

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
D. JOHNSON

) OTA Case No. 18113977
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OPINION

Representing the Parties:

For Appellant: Pete Palmer, CPA

For Respondent: David Kowalczyk, Tax Counsel

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Johnson (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$6,809.04 for the 2015 tax year.¹

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

ISSUES

1. Whether appellant has established reasonable cause for failing to make a timely payment of tax.
2. Whether appellant has established that the estimated tax penalty should be waived.
3. Whether appellant is entitled to an abatement of the collection cost recovery fee.

FACTUAL FINDINGS

1. Appellant is the surviving spouse of T. Johnson. In 2010, appellant was the sole income beneficiary of the Johnson Exempt Bypass Trust (Trust). As part of the couple’s estate plan, the trust was divided into three sub-trusts upon the death of T. Johnson: Trust A,

¹ This amount consists of a late payment penalty of \$5,417.60, an estimated tax penalty of \$863.51, and a collection cost recovery fee of \$266.00. Presumably, the remaining \$261.93 relates to interest, however, because appellant has not asserted any arguments for abating interest, interest will not be addressed separately here, and will only be abated if the underlying liabilities upon which interest accrued are abated.

Trust B, and Trust C. Shares of Ted Johnson Propane Company (S Corporation) were transferred to Trust B on October 11, 2010. On that same date, appellant made an election under Internal Revenue Code (IRC) section 1361(d)(1) to treat the Trust as a Qualified Subchapter S Trust (QSST) and the Trust became a shareholder of the S Corporation.

2. On October 14, 2016, appellant filed a 2015 California income tax return, reporting a tax due of \$67,720. On line 112 of the return, “interest, late return penalties, and late payment penalties,” appellant reported an additional \$1,035, which appellant paid in addition to the tax due of \$67,720 when she filed her 2015 return.
3. Appellant attached to her 2015 return a letter dated September 26, 2016, from her certified public accountant (CPA), PKC Kuebler, APC (PKC), which requested abatement of penalties related to the late payments of tax for the 2014 and 2015 tax years. Appellant engaged a new estate planning attorney in 2012 and a new CPA based in Pasadena, California in 2014. The estate planning attorney advised the Pasadena CPA “not to passthrough all the items of income from the S corporation to the Taxpayer [i.e., appellant] as current income beneficiary as required.” (Emphasis in original.) This resulted in the CPA reporting S Corporation income on the Trust’s return instead of on appellant’s individual return, although appellant was the income beneficiary of the Trust. In February 2016, appellant engaged PKC to prepare the 2015 returns for the S Corporation, the Trust, and appellant. PKC filed extensions for the 2015 returns and made estimated payments in the same manner as the prior CPA did by having the S Corporation income reported on the Trust’s return. However, on June 23, 2016, PKC determined that a QSST election was in place and accordingly reported the S Corporation’s income on appellant’s individual 2015 return.
4. On November 15, 2016, FTB issued appellant a Notice of Tax Return Change and imposed a late payment penalty of \$5,417.60 and an estimated tax penalty of \$863.51, plus applicable interest.
5. FTB issued an Income Tax Due Notice dated December 29, 2016, which lists a tax of \$114,790.00, payments of \$115,825.00, penalties of \$6,281.11, and interest of \$1,047.40, for a total balance due of \$6,293.51.

6. In a letter to FTB dated January 9, 2017, appellant requested that FTB place a hold on collection actions and referred to appellant's letter dated September 26, 2016.
7. FTB sent a Final Notice Before Levy and Lien (Final Notice) on February 6, 2017, for the remaining balance of \$6,311.53. The Final Notice informed appellant that if FTB did not receive payment in full within 30 days from the notice date, FTB may, among other things, impose a collection cost recovery fee.
8. Appellant responded to the Final Notice with a letter dated February 14, 2017. Appellant requested that FTB cancel the late payment penalty and applicable interest because the IRS abated the penalties based on appellant's good filing history.
9. On March 9, 2017, FTB imposed a collection cost recovery fee of \$266.
10. Appellant submitted an installment agreement request on June 27, 2017. On July 3, 2017, FTB approved appellant's request. Thereafter, appellant made several payments from August 10, 2017, to June 5, 2018, which satisfied her 2015 outstanding balance due.
11. Appellant subsequently submitted a Reasonable Cause – Individual and Fiduciary Claim for Refund (FTB Form 2917), requesting a refund of \$6,809.04, restating the same reasons listed in her September 26, 2016 letter.
12. On August 14, 2018, FTB denied appellant's claim for refund in the amount of \$6,281.11, plus interest.²
13. This timely appeal followed.

DISCUSSION

Issue 1. Whether appellant has established reasonable cause for failing to make a timely payment of tax.

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 due date of the return. The late payment penalty may be abated if the taxpayer establishes that the failure to make a timely tax payment was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, the taxpayer must

²This amount consists of the late payment penalty of \$5,417.60 and the estimated tax penalty of \$863.51 but does not include the collection cost recovery fee. However, on appeal, FTB states that the collection cost recovery fee of \$266 was properly imposed.

show that his or her failure to make a timely payment of the proper amount occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The late-filing and late payment penalties generally deal with the same questions and weigh the same evidence for purposes of making reasonable cause determinations. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.)

