

In the Matter of the Appeal of:) OTA Case No. 19064869
))
G. ANTOUN AND))
M. ANTOUN))
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1. For the 2016 tax year, Mr. Antoun received (among other things) non-employee compensation from Ruckus Wireless, Inc. (Ruckus). No tax was withheld or timely paid on this income when received.
2. Appellants ultimately paid the tax due with the filing of their joint 2016 California Non-Resident Income Tax Return on December 7, 2017, which was after the April 15, 2017 payment due date.
3. Consequently, FTB imposed a late-payment penalty plus applicable interest.

4. Appellants paid this additional amount and filed a claim for refund seeking penalty abatement on grounds that they had reasonable cause for the late payment.

DISCUSSION

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 not willful neglect. (R&TC, § 19132(a)(1).) 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.) Reasonable cause for a late payment may include situations where the taxpayer relied on a tax professional's advice for questions of substantive tax law. (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* (1985) 469 U.S. 241, 252; *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.) Unsupported assertions, however, are not sufficient to satisfy a taxpayer's burden of proof. (See *Appeal of Magidow* (82-SBE-274) 1982 WL 11930; *Appeal of Sleight* (83-SBE-244) 1983 WL 15615.)

Appellants provide several reasons for why the late-payment penalty should be abated. Primarily, appellants contend that, on September 8, 2016, they received an email from their Certified Public Accountant (CPA) erroneously advising appellants that no tax was due upon Mr. Antoun's receipt of "one-time option income" from Ruckus. Appellants assert that it was not until November 2017, after the payment deadline had passed, that their CPA reversed this position, ultimately concluding that this income from Ruckus was taxable. Appellants also argue that the penalty should be abated due to their good tax compliance history and the immediate actions they took to pay the tax and ensure that their future tax obligations are timely met.

To reliably determine whether appellants exercised due care in ensuring the timely payment of their tax liability, we would generally require evidence demonstrating that, prior to the payment deadline, appellants provided all necessary and accurate information to a competent professional, received substantive tax advice from that professional, and relied in good-faith on the advice rendered. This requires, at a minimum, a copy of the September 8, 2016 email.

However, appellants have not provided any evidence to support their assertions in this matter. Appellants' failure to provide evidence that is within their control gives rise to a

presumption that such evidence, if provided, would be unfavorable to appellants' case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

Appellants' remaining contentions are irrelevant to establishing that they exercised ordinary business care and prudence *prior* to the payment due date, and this is the only basis upon which penalty relief may be granted here. For these reasons, we find that appellants have failed to meet their burden of establishing reasonable cause.

HOLDING

The late-payment penalty should not be abated.

DISPOSITION

We sustain FTB's action denying appellants' claim for refund.

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Nguyen Dang

Administrative Law Judge

We concur:

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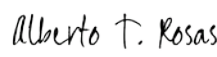


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Richard Tay

Administrative Law Judge

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Alberto T. Rosas

Administrative Law Judge

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