

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 230513344  
P. PHIBBS AND )  
C. PHIBBS )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: P. Phibbs  
C. Phibbs

For Respondent: Paige Chang, Attorney

For Office of Tax Appeals: Louis Ambrose, Attorney

K. GAST, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, P. Phibbs and C. Phibbs (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$5,151.06 for the 2021 tax year.

Appellants waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellants have established reasonable cause for their late payment of tax.

**FACTUAL FINDINGS**

1. Appellants timely filed electronically a California Resident Income Tax return (Form 540) for 2021 tax year on April 15, 2022. The Form 540 reported total tax due of \$79,247. Appellants authorized their CPA to schedule withdrawals from their bank account for payment of their federal and California income tax on the due date of April 18, 2022. The e-file payment attempt of \$79,247 was rejected on April 18, 2022.
2. Appellants received a Mandatory Electronic Payment Notice, dated April 28, 2022, stating that they recently made a tax payment of more than \$20,000 or filed a tax return

- with a total tax liability of over \$80,000, and so therefore needed to comply with the mandatory electronic payment requirement.
3. On May 4, 2022, FTB issued a State Income Tax Balance Due Notice showing a balance of \$1,585.72 due to a dishonored payment penalty. The notice did not state a tax year or break out the amount due between the penalty and interest.
  4. On June 15, 2022, FTB issued an Income Tax Due Notice showing a balance of \$1,591.21. On June 22, 2022, FTB issued a State Income Tax Balance Due Notice (June 22nd Notice) with a balance of \$84,864.40, stating tax of \$83,794, a late payment penalty of \$5,151.06, interest of \$466.34, and payments or adjustments of \$4,547. On June 29, 2022, FTB received appellants' payment of \$84,864.40.
  5. On July 13, 2022, appellants filed a Reasonable Cause – Individual and Fiduciary Claim for Refund, requesting a refund of the late payment penalty in the amount of \$5,151.06. Appellants stated that their CPA scheduled an automatic withdrawal from their bank account on April 18, 2022, for both their federal and California tax payments via tax software. The federal tax amount was withdrawn, but the California tax payment of \$79,247 was not withdrawn from the account. Appellants attached an e-file activity report from the CPA firm showing that the automatic withdrawals had been scheduled.
  6. On August 3, 2022, FTB issued a Final Notice Before Levy and Lien (Final Notice) showing a balance of \$1,645.79, consisting of the dishonored payment penalty, plus interest. On August 11, 2022, FTB received appellants' payment of \$1,645.79.
  7. On February 22, 2023, FTB issued a denial of the claim for refund of the late payment penalty. Appellants filed this timely appeal.

#### DISCUSSION

R&TC section 19132 provides that a late payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. Here, it is undisputed that appellants failed to make timely payment of the tax and appellants do not dispute that the penalty was correctly calculated in accordance with the statute. Therefore, the penalty was properly imposed.

However, the penalty may be abated if the taxpayer shows that the failure to make timely payment was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) The taxpayer has the burden of proof to show that reasonable cause exists to support abatement of the

late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) 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. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Appellants contend that they were “forced to rely on [their] CPA to have scheduled the payment effectively.” They argue that the error was due to a mistake of the CPA firm, which caused the attempted California payment to be made from a closed account. However, a failure to timely pay tax due caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.) Moreover, the United States Supreme Court has held that reliance on a tax preparer to meet a tax deadline does not constitute reasonable cause, unless such reliance involves substantive matters of tax law, which is not present here, as discussed below. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*).

Appellants contend that their CPA told them to allow “some time” or “several days” for the payments to be accepted since the CPA's records “indicated the payment submissions were accepted.”<sup>1</sup> However, the evidence on appeal does not show when appellants inquired with their CPA or what the CPA told them, and they did not pay the amount due until June 29, 2022, which is more than two months after the due date.

