

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20116970
J. ACHABAL AND)
A. BEHRENSMEYER)
_____)

OPINION

Representing the Parties:

For Appellants: H. Robert Tracy, CPA

For Respondent: Gi Jung Nam, Tax Counsel
Ellen Swain, Tax Counsel IV

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Achabal and A. Behrensmeyer (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants’ claim for refund of \$641.07¹ for the 2019 tax year.

Office of Tax Appeals Administrative Law Judges Natasha Ralston, Sheriene Anne Ridenour, and Tommy Leung held an oral hearing for this matter on August 25, 2021.² At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUE

Whether appellants have shown reasonable cause to abate the late payment penalty imposed under section 19132.

¹ This amount consists of a late payment penalty of \$556.01 plus applicable interest of \$85.06. We note that although the original claim for refund was for \$641.07, at the hearing, appellant’s representative conceded that appellants should be responsible for the interest in this matter because the payment was late.

² The oral hearing was conducted electronically.

FACTUAL FINDINGS

1. In anticipation of appellants filing their 2019 California Tax Return, appellant's representative, their CPA who prepared their return, provided appellants their tax return, along with a payment voucher and a letter instructing them to manually pay the tax due.
2. Subsequently, appellants timely filed their 2019 California Tax Return which showed a balance due of \$8,554. Appellants did not pay the balance with their return.
3. Respondent imposed a late payment penalty of \$556.01 and sent appellants a State Income Tax Balance Due Notice dated September 22, 2020, showing a balance due of \$9,195.07.³
4. Appellants paid the amount due on September 30, 2020.
5. Appellants subsequently filed a claim for refund on October 23, 2020, contending that their failure to timely pay the tax due was due to reasonable cause.
6. Respondent denied appellants' claim for refund and this timely appeal followed.

DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) The penalty may be abated if the taxpayer shows that the failure to timely file the return was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a).) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P). Reliance on a tax professional's advice for questions of substantive tax law, such as whether a liability exists, may constitute reasonable cause, where certain conditions are met, including where the tax professional has competency in the subject tax law and the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents. (*United States v. Boyle*, (1985) 469 U.S. 241, 250).⁴ By contrast, reliance

³ This amount consists of the outstanding tax due of \$8,554, a late payment penalty of \$556.01, and applicable interest.

⁴ For purposes of the facts and issue in this appeal, an analysis of whether there is reasonable cause for a failure to timely file a tax return is substantially the same as an analysis of whether there is reasonable cause for a failure to timely pay tax. Thus, authorities persuasive or controlling in one analysis may be equally persuasive or controlling in the other. (See *Appeal of Moren*, *supra*; *Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P.)

on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Id* at 251.)

Here, appellants acknowledge that their payment was untimely but contend that the penalty should be abated because they acted in good faith and exercised ordinary prudence in relying on their tax preparer to pay the tax due. Appellants assert that they did not become aware that the tax was not drawn from their bank account until they received the Notice of Tax Due, sent by respondent. Appellants also contend that the various Covid-19 due date extensions and surrounding circumstances confused them and delayed their response. At the hearing in this matter, appellants' representative further explained that appellants were expecting the representative to pay the tax due via electronic transfer, as this was how they had paid in the past, even though the representative had also sent appellants a payment voucher.

Appellants have a personal and nondelegable duty to make required tax payments. (*Appeal of Quality Tax & Financial Services, Inc.*, (2018-OTA-130P). Furthermore, there is nothing in the record which suggests that appellants' failure to timely pay the tax was caused by the accountant's advice on a substantive question of law. (See *United States v. Boyle* (1985) 469 U.S. 241, 250-251 [holding that the failure to timely file is not excused by the taxpayers' reliance on a tax professional, unless the taxpayers rely on the advice of a professional with respect to substantive matters of law.]) Appellants failed to pay the tax due until September 30, 2020, more than two months after the July 15, 2020, Covid extension due date.⁵ Although appellants may have been confused as to whether the payment to respondent should be made electronically or via check, appellants were aware that they had a tax obligation due; therefore, we would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled payment from their account to respondent was in fact paid. (*Appeal of Scanlon*, 2018-OTA-074P). Accordingly, we find that appellants have not established reasonable cause to abate the late payment penalty.

⁵ Due to the global pandemic, respondent postponed the original filing deadline and tax payment due date for 2019, from April 15, 2020, to July 15, 2020.

HOLDING

Appellants have not shown that the late payment of tax was due to reasonable cause and not willful neglect.

DISPOSITION

Respondent’s actions in denying appellants’ claim for refund is sustained.

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

Date Issued: 10/7/2021