

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053223
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MICHAEL GREENFELD) Date Issued: March 4, 2019
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OPINION

Representing the Parties:

For Appellant: Moshe Graber, CPA

For Respondent: Anne Mazur, Specialist

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Michael Greenfeld (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$10,013.97 for the 2016 tax year.

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

ISSUES

1. Whether appellant has established reasonable cause to abate the \$8,127.76 late payment penalty imposed under section 19132.
2. Whether appellant has established that the \$1,886.21 underpayment of estimated tax penalty imposed under section 19136 should be abated.

FACTUAL FINDINGS

1. On October 15, 2017, appellant filed a timely California income tax return for the 2016 tax year. Appellant reported taxable income of \$1,216,340 and total tax of \$136,797.

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

After applying payments of \$35,200, the return reported tax due of \$101,597, and a penalty of \$1,886 for underpayment of estimated tax (estimated tax penalty). Appellant paid the balance due on October 10, 2017.

2. FTB processed the return, and imposed an estimated tax penalty of \$1,886.21, and a late-payment penalty of \$8,127.76.
3. Appellant paid the additional liability and filed a claim for refund of the penalty amounts. In it, appellant claims that he was advised by his accountants (Gerber & Co., Inc.) that his estimated distributive share as a member of Picture Shop, LLC (the LLC), would be a loss of approximately \$2.1 million, and appellant used this amount to compute his estimated and extension tax payments for the 2016 tax year. Appellant then explains that when the loss was reported on the LLC's Schedule K-1 issued a few months later, it reflected a \$1.35 million lower loss for California purposes due to a difference between the federal and California depreciation claimed on the LLC's return. Appellant states that he did not become aware of the \$1.35 million difference until he received his Schedule K-1 from the LLC. Appellant also claims that he has a good filing history.
4. FTB denied the claim and this timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant has shown reasonable cause to abate the late payment penalty imposed under section 19132.

Section 19001 provides that the personal income tax "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 shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. The late payment penalty has two parts. The first part is 5 percent of the unpaid tax.

(§ 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (§ 19132(a)(2)(B).) Here it is undisputed that appellant failed to timely pay tax, and appellant does not dispute the imposition or computation of the late-payment penalty. Instead, appellant asserts that the penalty should be abated due to reasonable cause.

The late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (§ 19132(a).) To establish reasonable cause for a 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 Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.)² Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

Unsupported assertions that information could not be obtained due to difficulty in accumulating documents or other information do not establish reasonable cause for purposes of abating the late payment penalty.³ Appellant has provided no documentation to show by whom, when, or under what circumstances he was advised of the LLC's projected loss. Nor has he established what efforts he took to timely obtain the information necessary to calculate his share of the LLC's loss, or that he was precluded from obtaining a reasonably accurate estimate of the LLC's loss from the LLC itself. Accordingly, we find that appellant has not established that his failure to timely pay the tax was the result of reasonable cause.

In addition, although appellant also asserts that he had a good filing history, we have no authority to waive the late payment penalty based on appellant's prior good filing or payment history. The law provides that the late payment penalty shall apply unless it is shown that the failure to timely pay was due to reasonable cause and not willful neglect, and here, appellant's prior filing or payment history had no impact on his ability to timely pay the 2016 tax liability. (§ 19132(a)(1).) In conclusion, we find that appellant did not establish reasonable cause for failing to timely pay his tax for the 2016 tax year.

Issue 2 - Whether appellant has established that the underpayment of estimated tax penalty imposed under Section 19136 should be abated.

Generally, California conforms to Internal Revenue Code (IRC) section 6654, and imposes an estimated tax penalty for the failure to timely make estimated income tax payments.

² State Board of Equalization precedential opinions are viewable on BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

³ See, e.g., *Appeal of J. B. and P. R. Campbell*, 85-SBE-112, Oct. 9, 1985 [unsupported assertion that taxpayers could not timely obtain necessary information]; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982 [alleged difficulty in calculating income].

(§ 19136(a); IRC, § 6654.) The estimated tax penalty is similar to an interest charge, and applies from the due date of the estimated tax payment until the date it is paid. (IRC, § 6654(b)(2).) For the 2016 tax year, appellant was required to timely pay estimated tax payments totaling at least 90 percent of tax due for the 2016 tax year. (§§ 19136(a), 19136.3.) Here, appellant failed to make the estimated tax payments as required by section 19136, and as a result FTB properly imposed an underpayment of estimated tax penalty of \$1,886.21.

Appellant does not protest the imposition or computation of the penalty. Instead, appellant argues that the penalty amount should be refunded based on reasonable cause. However, there is no general reasonable cause exception to the estimated tax penalty.⁴ (*Estate of Ruben v. Commissioner* (1960) 33 T.C. 1071, 1072; *Farhoumand v. Commissioner* (2012) T.C. Memo. 2012-131; *Appeal of Weaver Equipment Company*, 80-SBE-048, May 21, 1980.) Accordingly, appellant has failed to establish a basis on which to abate the penalty for underpayment of estimated tax.

HOLDINGS

1. Appellant has failed to show reasonable cause to abate the late payment of tax penalty imposed under section 19132.
2. Appellant has not established that the underpayment of estimated tax penalty imposed under section 19136 should be abated.

⁴ Nevertheless, the estimated tax penalty may be waived if it is established that the failure to timely pay the estimated tax payment was due to reasonable cause and, in the tax year at issue or the preceding tax year, the taxpayer retired after reaching age 62 or became disabled. (IRC, § 6654(e)(3)(B).) In addition, IRC section 6654(e)(3)(a) permits a waiver of the penalty if the government determines that by reason of casualty, disaster, or other unusual circumstances the imposition of the penalty would be against equity and good conscience. Appellant has not alleged any of these conditions; therefore, we do not discuss this further.

DISPOSITION

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

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Nguyen Dang
4D465973FB44409...
Nguyen Dang
Administrative Law Judge