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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18113950
C. CARR (DEC'D)	)

OPINION

Representing the Parties:

For Appellant: Fred Storek, CPA

For Respondent: Andrew Amara, Tax Counsel III

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Carr (appellant) appeals an action by Franchise Tax Board (FTB) denying appellant's claim for refund of $110,448[1] and applicable interest for the 2016 tax year.

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

ISSUES

1. Whether appellant has established a basis for abatement of the late-payment penalty.
2. Whether appellant has established a basis for abatement of the underpayment of estimated tax penalty (estimated tax penalty).[2]

FACTUAL FINDINGS

1. On May 12, 2017, appellant filed a timely 2016 California Resident Income Tax Return (Form 540) within the extension period, reporting total tax of $1,550,061. Appellant also self-assessed an estimated tax penalty of $30,446.

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[1] This amount is comprised of a $80,001 late-payment penalty and a $30,447 underpayment of estimated tax penalty.

[2] Appellant is only contesting the interest as it pertains to the penalties such that if appellant does not owe the penalties, she will not owe any of the interest imposed thereon.

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2. Prior to filing her return, appellant made the following payments relating to the 2016 tax year: an estimated tax payment of $88,514[3] on April 15, 2016, a late estimated tax payment of $6,986 on March 1, 2017, and a late tax payment of $1,485,007 on May 2, 2017.
3. FTB subsequently issued to appellant a Notice of Tax Return Change – Revised Balance for the 2016 tax year reflecting an estimated tax penalty of $30,447[4] (as self-assessed by appellant) and imposing a late-payment penalty of $80,001.
4. Appellant then submitted FTB Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund,[5] seeking abatement of the penalties.
5. FTB denied the claim for refund and this timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established a basis for abatement of the late-payment penalty.

R&TC section 19132(a)(1)(A) provides that a late-payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment. However, the late-payment penalty will not apply if the taxpayer establishes that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect.[6] (R&TC, § 19132(a)(1).) The taxpayer bears the burden of proving both conditions existed. (*Appeal of Friedman*, 2018-OTA-077P.) The taxpayer must show that the failure to timely pay the amount due occurred despite exercising ordinary business care and prudence. (*Appeal of Friedman, supra*; *Appeal of Moren*, 2019-OTA-176P.) The reason for not timely paying the tax due must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman, supra*; *Appeal of Moren*, *supra.*) The failure to timely remit the balance due on a tax liability caused by an

[3] This amount was paid through the transfer of credit from appellant's 2015 tax year.

[4] Difference of $1 is due to rounding.

[5] Appellant subsequently perfected her claim for refund by paying the full amount of penalties due, including all accrued interest.

[6] FTB does not assert that the late payment was the result of appellant's willful neglect. As such, willful neglect will not be addressed further in this opinion.

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oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, *supra*; *Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Appellant asserts that due to her physical infirmities and declining health over the years, she relied heavily on her accountant to file her returns and make the necessary tax payments from her account. Appellant contends she "exercised ordinary and necessary business care and prudence" by: (i) timely providing the requisite documentation the accountant needed to properly prepare and timely file her returns; and (ii) making sure she had the funds available to timely pay the large state income tax payment.

Appellant explains that her tax returns were prepared, authorized for e-filing, and returned to her accountant around April 8, 2017. However, around this same time, appellant states that she received an additional Form 1099-DIV reporting dividend and capital gain information which she had not previously provided to the accountant. As a result, appellant's federal and state tax returns had to be corrected and revised to reflect this additional income. Appellant states that while her returns were being corrected, she provided the "old" e-filing authorization forms (federal and California Forms 8879), with the now-outdated income and tax information, to the accountant. On April 18, 2017, the last day for filing timely returns without extension,[7] the accountant's office noted that it did not have correct, signed e-filing authorization forms from appellant with appellant's revised tax return information. As a result, the accountant extended the due date for the federal return, and utilized California's automatic extension provisions, until revised e-filing authorizations were received from appellant. Unfortunately, due an inadvertent administrative error by her accountant stemming from a miscommunication between the accountant and his staff, electronic payments of the state and federal taxes shown as due on the returns were not transmitted by the accountant at the time the federal extension request was made (April 18th).[8] Appellant further states that several days after the April 18, 2017 deadline, she contacted the accountant and informed him that the funds set aside for the large tax payment had not yet been withdrawn from her bank account. Appellant also notes that she has a history of timely filing her returns and timely paying any tax due, and the late payment was discovered and remitted only 14 days after the payment deadline.

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[7] Because April 15, 2017, fell on a Saturday, and the following Monday was a holiday in the District of Columbia, the last day for filing a return without extension was April 18, 2017.

[8] Appellant explained that the accountant thought the office manager sent the tax payments when she filed the extension and the office manager thought the accountant had sent the tax payments.

