

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

MARGARET ELIZABETH CROWELL

) OTA Case No. 18011044

) Date Issued: March 6, 2018

OPINION

Representing the Parties:

For Appellant:

Lynn G. Wubbels, CPA

For Respondent:

Marguerite Mosnier, Tax Counsel IV

Raymond Rouse, Tax Counsel III

Brad Coutinho, Tax Counsel

For Office of Tax Appeals:

William J. Stafford, Tax Counsel III

HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section (Section) 19324,¹ Margaret Elizabeth Crowell (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant's claim for refund in the amount of \$89,953.75² for the 2012 tax year.

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

² This amount represents a late-filing penalty imposed under Section 19131. Appellant is seeking a refund of the late-filing penalty of \$89,953.75, plus applicable interest. Although the FTB also imposed a collection cost recovery fee of \$170.00, the collection cost recovery fee has not been argued by appellant as an issue in this appeal. We also note that once a collection cost recovery fee is properly imposed, nothing in the California Revenue and Taxation Code would permit abatement of the fee under any circumstances, including a showing of reasonable cause. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Pursuant to the Office of Tax Appeals Rules for Tax Appeals, precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion as part of a written opinion that the panel issues pursuant to this section. (California Code of Regulations, title 18, § 30501, subd. (d)(3).) The BOE's precedential decisions may be accessed at <http://www.boe.ca.gov/legal/legalopcont.htm>.

Administrative Law Judges Neil Robinson, John O. Johnson and Sara A. Hosey heard this matter in Sacramento, California, on January 22, 2018. The record was closed and the case was submitted for decision the same date.

ISSUE

Did appellant establish that the late filing of her California income tax return for the 2012 tax year was due to reasonable cause and not due to willful neglect?

FACTUAL FINDINGS

1. Appellant's California income tax return for the 2012 tax year had an original due date of April 15, 2013.³
2. Appellant made a \$500.00 estimated tax payment on January 8, 2013. In addition, appellant made a late payment of \$243,055.00 on April 19, 2013, after the payment deadline of April 15, 2013.
3. Appellant's tax preparer, Mr. Fjelstad, an attorney and a certified public accountant (hereinafter CPA), attempted to electronically file ("e-file") appellant's federal, Oregon, and California income tax returns for the 2012 tax year on October 15, 2013. Numerous attempts were made to submit appellant's California return that evening.
4. When the CPA returned to his office the next morning on October 16, 2013, he discovered that only appellant's federal and Oregon returns had successfully been filed and that appellant's California return had been rejected by the e-filing service, Intuit's ProSeries software.
5. Within one or two days of the CPA discovering the rejection of the attempted filing of the California return, he and appellant discussed the need to file a 2012 California paper return, but they did not attempt to refile appellant's return (electronically or in paper form) at that time.
6. Appellant filed her 2012 California return late on December 31, 2013.

³ Under Section 18567 and California Code of Regulations, title 18, § 18567, subd. (a), individuals, fiduciaries and partnerships are allowed an automatic six-month extension of time in which to file a return if the return is filed within six months of the original due date. However, "[i]f the return is not filed within six months of the original due date, no extension is allowed." (Cal.Code Regs., tit. 18, § 18567, subd. a.)

7. Appellant's return reported California taxable income of \$2,881,288.00. Appellant's return listed the late payment of \$243,055.00 and set forth an amount due of \$117,260.00. Appellant's return did not set forth the estimated tax payment of \$500.00 that appellant had submitted on January 8, 2013. The FTB received appellant's payment of \$117,260.00 on December 24, 2013.
8. After receiving appellant's California return, the FTB imposed a late-filing penalty of \$89,953.75 and later instituted a collection action, imposing a collection cost recovery fee of \$170.00.⁴
9. Appellant subsequently paid all of the amounts stated (i.e., late-filing penalty, collection cost recovery fee, and applicable interest) and filed a timely claim for refund. The FTB denied appellant's claim for refund on the basis that appellant had not shown that the late filing of her 2012 California return was due to reasonable cause and not due to willful neglect.
10. Appellant filed this timely appeal on February 12, 2017.

