

3. On October 21, 2021, FTB issued a refund of \$44,783,205 directly to appellant's bank account.
4. On December 15, 2021, appellant determined he wanted \$22,000,000 of the refund from the 2020 tax year applied to the 2021 tax year. Appellant's CPA initiated contact with FTB to determine whether appellant could return a portion of the refund and have it credited to appellant's 2021 account retroactively as of April 15, 2021.
5. Appellant sent FTB a check for \$22,000,000 with a letter dated December 21, 2021, explaining that due to the uncertainty with the pass-through elective tax (PTET) credit, he would like to adjust his application of the 2020 tax year overpayment and have it applied to the 2021 tax year.
6. On December 27, 2021, FTB posted the payment as an estimated payment for the 2021 tax year, with an effective date of December 27, 2021. FTB also imposed the mandatory e-pay penalty.
7. Appellant requested a waiver of the e-pay penalty based on reasonable cause, claiming that based on his CPA's general discussions with FTB agents, he could send a check to return a portion of his 2020 refund without incurring the e-pay penalty.
8. FTB issued to appellant a Penalty Waiver Denial to deny appellant's request to waive the e-pay penalty.
9. Appellant submitted a claim for refund of the e-pay penalty based on reasonable cause.
10. FTB denied appellant's claim for refund.
11. This timely appeal followed.

DISCUSSION

R&TC section 19011.5(a) requires individual taxpayers to remit payments electronically if they make an estimated tax payment or an extension payment in excess of \$20,000 on or after January 1, 2009, or if they file an original tax return with a tax liability over \$80,000, for any tax year on or after January 1, 2009. An individual who becomes subject to the e-pay requirement must continue to make all future payments electronically, unless the taxpayer meets the requirements of R&TC section 19011.5(b) and makes an election to discontinue e-

pay,¹ or the taxpayer requests and receives a written waiver of the e-pay requirement pursuant to R&TC section 19011.5(d).²

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 requirement to pay electronically, unless the taxpayer shows the failure to make an electronic payment was the result of reasonable cause and not willful neglect. Although R&TC section 19011.5 does not specify what circumstances will establish “reasonable cause” or a lack of “willful neglect,” the same terms are used to describe the bases for relief of other penalties (e.g., the late filing and late payment penalties of R&TC sections 19131 and 19132, respectively) and it is appropriate to look to cases that discuss those penalties for guidance. (*Appeal of Porreca*, 2018-OTA-095P.) In order to demonstrate reasonable cause in the context of late filing penalties, the taxpayer must show the failure to file timely returns occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) Ignorance of the law is not reasonable cause for failure to comply with statutory requirements. (*Ibid.*)

The taxpayer bears the burden of proving reasonable cause to excuse the penalty. (*Appeal of Porreca*, *supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18 § 30219(b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.) In other words, the preponderance of the evidence standard means more than 50 percent. (*Ibid.*) Taxpayers must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalty will not be abated. (*Ibid.*)

Here, appellant did not file an election under R&TC section 19011.5(b), and there was no waiver under R&TC section 19011.5(d) for the payment posted on December 27, 2021. However, appellant argues that his failure to comply with the e-pay requirement was due to reasonable cause and not willful neglect. Appellant asserts that his CPA contacted FTB for

¹ A taxpayer required to make e-payments pursuant to this section may elect to discontinue making payments electronically where the threshold requirements set forth in R&TC section 19011.5(a) were not met for the preceding tax year. The election shall be made in the form and manner prescribed by FTB. (R&TC, § 19011.5(b).)

² Any taxpayer required to make e-payments pursuant to this section may request waiver of those requirements from FTB. FTB may grant a waiver only if it determines that the particular amounts paid in excess of the threshold amounts established in this section were not representative of the taxpayer’s tax liability. If FTB grants a waiver to a taxpayer, the waiver shall be in writing, and subsequent electronic remittances shall be required only on those terms set forth in the written waiver. (R&TC, § 19011.5(d).)

guidance and appellant relied on his CPA's advice when he sent a check as a partial return of his refund. Appellant argues that FTB has an unofficial procedure wherein a taxpayer that is not subject to mandatory e-pay may return a refund check and have it applied as an estimated tax payment for the subsequent tax year; therefore, appellant's CPA contacted FTB to determine how appellant should remit a portion of the refund that was direct deposited. Appellant provides his CPA's call logs indicating that FTB was contacted twice on December 15, 2021, and once on December 17, 2021, and the CPA was instructed to send a check with a letter explaining how to apply the payment. Appellant also provides call logs dated January 25, 2022, and March 3, 2022, wherein FTB purportedly agreed the imposition of the e-pay penalty was unreasonable, agreed to remove the penalty due to reasonable cause or first-time abatement,³ and then confirmed the request for abatement was approved.

