

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 231214978
M. POTTER)
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OPINION

Representing the Parties:

For Appellant: M. Potter
For Respondent: Paige Chang, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Potter (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$5,923.75 for the 2021 tax year.

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

ISSUE

Whether appellant has established a basis to abate the late-payment penalty.¹

FACTUAL FINDINGS

1. On December 30, 2021, appellant made a payment to the IRS and attempted to make a \$45,000 payment, purportedly to FTB, described as “CA TLR transfer to CHK [XXXX] Banking Ctr WALNUT CREEK MAIN.”
2. Appellant timely filed her 2021 California income tax return reporting a \$45,000 estimated tax payment.

¹ Appellant has not provided separate arguments relating to interest abatement. Accordingly, interest abatement will not be separately discussed.

3. On December 13, 2022, FTB issued appellant a Notice of Tax Return Change – Revised Balance (Notice) informing appellant that the \$45,000 estimated tax payment was not received and imposing, as relevant here, a late-payment penalty.
4. When appellant received FTB’s Notice, she contacted her accountant and relied on the accountant to contact FTB.
5. On February 23, 2023, FTB issued appellant an Income Tax Due Notice showing the unpaid tax and penalty.
6. On April 5, 2023, FTB issued appellant a Final Notice Before Levy and Lien showing the unpaid tax and penalty.
7. On May 26, 2023, FTB issued appellant an Intent to Record a Notice of State Tax Lien.
8. On June 12, 2023, appellant paid the amount due. Shortly after, appellant filed a claim for refund.
9. FTB denied appellant’s claim for refund and this timely appeal followed.
10. On appeal, appellant states that the attempted December 30, 2021 payment of \$45,000 to FTB was rejected. FTB also provides a copy of appellant’s payments to FTB, which does not include the attempted December 30, 2021 payment of \$45,000.

DISCUSSION

Appellant does not contest the imposition or computation of the late-payment penalty. Instead, appellant requests that the late-payment penalty be abated because she attempted to make a timely estimated tax payment of \$45,000, and when she received the Notice from FTB that the payment was not received, she relied on her accountant to contact FTB.

The late-payment penalty may be abated if the failure to timely pay was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for abating the penalty, taxpayers must show that the failure to timely pay occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scanlon*, 2018-OTA-075P.)

Appellant contends the late-payment penalty should be abated because she attempted to timely make an estimated tax payment on December 30, 2021. As support, appellant provides a copy of her bank account statement showing an estimated tax payment to the IRS and a second attempted estimated tax payment of \$45,000, purportedly to FTB. However, the description of the item states that it is a payment to a checking account in Walnut Creek and does not state that it is a payment to FTB. In addition, FTB’s systems do not show any attempted payment from

appellant on this date. On appeal, appellant states that the payment was rejected. It is expected that reasonably prudent taxpayers exercising due care and diligence would monitor their bank account and verify whether a scheduled electronic payment to FTB was in fact paid. (*Appeal of Scanlon, supra.*) Further, a lack of notice from FTB of a failed payment does not negate appellant's duty of prudence and due care to verify that her scheduled payment was successful. (*Ibid.*) Accordingly, appellant has not met her burden of proof in demonstrating that she acted with ordinary business care and prudence.

In addition, taxpayers have a non-delegable duty to ensure that a timely payment is made. (*Baccei v. U.S.* (9th Cir. 2011) 632 F.3d 1140, 1148-1149.)² This means that regardless of any alleged negligence on the part of appellant's former accountant, appellant cannot rely on her former accountant to escape responsibility for failing to perform what is a non-delegable duty. (*Conklin Bros. of Santa Rosa, Inc. v. United States* (9th Cir. 1993) 986 F.2d 315, 317-318.)

Appellant states that she has an excellent payment and filing history for over 49 years. While commendable, there is no provision of law that would permit penalty abatement on this basis for 2021. R&TC section 19132.5, effective for tax years beginning on or after January 1, 2022, allows a taxpayer to request a one-time abatement of a timeliness penalty. However, as the relief requested is for 2021, the provision has no application here.

² Because the relevant language of R&TC section 19132 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts' interpretation of the reasonable cause standard is persuasive authority in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

HOLDING

Appellant has not established a basis to abate the late-payment penalty.

DISPOSITION

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

Signed by:
Veronica I. Long
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Veronica I. Long
Administrative Law Judge

We concur:

Signed by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

Date Issued: 8/29/2024