DISCUSSION

Taxpayers have a personal, non-delegable obligation to file their income tax return by the due date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985.) California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131 (emphasis added).) The penalty is computed at five (5) percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (Rev. & Tax. Code, § 19131, subd. (a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely paid tax amounts, and any credits against the tax which may be claimed on the return. (Rev. & Tax. Code, § 19131, subd. (c) (emphasis added).) Any payments made after the tax return filing due date do not reduce the penalty. (*Appeal of Mary Kay Cosmetics, Inc.*, 81-SBE-042, May 19, 1981.)

When the FTB imposes a late-filing penalty, it is presumed that the penalty was imposed correctly, and the burden of proof is on the taxpayer to show that reasonable cause for the late

⁴ The FTB did not impose a late payment penalty under Section 19132 because subdivision (b) of that section provides that a late payment penalty will not be imposed if there is an equal or greater penalty imposed under Section 19131 (i.e., the late-filing penalty provision).

filing of the tax return exists. (*Appeal of David A. and Barbara L. Beadling*, 77-SBE-021, Feb. 3, 1977; see generally *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) 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.)

To establish reasonable cause, the taxpayer must show "the exercise of ordinary business care and prudence, or such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Loew's San Francisco Hotel Corp*, 73-SBE-050, Sept. 17, 1973.) Willful neglect is defined as a conscious, intentional failure or reckless indifference to the filing requirement. (*United States v. Boyle* (1985) 469 U.S. 241, 245-246.) In general, ignorance of the law is not an excuse for failing to timely file a tax return. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967.) Nor does a taxpayer's reliance upon a professional to file a timely return constitute reasonable cause. (*United States v. Boyle*, *supra*, at pp. 251-252.)

In this case, it is undisputed that appellant failed to file her 2012 California income tax return on or before the due date. Appellant's CPA attempted to e-file the return through Intuit's ProSeries software late at night on October 15, 2013, and discovered the next day that his attempts had failed. Within one or two days, appellant's CPA informed her about the unsuccessful attempt, and she chose not to file until December 31, 2013, two and a half months later, because of pending litigation regarding the potential investment loss of \$830,000.00.⁵ Appellant lacked ordinary business care and prudence when she (and her CPA) chose not to file the return immediately when they discovered that the return had not been successfully e-filed on October 15, 2013, and instead waited until December 31, 2013 to file appellant's return.

Furthermore, appellant's argument that the late filing of her return was because of difficulties in determining whether she was entitled to an investment loss is not sufficient to show reasonable cause. Taxpayers have a personal, non-delegable obligation to file their income tax return by the due date and the fact that tax information is lacking, inaccurate or difficult to obtain is insufficient to meet the taxpayer's burden establishing reasonable cause. (*Appeal of Thomas K. and Gail G. Boehme*, *supra*; *Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) In addition, complexity of the tax law which leads to a delay in computing tax

⁵ Appellant has not explained how the outcome of the pending litigation in 2013 could retroactively affect the amount of her 2012 California tax liability.

liability is not reasonable cause. (*Appeal of Roger W. Sleigh, supra.*) Appellant should have known that it could take substantial time to prepare her return when considering her taxable income of \$2,881,288.00, filing obligations in three jurisdictions, and potential investment loss of \$830,000.00. Under these circumstances, she should have appreciated the magnitude of the consequences of not filing her return timely. Yet, appellant did not take appropriate measures to ensure that her return was timely filed. Appellant did not take the actions of an ordinarily intelligent and prudent businessperson under these circumstances.

Moreover, a taxpayer's reliance upon a professional to file a timely return does not constitute reasonable cause. (*United States v. Boyle, supra.*) While reliance upon the advice of a tax professional on a matter of law, such as whether a tax liability exists or a return is required to be filed, can constitute reasonable cause (see *Rohrbaugh v. United States* (7th Cir. 1979) 611 F.2d 211, discussed in *United States v. Boyle, supra*, 469 U.S. at pp. 244, 247-252), that is not the situation here. Appellant's CPA acknowledged that appellant need not have waited until the pending litigation was concluded in December 2013 to file her 2012 return; she could have filed her return earlier and then filed an amended return depending upon the outcome of the allegedly related litigation.

