

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**C. BASKIN AND  
J. FERNSTROM**

) OTA Case No. 21017142  
)  
)  
)  
)  
)

**OPINION**

Representing the Parties:

For Appellants:

C. Baskin and J. Fernstrom

For Respondent:

Alisa Pinarbasi, Tax Counsel  
Maria Brosterhous, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Baskin (appellant-husband) and J. Fernstrom (appellant-wife) (collectively appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,167.29,<sup>1</sup> plus applicable interest, for the 2019 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Cheryl L. Akin, Teresa A. Stanley, and Andrea L.H. Long held an electronic oral hearing for this matter on March 23, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for a decision.

**ISSUES**

1. Whether appellants have established reasonable cause for the late payment of tax such that the late-payment penalty should be abated.

---

<sup>1</sup> This amount is comprised of a late-payment penalty of \$927.29 and an underpayment of estimated tax penalty of \$240.00. At the hearing, FTB conceded \$71.33 of the late-payment penalty and agreed to reduce the late-payment penalty from \$927.29 to \$855.96 and refund \$86.01 (the \$71.33 penalty reduction, plus applicable interest) to appellants. Thus, the remaining amount on appeal is \$1,095.96 (the \$855.96 revised late-payment penalty, plus the \$240.00 underpayment of estimated tax penalty).

2. Whether appellants have established a basis for the abatement of the underpayment of estimated tax penalty (estimated tax penalty).<sup>2</sup>

#### FACTUAL FINDINGS

1. On March 27, 2020, appellant-husband timely filed appellants' joint 2019 California Resident Income Tax return using TaxSlayer tax preparation and electronic filing software. The return reported tax due of \$14,266.
2. When appellant-husband completed the tax return, the software provided appellant-husband with an option to pay the California tax due using bank account information that had been entered into the software during a prior year. The software only showed the last four digits of appellants' bank account number, which appellant-husband verified was correct. Appellant-husband selected this option and attempted to electronically pay the California tax due on March 27, 2020.
3. The attempted payment was not successfully processed from appellants' bank account due to a transcription error in the bank account number. The bank account number previously entered into the TaxSlayer software contained an extra "2." This error was not visible or apparent to appellant-husband because the error (i.e., the extra "2") was not contained within the last four digits of appellants' bank account number, which was the only information the TaxSlayer software displayed.
4. FTB processed and accepted appellants' return as filed. Subsequently, on September 14, 2020, FTB issued a Notice of Tax Return Change – Revised Balance, noting the tax due for the 2019 tax year and imposing a late-payment penalty, estimated tax penalty, and applicable interest.

---

<sup>2</sup> At the hearing, appellant-husband expressed confusion regarding whether the \$15,489.31 balance due paid by appellants included the estimated tax penalty and stated that it was his understanding that this penalty was not included. Appellant-husband stated that if that is the case, appellants will not challenge the estimated tax penalty. However, if the estimated tax penalty was included in that payment, appellant-husband stated that appellants reassert their challenge of this penalty. Because an estimated tax penalty of \$240.00 was included in the amount paid by appellants, OTA will not treat appellant-husband's statement as a concession of this issue, and will address whether the estimated tax penalty should be abated.

5. Appellants paid the balance due, including penalties and interest, on September 21, 2020, and October 26, 2020, and filed a claim for refund seeking abatement of the penalties for reasonable cause.<sup>3</sup>
6. FTB denied appellants' claim for refund, and this timely appeal followed.

### DISCUSSION

Issue 1: Whether appellants have established reasonable cause for the late payment of tax such that the late-payment penalty should be abated.

R&TC section 19001 generally provides that the personal income tax imposed “shall be paid at the time and placed fixed for filing the return (determined without regard to any extension of time for filing the return).” R&TC section 19132 provides that a late-payment penalty is imposed when taxpayers fail to pay the amount shown as due on the return on or before the due date of the return. The late-payment penalty may be abated if taxpayers show 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).)

