

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
TYKIM INCORPORATED

) OTA Case No. 21078216
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OPINION

Representing the Parties:

For Appellant: Henry Kim, President

For Respondent: Phillip C. Kleam, Tax Counsel III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19324, Tykim Incorporated (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$648, plus applicable interest for the 2018 tax year.

Appellant waived the right to 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 its tax return for the 2018 tax year.

FACTUAL FINDINGS

1. Appellant, a California S corporation, was required to file its 2018 California S Corporation Franchise or Income Tax Return by March 15, 2019. Appellant did not file a return on or before this date.
2. Appellant made an estimated payment of \$800 toward its 2018 tax liability on April 13, 2018.

3. Respondent subsequently sent appellant a notice confirming receipt of appellant's \$800 payment for the 2018 tax year, and also informed appellant that it was required to file a tax return for 2018 or explain why it did not have a filing requirement.
4. Appellant filed its 2018 tax return late on April 2, 2021, reporting total tax of \$800, and indicating that the maximum number of shareholders it had during 2018 was three.
5. Respondent accepted appellant's return and assessed a S corporation late-filing penalty of \$648 and issued a Notice of Payment Due informing appellant of the \$648 outstanding balance.
6. Subsequently, appellant paid the balance due and filed a claim for refund requesting abatement of the S corporation late-filing penalty due to reasonable cause.¹
7. Respondent denied appellant's claim for refund and thereafter appellant filed this timely appeal.

DISCUSSION

California imposes a per-shareholder late-filing penalty on an S corporation for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause. (R&TC, § 19172.5(a).) For tax year 2018, appellant was required to file its return on or before the 15th day of the third month following the close of its taxable year. (R&TC, § 18601(d)(1).) Thus, appellant's 2018 return was due on March 15, 2019. The per-shareholder S corporation late-filing penalty under R&TC section 19172.5 is computed at \$18 multiplied by the number of shareholders for each month, or fraction thereof, that the return is late, up to a maximum of 12 months. (R&TC, § 19172.5(b).) Appellant had three shareholders during the 2018 tax year and filed its return approximately two years late on April 2, 2021. Therefore, respondent properly imposed a \$648 S corporation late-filing penalty (\$18 x 3 shareholders x 12 months) for the 2018 tax year.

The per-shareholder late-filing penalty will be abated if it is established that the late filing was due to reasonable cause. (R&TC, § 19172.5(a).) For penalty abatement purposes, reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Auburn Old Town*

¹ Appellant asserted that it had reasonable cause for failing to timely file because its tax preparer could not timely file appellant's 2018 return, as the tax preparer's software had not been updated to comply with the latest Covid-19 tax protocols.

Gallery, LLC, 2019-OTA-319P.) In other words, a taxpayer must show that the failure to meet its tax filing obligation occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) 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).² Illness or other personal difficulties may be considered reasonable cause if taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

In *United States v. Boyle* (1985) 469 U.S. 241, 252, the U.S. Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing” The U.S. Supreme Court noted that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.* at p. 251.) Reliance on a tax professional’s advice for questions of substantive tax law, such as whether a liability exists or whether it is necessary to file a return, 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. (*Id.* At p. 250; *Appeal of Summit Hosting, LLC*, 2021-OTA-216P). By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*United States v. Boyle, supra*, 469 U.S. at p. 251.)

On appeal, appellant contends that reasonable cause exists for failing to timely file its 2018 return because its tax preparer was hospitalized during the tax season and could not process appellant’s tax return before the due date. It is well established that the failure to make a timely return is not excused by a taxpayer’s reliance on an agent and such reliance does not constitute reasonable cause for a late filing. (*United States v. Boyle, supra*, 469 U.S. at pp. 251-252.) Here, appellant has not substantiated what efforts it took to ensure that its 2018 return would be timely filed. Appellant has not provided the dates of its tax preparer’s illness, the dates appellant became aware of the tax preparer’s illness or what efforts, if any, appellant took to find another preparer to timely prepare and file its return. Furthermore, appellant did not file its return until

² 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.)

approximately two years after the due date. Even if the tax preparer's illness extended throughout this two-year period, we would expect an ordinarily intelligent and prudent businessperson to seek out another tax preparer or make other arrangements to timely file its return, soon after discovering that its tax preparer was unavailable and that its return would not be timely filed. Appellant has not established that it did so.

In its claim for refund, appellant requested abatement of the S corporation late-filing penalty because its tax preparer could not timely file appellant's 2018 return, as the tax preparer's software had not been updated to comply with the latest Covid-19 tax protocols. As noted above, the U. S. Supreme Court has promulgated the bright-line rule that a taxpayer's reliance on an agent, such as an accountant, to file a return by the due date does not constitute reasonable cause. (See *Boyle, supra*, 469 U.S. at pp. 251-252; *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.) As such, the fact that the tax-preparer's software was not updated does not constitute reasonable cause to abate the S corporation late-filing penalty.

In summary, appellant has not shown that it acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. Therefore, appellant has failed to establish reasonable cause for the late filing its 2018 return.

HOLDING

Appellant has failed to establish reasonable cause for failing to timely file its tax return for the 2018 tax year.

DISPOSITION

Respondent’s action denying appellant’s claim for refund for 2018 is sustained.

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Ovsep Akopchikyan
88E35E2A835348D

Ovsep Akopchikyan
Administrative Law Judge

DocuSigned by:
Josh Lambert
CB1E7DA37831416

Josh Lambert
Administrative Law Judge

Date Issued: 4/14/2022