

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010836
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RICHARD T. MCGUIRE) Date Issued: January 18, 2019
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OPINION

Representing the Parties:

For Appellant: Shail P. Shah, Andersen Tax, LLC

For Franchise Tax Board (FTB): Meghan McEvelly, Tax Counsel III

G. THOMPSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Richard T. McGuire (appellant) appeals an action by FTB denying his claim for refund in the amount of \$115,513.74 for the 2015 tax year.

Appellant did not request an oral hearing. Therefore, this matter is being decided based on the written record.

ISSUE

Has appellant shown that the late payment penalty should be abated?

FACTUAL FINDINGS

1. On April 8, 2016, appellant’s agent attempted to schedule an extension payment of \$1,500,000 for the 2015 tax year using FTB’s electronic Web Pay system.² The Web Pay system provided a confirmation page showing the time and date of the payment request, the amount of the payment, and related information. The confirmation page states that two business days should be allowed for the payment to be debited from the bank

¹All further statutory references are to “Sections” of the Revenue and Taxation Code unless otherwise stated.

²It is not clear who attempted to submit the payment on appellant’s behalf, but appellant states it was done by his agent.

account. However, the scheduled payment did not occur because appellant's agent had entered an incorrect bank routing number.

2. On October 14, 2016, appellant filed his 2015 California income tax return. On the return, appellant reported that he had made tax payments totaling \$8,767,527 for the 2015 tax year. This amount included the \$1,500,000 amount that appellant's agent attempted to pay on April 8, 2016. Thus, while appellant's tax return reported \$8,267,527 in payments for the 2015 tax year, FTB had only received tax payments of \$7,267,527 (i.e., the \$8,767,527 of payments reported by appellant, less the \$1,500,000 payment that was not received by FTB due to the entry of an incorrect bank routing number by appellant's agent).
3. On December 5, 2016, FTB sent appellant a Notice of Tax Return Change showing the amount due. As relevant to the issue on appeal, the notice informed appellant that FTB was imposing a late payment penalty of \$115,513.74.
4. On December 19, 2016, appellant paid the balance due, including the late payment penalty.³
5. By letter dated February 13, 2017, appellant, through his representative, filed a claim for refund of the late payment penalty. In his refund claim, appellant stated that he scheduled the \$1,500,000 payment to be made on or about April 8, 2016 and received a confirmation. Appellant stated there was apparently a "clerical error" so that FTB never received the funds. Appellant argued that he was not aware of the error and FTB never informed him of the error. As a result, appellant contended, he "had reason to believe that all of his payments were made timely"
6. On August 23, 2017, FTB issued a notice of action denying appellant's claim for refund of the late payment penalty. This timely appeal followed.

DISCUSSION

Section 19001 generally provides that the personal income tax imposed "shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)." Section 19132 provides that a late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the

³Appellant's payment exceeded the amount due, and appellant received a refund of the excess amount paid.

return. The late payment penalty will be abated if the taxpayer shows 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 that both conditions existed. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983 (*Sleight*).)

To establish reasonable cause for the late payment of tax, a taxpayer must show that his failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Sleight, supra*; *Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986 (*Curry*).) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Curry, supra*.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984 (*Risser*).)

In addition, each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*).) A taxpayer's reliance on an agent to timely file a federal return does not constitute reasonable cause for filing late. (*Id.*) The courts have applied *Boyle* to late payments, even in circumstances where a taxpayer acted prudently in dealing with its agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136, 1144-1146 [finding that reliance on payroll service to make payments was not sufficient to establish reasonable cause under *Boyle*]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [finding that reliance on taxpayer's controller to make payments was not sufficient to establish reasonable cause].)

Here, appellant argues that he reasonably relied on his agent to schedule a payment through FTB's Web Pay system. Unfortunately, appellant's agent provided erroneous bank account information, so that the payment never occurred. As noted above, the United States Supreme Court, in *Boyle, supra*, held that reliance on an agent to ensure timely payment does not constitute reasonable cause. Moreover, a taxpayer's oversight, even if understandable, does not demonstrate the exercise of ordinary business care and prudence. (*Risser, supra*.) Accordingly, the error of appellant's agent in entering incorrect bank account information does not constitute reasonable cause.

Appellant argues that he relied on the Web Pay confirmation. Even if this is so, the Web Pay confirmation page does not confirm that the payment has been made; it only confirms that the request to debit a bank account has been made.

We believe an ordinarily intelligent and prudent business person would confirm that a requested payment of \$1,500,000 occurred and, if there was a delay in the payment, would have taken steps to see if there were any problems. There is no evidence that any such steps were taken here. There is no indication that appellant checked his bank account to determine whether the payment went through prior to the due date on April 15, 2016. Furthermore, appellant failed to confirm the payment prior to filing his tax return on October 14, 2016, as he erroneously reported on that tax return that the payment had been made.

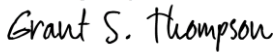
It appears that the late payment arose from an oversight by appellant's agent and appellant's oversight in not confirming that the payment had been made. While these oversights may be understandable, they do not establish that appellant acted with ordinary business care and prudence. Accordingly, "[w]hile we sympathize with appellant's unintentional error, these facts do not form a basis for granting relief from the penalt[y]." (*Risser, supra.*)

HOLDING

Appellant has not established that his failure to make a timely payment of tax for the 2015 tax year was due to reasonable cause.⁴


DISPOSITION

FTB's action denying appellant's claim for refund for the 2015 tax year is sustained.


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Grant S. Thompson
Administrative Law Judge

⁴As noted above, the late payment penalty can only be abated if both reasonable cause and the absence of willful neglect is shown. (*Sleight, supra.*) As we find that appellant has not shown reasonable cause for the late payment, there is no basis to abate the penalty, even though it appears appellant acted without willful neglect.

We concur:

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Nguyen Dang
Administrative Law Judge

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Linda C. Cheng
Administrative Law Judge