OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Consolidated Appeals of:	) OTA Case Number: 18010039[1]
CENTURY WEST PARTNERSHIP XXVIII, ET AL.	) Date Issued: May 10, 2019

OPINION

Representing the Parties:

For Appellants:	Timothy Thompson, Squar Milner LLP Ana M. Vogel, Chief Financial Officer
For Franchise Tax Board (FTB):	Michael J. Cornez, Attorney V Nancy Parker, Tax Counsel IV
For Office of Tax Appeals:	Tom Hudson, Tax Counsel III

G. THOMPSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Century West Partnership XXVIII, et al., appeal from FTB's denial or deemed denial of their claims for refund of late-filing penalties paid for the 2013 tax year.[2]

Office of Tax Appeals (OTA) Administrative Law Judges Grant S. Thompson, Daniel K. Cho, and Nguyen Dang, held an oral hearing for this matter in Los Angeles, California, on April 25, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

[1] Case No. 18010039 is the lead appeal. It is consolidated with 27 other appeals identified with case numbers 18010028 through 18010038 and 18010040 through 18010055.

[2] FTB denied the claims for refund of 21 of the appellants. Pursuant to R&TC section 19331, the refund claims of seven appellants were deemed denied because FTB did not issue a Notice of Action on the refund claims within six months.

ISSUE

Are appellants entitled to abatement of their late-filing penalties?

FACTUAL FINDINGS

1. Appellants are a related group of partnerships.
2. Ana M. Vogel is appellants' Chief Financial Officer. Ms. Vogel has many years of accounting and tax preparation experience. For the 2013 tax year, Ms. Vogel began preparing detailed accounting and tax information in January of 2014. She sent the information to appellants' accounting firm for the preparation of tax returns (Form 565, Partnership Return of Income) for the partnerships. The accounting firm prepared tax returns for the partnerships, which were circulated and reviewed by appellants' partners. Schedule K-1s were delivered to appellants' partners, and appellants timely paid the annual minimum tax that was owed for each partnership.
3. On April 10, 2014, appellants provided their accounting firm with authorizations for the e-filing of the partnership tax returns. Ms. Vogel assumed that the accounting firm would timely file the tax returns. Ms. Vogel did not request or receive an e-file acknowledgment. She credibly testified that, over the years, appellants have used three different accounting firms, including one large firm and a mid-sized firm, and none of the firms have provided e-file acknowledgments.
4. Appellants' accounting firm failed to timely file the tax returns.
5. In January of 2015, appellants' accounting firm notified appellants that there had been e-filing issues and filed appellants' tax returns.
6. In February of 2015, FTB sent appellants Notices of Balance Due reflecting FTB's imposition of late-filing penalties for each partnership. Prior to that date, FTB did not notify appellants that it had not received their 2013 tax returns.
7. In February of 2015, FTB imposed late-filing penalties on the appellants, which they paid.
8. The Internal Revenue Service (IRS) also imposed late-filing penalties. However, for all but one of the partnerships, the IRS waived the penalties pursuant to its "First Time Abate" program. The IRS did not abate the penalties based on a finding that appellants established reasonable cause for the late filing of the tax returns.

9. On or about November 20, 2015, appellants filed claims for refund of the late-filing penalties, arguing that the late filings were due to reasonable cause.
10. After FTB's denial or deemed denial of appellants' refund claims, appellants filed timely appeals which were consolidated.

DISCUSSION

R&TC section 19172 requires FTB to impose a late-filing penalty when a partnership fails to file its tax return on or before the due date[3] "unless it is shown that the failure is due to reasonable cause."[4] The United States Supreme Court has established a bright-line rule that a taxpayer's reliance on an agent, such as an accountant, to file a return by the due date is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*).)

In *Boyle*, the taxpayer was the executor of his mother's estate, and he was not experienced in taxation. He hired an attorney, fully cooperated with the attorney, and provided all the information needed to timely file the estate tax return. The taxpayer and his spouse contacted the attorney several times to check on the progress of the tax return and they were assured that the return would be filed "in plenty of time." (*Boyle*, *supra*, at pp. 242 - 243.)

The trial court found that the taxpayer had demonstrated reasonable cause, and the Seventh Circuit affirmed the trial court's determination. The Seventh Circuit found that the facts in *Boyle* were similar to those in *Rohrabaugh v. United States* (7th Cir. 1979) 611 F.2d 211 (*Rohrabaugh*). It further found that, like the taxpayer in *Rohrabaugh*, Boyle demonstrated reasonable cause for the late-filing because he was unfamiliar with the tax law, fully disclosed the relevant facts to a tax professional, and acted with ordinary business care and prudence. The Seventh Circuit noted that *Rohrabaugh* evaluated the specific facts of the case and declined to adopt a *per se* rule that reliance on counsel constituted reasonable cause.

The Supreme Court considered the opinion of the Seventh Circuit and noted that the Seventh Circuit relied on *Rohrabaugh*, *supra*. The Supreme Court also noted that there was a split in the appellate courts. In some cases, such as *Rohrabaugh*, courts found that the question

[3] There is no dispute that appellants each missed both the regular filing deadline and the extended deadline. For 2013, the deadline for partnership tax returns was generally the 15th day of the fourth month following the close of the partnership's taxable year and the extended deadline was six months after the original filing due date. (See former R&TC, § 18633, R&TC, § 18567(a), and Cal. Code Regs., tit. 18, § 18567(a).)

[4] The penalty amount is $18 per month per partner, for a maximum of 12 months. There is no dispute regarding the calculation of the penalties.

of whether reasonable cause had been established must be determined on a "case-by-case basis." (*Boyle, supra*, at pp. 247 - 248.) In contrast, some courts held that the duty to timely file a tax return was a nondelegable duty such that reliance on advisers to timely file a return is not reasonable cause.

