

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18042959
)
ANNA OSTROVSKY) Date Issued: October 8, 2018
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)
)

OPINION

Representing the Parties:

For Appellant:	Betty J. Williams, Attorney at Law
For Respondent:	David Kowalczyk, Tax Counsel

K. GAST, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324(a),¹ Anna Ostrovsky (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claims for refund in the amount of (1) \$4,085.75, plus interest, for the late-filing penalty imposed under section 19131 for the 2015 tax year, and (2) \$708.12, plus interest, for the late payment penalty imposed under section 19132 for the 2016 tax year.

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

ISSUES

1. For the 2015 tax year, has appellant established reasonable cause to abate the late-filing penalty?
2. For the 2016 tax year, has appellant established reasonable cause to abate the late payment penalty?

¹ Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code for the tax year at issue.

FACTUAL FINDINGS

1. Appellant was a Nevada resident and, therefore, a California nonresident for the tax years at issue.
2. On May 2, 2017, based on federal information it had received indicating California source income, respondent issued to appellant a Request for Tax Return for the 2015 tax year.
3. On June 6, 2017, appellant replied to respondent's request by filing her 2015 California nonresident income tax return, which was nearly one year and two months past the due date of April 18, 2016. Appellant reported a tax due of \$16,343, which she paid.
4. Also on June 6, 2017, appellant timely filed her 2016 California nonresident income tax return.² Appellant reported a tax due of \$11,802, which she paid the next day on June 7, 2017. However, because the payment was not made by the original due date of April 18, 2017, it was late.³
5. On June 27, 2017, respondent issued to appellant two separate Notices of State Income Tax Due for the 2015 and 2016 tax years. The first notice assessed a late-filing penalty of \$4,085.75, plus interest, for the 2015 tax year. The second notice assessed a late payment penalty of \$708.12, plus interest, for the 2016 tax year. Appellant paid both penalties.
6. On July 14, 2017, appellant filed the claims for refund at issue, requesting abatement on reasonable cause grounds of both the late-filing and late payment penalties for the 2015 and 2016 tax years, respectively.
7. Respondent issued to appellant two separate refund claim denial letters dated March 21, 2018, for the 2015 and 2016 tax years, asserting appellant had not established reasonable cause for abatement. This timely appeal followed.

² The original due date of appellant's 2016 return was April 18, 2017, because April 15th and 16th fell on a Saturday and Sunday, respectively, and April 17th was a federal holiday. (§ 18566; see also Cal. Code Regs., tit. 18, § 18566.) However, the FTB allows an automatic six-month extension to file if the return is filed within six months of the original due date. (§ 18567; see also Cal. Code Regs., tit. 18, § 18567(a).) Because appellant filed her 2016 return on June 6, 2017, it was timely filed within six months of the original due date.

³ The extension to file is not an extension of time to pay tax, as tax is due on the original due date of the return without regard to the extension to file. (Cal. Code Regs., tit. 18, § 18567(a).) Thus, even though appellant's 2016 return was timely filed after the original due date but within the six-month automatic extension period, she had to pay the tax due by April 18, 2017, to avoid imposition of the late payment penalty, which she failed to do.

DISCUSSION

Issue 1 – For the 2015 tax year, has appellant established reasonable cause to abate the late-filing penalty?

Section 19131 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. (§ 19131(a).) The late-filing 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. (*Ibid.*) Here, it is undisputed that respondent properly computed the late-filing penalty. In addition, respondent does not assert willful neglect is present in this case, and therefore the only issue is whether appellant has demonstrated reasonable cause for the late filing.

To establish reasonable cause to abate the late-filing penalty, “the taxpayer must show that the failure to file timely returns 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 Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)⁴ The burden of proof is on the taxpayer to establish reasonable cause exists to support an abatement of the penalty. (*Ibid.*)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252, the U.S. Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing” The court, however, did observe that reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney with respect to substantive matters of tax law or whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Id.* at pp. 250-251.)⁵ While good faith reliance on professional advice may provide a basis for a reasonable cause defense, it is not absolute. (*Repetto v. Comm’r*, T.C. Memo. 2012-168.)

