

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
ROBERT G. KETCHUM

) OTA Case No. 18011175
)
) Date Issued: July 24, 2019
)
)
)

OPINION

Representing the Parties:

For Appellant: John C. LeVine, E.A.
For Respondent: Brian Miller, Tax Counsel III
Maria Brosterhous, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Robert G. Ketchum (appellant) appeals an action by the respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$11,287.27 for the 2015 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Kenneth Gast, and Linda Cheng held an oral hearing for this matter in Los Angeles, California, on April 24, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Has appellant shown reasonable cause to abate the late-filing penalty for taxable year 2015?¹

FACTUAL FINDINGS

1. Appellant late-filed a 2015 California Resident Income Tax Return (Form 540) on November 7, 2016.

¹ Appellant’s representative stipulated at the hearing that appellant was dropping his request for abatement of the mandatory electronic payment penalty (e-pay penalty). Therefore, we do not address that issue in this opinion.

2. Thereafter, FTB issued a Notice of State Income Tax Due imposing a late-filing penalty of \$9,351.25, plus \$1,016.29 of interest.
3. Appellant paid the full tax liability and filed a claim for refund requesting abatement of the late-filing penalty based on reasonable cause, which FTB denied.²
4. Documents and testimony submitted on appeal show that appellant's tax preparer (Mr. LeVine) suffered a serious, life-threatening health issue in May 2016, and was not able to return to his practice full-time until sometime in August 2016. During that time, Mr. LeVine's wife functioned as the office manager in his absence while also tending to him. Mr. LeVine's wife is not qualified to prepare and transmit tax returns. Prior to being hospitalized, Mr. LeVine had already prepared appellant's tax return. An attempted transmission failed, but Mr. LeVine did not realize that appellant's return had not been filed until November 7, 2016.

DISCUSSION

R&TC section 19131 imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The late-filing penalty is computed at 5 percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (*Ibid.*) Here, appellant acknowledges that he filed his return late, and concedes that the late-filing penalty was properly imposed and computed for the tax year at issue.

To establish reasonable cause to abate the late-filing penalty, a "taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an [ordinarily] intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) The burden of proof is on the taxpayer to establish that the difficulties experienced prevented the taxpayer from filing a timely return. (*Appeal of Duff* (2001-SBE-007) 2001 WL 1674987.) Illness or other personal difficulties that prevent a taxpayer from filing a return may be considered reasonable cause. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) However, delegating the duty to meet a tax filing deadline to an accountant or attorney will not, by itself, constitute reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 248-249.)

² Appellant also requested abatement of a late-payment penalty; however, no such penalty was imposed.

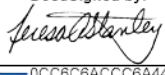
In this appeal, we are sympathetic to compelling circumstances that caused appellant’s representative to overlook a transmission error. Mr. Levine stated that appellant’s late-filing was his error, and he requested that we reduce the penalty to a one-month penalty, which he asserted the Internal Revenue Service did on appellant’s federal liability. Mr. LeVine testified that “I cannot afford to pay these types of penalties.”³ OTA has no authority to compromise a tax liability. Rather, OTA’s jurisdiction is limited to determining the correct amount of appellant’s California personal income tax liability. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) Despite Mr. LeVine’s illness, there is no evidence in the record that shows that appellant himself attempted to ensure that his taxes had been filed before the due date of the return. Nor may we impute Mr. LeVine’s reasonable cause arguments to appellant. In short, appellant’s delegation of his responsibility to timely file his return does not constitute reasonable cause. Therefore, appellant has not shown that the late-filing penalty should be abated.

HOLDING

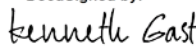
Appellant has not established that reasonable cause prevented him from filing a timely 2015 return.

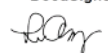
DISPOSITION

FTB’s action is sustained in full.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Linda Cheng
Administrative Law Judge

³ FTB provided information regarding its Offer in Compromise program and its installment agreement program to appellant. However, appellant has already paid all penalties, and there is no outstanding 2015 liability.