

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19125553
S. TENERY AND)
C. TENERY)
_____)

OPINION

Representing the Parties:

For Appellants: S. Tenery and C. Tenery

For Respondent: Christopher Tuttle, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellants S. Tenery and C. Tenery appeal respondent Franchise Tax Board’s action in denying appellants’ claim for refund of \$530.74 (late-filing penalty of \$478 plus interest of \$52.74) for tax year 2017. Appellants waived their right to an oral hearing and therefore we decide this matter based on the written record.

ISSUES

1. Whether appellants are entitled to relief because certain deadlines were postponed by reason of a federally declared disaster.
2. Alternatively, whether appellants established that the late filing of their return for tax year 2017 was due to reasonable cause and not due to willful neglect.
3. Whether appellants are entitled to interest abatement.

FACTUAL FINDINGS

1. S. Tenery worked as a firefighter in Orange County, California. In 2018, S. Tenery was assigned to a Federal Incident Management Team that gets deployed throughout the United States and internationally to manage large-scale incidents. S. Tenery worked for a team that primarily managed and mitigated large wildfires, along with other large-scale natural disasters where local resources request outside aide.

2. In early 2018, S. Tenery was deployed on multiple assignments with his team, managing mudslides and other large-scale incidents throughout California. During the summer, S. Tenery found himself away from home working to suppress wildland fires.¹
3. S. Tenery stated that because he was away from his home and his home fire station, he struggled to complete his 2017 California tax return. S. Tenery explained that while away from home fighting fires, he was required to bring his laptop. He explained that all of appellants' tax documents and related materials were with him on his laptop, and that his spouse, C. Tenery, who remained at their home, did not have access to it. S. Tenery explained that due to C. Tenery's inability to access the necessary information, she was unable to complete and file their federal and California tax returns.
4. In a February 2018 Tax News update, "*Wildfire, flood, and mudslide victims receive more time to file and pay,*" respondent stated that California would "automatically follow federal postponement periods for any presidentially-declared disasters."
5. In Internal Revenue Service (IRS) Notice CA-2018-11, issued on August 6, 2018, the IRS stated: "The President has declared that a major disaster exists in the State of California. . . . [¶] The declaration permits the IRS to postpone certain deadlines for taxpayers who reside or have a business in the disaster area. For instance, certain deadlines falling on or after July 23, 2018 and before Nov. 30, 2018, are granted additional time to file through Nov. 30, 2018. This includes taxpayers who had a valid extension to file their 2017 return due to run out on Oct. 15, 2018." The notice granted relief under Internal Revenue Code (IRC) section 7508A and indicated extensions applied to "the postponement of time to file returns, pay taxes and perform other time-sensitive acts" Per the notice, relief applied to numerous affected taxpayers, including "all relief workers affiliated with a recognized government or philanthropic organization assisting in the relief activities in the covered disaster area....."

¹ In an April 1, 2019 letter to respondent, Fire Captain G. Hosburg of the Orange County Fire Authority stated: "Fire season for the western half of the country kicked-off early spring . . . and viciously continued throughout California's summer and advancing well into the fall. As a result, all of our firefighters within our organization and across the state were taxed with what seemed to be a never-ending battle. Due to fire activity, [S. Tenery] had worked over 1,300 extra hours beyond his normal schedule in nine months. Along with his duties on his home front in Orange County, [S. Tenery] is also a member of a Federal Incident Management Team that when activated, travels wherever needed including out of state, to manage large fires." Fire Captain G. Hosburg concluded his letter by asking respondent to "take into consideration every firefighter's unwavering dedication to protecting the lives and property of all citizens."

6. S. Tenery stated in two separate documents (appellants' refund claim and appeal letter) that appellants filed for a tax extension.²
7. S. Tenery stated that when the fire activity subsided, he was able to return home and complete the 2017 tax returns. On October 26, 2018, appellants filed a 2017 California Resident Income Tax Return as married filing jointly, reported a tax due, and remitted full payment with their tax return.
8. On November 19, 2018, respondent issued appellants a Notice of State Income Tax Due. The notice listed a penalty of \$478, plus interest of \$52.74, for a total account balance due of \$530.74.
9. On December 3, 2018, appellants paid the \$530.74 account balance in full and submitted a claim for refund. After respondent denied the claim for refund, appellants filed this timely appeal.
10. During the appeal, the Office of Tax Appeals (OTA) informed the parties that, pursuant to Government Code section 11515 and Evidence Code section 452, on its own initiative, OTA intends to take official notice of the various matters.³ OTA gave the parties an opportunity to refute any of the officially noticed matters by evidence or by written presentation of authority. Neither party refuted any of the officially noticed matters by the deadline provided. In addition, OTA requested additional briefing from the parties.⁴ Appellants did not respond to OTA's request for additional briefing.

