OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

K. BUEHRING AND M. BUEHRING

OTA Case No. 18032380

OPINION

Representing the Parties:

For Appellants: Zena Greenspan, JD, CPA
Greenspan & Aaronson

For Respondent: Mira Coutinho, Tax Counsel
Maria Brosterhous, Tax Counsel IV

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellants K. Buehring and M. Buehring appeal respondent Franchise Tax Board's action in denying appellants' claim for refund totaling $50,917.84 for tax year 2014.[1]

Office of Tax Appeals (OTA) Administrative Law Judges Amanda Vassigh, Richard Tay, and Alberto T. Rosas held an oral hearing for this matter on November 18, 2020.[2] At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUES[3]

1. Whether appellants' failure to timely file their tax return for tax year 2014 was due to reasonable cause.
2. Whether appellants are entitled to abatement of the underpayment of estimated tax penalty (estimated tax penalty).

[1] The claim for refund consists of a late-filing penalty of $43,964.75 and an underpayment of estimated tax penalty of $3,621.88, as well as accrued interest of $3,331.24.

[2] The oral hearing was noticed for Cerritos, California and conducted electronically due to COVID-19.

[3] The parties agreed that interest abatement is not a separate issue. Appellants only contest the interest due insofar as it relates to the penalties. As such, if the penalties are abated, the corresponding interest charge is removed.

FACTUAL FINDINGS

Background

1. In 2010, Mr. Buehring accepted a senior vice-president position with an international corporation (Employer), which required that he relocate to the United Kingdom (U.K.). Mrs. Buehring remained in California.
2. The employment offer indicated that Employer "will implement a tax equalization policy." The offer letter explained that Employer would withhold U.S. federal and state taxes, that Employer's expatriate tax advisors (Tax Advisors) would "ensure the smooth handling" of Mr. Buehring's tax affairs, and that Employer would pay Tax Advisors to prepare his U.S. and U.K. tax returns during the period of his employment.
3. In 2012, Employer underwent a corporate merger and/or acquisition. Soon thereafter, Employer offered Mr. Buehring an executive vice-president position; the employment terms included "tax equalization" to avoid double-taxation and other benefits supported in the same or comparable manner as before. In 2013, these parties entered into another employment contract, which set the U.K. as Mr. Buehring's primary work location and, in addition to other provisions, included a "tax equalization policy."

Tax Year 2014

4. Mr. Buehring continued to live in the U.K., and he worked for Employer until August 31, 2014. His final paystub showed appellants' California address and a total year-to-date gross pay amount.
5. For tax year 2014, appellants made tax payments that consisted of withholdings, an estimated tax payment in June 2014, an estimated tax payment in April 2015, and an electronic payment on October 15, 2015.
6. Appellants untimely filed their 2014 California Resident Income Tax Return on October 26, 2015. Using the married filing jointly status and a California residential address, they reported wages from Employer that exceeded amounts shown on the final paystub. They applied withholdings and estimated tax payments but did not apply the return payment. They reported a tax due amount and self-assessed interest, a late-filing penalty, and an estimated tax penalty.

7. In November 2015, respondent issued a Notice of Tax Change, which accounted for appellants' total payments and tax liability, revised the late-filing penalty, revised the estimated tax penalty, and imposed interest. Respondent issued a refund.
8. Appellants filed a claim for refund of the penalties and interest. On August 2, 2017, respondent denied appellants' claim for refund, and this timely appeal followed.

DISCUSSION

Issue 1 - Whether appellants' failure to timely file their tax return for tax year 2014 was due to reasonable cause.

Because appellants failed to timely file their 2014 California tax return by April 15, 2015, or by the automatic six-month extension, respondent imposed a late-filing penalty of $43,964.75. Respondent imposes a late-filing penalty when a taxpayer does not timely file a return, unless it is shown that the failure to timely file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) When respondent imposes this penalty, the law presumes that it is correct. (*Appeal of Xie*, 2018-OTA-076P (*Xie*).) A taxpayer has the burden of establishing reasonable cause. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) Appellants do not dispute the late-filing penalty computation,[4] and there are no allegations of willful neglect in this appeal. Thus, our focus is on reasonable cause. 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.)

The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Taxpayers must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalties will be not be abated. (*Appeal of Walshe* (75-SBE-073) 1975 WL 3557.)

