OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **THOMAS M. CARL AND SHELLEY CARL**	OTA Case No. 18010826 Date Issued: February 26, 2018

OPINION

Representing the Parties:

For Appellants: Shari D. Nemirow, CPA

For Respondent: Maria Brosterhous, Tax Counsel III

For Office of Tax Appeals: Josh Lambert, Tax Counsel

ROBINSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,[1] Thomas M. Carl and Shelley Carl (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants' claim for refund in the amount of $3,213.60 for the 2015 tax year.

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

ISSUES

1. Have appellants established that their late payment of tax for 2015 was due to reasonable cause and not due to willful neglect?
2. Have appellants shown that the underpayment of estimated tax penalty for 2015 should be abated?

[1] Unless otherwise indicated, all "Section" references are to sections of the California Revenue and Taxation Code.

FACTUAL FINDINGS

1. Appellants filed a 2015 California Resident Income Tax Return (Form 540) on October 1, 2016.
2. On the return, Appellants reported a taxable income of $617,788, a total tax of $52,170, estimated tax payments of $12,000, and a tax due of $40,170.
3. Appellants remitted a payment of $40,170 on their 2015 tax liability on October 3, 2016.
4. Respondent issued a Notice of Tax Return Change on October 24, 2016, imposing a late payment penalty of $3,213.60 and an estimated tax penalty of $126.30, plus interest.
5. Appellants paid the amount due and filed a claim for refund.
6. Respondent denied appellants' claim for refund on December 12, 2016.
7. Appellants filed a timely appeal on March 8, 2017, claiming that they received a Schedule K-1, which was not available to them until September of 2016, showing unexpected income due to a failed Internal Revenue Code section 1031 tax-free exchange.
8. The Internal Revenue Service (IRS) imposed a federal late payment penalty for the 2015 tax year against appellants, but later abated that penalty.[2] The grounds for the IRS abatement are unclear from the record.

DISCUSSION

1. Have appellants established that their late payment of tax for 2015 was due to reasonable cause and not due to willful neglect?

It is well-settled that once respondent shows that its assessment was reasonable and rational, its determination is presumed to be correct,[3] and a taxpayer has the burden of proving error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) California Code of Regulations, title 18, section 30705, subdivision (c) states that unless there is an exception provided by law, "the burden of proof requires proof by a

[2] The reimbursement of the late payment penalty was documented in an IRS notice dated February 13, 2017, that taxpayer provided as an attachment to its appeal.

[3] Appellant has not contested respondent's calculation of the penalties and interest.

preponderance of the evidence."[4] Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Section 19132, subdivision (a)(1)(A), imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for payment of that tax. Generally, the date prescribed for payment of the tax is the due date of the return, without regard to extensions of time for filing. (Rev. & Tax. Code, § 19001.) The late payment penalty does not apply when the failure to pay is due to reasonable cause and not due to willful neglect. The taxpayer bears the burden of proving reasonable cause, which means that the taxpayer must show that his/her failure to pay the tax in a timely manner occurred despite the exercise of ordinary business care and prudence. (*Appeal of M. B. and G. M. Scott*, 82-SBE-249, Oct. 14, 1982.) An inability to determine income with exactitude does not negate the requirement that taxpayers make payments of tax based upon a reasonably accurate estimate of their tax liability. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) Further, complexity and problems in accumulating the necessary information and/or documents to complete a return is not reasonable cause for failing to pay the tax that is due. (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985.)

Appellants contend they have demonstrated reasonable cause for their late payment of tax. Appellants have shown that they were members in a partnership that sold property during 2015. Appellants believed the property sale qualified for tax-free exchange treatment pursuant to the U.S. Internal Revenue Code (IRC) section 1031, up until the time they received the Schedule K-1 in September of 2016 from the partnership that sold the property. Appellants filed their 2015 tax return on October 1, 2016, paying the full amount of tax due including tax on the income derived from the failed tax-free exchange. Appellants state that they have timely filed and paid taxes in past years, a fact that the FTB does not contest.

However, appellants have not submitted evidence documenting their attempts, if any, to acquire information from the partnership or other sources prior to April 15, 2016 (the due date for paying their taxes) concerning the amount of taxable income they had earned from the

[4] A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

partnership during 2015 and whether the partnership's 2015 property sale had qualified as a tax-free exchange. Appellants also have not shown that, if they had made reasonable inquiries, they still would have been unable to obtain information that would have allowed them to accurately estimate their 2015 income and pay their resulting California tax liability by the due date. Thus, appellants have not met their burden of proving there was reasonable cause for their failure to accurately estimate and timely pay the taxes due.[5]

Appellants have a history of timely tax filings and payments and note that the IRS abated the federal late payment penalty that it initially had imposed against them. However, the grounds upon which the IRS abated the federal late-filing penalty is unclear and it seems reasonable to conclude that the IRS abatement was made pursuant to an IRS program called First Time Abate, under which the IRS may abate penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the past three years.[6] Neither the California Legislature nor the FTB have adopted a comparable penalty abatement program, so the IRS penalty abatement and appellants' history of timely filing and paying California taxes cannot be used as a basis for abatement of the late payment penalty at issue here. Instead, appellants must establish that their failure to timely pay their 2015 taxes was due to reasonable cause not due to willful neglect, which they have failed to do.

2. Have appellants shown that the underpayment of estimated tax penalty for 2015 should be abated?

With respect to the estimated tax penalty imposed against appellants, Section 19136, subdivision (a), incorporates by reference IRC section 6654, except as otherwise provided. IRC section 6654(a) imposes a penalty for the underpayment of estimated tax where an individual taxpayer's installment payments are less than the amounts due at the end of the installment periods. This penalty is equal to the adjusted annual interest due on late payments. There is no general reasonable cause exception for the underpayment of the estimated tax penalty. Instead, IRC section 6654(e)(3)(a) provides a limited exception to the imposition of the penalty if, by

[5] As we find appellants have not shown "reasonable cause," we will not address the separate issue of whether the late filing of appellants' return was "not due to willful neglect." (See *Russell v. Commissioner,* T.C. Memo. 2011-81.)

[6] See Internal Revenue Manual Penalty Handbook section 20.1.1.3.6.1.

reason of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience.[7] Appellants have not provided any evidence of casualty, disaster, or other unusual circumstances affecting their ability to pay estimated tax payments, as would support a finding that the limited exceptions of IRC section 6654(e)(3) apply to this appeal. Accordingly, appellants have not demonstrated that they are entitled to an abatement of the estimated tax penalty.

HOLDINGS

1. Appellants have not established that their failure to timely pay their tax liability for their 2015 tax year was due to reasonable cause.
2. Appellants have not established that the underpayment of estimated tax penalty for their 2015 tax year should be abated.

DISPOSITION

Respondent's action in denying appellants' claim for refund is sustained in full.

Neil Robinson
Administrative Law Judge

We concur:

Teresa Stanley
Administrative Law Judge

Jeffrey I. Margolis
Administrative Law Judge

[7] IRC section 6654(e)(3) also provides for the abatement of the penalty if the late payment was due to reasonable cause, but only for individuals who retired after attaining the age of 62 in the taxable year or who became disabled in the taxable year. Neither of these conditions are shown to be present here.