

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
D. SWARTZENDRUBER AND) OTA Case No. 231114700
E. SWARTZENDRUBER)
_____)

OPINION

Representing the Parties:

For Appellants: Nicole P. Teshima, EA

For Respondent: Vivian Ho, Attorney

E. PARKER, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Swartzendruber and E. Swartzendruber (appellants) appeal actions by respondent Franchise Tax Board (FTB) denying appellants' claims for refund of \$1,394.50 for the 2018 tax year, \$9,112.25 for the 2020 tax year, and \$754 for the 2021 tax year.

Appellants waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellants have established reasonable cause to abate the late filing penalties for the 2018 and 2020 tax years.
2. Whether appellants have established reasonable cause to abate the demand penalties for the 2018 and 2020 tax years.
3. Whether appellants have established reasonable cause to abate the late payment penalty for the 2021 tax year.

FACTUAL FINDINGS

2018 Tax Year

1. Appellants did not file a 2018 California income tax return. On April 12, 2022, FTB issued a Demand for Tax Return (Demand) to appellants that stated FTB received information that indicated appellants may have a California filing requirement for the

2018 tax year. The Demand also informed appellants that failure to respond would result in FTB assessing a tax based on available information and assessing a demand penalty, a late filing penalty, a filing enforcement cost recovery fee, and applicable interest. Appellants did not respond to the Demand.

2. On June 10, 2022, FTB issued appellants a Notice of Proposed Assessment (NPA) proposing a total tax of \$2,193, a late filing penalty of \$548.25, a demand penalty of \$846.25, a filing enforcement fee of \$97, and interest to date of \$392.70. The NPA became final when appellants did not file a timely protest.
3. On August 4, 2023, appellants paid the outstanding balance for the 2018 tax year in full.
4. On August 15, 2023, appellants submitted a claim for refund of the penalties due to reasonable cause.
5. FTB denied the claim for refund.

2020 Tax Year

6. Appellants did not file a timely 2020 California income tax return. On February 21, 2023, FTB issued a Demand to appellants that stated FTB received information that indicated appellants may have a California filing requirement for the 2020 tax year. The Demand also informed appellants that failure to respond would result in FTB assessing a tax based on available information and assessing a demand penalty, a late filing penalty, a filing enforcement cost recovery fee, and applicable interest. Appellants did not respond to the Demand.
7. On April 21, 2023, FTB issued appellants an NPA proposing total tax of \$21,503, withholding of \$504, a late filing penalty of \$5,249.75, a demand penalty of \$5,375.75, a filing enforcement fee of \$100, and interest to date of \$1,733.23.
8. On May 5, 2023, appellants untimely filed a 2020 California income tax return reporting total tax of \$19,239, withholding of \$2,029, interest and penalties of \$4,737, and underpayment of estimated tax penalty of \$158.
9. FTB accepted appellants' return as filed and reduced the demand penalty to \$4,809.75, and the late filing penalty to \$4,302.50.
10. Appellants made payments on August 4, 2023, and on August 11, 2023, to satisfy the outstanding balance for the 2020 tax year.
11. On August 15, 2023, appellants submitted a claim for refund of the late filing and demand penalties due to reasonable cause.
12. FTB denied the claim for refund.

2021 Tax Year

13. On October 15, 2022, appellants timely filed a 2021 California income tax return reporting total tax due of \$7,443, withholding of \$1,643, self-assessed interest and penalties of \$585, and an underpayment of estimated tax penalty of \$107, resulting in an outstanding balance due of \$6,492.
14. On November 7, 2022, FTB issued a Notice of Tax Return Change – Revised Balance to assess a late payment penalty of \$493,¹ and interest and fees of \$99.59, resulting in a revised balance due of \$6,392.59.
15. On August 4, 2023, appellants paid the outstanding balance for the 2021 tax year in full.
16. On August 15, 2023, appellants submitted a claim for refund of the late payment penalty due to reasonable cause.
17. FTB denied the claim for refund.
18. This timely appeal for the 2018, 2020, and 2021 tax years followed.

DISCUSSIONIssue 1: Whether appellants have established reasonable cause to abate the late filing penalties for the 2018 and 2020 tax years.

R&TC section 19131 imposes a late filing penalty for the failure to file a return by the due date or the extended due date, unless the failure to file was due to reasonable cause and not due to willful neglect. To establish reasonable cause, a taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the late filing penalty. (*Appeal of Xie*, 2018-OTA-076P.)

Appellants do not contest that they failed to timely file tax returns for the 2018 and 2020 tax years, nor do they contest the computation of the late filing penalties. Rather, appellants request that the late filing penalties be abated based on reasonable cause. Appellants explain that they faced financial difficulties due to a business venture they entered into in 2018 that was negatively impacted by the COVID-19 pandemic, the sharp rise in building material costs, and a change in the real estate market. Appellants state that when the business venture terminated, they were forced to take legal action, spend over \$100,000 in legal fees, and were ultimately

¹ The late payment penalty subsequently increased to \$754 because appellants did not pay the balance due by the date listed in the notice. At the time of payment, the balance was 16 months overdue.

forced to settle. In support of their position, appellants provide copies of Schedules K-1 that were issued from the business venture to appellants' pass-through corporation for the 2018 through 2022 tax years,² copies of approximately \$16,000 of legal services invoices, and a copy of an undated Settlement Agreement and Release of Claims agreement.