[4] Originally, in their briefing, appellants argued that respondent should have computed the penalty using the married filing separately status, based on Mr. Buehring's purported status as a nonresident of California. At oral hearing, however, appellants clarified that they are no longer taking this position. Thus, the penalty computation based on the filing status claimed on their return—married filing jointly—is not at issue.

The record on appeal contains complex facts and legal arguments. Appellants submitted 29 exhibits totaling over 200 pages; respondent submitted 9 exhibits totaling over 100 pages. The facts span two continents. There are allegations of breach of quasi-fiduciary duties, breach of care, and breach of an employment contract. Appellants argued that the late filing is due to their detrimental reliance on Tax Advisors, whose errors and omissions resulted in Tax Advisors' failure to file the tax return on time. Appellants allege that Employer reneged on its promise to take care of the penalties at issue. But at the heart of this case, this is a matter of whether appellants could delegate their duty to timely file their return.

At oral hearing, appellants argued that they relied on their Tax Advisors and that Mr. Buehring "was assured by his [Tax Advisors'] liaison that he was covered for his 2014 taxes on April 15th." Appellants argued that based on an October 15, 2015 phone call between Mr. Buehring and his Tax Advisors, he "firmly believed that his income tax return was being filed on October the 15th"—by the automatic six-month extension.

When it comes to reliance on a representative, for the reliance to be reasonable, it must relate to substantive advice. (*United States v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*).) The U.S. Supreme Court established the non-delegable duty rule by stating that a taxpayer's reliance on a representative to timely file his or her return is not a substitute for compliance with an unambiguous statute. (*Ibid*.) In accordance with *Boyle*, the Ninth Circuit concluded that filing deadlines were non-substantive. (*Knappe v. United States* (9th Cir. 2013) 713 F.3d 1164, 1173-75 (*Knappe*), cert. den. 134 S. Ct. 422.) Therefore, appellants had a non-delegable duty to file their 2014 California tax return by April 15, 2015, or by the automatic six-month extension.

In addition to their arguments about their reliance on Tax Advisors, appellants argue that Employer breached the employment contract and the "tax equalization policy" provisions. At the oral hearing, appellants argued that the employment contract ensured that appellants' "tax returns would be prepared and filed on time, and that the taxes would be paid . . . ." Appellants argued that the "contractual relationship created an extraordinarily high duty of care, likened to a fiduciary duty of care[,]" for Employer.

We make no finding, however, as to whether Employer breached the employment contract. As an administrative tax tribunal, OTA is not the proper venue for adjudicating or determining whether there was a breach of a contract between a taxpayer and a third party. (Cal. Code Regs., tit. 18, § 30103(a).) Even if breach of the employment contract at issue had already been established and adjudicated by a court of proper jurisdiction, courts have held that a breach of contract does not constitute reasonable cause for a taxpayer's failure to timely file his or her tax returns. (See *Schroer v. U.S.* (2009) 594 F.Supp.2d 1257 (*Schroer*) [holding that buyers' breach of contract to purchase taxpayer's home did not constitute reasonable cause].)

Appellants stated at oral hearing that Mr. Buehring "had to be fully responsible for filing his California and U.S. tax returns." We agree about appellants' responsibility; they could not delegate their duty. According to the Ninth Circuit, if taxpayers could delegate their duty, then representatives would accept the blame for missed deadlines to help taxpayers escape penalties. (*Knappe*, *supra*, at p. 1774.) We believe the same policy applies if taxpayers could delegate their duty to their employers via an employment contract. Because taxpayers have a non-delegable duty to timely perform their income tax obligations, a contract with a third party does not relieve taxpayers of this duty. (See *U.S. v. Garami* (1995) 184 B.R. 834, 838 (*Garami*).) Although *Garami* is not controlling authority, we are persuaded by its reasoning, and we conclude that just as taxpayers cannot delegate to representatives the duty to timely perform income tax obligations, taxpayers cannot delegate this duty to their employers.

Moreover, an assertion regarding lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause. (*Appeal of Moren,* 2019-0TA-176P.) Appellants argued at oral hearing: "This is not just a case of the inability to prepare the 2014 tax return due to complex tax laws." They explained that the focus here is not just about lack of documentation. "This was an impossible situation," they argued, because Mr. Buehring "had no ability to receive his W-2." The argued that the impossible situation resulted from being "kept in the dark" because they were at the mercy of Employer and Tax Advisors.