² Respondent allows an automatic six-month extension to file a California tax return if the return is filed within six months of the original due date, without needing to file for an extension. (R&TC, § 18567(a).) In contrast, for federal tax purposes, individual taxpayers must file Form 4868 ("Application for Automatic Extension of Time to File U.S. Individual Income Tax Return"). (Treas. Reg. § 1.6081-4(b)(1).) Therefore, it seems appellants are referring to their filing for a federal tax extension on Form 4868. Moreover, respondent does not dispute appellants' filing for a federal tax extension.

³ The Notice of Intention to Take Official Notice indicated that OTA intends to take official notice of the existence of all California disasters in 2018 that are identified on a List of Disasters and include both "Governor Declared" and/or "President Declared" disasters. OTA also indicated that it intends to take official notice of the existence of all 2018 disasters identified on the Federal Emergency Management Agency's (FEMA) Disaster Declaration by Year list.

⁴ Some of the information that OTA requested of appellants included the following: whether S. Tenery was deployed to a covered area (a federally declared disaster area, or an area declared by the Governor to constitute a state of emergency); and for appellants to provide any information that may corroborate the dates and locations of each deployment.

DISCUSSION

Based on the preponderance of the evidence, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (Cal. Code Regs., tit. 18, § 30219(c); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) This standard “ ‘means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.’ ” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325, quoting *People v. Miller* (1916) 171 Cal. 649, 652.)

Issue 1 – Whether appellants are entitled to relief because certain deadlines were postponed by reason of a federally declared disaster.

IRC section 7508A provides certain relief to taxpayers determined “to be affected by a federally declared disaster” For example, one such relief is that the Treasury “Secretary may specify a period of up to 1 year that may be disregarded in determining” the taxpayers’ tax liability related to “the amount of any interest, penalty, additional amount, or addition to the tax” (IRC, § 7508A(a), (a)(2).) R&TC section 18572 incorporates IRC section 7508A by reference.⁵

R&TC section 18572(a) allows respondent to postpone certain tax-related deadlines for a federally declared disaster, and R&TC section 18572(b) allows respondent to postpone certain tax-related deadlines for a state of emergency declared by the Governor. We are not aware of any court cases, precedential Board of Equalization decisions, or precedential OTA opinions

⁵ California conforms to IRC section 7508A, relating to postponement of certain tax-related deadlines, as of the “specified date” of January 1, 2015; and as of this date, IRC section 7508A(a) referred to taxpayers determined “to be affected by a federally declared disaster (as defined by [IRC] section 165(h)(3)(C)(i))” Respondent does not conform to the 2018 amendment to the definition of “federally declared disaster.” (Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 (Mar. 23, 2018) 132 Stat. 348 [amending IRC section 7508A(a) by striking “section 165(h)(3)(C)(i)” and inserting “section 165(i)(5)(A)”].) Furthermore, a new subsection, subsection (d), was added to IRC section 7508A. (Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94 (Dec. 20, 2019) 133 Stat. 2534.) Subsection (d) provides that certain taxpayers affected by federally declared disaster areas are allowed a mandatory 60-day filing deadline extension beginning on the earliest incident date specified in the disaster area referred to in the declaration and ending on the date which is 60 days after the latest incident date specified. Subsection (d) applies to federally declared disasters declared after December 20, 2019. However, California does not conform to the new federal provision, subsection (d).

addressing R&TC section 18572.⁶ Moreover, the federal cases addressing IRC section 7508A are not on point.

In a February 2018 Tax News update, “*Wildfire, flood, and mudslide victims receive more time to file and pay,*” respondent stated that California would “automatically follow federal postponement periods for any presidentially-declared disasters.” IRS Notice CA-2018-11 explained that “certain deadlines falling on or after July 23, 2018 and before Nov. 30, 2018, are granted additional time to file through Nov. 30, 2018. This includes taxpayers who had a valid extension to file their 2017 return due to run out on Oct. 15, 2018.” It is undisputed that appellants filed such an extension.⁷ Thus, we ask ourselves whether appellants are entitled to relief because certain deadlines were postponed by reason of a federally declared disaster.

In the summer of 2018, the President declared that a major disaster existed in California. OTA took official notice of various facts, including the existence of California disasters in 2018 that are considered “Governor Declared” and/or “President Declared” disasters. For example, as pertains to Orange County, California, where appellants lived during the period at issue, in August 2017 the Governor (but not the President) declared a disaster related to the Holy Fire in this county and a neighboring county.

OTA requested additional briefing and information in an effort to determine whether the statement in the February 2018 Tax News update, indicating that California would “automatically follow federal postponement periods for any presidentially-declared disasters,” applied to appellants’ unique circumstances. For example, OTA asked appellants whether S. Tenery was deployed to a federally declared disaster area or an area declared by the Governor to constitute a state of emergency, and OTA also asked about the dates and locations of each deployment. However, appellants did not respond to OTA’s request.

Therefore, based on the lack of additional evidence, appellants did not meet their burden of showing that they are entitled to relief because certain deadlines were postponed by reason of a federally declared disaster.

⁶ We are aware of only one Board of Equalization case and one OTA case that mention R&TC section 18572, but neither case can be cited as precedent.