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.) While good faith reliance on professional advice may provide a basis for a reasonable cause defense, it is not absolute. (*Repetto v. Commissioner*, T.C. Memo. 2012-168.) If a taxpayer relies on the improper advice of an accountant or tax attorney as to a matter of tax law, failing to file a return (or make a timely tax payment) 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 CPA. In February 2016, appellant engaged PKC to prepare the 2015 returns for the S Corporation, the Trust, and appellant. PKC filed extensions for the 2015 returns and made estimated payments in the same manner as the prior CPA did by having the S Corporation income reported on the Trust’s return. Thereafter, on or around June 23, 2016, PKC discovered that appellant had previously made a QSST election for the Trust and, consequently, determined that the S Corporation’s income should have been reported on appellant’s individual return instead of the Trust’s return. PKC reported the income properly on appellant’s individual return in accordance with IRC section 1361(d)(1)(B).

However, these events, as presented by appellant, do not show that her failure to make a timely payment occurred despite exercising ordinary business care and prudence. As admitted by appellant’s CPA, appellant did not timely disclose the QSST election to PKC. Therefore, it is

unreasonable for appellant to rely on PKC's uninformed advice. While we sympathize that appellant's failure to disclose the QSST election may have been an innocent oversight, the mistake does not constitute reasonable cause. (See *Appeal of Friedman*, 2018-OTA-077P [The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause].) Appellant argues that she is elderly and is in reasonably good health, and FTB is holding appellant to an unreasonably high standard of care for someone of her age and circumstances. However, the standard for exercising ordinary business care and prudence is the same for all taxpayers. Accordingly, appellant has not established reasonable cause to abate the late payment penalty.

Issue 2. Whether appellant has established that the estimated tax penalty should be waived.

Except as otherwise provided, R&TC section 19136 conforms to 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, June 15, and January 15 of the following tax year. (R&TC, § 19136.1; IRC, § 6654(c)(2).) This penalty is similar to an interest charge, which applies from the installment due date to the earlier of April 15 of the following tax year or the date on which the underpayment is paid. (IRC, § 6654(b)(2).)

There is no general reasonable cause exception for the estimated tax penalty. (*Grosshandler v. Commissioner* (1980) 75 T.C. 1, 20-21; *Estate of Sanders v. Commissioner*, T.C. Memo 2018-104; *Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) Instead, IRC section 6654(e)(3)(A) provides a limited exception to waive the penalty if, by reason of casualty, disaster, or other unusual circumstances, imposing the penalty would be against equity and good conscience.³

As stated previously, appellant contends that she neglected to inform her CPA about the QSST election. Appellant's failure to disclose the election does not constitute a casualty, disaster, or other unusual circumstances affecting her ability to pay estimated tax payments, as would support a finding that the limited exceptions of IRC section 6654(e)(3)(A) apply to this

³ IRC section 6654(e)(3)(B) also provides for the waiver of the penalty if the underpayment was due to reasonable cause and not to willful neglect, but only for individuals who retired after attaining the age of 62 in the tax year or who became disabled in the tax year. Although appellant satisfies the age requirement, she does not contend, and the appeal record does not indicate, that she retired or became disabled during 2015.

appeal. Accordingly, appellant has not demonstrated that she is entitled to a waiver of the estimated tax penalty.

Issue 3. Whether appellant is entitled to an abatement of the collection cost recovery fee.

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery fee if the taxpayer fails to timely pay tax, penalty, or interest after FTB mails a notice to the taxpayer requesting payment, and the notice advises that the continued failure to pay the amount due may result in, among other things, the imposition of a collection cost recovery fee. Once FTB properly imposes the fee, there is no language in the statute that would excuse the fee for any reason, including reasonable cause. (See *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

Here, FTB mailed appellant a Final Notice dated February 6, 2017, which stated that if appellant failed to pay the 2015 balance due within 30 days, FTB may impose a collection cost recovery fee. Appellant did not pay the 2016 balance in full until June 5, 2018. Accordingly, FTB properly imposed the collection cost recovery fee after proper notice.


Appellant argues that the collection cost recovery fee was caused by FTB's failure to adequately respond to her September 26, 2016 letter, which requested FTB to abate the late payment penalty. However, once a collection cost recovery fee is properly imposed, there is no authority for abating it. Appellant is therefore not entitled to an abatement of the collection cost recovery fee.

HOLDINGS

1. Appellant has not established that her failure to make a timely payment of tax was due to reasonable cause and not willful neglect.
2. Appellant has not established that the estimated tax penalty should be waived.
3. Appellant is not entitled to an abatement of the collection cost recovery fee.


DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.


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 Andrea L.H. Long
 Administrative Law Judge

We concur:

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 John O. Johnson
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

Date Issued: 4/14/2020