

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**R. BREWER AND
M. BREWER**

) OTA Case No. 20076413
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OPINION

Representing the Parties:

For Appellants: Stewart A. Farber, CPA

For Respondent: David Muradyan, Tax Counsel III
Nancy Parker, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Brewer and M. Brewer (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$29,236.56, plus applicable interest for the 2018 tax year.

Office of Tax Appeals Administrative Law Judges Cheryl L. Akin, Sara A. Hosey, and Elliott Scott Ewing held an oral hearing via videoconference for this matter on September 28, 2021. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUE

Whether the late-payment penalty under R&TC section 19132 was properly imposed, and if so, whether appellants have established reasonable cause for the late payment such that the penalty should be abated.

FACTUAL FINDINGS

1. On October 14, 2019, appellants timely filed their 2018 joint California Resident Income Tax Return within the automatic extension period. On the return, appellants reported total tax of \$415,573. After applying payments and withholdings totaling \$50,116,

appellants reported a balance due of \$365,457. Appellants also self-assessed “[i]nterest, late return penalties and late payment penalties” of \$9,451 and an underpayment of estimated tax penalty (estimated tax penalty) of \$3,995.

2. Appellants remitted a payment of \$378,903 with the return on October 14, 2019.¹
3. FTB processed appellants’ return and imposed a late-payment penalty of \$29,236.56 and interest of \$10,336.38 and removed appellants’ self-assessed “[i]nterest, late return penalties and late payment penalties” of \$9,451 and estimated tax penalty of \$3,995. FTB notified appellants by way of a Notice of Tax Return Changed – Revised Balance dated November 4, 2019, which reflected a balance due of \$26,156.94² as of that date.
4. Appellants remitted \$26,154.94 to FTB on November 20, 2019, and an additional \$40.01 on January 28, 2020, which satisfied appellants’ balance due for the 2018 tax year.
5. On June 24, 2020, appellants filed a claim for refund seeking abatement of the late-filing penalty.
6. FTB denied appellants’ claim for refund and this timely appeal followed.

DISCUSSION

Imposition of the Late-Payment Penalty

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 tax. When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) Appellants suggest that their tax payment made on October 14, 2019, was timely because they “had a valid extension for filing,” timely filed their return within the extension period and immediately paid the full balance due with that return. However, R&TC section 19001 provides that the personal income tax “shall be paid at the time and place fixed for filing the return (determined without regard to any extension for time for filing the return).” As such, the payment due date was the original filing deadline of April 15, 2019, not the October 15, 2019, extended filing deadline. Because appellants did not completely satisfy their 2018 tax liability

¹ This amount is equal to the tax due of \$365,457 plus the self-assessed “[i]nterest, late return and late payment penalties” of \$9,451 and estimated tax penalty of \$3,995.

² This amount equals the late-payment penalty of \$29,236.56 and interest of \$10,366.38 assessed per the Notice of Tax Return Change less the “[i]nterest, late return and late payment penalties” of \$9,451 and estimated tax penalty of \$3,995 appellants self-assessed per their return.

until October 14, 2019, six months after the payment due date, FTB properly imposed the late-payment penalty.

Despite this, appellants contend the late-payment penalty was not properly imposed because the safe harbor (or relief provisions) provided in R&TC section 19136(c)(2) should apply. However, R&TC section 19136(c)(2) is applicable to the *estimated tax penalty*, not the *late-payment penalty* at issue in this appeal. R&TC section 19136(c)(2) specifically provides:

An addition to tax shall not be imposed under *this section* if the tax imposed under [R&TC section] 17041 or 17048 and the tax imposed under [R&TC section] 17062 for the preceding taxable year, minus the sum of any credits against the tax provided by Part 10 (commencing with [R&TC section] 17001) or this part, or the tax computed under [R&TC section] 17041 or 17048 upon the estimated income for the taxable year, minus the sum of any credits against the tax provided by Part 10 (commencing with [R&TC section] 17001) or this part, is less than five hundred dollars (\$500)..... (R&TC, § 19136(c)(2), emphasis added.)

When R&TC section 19136(c)(2) states that an addition to tax shall not be imposed under “this section,” it is specifically referencing R&TC section 19136, which imposes the *estimated tax penalty*. The *estimated tax penalty* under R&TC section 19136 and the *late-payment penalty* under R&TC section 19132 are separate and distinct penalties. Both may be imposed where the facts and circumstance establish that the statutory requirements for the imposition of the each have been met. (See e.g., *Appeal of Scanlon*, 2018-OTA-075P [upholding FTB’s imposition of both the late-penalty under R&TC section 19132 and the estimated tax penalty under R&TC section 19136].) Because the *late-payment penalty* is imposed by R&TC section 19132, not R&TC section 19136, the safe-harbor provided under R&TC section 19136(c)(2) is not applicable to the *late-payment penalty* at issue in this appeal.³ FTB properly imposed the late-payment penalty because appellants did not completely satisfy their 2018 tax liability until October 14, 2019, which was six months after the payment due date for the 2018 tax year.

