

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

E. BENZOR AND
S. BENZOR

) OTA Case No. 20056231
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OPINION

Representing the Parties:

For Appellants: William Schumann, Tax Appeals Assistance Program (TAAP)¹
For Respondent: Sarah J. Fassett, Tax Counsel

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, E. Benzor and S. Benzor (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,166.83 for the 2018 tax year.

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

ISSUE

Whether appellants have established reasonable cause for failing to timely pay their tax liability for 2018.

FACTUAL FINDINGS

1. On July 18, 2019, appellants timely filed their 2018 joint California Resident Income Tax Return within the automatic extension period. On the return, appellants reported total tax of \$28,412. After applying payments and withholdings, appellants reported a balance due of \$16,919.

¹ Appellants filed their opening brief. James Youn and William Schumann of TAAP filed appellants’ subsequent reply briefs.

2. On August 2, 2019, appellants remitted payment of \$18,101.87.²
3. On August 8, 2019, FTB issued a Notice of Tax Return Changed – Revised Balance, which imposed a late-payment penalty of \$1,166.83.
4. On August 12, 2019, appellants contacted FTB to confirm that their August 2, 2019 payment was received. According to FTB’s notes, FTB informed appellants that payment was received and that the balance was satisfied.
5. Appellants filed a timely claim for refund in the amount of the late-payment penalty, which FTB denied.
6. This appeal followed.

DISCUSSION

Individuals, including those filing jointly, must pay their taxes by the original due date of their return. (R&TC, § 19001.) For calendar year filers, that date is usually April 15 following the close of the taxable year.³ (R&TC, § 18566.)

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 tax. When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A late-payment penalty will be abated if the taxpayer shows that the late payment was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a).) Generally, to establish reasonable cause, the taxpayer must show that the failure to timely pay occurred despite the exercise of “ordinary business care and prudence.” (*Appeal of Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinarily intelligent businessperson would have acted similarly under the circumstances. (*Appeal of Triple Crown Baseball*, 2019-OTA-025P.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.)

² There is some dispute as to why appellants paid this amount. Appellants assert that they contacted FTB on August 2, 2019, and were instructed to make the payment. FTB asserts that they have no record of any such phone call.

³ An extension of time to file a return under R&TC section 18567(b) is not an extension of time to pay the taxes due.

A taxpayer's reliance on a tax preparer or agent to timely pay tax does not constitute reasonable cause. (See *U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*); see also *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860;)⁴ However, reasonable cause may be found when a taxpayer relies on substantive advice from an accountant or an attorney on a matter of tax law, such as whether a liability exists. (*Boyle, supra*, 469 U.S. at p. 251.) The taxpayer must show that the accountant or attorney was a competent tax adviser supplied with all relevant information, and the taxpayer's good faith reliance on the adviser's incorrect advice resulted in the failure to timely pay. (See *Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 315-318; *Estate of Curet v. Commissioner* T.C. Memo. 2016-138.)

Here, there is no dispute that appellants' return was timely filed on July 18, 2019. Additionally, there is no dispute that appellants made a late payment of tax. Appellants also do not dispute the calculation of the penalty. Instead, appellants assert that there is reasonable cause for their failure to timely pay the tax.

Initially, appellants assert their past intention to pay the tax liability after the sale of their home.⁵ Appellants state that they knew the home sale would occur after the due date of the payment, April 15, 2019. Appellants' selective inability to perform their tax obligation does not establish reasonable cause. (See *Appeal of Rougeau* 2021-OTA-335P, [a taxpayer's reliance on anticipated income to pay the tax does not amount to reasonable cause for failing to make a timely payment.])

Appellants also argue that they were misled by their tax preparer, Selso Ruiz. We note that in an April 11, 2019 letter Mr. Ruiz stated to appellants that their return was filed, even though the return was not filed. Thus, there is some evidence that appellants were misled by Mr. Ruiz. However, the evidence also shows that appellants were informed of the due date for payment and that penalties applied to late payments. Specifically, the April 11, 2019 letter states "please make your payment by 4/15/2019." Additionally, in a July 22 text message, Mr. Ruiz wrote "make your payments ASAP. Remember that there will be penalties *for the amount* that

⁴ While *Boyle* involved the issue of a late-filing penalty and this case involves the late-payment penalty, "decisions analyzing whether reasonable cause existed for failure to timely file a tax return is persuasive authority for determining whether reasonable cause existed for the failure to timely pay the tax." (*Appeal of Triple Crown Baseball*, 2019-OTA-025P at p.4, fn. 8.)

⁵ It is unclear from appellants' contentions whether such payment would occur pursuant to an installment agreement. Appellant's installment agreement request is discussed in greater detail below.

was due in April.” (Emphasis added.) The wording of this text message indicates that the penalty is for amounts past due. It also indicates that appellants were previously informed of the penalty. Thus, we conclude that appellants were informed by Mr. Ruiz of the due date for payment and the amount thereof.

Next, we consider whether appellants could have reasonably relied on payment advice made in connection with an installment agreement request. Here, there is no evidence that appellants filed an installment agreement request with FTB or that FTB accepted appellants’ request. Even if appellants filed the installment agreement request, the request instructions specifically state that penalties and interest apply. There is no evidence that appellants were advised that penalties would not apply under an installment agreement. Indeed, as discussed above, the available evidence shows that appellants were informed of the payment due date and that penalties applied.

Finally, with regard to appellants’ good filing and payment history, we note that there is no provision in the revenue and taxation code that would allow for penalty abatement based on a taxpayer’s previous filing and payment history. As to whether Mr. Ruiz’ statement that the penalties would be taken care of creates reasonable cause, we again note that appellants had a non-delegable duty to timely pay the tax. (*Boyle, supra*, at p. 251.) Further, Mr. Ruiz’ statement was made on July 22. As such this statement could not have reasonably caused appellants’ failure to pay the tax on time because the statement was made after the due date of April 15, 2019. As appellants have not shown reasonable cause exists for their failure to make a timely payment of tax, we find no basis to abate the late-payment penalty.

HOLDING

Appellants have not established reasonable cause for failing to timely pay their tax liability for 2018.

DISPOSITION

FTB’s denial of appellants’ claim for refund is sustained.

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Keith T. Long
Administrative Law Judge

We concur:

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Richard Tay
Administrative Law Judge

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Tommy Leung
Administrative Law Judge

Date Issued: 3/17/2022