

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 230312706  
J. MIDDLEMAN AND )  
V. MIDDLEMAN )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Michael Locascio, Representative  
Ted Tourian, Representative  
For Respondent: Eric R. Brown, Attorney

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. and V. Middleman (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$21,904.03, plus applicable interest, for the 2020 tax year.<sup>1</sup>

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

**ISSUE**

Whether appellants have shown reasonable cause to abate the late payment penalty.

**FACTUAL FINDINGS**

1. Appellants timely filed a 2020 California income tax return on October 15, 2021.
2. Appellants remitted estimated payments of \$20,431, \$20,000, and \$1,340,000 on July 15, 2020, September 13, 2020, and January 14, 2021, respectively. Appellants remitted an additional payment of \$399,783 on May 24, 2021, which led to the imposition of the late payment penalty by FTB.

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<sup>1</sup> Appellants filed a claim for refund for \$22,197.75, the amount of their bill payment that includes interest.

3. FTB sent appellants a Notice of Tax Return Change – Revised Balance, imposing, as relevant here, a late payment penalty of \$21,904.03.<sup>2</sup>
4. Appellants remitted a payment of \$22,197.95 and filed a claim for refund for the late payment penalty.
5. FTB denied appellants' claim for refund and appellants timely filed this appeal.

### DISCUSSION

A late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. (R&TC, § 19132(a).) However, a late payment penalty will be abated if the taxpayers show that the late payment was due to reasonable cause and not due to willful neglect. (*Ibid.*) Generally, to establish reasonable cause, the taxpayers must show that the failure to timely pay occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.)

The taxpayers' claim that a late payment was due to a lack of documentation or information, or difficulty calculating a tax liability, does not, by itself, establish reasonable cause for the late payment. (*Appeal of Moren, supra.*) Unsupported assertions are insufficient to satisfy the taxpayers' burden of proof. (*Ibid.*) A determination of whether there is reasonable cause for a late payment is based upon what the taxpayers knew or should have known as the payment due date approached, and what they did or failed to do to obtain the required information. (*Ibid.*) The taxpayers must have exercised ordinary business care and prudence of the type that would have been exercised by an ordinarily intelligent and prudent businessperson under the circumstances. (*Ibid.*)

Here, appellants claim that they made their tax payment late because they did not receive a Schedule K-1 from a partnership from which they received a distribution during the tax year. Appellants argue that due to the COVID-19 pandemic, there was a delay in receiving the information from the partnership. Appellants assert that upon receipt of the untimely K-1, they promptly made their tax payment.

However, appellants' 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, supra.*) Appellants must show the efforts made to acquire that information from the

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<sup>2</sup> Appellants do not contest the underpayment of estimated tax penalty.

source that held it. (*Ibid.* [taxpayer established reasonable cause to abate late payment penalty by showing numerous unsuccessful attempts made to obtain Schedule K-1 information].)

Appellants provide no evidence of their efforts to obtain the information necessary to estimate their tax liability. An assertion that records were difficult to obtain without any substantiation of efforts made to retrieve those records or otherwise showing that they were unobtainable is not sufficient to show reasonable cause. (*Ibid.*)

Appellants concede that they are not entitled to abatement for good compliance history pursuant to R&TC section 19132.5.<sup>3</sup> Rather, appellants argue that both their compliance history and their lack of documentation due to the COVID-19 pandemic are sufficient to meet the reasonable cause standard for abatement of the late payment penalty. Unfortunately, without evidence of the efforts shown to obtain the information necessary to estimate their tax liability, and considering the 2020 tax year payment due date extension provided during the pandemic,<sup>4</sup> the Office of Tax Appeals does not find appellants' arguments sufficient.

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<sup>3</sup> R&TC section 19132.5 allows for the abatement of an individual's certain first-time timeliness penalties. However, that section only applies to tax years beginning on or after January 1, 2022. (R&TC, § 19132.5(a)(1), (f).)

<sup>4</sup> FTB postponed the deadline for filing 2020 tax year returns and making tax payments from April 15, 2021, to May 17, 2021, due to the COVID-19 pandemic. (See FTB, State Tax Deadline for Individuals Postponed until May 17, 2021, news release (March 19, 2021) <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

HOLDING

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

DISPOSITION

FTB’s action denying appellants’ claim for refund is sustained.

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*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge

We concur:

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

DocuSigned by:  
*Asaf Kletter*  
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Asaf Kletter  
Administrative Law Judge

Date Issued: 10/14/2024