

**OFFICE OF TAX APPEALS  
 STATE OF CALIFORNIA**

In the Matter of the Appeal of:  <b>KRISTEN COONTZ AND</b>  <b>LISA COONTZ</b> <hr/>	) OTA Case No. 18011418 ) ) Date Issued: February 20, 2018 ) ) ) )
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**OPINION**

Representing the Parties:

For Appellants:	Daniel Kennelly, Enrolled Agent
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For Respondent:	Mira Patel, Tax Counsel
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For Office of Tax Appeals:	Tom Hudson, Tax Counsel III
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KWEE, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> Kristen Coontz and Lisa Coontz (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants' claim for refund in the amount of \$58,436<sup>2</sup> for the 2013 tax year.

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

**ISSUES**

1. Did appellants establish that their failure to timely file a tax return for the 2013 tax year was due to reasonable cause and not due to willful neglect?
2. Did appellants establish that their failure to timely respond to a Demand for Tax Return for the 2013 tax year was due to reasonable cause and not due to willful neglect?

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

<sup>2</sup> Appellants are appealing FTB's September 2, 2016, denial of their refund claim in the amount of \$58,436; however, the actual amount paid by appellants is \$58,435.50, which consists of a late-filing penalty of \$30,200.75 and a demand penalty of \$28,234.75.

**FACTUAL FINDINGS**

1. Appellant Kristen Coontz failed to timely file a 2012 California personal income tax return. Thereafter, FTB issued a Request for Tax Return dated January 15, 2014, and allowed appellant until February 19, 2014, to timely respond. Appellant Kristen Coontz failed to timely respond to the Request for Tax Return. Next, FTB issued a Notice of Proposed Assessment (NPA) dated March 17, 2014, notifying appellant of the proposed assessment for the 2012 tax year. The March 17, 2014, NPA also notified appellant that FTB had no record of receiving a response to its Request for Tax Return for the 2012 tax year.
2. For the subsequent tax year, appellants made a \$120,803 payment for their 2013 tax liability on October 10, 2014. Appellants did not file a 2013 tax return at the time of making the payment.
3. Appellant Kristen Coontz failed to timely file a 2013 California personal income tax return. Accordingly, FTB issued a Demand for Tax Return (Demand), dated January 22, 2015, to appellant Kristen Coontz at an address in Pasadena, California. The Demand notified appellant that failure to respond by February 25, 2015, will result in a penalty equal to 25 percent of the total tax amount before applying any payments (demand penalty). Appellant Kristen Coontz failed to timely respond to the Demand. Next, FTB issued an NPA dated March 23, 2015, notifying appellant of the proposed assessment for the 2013 tax year. FTB mailed the NPA to the same address as the Demand. The March 23, 2015, NPA notified appellant that FTB had no record of receiving a response to its Demand dated January 22, 2015 and, as relevant to this appeal,<sup>3</sup> proposed assessing a late-filing penalty in the amount of \$5,878.25 for failing to timely file a return,<sup>4</sup> and a demand penalty in the amount of \$28,234.75 for failing to timely respond to the Demand.<sup>5</sup>

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<sup>3</sup> In addition to the penalties, the NPA proposed assessing a tax liability of \$23,513, a filing enforcement cost recovery fee of \$76, and applicable interest.

<sup>4</sup> This amount represents 25 percent of the proposed unpaid tax due of \$23,513, after applying withholding payments of \$89,426.

<sup>5</sup> This amount represents 25 percent of the proposed total reportable tax of \$112,709, before applying withholding credits of \$89,426.

4. On April 30, 2015, appellants electronically filed an undated joint California personal income tax return for the 2013 tax year, reporting more tax due than was estimated in the March 23, 2015, NPA. As relevant herein, appellants' 2013 tax return reported total tax of \$210,385, and reported tax due of \$120,803 (after applying \$89,582 in withholding credits). With the exception of accrued interest and penalties,<sup>6</sup> FTB accepted appellants' return as filed and issued appellants a Return Information Notice dated May 7, 2015, notifying appellants that FTB increased the late-filing penalty from \$5,878.25 to \$30,200.75 (25 percent of the reported tax due) and made no adjustments to the amount of the demand penalty.<sup>7</sup>
5. On June 18, 2015, appellants submitted a written request to FTB for waiver of both penalties on the basis that appellants were going through a divorce and living in different places other than the address to which the notices at issue were mailed, and claiming that appellants had difficulties communicating with each other. Appellants also provided an updated mailing address; however, the address appellants provided is the same address in Pasadena, California, to which FTB previously mailed the NPA and Demand for the 2013 tax year. FTB denied the request for waiver of both penalties via notice dated August 18, 2015. The August 18, 2015, denial notice does not explain why the request was denied. Appellants paid the 2013 tax liability in full on July 25, 2016, including \$58,435.50 in penalties, pursuant to an installment payment agreement.
6. By letter dated June 13, 2016, appellants filed a claim for refund in the amount of \$58,436, based on reasonable cause, contending that their tax return was not timely filed due to an error or delay by appellants' paid tax preparer, and contending that appellants timely and in good faith paid their 2013 tax liability on October 10, 2014. In support, appellants submitted FTB Form 8879 "California e-file signature Authorization for Individuals," authorizing a paid preparer identified on the form to file appellants' 2013 personal income tax return on behalf of appellants by using each appellant's respective personal identification number, which appellants signed on October 9, 2014. By Notice

