

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

In the Matter of the Appeal of:  
**JARROD G. DAVIS AND**  
**JAYNE T. DAVIS**

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) OTA Case No. 18010744  
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) Date Issued: September 18, 2019  
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**OPINION**

Representing the Parties:

For Appellants: Tyler M. Nyman, CPA

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Andrea Long, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Jarrod G. Davis and Jayne T. Davis (appellants) appeal an action by the Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,009.50 for the 2015 tax year.

Appellants waived their right to an oral hearing, and therefore the matter is being decided based on the written record.

**ISSUE**

Whether appellants have established reasonable cause for failing to timely file a 2015 return.

**FACTUAL FINDINGS**

1. Appellants did not file a timely 2015 return. On October 5, 2016, appellants’ tax preparer attempted, unsuccessfully, to electronically file their 2015 tax return. FTB rejected the return because there was an error on the return.
2. On October 15, 2016, FTB received appellants’ payment of \$8,160, which was applied to their income tax liabilities for the 2015 tax year.

3. FTB received information that during 2015, appellant-husband received \$217,880 of taxable income from CI Holdings, LLC.<sup>1</sup>
4. FTB sent appellant-husband a Request for Tax Return (Request) dated April 4, 2017, requesting that he file a 2015 return or explain why he was not required to file a 2015 return. Appellant-husband's response was due by May 10, 2017. FTB did not receive a response by the due date.
5. FTB issued appellant-husband a Notice of Proposed Assessment (NPA) on June 5, 2017, which proposed a tax of \$2,098 based on an estimated taxable income of \$217,880, and imposed a late-filing penalty of \$524.50, plus interest. The NPA informed appellant-husband that the proposed assessment would be due on August 4, 2017, unless he filed a 2015 return or protested the proposed assessment before it became final.
6. On June 12, 2017, appellants filed a 2015 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR). Appellants reported total taxable income of \$2,251,583, California adjusted gross income of \$211,326, and a California tax liability of \$23,290. After claiming withholdings of \$15,252, appellants reported tax due of \$8,038 and self-assessed an estimated tax penalty of \$122, for a total amount due of \$8,160, which appellants previously remitted to FTB on October 15, 2016.
7. FTB accepted appellants' 2015 return as filed on June 12, 2017. However, because the return was untimely filed, FTB sent a Notice of Tax Return Change - Revised Balance on June 20, 2017, imposing a late-filing penalty of \$2,009.50, plus accrued interest of \$203.57. No underpayment of estimated tax penalty was imposed, and thus the self-assessed estimated tax penalty payment of \$122 was applied as a credit, resulting in a balance due of \$2,091.07. Appellants remitted a payment of \$2,091.07 on that same date.
8. On July 5, 2017, FTB received appellants' claim for refund of the late-filing penalty of \$2,009.50. Appellants assert that they had reasonable cause for the late-filing of their 2015 return for the following reasons. They did not make a tax payment with an extension because they were informed that CI Holdings, LLC withheld sufficient tax to satisfy their tax liability. After receiving a Schedule K-1 in late September (2015) and

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<sup>1</sup> For the 2015 tax year, a single individual under age 65 with no dependents realizing a California gross income of \$16,256 or a California adjusted gross income of \$13,005 was required to file a California income tax return. A single individual age 65 or older with no dependents realizing a California gross income of \$21,706 or a California adjusted gross income of \$18,455 was required to file a California income tax return.

completing their 2015 return, they determined that they owed an additional \$8,160 of tax, which they remitted to the FTB within two weeks after receiving the Schedule K-1. It was not until June 2017 that appellants received notice from FTB indicating that it did not receive their 2015 return. The tax preparation software allegedly had not properly alerted appellants that their electronically filed return was rejected. Upon notice from FTB, appellants promptly submitted a return on June 12, 2017.

9. By a letter dated August 2, 2017, FTB denied the refund claim on the basis that appellants did not demonstrate reasonable cause for the late-filing of their 2015 return.
10. Appellants filed this timely appeal.

