

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010975
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TOSHINARI TAMURA) Date Issued: March 21, 2019
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OPINION

Representing the Parties:

For Appellant: Miho Ikeda, Certified Public Accountant

For Respondent: Anne Mazur, Specialist

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Toshinari Tamura (appellant) appeals an action by respondent Franchise Tax Board (FTB) in denying appellant’s claim for refund of \$6,434.56¹ for the 2016 tax year. Appellant has waived his right to an oral hearing and, therefore, this matter is being decided based on the written record.

ISSUES

1. Whether appellant has shown reasonable cause for the late payment of tax.
2. Whether appellant has demonstrated that the underpayment of estimated tax penalty should be abated.

FACTUAL FINDINGS

1. Appellant is a foreign national residing in Japan who is a board member of FibroGen, Inc. (FibroGen), which is located in California. During 2016, appellant visited California for two weeks to attend FibroGen’s board meeting. FibroGen compensated appellant for his services as a board member during 2016 by awarding him non-qualified stock options

¹ This amount consists of the following: (1) a late-payment penalty of \$4,736.40; and (2) an underpayment of estimated tax penalty of \$1,698.16

of \$736,946 and other income of \$6,800. FibroGen issued appellant a 2016 Internal Revenue Service (IRS) Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, which states on line 2 that FibroGen paid appellant gross income of \$736,946 and on line 7a that it withheld federal tax of \$221,084. However, on line 17a of the Form 1042-S, the state income tax withheld box is empty. FibroGen also issued appellant a second 2016 Form 1042-S, on which FibroGen reported that appellant received additional gross income of \$6,800, but it did not report any withholding of federal or state income tax. FibroGen also issued appellant a 2016 California Form 592-B, *Resident and Nonresident Withholding Tax Statement*, which states that appellant had total income from FibroGen subject to withholding of \$12,500 and total California tax withholding (excluding backup withholding) of \$875. FibroGen did not withhold any other amounts from appellant's 2016 income.

2. Appellant did not file a 2016 California Nonresident or Part-Year Resident Income Tax Return on or before the due date for the return. In addition, other than the withholding of \$875, appellant did not make any payments toward his California 2016 tax liability on or before the payment due date.
3. The FTB received several telephone calls from appellant's tax professional after the tax payment due date concerning the amount of appellant's 2016 withholdings.
4. On June 15, 2017, appellant made a payment of \$78,940 to the FTB.
5. On June 28, 2017, appellant timely filed a 2016 California Nonresident or Part-Year Resident Income Tax Return, which reported California taxable income of \$740,395 and a total tax of \$79,815, claimed withholdings of \$875, and reported a total amount due of \$78,940, which was satisfied by appellant's June 15, 2017 payment.
6. The FTB accepted appellant's 2016 return as filed, but imposed a late-payment penalty of \$4,736.40, an underpayment of estimated tax penalty of \$1,698.16, and interest of \$534.48. The FTB notified appellant of these revisions by a Notice of Return Change – Revised Balance dated September 6, 2017. On September 17, 2017, appellant satisfied this revised balance due with a payment of \$6,969.04.
7. In a letter to the FTB dated September 20, 2017, appellant's tax professional requested the abatement of the late-payment penalty and the estimated tax penalty. Appellant's tax professional conceded that appellant did not timely pay his taxes. He contended that

appellant had not engaged in willful neglect, because he relied on FibroGen and his tax professional, who erroneously assumed that FibroGen had made all required 2016 California tax payments through withholding. According to appellant's tax professional, appellant took his tax responsibilities seriously and diligently disclosed the relevant facts and documents to his tax professional. Appellant's tax professional asserted that appellant is unfamiliar with American tax law because he is a nonresident taxpayer living in Japan, who is neither a citizen nor a permanent resident of the United States. The FTB treated appellant's tax professional's September 20, 2017 letter as a claim for refund.

