**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) OTA Case No. 19054781 |
| **A. CHERKASKY** | ) |
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# OPINION

Representing the Parties:

For Appellant: A. Cherkasky

For Respondent: Eric R. Brown, Tax Counsel III
Maria Brosterhous, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Cherkasky (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of $3,544.50, plus applicable interest, for the 2015 tax year.[1]

Office of Tax Appeals (OTA) Administrative Law Judges Cheryl L. Akin, Richard Tay, and Andrew Wong held an oral hearing for this matter in Cerritos, California, on April 13, 2022. At the conclusion of the hearing, the record was closed and this matter was submitted for a decision.

## ISSUE

Whether appellant has established reasonable cause to abate the late-filing penalty for the 2015 tax year.

## FACTUAL FINDINGS

1. Appellant attempted to electronically file (e-file) a 2015 joint California income tax

[1] Although appellant jointly filed his 2015 California income tax return with his spouse, only appellant filed this appeal. Therefore, references to "appellant" in this Opinion will at times refer to appellant individually, and at times to appellant and his spouse jointly, as the context may require.

return on October 14, 2016, using H&R Block's online tax preparation software.[2] On the same day, appellant separately mailed a check to FTB for the $14,449 reported balance due, which FTB subsequently processed on October 24, 2016.

2. After appellant completed and submitted the 2015 California return for e-filing, H&R Block provided appellant a confirmation email stating: "Congratulations – your California return is complete! As soon as California tax office processes your return, we'll send you an email to let you know that your return status has been updated..... "

3. When appellant subsequently logged into the H&R Block software and reviewed the 2015 tax year, he was presented with a tax return cover page containing columns for "Tax Return," "efile," "Refund/(Balance Due)," "Summary," and "Message." Under the "efile" column, "Yes" appeared for both appellant's federal and California returns. Under the "Message" column, appellant was instructed to "[s]ee the Filing Checklist for mailing instructions" with respect to the California return.[3]

4. FTB rejected appellant's attempt to e-file the 2015 joint California return because appellant was required, but failed, to correctly state the amount of appellant's prior-year adjusted gross income.[4]

5. H&R Block notified appellant that FTB rejected his 2015 joint California return in an email sent to appellant later the same day (i.e., on the afternoon of October 14, 2016). The email stated, "Your prior-year adjusted gross income (AGI) doesn't match the Franchise Tax Board's records. So, you can't sign your return electronically. You can still e-file by signing a FTB 8453-OL: California e-file return authorization form. This won't delay the processing of your return."

6. On November 6, 2017, FTB sent appellant's spouse a notice indicating that it had received an estimated tax payment for the 2015 tax year but had no record of receiving a tax return for that year. Appellant did not receive this notice because he and his spouse

[2] If successfully filed on October 14, 2016, this return would have been timely filed pursuant to California's automatic extension provisions. (See R&TC, § 18567; Cal. Code of Regs., tit. 18, § 18567(a).)

[3] With respect to the federal return, the "Message" column instructed appellant to "[s]ee the Filing Checklist for instructions," with no specific reference to "mailing instructions" included.

[4] Although this information is not relevant to the determination of appellant's 2015 tax liability, FTB requires it to verify the identity of the person(s) filing the return. Without this information, appellant's electronic signatures could not be verified, and the return was treated as being unsigned.

had moved.

7. On June 26, 2018, FTB sent appellant's spouse a Request for Tax Return, noting that it had not received a California tax return for the 2015 tax year and requesting that appellant file a return, send in a copy of the return if one had already been filed, or establish that no return was required for that tax year.
8. Appellant received the Request for Tax Return, and on July 9, 2018, provided FTB a copy of the 2015 joint California tax return. FTB processed the return and sent appellant a notice imposing a late-filing penalty of $3,544.50, plus interest.
9. Appellant paid the balance due and filed a claim for refund requesting abatement of the late-filing penalty based on reasonable cause.
10. FTB denied appellant's claim for refund and this timely appeal followed.

