

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 21037494
N. CADOCH)
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OPINION

Representing the Parties:

For Appellant: Sunny Zhu, Tax Appeals
Assistance Program (TAAP)¹

For Respondent: Bradley J. Coutinho, Tax Counsel III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19324, N. Cadoch (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$2,093.50 for the late-filing penalty for the 2017 tax year.

Appellant did not respond to our June 14, 2021 letter asking if she was requesting an oral hearing. Therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has established reasonable cause for failing to timely file her 2017 tax return.

FACTUAL FINDINGS

1. Appellant engaged S.K.B. Tax/Consulting (S.K.B.) to prepare and file her 2017 income tax returns.
2. Appellant did not file a timely California Resident Income Tax Return (Form 540) for the 2017 tax year.

¹ Appellant filed her opening brief. TAAP representative Connor E. McGettigan filed appellant’s reply brief.

3. On April 24, 2019, FTB issued a request for tax return for the 2017 tax year. Appellant did not respond and FTB issued a Notice of Proposed Assessment (NPA) dated December 2, 2019, proposing to assess additional tax plus interest.
4. On January 3, 2020, appellant filed a 2017 Form 540 with FTB. Thereafter, on March 1, 2020, appellant filed an amended Form 540 reporting tax due of \$8,374, which FTB accepted as filed.
5. FTB imposed a late-filing penalty, which appellant paid.
6. On November 24, 2020, appellant filed a claim for refund in the amount of the late-filing penalty. On January 4, 2021, FTB denied appellant's claim for refund. This timely appeal followed.

DISCUSSION

R&TC section 19131 imposes a late-filing penalty where a taxpayer fails to file a return when due, unless the failure is due to reasonable cause and not willful neglect. The penalty is calculated at five percent of the tax liability for each month the return is past due, up to a maximum of 25 percent. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that FTB properly imposed the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome this presumption of correctness. (*Appeal of Xie, supra.*) To establish reasonable cause, a taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Here, there is no dispute that appellant failed to file a timely return for the 2017 tax year. Thus, FTB properly imposed a late-filing penalty. Appellant also does not dispute the calculation of the penalty. Instead, appellant asserts that there is reasonable cause for her failure to timely file a return for the 2017 tax year.

Appellant asserts that reasonable cause exists because of her reliance on S.K.B. to file her return. However, every taxpayer has a personal, non-delegable obligation to file a tax return by

the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*).)² This means that a taxpayer cannot rely upon an agent to escape responsibility for failing to timely file a return. Therefore, appellant's claimed reliance on S.K.B. is not considered to be reasonable cause.

While the foregoing is dispositive, appellant asserts that following the Supreme Court's decision in *Boyle* would be overly stringent. Specifically, appellant asserts that because her tax preparer misled her as to the timely filing of her return, her case serves as an exception to the bright-line rule set out in *Boyle*. Appellant provides a signed affidavit making the following claims: S.K.B. stated that the 2017 return was timely filed; and S.K.B. stated that only accountants and attorneys could speak to FTB. Appellant also provides the following: a photocopy of an October 15, 2018 shipping label addressed to the IRS, which she received from S.K.B.; text message and email correspondence between S.K.B. and herself spanning the period 2019 through 2020; printouts showing small claims court filings made against S.K.B.; and printouts of negative reviews of S.K.B.

As discussed above, it is well-settled law that a taxpayer's reliance on a tax preparer or an agent to timely file their taxes does not constitute reasonable cause because they have a personal nondelegable obligation to file their taxes by the due date. (*U.S. v. Boyle, supra.*) Indeed, in *Boyle*, the Supreme Court stated that "one does not need to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due." (*U.S. v. Boyle, supra.*)

This is true even in instances where a taxpayer acted prudently in dealing with an agent or employee that committed some type of fraud. (See, e.g., *Kimdun Inc. v. U.S.* (C.D. Cal. 2016) 202 F.Supp.3d 1136, 1144 – 1146 [reliance on payroll service to make payments insufficient to establish reasonable cause under *Boyle*, despite a third-party payroll service's embezzlement of money that was intended to pay the employment tax obligations] (*Kimdun*); *Conklin Bros. of Santa Rosa Inc. v. U.S.* (9th Cir. 1993) 986 F.2d 315 [reliance on taxpayer's controller to make payments was insufficient to establish reasonable cause, despite the controller's alleged

² 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.)

intentional concealment of her failure to make timely payroll tax payments] (*Conklin*).³ Thus as the law makes clear, appellant had a personal and non-delegable duty to ensure the timely filing of her 2017 return. Based on all of the foregoing, we find that appellant has not established that reasonable cause exists to abate the late-filing penalty.

HOLDING

Appellant has not established reasonable cause for failing to timely file her 2017 tax return.


DISPOSITION

We sustain FTB's decision to deny appellant's claim for refund of the penalty for failure to timely file her 2017 return.

DocuSigned by:

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Keith T. Long
Administrative Law Judge

We concur:

DocuSigned by:

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Amanda Vassigh
Administrative Law Judge

DocuSigned by:

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Nguyen Dang
Administrative Law Judge

Date Issued: 11/23/2021

³ Although the penalties at issue in *Kimdun* and *Conklin*, were for late-payment of tax (as opposed to late-filing of a return) the court in those cases elaborated on *Boyle's* discussion of whether reliance on a tax preparer constitutes reasonable cause. The principles articulated in *Boyle*, *Kimdun*, and *Conklin* are similarly applicable in the instant case.