

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20046130
)
M. CYRUS AND)
B. CYRUS)
)
)

OPINION

Representing the Parties:

For Appellants:	Brian Plaut, Tax Appeals Assistance Program (TAAP) ¹ M. Cyrus B. Cyrus
For Respondent:	David Muradyan, Tax Counsel III Nancy Parker, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Cyrus and B. Cyrus (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$4,811.50, plus applicable interest, for the 2017 tax year.²

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Asaf Kletter, and John O. Johnson held an electronic oral hearing for this matter on October 20, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether the late-filing penalty was properly imposed for the 2017 tax year.
2. Whether appellants have shown reasonable cause for the late filing of their tax return for the 2017 tax year.

¹ Appellants filed their opening brief. McKenna Clark of TAAP filed a reply brief on behalf of appellants. Brian Plaut of TAAP represented appellants at the oral hearing.

² This amount consists entirely of the late-filing penalty.

FACTUAL FINDINGS

1. FTB received information for the 2017 tax year indicating that appellants had a filing requirement. Appellants did not file a 2017 income tax return, which was due April 15, 2018.³
2. On April 23, 2019, FTB sent a Request for Tax Return to appellants requesting that they file a return or explain why they had no filing requirement. Appellants responded that they had a filing requirement and that they filed their 2017 return on October 15, 2018.
3. Appellants filed their federal income tax return on November 9, 2018, and a check for payment to the IRS was processed on November 5, 2018.
4. Appellants filed a California return on May 31, 2019. Attached to the return was a copy of FTB Form 8453-OL, California Online e-file Return Authorization for Individuals, which was signed by appellants with the date October 15, 2018, and a handwritten note that they filed it by mail. Appellants made a payment of \$4,181 on May 27, 2019, for a portion of the amount due for the 2017 tax year.
5. FTB sent appellants a State Income Tax Balance Due Notice indicating tax due, and imposing a late-filing penalty of \$4,811.50, plus interest.
6. FTB and appellants entered into an installment agreement. The first installment payment was made on November 19, 2019.
7. Appellants subsequently paid the balance due for the 2017 tax year and filed a claim for refund seeking abatement of the late-filing penalty, which FTB denied.
8. This timely appeal followed.

DISCUSSION

Issue 1: Whether the late-filing penalty was properly imposed for the 2017 tax year.

If any taxpayer fails to make and file a return on or before the due date of the return or the due date as extended by FTB, then, unless it is shown that the failure is due to reasonable

³ Because April 15, 2018, was a Sunday, and Monday, April 16, 2018, was a federal holiday (Emancipation Day), 2017 tax returns filed on Tuesday, April 17, 2018, were considered timely.

cause and not due to willful neglect, FTB shall impose a late-filing penalty.⁴ (R&TC, § 19131(a).) When FTB imposes a penalty, the law presumes that it was properly imposed.⁵ (*Appeal of Xie*, 2018-OTA-076P.)

Appellants assert that, because they normally filed electronically, they attempted to e-file their 2017 federal and California returns in July 2018, but the returns were sent back to them because, given the amounts owed, they were required to file paper returns. Appellants contend that they mailed the federal and California returns to the IRS and FTB on October 15, 2018, but the returns were sent back to them in November 2018 because both the federal and California returns were missing one of appellants' signatures. Appellants contend that they completed signing the returns and mailed them back to the IRS and FTB, each with a payment by check and a request for an installment agreement. Specifically, appellants assert that they immediately mailed the federal return back to the IRS and mailed the California return to FTB a couple weeks later. Appellants assert that their federal return was processed on January 7, 2019, and the accompanying check was cashed on November 6, 2018. Appellants state that, because they did not hear back from FTB about their installment plan request provided with their return, they called FTB in January 2019 about implementing the plan and discussions led to them agreeing to an installment plan with FTB.⁶ Appellants state that, during these discussions, they were not told by FTB that their return was untimely. Appellants note that the IRS abated the federal penalties. During the hearing, M. Cyrus provided testimony to support these assertions.

FTB argues that appellants have not provided any proof that they timely mailed their 2017 return, including proof of the original mailing of the return with one signature in October 2018 or the mailing of the return with both signatures a couple weeks later. FTB asserts that its records do not indicate that it returned appellants' 2017 return due to a lack of signatures.

The FTB Form 8453-OL, which relates to e-file return authorization, was provided with their return filed in May 2019, but their signature and date of October 15, 2018, on the form does

⁴ While California provides an automatic six-month extension to file a return if the return is filed within six months of the original due date (here April 15, 2018), the granting of this extension is conditioned on the filing of a return within the automatic extension period (here April 15, 2018, through October 15, 2018). (See Cal. Code Regs., tit. 18, § 18567(a).) Because appellants did not file their 2017 return during this extension period, the automatic extension does not apply, and appellants' 2017 return was due on the original due date of April 15, 2018.

