

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
F. MAGEE

) OTA Case No. 18124097
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OPINION

Representing the Parties:

For Appellant: Cynthia F. Barry, CPA

For Respondent: Christopher T. Tuttle, Tax Counsel

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, F. Magee (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of a late payment penalty imposed for 2016 in the amount of \$10,763.11.

Appellant waived her right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUE

Whether appellant is liable for the late payment penalty imposed under R&TC section 19132.

FACTUAL FINDINGS

1. Appellant is an elderly woman. During 2016, she turned 87 years old and moved into an assisted living facility. Appellant had become forgetful and needed assistance with her daily activities. Although she was not incompetent to handle her affairs, she relied upon advisors for assistance.
2. Appellant resided in New York during 2016. She timely filed a California nonresident income tax return for 2016, pursuant to extension, on October 13, 2017.

3. Approximately 95 percent of appellant's income from all sources during 2016 was attributable to appellant's interest in a partnership that owned California real estate. During 2016, the partnership generated a substantial one-time gain from the sale of California real estate. The gain was California-source income. More than 99 percent of the California-source income reported on appellant's 2016 California return was her share of pass-through capital gain income from the partnership.
4. Appellant reported a total tax liability on her 2016 California return of \$134,762, less estimated tax and other prepayments of \$23, for a tax balance due of \$134,739.
5. Appellant paid the balance due (plus interest and a failure to pay estimated tax penalty) with her return on October 13, 2017.
6. FTB determined that appellant was liable for a late payment penalty under R&TC section 19132 in the amount of \$10,779.12. According to FTB, this amount is comprised of two amounts: \$6,736.95 imposed under R&TC section 19132(a)(2)(A),¹ and \$4,042.17 imposed under R&TC section 19132(a)(2)(B).²
7. Appellant paid the late payment penalty, in full, on January 3, 2018.
8. The Internal Revenue Service (IRS) also proposed a late payment penalty against appellant for 2016. That penalty was imposed under Internal Revenue Code section 6651(a)(2), the federal analogue to R&TC section 19132. The IRS subsequently agreed to abate the federal late payment penalty under its First Time Abate Program. The IRS informed appellant that its decision to abate the federal late payment penalty was a one-time occurrence "based solely on the fact that you have a good history of timely filing and timely paying." The IRS also advised appellant that any future waiver of this type of penalty would require proof that she "meets reasonable cause criteria."
9. Appellant filed a claim for refund of the state late payment penalty with FTB, alleging that her failure to timely pay her tax liability by the April 15, 2017 due date was attributable to reasonable cause and not willful neglect.³
10. FTB denied the claim, and appellant filed this appeal.

¹ FTB refers to this as the "underpayment penalty."

² FTB refers to this as the "monthly penalty"; it consists of 0.5 percent of the underpaid tax amount (\$134,739) for each of the six months that the return was late ($.005 \times \$134,739 \times 6 = \$4,042.17$).

³ Appellant does not contest FTB's computation of the penalty amount.

DISCUSSION

R&TC section 19132 provides that a late payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment. However, the late payment penalty will not apply if the taxpayer establishes that the failure to make a timely tax payment was “due to reasonable cause and not due to willful neglect.” (R&TC, § 19132(a)(1).) Reasonable cause is established if the taxpayer demonstrates that he or she acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) The burden of proof is on the taxpayer to show that the failure to make a timely payment was the result of reasonable cause and not due to willful neglect, and the late payment occurred despite the taxpayer’s exercise of ordinary business care and prudence. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615; *Appeal of Scott* (82-SBE-249) 1982 WL 11906.)

Appellant contends the late payment of her 2016 tax liability was attributable to reasonable cause and not to willful neglect.⁴ She makes the following allegations in support of this claim:

1. She was elderly and somewhat forgetful during the relevant period. She utilized the assistance of various financial experts to assist her in complying with her tax filing requirements.
2. In the course of moving to an assisted living facility in 2016, some of her records and tax information were misplaced. She alleges those records were “not in order or available” at the time she was required to estimate and pay her 2016 tax liability (that is, by April 15, 2017). This required her to file her federal and state tax returns for 2016 pursuant to extension.
3. She did not receive a copy of the Schedule K-1 reporting her distributive share of pass-through California income until after the time, in late March 2017, that she filed for an extension of time to file her 2016 federal income tax return. She did not become aware of the fact that she had a large California-source capital gain until she received the Schedule K-1.