### DISCUSSION

California imposes a penalty for failing to file a valid return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.<sup>2</sup> (Rev. & Tax. Code, § 19131.) The late-filing penalty is calculated at 5 percent of the tax for each month or a fraction thereof that the return is late, with a maximum penalty of 25 percent of the unpaid tax. To establish reasonable cause, the 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 ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Board* (2011) 199 Cal.App.4th 1, 22; *Estate of Barbara D. Gillespie (dec’d)* (2018-OTA-052P.) California Code of Regulations, title 18, section 30219(c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”<sup>3</sup> Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930; *Appeal of James C. and Monablance A. Walshe* (75-SBE-073) 1975 WL 3557.)

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<sup>2</sup> There is no evidence this record showing willful neglect or an allegation of willful neglect. Thus, the balance of this analysis shall focus only on whether appellant meets the standard for proving reasonable cause.

<sup>3</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

In *United States v. Boyle* (1985) 469 U.S. 241, 250 (*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 attorney. In contrast, the 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 tax liability exists, is reasonable because most taxpayers are not competent to discern error in the advice. (*Id.* at p. 251.) The court reasoned that it would defeat the purpose of seeking counsel in the first place if a taxpayer were required to seek a second opinion or attempt to monitor the original counsel on matters of tax law. (*Ibid.*) The Board of Equalization (BOE) has also determined that taxpayers' reliance on their accountant to timely file their tax returns did not establish reasonable cause for the failure to file timely returns. (*Appeal of Thomas K. and Gail G. Boehme* (85-SBE-134) 1985 WL 4224 [citing *Boyle, supra*, 469 U.S. at p. 241].)

There is no dispute that appellant did not file a 2015 return until June 12, 2017, which is more than 13 months after the due date of April 15, 2016. Neither appellants nor the record indicates that the failure to file the tax return on time involved matters of substantive tax law. Rather, appellants argue that they attempted to timely file their return within the extension period but that their tax preparer's filing software failed to alert the preparer that the FTB had rejected the attempted filing due to an error.

An ordinarily intelligent and prudent business person would confirm that his tax return was filed, and if there was a delay in filing, would have taken steps to fix the problem. Although appellants' return preparer contends its software did not properly alert it to the fact that the October 5, 2015 attempted filing had been rejected by FTB, the copy of the 2015 Activity Report attached to appellants' appeal letter indicates that the software had given the preparer notice that the attempted filing was unsuccessful. The notice was given on October 5, 2016, which afforded appellants an opportunity to timely, under extension, file the return by the October 15, 2016 deadline. Appellants do not describe what efforts, if any, they made to ensure that their 2015 return was timely filed after the preparer received notice that the attempted filing had been rejected. These facts do not establish that appellants acted with ordinary business care and prudence.

Appellants argue that requiring multistate taxpayers, such as themselves, to obtain confirmation from FTB that it accepted their electronically filed return is an onerous task. Deadlines, however, must be followed no matter how burdensome the taxpayer believes them to

be. As the United States Supreme Court observed in *United States v. Locke* (1985) 471 U.S. 84, 101:

Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. “Any less rigid standard would risk encouraging a lax attitude toward filing dates.” [citing *Boyle, supra*, 469 U.S. at p. 249.]

Multistate taxpayers have the same obligation to comply with tax requirements, such as timely filing returns, as other taxpayers. Accordingly, appellants have failed to meet their burden of proving that their failure to timely file a 2015 return was due to reasonable cause.

HOLDING

Appellants did not establish reasonable cause for the failure to timely file a 2015 return.

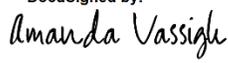
DISPOSITION

FTB’s action is sustained.

DocuSigned by:  
  
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Neil Robinson  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Andrew Kwee  
Administrative Law Judge

DocuSigned by:  
  
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Amanda Vassigh  
Administrative Law Judge