

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
D. KEITHLY) OTA Case No. 230814017
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OPINION

Representing the Parties:

For Appellant: D. Keithly
For Respondent: Alisa L. Pinarbasi, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Keithly (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,104.75 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, § 30209.05.) Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides this matter based on the written record.

ISSUE

Whether appellant has shown reasonable cause to abate the late-filing penalty.

FACTUAL FINDINGS

1. On October 26, 2022, appellant untimely filed a joint California Resident Income Tax Return (return) for the 2021 tax year.
2. FTB processed the return and issued appellant a State Income Tax Balance Due Notice, which, as relevant here, assessed a late-filing penalty.

¹ Appellant’s spouse did not join this appeal, and this opinion will refer only to D. Keithly as appellant. The sole issue appellant raises in this appeal is the late-filing penalty. Accordingly, this Opinion does not discuss the underpayment of estimated tax penalty and interest further.

3. Appellant paid the balance due and timely filed a claim for refund for penalty abatement.
4. On May 5, 2023, FTB issued appellant a Claim for Refund Denied letter denying the claim for refund.
5. This timely appeal followed.

DISCUSSION

R&TC section 19131(a) imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect. For individual filers, the due date of the 2021 return was April 15, 2022. (R&TC, § 18566.) While FTB allows an automatic six-month extension to file from the April 15 due date, the extension is conditioned solely upon the filing a return within the automatic extension period. (Cal. Code Regs., tit. 18, § 18567.) If the return is not filed within six months of the due date, no extension is allowed. (*Ibid.*)

The late-filing penalty is calculated at 5 percent of the tax for each month or fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax. (R&TC, § 19131(a).) When FTB imposes a late-filing penalty, the law presumes that it has been correctly imposed. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Xie*, 2018-OTA-076P). The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Mauritzson*, 2021-OTA-198P.)

Here, appellant disputes the imposition of the late-filing penalty, asserting that the return was filed on time, and that the penalty should only be 5 percent. Appellant provides no other information other than these assertions. Based on the record before OTA, appellant signed the return before October 26, 2022, the date FTB received the return.²

If a taxpayer places a return in a United States mailbox before the statutory filing deadline and the return is received late, the taxpayer must offer evidence that the return was timely filed, such as a registered or certified mail receipt. (Gov. Code, § 11003; Internal Revenue Code (IRC), § 7502; R&TC, § 21027; *Appeal of Fisher*, 2022-OTA-337P.)

² The date appellant signed the return is illegible.

Taxpayers “[assume] the risk that the postmark will bear a date on or before the last date . . . prescribed for filing the [return],” and have the burden of proving the date of the postmark or that the return was timely mailed. (Treas. Reg. § 301.7502-1(c)(1)(iii).) IRC section 7502 and Treasury Regulation section 301.7502-1 provide that, aside from proof of actual timely delivery, which is not present here, a taxpayer can use a postmarked envelope or a postmarked registered or certified mailing receipt to prove the date a document was filed with the IRS. R&TC section 21027 provides that Treasury Regulation section 301.7502-1, as revised on January 10, 2001, is also applicable to filings with FTB.³

Appellant fails to satisfy his burden of proving that the return was timely filed because he provides no evidence of a postmarked envelope, a postmarked registered or certified mailing receipt (or if applicable, an electronic filing confirmation). Thus, appellant has not shown that the return was timely filed. On appeal, FTB provides a copy of the return showing a stamped date of October 26, 2022. Based on the record before OTA, October 26, 2022, is the filing date.

Concerning the calculation of the penalty, appellant’s return was due on April 15, 2022. (See R&TC, § 18566.) The six-month extension was only until October 15, 2022, and because appellant did not file his return until October 26, 2022, the extension was not allowed. (See Cal. Code Regs., tit. 18, § 18567.) Appellant’s return was filed seven months after it was due. The late-filing penalty is calculated at 5 percent of the tax *for each month or fraction thereof that the return is late* (emphasis added). (R&TC, § 19131(a).) However, the maximum penalty is 25 percent, which is the amount FTB imposed. (*Ibid.*)

The burden of proof is on the taxpayer to show that reasonable cause exists to support penalty abatement. (*Appeal of Xie, supra.*) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of Xie, supra.*)

Appellant has not asserted reasonable cause, and the record before OTA does not show grounds for reasonable cause abatement of the late-filing penalty. Therefore, the late-filing penalty may not be abated.


³ Effective January 1, 2002, California amended R&TC section 21027 to add subdivisions (a)(2) and (b) to conform with specific provisions in IRC section 7502 regarding “designated delivery service” and “electronic filing.” Aside from those specific provisions, R&TC section 21027 does not conform to IRC section 7502 in its entirety. (See R&TC, § 21027, as amended by Stats. 2001, ch. 543 (SB 1185), § 20, West’s Cal. Legis. Service.)

HOLDING

Appellant has not shown reasonable cause to abate the late-filing penalty.

DISPOSITION

FTB's action denying appellant's claim for refund is sustained.

DocuSigned by:

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Asaf Kletter
Administrative Law Judge

Date Issued: 6/12/2024