

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

R. USHER AND
D. USHER

) OTA Case No. 21047658
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OPINION

Representing the Parties:

For Appellants:

R. Usher

For Respondent:

Eric R. Brown, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Usher and D. Usher (collectively, appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$4,638.66 for the 2019 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 shown reasonable cause for the late payment of a portion of their 2019 tax liability.

FACTUAL FINDINGS

1. Appellants remitted withholding and estimated tax payments totaling \$46,268 as of the July 15, 2020 due date of their 2019 income tax return.¹

¹Of the \$46,268, \$25,450 was tax withholding. The remaining \$20,808 was an estimated tax payment that was a transfer of some or a portion of appellants’ 2018 tax overpayment. Because of COVID-19, the 2019 return was due on or before July 15, 2020. (See *State Postpones Tax Deadlines Until July 15 Due to the COVID-19 Pandemic*, March 18, 2020, available at: <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.)

2. Appellant D. Usher received Schedules K-1 (K-1) from eight limited liability companies (LLCs) (collectively, Investments) for the 2019 tax year.² During the 2019 tax year, appellants received one or more cash distributions from the Investments totaling \$404,736. The same transactions that created the cash distributions generated other taxable income to appellants.
3. On July 11, 2020, appellants received an email from the company responsible for preparing the K-1s (Tax Preparer) for the Investments indicating that while some K-1s would be timely delivered on July 13, 2020,³ the remaining K-1s would be delayed beyond the filing due date. The communication further states that the K-1 for SSL Management Holdings, LLC (SSL) will only be completed after “the required information has been provided” by a third party for “the Joint Venture which typically occurs in August or September each year.” Consistent with prior tax years, appellants anticipated that the Investments’ K-1s would be delivered by Tax Preparer between August and September of the extended due date for the respective tax year.
4. Between July 27, 2020, and August 28, 2020, Tax Preparer delivered to appellants their 2019 K-1s for the Investments. On September 21, 2020, Tax Preparer delivered to appellants their outstanding K-1 for SSL.
5. Appellants filed their 2019 California tax return on October 13, 2020, approximately three weeks following receipt of the final outstanding K-1 from SSL. Appellants reported tax due of \$71,364. On the same day, October 13, 2020, appellants untimely remitted payment of the tax.
6. FTB accepted appellants’ return and issued appellants a Notice of Tax Return Change – Revised Balance (Notice) dated November 12, 2020, imposing (as relevant to this appeal) a late payment penalty of \$4,638.66.
7. On November 25, 2020, appellants remitted payment of \$5,538.74, consisting of the \$4,638.66 late payment penalty, plus applicable interest. Appellants timely filed a claim for refund for the late payment penalty for the 2019 tax year based on reasonable cause,

² Investments consisted of the following LLCs: (1) SSL Management Holdings, LLC; (2) Silverado Shareholders; (3) SSL Management Lake Zurich; (4) Management Orchard Park; (5) Management Menomonee Falls; (6) Management Brookfield; (7) Management Highland Park; and (8) SSL Management Bellingham.

³ Although the July 11, 2020 email states that the SSL Management Bellingham K-1 would be delivered by July 13, 2020, documentation provided by appellants shows that it was actually provided on July 27, 2020.

asserting that their late payment was due to an untimely notification of a one-time, unexpected tax liability.

8. FTB denied the refund claims on January 20, 2021. 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 is five percent of the initial underpaid tax amount plus one-half of one percent of the outstanding liability for each subsequent month or fraction thereof for a maximum of 40 months. (R&TC, § 19132.) Here, FTB properly imposed the late payment penalty because the payment due date for the 2019 tax year was July 15, 2020. Appellants did not satisfy their 2019 tax liability until October 13, 2020, three months after the due date.

The late payment penalty may be abated where the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of the tax, a taxpayer must show that failure to make timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P (*Moren*).) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Ibid.*) Taxpayer must present credible, competent, and relevant evidence to show error in FTB's determination. (*Appeal of Xie*, 2018-OTA-076P.) The most important factor in determining reasonable cause and good faith is the extent of the taxpayer's effort to assess his or her proper tax liability. (*Moren, supra.*)

Appellants timely paid approximately 39 percent of their 2019 tax liability with their withholdings and transfer of the refund from the prior tax year, the 2018 tax year. Appellants' payments satisfied their tax liability attributable to the cash distributions received from the Investments during the 2019 tax year. However, appellants also received other taxable income

(Non-Cash Income)⁴ from the Investments resulting from the same transactions that generated the cash distributions. Appellants made no payments to satisfy their tax liability on the Non-Cash Income by the payment due date. The late payment of tax is based solely on the Non-Cash Income recognized during the 2019 tax year. The question on appeal is whether appellants had reasonable cause for failure to pay the tax due on the Non-Cash Income until October 13, 2020, three months after the due date for payment. The determination of whether reasonable cause exists for the late payment requires an analysis of appellants' actions leading up to the late payment, the timing of those actions, and whether they reflect ordinary business care and prudence, such as an ordinarily intelligent and prudent businessperson would have performed under similar circumstances. (*Moren, supra.*)

Both parties believe *Moren, supra*, to be dispositive to this appeal and discuss it in detail. *Moren* held that a taxpayer who received estate distributions had reasonable cause for the late payment of tax for the 2015 tax year. In that case, the taxpayer received an email and attachment concerning the 2015 estate distributions on April 14, 2016, one day before the tax payment was due. Although the email and attachment confirmed the amounts of distributions the taxpayer received, they did not contain the information necessary to determine the taxpayer's 2015 tax liability, such as amounts or calculations. That same day, the taxpayer's co-beneficiary responded by email, copying the taxpayer on the email, and asked for clarification from the accountant. No response to the inquiry was received prior to the due date for payment of the tax. (*Moren, supra.*) On these facts, the panel concluded that the taxpayer's actions prior to the payment due date demonstrated reasonable cause for late payment of the tax. Although FTB urged that the taxpayer could have doubled his tax payments for the year where the taxpayer lacked information to determine the percentage of taxable distributions, the taxpayer's prompt request for clarification and more information from the K-1 issuer was sufficient to demonstrate ordinary business care and prudence, and the taxpayer's request was of the type that would be performed by an ordinarily prudent and intelligent businessperson in the same situation. (*Moren, supra.*)

Here, FTB asserts that appellants have not provided sufficient evidence establishing their efforts to obtain information from Tax Preparer to establish reasonable cause for late payment of

⁴ Non-Cash Income included taxable capital gains, depreciation recapture, and debt forgiveness income.

the tax. Appellants assert that they did not know, nor could they have known, about the Non-Cash Income generated from the transaction until after the payment due date. Appellants claim that only Tax Preparer knew about the transactions at the time, since they were not publicly disclosed, and appellants argue that the untimely K-1s revealed the Non-Cash Income to appellants only after the tax payment due date. Appellants argue that they had no power to compel Tax Preparer to timely deliver the K-1s.

“If a taxpayer asserts that he [or she] does not have the information necessary to make a reasonable accurate estimate of his [or her] tax liability, he [or she] must show the efforts made to acquire that information from the source that held it, and that difficulties in obtaining the necessary information led to the delay in payment.” (*Moren, supra.*) Lack of documentation, by itself, such as the relevant K-1s, is not reasonable cause for the late payment. (*Ibid.*)

The record is silent as to appellants’ efforts to determine their tax liability following the receipt of cash distributions from the Investments. Appellants concede that the cash distributions were generated in the same transactions as the Non-Cash Income. Yet appellants have not established that they inquired from Tax Preparer as to the transactions generating the cash distributions or the tax implications of those transactions, including potential recognition of other income such as the Non-Cash Income.⁵ Unlike the taxpayer in *Moren, supra*, appellants have not demonstrated the actions they undertook following receipt of the cash distributions to reasonably estimate or determine their tax liability. Specifically, appellants have not shown that they requested additional information from Tax Preparer to reasonably estimate their tax liability on the distributions or that they requested confirmation from Tax Preparer of their tax liability calculation on the distributions.⁶ Appellants’ unsupported assertion that any inquiry to Tax Preparer would have been futile is not credible and competent evidence. (*Appeal of Xie, supra.*)⁷

⁵ We note that FTB called appellants on June 16, 2021, and asked them to produce evidence supporting their allegations that they attempted to obtain information from the Investments prior to July 15, 2020, and FTB then followed the telephone conversation with an email summary to appellants containing examples. Appellants provided a response that did not produce supporting evidence.

⁶ We do not find credible appellants’ assertion that they were not informed or aware of the Non-Cash Income, as no evidence in the record supports the assertion. (See *Appeal of Xie, supra.*) Appellants do not show any efforts taken to become aware of their potential tax liability either at the time or after receipt of the cash distributions. We similarly find unsupported the assertion that the Non-Cash Income was unexpected.

⁷ We do not find credible appellants’ assertions that they and “[o]ther LLC owners . . . similarly sought timely information without success” because there is no supporting evidence in the record. We note these assertions are made in the context of the late delivery of K-1s. Merely requesting that the K-1s be delivered does not

Appellants also assert that only the completed K-1s disclosed the Non-Cash Income and the resulting tax liability. However, no record was provided of communications between appellants and Tax Preparer following appellants' receipt of the July 11, 2020 email indicating the K-1s would be delayed beyond the payment due date where appellants inquired about any other tax liabilities. On appeal, appellants have not provided any affidavits, nor have they provided signed declarations by Tax Preparer attesting to any inquiries regarding potential tax liabilities. Nor have appellants provided any evidence of communications with Tax Preparer at or following delivery of the K-1s for the Investments regarding the tax implications of those K-1s. In sum, because appellants neither documented the actions they took to become aware of their tax liability nor demonstrated that they could not have known about the tax liabilities attributable to the Non-Cash Income, appellants have not met their burden to show that they acted with ordinary business care and prudence.

demonstrate that appellants were seeking the information needed to determine their tax liability. Therefore, we must reject appellants' contention that Tax Preparer's July 11, 2020 email, combined with the historical late delivery of K-1s and oral communications about late delivery of the K-1s, demonstrates that they could not have obtained the required information. Appellants have not shown that, if obtained, the information from the K-1s would have been futile to accurately calculate their tax liability by the payment due date. "Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof." (*Appeal of Scanlon*, 2018-OTA-075P.)
Appeal of Usher

HOLDING

Appellants have not shown reasonable cause for the late payment of a portion of their 2019 tax liability.

DISPOSITION

FTB’s action denying appellants’ claim for refund concerning the late payment penalty is sustained.

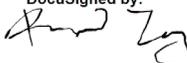
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Asaf Kletter
Administrative Law Judge

We concur:

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Richard Tay
Administrative Law Judge

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