

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010798
)
TAO XIE) Date Issued: July 23, 2018
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)
_____)

OPINION

Representing the Parties:

For Appellant: Kenneth Curry, TAAP¹

For Respondent: Eric A. Yadao, Tax Counsel III

J. JOHNSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,² Tao Xie (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in imposing a late-filing penalty in the amount of \$2,592.75 for the 2014 tax year.

Administrative Law Judges John O. Johnson, Tommy Leung, and Jeffrey G. Angeja held an oral hearing for this matter in Sacramento, California, on May 30th, 2018. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Has appellant shown that the late-filing of his 2014 tax return was due to reasonable cause and not willful neglect?

FACTUAL FINDINGS

1. Appellant’s 2014 California tax return was due on April 15, 2015.
2. Appellant filed his 2014 return on January 7, 2016. Appellant’s return reflected a total tax of \$83,062, and a balance due of \$10,371.

¹ Appellant filed his Appeal Letter himself, and subsequent representation was provided by the Tax Appeals Assistance Program (TAAP).

² All further statutory references are to “Sections” of the Revenue and Taxation Code unless otherwise stated.

3. On or about the same date, appellant filed amended returns for his 2012 and 2013 tax years.³ The amended returns state that they were being filed to remove depreciation expenses, and, as a result, “Form 4562 [Depreciation and Amortization] was removed,” and “Form 8582 [Passive Activity Loss Limitations] was modified.”
4. On June 27, 2016, respondent issued a Notice of Tax Return Change to appellant, notifying him of a \$2,592.75 late-filing penalty for the 2014 tax year.
5. Appellant paid the penalty, plus interest, on July 11, 2016.⁴
6. Appellant filed a claim for refund of the penalty amount on December 1, 2016, asserting that his 2014 tax return preparation was complicated by his move to California during the year and the need to correct errors on previous years’ returns.
7. Respondent denied appellant’s claim for refund, and appellant filed this timely appeal.

DISCUSSION

Issue – Has appellant shown that the late-filing of his 2014 tax return was due to reasonable cause and not willful neglect?

When the FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)⁵ The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of David A. and Barbara L. Beadling*, 77-SBE-021, Feb. 3, 1977.) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

Section 19131 imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to

³ Although the exact date that these amended returns were filed was not established, the evidence suggests that they were filed simultaneously with appellant’s 2014 return.

⁴ Respondent issued an erroneous notice on July 18, 2016, requesting payment of an additional \$10,552.69, which appellant paid on August 2, 2016, and, after a phone call between the parties on October 12, 2016, this payment was promptly refunded to appellant.

⁵ Pursuant to the emergency regulations of the Office of Tax Appeals, California Code of Regulations, title 18, section 30501(d)(3), precedential opinions of the 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. BOE opinions are generally available for viewing on the BOE’s website: www.boe.ca.gov/legal/legalopcont.htm.

reasonable cause and not willful neglect. The late-filing penalty is calculated at 5 percent of the tax for each month or fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax.

Here, appellant filed his 2014 tax return on January 7, 2016, nearly 21 months after the due date for the return. The only question before us is whether appellant had reasonable cause for the late filing of his return so that the penalty may be abated. Appellant makes assertions as to why he has reasonable cause for the late filing of his return. Primarily, he asserts that he needed to file amended returns for the two previous years before filing his 2014 return. Appellant also asserts that he had a good filing history in California prior to the 2014 tax year, and that he had received refunds in the past and it was reasonable to assume he would in 2014 as well.⁶

Need to File Amended Returns for Previous Years

Appellant contends that he discovered a need to file amended returns for his 2012 and 2013 tax years while preparing to file his 2014 tax return before its due date.⁷ Appellant states that he decided at that point to not file his 2014 tax return by the due date, and instead to wait until he had prepared his amended returns for 2012 and 2013 before filing his 2014 tax return. Appellant supports this decision by asserting that if he had filed by the due date, prior to preparing the prior years' amended returns, he might be filing based on incorrect numbers and be subject to penalties. This also might increase the number of amended returns he would need to file.

Taxpayers have an obligation to file timely returns with the best available information, and to then subsequently file an amended return, if necessary. (*Mileham v. Commissioner*, T.C. Memo. 2017-168 (*Mileham*)). Difficulty in obtaining information does not constitute reasonable cause for the late filing of a return. (*Estate of Vriniotis v. Commissioner* (1982) 79 T.C. 298, 311 (*Vriniotis*); see also *Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Avco*

⁶ Appellant also asserted in his claim for refund and in his original appeal letter that the preparation of his return was complicated by a move to California in 2014; however, appellant does not explain exactly how the move complicated his return preparation process, and it is well settled that a general difficulty in making computations or determining taxable income with exactitude does not constitute reasonable cause for filing late. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979.)

⁷ At the hearing, appellant could not recall whether he made this discovery before or after April 15, 2015, but believed it was prior to the extended due date of October 15, 2015.