8. In a notice dated October 3, 2017, the FTB denied appellant's claim for refund. On October 20, 2017, the instant appeal followed.²

DISCUSSION

Issue 1 - Whether appellant has shown reasonable cause for the late payment of tax.

R&TC section 19132(a)(1)(A) imposes a late-payment penalty when a taxpayer fails to pay the amount of tax shown as due on the return on or before the due date. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing the return). (R&TC, § 19001.) Individuals must generally file California income tax returns on or before April 15 following the tax year. (R&TC, § 18566.)

The late-payment penalty may be abated if the taxpayer establishes that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.)³ To establish reasonable cause for the late payment of tax, a taxpayer must show that his or her failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of M. B. and G. M. Scott*, 82-SBE-249, Oct. 14, 1982.) Ignorance of the law is not an excuse for the failure to make timely tax payments. (*Appeal of Diebold, Inc.*, 83-SBE-002, Jan. 3, 1983.) A taxpayer's failure to timely pay tax due to an oversight does not constitute reasonable cause. (*Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.)

² While the FTB imposed interest of \$534.48, appellant did not request the abatement of any interest in his appeal letter.

³ Published decisions of the Board of Equalization (BOE), designated by "SBE," may generally be found on the BOE's website: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

In *United States v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*), the United States Supreme Court held that the duty to file a tax return by a statutory deadline could not be delegated to an agent, such as an accountant or an attorney. By contrast, the Supreme Court stated that a taxpayer's reliance on an accountant or an attorney for advice on a substantive matter of tax law, such as whether a liability exists, is reasonable because most taxpayers are not competent to discern any error in the advice. (*Ibid.*) The Supreme Court reasoned that it would defeat the purpose of obtaining counsel if a taxpayer were required to seek a second opinion or attempt to monitor the original counsel. (*Ibid.*) The Supreme Court held that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.*, at pp. 251-252.)

In the *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172 (*Berolzheimer*), decided by the BOE on November 19, 1986, the BOE extended the holding in *Boyle, supra*, which involved a late-filing penalty, to the context of a late-payment penalty. In *Berolzheimer*, the taxpayers' tax professional miscalculated their federal capital gains tax liability because of a computer programming error. (*Id.*) The tax professional then calculated and paid the taxpayers' California income tax based on the erroneous figure. (*Id.*) The tax professional did not discover this underpayment until after the payment deadline had elapsed, resulting in the imposition of a late-payment penalty. (*Id.*) On appeal, the taxpayers argued that their reliance on their tax professional to timely compute the correct amount of tax owed constituted reasonable cause and the absence of willful neglect. (*Id.*) Applying the holding in *Boyle, supra*, 469 U.S. at pp. 251-252, the BOE held that the tax professional did not advise the taxpayers on a matter of tax law when he incorrectly estimated their tax liability. The BOE stated, "As this was a simple computational problem, not a legal interpretation, appellants cannot hide behind an 'expert' for the failure to properly determine the tax that was due." (*Appeal of Berolzheimer, supra*; see also *Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.)

It is undisputed that appellant was required to make his 2016 tax payment on or prior to the due date, and that no timely payments were made except for the withholding of \$875 by FibroGen. Appellant did not make a full payment of his 2016 tax liability of \$78,940 until June 15, 2017. Appellant's reliance on FibroGen and his tax professional to ensure that his state income tax withholdings satisfied his 2016 California tax liability does not amount to substantive

legal advice. As discussed above, the timely payment of a tax liability does not require an expert legal opinion.