Appellants explained that the Form W-2 determination depended on the U.K. taxes, which fell under the control of Employer and Tax Advisors. We do not doubt appellants' predicament; we understand their position that the Form W-2 information was interconnected to the U.K. taxes. We also understand that appellants were not completely in the dark; they did have some information available. For example, the final paystub from Employer showed total year-to-date gross pay. Appellants indicated at oral hearing that this paystub was all they had to determine income from Employer as of April 15, 2015.

The final paystub's total year-to-date gross pay was less than the wages that appellants eventually reported on their tax return. But as of April 15, 2015, the final paystub contained the best information available. Taxpayers have an obligation to file returns timely, with the best information available, and, if necessary, taxpayers may subsequently file an amended return. (*Xie*, *supra*.) At oral hearing, appellants stated that if they had received the Form "W-2 in January or even at the beginning of April, [Mr. Buehring] would have been able to have his income returns prepared and filed timely, and would have been able to pay his total tax liability by April the 15th." We do not entertain such speculation as to what appellants would have done differently had Employer provided them with Form W-2 on time.

But we do note that "[t]he omission of a Form W-2 does not prevent the calculation of tax liability." (*Blount v. Commissioner* (1986) 86 T.C. 383, 387.) After all, a tax return need not be perfect to be a valid return. (See *Zellerbach Paper Co. v. Helvering* (1934) 293 U.S. 172, 180 ["Perfect accuracy or completeness is not necessary......... This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary"].) Thus, a lack of a Form W-2 does not excuse taxpayers from their duty to timely perform their tax obligations; after all, taxpayers may attach a substitute form[5] to their California tax return if an employer does not provide them with the necessary tax document.

Therefore, although appellants provided credible and competent evidence, after weighing the evidence we conclude that it does not support the claim of reasonable cause. In other words, we find that appellants did not meet their burden of establishing that the late filing was due to reasonable cause. Thus, the late-filing penalty will be not be abated.

<u>Issue 2 - Whether appellants are entitled to abatement of the estimated tax penalty</u>.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated and often referred to as a penalty, when an individual fails to timely pay estimated tax.[6] Subject to certain exceptions not relevant to the issue on appeal, R&TC section 19136 incorporates IRC section 6654. The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (See IRC, § 6654(a);

[5] FTB Form 3525, Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.

[6] Where estimated tax payments are due, R&TC section 19136.1(a)(2) generally requires, for California income tax purposes, that the payments be made in installments on or before April 15 and June 15 during the applicable tax year, and January 15 of the immediately succeeding tax year.

see also R&TC, §§ 19136(b) and 19521.[7]) There is no general reasonable cause exception to imposing the estimated tax penalty. (*Appeal of Johnson*, 2018-OTA-119P (*Johnson*); *Adams v. Commissioner*, T.C. Memo. 2013-7.) The estimated tax penalty is mandatory unless the taxpayer establishes that a statutory exception applies. (*Johnson*, *supra*; *Nitschke v. Commissioner*, T.C. Memo. 2016-78.)

Appellants do not protest the imposition or computation of the penalty. In addition, appellants clarified at oral hearing that they are not seeking abatement based on filing status. Instead, appellants argue that respondent should refund the penalty amount based on reasonable cause. They argue that they were "kept in the dark" and were at the mercy of Employer and Tax Advisors, having no choice but to rely on the information received from them. However, because there is no general reasonable cause exception to imposing the estimated tax penalty, reliance on a tax professional or an employer is legally irrelevant for these purposes.

But although there is no provision allowing for the abatement of the addition to tax based on reasonable cause, IRC section 6654(e)(3) provides two grounds by which the addition to tax may be waived. Only the first ground is relevant here: Under IRC section 6654(e)(3)(A), respondent may waive the addition to tax if it determines that, "by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." Because the second ground is not at issue,[8] we focus on the first ground.

