

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 20106797  
A. LEVINE )  
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**OPINION**

Representing the Parties:

For Appellant: Rae Ellen Tate, Representative

For Respondent: Ashita Mohandas, Graduate Student Asst.

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellant A. Levine appeals respondent Franchise Tax Board's action in denying appellant's claim for refund for tax year 2018. The claim for refund consists of a late-filing penalty of \$3,612.25.<sup>1</sup> Appellant waived the right to an oral hearing, and therefore we decide this matter based on the written record.

**ISSUE**

Whether appellant's failure to timely file a tax return for tax year 2018 was due to reasonable cause.

**FACTUAL FINDINGS**

1. In October 2019, appellant's tax preparation firm prepared appellant's California tax return for tax year 2018. Due to a computer glitch and the firm's office move, the firm did not file appellant's return electronically. In November 2019, the firm realized the error but once again could not file the return electronically.
2. On January 2, 2020, the firm filed appellant's untimely 2018 California Resident Income Tax Return as a paper return.

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<sup>1</sup> On appeal, appellant states that he seeks a refund of \$4,804.88, which includes the interest assessed, but appellant does not make any arguments specific to interest abatement. Generally, to obtain waiver of interest, taxpayers must qualify under R&TC sections 19104, 19112, or 21012. However, OTA lacks jurisdiction for interest abatement under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Appellant does not allege that any of the three statutory provisions are applicable to the facts of this case; and based on the arguments and evidence, we conclude that none of these provisions apply. Therefore, we focus our decision on appellant's request for penalty abatement.

3. Respondent processed appellant's return, adjusted the payments received, and imposed a late-filing penalty of \$3,612.25, plus interest. Appellant requested a waiver of the late-filing penalty, which respondent denied.
4. After appellant paid the balance due in full, respondent treated the request for waiver as a claim for refund and issued a Notice of Action denying appellant's request.
5. This timely appeal followed.

### DISCUSSION

Because appellant failed to timely file the 2018 California tax return by April 15, 2019, or by the automatic six-month extension, respondent imposed a late-filing penalty of \$3,612.25. 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.) Appellant does not contest the specific calculation; rather, appellant appeals the fact that respondent did not waive the late-filing penalty. Thus, our focus is on whether appellant's failure to timely file was due to reasonable cause. A taxpayer has the burden of establishing reasonable cause. (*Appeal of Xie, supra.*) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.* (1993) 508 U.S. 602, 622.) Taxpayers must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Xie, supra.*)

Appellant's request for penalty abatement is based on reliance on his tax preparer(s). In October 2019, the firm prepared appellant's tax return for the tax year at issue. Appellant's representative indicated that due to a computer glitch at the firm, and due to the firm's office move, the firm did not file appellant's return electronically. Appellant's representative explained that the firm discovered the error the following month but could not file the return electronically. Then, in January 2020, the firm filed appellant's tax return via a paper return. At this point, appellant's tax return was already late, but as appellant's representative explained, "[n]one of these errors were the fault of" appellant.

It is commendable that appellant's representative has the integrity to admit that the late filing was due to the firm's fault, not appellant's. However, when it comes to reliance on a

representative, 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. (*United States v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*)). The wording of this rule suggests that reliance may only be reasonable when a statute is ambiguous. (*Ibid.*) In accordance with *Boyle*, the Ninth Circuit Court of Appeals concluded that filing deadlines were non-substantive. (*Knappe v. United States* (9th Cir. 2013) 713 F.3d 1164, 1173-75, *cert. denied*, 134 S. Ct. 422.) The Ninth Circuit justified its decision on the premise that categorizing certain deadlines as substantive would incentivize representatives to claim that they gave taxpayers erroneous advice. (*Id.* at p. 1174.) 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. (*Ibid.*)

That appears to be the situation before us, appellant's representative accepting the blame for the missed deadline. However, as the Ninth Circuit indicated, this will not help appellant avoid the late-filing penalty. The case law is clear that appellant's reliance on a representative to file a return on time is not a substitute for compliance with an unambiguous statute. Thus, appellant's reliance on his tax preparer is not reasonable cause to abate the late-filing penalty.

#### HOLDING

Appellant did not show that the failure to timely file a tax return for tax year 2018 was due to reasonable cause.

#### DISPOSITION

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

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Alberto T. Rosas

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Alberto T. Rosas  
Administrative Law Judge

We concur:

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Andrew J. Kwee  
Administrative Law Judge

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Huy "Mike" Le  
Administrative Law Judge

Date Issued: 9/9/2021