To establish reasonable cause for the late payment of tax, taxpayers must show that their 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.) Taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

Appellants assert that their intent was to fully pay their 2019 California tax liability when appellant-husband electronically filed appellants' return on March 27, 2020, and that the only reason the taxes were not timely paid on this date was due to an inadvertent and unintentional error in the bank account number entered into the TaxSlayer software. Appellant-husband testified, and the evidence establishes, that the bank account number entered into the TaxSlayer software and used for the attempted payment contained an extra “2” and that this extra “2” caused the attempted electronic payment to fail. Appellant-husband further testified that there was no way for him to identify and correct this error at the time of the attempted payment because the bank account number had been entered into the TaxSlayer software in a prior year,

---

<sup>3</sup> Appellants paid \$15,489.31 on September 21, 2020, and \$86.01 on October 26, 2020, for a total of \$15,575.32. This total consists of the reported tax due of \$14,266.00, a late-payment penalty of \$927.29, an estimated tax penalty of \$240.00, and interest of \$142.03.

the software did not prompt him to re-enter this information when he was preparing and submitting appellants' 2019 taxes, and the software only displayed the last four digits of appellants' bank account number, which was correct.<sup>4</sup> Appellants also state that they were unaware of the error until they received the notice from FTB months later in September 2020, and were not notified by FTB, their bank, or TaxSlayer that their attempted payment could not be processed. Appellants also note that their federal refund, which was requested on the same day, was processed timely by the IRS and refunded/deposited into appellants' account on April 8, 2020, despite the same transcription error.

While appellant-husband's testimony regarding his intent and attempt to timely pay appellants' 2019 California taxes in full when he electronically filed appellants' 2019 return on March 27, 2020, is both credible and supported by the evidence in the record, the transcriptional error, which caused the attempted payment to fail, does not establish reasonable cause. OTA has previously held that the failure to timely remit the balance due cause by an error or oversight does not, by itself, constitute reasonable cause. (*Appeal of Scanlon*, 2018-OTA-075P [appellants' error when inputting their bank account number into FTB's Web Pay system not found to be reasonable cause]; *Appeal of Friedman, supra* [appellants' error in not completing the Web Pay process by checking the agreement box and clicking the "submit" button not found to be reasonable cause].)<sup>5</sup>

Additionally, even if OTA were to find that there was reasonable cause for the failure of the attempted payment on March 27, 2020, in order to abate the late-payment penalty, OTA would also have to find reasonable cause for appellants' continued failure to remit the tax due until September 21, 2020. The question of whether there is reasonable cause for a late payment does not end once reasonable cause is found to exist at the time of the due date for payment. The

---

<sup>4</sup> The error occurred earlier in the bank account number.

<sup>5</sup> Appellants describe this error as a "scrivener's error" and, as support, cite to a U. S. Supreme Court case (*U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., et al.* (1993) 508 U.S. 439), a U.S. Court of Appeals, Seventh Circuit case (*Young v. Verizon's Bell Atlantic Cash Balance Plan* (7th Cir. 2010) 615 F.3d 808), and an IRS private letter ruling (PLR 201544005). Appellants contend that these cited authorities show that the "scrivener's errors" at issue were exonerated and the parties were allowed to retroactively amend the applicable document (i.e., the trust agreement or pension plan) or otherwise correct or disregard a clear drafting error to reflect the true intent of the drafters. Appellants note that people make mistakes and argue that appellants similarly should not be punished for appellant-husband's "scrivener's error" when his intent to timely pay the tax on March 27, 2020, is clear. However, these cases and the PLR cited by appellants are factually distinguishable. There is no "drafting error" and no document, agreement, or statutory language in this appeal that can be corrected, reformed, amended, or otherwise properly construed to reflect appellants' true intent. Instead, OTA finds its precedential cases in *Appeal of Scanlon, supra*, and *Appeal of Friedman, supra*, to be controlling here.

inquiry continues until actual payment is remitted, as “an acceptable reason for failure to pay taxes will excuse such failure only so long as the reason remains valid.” (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) OTA has previously held that it would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid. (*Appeal of Scanlon, supra*; see also *Appeal of Friedman, supra* [noting that appellants failed to exercise such ordinary business care and prudence when they did not check their bank account to make sure the payment was successfully made, either at the time of the attempted payment or at a later date].)

Appellants acknowledge that they did not check their bank account to verify that the attempted payment to FTB had in fact been processed, stating that the account used for the payment was a savings account in which they maintained a significant balance, from which they did not regularly make transactions and checked only infrequently. However, the fact that appellants did not regularly make transactions from this account or regularly check this account does not negate appellants’ duty of ordinary business care and prudence to check their account to ensure the scheduled electronic payment was successfully debited from their account.