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<sup>6</sup> Appellants left the line to report interest and penalties blank.

<sup>7</sup> The withholding credits amount reflected on FTB's records per the NPA was a slightly lower amount, \$89,426 (see footnote 4, *supra*). The May 7, 2015, Return Information Notice accepted the larger withholding credits amount claimed by appellants. This discrepancy is not relevant to our decision.

of Action (NOA) dated September 2, 2016, FTB denied appellants' claim for refund on the basis that the circumstances described in the claim do not constitute reasonable cause.

7. By letter dated December 1, 2016, appellants timely filed the instant appeal of FTB's September 2, 2016, NOA denying appellants' claim for refund. Appellants contend that reasonable cause exists because the Internal Revenue Service (IRS) waived the federal penalty imposed on appellants for failing to timely file their federal return for the 2013 tax year. In support, appellants attached as an exhibit: (1) FTB's September 2, 2016, NOA denying appellants' claim for refund; (2) appellants' June 13, 2016, claim for refund; and (3) a letter from the IRS stating that the IRS was removing a penalty based on appellants' explanation as to why they failed to timely file their federal return. Neither the basis for abatement or appellants' explanation for failing to timely file the return is specified or explained in the letter.

### **DISCUSSION**

#### **Issue 1 - Did appellants establish that their failure to timely file a tax return for the 2013 tax year was due to reasonable cause and not due to willful neglect?**

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.) 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. (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 tax payments, and any credits against the tax which may be claimed on the return. (Rev. & Tax Code, § 19131, subd. (c).)

An FTB determination is presumed correct and, therefore, a taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 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.) In addition, the United States Supreme Court concluded that each taxpayer has a personal, non-delegable obligation to file a tax return by the due date and, as such, a taxpayer's reliance on an agent to timely file a federal return does not constitute reasonable cause for a late filing. (*United States v. Boyle* (1985) 469 U.S. 241, 252.)

Here, respondent properly assessed a late-filing penalty equal to 25 percent of the tax, after applying withholding payments, because appellants filed their 2013 tax return more than five months late. Furthermore, appellants admit, and the documentation in the record supports, that the late filing was caused by appellants' reliance on their tax preparer to timely file the return. Consistent with the Supreme Court's holding in *Boyle*, we find that for California purposes a taxpayer's reliance on a tax preparer to timely file a California personal income tax return does not constitute reasonable cause for a late filing. (*Boyle, supra*, 469 U.S. at p. 252; see also, *Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985.)

Appellants believe we should waive the late-filing penalty on the basis that the IRS waived appellants' federal late-filing penalty for the same tax year. While there are circumstances under which we may statutorily presume reasonable cause exists once the taxpayer establishes that the IRS waived a federal late-filing penalty for the same tax year due to reasonable cause, the California legislature has not seen fit to create a presumption that would apply to the circumstances applicable to the instant case where the entire basis for relief is an IRS waiver of the late-filing penalty for the same tax year.<sup>8</sup> (See Rev. & Tax Code, § 19131, subd. (f)(1)(B).)

Nevertheless, the reasoning applied by the IRS in waiving a federal late-filing penalty for the same tax year might still be relevant under the appropriate circumstances. We are unable to consider whether the logic applied by the IRS is relevant under the specific facts of appellants' California case because appellants did not provide documentation indicating why or for what specific reasons the IRS waived the late-filing penalty. Furthermore, we are not bound

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<sup>8</sup> In the case of a late filing, reasonable cause is rebuttably presumed to exist where the taxpayer shows certain conditions are met, including all of the following: the taxpayer failed to file a federal return and the IRS determines the federal failure-to-file penalty imposed pursuant to section 6651(a)(1) of the Internal Revenue Code (IRC) does not apply because the failure was due to reasonable cause and not willful neglect; and FTB's deficiency assessment is for the same tax year and was based on a final federal determination. (Rev. & Tax Code, § 19131, subd. (f)(1).) This presumption is inapplicable because FTB's deficiency assessment was not based on a final federal determination.

to follow any IRS decision that we find to be erroneous and we have already concluded that, absent more, reliance on a tax preparer to timely file a return is not reasonable cause.<sup>9</sup> (*Appeal of Der Wienerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979.)

