

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**J. GERBER AND  
D. GERBER**

) OTA Case No. 21047635  
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**OPINION**

Representing the Parties:

For Appellants:

H. Kay Yue, CPA

For Respondent:

Phillip C. Kleam, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Gerber and D. Gerber (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$15,416.05 for the 2019 taxable year.

Appellants waived the right to an oral hearing; therefore, the Office of Tax Appeals 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 2019 California Resident Income Tax Return on September 29, 2020. Appellants remitted a payment of \$240,169 with their return.
2. FTB issued a State Income Tax Balance Due Notice to appellants imposing a late-payment penalty of \$15,416.05, plus interest.
3. Appellants paid their outstanding balance and submitted to FTB a claim for refund of the late-payment penalty based on reasonable cause.
4. FTB denied appellants’ claim for refund, and appellants filed this timely appeal.

## 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.) 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.*) Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Ibid.*)

The question of whether there is reasonable cause for a late payment does not end once reasonable cause is found to exist at the time of the due date for payment, however. The inquiry continues until actual payment is remitted, for “an acceptable reason for failure to pay taxes will excuse such failure only so long as the reason remains valid.” (*Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P [quoting *Steven Bros. Foundation, Inc. v. Commissioner* (1962) 39 T.C. 93, 130, *affd.* in part & *revd.* in part on other grounds (8th Cir. 1963) 324 F.2d 633].)

Appellants do not dispute that their payment was late, and FTB properly imposed the penalty. Instead, appellants assert that they had reasonable cause for the late payment of tax. Appellants assert that while they receive substantial pass-through income from an S-Corporation in which they have 33 percent ownership, the S-Corporation did not make timely distributions of its profits to appellants for the 2019 taxable year. Appellants state that because of the COVID-19 pandemic the S-Corporation had to save its working capital to be used for payroll and rental expenses. Appellants further assert that COVID-19 relief programs were not available to the S-Corporation, and due to business concerns and payroll burdens, the S-Corporation could not make a distribution to appellants in time for appellants to pay the tax due on July 15, 2020.<sup>1</sup>

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<sup>1</sup> In response to the COVID-19 pandemic, FTB postponed the deadline to file and pay 2019 taxes. (See *State Postpones Tax Deadlines Until July 15 Due to the COVID-19 Pandemic* available at <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.)

Two months later, on September 19, 2020, appellants were confident that the business operations would not be impacted by taking distributions and paid the tax due. Appellants also state that their failure to pay was not due to willful neglect.

FTB does not allege that appellants' failure to pay tax on time was due to willful neglect. Instead, FTB asserts that appellants' alleged circumstances do not equate to reasonable cause for the late payment. The determination of whether reasonable cause exists for the late payment requires an analysis of appellants' actions leading up to the late payment, the timing of those actions, and whether they reflect ordinary business care and prudence, such as an ordinarily intelligent and prudent businessperson would have performed under similar circumstances. (*Appeal of Moren, supra.*)

Appellants do not delineate the steps they took to ensure they would have the funds necessary to pay their taxes by the payment due date. Appellants have not explained why the S-Corporation was unable to distribute at least \$240,169 so appellants could pay their taxes given that the S-Corporation was able to pay \$46 million in payroll expenses alone. Appellants have not shown they took other steps to set aside funds sufficient to pay the tax. Lastly, appellants have not shown why it was unwise for them to pay tax on July 15, 2020, yet it was prudent only two months later, on September 29, 2020. Appellants have not established that they acted as reasonably prudent businesspersons would have under similar circumstances.

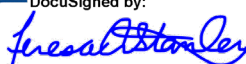
Appellants argue that FTB should follow the action of the IRS and abate the penalty on that basis. The record reflects that the IRS abated penalties based on its administrative first-time abate program for taxpayers with good filing and payment history. California has adopted a first-time abatement program for qualifying individuals; however, it is only effective for taxable years beginning on January 1, 2022, and later. (R&TC, § 19132.5.) Therefore, appellants' 2019 taxable year does not qualify for abatement.

HOLDING


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

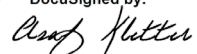
DISPOSITION

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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Josh Lambert  
Administrative Law Judge

DocuSigned by:  
  
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Asaf Kletter  
Administrative Law Judge

Date Issued: 5/17/2023