

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 22019448
N. GUHARAY AND)	
R. GUHARAY)	
)	

OPINION

Representing the Parties:

For Appellants: Linda Mambelli, CPA

For Respondent: Christopher T. Tuttle, Tax Counsel

For Office of Tax Appeals: Steven Kim, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, N. Guharay and R. Guha Ray (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$755.95.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellants waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellants have established that the dishonored payment penalty should be abated.

FACTUAL FINDINGS

1. On May 13, 2021, appellants timely filed a California Resident Income Tax Return (Form 540), self-assessing tax due of \$37,624.¹ Appellants scheduled an electronic

¹ For the 2020 tax year, California postponed the income tax return filing deadline for taxpayers filing a Form 540 from April 15, 2021, to May 17, 2021. See: <https://www.ftb.ca.gov/about-ftb/newsroom/2020-tax-year-extension-to-file-and-pay-individual.html>.

payment of \$37,624 for the 2020 tax year to be paid that same day (May 13 payment, or first payment).² The payment was successfully processed and posted on appellants' bank account statement on May 17, 2021.³

2. On May 14, 2021, appellants' tax preparer also scheduled another electronic payment of \$37,624 for the 2020 tax year (May 14 payment, or second payment).⁴ The second payment was dishonored due to insufficient funds in appellants' bank account.⁵
3. On June 14, 2021, FTB issued appellants a State Income Tax Balance Due Notice showing FTB imposed a dishonored payment penalty of \$752.91 for the 2020 tax year.
4. FTB issued appellants an Income Tax Due Notice requesting payment of \$755.95, which included the penalty and interest.
5. Appellants made a payment of \$755.95 to FTB and filed a claim for refund for that amount, which FTB denied.
6. This timely appeal followed.

DISCUSSION

R&TC section 19134 conforms to Internal Revenue Code (IRC) section 6657, except as otherwise provided. IRC section 6657 provides that if any instrument in payment, by any commercially acceptable means, of any amount receivable under this title is not duly paid, there shall be paid as a penalty by the person who tendered such instrument, in the same manner as tax, an amount equal to 2 percent of the amount of such instrument, except that if the amount of such instrument is less than \$1,250, the penalty under this section shall be \$25 or the amount of such instrument, whichever is the lesser. This penalty is often referred to as the "dishonored payment penalty." R&TC section 19134(b) provides that IRC section 6657 is applicable to payments made by credit card or electronic funds transfer.

² The record includes an email confirmation from FTB Webpay to appellant-husband dated May 13, 2021, stating that his payment is confirmed. The email, sent at 2:07 p.m., also indicates that the payment request was made at 2:07:42 p.m.

³ The FTB Webpay email indicated that the payment may take up to two business days to clear and reflect on appellants' bank account.

⁴ Appellants' tax preparer states that, "[d]ue to an error on my side as the tax preparer, an automatic electronic payment was also set up for 5/17/21."

⁵ Appellants received an email from their bank on May 18, 2021, stating that appellants did not have enough money in their bank account to cover the second payment on May 17, 2021.

The dishonored payment penalty shall not apply if the person tendered such instrument in good faith and with reasonable cause to believe that it would be duly paid. (IRC, § 6657.) The taxpayer bears the burden of proving the existence of reasonable cause. (See *Appeal of Xie*, 2018-OTA-076P.) To establish reasonable cause, the taxpayer must show that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman*, 2018-OTA-077P.)⁶ While not binding California authority, the IRS's Internal Revenue Manual (IRM) states that the dishonored payment penalty should be abated for reasonable cause in certain instances, such as when the taxpayer has sufficient funds, but the payment was dishonored due to a bank or tax agency error. (See IRM, § 20.1.10.7.4.)

Appellant scheduled an electronic payment of \$37,624 for the 2020 tax year on May 13, 2021, which was successfully processed and paid on May 17, 2021. Appellant's tax preparer also scheduled another payment of \$37,624 on May 14, 2021, for the 2020 tax year, which was dishonored due to insufficient funds in appellants' bank account on May 17, 2021. The dishonored payment penalty is imposed when a payment is dishonored and does not distinguish as to the nature of the payment, such as the amount owed before or after the payment is made. For instance, the dishonored payment penalty may be imposed on dishonored payments of estimated tax, even though such amounts are estimates of amounts owed and could ultimately be overpayments.⁷ Accordingly, FTB properly imposed the dishonored payment penalty.

While the reason for this erroneous second payment is unclear from the briefing, it appears that appellants are arguing that the tax preparer submitted this second payment not knowing that appellants had paid the tax directly on May 13, 2021, and that appellants likewise did not know that the tax preparer would also be submitting a payment on their behalf with the electronic filing of appellants' return. However, there is no dispute that appellants did not have sufficient funds in their account when the tax preparer attempted the May 14 payment. In addition, there was no error in FTB's payment system or by appellants' bank. (See e.g., IRM, § 20.1.10.7.4.) Appellants immediately received an email confirmation upon scheduling the

⁶ While *Appeal of Friedman, supra*, is a late-filing penalty case, OTA finds the analysis regarding reasonable cause to be relevant and persuasive authority here regarding reasonable cause to believe that the tendered payment would be duly paid.

⁷ Estimated tax payments may be made using FTB Webpay and may be required in certain circumstances. (See <https://www.ftb.ca.gov/pay/mandatory-e-pay.html>; see also *Appeal of Taylor*, 2021-OTA-275 [while not precedential or binding authority, this demonstrates the dishonored payment penalty applies to estimated tax payments].)

May 13 payment request. Therefore, appellants were notified that the May 13 payment was processed.


However, the evidence indicates that appellants did not notify their tax preparer of the May 13 payment until after the second payment was attempted by the tax preparer. In the context of the late-filing penalty and late-payment penalty, filing a tax return and making required tax payments are nondelegable duties of a taxpayer, and a mistake on the part of a tax preparer is not sufficient to establish reasonable cause. (See *United States v. Boyle* (1985) 469 U.S. 241, 251-252; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315.) Similarly, an error on the part of appellant's tax preparer in making the second payment, where it is the result of a lack of communication or due to an oversight, is not sufficient to establish reasonable cause to believe that the amount would be duly paid. Appellants have not provided evidence of any communication with their tax preparer before the second payment, either to show why the error occurred or any steps taken to prevent such an error from occurring. An oversight when remitting the balance due on a tax liability does not, by itself, constitute reasonable cause. (See *Appeal of Friedman, supra.*) OTA concludes that an ordinarily intelligent and prudent businessperson would have verified with their tax preparer how the tax due would be remitted. Accordingly, we find that appellants have not shown the second payment was made with reasonable cause to believe that it would be duly paid.

HOLDING

Appellants have not established that the dishonored payment penalty should be abated.

DISPOSITION

FTB's action is sustained.

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Josh Lambert
Administrative Law Judge

Date Issued: 8/11/2022