Financial Services, Inc., 79-SBE-084, May 9, 1979.) Therefore, contrary to appellant’s decision to choose to file a late return once additional information potentially became available, the law dictates that the appropriate path is to file a timely return and amend it later, if needed. “To hold otherwise would be to make the [late-filing penalty]⁸ optional for any taxpayer who claims to have delayed filing based on attorney advice that the return must be true, correct and complete.” (*Estate of Campbell v. Commissioner*, T.C. Memo. 1991-615.)

Appellant’s assertion that he made the reasonable choice in filing late because penalties could have applied if he had filed a timely return based on the information available at the time is not persuasive. It is unclear exactly what penalties appellant feared he might incur by filing timely, but the hypothetical possibility of a penalty became a certainty when appellant chose to not file timely, as seen by the late-filing penalty imposed by respondent. Furthermore, testimony and the evidence show that the changes made by the 2012 and 2013 amended returns had no effect on the net tax due for 2014, and therefore filing timely with the information available at the filing deadline would not have exposed appellant to any greater penalty liability.⁹ However, as appellant’s representative noted at the hearing, even though hindsight shows that appellant “perhaps had the right information and could have filed timely, that doesn’t mean at the time that he had to make that decision he knew that.” Thankfully, the law eliminates this uncertainty for taxpayers at the filing deadline by making it clear that the appropriate action is to file a timely return with the information available at the time, and then file an amended return later if necessary. (See, e.g., *Mileham*, T.C. Memo. 2017-168; *Vriniotis, supra*, 79 T.C. 298.)

Appellant contends that waiting to file his 2014 return helped to stop the cycle of amended returns. Appellant’s preference to not have to file an amended return for 2014 does not constitute reasonable cause for failing to timely file.

Accordingly, appellant’s decision to not file timely with the information available as of the filing due date, and to instead wait until after he completed amended returns for prior tax years, does not constitute reasonable cause for the failure to timely file.

⁸The Tax Court in this decision referenced Internal Revenue Code 6651(a), which is the federal corollary to California’s late-filing penalty statute, Section 19131.

⁹The record shows that appellant’s amended returns adjusted depreciation claimed and passive loss carryforwards. From testimony at the hearing, it appears that appellant’s 2014 tax account already contained sufficient passive losses to offset passive gains prior to the amending of the 2012 and 2013 returns, and therefore the carryforward adjustments did not affect the net tax liability for 2014.

Relevance of Appellant's Filing History

Appellant refers to his filing and payment history as support for a finding of reasonable cause for his failure to file timely. Even assuming that appellant had a clean history of timely filing and payments prior to 2014 (which appears to be the case), appellant's filing and payment history do not support a finding of reasonable cause here. First, we note that, unlike the Internal Revenue Service (IRS), California has not enacted legislation or otherwise instituted a means for abating late-filing penalties based solely on prior good filing history. Instead, the law provides that the California late-filing penalty shall apply unless reasonable cause is shown. (Rev. & Tax Code, § 19131, subd. (a).)

While a good filing and payment history, both with California and the IRS, might lend credibility to assertions that an attempt to file timely was made in some circumstances, the facts here show that there definitively was no attempt to timely file. Instead, appellant admits that he made a judgment call and chose not to attempt a timely filing. A good filing history has no relevance on reasonable cause in instances where a taxpayer knows he or she has a filing obligation and has the option to file timely, but instead chooses to wait and file late.¹⁰

Appellant also asserts that the penalty should be abated because he received refunds in years prior and received a refund from the IRS for the year at issue. However, a belief that no tax will be due generally does not constitute reasonable cause sufficient to abate a penalty. (*Vriniotis, supra*, 79 T.C. 298; *Appeal of Sal J. Cardinalli*, 81-SBE-018, Mar. 2, 1981.) If appellant did not have an outstanding 2014 tax liability as of April 15, 2015, he may have escaped the late-filing penalty for 2014, based purely on how it is calculated, but his supposition that he would not have an outstanding liability (and therefore no penalty) constitutes a gamble rather than reasonable cause.

Accordingly, appellant's filing and payment history does not constitute reasonable cause for the failure to timely file because he made the decision to file late, despite knowing of his filing obligation and the due date within which to file.

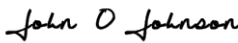
¹⁰ Appellant refers to the Internal Revenue Manual (IRM), published by the IRS, as support for his contention that a good filing history bears relevance to the issue of reasonable cause. However, "it is a well-settled principle that the IRM does not have the force of law, is not binding on the [IRS], and confers no rights on taxpayers." (*Mileham*, T.C. Memo. 2017-168, at p. 37, fn. 34.) Likewise, we find that the analysis provided by the IRM is not controlling, and does not persuade us that appellant's filing and payment history support a finding of reasonable cause for his failure to file timely under the facts before us.

HOLDING

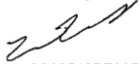
Appellant has not shown reasonable cause for the late filing of his 2014 tax return.


DISPOSITION

Respondent's action in denying appellant's claim for refund for the 2014 tax year is sustained.

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John O. Johnson
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge