

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19115487
R. BERBERIAN)
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OPINION

Representing the Parties:

For Appellant: Conrad Davis

For Respondent: Shanon Pavao, Tax Counsel III

For Office of Tax Appeals: Oliver Pfof, Tax Counsel

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Berberian (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$13,374.08 for the 2018 taxable year.¹

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

ISSUE

Whether appellant has established reasonable cause for failing to make a timely payment of tax.

¹ The Office of Tax Appeals originally acknowledged the appeal in the amount of \$19,743.06. However, by agreement of the parties, the amount on appeal was reduced to \$13,374.08.

FACTUAL FINDINGS

1. Appellant did not remit the balance due of \$329,051 shown on the 2018 Form 540 at the time the return was filed.
2. FTB accepted the return as filed and subsequently mailed appellant a Notice of Tax Return Change - Revised Balance for a total balance due of \$356,442.68, which included a late payment penalty of \$19,743.06 and an estimated tax penalty.
3. On June 6, 2019, appellant remitted \$356,442.68 to FTB, which FTB applied to appellant's 2018 account with an effective date of May 30, 2019.
4. Afterwards, appellant filed a Reasonable Cause - Individual and Fiduciary Claim for Refund (FTB Form 2917), requesting a refund of the penalties and interest.
5. FTB denied appellant's claim for refund, and this appeal followed.
6. After this appeal was filed, FTB acknowledged receiving a timely fourth quarter 2018 estimated tax payment of \$105,000 from appellant. With the application of this payment and other credits to appellant's 2018 account, FTB reduced the late payment penalty from \$19,743.06 to \$13,374.08.

DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on a return by the date prescribed for the payment of the tax. Generally, the date prescribed for payment of the tax is the due date of the return (without regard to extensions of time for filing). Here, there is no dispute that appellant failed to timely pay the 2018 tax liability on or before the payment deadline, April 15, 2019. Further, appellant does not contend FTB incorrectly imposed or calculated the late payment penalty. Rather, appellant argues that the failure to pay the 2018 tax liability on time "was an honest oversight and not for any unwillingness or intentional disregard to pay the taxes due."

A late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and 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 tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.) A taxpayer making an untimely payment of tax due to an oversight is not, by itself, reasonable cause to

abate a late payment penalty. (*Appeal of Friedman*, 2018-OTA-077P.) Every taxpayer has a personal, non-delegable obligation to pay taxes when due and it does not require tax expertise to know that tax returns have fixed filing dates and that taxes must be paid when they are due. (*United States v. Boyle* (1985) 469 U.S. 241, 251.)

Appellant argues there is reasonable cause to abate the late payment penalty because appellant relied on an assistant to pay the tax reported as due on the 2018 return. According to appellant the assistant had, for decades, reliably transacted business on appellant's behalf, including the timely filing of tax returns and the timely payment of appellant's taxes. By relying on an assistant who had reliably transacted appellant's business for decades, appellant argues the late payment of tax occurred despite having exercised ordinary business care and prudence. Due to a change at appellant's accounting firm, appellant's assistant received PDF copies, but not paper copies, of appellant's 2018 return. Historically, the assistant received a paper copy of the return the accounting firm prepared. This change caused the assistant to overlook the self-assessed tax due on appellant's 2018 return. If it had not been for this change in appellant's accounting firm's practice, appellant argues the assistant would have realized appellant reported tax due and, as the assistant had done in the past, would have timely paid the tax.

While the assistant might have made an unintentional error, these facts do not form a basis for abating the late payment penalty. Appellant has not shown that the failure to make a timely payment occurred despite exercising ordinary business care and prudence. First, it is well settled that every taxpayer has a personal, non-delegable obligation to pay taxes when due and an agent's mistake in making a timely payment of his or her principal's tax is not reasonable cause to abate a late payment penalty. As stated previously, it does not require tax expertise to know that tax returns have fixed filing dates and that taxes must be paid when they are due. (*United States v. Boyle, supra*, 469 U.S. at p. 251.)

Second, appellant does not discuss what efforts, if any, the assistant took to determine whether appellant owed any tax for the 2018 taxable year. Appellant does not discuss why the unfamiliar format of the 2018 return, as transmitted to the assistant, caused the oversight.


For the foregoing reasons, appellant has not established reasonable cause for failing to make a timely payment of tax.

HOLDING


Appellant has not established reasonable cause for failing to make a timely payment of tax.


DISPOSITION

FTB’s action is modified, such that the late payment penalty imposed under R&TC section 19132 is reduced to \$13,374.08, as described above, and the interest accrued on the late payment penalty is adjusted accordingly. FTB’s action denying appellant’s refund claim is otherwise sustained.

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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:

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Keith T. Long
Administrative Law Judge

DocuSigned by:

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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 1/6/2021