

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 220911516
J. ERSKINE AND)	
H. ERSKINE)	
)	
)	

OPINION

Representing the Parties:

For Appellants:	J. Erskine and H. Erskine
For Respondent:	Blake Cunningham, Program Specialist Christopher T. Tuttle, Attorney

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Erskine and H. Erskine (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants' claim for refund of \$8,442.43¹ for the 2020 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Andrea L. H. Long, Andrew J. Kwee, and Natasha Ralston held an oral hearing for this matter via Webex on September 22, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUES

1. Have appellants established reasonable cause to abate the late-payment penalty?
2. Have appellants established a basis to waive the estimated tax penalty?

FACTUAL FINDINGS

1. Appellants filed their 2020 California income tax return on October 15, 2021. On the same day, appellants made a \$66,779 payment satisfying the total amount due for appellants' 2020 tax year.

¹ This amount consists of a \$5,008.43 late-payment penalty and a \$3,434 estimated tax penalty.

2. Respondent imposed a \$5,008.43 late-payment penalty and a \$3,434 estimated tax penalty because appellants' payment was not received by the May 17, 2021, payment due date.² On November 5, 2021, respondent sent appellants a Notice of Tax Return Change, showing the balance due.
3. Appellants requested that respondent reconsider imposition of the penalties based on reasonable cause.
4. Respondent issued a claim denial to appellant in June of 2022. This timely appeal followed.

DISCUSSION

Issue 1: Have appellants established reasonable cause to abate the late-payment penalty?

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.) When respondent imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.)

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 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). Generally, “[t]he 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.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) Additionally, unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Porreca*, 2018-OTA-095P.)

² R&TC section 18572, which incorporates Internal Revenue Code section 7508A, gives respondent the authority to postpone certain tax-related deadlines. Respondent postponed the original payment due date from April 15, 2021, to May 17, 2021, due to the COVID-19 pandemic. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-05-may-17-tax-deadline-approaching.html>.)

Here, appellants' 2020 tax payment was due May 17, 2021. (R&TC, §§ 19132, 18572.) Because respondent did not receive appellants' payment until October 15, 2021, respondent properly imposed a late-payment penalty. Appellants do not dispute that their return was filed late nor do they dispute respondent's calculation of the penalty, but rather, appellants argue that there is reasonable cause for the late payment because they made reasonable payments based on previous years' revenue. Appellants assert that their income fluctuates yearly, and they had no way of knowing what their income would be until they received their Schedule K-1's in September 2021.

A taxpayer's asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Moren*, 2019-OTA-176P.) Instead, the taxpayer must show the efforts made to acquire that information from the source that held it. (*Ibid.*) Appellants have failed to explain what efforts they made (if any) to obtain the information or documentation necessary to timely calculate and pay their taxes for the 2020 tax year. Again, in order to establish reasonable cause, appellants "must show the efforts made to acquire that information from the source that held it, and that difficulties in obtaining the necessary information led to the delay in payment." (*Ibid.*) Appellants have failed to make such a showing here.

As noted above, the taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Triple Crown Baseball, supra.*) An ordinarily intelligent and prudent businessperson would make an effort to determine their tax liability with reasonable accuracy prior to the due date for the payment of tax. If unable to do so based on the information available to appellants, ordinary business care and prudence would require efforts by appellants to obtain the information necessary to make such determination from the source that held it prior to the payment deadline.

Appellants do not describe any efforts they made to calculate or determine their tax liability before the payment deadline, or if unable to make such a determination on their own, what steps they took to try to obtain information necessary to make such a determination prior to this deadline. Instead, appellants merely assert without evidence or support that there was "no way for [appellants] to know what their tax burden was going to be until they received this [Schedule] K-1." These unsupported assertions are not sufficient to establish reasonable cause. (*Appeal of Scanlon*, 2018-OTA-075P.) If appellants were unable to determine their 2020 tax

liability without additional information, appellants must show that they nevertheless made efforts to seek such information prior to the payment deadline rather than simply waiting for the Schedule K-1's, which would not be provided to them until after this deadline in September 2019. Appellants failed to demonstrate that they made such efforts and, therefore, appellants have failed to establish reasonable cause for the untimely payment of tax.

Issue 2: Have appellants established a basis to abate the estimated tax penalty?

The estimated tax penalty is mandatory unless the taxpayer establishes that an exception applies. (*Appeal of Saltzman*, 2019-OTA-070P; *Appeal of Johnson*, 2018-OTA-119P.) A statutory exception can be found in Internal Revenue Code (IRC) section 6654(e)(3)(A), which provides that the taxing agency may waive the estimated tax penalty if it determines that, “by reason of casualty, disaster, or other unusual circumstances the imposition of [the estimated tax penalty] would be against equity and good conscience.”

Except as otherwise provided, R&TC section 19136 conforms to IRC section 6654 and imposes a penalty for the underpayment of estimated tax where the taxpayer's installment tax payments are less than the amounts due at the end of the installment periods. (R&TC, § 19136(a).) There is no general reasonable cause exception to the imposition of the estimated tax penalty; the penalty is mandatory unless the taxpayer establishes that a statutory exception applies.³ (*Appeal of Johnson, supra.*) Appellants have not specifically addressed the imposition of the estimated tax penalty, but rather make the same reasonable cause arguments as they made for the late-payment penalty. Namely, that appellants contend that they were unaware of the amount of the tax liability until they obtained their Schedule K-1's, and filed the returns promptly thereafter. As a mandatory penalty for which there is no general reasonable cause exception, appellants have not established a basis upon which the estimated tax penalty can be abated.


³ IRC section 6654(e)(3) provides two avenues upon which the penalty may be waived. First, under IRC section 6654(e)(3)(A), the penalty may be waived if it is determined that, “by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.” Second, under IRC section 6654(e)(3)(B), the penalty may be waived if it is determined that: (1) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, and (2) the underpayment was due to reasonable cause and not due to willful neglect. Appellants have not asserted, nor have they provided evidence to support that either exception applies to the present matter.

HOLDINGS

1. Appellants failed to establish reasonable cause to abate the late-payment penalty.
2. Appellants have failed to establish a basis to abate the estimated tax penalty.

DISPOSITION

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

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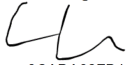
 Natasha Ralston
 Administrative Law Judge

We concur:

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 Andrea L.H. Long
 Administrative Law Judge

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 Andrew J. Kwee
 Administrative Law Judge

Date Issued: 11/14/2023