

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011379
)
DENVER T. BISHOP JR.) Date Issued: April 2, 2018
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)
_____)

OPINION

Representing the Parties:

For Appellant: Denver T. Bishop Jr.
For Respondent: Eric R. Brown, Tax Counsel III

HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Denver T. Bishop Jr. (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$373.66² for the 2015 tax year.

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

ISSUES

1. Did appellant establish that his failure to timely file a tax return for the 2015 tax year was due to reasonable cause and not due to willful neglect?
2. Did appellant establish that FTB’s imposition of a penalty for the underpayment of estimated tax penalty was improper?

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code. Section 19324 states that taxpayers have 90 days to appeal FTB’s action upon a taxpayer’s protest to the board (Board of Equalization). Section 20(b) provides that for appeals transferred to the Office of Tax Appeals on or after January 1, 2018: “Unless the context requires otherwise, as used in this code or any other code, ‘board,’ with respect to an appeal, means the Office of Tax Appeals.”

² The claim is for refund of a \$355.00 late-filing penalty and an \$18.66 underpayment of estimated tax penalty.

FACTUAL FINDINGS

1. Appellant's California income tax return for the 2015 tax year had an original due date of April 15, 2016.³
2. Appellant failed to timely file his 2015 California return by the due date. It was not filed until December 5, 2016.
3. On his 2015 California return, appellant reported taxable income of \$86,740 and total tax liability of \$5,431. After accounting for \$4,011 in withholding credits, appellant reported tax due of \$1,420 and an underpayment of estimated tax penalty of \$19.00. Appellant's Schedule C, Profit of Loss from Business, lists appellant's profession as tax preparer at Bishop Tax Service in Alameda, California.
4. Appellant made a \$1,400 payment upon his 2015 liability on December 5, 2016.
5. FTB issued a Notice of State Income Tax Due to appellant showing a balance of \$428.33. The notice showed the combined penalty amount of \$373.66 and indicated the penalties were for appellant's failure to file the return by the due date and his underpayment of estimated tax.
6. On January 6, 2017, appellant made a payment of \$428.33 and submitted a claim for refund requesting abatement of the delinquent return penalty based on reasonable cause.
7. On February 14, 2017, FTB denied appellant's claim for refund. Appellant submitted this timely appeal on April 25, 2017.

DISCUSSION

Issue 1 - Did appellant establish that his failure to timely file a tax return for the 2015 tax year was due to reasonable cause and not due to willful neglect?

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 was due to reasonable cause and not due to willful neglect. (§ 19131.)

³ Under Section 18567 and California Code of Regulations, title 18, § 18567(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(a).)

The penalty is computed at five 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. (§ 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely tax payments and any credits against the tax which may be claimed on the return. (§ 19131(c).)

When 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 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.)

As a general matter, in order for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

Here, respondent properly assessed a late-filing penalty because appellant filed his 2015 tax return almost eight (8) months late. Appellant states that he sent in the return before October 15, 2016, but that there was a problem with the software company that he did not find out about until he called the FTB to pay, as he knew he had a balance due. However, appellant has failed to substantiate these statements or provide any documentation as to the efforts or attempts made to ensure the return was properly filed with the FTB. Based on his statements, appellant knew he had a balance due but did not attempt to make a payment until December 5, 2016, well after the April 15, 2016 due date. Furthermore, we do not find appellant's argument that he was unfamiliar with e-filing credible, as his return states he is a tax preparer at his own tax preparation business. Appellant did not take the actions of an ordinarily intelligent and prudent business person under these circumstances.

Additionally, appellant asserts that he had medical problems and constant pain which caused him some confusion. While illness or other personal difficulties that prevent a taxpayer from filing a timely return can be considered reasonable cause in some cases, the taxpayer must

present credible and competent evidence that the circumstances of the illness continuously prevented the taxpayer from filing a timely return. (*Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, April 9, 1985.) In the present case, there is no evidence that appellant was continuously prevented from filing his return due to his unspecified medical problems. Consequently, we cannot conclude that appellant’s medical issues prevented him from timely filing his 2015 tax return.

Therefore, we conclude that appellant failed to establish that his failure to timely file his 2015 personal income tax return was due to reasonable cause.

Issue 2 - Did appellant establish that the underpayment of estimated tax penalty was improper?

Pursuant to Section 19136, taxpayers are liable for a penalty for failing to pay estimated tax if they fail to make sufficient payments towards their tax liability either through withholdings or timely estimated tax payments.⁴ Section 19136 does not allow for abatement of this penalty based upon a showing of reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.) Appellant self-assessed the underpayment of estimate tax penalty and has not provided evidence as to why it was improperly imposed.

Therefore, we find appellant has not established that the underpayment of estimated tax penalty was improper.

HOLDINGS

1. Appellant failed to establish that his failure to timely file a personal income tax return for the 2015 tax year was due to reasonable cause and not willful neglect.
2. Appellant failed to establish that the underpayment of estimated tax penalty was improper.

DISPOSITION

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

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 Sara A. Hosey
 Administrative Law Judge

We concur:

⁴Section 19136 substantially conforms to Internal Revenue Code section 6654.

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John O Johnson

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John O. Johnson

Administrative Law Judge

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Jeff Angeja

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Jeffrey G. Angeja

Administrative Law Judge