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We, however, do not agree that appellant has established reasonable cause for the late payment of her tax. First, it is clear that an oversight or error, by itself, does not constitute reasonable cause for the abatement of the late-payment penalty. (*Appeal of Friedman, supra*; *Appeal of Risser, supra.*) Here appellant's late payment was the result of an error or oversight. Appellant provided her accountant with outdated e-filing authorizations while appellant's tax returns were in the process of being revised. As a result, appellant's accountant was unable to e-file appellant's returns on April 18, 2017, and instead filed a federal extension but failed to remit payments to the Internal Revenue Service (IRS) and FTB at that time. Appellant's representative made it clear that the failure to remit the tax payments on April 18, 2017, was the result of an oversight or error – i.e., an administrative error stemming from a miscommunication between the accountant and his staff. Such an error or oversight does not, by itself, constitute reasonable cause for abatement of the penalty.

Additionally, it is well-settled law that taxpayers' reliance on a tax preparer or an agent to timely file their taxes does not constitute reasonable cause because they have a personal, non-delegable obligation to file their taxes by the due date. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*).) The nondelegable duty principle applicable to the late-filing penalty in *Boyle* also applies in the late-payment penalty context. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.) Moreover, the courts have applied this bright-line rule, as articulated in *Boyle*, to the late-payment penalty even in circumstances where a taxpayer acted prudently in dealing with their agent or employee. (See, e.g., *Kimdun Inc. v. U.S.* (C.D.Cal. 2016) 202 F.Supp.3d 1136, 1144-1146 [reliance on payroll service to make payments insufficient to establish reasonable cause under *Boyle*, despite a third-party payroll service's embezzlement of money that was intended to pay the employment tax obligations]; *Conklin Bros. of Santa Rosa Inc. v. U.S.* (9th Cir. 1993) 986 F.2d 315 [reliance on taxpayer's controller to make payments was insufficient to establish reasonable cause, despite the controller's alleged intentional concealment of her failure to make timely payroll tax payments].) Thus, as the law makes clear, appellant had a personal and non-delegable duty to ensure timely payment of her taxes and cannot delegate that duty to her accountant.

Regarding appellant's reference to her history of compliance, we note that the IRS administers a program called "First Time Abate" under which it abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years.

In this case, the IRS abated appellant's penalty based on the first-time abate program. However, FTB has no such program, and California law allows abatement only on a showing that the failure to pay was due to reasonable cause.[9] As the evidence does not establish that appellant's failure to pay was due to reasonable cause, there is no basis to abate the penalty.

Issue 2: Whether appellant has established a basis for abatement of the estimated tax penalty.

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes a penalty for the underpayment of estimated tax where the taxpayer's installment tax payments are less than the amounts due at the end of the installment periods. For California purposes, installment tax payments are due on April 15 and June 15 of the tax year, and January 15 of the following year. (R&TC, § 19136.1; IRC, § 6654(c)(2).) The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (*Appeal of Saltzman*, 2019-OTA-070P (*Saltzman*); IRC, § 6654(a).)

Appellant does not dispute the imposition or computation of the estimated tax penalty. Instead, appellant argues that the penalty should be abated because appellant exercised "ordinary business care and prudence." Appellant explains that the tax she owed for 2016 was in substantial part attributable to the sale of a property by a pass-through entity in which she held an interest and that this sale resulted in a substantial gain. She states that she requested her accountant calculate the taxes she would owe based on the gross sales price of the pass-through entity's property and make estimated tax payments based on this estimate. Appellant claims that when she finally received the Schedule K-1 from the entity involved, the actual gain she received was higher than estimated and asserts that she exercised ordinary business care and prudence by having her accountant calculate what the accountant believed to be the proper estimated tax payments based on the information available to appellant.

However, these are reasonable cause arguments, and there is no general reasonable cause exception to the imposition of the estimated tax penalty. (*Saltzman, supra*; *Appeal of Johnson*, 2018-OTA-119P (*Johnson*); *Adams v. Commissioner*, T.C. Memo. 2013-7 at p. *45.) Rather, the estimated tax penalty is mandatory unless the taxpayer establishes that a statutory exception

[9] 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 Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

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applies. (*Saltzman, supra*; *Johnson*, *supra*; *Nitschke v. Commissioner*, T.C. Memo. 2016-78 at p. *4.) As such, we cannot abate the estimated tax payment based solely on appellant's reasonable cause arguments.

In addition, appellant also states that she was 63 and suffered from a serious medical condition in 2016. Appellant states that her medical condition caused her to be heavily reliant on her accountant to manage her tax filings and to make sure all filings were accurate and timely made. Appellant claims these facts warrant abatement of the estimated tax penalty under IRC section 6654(e)(3). We disagree.