Moreover, appellant has not provided any evidence showing that his failure to timely pay the proper amount of tax occurred despite the exercise of ordinary business care and prudence. Appellant does not contend and the evidence does not show that he or his tax professional made any inquiries to FibroGen or the FTB concerning his 2016 income tax withholdings prior to the payment due date. It appears that, prior to the tax payment due date, appellant and his tax professional were not aware that the state income tax withholding information reflected on the two Forms 1042-S and the Form 592-B indicated that FibroGen did not withhold a sufficient amount to satisfy appellant's 2016 California tax liability. This withholding information was available to appellant and his tax professional well before the due date. The deadlines for FibroGen to issue the Form 592-B and Forms 1042-S to appellant were January 31, 2017,⁴ and March 15, 2017,⁵ respectively. Such oversight or ignorance of the law does not constitute reasonable cause for the late payment of appellant's 2016 tax liability. (*Appeal of J. Ray Risser, supra*; *Appeal of Diebold, Inc., supra*.) Similarly, the fact that appellant may be unfamiliar with American tax law because he lives in Japan and is neither a citizen nor a permanent resident of the United States is not an excuse for his failure to make timely payments of tax. (*Appeal of Diebold, Inc., supra*.) Accordingly, appellant has not demonstrated reasonable cause for the failure to make a timely payment of tax.

Issue 2 – Whether appellant has demonstrated that the underpayment of estimated tax penalty should be abated.

R&TC section 19136 incorporates by reference Internal Revenue Code (IRC) section 6654, with certain modifications. IRC section 6654 imposes a penalty for the underpayment of estimated tax when a taxpayer fails to make required estimated tax payments in a timely manner. As relevant to this appeal, R&TC section 19136(f) provides, “This section applies to a nonresident individual.” The amount charged is similar to an interest charge and applies from the date the estimated tax payment was due until the date it is paid. (R&TC, §§ 19136(a), (b),

⁴ See 2016 Instructions for FTB Form 592-B, *Resident and Nonresident Withholding Tax Statement*, p. 3.

⁵ See 2016 Instructions for IRS Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, p. 3.

19521.) There is no dispute as to the calculation of the penalty. Instead, appellant is solely disputing the imposition of the penalty.

Neither R&TC section 19136 nor IRC section 6654 provides for a general reasonable cause exception or a lack of willful neglect exception for the estimated tax penalty. “This penalty is mandatory upon a finding of an underpayment of estimated taxes; there is no exception upon a showing of reasonable cause.” (*Appeal of George S. and Jean D. McEwen*, 85-SBE-091, Aug. 20, 1985; see also *Wolffington v. Commissioner* T.C. Memo. 2014-45; *Appeal of J. Ray Risser, supra.*)

IRC section 6654(e)(3) provides for a waiver of the estimated tax penalty based on specified limited circumstances as follows: 1) by reason of casualty, death, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience (IRC, § 6654(e)(3)(A)); or 2) the taxpayer retired after attaining the age of 62 or became disabled, in the tax year for which the estimated tax payments were required to be made, or in the preceding tax year, *and* the underpayment was due to reasonable cause and not to willful neglect. (IRC, § 6654(e)(3)(B).)

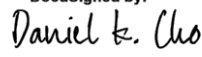
There is no dispute that appellant did not make any estimated tax payments for the 2016 tax year. Instead, appellant raises the same reasonable cause arguments that he advanced relative to the late-payment penalty. However, there is no basis for the abatement of the underpayment of estimated tax penalty based on reasonable cause. (*Appeal of George S. and Jean D. McEwen, supra.*) Appellant does not contend, nor does the evidence show, that this appeal involves a casualty, a disaster, or other unusual circumstances for which the imposition of the penalty would be against equity and good conscience, or, alternatively, that appellant retired after attaining the age of 62 or became disabled during 2016 or 2015 *and* the underpayment was due to reasonable cause and not to willful neglect. Accordingly, appellant has failed to establish a basis on which to abate the estimated tax penalty.

HOLDINGS

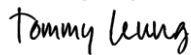
1. Appellant failed to demonstrate reasonable cause for the abatement of the R&TC section 19132 late-payment penalty.
2. Appellant failed to demonstrate that the R&TC section 19136 underpayment of estimated tax penalty should be abated.

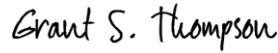
DISPOSITION

The action of the FTB in denying appellant's claim for refund is sustained.

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Daniel K. Cho
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Grant S. Thompson
Administrative Law Judge