

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 221011689
A. HELLER)
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OPINION

Representing the Parties:

For Appellant: A. Heller

For Respondent: David Muradyan, Tax Counsel IV

L. KATAGIHARA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Heller (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$909.05 for the 2021 tax year.¹

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has shown a basis to abate the mandatory electronic payment (e-pay) penalty.

¹ As further discussed below, this appeal stems from a \$909.05 electronic payment (e-pay) penalty imposed for appellant’s failure to electronically pay his 2021 tax year extension payment. Some of FTB’s records indicate that the e-pay penalty was applied to the 2020 tax year. On this basis, FTB argues that the 2020 tax year is at issue. However, the penalty arose with respect to a payment made for the 2021 tax year, appellant’s claim for refund requested a refund for the 2021 tax year, FTB’s claim denial letter specified the 2021 tax year, and the Office of Tax Appeals acknowledged this appeal for the 2021 tax year. As such, for the purposes of this appeal, the e-pay penalty is attributable to the 2021 tax year.

FACTUAL FINDINGS

1. On January 15, 2020, FTB received from appellant an estimated tax payment exceeding \$20,000 for the 2019 tax year. As a result, FTB issued a Mandatory E-Pay Notice to appellant on January 31, 2020, informing him that all future payments to FTB must be paid electronically and that the e-pay penalty would be imposed if appellant failed to do so.
2. After receiving the Mandatory E-Pay Notice, appellant made a payment for the 2020 tax year but failed to make the payment electronically. Consequently, on February 3, 2021, FTB issued a State Income Tax Balance Due Notice (2021 Balance Due Notice) to appellant imposing the mandatory e-pay penalty.² Appellant paid the penalty that same month.
3. In April 2022, appellant mailed a tax extension payment for the 2021 tax year to FTB rather than remitting the payment electronically. FTB therefore issued another State Income Tax Balance Due Notice to appellant imposing a \$909.05 e-pay penalty, which appellant paid.
4. Appellant then timely filed a claim for refund for the 2021 tax year for the same amount, which FTB denied.
5. This timely appeal followed.

DISCUSSION

Individual taxpayers are required to electronically remit all payments to FTB once they meet either of the following two conditions for any taxable year beginning on or after January 1, 2009: (1) their estimated tax payment or extension payment exceeds \$20,000; or (2) their total tax liability exceeds \$80,000. (R&TC, § 19011.5(a)(1)-(2).) “Electronically remit” means to send payment through use of any of the e-pay applications provided by FTB, including a pay by phone option (when made available by FTB).³ (R&TC, § 19011.5(f)(1).)

An individual who becomes subject to the e-pay requirement must continue to make all future payments electronically, regardless of the taxable year to which the payments apply,

² The mandatory e-pay penalty imposed on February 3, 2021, is not at issue in this appeal.

³ “Pay by phone” means a method that allows a taxpayer to authorize a transfer of funds from a financial institution using telephonic technology. (R&TC, § 19011.5(f)(2).)

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). (*Appeal of Porreca*, 2018-OTA-095P.) Failure to electronically remit payment (i.e., paying by non-electronic means) will result in a mandatory e-pay penalty of 1 percent of the amount paid unless the taxpayer shows that this failure was for reasonable cause and not the result of willful neglect.⁴ (R&TC, § 19011.5(c).) Reasonable cause may be established if a taxpayer shows that the failure to electronically remit payment occurred despite the exercise of ordinary business care and prudence. (See *Appeal of Porreca*, *supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*)

Although appellant does not dispute FTB’s calculation of the penalty, appellant alleges that the e-pay penalty was improperly imposed because it was “assessed on [appellant’s] 2021 taxes,” even though appellant’s 2021 taxes had “not [yet] been finalized.” However, the penalty was imposed for appellant’s failure to comply with the mandatory e-pay requirement, and the amount of the penalty was based on the amount of the payment that was not made electronically. (R&TC, § 19011.5(c).) There is no requirement that the tax liability for the relevant tax year be determined before the penalty is imposed. Appellant became subject to the e-pay requirement in January 2020 (after remitting an estimated tax payment exceeding \$20,000 for the 2019 tax year), and thus, was required to electronically remit all payments made thereafter. (R&TC, § 19011.5(a)(1).) Yet, in 2022, appellant made a 2021 tax year extension payment by mail. It was the act of *mailing* this payment that triggered the imposition of the e-pay penalty. Said differently, the mandatory e-pay penalty was imposed solely because appellant made a payment that he did not remit electronically. As such, the penalty was properly imposed, and appellant bears the burden to prove that his failure to electronically remit payment occurred despite the exercise of ordinary business care and prudence.

Appellant contends that he made his payment by mail because he was unable to access FTB’s website on the date payment was due. However, appellant has not provided any evidence indicating that FTB’s website was unavailable when he attempted to make the payment online, and unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Porreca*, *supra*.)

⁴ FTB has not alleged willful neglect, and thus, willful neglect will not be examined in this appeal.

Next, appellant argues that he was unaware that he was required to remit his payments electronically, but this contention is contradicted by the evidence submitted by FTB. The evidence shows that FTB issued the Mandatory E-Pay Notice to appellant, informing him of his e-pay requirement, on January 31, 2020. Even if appellant did not receive the initial Mandatory E-Pay Notice, the 2021 Balance Due Notice issued to appellant specifically stated that appellant is required to remit all payments to FTB electronically and that penalties will apply if payment is made by other means. Moreover, the 2021 Balance Due Notice imposed an e-pay penalty for appellant’s failure to comply with the e-pay requirement in January 2021, and appellant paid the penalty in February 2021. Having received notice of his e-pay requirement on numerous occasions, and having previously paid an e-pay penalty, appellant was aware of the e-pay requirement and his failure to electronically remit the payment at issue cannot be said to have occurred despite the exercise of ordinary business care and prudence.

Lastly, appellant claims that the e-pay penalty is “horribly excessive and unduly punitive.” Appellant argues that the e-pay penalty constitutes age discrimination. The Office of Tax Appeals (OTA) does not, however, have jurisdiction over such claims. (See Cal. Code Regs., tit. 18, § 30104; *Appeal of Sheward*, 2022-OTA-228P [OTA’s duty is to determine the correct amount of tax based on the law]; *Appeal of Robinson*, 2018-OTA-059P [OTA’s function in the appeals process is to determine the correct amount of the taxpayer’s California income tax liability].)


Therefore, appellant has not satisfied his burden of proving reasonable cause to abate the e-pay penalty.

HOLDING

Appellant has not shown a basis to abate the mandatory e-pay penalty.

DISPOSITION

FTB's action is sustained.

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Lauren Katagihara
Administrative Law Judge

Date Issued: 7/11/2023