



FACTUAL FINDINGS

1. On March 19, 2022, appellant timely filed her 2021 California income tax return, reporting tax due of \$13,063.
2. On the same date, appellant submitted a payment request for \$13,063, using FTB's electronic Web Pay system.
3. The Web Pay system issued a notice with the word "Confirmation" written in large, bold font at the top of the page. The notice includes the following information in the following order: the confirmation number; the date of the payment request; appellant's identification and contact information; the tax year and payment amount; appellant's banking information, including the bank name, account type, full routing number, and last five digits of the account number; and a paragraph advising appellant to allow two business days for her bank account to reflect the payment and to review her bank account statement or contact her bank to confirm that her payment has cleared.
4. Appellant had sufficient funds in the bank account at all relevant times.
5. The attempted payment of \$13,063 did not clear appellant's bank account. FTB's records indicate that the payment was rejected due to "invalid account information." Appellant's bank issued a letter dated August 9, 2022, stating that it does not have a record of a rejected payment on that date.
6. Appellant has used FTB's Web Pay system to make tax payments every year beginning with 2012. Appellant made several of those payments using the same bank account she used for 2021. All of appellant's prior Web Pay payments cleared her bank account.
7. On June 8, 2022, FTB issued a State Income Tax Balance Due Notice ("Balance Due Notice"), advising appellant that she has a balance due for the 2021 tax year.
8. On June 13, 2022, appellant called FTB regarding the Balance Due Notice and her attempted Web Pay payment on March 19, 2022. Appellant could not reach anyone at FTB. The next day, on June 14, 2022, appellant sent an electronic message to FTB, where she provided the confirmation number for the March 19, 2022 attempted payment and stated that she does not understand why she received the Balance Due Notice.

9. On July 18, 2022, appellant paid the full amount reflected in the Balance Due Notice. Appellant sent another electronic message to FTB, asking how she can appeal the penalties and interest.
10. On July 22, 2022, appellant sent another electronic message to FTB, asking for additional information about the attempted Web Pay payment.
11. On July 29, 2022, appellant contacted her State Senator's office for assistance regarding her attempted payment on March 19, 2022, because FTB had not responded to any of her messages. The State Senator's office contacted FTB and, on August 19, 2022, FTB responded to one of appellant's electronic messages and provided appellant the instructions for filing a claim for refund.
12. Appellant filed a claim for refund and requested abatement of the penalties and interest based on reasonable cause. FTB denied the refund claim and this timely appeal followed.

#### DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the tax shown on a return by the original filing deadline. The late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) Reasonable cause means that the failure to make a timely payment of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) Willful neglect means a “conscious, intentional failure or reckless indifference.” (*Ibid.*) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P.) Reasonable cause for a late payment must continue 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.” (*Ibid.*)

FTB contends that appellant cannot establish reasonable cause because appellant did not monitor her bank account to determine whether the payment was successfully withdrawn from her account. FTB argues that OTA's precedential Opinion in *Appeal of Scanlon*, 2018-OTA-075P (*Scanlon*), stands for the proposition that a taxpayer's failure to monitor the bank account and quickly ascertain whether the scheduled payment was withdrawn from the account, in and of itself, defeats reasonable cause. FTB's interpretation of *Scanlon* is overbroad.

In *Scanlon*, the taxpayers had a history of entering incorrect bank information on FTB's Web Pay system. OTA in that case stated, "[i]n light of [the taxpayers'] actual knowledge of their prior error in 2012, [OTA] would expect [the taxpayers] to have been especially diligent regarding their electronic payments in 2016." Therefore, OTA found that the taxpayers' notice of entering incorrect bank information, coupled with their failure to monitor their bank account, did not meet the reasonable cause standard.

The only other OTA precedential Opinion that has facts similar to this case is *Appeal of Freidman*, 2018-OTA-077P (*Freidman*), but the facts in that case are also distinguishable. There, the taxpayers began the payment process on FTB's Web Pay system, but they never pressed the "submit" button and therefore never received a Web Pay confirmation notice. OTA found that the taxpayers' error in not completing the Web Pay process, coupled with their failure to monitor their bank account, did not demonstrate the type of due diligence that would be exercised by an ordinarily intelligent and prudent businessperson.