IRC section 6654(e)(3) provides two exceptions to the imposition of the penalty. First, under IRC section 6654(e)(3)(A), the penalty may be abated if, "by reason of casualty, disaster, or other unusual circumstances," the imposition of the penalty would be "against equity and good conscience." While appellant states (and we assume, for purposes of our analysis) that she suffered from a serious medical condition in 2016, appellant does not provide any evidence or argument linking her failure to make the required estimated tax payment in 2016 to her medical condition. To the contrary, appellant merely states that the amount of gain reported on the Schedule K-1 was unanticipated, the underpayment of estimated tax was not due to willful neglect, she relied on her accountant, and she exercised ordinary business care and prudence by requesting her accountant calculate the necessary estimated tax payments based on the information available to appellant. Accordingly, we do not find appellant's medical condition to be a "casualty, disaster, or other unusual circumstance" that would cause the imposition of the estimated tax penalty to be "against equity and good conscience."

We similarly conclude that appellant's gain from the sale of property by a pass-through entity was not a "casualty, disaster, or unusual circumstance" that would cause the imposition of the estimated tax penalty to be "against equity and good conscience." As we explained in *Saltzman* and *Johnson*, the phrase "casualty, disaster, or other unusual circumstances" generally refers to unexpected events that cause a hardship or loss such that, due to the circumstances, it would be "against equity and good conscience" to impose the penalty. The receipt of a substantial gain does not qualify as an unusual circumstance justifying waiver of the penalty. (See, e.g., *Saltzman, supra* [taxpayers' receipt of a substantial payment from a partnership not an unusual circumstance justifying waiver of the penalty]; *Johnson, supra* [taxpayers' profitable sale of real estate not an unusual circumstance that would cause the imposition of the estimated

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tax penalty to be "against equity and good conscience"]; *Farhoumand v. Commissioner,* T.C. Memo. 2012-131 [bursting of the dot-com bubble and resulting capital losses not an unusual circumstance justifying waiver of the penalty].)

While the estimated tax penalty is commonly referred to as a "penalty," in practical effect, it merely imposes an interest charge to compensate the government for the time value of the tax that is due but is not paid until a later date. (*Saltzman, supra.*) We find that imposing interest on the late payment of estimated tax due from appellant's pass-through gain received as a result of the sale of property by a pass-through entity does not offend "equity and good conscience."

Lastly, under IRC section 6654(e)(3)(B), the penalty also may be abated if the taxpayer retired at the age 62 or older, or became disabled, in the tax year at issue or in the prior tax year, and the underpayment was due to reasonable cause and not due to willful neglect. In order to fall within the provisions of this section, appellant must establish that the underpayment of the estimated tax was due to reasonable cause, *and* that she retired or became disabled in the taxable year for which estimated payments were required to be made or in the previous taxable year. (See *Hardin v. Commissioner,* T.C. Memo. 2012-162, at p. *5 [because the taxpayer did not retire or become disabled in 2005 or 2006, the taxpayer did not fall within the narrow exception for reasonable cause pursuant to IRC section 6654(e)(3)(B)].) Here, despite appellant's age (63) during the 2016 tax year and her medical condition, appellant has failed to demonstrate that she falls within the narrow exception provided in IRC section 6654(e)(3)(B) as appellant did not provide any evidence or argument to show that she retired or became disabled in the taxable year for which estimate payments were required to be made (2016) or previous taxable year (2015). To the contrary, appellant notes that "her physical infirmities and declining health" occurred "over the years." As appellant provides no evidence (such as medical records, third-party declarations, etc.) to show that she became disabled during 2015 or 2016 or retired during those years, appellant has failed to establish that she falls into the narrow exception for abatement of the estimated tax penalty provided in IRC section 6654(e)(3)(B).

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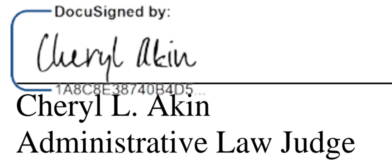
HOLDINGS

1. Appellant has not established a basis for abatement of the late-payment penalty.
2. Appellant has not established a basis for abatement of the estimated tax penalty.

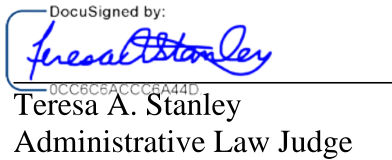
DISPOSITION

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

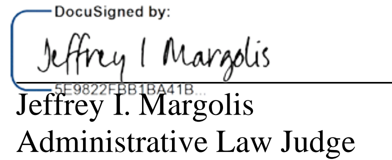


Cheryl L. Akin
Administrative Law Judge

We concur:



Teresa A. Stanley
Administrative Law Judge



Jeffrey I. Margolis
Administrative Law Judge

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