

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
STEPHEN NASH

) OTA Case No. 18042960
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OPINION

Representing the Parties:

For Appellant: Leonard J. Conniff, CPA

For Respondent: Brian Werking, Tax Counsel

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Stephen Nash (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant's claim for refund of \$51,110 for the 2015 tax year.

Appellant waived his right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUE

Did appellant show that reasonable cause existed to abate the late-filing penalty imposed under section 19131 for the 2015 tax year?

FACTUAL FINDINGS

1. Appellant mailed a payment of \$204,663 for his 2015 California taxes due, which respondent received on or about October 14, 2016.
2. Because respondent had no record of receiving appellant's 2015 tax return, it mailed a Request for Tax Return (Request) on April 25, 2017. The Request was mailed to a Manhattan Beach address that was not the last-known address shown on appellant's 2014 tax return (a San Ramon address).

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

3. Appellant did not respond, and respondent mailed a Notice of Proposed Assessment to the same Manhattan Beach address on June 26, 2017.
4. Thereafter, appellant untimely filed his 2015 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) on July 17, 2017. Appellant used the services of a certified public accountant (CPA) to prepare and file his federal and state tax returns. The amount of tax due as shown on his California return was \$204,440.
5. Respondent accepted appellant's tax return and issued a Notice of Tax Return Change – Revised Balance, and mailed an Income Tax Due Notice on September 6, 2017, that included a late-filing penalty of \$51,110, plus interest, totaling \$56,602.29.
6. Appellant protested the imposition of the late-filing penalty by letter dated September 12, 2017.
7. Appellant submitted an e-file transmission log from his tax preparation software company, showing that his federal return was transmitted on time and accepted. The log does not reflect that a California return was either transmitted or accepted.
8. After appellant's outstanding balance was satisfied, respondent treated appellant's protest of the late-filing penalty as a claim for refund, which it denied on January 17, 2018.
9. Appellant filed this timely appeal.

DISCUSSION

California imposes a penalty on taxpayers that file their tax returns late. (§ 19131.) The penalty is 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. (§ 19131(a).) For purposes of calculating the 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. (§ 19131(c).)

Here, appellant filed his return 15 months after the original due date for the return. Appellant does not dispute the imposition or calculation of the penalty, but instead requests abatement of the late-filing penalty. A late-filing penalty imposed under section 19131 will be abated if appellant establishes that the late filing was attributable to reasonable cause and not due to willful neglect. (§ 19131(b).)

To establish reasonable cause for failing to file a timely return, a taxpayer must show that the failure occurred “despite the exercise of ordinary business care and prudence, or that such

cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)² The burden is on the taxpayer to prove that the difficulties experienced prevented the taxpayer from filing a timely return. (*Appeal of Duff*, 2001-SBE-007, Dec. 20, 2001.)

Appellant asserts that reasonable cause exists to abate the late-filing penalty because a software error (either in the Prosystem FX software used by appellant’s CPA tax preparer or the FTB’s own system) prevented his California tax return from being submitted on time. In the appeal letter, appellant’s representative notes that the software uploads and transmits federal and state returns simultaneously. Appellant asserts that he and his CPA reasonably relied on the Prosystem FX software to simultaneously file both the federal and state returns, and confirmation of his federal filing was received on October 12, 2016. Thus, appellant claims he had no reason to believe the state return was not filed.

Courts have found that reasonable cause may be established when a taxpayer reasonably relies on the substantive tax advice of a tax professional, if certain requirements are met. (*Kidder v. Commissioner* (1999) 78 T.C.M. (CCH) 602, 605 [accuracy-related penalty abated because taxpayers relied on their accountant for substantive tax advice]; cf. *United States v. Boyle* (1985) 469 U.S. 241, 250 (*Boyle*) [late-filing penalty not abated where late-filing was not attributable to substantive tax advice received].) In this case, appellant relied on his CPA and on a tax preparation software company³ to prepare and transmit his tax return to respondent.

However, appellant’s claim for reasonable cause is based on his reliance on a tax professional to perform a ministerial task, rather than on his CPA’s substantive tax advice. The U.S. Supreme Court has drawn a bright-line rule in the case of a taxpayer’s failure to meet a filing deadline. (*Boyle, supra*, 469 U.S. at p. 248.) The purpose of the late-filing penalty is to ensure timely filing so that the proper tax liability “will be ascertained and paid promptly.” (*Id.* at p. 245.) Because no special training is required to determine a filing deadline, a taxpayer’s reliance on an agent is not reasonable cause for filing late. (*Id.* at p. 252.) We are sympathetic to the fact that appellant’s CPA may have a mandatory obligation to e-file his clients’ tax returns

² Precedential opinions of the Board of Equalization, designated by “SBE” in the citation, may be found on the Board of Equalization’s website at www.boe.ca.gov/legal/legalopcont.htm.

³ The Internal Revenue Service has determined that a tax preparation software company may be considered a tax preparer when the software “goes beyond merely furnishing typing, reproducing or other mechanical assistance.” (Rev. Rul. 85-187, 1985-48 I.R.B. 5, Dec. 2, 1985.)

pursuant to section 18621.9, which would subject the CPA to a penalty if the return were mailed. However, appellant remains obligated to confirm that the filing was accomplished and that the return was accepted by respondent. That duty is non-delegable. Appellant provided no evidence of filing confirmation or acceptance of his state tax return by FTB.⁴ He offered no evidence that he followed up with his CPA or with FTB to ensure the return was filed. Therefore, appellant has not established that there is reasonable cause for his late filing.

Appellant argues that respondent's error in using an incorrect address caused further delay in filing his return. As stated above, appellant is not relieved of his obligation to file on time. Additionally, even if appellant had filed on the date the first notice was mailed to an incorrect address, the maximum late-filing penalty still would have been assessed. The penalty is calculated at 5 percent of the tax for "each month or fraction thereof elapsing between the due date of the return (determined without regard to any extension of time for filing) and the date on which filed." (§ 19131(a).) Respondent mailed the Request on April 25, 2017. The penalty is calculated starting in April, 2016, so by the time respondent's first notice was mailed to the Manhattan Beach address, appellant's return was more than 12 months late, and the maximum penalty already applied.

Finally, appellant notes that he has a 20-year history of filing his California tax returns on time. While the Internal Revenue Service has an administrative program called "First Time Abate" in which it abates timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program.⁵ We commend appellant for his previous diligence in filing and paying on time; however, under California law the late-filing penalty may only be abated if we find that the failure to file on time was due to reasonable cause and not to willful neglect.

⁴ The transmission log submitted by appellant appears to only relate to the filing of his federal return.

⁵ The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

HOLDING

Appellant has not established that his failure to file his 2015 tax return on time was due to reasonable cause.

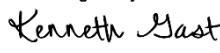
DISPOSITION

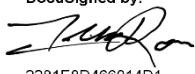
Respondent's denial of appellant's claim for refund is sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Alberto T. Rosas
Administrative Law Judge