OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19115473
N. SHI AND	)
C. LIN	)
	)
	)

OPINION

Representing the Parties:

For Appellants: N. Shi and C. Lin

For Respondent: Christopher M. Cook, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, N. Shi and C. Lin (appellants) appeal the action of respondent Franchise Tax Board (FTB) denying appellants' claim for refund for the 2017 tax year.[1]

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

ISSUE

Whether the late payment penalty should be abated.

FACTUAL FINDINGS

1. On October 14, 2018, appellants timely filed a California income tax return for the 2017 tax year, reporting total tax of $25,413, withholdings of $18,431, and tax due of $6,982. On the same day, appellants made a payment of $7,108, comprised of tax of $6,982 and a self-assessed underpayment of estimated tax penalty of $126.

[1] FTB proposed to assess a total late payment penalty of $558.56, but appellants filed a claim for refund for only the portion that consists of the underpayment penalty of $349.10. Therefore, appellants' claim for refund did not include the portion that consists of the $209.46 monthly penalty. FTB notes that the monthly penalty portion of the late payment penalty is automatically assessed when the underpayment penalty portion is assessed. Therefore, FTB states that if the underpayment penalty is abated, then the monthly penalty will be abated as well.

2. FTB issued a Notice of State Income Tax Due assessing an underpayment of estimated tax penalty of $26, and a late payment penalty of $558.56 (underpayment penalty of $349.10 + monthly penalty of $209.46), plus interest, which appellants paid.
3. Appellants filed a claim for refund for the underpayment penalty portion of the late payment penalty (not the monthly penalty), which FTB denied. This timely appeal followed.

DISCUSSION

R&TC section 19001 provides that the personal income tax "shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)." 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 due date of the return. The late payment penalty has two parts. The first part is the underpayment penalty, which is 5 percent of the unpaid tax. (R&TC, § 19132(a)(2)(A).) The second part is the monthly penalty, which is 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).)

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 was not due to 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 Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

A taxpayer's reliance on a tax preparer or agent to timely pay tax does not constitute reasonable cause.[2] (See *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860; see also *U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*).) However, reasonable cause may be found when a taxpayer relies on substantive advice from an accountant or attorney on a matter of tax law, such as whether a liability exists. (*Id.* at p. 251.) The taxpayer must show that the accountant or

[2] While *Boyle* involved the issue of a late-filing penalty and this case involves the late payment penalty, "decisions analyzing whether reasonable cause existed for failure to timely file a tax return are persuasive authority for determining whether reasonable cause existed for the failure to timely pay the tax." (*Appeal of Triple Crown Baseball*, 2019-OTA-025P at p. 4, fn. 8.)

attorney was a competent tax adviser supplied with all relevant information, and the taxpayer's good faith reliance on the adviser's incorrect advice resulted in the failure to timely pay. (See *Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 315-318; *Estate of Curet v. Commissioner*, T.C. Memo. 2016-138.)

In this case, FTB assessed a late payment penalty because, on October 14, 2018, appellants untimely paid tax of $6,982 that was due on April 15, 2018. The late payment penalty of $558.56 is comprised of the underpayment penalty of $349.10 and the monthly penalty of $209.46. Appellants' refund claim was not for the underpayment of estimated tax penalty, and was only for the portion of the late payment penalty that consists of the underpayment penalty of $349.10. FTB states that if the underpayment penalty is abated, then the monthly penalty will be abated as well. There is no dispute that appellants paid their taxes late or that the penalty was correctly calculated. Therefore, we examine whether appellants had reasonable cause for failing to make a timely payment of tax by April 15, 2018.

Appellants contend that they have reasonable cause for the late payment because their tax preparer, a certified public accountant (CPA), provided them with erroneous advice. Specifically, appellants contend that the CPA advised them on April 14, 2018, that they did not owe tax with regard to a certain stock transaction, and that they would receive a federal refund of $3,000. However, appellants assert that in October 2018, they were advised that they owed tax from capital gain as a result of the stock transaction.[3] Appellants provide an email dated October 14, 2018, where the CPA states: "I am sorry. Your originally refund [*sic*] several thousands before entering your investments. Now you owe federal $32,041 & state $7,108 after all done. Please review & come pick up." This email indicates that the CPA advised appellants in October 2018 that, after including the stock transaction in the calculation of tax, appellants were no longer owed a refund, but instead owed tax.

Appellants provide a copy of text message correspondence from April 2020 between them and the CPA. A text message from the CPA states: "The $3K was done by my assistant. They did not know about you [*sic*] stocks. Before knowing & entering you [*sic*] stocks." (Underline in original.) This text message indicates that the CPA's assistant, who prepared appellants' tax return, was unaware of the stocks or the stock transaction, and, therefore,

[3] Appellants reported a capital gain on their tax return of $94,973, which appears to be related to the stock transaction that appellants contend resulted in the underpayment of tax.

information related to the stocks was not included in the tax calculation completed in April 2018. Appellants contend, to the contrary, that the CPA advised them in April 2018 that the stock transaction was not taxable because the stocks were from an "employment stock purchase plan." However, appellants contend that the CPA was mistaken because they advised the CPA in April 2018 that the stocks were "personal stock accounts."

Appellants contend that, in April 2018, they provided the CPA with the information necessary to properly calculate their tax with regard to their stock transactions which resulted in capital gain. Appellants contend that they provided the CPA the documentation necessary to complete the tax return both in person and in an email. The appeal record includes an email dated April 7, 2018, that appellants sent to their CPA. The email states that they are providing requested tax information in an attached zip file to their CPA for use in preparing their 2017 tax return. In the email, appellants state that the tax information in the zip file includes an escrow statement and their 2016 tax return. In the email, appellants also inform the CPA that they rented an apartment before buying their current house in 2017. The tax information described in the email is not in the appeal record. The record also does not include any other tax information or documentation related to the preparation of appellants' tax return, such as information related to the stock transaction at issue.

The record is insufficient to support appellants' claims that the CPA was provided with information as to the taxable stocks or the related transaction resulting in capital gain. In addition, the evidence is insufficient to establish that advice was provided to appellants by the CPA in April 2018 as to the non-taxability of the stock transaction that ultimately resulted in capital gain. The email to the CPA in April 2018 does not include any mention of stocks. In addition, a text message from the CPA indicates that the CPA's assistant, who prepared the tax return, was unaware of the taxable stocks or the related stock transaction at issue. Furthermore, appellants do not provide any documentation or explanation to clarify the circumstances surrounding the stock transaction that resulted in capital gain, such as evidence to establish the type of stocks at issue, and the details of the transaction that occurred that resulted in capital gain. As such, the record does not include sufficient evidence from which we may determine that appellants' failure to timely pay tax was the result of their reliance on substantive advice as to a matter of tax law provided by their CPA. Therefore, appellants have not shown reasonable cause for the late payment of tax.

Appellants argue the penalty should be abated based on their good filing history and because the Internal Revenue Service (IRS) abated their penalty. However, while the IRS abated appellants' penalty as a one-time consideration based on their good filing history as part of its first-time abate program, there is no comparable California law allowing abatement of the penalty based on appellants' history of timely filing and paying California taxes. California law allows abatement only on a showing that the failure to pay was due to reasonable cause and not due to willful neglect. As the evidence does not establish that appellants' failure to pay was due to reasonable cause, there is no basis to abate the penalty.

HOLDING

The late payment penalty should not be abated.

DISPOSITION

FTB's action denying appellants' claim for refund is sustained.

DocuSigned by:
Josh Lambert
B90E40A720E3440...
Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge

DocuSigned by:
Kenneth Gast
FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge

Date Issued: 10/21/2020