

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19024297  
JONATHAN J. TOMPSON AND )  
VANESSA A. REID )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellant: Matthew J. Colvin, CPA

For Respondent: Meghan McEvilly, Tax Counsel III

For Office of Tax Appeals: James Scott Whitehouse, Analyst

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Jonathan J. Tompson and Vanessa A. Reid (appellants) appeal an action by the respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$770.71 for the 2017 tax year.<sup>1</sup>

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

**ISSUE**

Whether appellants have shown that the late-payment penalty imposed under R&TC section 19132 should be abated due to reasonable cause.

**FACTUAL FINDINGS**

1. Appellant-husband and Arjun Jain (Jain) formed Perceptive Code, LLC (the LLC) as a technology consulting company. Appellant-husband and Jain each held a 50-percent

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<sup>1</sup> The total amount of penalties assessed and paid by appellants for the 2017 tax year is \$1,341.93. This figure is the sum of the previously imposed underpayment of tax penalty of \$565 and the late-payment penalty of \$776.93. However, appellants have only requested a refund in the amount of \$770.71 in this appeal and in Form 2917—Reasonable Cause—Individual and Fiduciary Claim for Refund filed with and denied by FTB. As such, \$770.71 is the amount at issue in this appeal.

- interest in the LLC. In addition to being a co-founder of the LLC, appellant-husband was the LLC's chief executive officer (CEO) and the designated agent for service of process. Appellant-husband, as agent, also shared the same address with the LLC.
2. On September 15, 2017, the LLC sold intangible property, which resulted in a gain of \$750,000. As appellant-husband owned a 50-percent interest in the LLC, he realized a \$375,000 gain from the sale.
  3. On March 14, 2018, the LLC filed its 2017 tax return (Form 568). Appellant-husband signed the LLC's return. The LLC reported that it had a foreign nonresident member. The LLC also reported that no Forms 592, 592-A, 592-B, or 592-F were filed for the foreign nonresident member. According to the Schedule K-1 for appellant-husband, the LLC reported \$375,000 as appellant-husband's share of the capital gain. According to the Schedule K-1 for Jain, Jain was a foreign nonresident member. Jain was allocated \$375,000 long-term capital gain which was subject to withholding requirements pursuant to R&TC section 18666.<sup>2</sup>
  4. On April 12, 2018, appellants filed a timely California resident tax return. Appellants properly reported the net-long term capital gain of \$375,000 from the LLC's sale of property, in addition to other income, and a total tax liability of \$155,160.
  5. Appellants claimed income tax withholding of \$100,601 and an estimated tax payment of \$44,200. Appellants also claimed an additional California withholding (Form 592-B) in the amount of \$32,289. According to the Form 592-B attached to appellants' return, the type of income subject to withholding was "Distributions to Domestic (U.S.) Nonresident Partners/Members/Beneficiaries/S Corporation Shareholders," even though appellant-husband was a California resident. These payments equated to \$177,090, which resulted in an overpayment of \$21,930. Appellants requested that \$21,916 of the overpayment be applied to their 2018 estimated tax and that the remaining \$14 be refunded.
  6. Both appellants' and the LLC's tax returns were prepared by the same certified public accountant (CPA).
  7. FTB processed appellants' return and on June 20, 2018, issued a Notice of Tax Return Change – Revised Balance dated June 20, 2018. The notice explained that the \$32,289

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<sup>2</sup> R&TC section 18666 requires withholding on income from California sources, which is allocated to foreign partners. R&TC section 18666 generally conforms to Internal Revenue Code (IRC) section 1446 to the extent that the income is from California sources.

withholding could not be verified and was therefore disallowed, as was the application of the \$21,916 to appellants' 2018 estimated tax payments, and an estimated tax penalty of \$565 was imposed, plus interest and fees, resulting in a balance due of \$10,999.31. The notice advised appellants that the new balance was due July 5, 2018.

8. Appellants paid \$10,999.31 on September 4, 2018. FTB received an additional payment of \$110.06 on September 17, 2018 from appellants in payment of additional accrued interest.
9. Subsequently FTB issued a Notice of State Income Tax Due, dated October 8, 2018, which imposed the late-payment penalty of \$776.93. This notice reflected total penalties of \$1,341.93, which consisted of the previously imposed and paid underpayment of estimated tax penalty of \$565.00 and the newly imposed late-payment penalty of \$776.93.
10. FTB received a \$770.70 payment from appellants on November 7, 2018.
11. Appellants filed a claim for refund, by filing Form 2917 – Reasonable Cause – Individual and Fiduciary Claim for Refund, dated December 11, 2018, for a partial refund of penalties for late payments in the amount of \$770.71.
12. On January 11, 2019, FTB denied appellants' claim for refund.
13. Appellants then filed this timely appeal.

