

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20025910
A. MNUCHIN AND)
A. RAMPOGNA)
_____)

OPINION

Representing the Parties:

For Appellants: Joseph Fuschetto, CPA
Ernst & Young, LLP

For Respondent: Sarah J. Fassett, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellants A. Mnuchin and A. Rampogna appeal respondent Franchise Tax Board’s action in denying appellants’ claim for refund totaling \$3,396.62 for tax year 2018.¹ Appellants waived their right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Whether appellants’ failure to timely pay their tax liability for tax year 2018 was due to reasonable cause.
2. Whether appellants are entitled to interest abatement.

FACTUAL FINDINGS

1. For tax year 2018, appellants were California nonresidents who did not make any California estimated tax payments or report any California income tax withholdings.
2. In September 2019, Mr. Mnuchin received two Schedule K-1s from partnerships in which he held limited interests; the two partnerships generated California source income.

¹ The refund at issue consists of a late-payment penalty of \$2,506.88 and interest of \$889.74.

3. On October 15, 2019, appellants timely filed a 2018 California Nonresident or Part-Year Resident Income Tax Return. As a result of the two Schedule K-1s, appellants reported over \$270,000 in California taxable income and total tax of \$31,336. They self-assessed interest and penalties for a total amount due of \$34,747, which appellants paid in full when they filed their return.
4. In a letter dated that same month, appellants requested abatement and refund of the late-payment penalty. The following month, in November 2019, respondent sent a notice to appellants, indicating that respondent adjusted the late-payment penalty from \$2,507.00 to \$2,506.88 and interest from \$889 to \$889.74, for a total of \$3,396.62.²
5. In a Notice of Action issued on December 5, 2019, respondent denied appellants' claim for refund. Appellants then filed this timely appeal.

DISCUSSION

Issue 1 – Whether appellants' failure to timely pay their tax liability for tax year 2018 was due to reasonable cause.

Because appellants failed to timely pay their tax liability for tax year 2018 by April 15, 2019, respondent imposed a late-payment penalty of \$2,506.88. The penalty is presumed correct unless the taxpayer can demonstrate that the late payment resulted from reasonable cause and not willful neglect. (R&TC, § 19132.) Appellants do not dispute the late-payment penalty computation, and there are no allegations of willful neglect in this appeal; our sole focus here is on reasonable cause. To establish reasonable cause, the taxpayer must demonstrate that its failure to timely pay the proper amount of the tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P.) The reason for missing the deadline must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Moren*, 2019-OTA-176P (*Moren*).)

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*

² Although appellants self-assessed an estimated tax penalty of \$15, respondent did not impose this penalty. Thus, because appellants previously paid a total of \$3,411 in self-assessed penalties and interest, respondent refunded the difference of \$14.38 to appellants ($\$3,411 - \$3,396.62 = \14.38).

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 (italics omitted), quoting *People v. Miller* (1916) 171 Cal. 649, 652.)

“The most important factor in determining reasonable cause and good faith is the extent of the taxpayer’s effort to assess his or her proper tax liability.” (*Frias v. Commissioner* (2017) T.C. Memo. 2017-139.) In *Moren, supra*, where the Office of Tax Appeals (OTA) found reasonable cause to abate the late-payment penalty, the appellant made diligent efforts to obtain tax information from an estate, but the estate, which controlled sole access to the tax information, denied the taxpayer access to that information. OTA also held that the taxpayer demonstrated that he neither had nor could have acquired the information necessary to make a timely estimate of his tax liability. Taxpayers who argue they lacked the information necessary to timely estimate the taxes owed must show they attempted to obtain the partnerships’ financial records and an estimate of the partnerships’ finances to establish reasonable cause. (*Moren, supra*, citing *Appeal of Campbell* (85-SBE-112) 1985 WL 15882.)

Here, appellants argue that they were unaware of the California source income for tax year 2018 until they received the Schedule K-1s in September 2019. We understand appellants’ assertion. However, from an evidentiary perspective, unsupported assertions are insufficient to satisfy the taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) It is well established that argument is not evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 734; *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552.) Appellants present no evidence to show, or tend to show, that appellants made diligent efforts to obtain information from the partnerships or that appellants made any other efforts to assess their proper California tax liability.

Due to the lack of evidence and appellants’ inability to meet their burden of proof, we find that they did not establish that the late payment was due to reasonable cause.

Issue 2 – Whether appellants are entitled to interest abatement.

For tax year 2018, appellants paid interest in the sum of \$889.74. Imposing interest is mandatory, and respondent cannot abate interest except where authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for

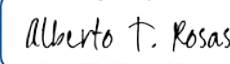
the use of money. (*Ibid.*) Generally, to obtain waiver or abatement of interest, taxpayers must qualify under R&TC sections 19104, 19112, or 21012. Appellants do not specify why they may be entitled to interest abatement. They do not allege any of these statutory grounds. However, based on the information in the record, none of these statutory provisions apply. Therefore, appellants did not establish that they are entitled to waiver or abatement of interest.

HOLDINGS

1. Appellants did not show that the failure to timely pay their tax liability for tax year 2018 was due to reasonable cause.
2. Appellants did not show that they are entitled to interest abatement.

DISPOSITION


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

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 Alberto T. Rosas
 Administrative Law Judge

We concur:

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 Keith T. Long
 Administrative Law Judge

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 Administrative Law Judge

Date Issued: 12/1/2020