

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**R. PANCHOLY AND
V. PANCHOLY**

) OTA Case No. 20046096
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OPINION

Representing the Parties:

For Appellants:

Michael Lim, Tax Appeals Assistance
Program (TAAP)¹

For Respondent:

Christopher M. Cook, Tax Counsel

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Pancholy and V. Pancholy (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$9,245.75, plus applicable interest, for the 2016 tax year.

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

ISSUE

Whether appellants have established reasonable cause for the late filing of their 2016 return.

FACTUAL FINDINGS

1. Appellants untimely filed a 2016 California income tax return (Form 540) on April 15, 2018. Appellants also sent a letter to FTB titled “Explanation letter for late filing 2016 State tax return...” in which appellants requested a waiver of any late fees and penalties.

¹ Appellants filed their opening brief on April 6, 2020. Thereafter, TAAP representatives Bethany Zoelle, Michael Hallock, Brittany Cho, and Michael Lim filed appellants’ reply, supplemental, and additional supplemental briefs.

2. After processing appellants' return, FTB sent a Notice of Tax Return Change - Revised Balance, to impose a \$9,245.75 late-filing penalty, plus accrued interest.
3. On July 8, 2018, appellants remitted the balance due to FTB.
4. On October 28, 2019, appellants filed a timely claim for refund of the late-filing penalty and interest.² FTB denied the claim for refund on January 13, 2020.
5. This appeal followed.

DISCUSSION

Taxpayers filing on a calendar year basis have three and a half months following the close of the calendar year (i.e., until April 15) to timely file their personal income tax return. (R&TC, § 18566.)³ R&TC section 19131 imposes a late-filing penalty where taxpayers fail to file a return when due, unless the failure is due to reasonable cause and not willful neglect. The penalty is calculated at five percent of the tax liability for each month the return is past due, up to a maximum of 25 percent. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that FTB properly imposed the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

On appeal, there is no dispute that appellants failed to file a timely return for 2016. Thus, FTB properly imposed a late-filing penalty. Appellants also do not dispute the calculation of the penalty. Instead, appellants assert that there is reasonable cause for their failure to timely file a return for the 2016 tax year.

Taxpayers must provide credible and competent evidence supporting a claim of reasonable cause to overcome the presumption that a penalty is properly imposed. (*Appeal of Xie, supra.*) To establish reasonable cause, the taxpayers must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Unsupported assertions are not sufficient to satisfy the taxpayers' burden of proof.

² FTB denied appellants' claim for refund in the amount of the late-filing penalty and any applicable interest. On appeal, appellants do not present any argument regarding the imposition of tax or interest. Therefore, we find they are not at issue and will not be discussed further.

³ FTB allows an automatic six-month extension to file a tax return if a taxpayer files the return within six months of the original due date (i.e., by October 15). (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18657(a).) If a taxpayer does not file his or her return by the extended due date, however, FTB does not allow the extension. (Cal. Code Regs., tit. 18, § 18567(a).)

(Appeal of GEF Operating, Inc., 2020-OTA-057P.)

Illness or other personal difficulties may be considered reasonable cause if the taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. *(Appeal of Head and Feliciano, 2020-OTA-127P.)* When difficulties simply cause taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, taxpayers must bear the consequences of that choice. *(Ibid.)*

Appellants argue that a series of events prevented the filing of a timely return, which when considered together constitute reasonable cause for the late filing. First, the evidence establishes that appellants' business suffered from a fire in July 2015. However, appellants must show that their personal difficulties continuously prevented them from filing a return. *(Appeal of Head and Feliciano, supra.)* Thus, while a fire at appellants' business is unfortunate, we fail to see how a fire in one year (2015) continuously prevented appellants from filing a timely 2016 return due almost two years later by the April 15, 2017 due date.

Next, appellants argue that they were required to travel internationally to care for a sick family member and later to make funeral arrangements. However, by appellants' own admission, that family member died in March 2017, before the return was due. While appellants may have felt it necessary to travel as a result of a family member's death, these circumstances do not excuse the requirement to timely file a return. When difficulties simply cause taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, taxpayers must bear the consequences of that choice. *(Appeal of Head and Feliciano, supra.)* Further, even if appellants were required to travel as a result of familial duties, appellants have not provided any explanation as to why such duties prevented them from filing a return until April 15, 2018, one full year after the due date of the return. Indeed, appellants assert that they faced travel requirements during the period February through April 2017 and September through November 2017. Thus, it appears that appellants were available to prepare and file a return during the months of May through August 2017, which is prior to the extended due date.

Appellants also argue that a computer virus affected their ability to file a return during the months of April and May 2017. However, appellants have not provided any evidence to support this contention. Appellants' unsupported assertions are not sufficient to meet their burden of proof. *(Appeal of GEF Operating, Inc., supra.)* Appellants also have not explained how any alleged computer virus prevented them from filing a timely return during the six-month

extension period, which did not end until October 15, 2017. Thus, based on all of the foregoing, appellants have not established reasonable cause for the late filing of their 2016 return and therefore the late-filing penalty may not be abated.

Finally, appellants assert that the late-filing penalty must be abated because the IRS abated a similar penalty for the same tax year. There is no dispute that the IRS abated a penalty imposed on appellants for their failure to file a timely 2016 federal income tax return. However, the reason for such abatement is in dispute. On the one hand, FTB asserts that it obtained appellants' federal return transcript and the notations are consistent with a first-time federal penalty abatement. FTB asserts that there is no such first-time abatement program in the California tax law. On the other hand, appellants assert that they could not receive a first-time abatement for 2016 because they also filed an untimely federal return for 2015, thus implying that the IRS abated the federal late-filing penalty for 2016 due to reasonable cause.

Under the IRS's "First Time Abate" program, the IRS will abate first time penalties if a taxpayer has timely filed his or her returns for the preceding three years. Here, there is no dispute that appellants failed to file a timely return for the 2015 tax year for federal purposes. Appellants contend that as a result, they did not qualify for a first-time penalty abatement under a federal program and the federal penalty must have been abated for reasonable cause. However, the record does not clearly show whether the IRS abated the 2016 penalty based on reasonable cause or some other reason. We cannot draw a conclusion from appellants' federal transcript alone as to why the IRS abated the federal late-filing penalty. Even if the IRS abated the late-filing penalty based on a showing of reasonable cause, we are not bound to follow a federal determination when our own analysis reaches a different conclusion. (*Appeal of Der Wienerschnitzel International, Inc.* (76-SBE-063) 1979 WL 4104.) Accordingly, we find no basis to abate the late-filing penalty.

HOLDING

Appellants have not established reasonable cause for the late filing of their 2016 return.

DISPOSITION

FTB’s denial of appellants’ claim for refund for the 2016 tax year is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

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Cheryl L. Akin
Administrative Law Judge

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Kenneth Gast
Administrative Law Judge

Date Issued: 1/25/2022