

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18010750
	)	
<b>THOMAS ALAN SHUE AND SUSAN KAY</b>	)	Date Issued: January 24, 2019
	)	
<b>SHUE</b>	)	

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**OPINION**

Representing the Parties:

For Appellants:	Thomas Alan Shue Susan Kay Shue
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For Respondent:	David Kowalczyk, Tax Counsel Nancy Parker, Tax Counsel IV
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M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Thomas Alan Shue and Susan Kay Shue (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,950.38 for the 2016 taxable year.

Office of Tax Appeals (OTA) Administrative Law Judges Michael Geary, Jeffrey Margolis, and Amanda Vassigh held an oral hearing for this matter in Sacramento, California, on October 30, 2018. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUE**

Are appellants entitled to abatement of the late-payment penalty?

**FACTUAL FINDINGS**

1. In 2016, appellants sold their long-term home, resulting in substantial capital gains.
2. Appellants stated they had sufficient funds on hand to pay the taxes due, but the evidence also indicates that appellants inquired about the possibility of an installment payment plan. Appellants state that the person who prepared appellants’ 2016 tax return

recommended they speak with another tax professional for help setting up a payment plan.

3. Appellants consulted with Tax Tiger, a group of lawyers and other tax professionals, and, according to appellants, a representative of Tax Tiger advised them not to remit payment with their return, but to wait until they received a bill from FTB. An email exchange between appellants and Tax Tiger confirms a consultation but not that Tax Tiger gave appellants the erroneous advice.
4. Appellants filed their 2016 California income tax return by the due date, but they did not remit payment of the \$49,173 tax due by the due date.
5. On June 6, 2017, FTB sent appellants a “Notice of Tax Return Change - Revised Balance,” which showed, in addition to \$49,173 tax, a \$2,950.38 late-payment penalty, and interest due.
6. On June 20, 2017, appellants paid the entire balance due and filed a claim for refund of the \$2,950.38 late-payment penalty on the ground that their failure to pay timely was due to reasonable cause in that they relied on the advice of Tax Tiger. The claim also states that appellants had an excellent history of timely filing their returns and paying taxes due, and that under the circumstances, the penalty was unduly punitive.
7. By notice dated September 12, 2017, FTB denied the claim. This timely appeal followed.

### DISCUSSION

Individuals, including those filing jointly, must pay their taxes by the due date for their return. (R&TC, § 19001.) That date is April 15 following the close of the taxable year.<sup>1</sup> (R&TC, § 19001.) A late-payment penalty is imposed when taxpayers fail to pay the amount shown as due on the return on or before the due date of the return. (R&TC, § 19132.) However, a late-payment penalty will be abated if the taxpayer shows that the late payment was due to reasonable cause and not to willful neglect. (R&TC, § 19132(a).) The taxpayers bear the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) In this case, there is no evidence of willful neglect. Thus, the question is whether appellants’ late payment was due to reasonable cause.

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<sup>1</sup> An extension of the time to file a return under R&TC section 18567 is not an extension to pay the taxes due.

To establish reasonable cause, the taxpayer must show the failure to pay timely occurred despite the exercise of “ordinary business care and prudence.” (*Appeal of Sidney G. Friedman and Ellen Friedman*, 2018-OTA-077P, August 23, 2018.) 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.)<sup>2</sup> Ignorance or a misunderstanding of California’s tax law does not excuse a failure to follow the law. (*Appeal of LaVonne A. Hodgson*, 02-SBE-001, Feb. 2, 2002.) Nevertheless, if the evidence establishes that: (1) the taxpayer consulted with a tax professional on a substantive question of law and provided the tax professional with all of the information needed to correctly answer the question; (2) the tax professional provided the taxpayer with legal advice on the question of law; and (3) taxpayer reasonably relied on that advice and otherwise exercised ordinary and reasonable care with regard to the action taken in reliance on the advice, such evidence may establish reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 250-251 (*Boyle*).

Appellants allege that they did not pay their taxes by the due date because they believed, based on Tax Tiger’s advice, that they could wait for FTB to send them a notice of the amount due. They had the money to remit with their return, but because their tax liability was unusually high due to their gain on the home, they were hoping to pay their taxes in installments. However, the return showed the amount due and appellants signed the return. Appellants do not argue that FTB had agreed to accept a lower amount, as an installment or otherwise. The law clearly stated that payment was due with the return, and appellants understood they were required to file their return by April 17, 2017.<sup>3</sup>

Finally, there is insufficient evidence that appellants reasonably relied on advice from a tax professional on a substantive question of law after full disclosure of the relevant facts. There is no independent support for appellants’ assertion that Tax Tiger advised appellants they could delay payment until after FTB processed their return and sent them a bill. Tax Tiger does not admit it gave that advice. There is no independent evidence that the question was even presented

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<sup>2</sup> Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, tit. 18, § 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) which were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion as part of a written opinion that the panel issues pursuant to this section. BOE opinions are generally available for viewing on the BOE’s website: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

<sup>3</sup> April 15, 2017 was a Saturday, so taxes were due on the following Monday.


to Tax Tiger for its consideration. Appellants consulted with Tax Tiger to see if they could avoid having to pay their taxes in one lump-sum payment with their returns. Even if Tax Tiger had admitted to giving the clearly erroneous advice, we would not conclude that appellants were entitled to rely on such advice. Questions regarding a payment due date are not the kind of substantive questions of law that the Supreme Court was talking about in *Boyle*. The law regarding payment by the due date is clear, and there are no exceptions.<sup>4</sup> “[O]ne does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute.” (*Boyle, supra*, at p. 251.) Thus, we find that appellants’ failure to pay their taxes by the due date was not due to their reasonable reliance on advice from a tax professional regarding a substantive question of law, or to any other reasonable cause. We therefore conclude that appellants are not entitled to abatement of the late payment penalty.

HOLDING

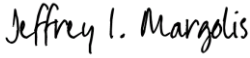
Appellants are not entitled to abatement of the late payment penalty.


DISPOSITION

We sustain FTB’s denial of the claim for refund.

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Michael F. Geary  
Administrative Law Judge

We concur:

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Jeffrey I. Margolis  
Administrative Law Judge

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Amanda Vassigh  
Administrative Law Judge

<sup>4</sup> Furthermore, even when FTB enters into an installment payment agreement with a taxpayer, the late payment penalty still is applicable.