

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
 )  
**B. CONCANNON AND** )  
**C. CONCANNON** )  
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**OPINION**

Representing the Parties:

For Appellants: Katherine Gan, TAAP<sup>1</sup>

For Respondent: Eric R. Brown, Tax Counsel III  
Eric Yadao, Tax Counsel IV

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, B. Concannon and C. Concannon (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants’ claim for refund of \$1,122.95 for the 2020 and 2021 tax years.<sup>2</sup>

Office of Tax Appeals (OTA) Administrative Law Judges Josh Aldrich, Teresa A. Stanley, and Michael F. Geary held an online oral hearing for this matter on March 23, 2023. At the conclusion of the hearing, the parties submitted the matter and OTA closed the record.

**ISSUES**

Are appellants entitled to abatement of the penalty imposed on them for failing to pay taxes electronically (e-pay penalty)?

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<sup>1</sup> The Tax Appeals Assistance Program (TAAP) provides free legal assistance to qualified taxpayers in appeals before OTA. Law students represent appellants under the supervision and direction of attorneys in respondent’s Taxpayers’ Rights Advocate’s Office.

<sup>2</sup> Appellants’ claim is in the amount of \$1,119.63, but the actual amount of the e-pay penalty plus interest paid is \$1,122.95. Also, although the parties characterize appellant’s claim for refund as pertaining to the 2020 tax year, as explained below, the asserted overpayments were made in connection with the 2020 (payment with return) and 2021 (estimated tax payment) tax years.

### FACTUAL FINDINGS

1. Prior to January 14, 2021, appellants had not been required to e-pay taxes to respondent.
2. Appellants' first full year of operating a new business was 2020. The success of the business and the resulting income tax liability required appellants to make larger estimated tax payments than they had ever before made.
3. Appellants used the same licensed tax professional, a certified public accountant (CPA), to prepare their tax returns and advise them regarding income tax matters for many years, including the tax years at issue.
4. On January 14, 2021, appellants remitted a \$50,000 check to respondent as an estimated tax payment for the 2020 tax year.
5. On January 19, 2021, respondent sent appellants a Mandatory Electronic Payment Notice (E-Pay Notice) to inform appellants that R&TC section 19011.5 required them to make all future payments electronically and that their failure to do so will result in an e-pay penalty of 1 percent of the amount paid by other means. The E-Pay Notice also informed appellants that they could request a general waiver under certain conditions.<sup>3</sup>
6. On April 15, 2021, appellants paid \$66,902 with their return for 2020 and a \$45,000 estimated tax payment for the 2021 tax year. Both payments were made by check.
7. On May 4, 2021, respondent sent appellants a State Income Tax Balance Due Notice (Balance Due Notice) to inform appellants that \$1,119.63 (1 percent of the payments that appellants did not make electronically, plus interest) remained owing.
8. On June 9, 2021, appellants electronically paid respondent \$1,847.32. Respondent applied \$1,122.95 to the e-pay penalty and \$724.37 to appellants' account.<sup>4</sup>
9. Appellants filed the timely claim for refund of \$1,119.63.
10. On January 5, 2022, respondent issued a Notice of Action denying the claim.
11. This timely appeal followed.

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<sup>3</sup> Those conditions were as follows: (1) appellants had not made an estimated tax or extension payment in excess of \$20,000 during the previous income year; (2) appellants' total tax liability reported for the previous income year did not exceed \$80,000; (3) the amount appellants paid is not representative of their total tax liability; (4) appellants had a one-time event, such as a lottery winning or inheritance; or (5) appellants had permanent disabilities that prevented them from using a computer.

<sup>4</sup> Respondent's brief states that the latter amount was applied to appellants' account for the 2020 tax year, but the facts otherwise indicate that the amount owed for 2020 had by then been paid in full. Neither party has raised this as an issue, so OTA will not address it further.

## DISCUSSION

E-payments are required of individual taxpayers if they make an estimated tax or extension payment of more than \$20,000 on or after January 1, 2009, or if they file an original tax return with a tax liability over \$80,000 for any tax year beginning on or after that date. (R&TC, § 19011.5(a).) In addition, taxpayers who have become subject to the e-pay requirement by making a payment in excess of the threshold amounts stated above must continue to make all future payments electronically, unless the taxpayer either meets the requirements of R&TC section 19011.5(b) and makes an election to discontinue e-pay, or the taxpayer requests and receives a waiver of the e-pay requirement pursuant to R&TC section 19011.5(d).<sup>5</sup> R&TC section 19011.5(c) imposes the one-percent e-pay penalty on a taxpayer who does not comply with the e-pay requirement unless the taxpayer shows that the failure to make the e-payment was the result of reasonable cause and was not due to willful neglect.<sup>6</sup>