In both *Scanlon* and *Friedman*, the taxpayers' failure to monitor the bank account was coupled with another unfavorable fact. Thus, contrary to FTB's position in this case, OTA precedent does not stand for the proposition that a taxpayer's failure to monitor a bank account, in and of itself, defeats reasonable cause. Rather, the determination of whether reasonable cause exists for a late payment depends on the facts and circumstances of each case and requires an analysis of appellant's actions leading up to the late payment, the timing of those actions, and whether they reflect ordinary business care and prudence, i.e., whether appellant acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Moren, supra.*)

In this case, as a threshold matter, it is not entirely clear why appellant's Web Pay payment request was rejected. The record establishes that appellant submitted her payment request before the due date and received a Web Pay confirmation notice. Appellant credibly testified that she reviewed the confirmation notice and confirmed that all of the information on the notice—including the full routing number and the last five digits of her bank account number—was correct. In addition, appellant's bank issued a letter stating that it does not have a record of a rejected payment on the payment date. Although FTB asserts that appellant's payment was rejected because of "invalid account information," FTB has not explained what account information was invalid or incorrect (e.g., the first digits of appellant's bank account

number, which was not reflected on the confirmation notice). Thus, the record does not establish what information appellant incorrectly submitted for the March 19, 2022 payment request.

Turning to the analysis of reasonable cause, the question is whether an ordinarily intelligent and prudent businessperson would have monitored his or her bank account after submitting the payment request on March 19, 2022. That certainly would be the most cautious approach, as appellant would have discovered that the payment did not clear her account and would have made another payment before the due date. However, the most cautious approach is not the only reasonable and prudent approach. (*Appeal of Moren, supra.*)

Appellant contends that she acted as a reasonably prudent person because (1) the confirmation notice misled her to believe that she successfully made the March 19, 2022 electronic payment, (2) she has paid her taxes using the Web Pay system every year since 2012 and never had a payment rejected for any reason, (3) she has used the same bank account for prior Web Pay payments, (4) she did not monitor her bank account because this was not her account for day-to-day expenses, (5) she submitted the March 19, 2022 payment using a Charles Schwab checking account that sweeps the funds from a linked brokerage account, (6) she keeps her life savings in the brokerage account and uses the account only occasionally to pay large-ticket items such as her taxes and her children's tuition, and (7) she monitors the Charles Schwab accounts by meeting with her bankers on a quarterly basis and occasionally checking the performance of her investments online. Although this is a close case, appellant has established that a reasonably prudent businessperson would have acted similarly under the facts and circumstances in this case.

Appellant's demeanor and tone during her testimony were credible and established that appellant is financially responsible. The evidence in the record also establishes that appellant is financially responsible. Unlike in *Scanlon*, appellant does not have a history of incorrectly entering her bank information on FTB's Web Pay system. All of appellant's prior Web Pay payments, starting with the 2012 tax year, had cleared her bank account. Some of those payments were made using the same bank account at issue in this case. In addition, as discussed above, the record does not establish what account information appellant incorrectly entered for the March 19, 2022 payment request. Although FTB contends that the payment was rejected due to "invalid account information," the full routing number and the last five digits of the bank account number, as reflected on the confirmation notice, were correct. Appellant's history of

timely filing and paying her taxes is supporting evidence of her credibility and intent. (See *Appeal of Moren, supra*; *Appeal of Xie, 2018-OTA-076P.*)

In addition, appellant was credible in testifying that she was misled by the confirmation notice she received in this case. Appellant testified that she believed the notice was confirmation that she had successfully made the payment, as she had done in prior years using the same bank account, and as she receives when she makes online payments for other expenses such as her children's tuition. She also credibly testified that she believed the language at the very bottom of the notice—advising her to allow 2 business days for her bank account to reflect the payment and review her bank account statement or contact her bank to confirm that her payment has cleared—was “an FYI, that if [she wants] to know how long it's going to take for things to clear, [she] can check it out.” A reasonably prudent person, who (like appellant) is not a tax professional by trade, could reasonably be misled by the confirmation notice in this case. The notice states “Confirmation” in large, bold font at the top of the page and does not expressly state that it is not confirming that the electronic payment was successful. Nor does the notice state that FTB will not notify appellant if the payment is rejected for any reason.

Furthermore, appellant did not make the payment request using her primary bank account that she uses for day-to-day expenses. Rather, appellant used a bank account that sweeps the funds from a linked brokerage account, which contains her life savings. She only used this account occasionally for large-ticket items like paying her taxes and her children's college tuition. She monitors her brokerage account by meeting with her bankers on a quarterly basis and occasionally monitors the performance of her investments online. As soon as appellant learned that there was an issue with her tax payment, she attempted to contact FTB several times through different methods. When she did not receive a response from FTB, she made full payment of the outstanding balance and contacted her State Senator's office for help in resolving this matter with FTB.

Accordingly, appellant has established that her failure to timely pay her 2021 taxes was due to reasonable cause and not willful neglect.

HOLDING

Appellant has established reasonable cause to abate the late payment penalty.

DISPOSITION

FTB's action is partially reversed and appellant is entitled to a refund of the late payment penalty.

DocuSigned by:

*Ovsep Akopchikyan*

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Ovsep Akopchikyan  
Administrative Law Judge

Date Issued: 1/24/2024