

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

A. EINAV) OTA Case No. 19115426
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)**OPINION**

Representing the Parties:

For Appellant:

Ben Gruen, Tax Appeals Assistance
Program

For Respondent:

Leoangelo C. Cristobal, Tax Counsel

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Einav (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$5,413.82 for the 2017 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.

FACTUAL FINDINGS

1. On October 15, 2018, appellant filed a 2017 California income tax return, reporting a tax due of \$59,092, self-assessed interest of \$1,197, and an underpayment of estimated tax penalty of \$400,² for a total amount due of \$60,689. FTB received appellant's payment

¹ This amount consists of a late payment penalty of \$5,022.82 and an estimated tax penalty of \$391.

² FTB states that it calculated the estimated tax penalty to be \$391.

- of \$60,689 on October 26, 2018. Appellant also sent a letter from appellant's bank to FTB, which requested a waiver of any penalties relating to the late tax payment.
2. FTB sent appellant a Notice of State Income Tax Due reflecting a balance of \$65,821.16, consisting of the following: an additional tax of \$59,092.00, penalties of \$5,413.82, plus interest.³ Subsequently, FTB sent appellant a Penalty Waiver Denial, reflecting an outstanding balance on his 2017 account.
 3. Appellant sent a letter to FTB to request a waiver of the outstanding balance. Appellant explained that the bank erred when he attempted to make a payment on October 15, 2018, by failing to timely process the payment.
 4. On January 8, 2019, FTB issued an Income Tax Due Notice to appellant stating that appellant had an outstanding balance due. On February 13, 2019, FTB issued a Final Notice Before Levy and Lien, which served as a final demand for payment.
 5. By a letter dated February 26, 2019, appellant requested a reversal of his penalties. Appellant admitted that the penalties were the result of appellant's own action, but requested a one-time reversal based on his history of filing timely returns.
 6. On March 13, 2019, FTB received appellant's payment for the remaining amount due for the 2017 tax year.
 7. FTB treated appellant's February 26, 2019 letter as a claim for refund and, by Notice of Action dated May 9, 2019, denied the claim. FTB informed appellant that it could appeal its decision with the Office of Tax Appeals (OTA) by August 7, 2019.⁴
 8. Subsequently, appellant sent a second claim for refund to FTB requesting penalty abatement. This time, appellant included a doctor's note stating that appellant had been "under a significant amount of stress for some time which has led to an exacerbation in heart palpitations," was managing chronic depression, and as a result, appellant's "capacity for daily activities and adherence to deadlines" was limited. FTB denied the claim by a letter dated October 1, 2019.
 9. This timely appeal followed.

³ FTB states that this notice did not account for appellant's payment of \$60,689.

⁴ Appellant subsequently filed an appeal with OTA on August 16, 2019. Appellant did not timely file the appeal by the August 7, 2019 deadline and OTA dismissed the case. Because the dismissal was due to a procedural matter based on a lack of jurisdiction, there was no final judgment on the merits of the case and thus, claim preclusion does not apply. (See *Appeal of Millennium Dental*, 2019-OTA-178P.)

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 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 Friedman*, 2018-OTA-077P.)

In *In United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*), 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.)

In *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860 (*Berolzheimer*), the Board of Equalization (BOE) extended the holding in *Boyle, supra*, which involved a late filing penalty, to the context of a late payment penalty. In *Berolzheimer*, the taxpayers’ tax professional miscalculated their federal capital gains tax liability because of a computer programming error. (*Id.*) The tax professional then calculated and paid the taxpayers’ California income tax based on the erroneous figure. (*Id.*) The tax professional did not discover this underpayment until after the payment deadline had elapsed, resulting in the imposition of a late payment penalty. (*Id.*) On appeal, the taxpayers argued that their reliance on their tax professional to timely compute the correct amount of tax owed constituted reasonable cause and the absence of willful neglect. (*Id.*) Applying the holding in *Boyle, supra*, 469 U.S. at pp. 251-252, the BOE held that the tax professional did not advise the taxpayers on a matter of tax law when he incorrectly estimated their tax liability. The BOE stated, “As this was a simple computational problem, not a legal interpretation, appellants cannot hide behind an ‘expert’ for the failure to properly determine the tax that was due.” (*Appeal of Berolzheimer, supra*; see also *Appeal of Curry* (86-SBE-048) 1986 WL 22783.)

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 to 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 he made an untimely payment. Instead, appellant asserts that he acted reasonably by relying on his certified public accountant (CPA), who failed to let him know that his payments were due on April 15, 2018. Appellant provided a letter from his CPA, who admits that he "inadvertently failed to mention to Mr. Einav that accurate estimates had to be paid by April 15th, 2018 to avoid late tax payments and associated penalties"

These events, as presented by appellant, do not show that appellant's failure to make a timely payment occurred because of his reliance on his CPA's mistaken advice. As admitted by his CPA, the CPA provided no advice or information regarding when the payments were due. It appears that the late payment occurred due to appellant's own assumption that the payments could be paid after the due date without penalty. Even if the CPA had provided incorrect advice regarding when the payments were due, it is a non-delegable obligation to pay taxes by the due date, and one cannot shift the blame to a tax professional for failing to disclose this information. (See *Berolzheimer, supra*; *Boyle, supra*, 469 U.S. 241, 247-248.) Appellant also argues that he has reasonable cause because he has attention deficit hyperactivity disorder (ADHD) and depression, which continuously prevented him from paying his 2017 taxes on time. Illness or other personal difficulties may be considered reasonable cause if the taxpayer presents credible and competent proof that the taxpayer was continuously prevented from making a timely tax payment. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of James* (83-SBE-009) 1983 WL 15396.) When a taxpayer alleges reasonable cause based on the taxpayer's incapacity due to his or her illness, the duration of the incapacity must approximate that of the tax obligation deadline. (See *Wright v. Commissioner*, T.C. Memo. 1998-224 [involving the late filing penalty], citing *Hayes v. Commissioner*, T.C. Memo. 1967- 80.) However, if the difficulties simply caused the taxpayer to sacrifice the timeliness of one

aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640 [involving the late filing penalty].) A taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo. 1999-416.)

While appellant has provided letters from his doctor that state appellant has depression, ADHD, and stress which has led to an exacerbation in heart palpitations, that is the only information provided in the letters. They do not address the relevant time period at issue or state that he was continuously prevented by his illness from paying tax by April 15, 2018. As such, it does not rise to the level of reasonable cause for penalty abatement. 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 the Internal Revenue Code (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; *Appeal of Johnson*, 2018-OTA-119P.) 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.

As stated previously, appellant contends that his CPA neglected to inform him about the estimated tax payment due dates and that his medical conditions prevented him from making timely payments. However, these contentions are reasonable cause arguments and do not constitute a casualty, disaster, or other unusual circumstances affecting his 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 appeal. Accordingly, appellant has not demonstrated that he is entitled to a waiver of the estimated tax penalty.

HOLDINGS

1. Appellant has not established reasonable cause for failing to make a timely payment of tax.
2. Appellant has not established that the estimated tax penalty should be waived.

DISPOSITION

FTB's action is sustained.

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Andrea L.H. Long

Administrative Law Judge

We concur:

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Sheriene Anne Ridenour

Administrative Law Judge

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Daniel K. Cho

Administrative Law Judge

Date Issued: 8/4/2020