a timely payment. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

On appeal, appellant argues that he was unable to obtain the necessary information to pay his taxes by the due date. Appellant explains that he was waiting for information from an IRS Form 1065 Schedule K-1 (K-1) from NAP. Appellant states that he was one of five active co-managers of NAP, and he could not exercise complete control over NAP, which included the ability to direct NAP to issue any K-1s prior to appellant's tax payment deadline. Without the K-1 information from NAP, appellant states that he was unable to estimate his tax liability. In support of this contention, appellant provided an email dated March 1, 2019, where appellant is asking a tax attorney questions regarding how NAP will be reporting a net operating loss and the potential tax consequences of engaging in an exchange of real property. However, this document does not demonstrate that appellant attempted to obtain tax related information from NAP in order to estimate his 2018 tax liability. In fact, it appears that appellant was aware of NAP's financial position (existence of a substantial net operating loss) and received a tax attorney's advice as to how the losses would be treated prior to appellant's tax payment deadline. Thus, this evidence does not establish that appellant was prevented from accessing the necessary information to estimate his tax payment.

Appellant also provided some additional documentation; however, those documents related to a different entity (National Avenue Partners LLC) or were emails sent after the payment deadline recounting when NAP's K-1 was ultimately issued. These documents do not show what steps appellant took to try and obtain the necessary information from NAP prior to appellant's tax payment deadline. As a result, these documents do not satisfy appellant's burden of proof.

Lastly, appellant also asserted that because of the substantial net operating loss, appellant believed that he would not owe any tax. Appellant states that it was not until late 2019 that he realized that he could not offset his income with the net operating loss. Appellant's misunderstanding of his ultimate tax liability is not reasonable cause for failing to comply with

tax payment deadlines. Similarly, ignorance of the law is not reasonable cause for failing to comply with tax payment deadlines. (*Appeal of Porreca*, 2018-OTA-095P.)

Based on the foregoing, we find that appellant has not demonstrated reasonable cause for his failure to timely pay his 2018 tax liability.

HOLDING

Appellant has not established reasonable cause for his failure to timely pay his 2018 tax liability.

DISPOSITION

Respondent’s action is sustained.

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Daniel Cho

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Daniel K. Cho
Administrative Law Judge

We concur:

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Sara A. Hosey

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Sara A. Hosey
Administrative Law Judge

DocuSigned by:

E. S. Ewing

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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 2/10/2022