While appellant contends that *Appeal of Dorothy Chandler*, 79-SBE-087, May 9, 1979, is supportive of her case, we disagree. In that appeal, the Board of Equalization abated a late-filing penalty, reasoning as follows:

[W]e were impressed at the oral hearing with appellant's firm conviction that she paid her 1972 tax liability. While we recognize that the record herein does not support that belief, appellant's account of her circumstances combined with other factors made apparent at the hearing, has convinced us that the failure to file was due to reasonable cause and not willful neglect.

There are no comparable circumstances or supporting testimony in the case before us.

Next, as to calculation of the late-filing penalty, we note that the late-filing penalty is computed at five (5) percent of the tax due, after allowing for *timely* payments, for every month elapsing from the due date of the return (without regard to any extension) to the filing date, up to a maximum of 25 percent. (Rev. & Tax. Code, § 19131.) In other words, the late-filing penalty is computed based upon any portion of tax that remains unpaid as of the filing date (without regard to any extension), which for most individuals is April 15th of each year unless

that date falls on a weekend or holiday. (*Ibid.*) Appellant submitted a large late payment of \$243,055.00 on April 19, 2013, which is significant because the late-filing penalty at issue was calculated on the basis of the amount of tax that remained unpaid as of April 15, 2013, regardless of the large amount paid shortly thereafter.⁶ However, the calculation of the late-filing penalty is set by statute, and the statutory language is clear and unambiguous. Furthermore, the statutory method for calculating the penalty does not permit variance based upon a showing reasonable cause or undue hardship. In appellant's case, this has the unfortunate result of the penalty being computed based upon the amount of the deficiency as of the due date of the return, without taking into account the large payment appellant made towards that deficiency just a few days after the return due date. However, the language of section 19131 compels this result, and the Board of Equalization, in a precedential opinion, previously addressed this issue and ruled that payments made after the tax return due date are not taken into account in computing the amount of the late-filing penalty. (*Appeal of Mary Kay Cosmetics, Inc., supra.*) We are not inclined to overrule that precedent. Moreover, at the hearing, appellant agreed that the calculation of the penalty itself was not at issue.

In conclusion, we find that appellant has not shown reasonable cause for late filing her 2012 California return, and that she failed to exercise ordinary business care and prudence under the circumstances. We also find that the late-filing penalty of \$89,953.75 was properly calculated (i.e., $\$89,953.75 = \$359,815.00$ [unpaid tax as of April 15, 2013] x 25%). As we find appellant has not shown "reasonable cause," we will not address the separate issue of whether the late filing of appellant's return was "not due to willful neglect." (See *Russell v. Commissioner*, T.C. Memo. 2011-81 [finding that if taxpayer did not provide she had reasonable cause for filing late that the court need not consider whether taxpayer acted with willful neglect].)

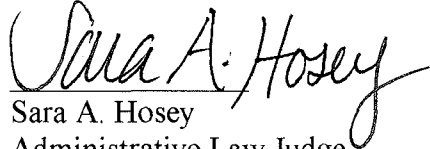
HOLDING

Appellant failed to establish reasonable cause for the late filing of the 2012 California income tax return.

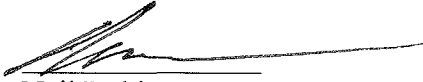
⁶ Appellant explained that the payment of \$243,055.00 was submitted late on April 19, 2013, because she needed time to transfer funds from her brokerage account to her bank account.

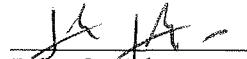
DISPOSITION

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


Sara A. Hosey
Administrative Law Judge

We concur:


Neil Robinson
Administrative Law Judge


John O. Johnson
Administrative Law Judge