



- E- Trade document containing the missing cost basis amounts was “found or made accessible” to appellants.
2. Appellants timely filed their 2020 joint California income tax return reporting total tax of \$146,013 and withholdings of \$25,935. Appellants paid the balance due on June 17, 2021,<sup>2</sup> after the extended payment due date of May 17, 2021.<sup>3</sup>
  3. FTB issued appellants a State Income Tax Balance Due Notice informing appellants that it had imposed a late-payment penalty for the 2020 tax year.
  4. The IRS also imposed a late-payment penalty on appellants for the 2020 tax year and later waived the penalty. Appellants’ federal transcript states that the IRS penalty was waived under the IRS first-time abatement program.
  5. Appellants paid the late-payment penalty and filed a claim for refund, seeking abatement of the penalty based on reasonable cause grounds. FTB denied the claim, and this timely appeal followed.

#### DISCUSSION

California imposes a penalty for the failure to pay the amount shown as due on a return on or before the due date of the return, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) The late payment penalty is the sum of two figures that may not exceed 25 percent of the unpaid tax. (R&TC, § 19132(a)(2).) The first part is 5 percent of the tax that remained unpaid as of the due date. (R&TC, § 19132(a)(2)(A).) The second part is 0.5 percent of the unpaid tax balance per month for each month, or portion of a month, that the tax remains unpaid after the due date, not to exceed 40 months. (R&TC, § 19132(a)(2)(B).) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness attached to the penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*)

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<sup>2</sup> Although FTB’s brief states that the payment was made on June 20, 2021, appellants’ 2020 tax year detail states the payment was made on June 17, 2021. OTA uses the earlier date because it appears supported by the record, however because the penalty is computed for a full month, the amount of the penalty is not affected.

<sup>3</sup> In response to COVID-19, FTB postponed the due dates for individual returns and payments from April 15, 2021, to May 17, 2021. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

To establish reasonable cause, the 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 Scanlon*, 2018-OTA-057P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

Here, appellants paid the balance of the tax due on June 17, 2021, one month after the payment due date of May 17, 2021. Appellants had an outstanding tax due balance of \$120,078 on the payment due date, thus the 5 percent penalty is amount is \$6,003.90 and the monthly penalty amount is \$600.39 (\$120,078 multiplied by 0.005, multiplied by 1 month), for a total penalty of \$6,604.29. Thus, OTA finds that the late-filing penalty was correctly calculated and imposed.

On appeal, appellants assert that there is reasonable cause to abate the penalty. Appellants contend that the late payment occurred because they were unable to obtain tax documents. Specifically, appellants sold stock and securities in 2020 through E-Trade but when appellants received the Form 1099-B issued by E-Trade on March 13, 2021, it did not include appellants' cost basis in many of the sales and thus overstated appellants' gain. Appellants worked with their CPA to search their records and determine their cost basis in their stock, and eventually a document from E-Trade was "found and made accessible" to appellants which included the missing cost basis. Appellants filed their tax return within the extended filing period, which was after the payment due date. Although the IRS imposed a similar penalty, the penalty was abated. Appellants also contend that they relied on their CPA's advice to "hold off" on paying the tax until appellants were able to determine their cost basis in the stock.

In support, appellants provided copies of their electronic communications with E-Trade, copies of their download history showing the dates they received tax forms from E-Trade, and copies of communications with their CPA.

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 (*Moren*)). Rather, if a taxpayer asserts that he or she does not have the information necessary to make an accurate estimate of their tax liability, the taxpayer must show the efforts made to acquire that information from the source that held it. (*Ibid.*)

In *Moren, supra*, OTA abated the late-payment penalty because the taxpayer established that he acted in the manner of an ordinarily intelligent and prudent businessperson. In that case, the taxpayer learned the day before the tax payment deadline that he had a potential tax obligation as the result of being a beneficiary of an estate. The taxpayer promptly asked for details of the tax obligation and repeatedly attempted to obtain the tax information from the estate's return preparer, but he received no response. The taxpayer used the best-available information to prepare a return and pay tax in a matter of weeks. In that case, OTA determined the taxpayer's efforts to acquire the necessary tax information and determine the tax liability, despite the nonresponsive nature of a third party in control of that tax information, demonstrated that the taxpayer acted in the manner of an ordinarily intelligent and prudent businessperson.

Appellants' actions are distinguishable from the taxpayer in *Moren, supra*. In this case, appellants were aware that their sale of stock and other securities would result in a tax obligation far in advance of the payment due date. Appellants state that they were unable to determine their cost basis until an E-Trade document containing that information was "found or made accessible" to them on May 28, 2021. Appellants do not explain why this document was unavailable to them previously or why they did not maintain records of the cost basis of their stock. Unlike the taxpayer in *Moren*, who did not have control over the tax information and made continuous efforts to determine and pay the necessary tax, appellants were aware that tax would be due based on the sale of stock and other securities but did not maintain proper records to timely compute and pay the tax due. Accordingly, appellants have not demonstrated reasonable cause for abatement of the late-payment penalty.

Additionally, to the extent appellants argue they relied on their CPA's advice, it is well settled that a taxpayer's failure to make a timely payment or file a return is not excused by the taxpayer's reliance on a tax preparer because a taxpayer has a personal, non-delegable obligation to meet statutory deadlines. (See *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*); see also *Appeal of Rougeau*, 2021-OTA-335P [applying *Boyle*, a case involving a late-filing penalty, to the late-payment penalty].)

Appellants also assert that the penalty should be abated because the IRS waived the penalty. However, appellants' federal transcript shows that the IRS penalty was waived under the IRS first-time abatement program. California law does not require FTB to adopt the IRS's determination regarding a penalty abatement request and, for the 2020 tax year, California did

not have a first-time abatement program.<sup>4</sup> (See *Appeal of Der Wienerschnitzel International, Inc.* (79-SBE-063) 1979 WL 4104.) Accordingly, FTB’s imposition of the late filing penalty must be upheld.

HOLDING

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

DISPOSITION

FTB’s denial of appellants’ claim for refund is sustained.

DocuSigned by:  
*Veronica I. Long*  
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Veronica I. Long  
Administrative Law Judge

We concur:

DocuSigned by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

DocuSigned by:  
*Andrew Wong*  
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Andrew Wong  
Administrative Law Judge

Date Issued: 2/5/2024

<sup>4</sup> Although R&TC section 19132.5 authorizes first-time abatement of a late filing penalty for certain filers, that section only applies to tax years beginning on or after January 1, 2022, and thus is not applicable here.