Appellants argued at oral hearing that the estimated tax penalty would be against equity and good conscience, and that they demonstrated "sufficient unusual circumstances and even extraordinary circumstances" to warrant waiver of the estimated tax penalty. The phrase "casualty, disaster, or other unusual circumstances" from IRC section 6654(e)(3)(A) generally refers to unexpected events that cause a hardship or loss such that, due to the circumstances, it would be "against equity and good conscience" to impose the penalty. (*Johnson*, *supra*.) Appellants focus on their relationship with Employer and Tax Advisors, arguing that the facts

[7] With modification, R&TC section 19521 conforms to the federal interest provisions in IRC section 6621.

[8] Under the second ground, IRC section 6654(e)(3)(B), the addition to tax may be waived if respondent determines that (i) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, and (ii) the underpayment was due to "reasonable cause" and not due to willful neglect. Thus, the issue of whether a taxpayer had reasonable cause for underpaying estimated tax only arises if, during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled. We will not discuss this second provision because appellants provide no evidence or argument that one of them either retired after having attained age 62 or became disabled during the applicable tax year (2014) or the preceding year (2013).

and events surrounding this relationship created an unusual circumstance. When we focus on this relationship, however, we do not see an unusual circumstance. Instead, we see an employment contract and a contractual relationship.

Per the written offer from 2010, Employer's Tax Advisors were supposed to "ensure the smooth handling" of appellants' tax affairs, and Employer was to pay Tax Advisors to prepare appellants' U.S. and U.K. tax returns during the period of employment. The employment contract from 2013 included a "tax equalization policy." As indicated above, we make no finding as to whether Employer breached the contract. But if there was a breach, just as a breach of contract does not constitute reasonable cause for a taxpayer's failure to timely file his or her tax returns (see *Schroer*, *supra*, at p. 1257), as explained below we similarly conclude that a breach of contract does not constitute the type of unusual circumstances contemplated by IRC section 6654(e)(3)(A) to warrant waiver of the estimated tax penalty.

As OTA indicated in *Johnson*, *supra*, where specific words ("casualty" and "disaster") are followed by more general words ("other unusual circumstances"), the more general words are generally limited to items that are similar to the specific words. (*Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202; see also *Martin v. Holiday Inns, Inc.* (1988) 199 Cal.App.3d 1434, 1437-1438; Civ. Code, § 3534 ["Particular expressions qualify those which are general"].) Casualties and disasters are unexpected events that cause a hardship or loss such that, depending on the circumstances, it might be inequitable for the addition to tax to apply. (*Johnson*, *supra*.) While we do not foreclose the possibility that other types of unusual circumstances might fall within this provision, the statutory context suggests that a breach of contract is not the type of event that the provision was intended to cover.

Moreover, the decision of the tax court in *Farhoumand v. Commissioner,* T.C. Memo. 2012-131, suggests a narrow interpretation of the provision. In that case, the tax court found that stock market volatility was not an unusual circumstance within the meaning of IRC section 6654(e)(3)(A). There are analogous parallels between entering the stock market and entering an employment contract. Just as persons enter the stock market with the best intentions and hopes for success, parties similarly enter employment contracts with the best intentions. Just as investors understand that a stock market loss is an undesirable possibility, parties to a contract understand that a breach of contract, though undesirable, is possible. Both situations are about possibilities—desirable and undesirable.

It is not unusual for taxpayers to enter into employment contracts. Similarly, it is not unusual for taxpayers to contractually agree that someone other than themselves will prepare and file their tax returns. Therefore, we conclude that when a taxpayer is a party to a contract, a breach or alleged breach of the contract is not an unusual circumstance within the meaning of IRC section 6654(e)(3)(A).

At oral hearing, appellants also argued that "[i]t would be punitive under the circumstances to penalize" them. The estimated tax penalty effectively imposes an interest charge to compensate the government for the time value of tax that is due but is not paid until a later date. We find that imposing an interest charge on tax that was due on the payment received by appellants does not offend "equity and good conscience."

Lastly, although appellants reference their good compliance history, unlike the federal First Time Penalty Abatement program, the State of California has not adopted a comparable penalty abatement program. (*Xie*, *supra*.) Thus, we cannot consider appellants' good compliance history.

HOLDINGS

1. Appellants did not show that the failure to timely file their tax return for tax year 2014 was due to reasonable cause.
2. Appellants did not show that they are entitled to abatement of the estimated tax penalty.

DISPOSITION

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

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Alberto T. Rosas
Administrative Law Judge

We concur:

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Amanda Vassigh
Administrative Law Judge

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Richard Tay
Administrative Law Judge

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