

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19054802
KIRK ZOERB AND MARTHA ZOERB) Date Issued: December 17, 2019
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OPINION

Representing the Parties:

For Appellants: Kirk Zoerb and Martha Zoerb

For Respondent: John E. Yusin, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Kirk Zoerb and Martha Zoerb (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,282.61 for the 2016 taxable year. Appellants waived the right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUE

Have appellants shown that they are entitled to abatement of the late-payment penalty imposed for taxable year 2016?

FACTUAL FINDINGS

1. Appellants timely filed a California Resident Income Tax Return by the extended filing date of October 15, 2017.
2. After applying withholding credits, appellants had a tax liability of \$18,505 on the payment due date of April 15, 2017. Appellants did not make an extension payment for that amount, nor did they make a payment when filing their return.

3. FTB issued a Notice of Tax Return Change showing assessment of a late-payment penalty.¹
4. In December 2017, appellants began making payments under an installment payment agreement, which they completed on September 24, 2018.
5. After appellants paid the balance due, they filed a claim for refund with FTB based on reasonable cause for the late payment due to their asserted financial hardship.
6. FTB denied the claim for refund, and 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 late payment.

The late-payment penalty may be abated if the taxpayer shows 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 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.*)

Here, appellants assert two reasons that they had reasonable cause for their late payment of taxes. First, they were experiencing financial hardship because they had just purchased and remodeled a new home and had associated moving and real estate expenses. Second, they did not withhold enough of the distribution from their 401(k) retirement account, and they had relied on a tax professional to aid them in determining the amount of withholding.

With respect to appellants' claim of financial hardship, such hardship may be considered reasonable cause for a refund of the late-payment penalty if the taxpayer exercised ordinary business care and prudence but was either unable to pay the tax or would suffer an undue hardship if tax were paid on the due date. (Int.Rev. Code, § 6651; Treas. Reg. § 301.6651-1(c)(1).) Financial hardship is more than an inconvenience to the taxpayer, and the

¹ The late-payment penalty at the time FTB issued the notice was \$1,572.93. FTB subsequently increased the penalty for continued late payments.

determination is based on all the facts and circumstances. (Treas. Reg. § 1.6161-1 (b).) Appellants have provided no evidence of a financial hardship. To the contrary, appellants admit that in 2016 they had sufficient funds to purchase a home, remodel that home, pay real estate expenses, and pay moving costs. Thus, instead of acting as ordinarily intelligent business persons and making timely payment of their tax obligations, appellants prioritized their residence over payment of taxes. Appellants have not established reasonable cause to abate the late-payment penalty due to financial hardship.

With respect to appellants' second contention, that their payments were not timely because they relied on a tax professional to determine their withholding, we note that taxpayers have a personal and nondelegable duty to file timely tax returns. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*).) The nondelegable duty relating to late filing in *Boyle* also applies in the late payment penalty context. (*Appeal of Berolzheimer* (86-SBE-172) 1985 WL 22860.) Reliance upon the advice of a tax professional on a matter of law, such as whether a tax liability exists or a return is required to be filed, can constitute reasonable cause. (See *Estate of La Meres v. Comm'r* (1992) 98 T.C. 294.) The taxpayer must show that full disclosure was made of the relevant facts and documents to the tax preparer, that the tax preparer was a competent professional with sufficient expertise, and that the taxpayer relied in good faith on the tax preparer's advice. (*Boyle, supra.*)

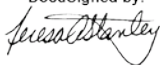
Appellants have provided no evidence of their tax professional's competency. Moreover, appellants have provided no evidence that they fully disclosed to their tax professional that they had received both wage income and retirement income. Appellants provided no evidence of the substance, if any, of their tax professional's advice. Appellants have therefore not established that they had reasonable cause for their late payment based on tax withholding advice given by their tax professional.

HOLDING


Appellants have not established that they had reasonable cause for the late payment of their tax.

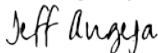
DISPOSITION

FTB’s denial of appellant’s claim for refund is sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Josh Lambert
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge