

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
N. VISCONSI

) OTA Case No. 20015777
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)

OPINION

Representing the Parties:

For Appellant: Theodore S. Maleski, Jr., CPA

For Respondent: Leoangelo C. Cristobal, Tax Counsel

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, N. Visconsi (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,267.25, plus applicable interest, for the 2017 tax year.

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

ISSUES

1. Whether there is reasonable cause to abate the late-filing penalty.
2. Whether appellant is entitled to an abatement of interest.

FACTUAL FINDINGS

1. During 2017, appellant, an individual, was a California nonresident and a minority member of DHSM Investors LLC (DHSM), a limited liability company (LLC) that is treated as a partnership for both federal and California income tax purposes. Both appellant and DHSM had mailing addresses in Ohio.

2. On an unknown, presumably timely date, DHSM issued a 2017 California Schedule K-1 (*Member's Share of Income, Deductions, Credits, etc.*) to appellant.¹ Based on the information reported on this Schedule K-1, FTB concedes that appellant was not required to file a 2017 California nonresident income tax return.
3. During 2018, appellant did not file a 2017 California nonresident income tax return.
4. In January 2019, DHSM issued an amended 2017 California Schedule K-1 to appellant. Based on the information reported on this amended Schedule K-1, the parties agree that appellant *was* required to file a 2017 California nonresident income tax return.
5. On May 15, 2019, FTB received appellant's 2017 California nonresident income tax return and payment for tax due of \$5,069 and a self-assessed estimated tax penalty of \$129 (which is not at issue in this appeal). Appellant's 2017 California nonresident income tax return indicated that appellant resided in Ohio; the return was prepared by an Ohio-based CPA firm.
6. Appellant's brother also was an Ohio resident and a member of DHSM. His situation is identical to appellant's except that he late-filed his 2017 California return more promptly, on January 31, 2019.
7. FTB originally determined that both appellant and her brother were liable for the maximum 25 percent late-filing penalty. Both paid the amounts claimed to be due and filed claims for refund that were denied by FTB. Then they filed separate appeals with the Office of Tax Appeals. On appeal, FTB abated the \$1,496 penalty imposed against appellant's brother, but not the \$1,267.25 penalty imposed against appellant.

DISCUSSION

Issue 1: Whether there is reasonable cause to abate the late-filing penalty.

An individual taxpayer filing on a calendar year basis has three and a half months following the close of the calendar year (i.e., until April 15) to timely file his or her personal income tax return. (R&TC, § 18566.)² FTB imposes a late-filing penalty when a taxpayer fails

¹ Although the Schedule K-1 was addressed to "Lil Tito LLC," the parties agree that Lil Tito LLC was a nominee for appellant.

² FTB allows an automatic six-month extension to file a tax return if a taxpayer files the return within six months of the original due date (i.e., by October 15). (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567(a).) If a taxpayer does not file his or her return by the extended due date, however, FTB does not allow the extension. (Cal. Code Regs., tit. 18, § 18567(a).)

to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131.) The late-filing penalty is computed by reference to the original due date of the return (Cal. Code Regs., tit. 18, § 18567(b)), at 5 percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131.) Appellant does not dispute that her return was late or FTB's calculation of the penalty. The only issue before us is whether appellant had reasonable cause for late filing her return.³

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) The taxpayer bears the burden of proving that the late filing was due to reasonable cause and not due to willful neglect. (*Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) To establish reasonable cause, the taxpayer must show that the failure to timely file the return occurred despite the exercise of ordinary business care and prudence. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Tons* (79-SBE-027) 1979 WL 4068.) In making this determination, the critical date is the filing due date. “The reasonable cause standard is a one-time test to be passed or failed at the ... due date. ... Events occurring after the due date are still relevant, however, to the reasonable cause determination.” (*Estate of Hartsell v. Commissioner*, T.C. Memo. 2004-211, 2004 WL 2094750 at p. *3, citations omitted [applying the reasonable cause standard in connection with a failure to timely pay tax penalty].)

On appeal, appellant offers two arguments for why there is reasonable cause to abate the late-filing penalty. First, appellant asserts that she had no reason to believe she had a California filing requirement for 2017 until January 2019, when DHSM issued an amended Schedule K-1 showing she had a significant amount of California-source income from DHSM, and that she acted reasonably in filing her 2017 California nonresident tax return several months later, on May 15, 2019. Second, appellant argues that she should be treated like her brother, who also was a member of DHSM and whose late-filing penalty FTB abated for reasonable cause, because their circumstances allegedly are “identical.”