## DISCUSSION

R&TC section 19131 imposes a penalty when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. While appellant attempted to timely e-file the joint 2015 return on October 14, 2016, during the extension period, the attempted e-filing was unsuccessful, and appellant did not subsequently file a 2015 return until July 9, 2018. Because appellant failed to timely file the 2015 return by April 15, 2016, or by the automatic six-month extension period, FTB properly imposed a late-filing penalty.[5] Appellant does not dispute that FTB properly imposed the late-filing penalty, but rather argues that the penalty should be abated due to reasonable cause.

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the late-filing penalty. (*Ibid.*) To establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an

[5] FTB allows an automatic six-month extension to file if the return is filed within six months of the original due date. The granting of the extension is conditioned solely upon the filing of a return within the automatic extension period. If the return is not filed within six months of the original due date, no extension is allowed. (Cal. Code Regs., tit. 18, § 18567(a).)

ordinarily intelligent and prudent businessperson to have so acted under similar circumstance. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Appellant asserts that the penalty should be abated for reasonable cause because he reasonably believed that he timely filed his 2015 tax return. Appellant notes that he personally prepared his 2015 tax return through H&R Block's online tool. Appellant states that he reasonably believed that he e-filed his California tax return on October 14, 2016, based on the confirmation email sent by H&R Block and the 2015 tax return cover page, which indicated "yes" under the "efile" column for both his federal and California returns. Appellant also notes that, on October 24, 2016, FTB cashed appellant's check dated October 14, 2016, in the amount of $14,449, and that he never received any communications indicating there were any issues with the California filing. Based on all of the above, appellant states that he honestly and reasonably believed that he timely filed his 2015 California tax return on October 14, 2016.

However, OTA has previously held that ordinary business care and prudence requires a taxpayer to ensure that a return submitted for e-filing was successfully transmitted to, and accepted by, FTB. "In the absence of an acknowledgment that a return was transmitted, received, or accepted, an ordinarily intelligent and prudent businessperson would have viewed the E-File History and acknowledgment records to confirm whether the return had been timely transmitted, received by Intuit,[6] and accepted [by FTB]." (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P; see also *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Appellant's testimony that he honestly believed that he properly filed the 2015 joint California return on October 14, 2016, based on the H&R Block confirmation email and tax return cover page, is both credible and believable. However, this honest belief, alone, is not sufficient to establish reasonable cause. The reasonable cause standard is an objective rather than subjective standard. As noted above, to establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstance. (*Appeal of GEF Operating, Inc.*, *supra*.) An ordinarily careful and prudent reading of the H&R Block confirmation email should

[6] While appellant used H&R Block, rather than Intuit's software, to prepare and e-file the 2015 return, this difference does not impact the analysis above or the applicability of the holding to this appeal.

have alerted appellant that FTB had not yet accepted the return and that appellant therefore needed to further verify whether FTB had accepted appellant's return before concluding that the return was filed successfully. The email specifically noted that the California tax office had not yet "processe[d]" appellant's return and indicated that H&R Block would email appellant to let him know when his "return status has been updated."[7]

Indeed, H&R Block subsequently sent appellant an email later that same day (i.e., on the afternoon of October 14, 2016) informing appellant that his 2015 California return had been rejected. While appellant's testimony that he did not see or read this email is again both credible and believable, OTA concludes that an ordinarily intelligent and prudent businessperson receiving the confirmation email noted above would have taken the additional step of verifying that the return had not only been transmitted to FTB but also "processed" and accepted by FTB. This could have been accomplished by either monitoring the email address appellant provided to H&R Block for the subsequent email which the H&R Block confirmation email stated would be sent once the California return was "processed" or by logging back into the H&R Block online software to specifically check the "return status," which the H&R Block confirmation email indicated would be updated following such "processing." Had appellant monitored his email for this follow-up email from H&R Block and/or specifically checked for the updated "return status"

[7] OTA recognizes that this email could have been clearer by expressly stating that FTB had not yet accepted appellant's return and that appellant needed to check back to ensure that FTB had subsequently accepted, and not rejected, the return, instead of merely stating that H&R Block would email appellant to provide an updated return status "as soon as the California tax office processes your return." However, OTA concludes that an ordinarily intelligent and prudent businessperson reading this email should have understood that FTB had not yet "processe[d]" the return and that the taxpayer should therefore check back to confirm that the return was subsequently "processe[d]" or accepted by FTB.

on H&R Block's online software, appellant would have known that FTB had rejected his return.[8] Appellant could have then taken immediate corrective action by either completing the requested return authorization form or mailing the California tax return to FTB by the extended filing deadline.