To the extent that the CPA gave them false assurances that the payment had been properly scheduled or failed to check the CPA's records and discover that the payment had been scheduled from the wrong bank account, such non-substantive errors by appellants' CPA do not establish reasonable cause. While reliance on the *substantive* advice of a tax professional, such as a tax accountant, may be considered reasonable cause, the requirement of a timely tax payment is not a matter of substantive tax law. (*Appeal of Summit Hosting LLC*, 2021-OTA-216P.) Each taxpayer has a non-delegable duty to file a tax return by the due date, and this non-delegable duty also applies to a timely tax payment. (*Ibid.*, citing *Boyle, supra.*)

Appellants also contend that their receipt of a Mandatory Electronic Payment Notice, dated April 28, 2022, in combination with the other circumstances, assured them that their payment had been accepted and approved. They note that the notice stated in part that they had

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<sup>1</sup> Appellants also note that FTB experienced a service disruption to the Web Pay application and extended the electronic payment deadline by one day to April 19, 2022. Appellants indicate that the extension dispelled their initial doubt that FTB timely received the tax payment.

recently made a tax payment of more than \$20,000. They contend that, as they lacked experience with such large payments, they “assumed the FTB would withdraw the funds, much like a paper check, at a time of its choosing.”

However, the notice does not specifically identify or confirm receipt of the payment in question, and a reasonably prudent person, exercising ordinary business care, would not assume that FTB would draw down an electronic payment at the time of its choosing. Instead, a prudent businessperson, especially one making a large payment like this, would check their bank account to determine that the payment had been successfully processed.

Appellants indicate that they did not attempt to contact FTB until after May 4, 2022, which is when they received a notice of a dishonored payment penalty. They state that they then attempted to call FTB nine times and were never able to talk to a person, and that they attempted to create an account on the FTB website but had difficulties. However, there is no evidence substantiating these efforts or showing when they occurred, so this contention does not provide a legal basis for FTB’s action to be reversed or modified.

Appellants note that the June 22nd Notice was the first notice from FTB stating the unpaid tax amount. However, regardless of when FTB notified appellants of the unpaid tax, ordinary business care and diligence required that appellants ensure that they timely paid the tax due, as shown on their tax return. Reasonably prudent taxpayers exercising due care and diligence are expected to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid. (*Appeal of Scanlon, supra.*)

Appellants also dispute the \$1,645.79 dishonored payment penalty demanded by the Final Notice and request a refund of that amount. However, appellants have not filed a claim for refund of the dishonored payment, so there is no FTB action denying such a refund claim for the Office of Tax Appeals (OTA) to review. (See Cal. Code Regs., tit. 18, § 30103(a)(3) & (4).) This appeal is based upon FTB’s Notice of Action on appellants’ refund claim dated February 22, 2023, which denied appellants’ claim for refund of the late payment penalty only, in the amount of \$5,151.06. Thus, OTA only has authority in this appeal to review FTB’s imposition of the late payment penalty.

Appellants additionally note that for the 2022 tax year, FTB extended the due date for individuals for filing and payment to October 16, 2023, due to winter storms. However, the tax year on appeal is the 2021 tax year, and each tax year stands alone. (*Burnet v. Sanford & Brooks*

*Co.* (1931) 282 U.S. 359, 365-366; *Appeals of Kwon, et al.*, 2021-OTA-296P.) Moreover, the due date for the 2022 tax year was extended due to specific disaster-related relief under R&TC section 18572, which has no application to this situation.

Appellants argue that they acted in good faith and without willful neglect. OTA does not question appellants' good faith, and the record does not indicate that they acted with willful neglect. However, R&TC section 19132 also requires, as a condition to abatement, that appellants show that they had reasonable cause for the late payment. As the evidence on appeal does not show that appellants had reasonable cause for the late payment, as that requirement has been interpreted by the United States Supreme Court and other controlling precedent, they have not shown error in FTB's determination.

### HOLDING

Appellants have not established reasonable cause for their late payment of tax.

### DISPOSITION

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

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*Kenneth Gast*

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Kenneth Gast  
Administrative Law Judge

We concur:

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*Veronica I. Long*

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Veronica I. Long  
Administrative Law Judge

DocuSigned by:

*Huy "Mike" Le*

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Huy "Mike" Le  
Administrative Law Judge

Date Issued: 7/18/2024