

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

MICHAEL AND DIANE M. STAVROS

) OTA Case No. 18010991
)
) Date Issued: December 14, 2018
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)
)

OPINION

Representing the Parties:

For Appellants: Michael Stavros

For Respondent: Greg W. Heninger, Program Specialist II

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Michael and Diane M. Stavros (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) denying their claim for refund of \$549.90 for the 2016 tax year.

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

ISSUE

Whether appellants have established that the section 19132 (late payment) penalty should be abated due to reasonable cause and the absence of willful neglect.

FACTUAL FINDINGS

1. During the 2016 tax year, appellants sold their rental property to their children.
2. On April 14, 2017, appellants engaged J’s Tax Service, whom they previously used for many years, to prepare their 2016 tax return. On the following day, as advised by their tax preparer, appellants made an extension payment of \$3,703 for the 2016 tax year.
3. On May 25, 2017, FTB received appellants’ 2016 joint California Resident Income Tax Return. Included with this return was an additional payment of \$9,165, which satisfied appellants’ reported 2016 tax liability in full.

¹ Unless otherwise indicated, all undesignated statutory “section” or “§” references are to sections of the Revenue and Taxation Code.

4. Because appellants failed to fully pay their 2016 tax liability by the April 15, 2017 due date, FTB issued to them a Notice of Tax Return Change dated June 15, 2017, imposing a late-payment penalty of \$549.90 and interest of \$40.35.
5. Thereafter, appellants paid the balance due in full and, via letter dated August 30, 2017, filed a timely claim for refund requesting abatement of the late payment penalty.
6. In response, FTB issued to appellants a Notice of Action denying their claim for refund. This timely appeal followed.

DISCUSSION

Unless it is shown that the failure to timely pay tax is due to reasonable cause and not willful neglect, a penalty of up to 25 percent is imposed for a taxpayer's failure to pay the amount of tax required to be shown on a return on or before the due date. (§ 19132(a).) The standard of reasonable cause requires the taxpayer to establish that the failure to timely act occurred despite the exercise of ordinary business care and prudence. (See *United States v. Boyle* (1985) 469 U.S. 241, 246.)² The burden is on the taxpayer to establish reasonable cause by a preponderance of the evidence. (See Cal. Code Regs., tit. 18, § 30705(a), (c).) On the other hand, willful neglect means a conscious, intentional failure or reckless indifference. (*United States v. Boyle, supra*, at p. 245.)

In the absence of any evidence or allegations that appellants' failure to timely pay their taxes was intentional or due to reckless indifference, we find that there is no willful neglect.

Regarding the existence of reasonable cause, appellants argue that they acted "to the best of their ability" to timely pay their taxes, and because they are not tax experts, they relied upon the professional advice of their tax return preparer to properly calculate their extension payment. Appellants assert that they provided their return preparer with all the information necessary to accurately compute this payment, and that he initially determined that amount to be \$3,703. Thereafter, appellants made an extension payment of \$3,703 under the assumption that it would be sufficient to fully satisfy their 2016 tax liability. Appellants contend that because they had used the same return preparer for many years without incident, they had no reason to question the calculation of their extension payment. Upon later being told by their return preparer that

² Because the relevant language of section 19132 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts' interpretation of the "reasonable cause" standard is persuasive authority in determining the proper construction of these California statutes. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

they owed an additional \$9,165, appellants allege that they were surprised, and that their return preparer attributed this unexpected difference to his difficulty in determining the proper tax treatment for the sale of appellants' rental property to their children.

We begin by acknowledging that the exercise of ordinary business care and prudence does not require taxpayers to question the legal advice of a tax professional, for it would “nullify the very purpose of seeking the advice of a presumed expert in the first place.” (*United States v. Boyle, supra*, 469 U.S. at p. 251.) However, when underpayments are attributable to simple computations not involving any legal interpretation, taxpayers may not “hide behind an ‘expert’ for the failure to properly determine the tax that was due.” (*Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986.)³ This means that for appellants to prevail on this issue, they must first show that they obtained substantive legal advice from their return preparer with respect to the calculation of their 2016 extension payment.

However, there is no evidence that shows appellants' underpayment was attributable to erroneous substantive legal advice received from their tax preparer. While conceivably, the sale of real property might potentially involve areas of ambiguity or complication requiring legal interpretation, there are also many such transactions for which determining the resulting tax liability is straightforward. Appellants have not demonstrated that the sale of their rental property falls within the former category, nor have they provided any transaction level details that might indicate that substantive legal interpretation was required to properly compute their extension payment.

Further, appellants have not provided any specific details regarding the circumstance which caused the alleged error; for example, the legal authority relied upon by appellants' return preparer in calculating their extension payment, or the actual calculation which they allege he had difficulty computing. Without this information, we are unable to verify whether the alleged error was in fact due to a genuine misinterpretation of the law, and not the result of mathematical error, insufficient or contradictory information, or mere negligence. Accordingly, appellants have not shown that they reasonably relied upon substantive legal advice in computing their extension payment. Absent such a showing, appellants cannot avoid the resulting penalty by

³ Precedential opinions of the State Board of Equalization (SBE) that were adopted prior to January 1, 2018, are also precedential authority before the Office of Tax Appeals. (Cal. Code Regs., tit. 18, § 30501(d)(3).) These decisions may be found on the SBE's website at: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

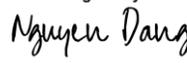
placing responsibility on their tax return preparer. (*Metra Chem Corp. v. Commissioner* (1987) 88 T.C. 654, 662; *Appeal of Philip C. and Anne Berolzheimer, supra.*)

HOLDING

Appellants have not established that abatement of the late payment penalty is warranted.

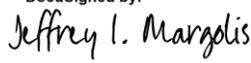
DISPOSITION

Respondent's action is sustained.

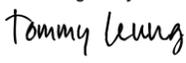
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Nguyen Dang
Administrative Law Judge

We concur:

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Jeffrey I. Margolis
Administrative Law Judge

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Tommy Leung
Administrative Law Judge