OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18093768
LARRY T. KENNARD AND PAT A. KENNARD (DEC'D)	) Date Issued: October 16, 2019

OPINION

Representing the Parties:

For Appellants: Larry T. Kennard and Pat A. Kennard

For Respondent: Mira Patel, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (RT&C) section 19324, Larry T. Kennard and Pat A. Kennard (appellants) appeal an action by the Franchise Tax Board (respondent) in denying a claim for refund of $1,396.75 for the 2015 tax year.[1]

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

ISSUE

Whether appellants have shown reasonable cause for the late filing of their return.

FACTUAL FINDINGS

1. Appellants' 2015 tax return, and payment of their 2015 tax liability, was due by April 18 , 2016.[2] On May 15, 2016, appellants made a payment of $6,009 on their 2015 tax liability.

[1] The Office of Tax Appeals accepted the amount of $1,055.17 on appeal, which is the amount of a payment made by appellants on December 13, 2017. Because appellants contest the late-filing penalty, the amount at issue is the $1,396.75 late-filing penalty. There is also an estimated tax penalty of $5.86 imposed. However, because appellants only contest the late-filing penalty, we will only address this issue.

[2] The deadline was extended from April 15, 2016, to April 18, 2016, because of Emancipation Day.

2. On November 6, 2017, when no return was received, respondent sent a Payment Received - No Return on File Notice. The notice indicated that respondent received a payment for the 2015 tax year, but had no record of an income tax return.
3. On November 15, 2017, appellants filed their 2015 tax return.
4. On December 7, 2017, respondent sent appellants a Notice of Tax Return Change - Revised Balance. On the notice, respondent imposed a late-filing penalty of $1,396.75, an estimated tax penalty, and applicable interest.
5. Appellants paid the balance due in full and filed a claim for refund. Appellants contend that they relied on their tax preparer to file their return and that they signed a Form 8879 which authorized him to e-file their return. They asserted that the Internal Revenue Service (IRS) also imposed a federal late-filing penalty that was abated.
6. Appellants provided a September 7, 2017 letter from their tax preparer indicating that their return was not filed due to the tax preparer's mistake and apologizing "for the screw up." Appellants also provided a letter from the IRS indicating it was abating the late-filing penalty that was imposed at the federal level.
7. Respondent denied appellants' claim for refund. This timely appeal followed.

DISCUSSION

R&TC section 19131 provides that a late-filing penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and not due to willful neglect. When respondent imposes a late-filing penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.) To establish reasonable cause, a taxpayer must show that the failure to file a return on time occurred despite the exercise of ordinary business care. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068; *Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) The taxpayer's reason for failing to file timely must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Cummings* (60-SBE-040) 1960 WL 1418.)

In this case, appellants filed their return on November 15, 2017, more than one and one-half years after the original due date. Appellants argue that they relied their tax preparer to e-file their 2015 tax return and he mistakenly did not file it on time. However, reliance on their tax preparer to file their return does not constitute reasonable cause because appellants had a non-

delegable obligation to file their tax return by the due date. As the Supreme Court held in *United States v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*), "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due" such that reliance on an agent, such as a tax preparer, cannot function as a substitute for compliance with an unambiguous statute. Thus, it is the non-delegable responsibility of the taxpayer, and not that of the tax preparer, to timely file the return. Here, appellants' tax preparer acknowledges that there was a mistake on his part in filing the return, which he calls a "screw up." As noted above, the United States Supreme Court in *Boyle, supra,* held that reliance on an agent to ensure timely filing does not constitute reasonable cause. Accordingly, the error of appellants' tax preparer does not constitute reasonable cause.

Furthermore, appellants waited two months after they were informed by the tax preparer that their return was not e-filed to file their return. It was only after respondent sent them the Payment-Received – No Return on File Notice, that they filed their return. An acceptable reason for failure to file a return will excuse such failure only so long as the reason remains valid. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P, [citing *Steven Bros. Foundation, Inc. v. Commissioner* (1962) 39 T.C. 93, 130, affd. in part & revd. in part on other grounds (8th Cir. 1963) 324 F.2d 633].) As such, appellants did not exercise ordinary business care and prudence. Accordingly, appellants' argument of reliance on their tax preparer is not a basis for reasonable cause and we find that appellants have not shown reasonable cause for failing to file their return by the due date.

Appellants state that the IRS abated their federal failure to file penalty for the 2015 tax year. However, their federal transcript does not indicate that the penalty was abated for reasonable cause. Additionally, the IRS's June 5, 2018 letter regarding the abatement does not state that the IRS abated the penalty due to reasonable cause. While the penalty may have been abated due to the IRS first-time abate program, which allows for abatement of a penalty based on a taxpayer's history of compliance, respondent does not have a comparable program. The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See, e.g., Assembly Bill No. 1777 (2013-2014 Reg. Sess.).)

Thus, the only basis upon which the late-filing penalty may be abated is a showing of reasonable cause, which appellants have not made. Therefore, appellants have not shown that the penalty should be abated.

HOLDING

Appellants have not shown reasonable cause for the late filing of their return.

DISPOSITION

Respondent's action is sustained.

DocuSigned by:
Josh Lambert
B90E40A720E3440...
Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
873D9797B9E84E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
7B17E958B7C14AC...
Amanda Vassigh
Administrative Law Judge