

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18073433
E. AMINI AND)
F. AMINI)
_____)

OPINION

Representing the Parties:

For Appellants: Maydrian Gomez

For Respondent: David Kowalczyk, Tax Counsel

For Office of Tax Appeals: Neha Garner, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, E. and F. Amini (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying their claim for refund of \$9,624 for the 2013 tax year.

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

ISSUES

1. Are appellants liable for the late filing penalty imposed under R&TC section 19131?
2. Are appellants liable for the notice and demand (demand) penalty imposed under R&TC section 19133?

FACTUAL FINDINGS

1. Appellants did not file a timely California tax return (Form 540) for the 2013 tax year.
2. FTB received information through its annual Integrated Non-Filer Compliance program indicating that appellants received income in 2013 sufficient to prompt a return-filing requirement.

3. On May 5, 2015, FTB issued a Demand for Tax Return requiring appellants to file a tax return, send a copy of the tax return if one already had been filed, or explain why appellants were not required to file a tax return by June 10, 2015.
4. Appellants did not timely respond to the Demand for Tax Return. As a result, on July 6, 2015, FTB issued a Notice of Proposed Assessment (NPA) determining a tax liability of \$15,698.00, a late filing penalty of \$3,924.50, a demand penalty of \$3,924.50, and a \$76.00 filing enforcement fee, plus applicable interest. FTB's tax determination was based upon information returns showing that appellants earned \$27 of interest income, \$1,136 of dividend income, and \$198,179 of Schedule K-1 income.
5. Appellants did not timely protest the NPA and it became a final assessment.
6. On January 13, 2016, appellants filed their 2013 Form 540, reporting a total tax liability of \$22,798. Among other items on their return, appellants reported, on their Schedule D, a long-term capital gain from the sale of their property located in Nice, France (the Nice property). Appellants reported they acquired the property on January 1, 1995, and sold the property on June 30, 2013. On their Schedule E, appellants reported rental income from properties located in Paris, France, and Venice, California. Appellants also reported income from a Schedule K-1.
7. FTB accepted appellants' late-filed return and adjusted its accounts accordingly.
8. On January 21, 2016, FTB issued a Notice of Tax Return Change, which increased the late filing penalty to \$5,699.50 based on the tax liability reported on appellants' 2013 tax return. No adjustment was made to the demand penalty.
9. In a letter dated January 12, 2017, appellants requested an abatement of all penalties and interest for the 2013 tax year.
10. On February 5, 2018, after paying the penalties and interest claimed to be due, appellants filed a claim for refund, reiterating the points made in their January 12, 2017 letter. Appellants also claimed that they were waiting for an Internal Revenue Service (IRS) decision on their claim for abatement of the penalties imposed against them by the IRS with respect to their late-filed federal income tax return for 2013.
11. FTB issued an NPA for appellants' 2009 tax year dated April 18, 2011, and an NPA for appellants' 2010 tax year dated February 29, 2012, after FTB issued requests or demands for tax returns for those years to which appellants failed to timely respond.

12. On February 26, 2018, FTB denied appellants' claim for refund. This timely appeal followed.

DISCUSSION

Issue 1 - Are appellants liable for the late filing penalty imposed under R&TC section 19131?

R&TC section 19131 imposes a penalty when a taxpayer fails to file a tax return on or before its due date, computed at five percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. Here, appellants late-filed tax return reported a tax due of \$22,798.00, and FTB computed the late filing penalty as \$5,699.50 (i.e., \$22,798.00 x 25 percent.) The maximum penalty of 25 percent was properly imposed, since appellants return was filed more than five months past its due date of April 15, 2014.

The penalty shall be imposed unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131.) To establish reasonable cause, "the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an [ordinarily] intelligent and prudent business[person] to have so acted under similar circumstances." (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) A late filing penalty imposed by FTB is presumed to be correct, and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Ibid.*) Each taxpayer has a personal and non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252.)

