

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19054729
L. THIEDE AND)
M. THIEDE)
_____)

OPINION

Representing the Parties:

For Appellants: L. Thiede and M. Thiede

For Respondent: Eric A. Yadao, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellants L. Thiede and M. Thiede appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of a late-payment penalty in the amount of \$2,605.68,¹ plus interest of \$693, for the 2017 tax year.

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

ISSUE

Whether appellants have shown that their late payment of tax for the 2017 tax year was due to reasonable cause and not due to willful neglect.

FACTUAL FINDINGS

1. Appellants filed a timely joint 2017 California income tax return (Form 540) on October 15, 2018, reporting taxable income of \$597,117 and a total tax of \$50,701.

¹ Appellants claim for refund lists a late-payment penalty of \$2,606. The FTB clarifies on appeal that the actual amount of the late-payment penalty is \$2,605.68 (underpayment portion of \$1,628.55, plus monthly portion of \$977.13).

2. After reporting withholdings of \$819, the application of a prior year overpayment of \$1,311, and a timely extension payment of \$16,000, appellants reported a tax due of \$32,571.
3. Appellants also self-reported a late-payment penalty of \$2,606 and interest of \$693.
4. Appellants' return after payments and credits showed a total balance due of \$35,870, which appellants remitted with their return.
5. On November 13, 2018, FTB issued a Notice of Tax Change to appellants, notifying them that they would receive a refund of \$55.40, because the late-payment penalty was actually \$2,605.68 and the accrued interest due was only \$637.92.
6. On January 15, 2019, appellants submitted a claim for refund of their self-assessed late-payment penalty, asserting that the late payment was due to incorrect tax advice received from a certified public accounting (CPA) firm.
7. It is undisputed that the late payment of tax at issue is related to a taxable trust distribution that appellant-wife was treated as having received in the 2017 tax year. Specifically, during the 2017 tax year, the Lauren Slavik Trust transferred its assets to the Lauren Thiede Trust; and the Lauren Slavik Trust was thereafter terminated. The transfer of assets resulted in a taxable distribution for income tax purposes. Appellants were aware of the asset transfer. Further, appellants were aware that the Lauren Slavik Trust had been terminated.
8. As for why they paid their tax liability late, appellants asserted in their claim for refund proceedings that a CPA firm provided incorrect advice that the applicable transfer of assets from the Lauren Slavik Trust to the Lauren Thiede Trust would be treated as a nontaxable distribution of corpus and, furthermore, that any income generated by assets in the trust for the 2017 tax year would be taxable to the trust, not appellant-wife. Accordingly, appellants asserted they were not aware when they submitted their timely estimated tax payment of \$16,000 that a taxable trust distribution and taxable trust income would have to be reported by appellant-wife for the 2017 tax year. In support, appellants provided a string of emails.
9. In an email dated October 4, 2018, Ms. Fleming, an accountant and/or account manager for the Lauren Slavik Trust, stated that sometime before appellants' payment deadline of April 15, 2018, Haskell & White LLP (Haskell & White), which is the CPA firm

representing and/or hired by the Lauren Slavik Trust, informed Ms. Fleming that (i) the transfer of assets from the Lauren Slavik Trust during the 2017 tax year would be a nontaxable distribution of corpus, (ii) any income generated by assets in the trust during the 2017 tax year would be taxable to the trust (and thus not taxable to appellant-wife), and (iii) the extension payment for the Lauren Slavik Trust would be “very similar” to the prior tax year.

10. In that email, Ms. Fleming further asserted that she was shocked when she received a Schedule K-1 in or about late September 2018 indicating that a large amount of income would have to be reported by appellant-wife for the 2017 tax year in relation to a taxable trust distribution and taxable trust income. Ms. Fleming further stated in the email that she had previously discussed her concerns with the CPA firm and that the CPA firm had assured her that the transferred assets would be treated as a nontaxable distribution of corpus and that any income generated by assets in the trust during the 2017 tax year would be taxable to the trust (and thus not taxable to appellant-wife). Also, Ms. Fleming noted in the email that the reporting of income on appellants’ return would result in the imposition of federal and state penalties.
11. In response to Ms. Fleming’s email, the CPA firm sent Ms. Fleming an email dated October 24, 2018, in which the CPA firm did not deny Ms. Fleming’s version of events. Further, the CPA firm indicated that it would prepare letters seeking abatement of applicable state and federal penalties.
12. Appellants also provided a string of emails between Ms. Fleming and the CPA firm from February 21 to February 22, 2018, which confirm that before appellants’ payment deadline of April 15, 2018, Ms. Fleming and the CPA firm had discussions concerning the Lauren Slavik Trust and that the CPA firm had represented that the extension payment for the Lauren Slavik Trust would be “very similar” to the prior tax year.
13. In summary, appellants asserted during their claim for refund proceedings that the above-listed string of emails supports a finding that the late-payment penalty should be refunded because appellants received incorrect tax advice from a CPA firm.
14. FTB denied appellants’ claim for refund on the basis that appellants did not provide documentation that they received improper advice from a qualified tax professional after appellants full disclosure of all relevant facts.