⁴ Board of Equalization (BOE) opinions are generally available for viewing on the its website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

⁵ The reason the court drew this distinction between substantive versus non-substantive tax advice is, with respect to the former, “[m]ost taxpayers are not competent to discern error in the substantive advice of an accountant or attorney,” and “[t]o require the taxpayer to challenge the attorney, to seek a ‘second opinion,’ or to try to monitor counsel on the provisions of [the tax law] h[er]self would nullify the very purpose of seeking the advice of a presumed expert in the first place.” (*Boyle, supra*, at p. 251, citation omitted.) “ ‘Ordinary business care and prudence’ do not demand such actions.” (*Ibid.*)

If a taxpayer relies on improper advice of an accountant or tax attorney as to a matter of tax law, failing to file a return in reliance on that advice may be considered reasonable cause if two conditions are met. (*Rohrbaugh v. United States* (7th Cir. 1979) 611 F.2d 211, as cited in *Boyle, supra*, at p. 244.) These conditions are (1) whether the person relied on by the taxpayer is a tax professional with competency in the subject tax law, and (2) whether the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents.

In the present appeal, appellant asserts that she is a former resident of California, having moved to Nevada when she was relocated by her employer in 2014. She alleges she was advised by her employer's tax preparer that, because she was a full-time resident of Nevada, she did not need to report or pay nonresident income taxes to California for 2015 or any subsequent tax year. She claims she was given this advice, despite her employer's California tax preparer being "aware" she would occasionally travel to California for work after her move to Nevada. She further alleges that she was given the same advice by her personal tax preparer located in Nevada. Appellant contends it was not until after respondent contacted her about not filing a 2015 California nonresident tax return that she contacted her current attorney-representative, who advised her she did in fact have a filing obligation because she occasionally worked in California and therefore had wage income from sources within the state.

Appellant, however, has not provided any support—such as correspondence, emails, declarations, or affidavits—for the contention that she relied on two unnamed tax preparers for the advice not to file a California nonresident tax return. Specifically, appellant has not provided any evidence to support that the tax preparers were competent professionals who had sufficient expertise to justify her reliance on the advice. She has also not provided any evidence to support that the tax preparers were supplied with necessary and accurate information other than her assertions. 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.) Accordingly, appellant has not shown reasonable cause exists to abate the late-filing penalty.

Issue 2 – For the 2016 tax year, has appellant established reasonable cause to abate the late payment penalty?

Section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment of the tax. The late payment penalty has two parts. The first part of the penalty is five percent of the unpaid tax.

(§ 19132(a)(2)(A).) The second part is 0.5 percent per month, or a portion of a month, calculated on the outstanding balance. (§ 19132(a)(2)(B).) The aggregate amount of the penalty may not exceed 25 percent of the total unpaid tax. (§ 19132(a)(3).) Here, it is also undisputed that respondent properly computed the late payment penalty. In addition, as with the late-filing penalty, respondent does not assert willful neglect is present in this case, and therefore the only issue is whether appellant has demonstrated reasonable cause for the late payment.

The late payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect.

(§ 19132(a).) The taxpayer bears the burden of proving reasonable cause exists. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) To establish reasonable cause for the late payment of tax, the taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) The late-filing and the late payment penalties generally deal with the same questions and weigh the same evidence for purposes of making reasonable cause determinations. (*Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986.)

Here, even though appellant timely filed her 2016 tax return after consulting with her current representative, the payment for that return was already late at that point. As with the late-filing penalty, appellant contends the late payment penalty should be abated because she relied on the advice of her tax preparers to not file a 2016 California nonresident income tax return, which caused the late payment. However, for the same reasons expressed above, appellant has not shown reasonable cause exists to abate the late payment penalty.

HOLDINGS

1. For the 2015 tax year, appellant has not established reasonable cause to abate the late-filing penalty.
2. For the 2016 tax year, appellant has not established reasonable cause to abate the late payment penalty.

DISPOSITION

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

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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Neil Robinson
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Neil Robinson
Administrative Law Judge

DocuSigned by:
Douglas Bramhall
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Douglas Bramhall
Administrative Law Judge