

3. Thereafter, appellants acknowledged their failure to timely pay their California tax liability, remitted a partial payment for their tax liability, and requested that FTB abate the late payment penalty.
4. Because there was an outstanding balance, FTB issued an Income Tax Due Notice to appellants. In response, appellants remitted another partial payment and again requested that FTB abate the late payment penalty.
5. FTB then issued a Final Notice Before Levy and Lien to appellants for the remaining balance.
6. Appellants thereafter paid their outstanding balance for the 2021 tax year.
7. Appellants filed a claim for refund for the late payment penalty, which FTB denied.
8. This timely appeal followed.

DISCUSSION

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 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.) Here, it is undisputed that appellants failed to timely pay their tax liability, and therefore, the penalty was properly imposed and computed.

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).) Willful neglect is a conscious, intentional failure to do something that is required or to avoid doing something that is prohibited, or a reckless indifference to the requirement or prohibition. (*Appeal of Porreca*, 2018-OTA-095P.) 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.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Illness may establish reasonable cause where the taxpayer presents credible and competent proof that the circumstances of the illness prevented the taxpayer from complying

with the law. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) However, if the difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Ibid.*; *Appeal of Head and Feliciano*, 2020-OTA-127P.)

Here, appellants assert that, due to illnesses sustained by both appellants, they forgot to timely pay their California tax liability and/or believed they had timely remitted the payment. Appellants refer to their history of timely filing and paying their income taxes as evidence that they intended to timely remit their California tax payment. Appellants also assert that they qualify for FTB's one-time penalty abatement because this is the first late payment they have made in the last 30 years (or more) and they did not receive the Balance Due Notice until June 21, 2022.¹

With respect to appellants' assertion that their illnesses caused or prevented their timely payment, appellants have not provided any documentary evidence of their illnesses, and unsupported assertions are not sufficient to satisfy appellants' burden of proof. (*Appeal of Scanlon, supra.*) In addition, appellants state that appellant B. Gendein was "absen[t] due to business" when appellant A. Gendein filed their California tax return. Therefore, even if appellant A. Gendein's illness was supported by credible and competent proof, appellant B. Gendein's decision to tend to his business affairs rather than remitting a timely tax payment refutes a finding of reasonable cause. (*Appeal of Head and Feliciano, supra.*) Therefore, appellants have not established that their failure to timely pay their California tax liability occurred despite the exercise of ordinary business care and prudence.

Moreover, a history of timely payments does not provide sufficient grounds to abate appellants' late payment penalty. California's one-time penalty abatement is only applicable for "taxable years beginning on or after January 1, 2022." (R&TC, § 19132.5.) The statute does not apply to penalties assessed for the 2021 taxable year, even if the Balance Due Notice was mailed on June 21, 2022.

¹ Appellants specify in their reply brief that they received the Balance Due Notice on June 21, 2022. Although insignificant here, it is likely appellants received the Balance Due Notice shortly after June 21, 2022, as that is the date that FTB issued and mailed the Balance Due Notice to appellants.

For these reasons, appellants have failed to show reasonable cause exists to support abating the late payment penalty. And because appellants have not shown reasonable cause, it is not necessary to address whether appellants' failure to timely pay their tax liability was due to willful neglect.

HOLDING

Appellants have not established reasonable cause for failing to timely pay their tax liability.

DISPOSITION

FTB's action is sustained in full.

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Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

Date Issued: 4/10/2023