

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
L. HIRSH

) OTA Case No. 20056154
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OPINION

Representing the Parties:

For Appellant: L. Hirsh

For Respondent: Leoangelo C. Cristobal, Tax Counsel

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19234, L. Hirsh (appellant) appeals an action by the respondent Franchise Tax Board denying appellant’s claim for refund of \$895.25 for the 2017 tax year.

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

ISSUES

1. Is appellant entitled to abatement and refund of the late-filing penalty?
2. Is appellant entitled to abatement and refund of interest?

FACTUAL FINDINGS

1. Appellant hired a tax preparer that appellant had worked with for over ten years to prepare and file the 2017 individual income tax returns. Appellant authorized the tax preparer to e-file the returns.
2. The tax preparer sent appellant a letter on February 11, 2018, stating that “the California tax return will be electronically filed.” The letter also provided appellant with instructions on how to pay the reported tax balance.
3. The tax preparer did not file the California tax return by the extended due date of October 15, 2018.

4. Respondent sent appellant a Request for Tax Return dated April 23, 2019, which explained that respondent had not yet received appellant's 2017 California tax return, and instructed appellant to respond by May 29, 2019, by filing a return, providing a copy of a return if already filed, or explaining why no return was required.
5. Appellant filed a 2017 California tax return on May 30, 2019.
6. On June 5, 2019, respondent issued to appellant a Notice of Tax Return Change - Revised Balance, reflecting a balance due and notified appellant that the 2017 liability also included a late-filing penalty and interest, which were then due.
7. Appellant paid the balance due on June 14, 2019.
8. On December 26, 2019, respondent received appellant's claim for refund of the late-filing penalty and interest.
9. Respondent denied appellant's claim for refund. This appeal followed.

DISCUSSION

Issue 1 - Is appellant entitled to abatement and refund of the late-filing penalty?

R&TC section 19131 requires respondent to impose a late-filing penalty when a taxpayer does not file its return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect.¹ According to R&TC section 19131(a), the late-filing penalty is five percent of the tax for each month or fraction thereof elapsing between the due date of the return (determined without regard to any extension of time for filing) and the date on which the return is filed, with a maximum penalty equal to 25 percent of the tax.

When respondent imposes a late-filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause. (*Ibid.*) To establish reasonable cause, the taxpayer must show the failure to timely file occurred despite the exercise of "ordinary business care and prudence." (*Appeal of Friedman*, 2018-OTA-

¹ Respondent may grant a taxpayer up to six more months to file a tax return and the corresponding regulation provides for an automatic six-month extension without a written request. (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567.) However, if the return is not filed within six months of the original due date, no valid extension exists, and the late-filing penalty amount is computed by reference to the original due date of the return. (*Ibid.*)

077P.) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Appellant does not dispute that the return was filed late or claim that respondent's calculation of the penalty is incorrect. Instead, appellant argues that the late filing of the return was due to reasonable cause and not due to willful neglect and, therefore, the late-filing penalty should be abated and refunded. In support of this argument, appellant asserts that appellant had entrusted the preparation and filing of the return to appellant's longtime tax preparer.

In *United States v. Boyle* (1985) 469 U.S. 241, the Supreme Court established a bright-line rule that a taxpayer has a nondelegable duty to timely file tax returns.² Reliance on a third party to fulfill that duty does not constitute reasonable cause that relieves the taxpayer of the duty to comply with the unambiguous statute. (*Id.* at p. 251.) R&TC section 18566 unambiguously required appellant to file her 2017 return by April 15, 2018, absent an extension. Appellant failed to file the California tax return by the due date or extended due date, and reliance on a tax professional does not constitute reasonable cause for failure to file on time.

We recognize that appellant gathered tax documents and submitted them to appellant's tax preparer in advance of the tax return due date. We find credible appellant's statement that appellant expected the tax preparer to timely file the California tax return; appellant's tax preparer indicated in a letter to appellant that both the California and federal income tax returns would be electronically filed by the tax preparer, and the federal return was filed as promised. However, as explained above, taxpayers cannot delegate their duty to ensure that their returns are timely filed.

Furthermore, appellant has not established that she actively took any steps to confirm, verify, or otherwise ensure that her California tax filing and payment obligations for the 2017 tax year were timely met. The evidence suggests that appellant took a passive approach after having provided the tax preparer with the tax documents. For instance, the letter from the tax preparer and the copy of the California tax return indicated that appellant had a balance due for 2017. The letter from the tax preparer instructed appellant on how to pay respondent for the 2017 tax

² Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, federal courts' interpretation of the "reasonable cause" standard is persuasive authority in determining the proper application of this California statute. (See *Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658.)

balance. However, appellant did not make a payment on the 2017 tax account until 2019.³ This does not illustrate the exercise of ordinary business care and prudence in dealing with the tax obligation that might establish reasonable cause. We find that the duty of exercising ordinary business care and prudence must not stop when documents are delivered to the tax preparer.

Thus, we conclude that appellant is not entitled to abatement and refund of the late-filing penalty.

Issue 2 - Is appellant entitled to abatement and refund of interest?

Taxes are due and payable as of the due date of the taxpayer's return without regard to any extension. (R&TC, § 19001.) If tax is not paid by the due date, or if respondent assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due, compounded daily. (R&TC, §19101.) Interest is not a penalty but is merely compensation for a taxpayer's use of the money. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Appellant makes the same reasonable cause argument in support of the request for relief of interest. However, there is no reasonable cause exception to the imposition of interest.⁴ (*Appeal of GEF Operating, Inc.*, *supra.*) Consequently, we conclude that appellant is not entitled to abatement and refund of interest.

³ The late-filing penalty is only imposed on any tax required to be reported on the return which is not timely paid by the payment due date (see R&TC section 19131(c): "For purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax"). Thus, had appellant timely paid the tax, no late-filing penalty would have been imposed.


⁴ Although respondent may abate all or a part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by respondent in the performance of a ministerial or managerial act, and we may review respondent's denial of interest relief for an abuse of discretion, appellant makes no such argument here. (R&TC, § 19104(a)(1), (b)(1) and (b)(2)(B).)

HOLDINGS

1. Appellant is not entitled to abatement and refund of the late-filing penalty.
2. Appellant is not entitled to abatement and refund of interest.

DISPOSITION

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

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 Amanda Vassigh
 Administrative Law Judge

We concur:

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 Natasha Ralston
 Administrative Law Judge

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 Elliott Scott Ewing
 Administrative Law Judge

Date Issued: 3/24/2021