

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

In the Matter of the Appeal of:

**D. NEWBERGER**) OTA Case No. 21057746  
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)  
)**OPINION**

Representing the Parties:

For Appellant:

Doris Newberger, EA (Representative)

For Respondent:

Anne Mazur, Specialist

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Newberger (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$4,498.98<sup>1</sup> for the 2019 taxable year.

Appellant waived the right to an oral hearing; therefore, we decide the matter based on the written record.

**ISSUE<sup>2</sup>**

Has appellant established reasonable cause to abate the late-filing penalty?

**FACTUAL FINDINGS**

1. On November 21, 2020, appellant filed a late, 2019 California Resident Income Tax Return.
2. FTB issued a notice showing a balance due because FTB imposed a late-filing penalty and interest. The notice does not include a late-payment penalty, although appellant paid

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<sup>1</sup> The total includes a late-filing penalty of \$4,118.75, plus interest of \$380.23, which was the total on the FTB State Income Tax Balance Due Notice (the Notice). Appellant paid \$383.91 in interest, which included interest that accrued after the date of the Notice.

<sup>2</sup> Appellant agrees that FTB correctly applied interest attributable to late payment of his tax liability. Therefore, the only interest at issue on appeal is the amount applicable to the late-filing penalty. Appellant does not make any specific arguments regarding the portion of the interest applicable to the late-filing penalty. Thus, we do not address interest further.

part of his tax liability after the due date on November 21, 2020, along with his late-filed return.

3. Appellant paid the penalty and interest balance due and filed a claim for refund based on reasonable cause.
4. FTB denied the claim for refund.
5. Appellant filed a timely appeal to the Office of Tax Appeals.

### DISCUSSION

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The late-filing penalty is calculated at 5 percent of the tax due for each month or fraction of each month the return is late, with a maximum penalty of 25 percent of the tax due. (R&TC, § 19131(a).) When a return is filed late, the penalty is calculated beginning on the original due date for the return. (*Ibid.*) The penalty is calculated based on the amount of tax required to be shown on the return reduced by the amount of any part of the tax which is paid on or before the payment due date. (R&TC, § 19131(c).)

When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Appeal of Xie, supra.*)

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 existed as would prompt an ordinarily prudent businessperson to have so 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. (*United States v. Boyle* (1985) 469 U.S. 241, 250 (*Boyle*), *Appeal of Mauritzson*, 2021-OTA-198P.) 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, supra.*)

Appellant contends he had reasonable cause for paying late (not filing late) based on the advice of his tax preparer. Specifically, appellant asserts that “the penalty he incurred under

R&TC [section] 19131 is a result of his failure to [pay] his tax liability in full prior to the tax return postponed due date of July 15, 2020. If he had been properly advised as to the [payment] of his tax liability in full prior to July 15, 2020, then his late filing just over a month after the extended due date would not have resulted in any penalty.”

We understand appellant’s argument to be based on the fact that under R&TC section 19131, the late-filing penalty is calculated based on the amount of tax not paid by the payment due date, which was July 15, 2020, for the 2019 taxable year. Appellant asserts that had he received the correct advice with respect to the payment of tax, he would have paid on time, and therefore, the late-filing penalty would not have applied.<sup>3</sup>

Under certain circumstances not existing here, taxpayers may establish reasonable cause when they rely on substantive advice of a tax expert. (*Boyle, supra; Appeal of Summit Hosting, LLC, 2021-OTA-216P.*) However, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra, at p. 251; Appeal of Summit Hosting, LLC, supra.*) A tax filing due date statute is unambiguous, and appellant cannot rely on an expert’s advice related to something other than the filing due date. Moreover, appellant admits that the late filing of his tax return was not due to any substantive advice given by his expert. Rather, appellant states that his failure to timely file was because “his tax preparer was unable to timely complete his tax return due to her workload.” Under the circumstances, even if appellant were to establish that the expert’s advice with respect to late payments constituted reasonable cause, we cannot find that it establishes reasonable cause to file a tax return late.

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<sup>3</sup> Even if appellant’s argument were successful with respect to advice relating to payments, R&TC section 19131(b) requires imposition of a minimum amount of \$135 for late-filed returns when reasonable cause is not shown.

HOLDING

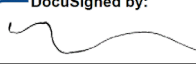
Appellant has not established reasonable cause to abate the late-filing penalty.

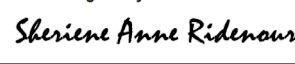
DISPOSITION

FTB’s action denying appellant’s claim for refund is sustained.

DocuSigned by:  
  
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Teresa A. Stanley  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Andrew J. Kwee  
Administrative Law Judge

DocuSigned by:  
  
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Sheriene Anne Ridenour  
Administrative Law Judge

Date Issued: 1/3/2022