³ To the extent the requirements for the application of the safe harbor (or relief provisions) of R&TC section 19136(c)(2) have been met as appellants contend, we note that FTB removed or abated the *estimated tax penalty* of \$3,995 appellants self-assessed on their 2018 return. However, R&TC section 19132 applicable to the *late-payment penalty* at issue here does not contain a safe harbor or relief provisions like that contained in R&TC section 19136(c)(2).

Reasonable Cause

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 Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Scanlon*, *supra.*)

Appellants contend that reasonable cause for the late payment of tax existed here because appellants were minority investors in multiple real estate limited liability companies (LLCs) and “[g]iven the complex issues associated therewith, [appellants had] no viable way to estimate taxable income, other than to rely on K-1 Forms.” Appellants note that they filed a timely tax return in October 2019, days after receiving the Schedule K-1 forms, and fully paid the tax due at that time. Appellants further note that the amount of money a taxpayer received from a highly complex transaction is not a valid indication of tax liability. Appellants contend that given the magnitude and complexity of the transaction, appellants’ financial interest of one percent or less, the involvement of giant law firms, and the largest CPA firm in the world, “it is unrealistic for [FTB] to think [appellants] could have any idea as to the tax issues, calculations, etc. without a [Schedule] K-1 form.” Appellants further state: “They are beyond minority shareholders. They are under [one] percent owners of this particular venture. They had no input. They had no knowledge. They had no discussions with accountants. They had no discussions with the lawyers. They [did not] have any detailed knowledge of what this transaction was going to ultimately be, until . . . [they received the Schedule] K-1, which suddenly told them . . . they were responsible for tax”

However, a taxpayer’s asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Moren*, *supra.*) Instead, the taxpayer must show the efforts made to acquire that information from the source that held it. (*Ibid.*) While we understand appellants’ assertions regarding the complexity of the transaction, their position as minority investors, and the difficulty in calculating or determining their tax liability prior to the receipt of the Schedule K-1, appellants

have failed to explain what efforts they made (if any) to obtain the information or documentation from the real estate LLC necessary to timely calculate and pay their taxes for the 2018 tax year. Again, in order to establish reasonable cause, appellants “must show the efforts made to acquire that information from the source that held it, and that difficulties in obtaining the necessary information led to the delay in payment.” (*Ibid.*). Appellants have failed to make such a showing here.

Additionally, we note that appellants acknowledge receiving a large distribution from the real estate LLC during the 2018 tax year. While appellants are correct that the receipt of this money does not necessarily indicate a resulting tax liability, the receipt of a larger than normal cash distribution during the tax year should have put appellants on notice that they may also have a larger than normal tax liability during that tax year. The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Triple Crown Baseball*, 2019-OTA-025P.) Here, we find that an ordinarily intelligent and prudent businessperson would make an effort to determine their tax liability with reasonable accuracy prior to the due date for the payment of tax. If unable to do so based on the information available to appellants, ordinary business care and prudence would require efforts by appellants to obtain the information necessary to make such determination from the source that held it (here the real estate LLC) prior to the payment deadline.


“The most important factor in determining reasonable cause and good faith is the extent of the taxpayer’s efforts to assess his or her proper tax liability.” (*Frias v. Commissioner* (2017) T.C. Memo. 2017-139, at p. 16-17.) Appellants do not describe any efforts they made to calculate or determine their tax liability before the April 15, 2019 payment deadline, or if unable to make such a determination on their own, what steps they took to try to obtain information necessary to make such a determination from the LLC prior to this deadline. Instead, appellants merely assert without evidence or support that it was “impossible” to make such a determination prior to receiving the Schedule K-1 from the LLC. These unsupported assertions are not sufficient to establish reasonable cause. (*Appeal of Scanlon, supra.*) If truly “impossible” to determine appellants’ 2018 tax liability without additional information, appellants must show that they nevertheless made efforts to seek such information prior to the April 15, 2019 payment deadline rather than simply waiting for the Schedule K-1 which would not be provided to them until six months after this deadline, in October of 2019.

HOLDING


The late-payment penalty under R&TC section 19132 was properly imposed, and appellants have failed to establish reasonable cause for the late payment such that the penalty should be abated.

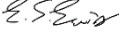
DISPOSITION

FTB’s action is sustained.

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Cheryl L. Akin
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 12/28/2021