15. In response, appellants filed this timely appeal.

DISCUSSION

R&TC section 19132 imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) Here, FTB properly proposed the late-payment penalty because appellants' tax payment was due on April 15, 2018, but appellants did not completely satisfy their 2017 tax liability until October 15, 2018, six months after the due date.

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 and was not due to willful neglect. (R&TC, § 19132(a)(1).) Willful neglect is defined as a conscious, intentional failure or reckless indifference. (*United States v. Boyle* (1985) 469 U.S. 241, 245.)

To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.) Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) However, reliance on a tax professional's advice for questions of substantive tax law, such as whether liability exists, may constitute reasonable cause for abatement of the late-payment penalty. (See *Estate of Thouron v. United States* (3d Cir. 2014) 752 F.3d 311, 314-316; see also *Baccei v. United States* (9th Cir. 2011) 632 F.3d 1140, 1148, citing *United States v. Boyle, supra*; *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.)

Here, the above-listed email string between Ms. Fleming and the CPA firm demonstrates that appellants were given incorrect tax advice and were first made aware of the potential tax liability from the trust distribution and trust income for the 2017 tax year when Ms. Fleming received a Schedule K-1 in or about late September 2018, which was well after the payment due date of April 15, 2018. Notably, the email dated October 24, 2018, from the CPA firm to Ms. Fleming does not dispute Ms. Flemings' assertion that the CPA firm provided incorrect tax

advice—and we find no evidence in the appeal record demonstrating that Ms. Fleming’s version of events is incorrect.

We further note that the appeal record contains no evidence that appellants had any significant experience and/or formal training in relation to tax matters, which might have put appellants on notice that the trust distribution and trust income were taxable to appellants in the 2017 tax year despite the representations made by the CPA firm.

We recognize that the CPA firm represented the trust, and not appellants directly. Nevertheless, we note that appellant-wife was a beneficiary of the trust, and the advice that the CPA firm provided to the trust directly affected appellant-wife’s tax liability as a beneficiary of the trust. In other words, the advice to the trust was tantamount to advice to appellant-wife. Therefore, given the particular circumstances at hand, we find that appellants acted reasonably in not seeking a second opinion regarding the advice provided by the CPA firm.

Further, we note that shortly after finding out that such amounts were taxable, appellants promptly filed their 2017 California return and paid the applicable tax in full, both of which occurred on October 15, 2018. These factors reflect that appellants acted with ordinary business care and prudence and had reasonable cause for the late payment of tax through the date of full payment on October 15, 2018. In addition, the above-listed evidence supports a finding that appellants’ late payment was not due to willful neglect.²

FTB contends, however, that appellants have not sufficiently addressed why appellants made a significantly smaller estimated tax payment for the 2017 tax year (\$16,000) compared to a previous tax year of 2014 (\$40,000) when the distribution from the Lauren Slavik Trust was much higher for the 2017 tax year (\$399,097) than for the 2014 tax year (\$359,018). The question raised by FTB, however, is resolved by the fact that the CPA firm had assured Ms. Fleming that the transfer of assets would be treated as a nontaxable distribution of corpus

² In further support of their argument that the late-payment penalty should be refunded, appellants assert that they have a good history of California tax compliance. Appellants also note that the Internal Revenue Service (IRS) abated the applicable federal late-payment penalty based on appellants’ good history of federal tax compliance. We note that the IRS may abate a federal late-filing penalty pursuant to an IRS policy called First Time Abate *for reasons other than reasonable cause*. Under this program, the IRS may administratively abate penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the past three years. Neither the California Legislature nor FTB have adopted a comparable penalty abatement program to allow for abatement in the absence of reasonable cause, so the IRS penalty abatement and appellants’ history of timely filing and paying California taxes cannot be used as a basis for abatement of the late-payment penalty at issue here.

and that any income generated by the assets in the trust during the 2017 tax year would be taxable to the trust (and thus not taxable to appellant-wife).

In summary, the above-listed factors demonstrate that appellants had reasonable cause for the late payment of tax through the date of full payment on October 15, 2018, and did not act with willful neglect.

HOLDING

Appellants have shown that their late payment of tax for the 2017 tax year was due to reasonable cause and not due to willful neglect.

DISPOSITION

FTB’s action in denying appellants’ claim for refund of the late-payment penalty in the amount of \$2,605.68, plus applicable interest on that penalty, for the 2017 tax year is reversed, and appellants’ claim for refund of such amount is granted.³

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
873D8797B9E64E1
John O. Johnson
Administrative Law Judge

DocuSigned by:
Elliott Scott Ewing
2D8DE82EB65E1A6
Elliott Scott Ewing
Administrative Law Judge

Date Issued: 2/24/2020

³ To the extent that appellants’ claim for refund included interest applicable to the tax liability itself (i.e., interest other than interest accrued on the late-payment penalty), that interest is not abated, and FTB’s denial of the claim for refund is sustained as to that interest amount.