Appellants also explain they experienced difficulties related to the COVID-19 pandemic due to "a complete change in [their] day-to-day lives, from quarantining for health and safety to home-schooling [their] children and working from home." Appellants state they were "subject to numerous, unexpected life hardships throughout the years in question which contributed to [their] having accrued tax liabilities."

Illness or other personal difficulties may be considered reasonable cause if the taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. (*Appeal of Head and Feliciano, supra.*) However, if the difficulties simply cause the taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, the taxpayers must bear the consequences of that choice. (*Ibid.*) The taxpayers' selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Ibid.*)

Appellants' explanation of the difficulties they experienced due to their business venture, the COVID-19 pandemic, and the general unexpected hardships during the years on appeal fail to address how those difficulties prevented appellants from timely filing returns for the 2018 and 2020 tax years. On the contrary, the evidence provided indicates appellants were actively involved in the conduct of other business affairs while neglecting their tax filing obligations. Appellants provide no evidence of steps taken to timely file their returns or that they were unable to timely file despite the exercise of ordinary business care and prudence. Therefore, appellants have not established reasonable cause to abate the late filing penalties.

Issue 2: Whether appellants have established reasonable cause to abate the demand penalties for the 2018 and 2020 tax years.

R&TC section 19133 provides that if a taxpayer fails to make and file a return upon notice and demand by FTB, then FTB may impose a 25 percent demand penalty unless the taxpayer's failure is due to reasonable cause. The demand penalty will only be imposed if: (1) the taxpayer fails to timely respond to a current Demand in the manner prescribed; and (2) FTB has proposed an assessment of tax under R&TC section 19087(a) after the taxpayer failed to

² The Schedules K-1 provided were issued to Tru-line Builders, Inc. Based on the record, it appears Tru-line Builders, Inc. is a wholly owned pass-through entity of appellants.

timely respond to a Request for Tax Return or a Demand in the manner prescribed, for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued.³ (Cal. Code Regs., tit. 18, § 19133(b).)

To establish reasonable cause to abate the demand penalty, a taxpayer has the burden of proof to establish that the failure to respond to the Demand in the manner prescribed occurred despite the exercise of ordinary business care and prudence or that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Shanahan*, 2024-OTA-039P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Appellants failed to respond to the Demands sent on April 12, 2022, and February 21, 2023, for the 2018 and 2020 tax years, respectively. On appeal, appellants provide the same reasonable cause arguments discussed above. However, appellants have not explained how the business difficulties they faced, the COVID-19 pandemic, and other hardships they experienced prevented them from responding to the Demands. Appellants have not shown that they exercised ordinary business care and prudence in not responding to FTB's Demands. Appellants have not established reasonable cause to abate the demand penalties.

Issue 3: Whether appellants have established reasonable cause to abate the late payment penalty for the 2021 tax year.

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) For the 2021 tax year, the filing and payment due date was April 15, 2022. Since appellants did not remit the entire balance due until August 4, 2023, FTB properly imposed the late payment penalty.

The late payment penalty may be abated if the 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).) 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. (*Appeal of Rougeau*, 2021-OTA-335P.)

³ For the 2018 tax year, this requirement is satisfied as FTB previously issued appellants an NPA for the 2015 tax year after appellants did not respond to a request to file a 2015 tax return. For the 2020 tax year, the requirements are met to impose the demand penalty because FTB issued an NPA for the 2018 tax year after appellants did not respond to the 2018 Demand.

Appellants do not dispute that they paid their 2021 tax liability late, nor do they dispute the computation of the late payment penalty. Rather, they provide the same reasonable cause arguments provided above. Appellants have not explained how the business difficulties they faced, the COVID-19 pandemic, and other hardships they experienced prevented them from meeting their payment deadline. Appellants fail to show how they exercised ordinary business care and prudence in satisfying their tax liability over a year after it was due. Appellants have not established reasonable cause to abate the late payment penalty.

HOLDINGS

1. Appellants have not established reasonable cause to abate the late filing penalties for the 2018 and 2020 tax years.
2. Appellants have not established reasonable cause to abate the demand penalties for the 2018 and 2020 tax years.
3. Appellants have not established reasonable cause to abate the late payment penalty for the 2021 tax year.

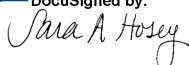
DISPOSITION


FTB's actions denying appellants' claims for refund are sustained.

DocuSigned by:

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 Erica Parker
 Hearing Officer

We concur:

DocuSigned by:

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 Sara A. Hosey
 Administrative Law Judge

Signed by:

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 Josh Lambert
 Administrative Law Judge

Date Issued: 2/5/2025