⁴FTB does not contend, and the evidence does not suggest, that the late payment was due to willful neglect, so our analysis focuses on whether appellant had reasonable cause for the late payment.

4. Appellant claims to have mistakenly believed that the partnership was going to pay whatever California taxes were attributable to the pass-through gains.
5. Appellant has a good tax filing and payment history, and her late payment was a one-time event resulting from the confluence of factors recounted above. Appellant states that as a result of the difficulties she encountered with respect to paying her 2016 tax liabilities in a timely fashion, she has “since arranged for others to handle her tax and financial matters so that this issue does not happen again.”
6. The IRS waived the late payment penalty it had imposed for 2016 arising from the same set of facts.

Unfortunately, the foregoing allegations do not satisfy the legal requirement that appellant establish “reasonable cause.” Although appellant was an elderly woman who was becoming somewhat forgetful during the period at issue, there is no allegation, much less proof, that she was incompetent or suffering from a debilitating illness that rendered her unable to handle her tax affairs. (See e.g., *Logan Lumber Co. v. Commissioner* (5th Cir. 1966) 365 F.2d 846 [forgetting to file return no basis for penalty waiver; neither was confusion resulting from transitions in executive staff]; compare, *Shaffer v. Commissioner*, T.C. Memo. 1994-618 [taxpayer not liable for late-filing penalties where evidence showed he had “a significant psychiatric disorder and that he was mentally incapacitated”].) Appellant’s advancing age and forgetfulness have not been shown to have precluded her from timely estimating and paying her 2016 California tax liability.

The fact that appellant failed to timely receive a copy of the Schedule K-1 reflecting her California-source income also does not establish reasonable cause for her failure to timely estimate and pay her California tax liability. Appellant has not shown that she took any affirmative efforts to estimate her tax liability besides passively waiting to receive a Schedule K-1 from the partnership. (See generally, *Appeal of Moren*, 2019-OTA-176P [taxpayer established reasonable cause to abate failure to pay penalty by showing numerous unsuccessful attempts made to obtain Schedule K-1 information from partnership].)

Appellant also has not shown any basis for her purported belief that the partnership would pay the tax she would owe on her partnership income. Accordingly, her mistaken belief that her tax liability would be paid by the partnership cannot constitute reasonable cause excusing her from the late payment penalty. (See, e.g., *Appeal of Bryant* (83-SBE-180) 1983

WL 961596 [mistaken beliefs concerning tax obligations, even if held in good faith, do not constitute reasonable cause]; *Appeal of Malakoff* (83-SBE-140) 1983 WL 15525 [to same effect].) A mistaken understanding that taxes were timely paid does not in itself demonstrate reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.)

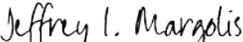
Finally, appellant notes that the IRS also initially imposed a late payment penalty against her for 2016 but waived it in light of her good filing and payment history. While the IRS has an administrative program called “First Time Abate,” under which it will abate timeliness penalties if a taxpayer has timely filed returns and paid tax for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program. The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement of timeliness-related penalties based solely on a taxpayer’s history of timely filing and payment. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.)) FTB has not adopted a program comparable to the IRS’s First Time Abate Program, and OTA has no authority to compel them to adopt such a program.

HOLDING

Appellant has not established reasonable cause for her late payment of tax.

DISPOSITION

FTB’s denial of appellant’s claim for refund is sustained.

DocuSigned by:


JEFFREY I. MARGOLIS
Administrative Law Judge

We concur:

DocuSigned by:


DANIEL K. CHO
Administrative Law Judge

DocuSigned by:


JOHN O. JOHNSON
Administrative Law Judge

Date Issued: 10/22/2020