⁷ In respondent’s opening brief, respondent neither disagrees nor disputes this fact. Moreover, respondent did not provide copies of any federal information.

Issue 2 – Alternatively, whether appellants established that the late filing of their return for tax year 2017 was due to reasonable cause and not due to willful neglect.

Respondent allows an automatic six-month extension to file a California tax return if the return is filed within six months of the original due date, without needing to file for an extension. (R&TC, § 18567(a).) Respondent shall impose a late-filing penalty when a “taxpayer fails to make and file a return . . . on or before the due date of the return or the due date as extended by the Franchise Tax Board . . . unless it is shown that the failure is due to reasonable cause and not due to willful neglect” (R&TC, § 19131(a).) IRC section 7508A “provides no general presumption of reasonable cause for late filing or late payment.” (*Godwin v. Commissioner*, T.C. Memo. 2003-289 at p. 10.) Accordingly, persons who do not qualify as affected taxpayers under IRC section 7508A may nevertheless attempt to establish that their late filing or late payment was “due to reasonable cause and not due to willful neglect” (R&TC, § 19131(a).)

At the outset, we want to make it clear that based on the preponderance of the evidence, appellants’ filing of their California tax return eleven days after the extension deadline did not constitute willful neglect. Willful neglect is defined as a “conscious, intentional failure or reckless indifference.” (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860, citing *United States v. Boyle* (1985) 469 U.S. 241, 245-246.) The evidence shows that S. Tenery was dealing with a vicious fire season and, like many firefighters across California, demonstrated—in the words of Fire Captain G. Hosburg—an “unwavering dedication to protecting the lives and property of all citizens,” while combating what seemed to be a never-ending battle. Thus, appellants’ late filing was neither a conscious, intentional failure nor a reckless indifference.

However, even in the absence of willful neglect, an addition to tax (i.e., a late-filing penalty) will be assessed unless the failure to file was due to reasonable cause. (R&TC, § 19131(a).) When respondent imposes this penalty, the law presumes that it is correct. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer has the burden of establishing reasonable cause. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) As a general matter, for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.)

Appellants filed their tax return on October 26, 2018, instead of on or before October 15, 2018; thus, appellants filed eleven days after the deadline for the automatic six-month extension. The late filing was the result of numerous facts and circumstances. As stated above, in the summer of 2018, the President declared that a major disaster existed in California. S. Tenery explained and Fire Captain G. Hosburg corroborated that S. Tenery found himself away from home working to suppress wildfires. As a firefighter, S. Tenery was assigned to a Federal Incident Management Team that primarily managed and mitigated large wildfires and other large-scale incidents. S. Tenery explained that while away from home fighting fires, he was required to bring his laptop. He explained that all of appellants' tax documents and related materials were with him on his laptop, and that his spouse, C. Tenery, who remained at their home, did not have access to it. S. Tenery stated that when the fire activities subsided, he was able to return home and complete the 2017 federal and California tax returns. These are all important facts.

However, other facts are equally important, and appellants have not carried their burden of establishing reasonable cause because they did not submit evidence of these additional facts, including but not limited to the following: the dates and locations of each deployment; whether S. Tenery returned home at the end of each deployment, or whether he was immediately deployed to another location; the total amount of time that S. Tenery spent in his home county, when not deployed; and whether S. Tenery could have transferred the necessary tax documents and related materials from his laptop to C. Tenery. While OTA requested additional facts and information relevant to the issue of reasonable cause, appellants did not respond to such request.

Therefore, based on the preponderance of the evidence, appellants have not shown reasonable cause for the late filing of their 2017 tax return.

Issue 3 – Whether appellants are entitled to interest abatement.

Tax is due on the original due date of the return without regard to any filing extension. (R&TC, § 18567.) If taxpayers do not pay the tax by the original due date, or if respondent assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Imposing interest is mandatory, and respondent cannot abate interest except where authorized by law. (*Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Ibid.*) Generally, to obtain waiver or abatement of interest,

appellants must qualify under R&TC sections 19104, 19112, or 21012; however, based on the evidence and appellants' arguments, none of these statutory provisions apply.

Moreover, Treasury Regulation section 301.7508A-1(b)(2) specifically provides that an affected taxpayer under IRC section 7508A is eligible for relief from interest, penalties, additional amounts, or additions to taxes during the postponement period. R&TC section 19109 states that if respondent extends for any period the time for filing a return under R&TC section 18572, respondent shall abate for that period the assessment of any interest. However, as stated above, appellants did not establish that they were affected taxpayers under IRC section 7508A. Accordingly, appellants did not establish that they are entitled to interest abatement.

HOLDINGS

1. Appellants did not establish that they are entitled to relief by reason of a federally declared disaster.
2. Appellants did not establish that their late filing was due to reasonable cause.
3. Appellants did not establish that they are entitled to interest abatement.

DISPOSITION

We sustain respondent's denial of the claim for refund.

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Andrea L.H. Long
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Andrea L.H. Long
Administrative Law Judge

DocuSigned by:
John O. Johnson
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John O. Johnson
Administrative Law Judge

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