

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19014216
KIMBERLY JEFFREY)
) Date Issued: August 12, 2019
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OPINION

Representing the Parties:

For Appellant: Kimberly Jeffrey
For Respondent: Gi Nam, Tax Counsel

K. GAST, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324(a), Kimberly Jeffrey (appellant) appeals an action by respondent Franchise Tax Board (FTB) in denying her claim for refund in the amount of \$2,248.96 for the 2017 tax year. Appellant waived her right to an oral hearing. Therefore, this matter is being decided based on the written record.

ISSUE

Has appellant established reasonable cause to abate the late payment penalty imposed under R&TC section 19132?

FACTUAL FINDINGS

1. On her 2017 California resident income tax return, appellant reported total tax due of \$32,128 after applying timely estimated tax payments. Appellant did not pay the \$32,128 by the payment due date of April 15, 2018. Rather, she untimely paid it about three months later on July 27, 2018.
2. FTB proposed a late payment penalty of \$2,248.96.
3. Appellant paid the \$2,248.96 and filed a claim for refund, requesting abatement of the late payment penalty on reasonable cause grounds.

4. FTB denied appellant's refund claim, asserting she had not established reasonable cause for abatement. This timely appeal followed.

DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment of the tax. Here, it is undisputed that FTB properly imposed and computed the late payment penalty. In addition, FTB does not assert willful neglect is present in this case, and therefore the only issue is whether appellant has demonstrated reasonable cause for the late payment.

The late payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of tax was due to reasonable cause. (R&TC, § 19132(a).) To establish reasonable cause for the late payment of tax, the taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) The taxpayer bears the burden of proving reasonable cause exists. (*Ibid.*)

On appeal, appellant contends she has reasonable cause to abate the penalty. She alleges that on March 30, 2018, she mailed all tax documents to her accountant, and confirmed delivery with United States Postal Service tracking. She asserts that a few days prior to the original due date of the return, she contacted her accountant's office to get a status update and/or confirm that a tax return extension was being filed but was told nothing had been done with her tax information. She claims that her accountant had suffered an accident in early 2018 and was out of the office for several weeks, but nobody in the accountant's office had notified her or started preparing her taxes. As support, appellant submitted email exchanges between her and her accountant, dated between July 2018 and November 2018. The emails recount appellant's dissatisfaction with her accountant's unresponsiveness and poor customer service throughout the process of preparing her 2017 federal and California returns.

Based on a review of the record, it appears the essence of appellant's contention is she relied on her accountant to assist her in making a timely payment, which he failed to do. However, it is well-settled law that a taxpayer's reliance on a tax preparer or agent to timely file her taxes does not constitute reasonable cause because she has a personal, non-delegable obligation to file her tax returns by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*)). The courts have applied this bright-line rule—as articulated in *Boyle*, a case

involving a late-filing penalty—to the late payment penalty, even in circumstances where taxpayers acted prudently in dealing with their agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136, 1144-1146 [reliance on payroll service to make payments was insufficient to establish reasonable cause under *Boyle*]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [reliance on taxpayer’s controller to make payments was insufficient to establish reasonable cause].) Thus, appellant had a non-delegable duty to ensure timely payment of her taxes and cannot delegate that duty to her accountant. Accordingly, the fact that appellant relied on her accountant to pay her taxes does not relieve her of the late payment penalty.

To be sure, appellant acted diligently and promptly when she confirmed her tax documents were in fact delivered to her accountant on March 30, 2018, several weeks before the payment due date of April 15, 2018. However, after she contacted her accountant’s office and was told, just a few days prior to the due date, that nothing had been done with her tax information, she does not show—or even allege—she took any steps to properly determine and timely pay her taxes. Under these circumstances, we believe an ordinary and prudent businessperson would have immediately attempted to calculate and pay the outstanding balance. While appellant did make a timely extension payment of \$20,000, she does not explain how this amount was computed for purposes of showing it was based on a good faith estimate of the remaining tax due. Appellant further alleges she had a large taxable event in the third quarter of 2017, which, at the advice of her accountant, prompted her to pay estimated taxes of \$25,000 in early January 2018. But this event should have put her on further notice that she needed to closely monitor her total tax payments prior to the due date to ensure their timeliness. In addition, appellant’s email exchanges between her and her accountant, dated between July 2018 and November 2018, only reveal she attempted to rectify the situation several months after the payment due date.

Finally, appellant maintains she has history of timely filing and paying her taxes. On that basis, she claims the Internal Revenue Service (IRS) abated the late payment penalty imposed for the same tax year and related to the same issue on appeal here. However, California, unlike the


IRS, does not permit penalty abatement under these circumstances.¹ Rather, reasonable cause must be shown, which is lacking here.

HOLDING


Appellant has not established reasonable cause to abate the late payment penalty.


DISPOSITION

FTB's action denying appellant's refund claim is sustained.

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Kenneth Gast
Administrative Law Judge

We concur:

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Neil Robinson
Administrative Law Judge

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Patrick J. Kusiak
Administrative Law Judge

¹ While the IRS has an administrative program called "First Time Abate," under which it will abate timeliness penalties if a taxpayer has timely filed returns and paid tax for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program. The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement of timeliness-related penalties for taxpayers based solely on their history of timely filing and payment. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.))