The facts in this appeal are similar to those in *Spottiswood v. U.S.* (N.D. Calif., April 24, 2015, No. 17-cv-0029-MEJ) 2018 WL 1933521 (*Spottiswood*).[9] In *Spottiswood*, the taxpayer similarly attempted to e-file a joint return for the 2012 tax year (using TurboTax rather than H&R Block's online service). The IRS rejected that return (because the taxpayer mistakenly input a dependent's social security number incorrectly) and TurboTax notified the taxpayer via email on the same day as the attempted e-filing. Similar to this appeal, the taxpayer in *Spottiswood* did not see that email and did not check TurboTax's "check e-file status" screen to verify that the IRS accepted the return. Because the taxpayer did not check the email account provided to TurboTax for the purposes of communicating with him about his tax return and did not use the "check e-file status" TurboTax screen to confirm the IRS had accepted the return, the district court concluded that the taxpayer did not create a triable issue that there was reasonable cause for the failure to timely file his tax return and granted the IRS's motion for summary judgment. OTA similarly finds that appellant's failure to check either his email for the subsequent, follow-up email, or the H&R Block online "return status" screen or information to

[8] Appellant testified that he did log back into the H&R Block software to verify that his California return had been successfully e-filed and points to the tax return cover page as being what he saw when he checked back. Appellant points to the "yes" under the "efile" column as indicating to him that the California return had been successfully e-filed. However, OTA does not find appellant's reliance on the tax return cover page to conclude that the California return had been successfully e-filed to be reasonable. That cover page also indicated (under the "Message" heading for the California return) that appellant should "[s]ee the Filing Checklist for **mailing** instructions." (Emphasis added.) There would be no need to mail the California return if it had already been successfully e-filed. Thus, the cover page, when read in its entirety, is ambiguous as to whether the California return had been successfully e-filed with FTB at this point. Additionally, appellant acknowledged that he was not sure if had he "clicked around enough" and "through enough sub-pages," he may have been able to find something that said the California return had been rejected. Instead, appellant testified that he could not say that he had "clicked around enough to clarify that." OTA concludes that in order to establish reasonable cause, appellant needed to take steps to specifically verify that the return had not only been submitted for e-filing but also "processed" and accepted by FTB. Appellant's failure to explore beyond the initial tax return cover page does not meet this standard and fails to establish reasonable case for the late filing of appellant's 2015 return.

[9] U. S. district court cases generally are not precedential authority, and this case is not binding on OTA. Instead, this case is being cited for its persuasive value only. OTA agrees with the reasoning illustrated by the district court in this case and finds such reasoning to be applicable to the facts in this appeal.

verify actual acceptance of the California return following the initial transmission of that return, fails to establish reasonable cause.

Appellant also argues that the penalty should not be applied because the taxes were paid at the time of the attempted e-filing and the check clearly indicated that it was intended for appellant's 2015 tax year. Appellant contends that this establishes that FTB knew that appellant had attempted to file his 2015 tax return and knowingly rejected that return. Appellant argues that FTB should not be allowed to impose a penalty where, as here, FTB willingly accepted appellant's payment for the tax year, and, at the same time, rejected appellant's return and failed to directly notify appellant of the missing return until more than a year and a half later.