⁵ There is no dispute as to the calculation of the penalty.

⁶ The evidence does not establish that FTB received either a request for an installment agreement or a 2017 tax return from appellants in 2018.

not establish that they mailed a return on that date. Taxpayers attempting to prove that a paper return was timely mailed would have to show evidence, such as a registered or certified mail receipt, that the return was timely mailed and thus, timely filed with FTB. (*Appeal of Fisher*, 2022-OTA-337P.) Similar to *Appeal of La Salle Hotel Co.* (66-SBE-071) 1966 WL 1412, there is no direct evidence that the return was actually mailed, and FTB's records indicate that no return was ever timely received. The production of a copy of a return without convincing evidence of mailing has been held insufficient to overcome official government records indicating that no return was filed. (*Ibid.*) In this case, there is no documentation or records to corroborate appellants' contentions that the return was timely mailed.

While appellants assert the return was prepared in July 2018, evidence that a return was prepared prior to the due date does not, in itself, prove a filing of the return. (*Appeal of La Salle Hotel Co.*, *supra.*) And although appellants filed their federal return on November 9, 2018, which was still untimely, and a check to the IRS was processed on November 5, 2018, this does not establish the filing dates of the California returns that were allegedly mailed. A timely federal filing is irrelevant for purposes of proving filing for California purposes. (*Appeals of Day and Donaldson* (86-SBE-181) 1986 WL 22864.) Appellants do not provide evidence establishing that they timely filed their return, such as proof of mailing. Additionally, FTB's records indicate that appellants' 2017 return was filed late on May 31, 2019. Therefore, appellants have not established that their California return was filed by the October 15, 2018 extended due date as they contend. Accordingly, the late-filing penalty was properly imposed.

Issue 2: Whether appellants have shown reasonable cause for the late filing of their tax return for the 2017 tax year.

A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome the presumption of correctness attached to FTB's imposition of a late-filing penalty. (*Appeal of Xie*, *supra.*) To establish reasonable cause, a 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 circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

As discussed above, appellants contend that they filed their return timely with only one signature and, after it was returned to them by FTB, they ensured there were two signatures and mailed the return two weeks later. Appellants cite to *Reifler v. Commissioner*, T.C. Memo. 2015-199, and state that in that case, the taxpayers submitted their tax return pending one of the spouse's signatures, and the IRS rejected the return. Appellants state that in that case, the taxpayers failed to exercise ordinary business care and prudence when they did not attempt to find out why the IRS had sent their return back to them. Appellants state that the court's reasoning implies reasonable cause would have existed had they attempted to inquire about the rejected returns and then took remedial actions. Appellants contend that, unlike that case, appellants promptly responded to FTB and filed a corrected return with both signatures. However, there is no evidence in the record to establish that appellants timely mailed their tax return to FTB with only one signature, or that any return was mailed to FTB other than the one filed on May 31, 2019. Therefore, there is no basis to find reasonable cause based on those circumstances.⁷

Appellants also note that FTB did not inform them that their return was not timely filed during discussions with FTB as to the payment of their installment payment plan in early 2019. Appellants assert that, had they known the return was not received, they would have filed sooner. However, FTB has no duty to individually inform taxpayers of filing due dates. FTB's alleged failure to notify appellants of an untimely return does not show reasonable cause, as every taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252.) In addition, the alleged failure of FTB to notify appellants of the untimely filing occurred after the due date for the return had passed and after the return was already untimely. Therefore, this cannot provide reasonable cause for the failure to timely file by the October 15, 2018 extended due date. While appellants' federal late-filing penalty was abated, it was done so under the federal first-time abatement program based on a taxpayer's good filing history. For the taxable year at issue, California did not have a first-time

⁷ Appellants also state that they were dealing with medical issues during this period but assert that they are not arguing that the medical issues were reasonable cause for the late filing.


abatement program like the IRS and there is no basis to abate the penalty on such grounds.⁸ Accordingly, appellants have not shown reasonable cause for the untimely filing of their return.

HOLDINGS

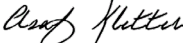
1. The late-filing penalty was properly imposed for the 2017 tax year.
2. Appellants have not shown reasonable cause for the late filing of their tax return for the 2017 tax year.

DISPOSITION

FTB's action is sustained.

DocuSigned by:

CB1F7DA37831416...

Josh Lambert
Administrative Law Judge

We concur:
DocuSigned by:

D17AEDDCAAB045B...

Asaf Kletter
Administrative Law Judge

DocuSigned by:

873D9797B9E64E1...

John O. Johnson
Administrative Law Judge

Date Issued: 1/19/2023

⁸ Beginning with taxable years beginning on or after January 1, 2022, California has adopted a first-time abatement program, by statute. (R&TC, § 19132.5.) However, the statute does not apply retroactively such that appellants' late-payment penalty imposed for the 2017 tax year may be abated.