The Supreme Court resolved this dispute among the courts by holding that the duty to timely file a tax return was a nondelegable duty. It stated that it "need not dwell on the similarities or differences in the facts presented by the conflicting holdings" of the various court decisions. (*Boyle, supra*, at p. 248.) Instead, the Supreme Court stated, "The time has come for a rule with as 'bright' a line as can be drawn consistent with the statute and implementing regulations. [footnote omitted]."[5] (*Id.* at p. 249.) It therefore 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 . . . . " (*Id.* at p. 252.)

The courts have consistently applied the bright-line rule set forth in *Boyle*, even in circumstances where a taxpayer acted prudently in its dealings with its agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136 [finding that reliance on a payroll service was not sufficient to establish reasonable cause under *Boyle*]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [finding that reliance on the taxpayer's controller was not sufficient to establish reasonable cause].)

Boyle explains as follows:

> Congress has placed the burden of prompt filing on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations. Engaging an attorney to assist in the probate proceedings is plainly an exercise of the "ordinary business care and prudence" ....., but that does not provide an answer to the question we face here. To say that it was "reasonable" for the executor to assume that the attorney would comply with the statute may resolve the matter as between them, but not with respect to the executor's obligations under the statute. Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months; extensions are granted fairly routinely. *That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute*. (*Boyle, supra*, at pp. 249 – 250, italics added.)

[5] In footnote 6 of its opinion, the Supreme Court distinguished the facts in *Boyle* from circumstances recognized in administrative regulations and practices where the late filing resulted from "postal delays, illness, and other factors largely beyond the taxpayer's control."

Appellants contend that they acted with ordinary business care and diligence by timely providing necessary financial information to their accountants and relying on the accountants to timely file their tax returns. While we sympathize with appellants' contention that they reasonably relied on their accountants and they provided everything necessary for their tax returns to be filed in a timely manner, we are compelled to apply the legal standard established by the United States Supreme Court in *Boyle*. Under the bright-line rule established by the Supreme Court, appellants' reliance on their accounting firm to timely file their tax returns cannot constitute reasonable cause.

Among other things, appellants argued that *Boyle* and other cases cited by FTB were factually distinguishable and that appellants had exhibited greater diligence than the taxpayers in those cases. For example, with regard to *Boyle*, appellants noted that they had completed tax returns and returned e-filing authorizations prior to the filing deadline, which had not occurred in *Boyle*. However, as noted above, *Boyle* rejected this type of fact-specific analysis, which had been applied by the Seventh Circuit. Instead, the Supreme Court adopted a bright-line rule that reliance on a professional advisor to timely file a tax return does not constitute reasonable cause. Therefore, we are not persuaded by appellants' argument that the facts here are more favorable than those in *Boyle* and other similar cases.

Appellants also argued that appellants completed their duty when they timely delivered their e-filing authorizations to their accounting firm, because the accounting firm was an authorized e-filer. Appellants contended that authorized e-filers are analogous to designated private delivery services, such as certain services provided by FedEx and other private delivery services designated by the IRS. Thus, appellants argued that, like a taxpayer who establishes that he timely mailed a tax return which was then delayed or lost in the mail, appellants should not be penalized because there was a later error by the accounting firm that occurred after they had timely delivered the e-filing authorization to the accounting firm.

However, we find appellants' situation to be like the situation of a taxpayer who signs a tax return and gives it to his or her preparer to be mailed. If the preparer fails to mail the return by the deadline, the taxpayer is responsible for the late filing under *Boyle*. The taxpayer's reliance on the preparer does not constitute reasonable cause for the late filing. Similarly, appellants' reliance on their accounting firm to timely e-file does not constitute reasonable cause.

Appellants also argued that FTB did not adequately consider their refund claims, that FTB's refund denials set forth incorrect dates, and that FTB's brief on appeal contained errors. However, such allegations involve errors or events that occurred after appellants had failed to timely file their tax returns. Therefore, none of the errors or events could have caused the late filing of appellants' tax returns.

Appellants further contended that FTB failed to notify them that the tax returns had not been filed. However, under *Boyle*, *supra*, it is taxpayers' nondelegable duty to timely file tax returns. Appellants' late filing cannot be excused on the basis that FTB did not notify appellants that they had failed to timely file. As the Supreme Court explained, "The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards." (*Boyle*, *supra*, at p. 249.)

Appellants also noted that the IRS waived appellants' federal late-filing penalties (except for one partnership). Appellants noted that FTB often relies on federal determinations and essentially argued that is unfair for FTB to rely on federal determinations when the determinations are adverse to the taxpayer but not rely on federal determinations when they are favorable for the taxpayer. However, the IRS did not abate the federal late-filing penalties based on a determination of reasonable cause. Instead, it waived the penalties pursuant to an IRS administrative program called "First Time Abate" in which the IRS waives certain penalties if a taxpayer has timely filed returns and paid taxes due for the past three years. FTB does not have such a program, and California law requires a finding of reasonable cause to abate the late-filing penalties.[6] Accordingly, the IRS administrative waiver of the federal late-filing penalties does not provide grounds to abate the penalty under California law.

HOLDING

Appellants' reliance on their accountants to timely file their tax returns does not constitute reasonable cause for the late filing of the tax returns. Therefore, the late-filing penalties cannot be abated.

[6] 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.).)

DISPOSITION

FTB's denials and deemed denials of appellants' claims for refund are sustained.

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Grant S. Thompson
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Grant S. Thompson
Administrative Law Judge

We concur:

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Daniel K. Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Nguyen Dang
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Nguyen Dang
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