At the oral hearing, appellant provided witness testimony from J. Hill, CPA. J. Hill testified that on December 15, 2021, he called FTB three times requesting guidance on how to return a portion of the 2020 refund and have it applied to the 2021 tax year as of April 15, 2021, and avoid penalties. J. Hill provided further testimony that he called FTB again on December 17, 2021, specifically to confirm that appellant would not be subject to the e-pay penalty if he mailed a check and included a letter of explanation.

FTB contends that it does not have a procedure to allow a refund that was already issued to be returned as an estimated tax payment for the subsequent year. FTB provides a call log dated December 15, 2021, indicating that J. Hill called and was informed that the refund could not be adjusted since it was already issued to appellant. FTB also provides a call log dated January 24, 2022, indicating J. Hill called FTB and stated appellant mailed the check based on advice received from FTB and requested the e-pay penalty be removed. FTB informed J. Hill that the prior call log does not indicate that appellant was advised to mail a check. FTB provided instructions on how to request a waiver of the penalty. FTB provides a final call log dated March 29, 2022, wherein FTB confirmed the penalty waiver was denied.

OTA construes appellant's assertions as constituting an argument that reasonable cause exists because he exercised ordinary business care and prudence in relying on advice from FTB. As explained above, appellant has the burden of proving reasonable cause to excuse the penalty. (*Appeal of Porreca, supra.*) Here, appellant and FTB provide records purporting to document their conversations that are in direct conflict with one another. Appellant provides

³ While R&TC section 19132.5 authorizes a one-time abatement of a timeliness penalty for individual filers effective for tax years beginning on or after January 1, 2022, California does not have a similar statutory provision that allows for a one-time abatement of the e-pay penalty.

testimony that FTB provided instructions on how to return a portion of his refund that was already issued and FTB points out that it does not have such a procedure. In light of the conflicting evidence, OTA finds that appellant has not met his burden of establishing that the circumstances he asserts are more likely than not to be correct. Furthermore, OTA notes that even if appellant's account of the telephone discussions were accepted as true, a taxing agency is generally not bound by informal opinions expressed by its employees. (See *Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544.) Appellant has not shown by a preponderance of the evidence that reasonable cause exists to excuse the e-pay penalty.

To the extent that appellant also asserts he relied on advice from his representative, he must show he relied on his tax professional for substantive tax advice, and his reliance on his tax professional cannot be a substitute for compliance with an unambiguous statute. (See *U.S. v. Boyle* (1985) 469 U.S. 241 [noting it requires no special training or effort to ascertain a deadline and make sure that it is met].) Here, appellant had a personal, nondelegable obligation to ensure that his payment complied with the unambiguous requirements of R&TC section 19011.5. R&TC section 19011.5 clearly states that taxpayers who are required to electronically remit payments must continue to do so, unless an exception to the e-pay requirement is met. Appellant does not contend that he met the requirements of an exception and filed an election under R&TC section 19011.5(b), or that he received a waiver under R&TC section 19011.5(d).⁴ Appellant has not shown reasonable cause for abatement of the e-pay penalty.

⁴ Additionally, to the extent appellant infers that FTB granted a waiver by allegedly informing appellant that a check would be accepted, this is not persuasive. R&TC section 19011.5(d) provides that if FTB grants a waiver, it must be in writing. There is no evidence of a written waiver in the record.

HOLDING

Appellant has not established reasonable cause to abate the e-pay penalty.

DISPOSITION

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

DocuSigned by:
Erica Parker
6651E0AAC34B4F6...
Erica Parker
Hearing Officer

We concur:
DocuSigned by:
Amanda Vassigh
7B17E958B7C14AC...
Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge

Date Issued: 10/30/2025