#### DISCUSSION

R&TC section 19132 provides that a late-payment penalty is imposed when taxpayers fail to pay the amount shown as due on the return on or before the due date of the return. The late-payment penalty has two parts. The first part is 5 percent of the unpaid tax. (R&TC, § 19132, subd. (a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion thereof, calculated on the outstanding balance. (R&TC, § 19132, subd. (a)(2)(B).) The total amount of the penalty may not exceed 25 percent of the total unpaid tax. (R&TC, § 19132, subd. (a)(3).) Appellants were required to pay the tax due by April 15, 2018. (R&TC, §§ 19132, 18566.) Since FTB did not receive full payment of the tax until September 4, 2018, the late-

payment penalty was properly imposed. Further, the penalty amount was properly calculated and appellants have not disputed the amount or the calculation method.<sup>3</sup>

The late-payment penalty will be abated if the taxpayers show that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132, subd. (a).) Appellants bear the burden of proving that both conditions existed. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) Willful neglect is defined as a “conscious, intentional failure or reckless indifference.” (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860 [citing *United States v. Boyle* (1985) 469 U.S. 241, 245-246].) Willfulness has not been asserted by FTB nor do we see any basis in the record to support a willful failure finding; however, because of our finding regarding reasonable cause below, we do not further discuss that issue.

Reasonable cause exists when the taxpayers demonstrate that their failure to timely pay the proper amount of the tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Sleight, supra.*) The reason for missing the deadline must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Appellants contend that they relied on the incorrect Form 592-B issued by the LLC to appellant-husband which resulted in the late payment. Appellants have not explained what steps appellant-husband took to verify whether the withholding was correctly attributed to appellant-husband prior to April 15, 2018. Appellants’ assertion that they needed to “contact the LLC” to verify that the Form 592-B had been issued to appellants in error and should have been applied to the other LLC member appears misleading given that appellant-husband, as the CEO, had an active role in the LLC’s activities, as well as access to the LLC’s financial information and the same certified public accountant prepared the tax returns of the LLC and appellants. We note that a review of the LLC tax return and the attached Schedule K-1s to appellant-husband and Jain would have alerted appellant-husband to the inconsistency of the Form 592-B reporting. Since appellant-husband signed the LLC tax return on March 14, 2018, he would presumably have read

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<sup>3</sup> The penalty is calculated as follows:  $5\% \times \$10,359.00 = \$517.95$  for the underpayment portion of the penalty. This amount is added to  $0.5\% \times 10,359.00 \times 5$  (April – September = 5 months) = \$258.98. When added together these amounts equal \$776.93. This amount, in addition to the previously imposed late-payment of estimated tax penalty of \$565.00, equals \$1,341.93.

it and been aware of this inconsistency prior to April 15, 2018. Furthermore, while the Form 592-B reported that the type of income subject to withholding was “Distributions to Domestic (U.S.) Nonresident Partners/Members/Beneficiaries/S Corporation Shareholders,” appellants filed a California *resident* tax return, an error that a reasonable businessperson would have recognized. It appears most likely that appellants fully relied on their CPA to properly prepare the return, which in fact did not happen. The result of the error, which was later acknowledged by appellants, was a delinquent payment of tax.

Appellants contend that reasonable cause is established by their reliance upon their CPA and the prompt action they took to pay following discovery of the error. While reasonable businesspeople do in fact rely on CPAs for tax assistance regularly, they do continue to be obligated to timely file and timely pay. As discussed below, reliance on professionals for such non-delegable duties does not establish reasonable cause under the law.

The United States Supreme Court, in *United States v. Boyle* (1985) 469 U.S. 241, held that it is reasonable for a taxpayer to rely on the advice of an accountant or attorney when that accountant or attorney advises a taxpayer as to a matter of tax law. However, the Supreme Court also reasoned that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due, and a taxpayer’s reliance on an accountant or attorney cannot be a substitute for compliance with an unambiguous statute. (*Ibid.*) As the Supreme Court held in *Boyle*, “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met.” (*Id.*, at p. 252.)

Appellants further contend that, once they determined that the notices mailed by FTB were correct, they paid the balance in full. Although appellants argue that their actions demonstrate reasonable cause, those actions took place after April 15, 2018, and are irrelevant as to whether appellants acted with reasonable cause prior to the due date of the tax.


Accordingly, we find that appellants have not demonstrated reasonable cause for their untimely payment of tax.

HOLDING

Appellants have not demonstrated reasonable cause for abatement of the late-payment penalty for the 2017 tax year.


DISPOSITION

FTB's action is sustained.


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James S. Whitehouse,  
Staff Services Analyst on behalf of:  
Douglas Bramhall  
Administrative Law Judge

We concur:

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Linda C. Cheng  
Administrative Law Judge

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Michael F. Geary  
Administrative Law Judge

Date Issued: 12/30/2019