

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

In the Matter of the Appeal of: ) OTA Case No. 21017110  
 )  
**D. DULL AND** )  
**S. SHIELDKRET** )  
 \_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: Susan Shusko, CPA

For Respondent: Jean M. Cramer, Tax Counsel IV

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Dull and S. Shieldkret (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying a claim for refund of \$82,650<sup>1</sup> and applicable interest, for the 2016 tax year.

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

**ISSUES**

1. Whether appellants have established reasonable cause to abate the late-filing penalty.
2. Whether appellants have established reasonable cause to abate the demand penalty.

**FACTUAL FINDINGS**

1. FTB received information indicating D. Dull (appellant-husband) had sufficient income to file a 2016 California tax return. FTB sent appellant-husband a Demand for Tax Return outlining the income information FTB received and a request to file a return or explain why one was not required.
2. FTB did not receive a response and issued appellant-husband a Notice of Proposed Assessment (NPA), imposing tax, a late-filing penalty, and the demand penalty.

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<sup>1</sup> This amount consists of a \$80,267.50 late-filing penalty and a \$2,382,50 demand penalty.

3. FTB received appellants' untimely joint 2016 California tax return on February 15, 2020. Appellants reported an overpayment and requested a portion of it to be applied to their 2017 tax year and the other portion to be refunded to them. FTB accepted the filing and revised the late-filing penalty and demand penalty.
4. FTB received appellants' request for interest abatement and request for abatement of the demand and late-filing penalties.
5. FTB issued a Notice of Tax Return Change – Revised Balance acknowledging appellants' payments, and stating the imposed penalties, plus accrued interest, and the outstanding balance due. On the same day, FTB sent a State Income Tax Due Notice indicating the balance due for appellants' 2016 tax year.
6. FTB transferred the estimated tax payment from appellants' 2015 tax year account to pay the remaining balance due on their 2016 tax year. Upon payment in full, FTB treated appellants' untimely return reporting an overpayment as a claim for refund.
7. FTB issued a Notice of Action denying appellants' claim for refund.
8. Appellants received a Demand and NPA for the 2015 tax year (during the 2017 tax year) and a subsequent Demand and NPA for the 2016 tax year (during the 2018 tax year).
9. Appellants filed this timely appeal.

### DISCUSSION

#### Issue 1: Whether appellants have established reasonable cause to abate the late-filing penalty.

The late-filing penalty shall not apply if a taxpayer establishes that the failure to file a return within the prescribed deadline was due to reasonable cause and not willful neglect. (R&TC, § 19131(a).) The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*United States v. Boyle* (1985) 469 U.S. 241, 246 (*Boyle*).)<sup>2</sup> The taxpayer carries the burden of establishing that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

To establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause

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<sup>2</sup> Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts' interpretation of the "reasonable cause" standard is persuasive authority in determining the proper construction of these California statutes. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rhin v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

existed as would prompt an ordinarily prudent businessperson to have acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) The U.S. Supreme Court has held that “reasonable cause” is established when a taxpayer shows reasonable reliance on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken. (*Boyle, supra* at 250.) California follows *Boyle* in that a taxpayer’s reliance on a tax adviser must involve reliance on substantive tax advice and not on simple clerical duties. (*Appeal of Mauritzson*, 2021-OTA-198P.)

Here, FTB did not receive appellants’ 2016 tax return until February 15, 2020, which was over two years late. Appellants contend that because of personal and business challenges from federal income tax audits and the loss of appellant-wife’s mother, appellants were unable to meet tax filing deadlines, as they needed to take care of these other matters. However, each person has a personal, non-delegable obligation to file their tax return by the due date. FTB contends that appellants continued to run their businesses, worked earning wages, and started several startup companies during this same time. Appellants chose to deal with their businesses and other matters instead of filing timely returns. These facts are not sufficient to establish reasonable cause to abate the late-filing penalty.

Furthermore, the complexity of the tax return and the difficulty in obtaining and locating documents are not sufficient to establish reasonable cause to abate the late-filing penalty. (*Appeal of Xie, supra.*)

Appellants also claim that they were advised to delay filing the 2016 tax return until the 2015 tax return was filed, and that the 2017 tax return needed to be filed before they knew how to file the 2015 and 2016 returns. However, contrary to appellants’ decision to choose to file a late return once additional information potentially became available, the law dictates that the appropriate path is to file a timely return and amend it later, if needed. To hold otherwise would be to make the late-filing penalty optional for any taxpayer who claims to have delayed filing based on attorney advice that the return must be true, correct and complete. (*Appeal of Xie, supra.*)

Accordingly, appellants failed to establish reasonable cause to abate the late-filing penalty.

Issue 2: Whether appellants have established reasonable cause to abate the demand penalty.

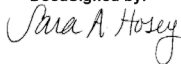
California imposes a penalty on taxpayers for failing to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from complying with the demand. (R&TC, § 19133.) For individuals, a demand penalty will only be imposed if FTB has previously proposed an assessment of tax after the taxpayer failed to timely respond to a request or demand for tax return at any time during the prior four taxable years. (Cal. Code Regs., tit. 18, § 19133(b).) Because appellants failed to respond to a prior demand for tax return for the 2015 tax year, and FTB thereafter issued an NPA for that tax year, FTB properly imposed the demand penalty for the 2016 tax year. (*See Appeal of Jones*, 2021-OTA-144P.)

HOLDINGS

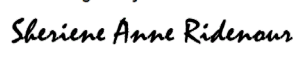
1. Appellants have not established reasonable cause to abate the late-filing penalty.
2. Appellants have not established reasonable cause to abate the demand penalty.

DISPOSITION

FTB action is sustained in full.

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Sara A. Hosey  
Administrative Law Judge


We concur:

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Sheriene Anne Ridenour  
Administrative Law Judge

T. LEUNG, concurring:

I disagree with the majority’s Opinion with respect to the imposition of the Revenue and Taxation Code section 19133 demand penalty.

Respondent’s own regulation requires that an initial notice of proposed assessment (NPA) imposing the demand penalty be issued during the four taxable years preceding the 2016 taxable year. (See Cal. Code Regs., tit. 18, § 19133.) Here, the initial NPA for the 2015 taxable year was issued in 2017, and not prior to 2016. However, because of OTA’s precedential opinion in *Appeal of Jones*, 2021-OTA-144P, my hands are tied, and I am precluded from abating the demand penalty.

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Tommy Leung  
Administrative Law Judge

Date Issued: 9/16/2021