

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

M. O'DONNELL AND
P. MCQUILLEN) OTA Case No. 220410116
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)**OPINION**

Representing the Parties:

For Appellants:

M. O'Donnell

For Respondent:

Josh Ricafort, Tax Counsel

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. O'Donnell and P. McQuillen (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$1,261.61, plus interest, for the 2020 taxable year.

Appellants waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUE

Have appellants established reasonable cause to abate the late-payment penalty?

FACTUAL FINDINGS

1. Appellants filed a timely 2020 California Resident Income Tax Return. Appellants reported total tax of \$83,794 and estimated payments totaling \$32,721.
2. FTB issued a Notice of Tax Return Change – Revised Balance (Notice) increasing the total tax from \$83,794.00, as reported by appellants, to \$101,817.00¹ to account for an

¹ In the Notice, FTB increased appellants' California adjusted gross income and California taxable income by \$171,795 based on "an error made when [appellants] transferred [their] Schedule CA adjustments to [their] tax return." This adjustment to appellants' income resulted in revised total tax of \$101,817 (compared \$83,794 as reported on appellants' return). Because appellants' Schedule CA is not in the evidentiary record, OTA is unable to verify FTB's adjustment to appellants' income; however, appellants acknowledge that they made an error, concede the tax, and are only appealing the late-payment penalty imposed by FTB.

- error appellants made in transferring their Schedule CA adjustments to their tax return. The Notice further assessed a late-payment penalty plus interest.
3. On September 9, 2021, and October 6, 2021, appellants paid the outstanding balance. Appellants filed a claim for refund of the penalty based on reasonable cause.
 4. FTB denied appellants' claim for refund, and this timely appeal followed.

DISCUSSION

R&TC section 19132 imposes a late-payment penalty when a taxpayer fails to pay the amount required to be shown on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.)

The late-payment penalty may be abated if a 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).) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.) To establish reasonable cause for a late payment of tax, a taxpayer must show that the failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Rougeau*, 2021-OTA-335P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) The applicable standard of proof is by a preponderance of the evidence. (*Ibid.*) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Ibid.*)

Appellants admit they made a mistake when transferring adjustments from their Schedule CA to their tax return. Appellants do not dispute the accuracy of FTB's penalty calculation, but rather assert that reasonable cause exists to abate the late-payment penalty. The reasons appellants provide are that (1) as soon as they received FTB's Notice they immediately attempted to contact FTB by phone but were unable to do so because "[a] recorded message was being provided that FTB was short staffed due to Covid restrictions before the call timed-out and was disconnected;" and (2) because appellants were unable to reach FTB, they did as the Notice instructed and sent a letter to FTB disputing the late-payment penalty. Appellants assert that FTB's instructions did not explain to them that they should pay the liability and then claim a refund and, furthermore, appellants did not know that FTB would take three months to respond

to their dispute letter and immediately assess the late-payment penalty. Lastly, appellants claim that they have never been in arrears and have always acted in good faith with FTB.

As indicated, above, appellants acknowledge that they made a mistake, which does not by itself constitute reasonable cause to abate a penalty. With respect to the argument that appellants followed FTB's guidance in the Notice, which did not direct them to pay the liability first and then dispute it, the Notice of Tax Return Change – Revised Balance states the penalty and interest due as of the date of the notice. Moreover, appellants were advised to pay the balance in full by August 8, 2021, in order to avoid additional interest and penalties, if applicable. Therefore, appellants were put on notice that the late-payment penalty was due, and that interest was accruing on that amount. Moreover, appellants' claim that they were unaware that FTB would take three months to respond to their dispute letter and immediately assess the late-payment penalty does not show reasonable cause to abate the penalty. As noted above, the late-payment penalty is imposed unless the failure to pay the amount required to be shown on the return by the return due date is due to reasonable cause. Ignorance of the law does not excuse compliance with statutory requirements. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Appellants did not act as reasonably prudent businesspersons when they made the mistake on their return. Thus, appellants have not established reasonable cause to abate the late-payment penalty.

Finally, while appellants' good faith dealing with FTB and their history of compliance is commendable, there is no legal provision that is effective for the 2020 taxable year that would allow for abatement of the late-payment penalty on that basis. A recently enacted statute allows for a one-time abatement of penalties under circumstances alleged by appellants. (R&TC, § 19132.5.) However, that statute expressly applies to taxable years beginning on or after January 2, 2022. (R&TC, § 19132.5(f).)

HOLDING

Appellants have not established reasonable cause to abate the late-payment penalty.

DISPOSITION

FTB’s action denying appellants’ claim for refund is sustained.

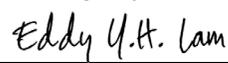
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Teresa A. Stanley
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour
Administrative Law Judge

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Eddy Y.H. Lam
Administrative Law Judge

Date Issued: 1/24/2023