Appellants also contend that there was no way for them to know that their payment had not been successfully processed because they did not receive any notification from FTB, their bank, or TaxSlayer that their attempted payment had failed. However, lack of notice of a failed payment does not negate appellants’ duty of prudence and due care to verify that their scheduled payment was successful. (*Appeal of Scanlon, supra.*) Appellants further assert that reviewing their bank account would not have been helpful because: (1) the rejection of the attempted payment would not be reflected on the account statement; and (2) FTB does not withdraw the funds immediately, and appellants therefore had no way of knowing when exactly the money would be withdrawn from their account and when to review their statement. While appellants are correct that the rejection of the payment would not be reflected on the account statement, appellants simply needed to review their account to verify whether a payment of approximately \$14,000 was withdrawn from the account on or shortly after their attempted payment on

March 27, 2020.<sup>6</sup> Because appellants did not check their bank account to ensure that the attempted payment was actually made, OTA finds that they did not act as a reasonably prudent businessperson. Thus, appellants have failed to establish reasonable cause for the late payment of tax.

Issue 2: Whether appellants have established a basis for the abatement of the estimated tax penalty.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated as and often referred to as a penalty, where taxpayers fail to timely pay estimated tax. Subject to certain exceptions not relevant to the issues on appeal, R&TC section 19136 incorporates IRC section 6654. The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpaid estimated tax. (See IRC, § 6654(a) [calculating the estimated tax penalty by reference to the interest rate imposed on underpayments in IRC section 6621]; R&TC, § 19136(b) [referring to R&TC section 19521 which, with modification, conforms to the federal interest provisions in IRC section 6621]; *Appeal of Johnson*, 2018-OTA-119P.)

Appellants do not contest the imposition or computation of the estimated tax penalty. Instead, appellants present only reasonable cause type arguments for both the late-payment penalty and the estimated tax penalty. However, there is no provision in the IRC or R&TC that allows the estimated tax penalty to be abated based solely on a finding of reasonable cause. (*Appeal of Saltzman*, 2019-OTA-070P.) As a result, there is no general reasonable cause exception to the imposition of the estimated tax penalty, and the estimated tax penalty imposed under IRC section 6654 is mandatory unless taxpayers establish that a statutory exception applies.<sup>7</sup> (*Appeal of Saltzman, supra*; *Appeal of Scanlon, supra*.) Because appellants only

---

<sup>6</sup> While it can take a couple of business days for an electronic payment to be processed, the payment should have been debited from appellants' account shortly after the attempted payment on March 27, 2020. Had appellants checked the account within a week or two of the attempted payment, they could have quickly ascertained that the attempted payment had not been processed and withdrawn from the account and taken immediate corrective action.

<sup>7</sup> Although there is no provision allowing for the abatement of the estimated tax penalty based solely on reasonable cause, IRC section 6654(e)(3) provides that FTB may waive the addition to tax if it determines either that (1) "by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience," or (2) the failure to timely pay the estimated tax payment was due to reasonable cause, *and* the taxpayer retired after reaching age 62 or became disabled in the taxable year for which the estimated payments were required to be made or in the previous year. Appellants have not alleged that either of these exceptions apply; therefore, this Opinion will not discuss them further.

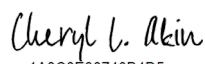
provide reasonable cause type arguments for the abatement of the estimated tax penalty, appellants have alleged no basis upon which OTA may waive or abate the estimated tax penalty.

HOLDINGS

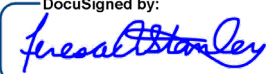
1. Appellants have not established reasonable case for the late payment of tax and the late payment penalty will not be abated.
2. Appellants have not established a basis for the abatement of the estimated tax penalty.

DISPOSITION

FTB’s action denying appellants’ claim for refund is modified (based on FTB’s concession on appeal) to reduce the late-payment penalty by \$71.33, plus applicable interest. The late-payment penalty is thus revised from \$927.29 to \$855.96. FTB’s denial of appellants’ remaining claim for refund is otherwise sustained.

DocuSigned by:  
  
 1A8C8E38740B4D5...  
 \_\_\_\_\_  
 Cheryl L. Akin  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
 0CC6C6ACCC6A44D...  
 \_\_\_\_\_  
 Teresa A. Stanley  
 Administrative Law Judge

DocuSigned by:  
  
 272945E7B372445...  
 \_\_\_\_\_  
 Andrea L.H. Long  
 Administrative Law Judge

Date Issued: 5/24/2022