When respondent imposes a penalty, the law presumes respondent correctly imposed the penalty. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof is on the taxpayer to prove facts that warrant abatement of the penalty. (*Ibid.*) To carry that burden, appellant must provide credible and competent evidence supporting the request for abatement. (*Ibid.*)

R&TC section 19011.5 does not describe the circumstances that will establish “reasonable cause.” However, the same terms are used to describe the bases for relief of other penalties (e.g., the late-filing and late-payment penalties of R&TC sections 19131 and 19132, respectively), and it is appropriate to look to cases that discuss those penalties for guidance. Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.) Ignorance of the law is not reasonable cause for failure to comply with statutory requirements. (*Appeal of Porreca*, 2018-OTA-095P (*Porreca*)). A taxpayer does not exercise ordinary business care and prudence when he or she fails to acquaint himself or herself with the requirements of California tax law. (*Ibid.*)

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<sup>5</sup> FTB Form 4107 may be used for an election or a waiver request.

<sup>6</sup> 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. (*United States v. Boyle* (1985) 469 U.S. 241, 245.) Because the evidence does not show willful neglect by appellants, and respondent does not argue otherwise, this Opinion will not discuss it further.

Appellant-husband testified that he relied on the same accountant for many years to prepare appellants' tax returns and had always paid taxes by check prior to receiving the Balance Due Notice and learning, for the first time, that appellants were required to make their tax payments electronically. According to appellant-husband, appellants' accountant did not inform appellants regarding the e-payment requirement.

Appellants argue that *Porreca* should not be controlling here because the taxpayers in that case were guilty of willful neglect, having repeatedly violated the e-pay requirement. They contend that, while *Porreca* states that ignorance of the law does not constitute reasonable cause, the Internal Revenue Manual (IRM) section 20.1.1.3.2.2.6 states that reasonable cause may be shown if the taxpayer establishes ignorance of the law in conjunction with other facts and circumstances, which prove that the taxpayer made a reasonable and good faith effort to comply with the law or the taxpayer was unaware of the e-pay requirement and could not have been reasonably expected to know about it. Appellants contend that the following facts and circumstances establish reasonable cause for their failure to comply with the e-pay requirement:

- The e-pay requirement established by R&TC section 19011.5 is an obscure legal requirement unknown to the average taxpayer, as evidenced by respondent's practice of specifically notifying taxpayers when the obligation to e-pay has been triggered.
- Appellants did not receive the E-Pay Notice, as evidenced by appellant-husband's testimony and the fact that they did not apply for a waiver of the e-pay requirement, to which they were entitled.<sup>7</sup>
- Appellants' CPA, upon whom they had reasonably relied to inform them regarding amounts to be paid and the manner in which such amounts were to be paid, did not inform appellants regarding the e-pay requirement.
- Appellants were not aware of the e-pay requirement until they received the Balance Due Notice.
- Respondent received the payments that were in violation of the e-pay requirement on or before the due date.

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<sup>7</sup> R&TC section 19011.5 allows respondent to grant a waiver of the e-pay requirement if it determines that the triggering payments were not representative of the taxpayer's tax liability.

Finally, appellants argue that for reasons of fairness and equity, the e-pay penalty should abated because respondent received the money by the due date and, therefore, it suffered no harm.

Respondent makes several arguments: *Porreca* is controlling here; the e-pay requirement is not obscure, there being specific instructions regarding e-payment in the instructions to the income tax return form used by appellants; the E-Pay Notice was properly mailed and not returned by the postal service; the E-Pay Notice is a courtesy, not a requirement; the IRS does not have an e-pay requirement; and the IRM has little, if any, relevance to the issue at hand.

It is well settled that the IRM does not have the force of law, is not binding on the IRS, much less on OTA, and confers no rights on taxpayers. (*Appeal of Xie, supra.*) It is not controlling here. And while it is true that OTA found that the taxpayers in *Porreca* had willfully neglected their obligations to e-pay, the propositions for which this Opinion cites *Porreca* do not in any way require such a finding. Furthermore, R&TC section 19011.5 clearly establishes the e-pay requirement, and there is no requirement, statutory or otherwise, of a prior notice by respondent.<sup>8</sup>

Not only is the e-pay requirement clearly stated in the law, the instructions to the 2020 Form 540, the California Resident Income Tax Return, contained the following language:

