

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

In the Matter of the Appeal of: ) OTA Case No. 18042826  
**BARBARA GLAZER** )  
 ) Date Issued: October 22, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Moshe Graber, CPA

For Respondent: Joel M. Smith, Tax Counsel

For Office of Tax Appeals: Andrea Long, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Barbara Glazer (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$4,398 for the 2016 tax year.

Appellant waived her right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant has established reasonable cause for failing to make a timely payment of tax so that the late payment penalty imposed against her under R&TC section 19132 may be abated.

**FACTUAL FINDINGS**

1. Appellant filed a 2016 California income tax return on October 11, 2017, reporting a total tax of \$170,244, payments of \$115,269,<sup>1</sup> and tax due of \$54,975, which appellant paid with the return.

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<sup>1</sup> Appellant made an estimated tax payment of \$65,269 on April 15, 2016, and an extension payment of \$50,000 on April 5, 2017.

2. FTB accepted the return as filed. However, because FTB did not receive the tax due of \$54,975 by April 15, 2017, FTB imposed a late payment penalty of \$4,398, plus interest, which appellant subsequently paid.
3. Appellant submitted a claim for refund of the late payment penalty, which FTB denied. This timely appeal followed.

### DISCUSSION

R&TC 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).” R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment. The late payment penalty may be abated if the taxpayer can show that the failure to make a timely tax payment was due to reasonable cause. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, the taxpayer must show that his or her failure to make a timely tax payment of the proper amount occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.)

In *United States v. Boyle* (1985) 469 U.S. 241, 252, the U.S. Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing ..... ” The court, however, did observe that reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney with respect to substantive matters of tax law or whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Id.* at pp. 250-251.) If a taxpayer relies on improper advice of an accountant or tax attorney as to a substantive matter of tax law, failing to file a return in reliance on that advice may be considered reasonable cause if two conditions are met: (1) the person relied on is a tax professional with competency in the subject tax law; and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of the relevant facts and documents. (*Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 315-318.)

Appellant does not dispute that she made an untimely payment. Instead, appellant asserts that she acted reasonably by relying on her CPAs who projected a substantial loss from a flow-through partnership entity. Appellant notes that she remitted an estimated payment of \$50,000 by April 5, 2017, based upon her CPAs’ projection of flow-through loss of \$1,625,000.

Appellant provided a copy of a schedule projecting this estimated loss that she asserts was provided to her before the filing deadline. Appellant states that she did not receive a Schedule K-1 by the filing deadline, which showed an actual loss of \$793,086.

Although appellant provides a copy of the projection schedule, she has not provided any corroborating evidence, such as contemporaneous information as to when the tax projection was provided to her, and what information was communicated between her and her CPAs. Furthermore, there are contradictions in appellant's CPAs' statements. In appellant's opening brief, the CPAs state that they created the projection, estimating a flow-through loss of \$2.1 million. However, in appellant's reply brief, the CPAs state that the projection was provided to them, estimating a flow-through loss of \$1,625,000. Therefore, the facts surrounding the projection are unclear and unreliable. Additionally, appellant provides no other evidence to show her reliance on the schedule, or evidence of the reason for the discrepancy between the projected loss and the actual loss. Based on the lack of evidence and information in the record, we are unable to determine that appellant relied on her CPAs' advice, such that she has reasonable cause for failing to timely pay tax.

It is unclear whether appellant took any other steps to determine her correct tax liability, such as keeping her own financial records or of attempts to retrieve such records. (See *Appeal of Moren*, 2019-OTA-176P.) An assertion that records were difficult to obtain without any substantiation of efforts made to retrieve those records or otherwise showing that they were unobtainable is not sufficient to show reasonable cause. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) While appellant timely paid a portion of her tax, there are no facts or reliable evidence in the appeal record to clarify the reason for appellant's late payment of the remainder of the tax due. Therefore, appellant has not provided a basis to show reasonable cause.

HOLDING

Appellant has not established reasonable cause for her failure to make a timely payment of tax. Accordingly, the late payment penalty imposed against her for 2016 may not be abated.

DISPOSITION

FTB's action is sustained.

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Josh Lambert  
Administrative Law Judge

We concur:

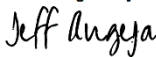
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John O. Johnson  
Administrative Law Judge

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Jeffrey G. Angeja  
Administrative Law Judge