

3. On May 2, 2022, FTB issued appellant-husband a State Income Tax Balance Due Notice imposing a mandatory e-pay penalty and interest totaling \$1,600.79 because appellants are required to electronically remit payment to FTB and failed to do so.¹
4. On May 13, 2022, appellants paid the outstanding liability in full.
5. On July 5, 2022, appellants filed a refund claim requesting abatement of the e-pay penalty based on reasonable cause.
6. FTB, having found appellants did not establish reasonable cause, denied the refund claim.
7. This timely appeal followed.
8. On appeal, appellants submit a copy of their tax preparer's cover letter instructing them to enclose a check for \$160,000 with the extension form and mail it to FTB on or before April 18, 2022.
9. On appeal, FTB submits a copy of the 2021 Instructions for Form 3519 and the attached payment coupon for automatic extension for individuals (FTB Form 3519 (PIT)). The instructions state that a taxpayer who makes an estimate or extension payment exceeding \$20,000 is required to remit all future payments electronically. The payment coupon states, "CAUTION: You may be required to pay electronically. See instructions." (All caps in original.)
10. FTB also submits a copy of a Notice of State Income Tax Due, dated January 11, 2018, showing that appellants were previously assessed a mandatory e-pay penalty for the 2018 tax year.

DISCUSSION

A taxpayer must electronically remit all future payments to FTB once the taxpayer has made an estimated or extension tax payment in excess of \$20,000, for any tax year beginning on or after January 1, 2009. (R&TC, § 19011.5(a)(1).) An individual who is required to electronically remit tax payments must continue to make all future payments electronically, unless the taxpayer either: (1) meets the requirements of R&TC section 19011.5(b) and makes an election to discontinue paying electronically; or (2) requests and receives a waiver of the requirement pursuant to R&TC section 19011.5(d). R&TC section 19011.5(c) imposes a penalty equivalent to one percent of the amount paid by a taxpayer who does not comply with the

¹ Appellants' claim for refund is only for the \$1,600 of e-pay penalty as they do not specifically contest the imposition of interest.

requirement to pay electronically, unless the taxpayer shows that the failure to pay electronically was the result of reasonable cause and not willful neglect. (R&TC, § 19011.5(c).) R&TC section 19011.5(f)(1) defines “electronically remit” (i.e., pay electronically) as “to send payment through use of any of the electronic payment applications provided by [FTB], including, but not limited to, a pay by phone option, when made available by [FTB].”

There is no dispute that appellants were required to e-pay their extension payment of \$160,000. Appellants do not dispute the imposition or calculation of the e-pay penalty, and FTB has not alleged willful neglect; therefore, the only issue is whether there is reasonable cause to abate the penalty.

To establish reasonable cause to abate the mandatory e-pay penalty, a taxpayer has the burden of proving that the failure to electronically remit a required payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Porreca*, 2018-OTA-095P.) The issue of whether a taxpayer has demonstrated reasonable cause for the mandatory e-pay penalty asks the same questions and weighs the same evidence as the issue of whether reasonable cause exists for failure to file a tax return or failure to make a timely payment of tax. (*Ibid.*) Therefore, cases analyzing whether reasonable cause exists for failure to file a tax return or failure to make a timely payment of tax are appropriate guidance for determining whether reasonable cause exists for the mandatory e-pay penalty. (*Ibid.*)

In general, a taxpayer’s reliance on an agent (such as an accountant or a tax attorney) to file a return or make a timely payment of tax is not reasonable cause. (*U.S. v. Boyle* (1985) 469 U.S. 241, 250-252 (*Boyle*)). Reasonable cause may exist, however, if a taxpayer relies on a tax professional for *substantive* tax advice as to whether a tax liability exists and the following conditions are met: (1) the person reasonably relied on by the taxpayer is a tax professional with competency in the subject tax law; and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of relevant facts and documents. (*Ibid.*; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.) By contrast, reliance on a tax professional cannot be a substitute for compliance with an unambiguous statute. (*Boyle, supra*, at p. 251.) Ignorance of the law is not a reasonable cause for the failure to comply with the mandatory e-pay requirements. (*Appeal of Porreca, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*)

Here, appellants contend that the e-pay penalty should be abated because they relied on incorrect instructions from their CPA to mail their \$160,000 extension payment to FTB, instead of making an electronic payment. However, under *Boyle*, reliance on a tax professional that is not substantive tax advice, such as instructions on how to remit payment, cannot be a substitute for compliance with an unambiguous statute. R&TC section 19011.5 clearly defines when taxpayers must electronically remit payments to FTB, as well as when a taxpayer can make an election under R&TC section 19011.5(b) or request a waiver under R&TC section 19011.5(d) to discontinue the e-pay requirement. Appellants do not contend and evidence in the record does not indicate that they made an R&TC section 19011.5(b) election or requested an R&TC section 19011.5(d) waiver. Additionally, R&TC section 19011.5(f)(1) specifies what “electronically remit” means for purposes of making an electronic payment. Therefore, OTA finds no ambiguity in R&TC section 19011.5 and that appellants’ reliance on incorrect filing instructions from their CPA cannot be a substitute for compliance with an unambiguous statute.

Furthermore, evidence in the record shows that FTB received appellants’ estimated tax payment of \$47,000 for the 2016 tax year. Pursuant to R&TC section 19011.5(a)(1), appellants were required to make all future tax payments electronically since their estimated tax payment of \$47,000 exceeded \$20,000. Additionally, FTB previously assessed appellants a mandatory e-pay penalty for the 2018 tax year. Therefore, appellants were on notice that any payment subsequent to the September 15, 2016 estimated tax payment, such as the \$160,000 extension payment at issue, is required to be electronically remitted to FTB. Appellants have not established that they took any steps to ensure compliance with the mandatory e-pay requirements, but were otherwise prevented from complying. Therefore, OTA finds that appellants have not established reasonable cause for their failure to make an e-pay of tax in compliance with the requirements of R&TC section 19011.5.

Appellants also request that OTA abate the penalty due to a “one-time exception.” However, neither the California Legislature nor FTB has adopted such a penalty abatement program for the e-pay penalty.² OTA has no authority to grant relief except where the law specifically allows. (*Appeal of Porreca, supra.*)

² R&TC section 19132.5 allows for the abatement of an individual’s first-time timeliness penalties imposed under R&TC section 19131 or 19132, but not the e-pay penalty under R&TC section 19011.5. (R&TC, § 19132.5(a), (c).) Furthermore, R&TC section 19132.5 only applies to tax years beginning on or after January 1, 2022. (R&TC, § 19132.5(f).)

HOLDING

Appellants have not established reasonable cause to abate the mandatory e-pay penalty for the 2021 tax year.

DISPOSITION

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

DocuSigned by:
Eddy Y. H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

We concur:
DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

DocuSigned by:
Josh Aldrich
48745BB806914B4...

Josh Aldrich
Administrative Law Judge

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