**Mandatory Electronic Payments** – You are required to remit all your payments electronically once you make an estimate or extension payment exceeding \$20,000 or you file an original tax return with a total tax liability over \$80,000. Once you meet this threshold, all subsequent payments regardless of amount, tax type, or taxable year must be remitted electronically. The first payment that would trigger the mandatory e-pay requirement does not have to be made electronically. Individuals that do not send the payment electronically will be subject to a 1% noncompliance penalty.<sup>9</sup>

(Bold type in original.) Even if appellants were not aware of the e-pay requirement, their CPA certainly would have been aware of it.<sup>10</sup> Appellants cannot defend their failure to comply with the e-pay requirement by claiming their CPA neglected to

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<sup>8</sup> OTA perceives appellants' argument regarding the availability of a waiver of the e-pay requirement to be made in support of appellants' claim that they did not receive the E-Pay Notice. Because the e-pay requirement is not dependent on the mailing or receipt of such a notice, this Opinion will not discuss the argument further.

<sup>9</sup> In *Porreca*, OTA noted that the same information was in the instructions for the 2015 Form 540.

<sup>10</sup> If the CPA had been the one who failed to comply with the e-pay requirement, appellants would have been liable for the acts or omissions of their authorized representative. (*Pioneer Investment Services Company v. Brunswick Associates Limited Partnership* (1993) 507 U.S. 380, 396-397.)

instruct them to e-pay; the obligation is theirs. (See *United States v. Boyle* (1985) 469 U.S. 241.)

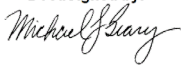
Finally, regarding appellants' argument that they are entitled to abatement of the penalty on the grounds of equity and fairness, OTA has no general equitable powers. (Gov. Code, § 15672(b).) Those reside exclusively with courts of general jurisdiction. (*Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 766.) OTA lacks constitutional authority to exercise judicial powers. (Cal. Const., Art. 6, § 1.) Although OTA has the authority to consider an argument based on equitable estoppel (*Lentz v. McMahon* (1989) 49 Cal.3d. 393, 402-403), appellant has not made that argument here, and, in any event, OTA finds insufficient support in the record for such an argument.

#### HOLDING


Appellants are not entitled to abatement of the e-pay penalty.

#### DISPOSITION

Respondent's action denying appellants' claim for refund is sustained.

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Michael F. Geary  
Administrative Law Judge

I concur:

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Josh Aldrich  
Administrative Law Judge

T. STANLEY, dissenting:

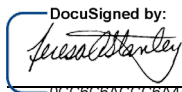
It is my opinion that appellants have established reasonable cause to abate the penalty for failure to make electronic payments (e-pay penalty). I find several facts compelling: (1) appellants had paid taxes by check for 50 years; (2) the taxable year at issue, 2020, was the first full year of operating a new business that generated sufficient revenue to trigger the e-pay requirement; (3) appellants' checks (April 15, 2021) were sent shortly after the triggering payment (January 14, 2021); and (4) the Franchise Tax Board (FTB) received and deposited the checks prior to the due date for the payment.

According to the legislative analysis for Revenue & Taxation Code (R&TC) section 19011.5, the main statutory purpose was to increase revenues from interest.<sup>1</sup> Because FTB received appellants' checks and deposited them prior to the payment due date, no interest was lost which counterbalances the main legislative intent for imposing the penalty. I believe appellants acted as reasonably prudent businesspersons under the circumstances described, and I would abate the penalty.

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<sup>1</sup> See Assembly Floor Analysis dated November 11, 2008, at [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=200720080AB1389](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200720080AB1389).

*Appeal of Porreca*, 2018-OTA-095P (*Porreca*) can be easily distinguished, not only because the Opinion found that the appellants in that case were willful, but also because there was a continuing pattern of failing to e-pay. Here, appellants made a one-time mistake (i.e., both checks comprised a single instance) and willingly corrected it for all subsequent payments. The majority applies *Porreca* in a manner that suggests that the penalty is a strict liability penalty because no reasonably prudent businessperson would be unaware of the e-pay statute in R&TC section 19011.5. On the contrary, I believe a reasonably prudent businessperson could have easily made the same mistake that appellants did. Appellants did not prepare their own return; and thus, were unlikely to find the one paragraph describing the e-pay requirement in the extensive instructions for the California tax return. Indeed, reasonably prudent businesspersons rely on tax preparation experts so that they do not have to familiarize themselves with complex tax law, much less read the full Form 540 instructions. The standard for abatement of the penalty is not that high. So long as it is the first payment (checks sent together) that met the e-pay requirement, and appellants corrected their mistake immediately, they acted prudently.

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Teresa A. Stanley  
Administrative Law Judge

Date Issued: 6/30/2023