In response, FTB admits that appellant reasonably believed she did not have an obligation to file a California return on the filing due date based on the information reported to her in the

³ FTB does not contend, and the evidence does not suggest, that the late filing was due to willful neglect. Hence, we address only whether appellant has established reasonable cause.

originally issued Schedule K-1. FTB states: “[T]he earliest appellant would have realized she was required to file a California return was upon receipt of her amended DHSM K-1 in January of 2019.” But FTB claims that an acceptable reason for failing to timely comply with one’s tax obligations excuses the failure only for so long as the reason remains valid. (See generally *Appeal of Moren*, 2019-OTA-176P [involving the late-payment penalty].) FTB’s position is that when appellant received the amended Schedule K-1 from DHSM in January 2019,⁴ it would have become clear to her that she was obligated to file a California return but she failed to do so within a reasonable period of time. FTB also distinguishes the case of appellant’s brother, noting that he also received an amended Schedule K-1 from DHSM in January 2019, but, unlike appellant, he filed his California tax return that same month, on January 31, 2019. FTB therefore concluded that appellant’s brother exercised ordinary business care and prudence, whereas appellant did not.

The question before us, then, is whether it was reasonable for appellant to take approximately four months to file her California nonresident return after receiving the amended Schedule K-1 in January 2019. FTB states:

Hypothetically, appellant provided an adequate explanation for filing her return within a few weeks of receiving her amended DHSM K-1 in January of 2019; in reality, appellant provided no explanation for[]filing her return four months later. As a result, appellant has failed to establish reasonable cause to abate the delinquent filing penalty.

FTB, however, has not provided us with any authority for its position that appellant was required to file her return “within a few weeks” of receiving the amended Schedule K-1. Moreover, the fact that appellant’s brother filed his California nonresident tax return more promptly than appellant did does not itself show that appellant failed to exercise ordinary business care or prudence. Instead, we look to all of the facts and circumstances in determining whether appellant has established reasonable cause for her late filing.

Here, FTB admits that on the filing due date, April 15, 2018, appellant had no reason to believe that a return was due, and that it was not until January 2019 that appellant had reason to believe she needed to file a California return. She voluntarily filed her return, without any prodding by the state, approximately four months later. Obviously, upon the receipt of the amended Schedule K-1 in January 2019, appellant would need to analyze it, determine whether it

⁴ The record does not indicate the precise date of receipt.

gave rise to a California filing obligation, contact a tax advisor with expertise in preparing an out-of-state return, and provide the preparer with the necessary information to prepare and file the return. This obviously takes some time,⁵ and given the circumstances involved, it appears to us that appellant acted reasonably and not with willful neglect. Accordingly, we hold that appellant is not liable for the proposed late-filing penalty.⁶

Issue 2: Whether appellant is entitled to an abatement of interest.

R&TC section 19101 provides that taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). If the tax is not paid by the original due date or if FTB 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.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

Although appellant requests that interest be abated, she has not identified any basis for abating the interest that was charged, and our review of the record does not suggest that any such basis exists.⁷ Accordingly, appellant's request for abatement of interest is denied.⁸

HOLDINGS

1. There is reasonable cause to abate the late-filing penalty.
2. Appellant is not entitled to interest abatement.

⁵ We reiterate that California law allows individual taxpayers (residents and nonresidents alike) three and a half months after the close of the tax year to prepare and file their returns. Furthermore, individuals are entitled to an automatic six-month extension to file a tax return if they file their return within six months of the original due date. (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567(a).)

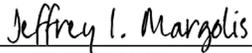
⁶ We are not establishing a bright-line test for how long one may "reasonably" take to file a return after becoming aware that one has a filing obligation. Instead, we base our conclusion upon the unique facts of circumstances of this case.

⁷ Appellant also requests that "fees" be abated, but appellant has not established that she paid any fees with respect to the year at issue.

⁸ Of course, any interest appellants paid on the late-filing penalty that we have abated will also be abated and refunded.

DISPOSITION

FTB's action is reversed as to the late-filing penalty and sustained in all other respects.

DocuSigned by:

Jeffrey I. Margolis
Administrative Law Judge

I concur:

DocuSigned by:

Kenneth Gast
Administrative Law Judge

A. WONG, Administrative Law Judge, concurring in part and dissenting in part:

I concur with the majority's opinion regarding Issue 2. However, I respectfully dissent from the majority's ultimate conclusion regarding Issue 1.

Although there was reasonable cause for appellant's failure to file a California nonresident tax return until January 2019, appellant has not explained whether or how she exercised any ordinary business care or prudence from January 2019 until May 15, 2019, when she finally filed her return. Additionally, she has failed to show that her late filing was *not* due to willful neglect as required by R&TC section 19131. (See generally *United States v. Boyle* (1985) 469 U.S. 241, 246, fn. 4 ["A taxpayer seeking a refund must therefore prove that his [or her] failure to file on time was the result neither of carelessness, reckless indifference, nor intentional failure".]) Because of the lack of argument or facts as to appellant's actions (or inaction perhaps?) during the period from January 2019 until May 15, 2019, I would conclude that appellant has failed to carry her burden to show reasonable cause to abate the late-filing penalty and to overcome the presumption that FTB correctly imposed said penalty.

DocuSigned by:

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Andrew Wong
Administrative Law Judge

Date Issued: 4/2/2021