Although appellants also assert that their 2013 late-filing is a one-time occurrence, we have no authority to waive the late-filing penalty based on appellants' prior good filing history, and in the absence of reasonable cause, because the law provides that the California late-filing penalty shall apply unless reasonable cause is shown. (Rev. & Tax Code, § 19131, subd. (a).) Furthermore, the logic of applying such a policy to waive appellants' late-filing penalty is inapplicable to the facts of this case because appellants also failed to timely file their 2012 California personal income tax return.

Therefore, we conclude that appellants' failure to timely file their 2013 personal income tax return was not due to reasonable cause.

Issue 2 - Did appellants establish that their failure to timely respond to FTB's Demand for Tax Return for the 2013 tax year was due to reasonable cause and not due to willful neglect?

California imposes a penalty for the failure to file a return upon notice and demand by FTB, unless the failure is due to reasonable cause and not willful neglect. (Rev. & Tax. Code, § 19133.) The penalty is 25 percent of the total tax assessed pursuant to Section 19087 for failing to file a return or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (Rev. & Tax. Code, § 19133.) With respect to a failure to file a personal income tax return, FTB will only impose a demand penalty if both the following conditions are met: (1) the taxpayer fails to timely respond to a Demand for the tax year at issue, and; (2) during the four-taxable-year period preceding the taxable year at issue, FTB issued an NPA after the taxpayer failed to timely respond to a Demand or to a Request for Tax Return. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

Here, respondent properly assessed a demand penalty equal to 25 percent of the total tax proposed in the NPA issued pursuant to Section 19087, because appellant Kristen Coontz failed

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<sup>9</sup> We make no finding on whether or not the IRS waived the federal late-filing penalty for reasonable cause or for some other purpose or purposes. We do note, however, that the IRS may waive the federal late-filing penalty for purposes other than reasonable cause. For example, the IRS adopted a first-time abatement policy in 2001 for certain taxpayers with a good filing history, as provided in Section 20.1.1.3.3.2.1 of the Internal Revenue Manual, and this policy applies regardless of whether a late filing was due to reasonable cause and not willful neglect. As relevant, FTB does not have a first-time abatement policy.

to timely respond to the Demand for the 2013 tax year, and FTB issued an NPA to appellant after appellant Kristen Coontz also previously failed to timely respond to a Request for Tax Return for the prior 2012 tax year. Respondent ultimately assessed the demand penalty in response to appellants' failure to timely respond to the Demand; therefore, the tax preparer's failure to timely file appellants' return is not a relevant consideration in determining whether reasonable cause exists.

While events such as divorce and related communication difficulties may, under certain circumstances, be cause for minor delays, we find that appellants' delay was not due to reasonable cause under the circumstances. The circumstances we find most relevant to this conclusion are as follows. First, respondent mailed the Demand directly to appellant Kristen Coontz at an address and to the attention of the person to whom appellants admitted was the correct contact person and mailing address to receive mailed correspondence from respondent. Second, appellant Kristen Coontz has a prior history of failing to timely respond to notices from FTB. Third, the Demand notified appellant Kristen Coontz that failure to timely respond will result in a 25 percent penalty, nevertheless appellants ultimately took more than 90 days after the Demand to file a return. Finally, aside from their written contentions, appellants provided no documentary evidence indicating that circumstances such as divorce or an inability to timely receive mailed correspondences from respondent impacted appellants' ability to timely respond to the Demand.

The purpose of a demand penalty is to encourage taxpayers to communicate with FTB by penalizing a failure to timely respond to a notice and demand. (See *Appeal of W. L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Frank E. and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.) Waiving the penalty under the facts of this case will only encourage future non-compliance and is inconsistent with the intent of the statute. In conclusion, we find that appellants did not establish reasonable cause for failing to timely respond to the Demand.


#### **HOLDINGS**

1. Appellants failed to establish that their failure to timely file a personal income tax return for the 2013 tax year was due to reasonable cause and not willful neglect.


2. Appellants failed to establish that their failure to timely respond to the FTB's Demand for Tax Return for the 2013 tax year was due to reasonable cause and not due to willful neglect.


**DISPOSITION**

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

  
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Andrew J. Kwee  
Administrative Law Judge

We concur:

  
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John O. Johnson  
Administrative Law Judge

  
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Sara A. Hosey  
Administrative Law Judge