First, the filing of a return and the payment of the tax due are two separate and independent obligations with separate penalties imposed for failure to timely complete each.[10] Thus, there is no error in FTB's acceptance of appellant's payment while also rejecting appellant's attempt to e-file a tax return for the same tax year. Additionally, H&R Block notified appellant that FTB rejected the return on the same day of the attempted e-filing. H&R Block sent this notification to the email address appellant provided to H&R Block for purposes of communicating with him about his tax return acceptance status. Thus, appellant was timely notified of the rejection, and as noted above, appellant's failure to check either his email or the H&R Block online "return status" screen or information to verify acceptance of the California return following the initial transmission of that return fails to establish reasonable cause.

Finally, appellant contends that because FTB had the use of appellant's money,[11] if reasonable cause is not established for the late filing of the return, the penalty should be reduced "out of equity" or fairness. Given the payment of the taxes in October 2016, appellant contends that the penalty computed based on 25 percent of the tax reported on the return, when FTB already had that money, is excessively punitive. Appellant therefore requests OTA recalculate this penalty based on interest only between April 2016 and October 2016. However, there is nothing in the law that allows OTA to abate, reduce, or otherwise revise or recalculate the late-

[10] The late-filing penalty is imposed under R&TC section 19131, while the late-payment penalty is imposed under R&TC section 19132. However, the late-payment penalty generally will not be imposed where, as here, the late-filing penalty has already been imposed for the same tax year in amount equal to or greater than the otherwise applicable late-payment penalty. (See R&TC, § 19132(b).)

[11] It is undisputed that appellant sent a check to FTB for the payment of his taxes on or about October 14, 2016, and that FTB received this check and processed it on October 24, 2016, and therefore, had the use of appellant's money from this date forward.

filing penalty based on equity or fairness. (See, e.g., *Appeal of Robinson*, 2018-OTA-059P.) Instead, R&TC section 19131(a) only allows the abatement of the late-filing penalty upon a showing of reasonable cause, which appellant has not established here.

Additionally, with respect to the computation of the penalty, R&TC section 19131(a) specifically provides that the late-filing penalty is calculated at 5 percent of the tax required to be shown on the return for each month or fraction thereof "elapsing between the due date of the return (determined without regard to any extension of time for filing)" and the date the return is filed, with a maximum penalty of 25 percent of the tax. However, R&TC section 19131(c) states that "for purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax . . . ." 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.) The original due date of appellant's return was April 15, 2016. Thus, had appellant timely paid the tax due by April 15, 2016, appellant would have been given credit for this timely payment under R&TC section 19131(c) in the computation of the late-filing penalty.[12]

Additionally, under R&TC section 19131(a), when a return is not timely filed, the penalty is computed starting on the original due date of the return "determined without regard to any extension of time for filing" (here, that is April 15, 2016). Thus, the late-filing penalty in this appeal was assessed at 5 percent for each month between April 2016 and August 2016.[13] By the time appellant paid the tax due in October 2016, the 25 percent maximum penalty had already been reached. Thus, the penalty is not being assessed for the time period during which FTB had use of appellant's tax payment (i.e., after October 2016 when the payment was made), as appellant suggests.

In conclusion, FTB properly computed the late-filing penalty as provided in R&TC section 19131(a) and (c), and OTA does not have the ability to make discretionary adjustments to the amount of tax or penalty imposed under the law. (See, e.g., *Appeal*

[12] R&TC section 19131(b) provides for a minimum penalty amount of $135, which would apply if the full amount of tax shown on the return was timely paid, but the return was not filed within 60 days of the extended due date for the filing of that return (here October 15, 2016).

[13] The maximum 25 percent penalty was reached in August 2016, the fifth month (or fraction thereof) following the original April 15, 2016 due date. (5 percent x 5 months = 25 percent (the maximum penalty imposed).)

*of Robinson*, *supra*.) Because appellant has not established reasonable cause for the late filing of the 2015 return, the late-filing penalty cannot be abated.

## HOLDING

Appellant has not established reasonable cause to abate the late-filing penalty for the 2015 tax year.

## DISPOSITION

FTB's denial of appellant's claim for refund is affirmed.

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

We concur:

DocuSigned by:
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Richard Tay
Administrative Law Judge

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Andrew Wong
Administrative Law Judge

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