Appellants state that: (a) they have lived in the United States since 1985 and paid American and French taxes; (b) appellant-husband and his stepmother inherited the Nice property; (c) when they sold the Nice property, appellant-husband used the proceeds to pay off his debts; (d) appellants did not realize the sale would result in a tax liability to the United States; and (e) appellants were unable to timely file their tax return because their bookkeeper moved to Vietnam and did not give them their financial documents before leaving the country. Appellants argue that they did not intentionally file their tax returns late, but appellants have not explained what appellants did to try to timely file their tax return.

Appellants contend that it was difficult to determine the tax consequences of the sale of the Nice property. However, a delay in filing caused by the complexity of the tax law which leads to a delay in computing a taxpayer's tax liability is not reasonable cause. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.) Appellants also argue that they were unaware of American tax laws and did not know that the sale of the Nice property would result in taxable income. Appellants stated that they sold the property on June 30, 2013, and have been using a bookkeeper for “quite some time.” Appellants had 14 months to ask their bookkeeper or another tax professional, how to report the sale of the Nice property. An ordinarily intelligent and prudent businessperson would seek the advice of a tax professional to help them determine how to report the transaction. (*Appeal of Tons, supra.*) However, appellants do not claim that they sought the advice of their bookkeeper or any other tax professional. Furthermore, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

Appellants argue that they had difficulty obtaining their financial documents to prepare their 2013 tax return because appellants’ bookkeeper moved to Vietnam and did not give them their financial documents. Generally, a taxpayer’s inability to file a return by the due date because of a lack of necessary information or documents is not considered reasonable cause. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640.) The fact that tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer's burden of establishing reasonable cause. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) Ordinarily intelligent and prudent businesspersons would have filed a timely tax return, even if their bookkeeper left the country and did not return their financial documents, and later filed an amended tax return once they received their documents. Therefore, appellants’ inability to provide documents and tax information during the appeal is not sufficient evidence of reasonable cause to abate the penalty.

Appellants have been living in the United States since 1985 and filing tax returns on the same rental properties since at least 2012. Appellants also have a history of filing late tax returns.¹ Appellants’ federal Account Transcript indicates that appellants requested an extension from the IRS to file their 2013 federal return on April 11, 2014. However, appellants still filed

¹FTB’s records indicate that it imposed late filing penalties against appellants for tax years 2010, 2011, and 2012.

their federal tax return late, on January 7, 2016. We also note that appellants' federal Account Transcript indicates that appellants received no relief from the penalties imposed by the IRS.

Appellants have presented no evidence establishing that they exercised ordinary business care and prudence and acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. Accordingly, we find that appellants failed to meet their burden of proof in substantiating that reasonable cause exists for an abatement of the late filing penalty.

Issue 2 - Are appellants liable for the demand penalty imposed under R&TC section 19133?

R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. For individuals, the demand penalty will only be imposed if the following two conditions are satisfied:

- (1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
- (2) the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.

(Cal. Code. Regs., tit. 18, § 19133(b)(1)-(2).)

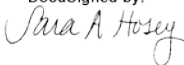
FTB has shown that it meets the requirement of its regulation. Not only did appellants fail to timely respond to FTB's demand that they file their 2013 California tax return, they also failed to respond to prior requests or demands for tax returns that were issued with respect to their 2009 and 2010 tax years. FTB showed that it issued an NPA for appellants' 2009 tax year dated April 18, 2011, and an NPA for appellants' 2010 tax year dated February 29, 2012, after FTB issued requests or demands for tax returns for those years to which appellants failed to timely respond. Therefore, the penalty was properly imposed for tax year 2013, and, as explained in detail above, appellants have not shown that their failure to timely respond was due to reasonable cause and not willful neglect.

HOLDINGS


1. Appellants are liable for the late filing penalty imposed under R&TC section 19131.
2. Appellants are liable for the demand penalty imposed under R&TC section 19133.

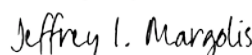
DISPOSITION

For the foregoing reasons, FTB's action is sustained.

DocuSigned by:

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Sara A. Hosey
Administrative Law Judge

We concur:

DocuSigned by:

0C90542BEF88D4E7
Tommy Leung
Administrative Law Judge

DocuSigned by:

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Jeffrey I. Margolis
Administrative Law Judge

Date issued: 7/8/2020