

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 21098547
C. MATHIEU AND)
M. MATHIEU)
_____)

OPINION

Representing the Parties:

For Appellants: Cassandra L. Tuchscher, Representative

For Respondent: Brad J. Coutinho, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Mathieu (appellant-wife) and M. Mathieu (appellant-husband) (collectively, appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants’ claim for refund of \$109,673.50 for the 2016 tax year.

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

ISSUES

1. Whether appellants have established reasonable cause for failing to timely file their 2016 tax return.
2. Whether appellants have established reasonable cause for failing to timely reply to the Demand for Tax Return (Demand) for the 2016 tax year.

FACTUAL FINDINGS

1. Respondent received information that appellants may have a filing requirement for 2016 tax year.
2. On February 22, 2018, respondent issued to appellant-husband a Demand for the 2016 tax year that required him to respond to the Demand by March 28, 2018, by filing a

- return, providing evidence that the return was already filed, or explaining why a 2016 return need not be filed.
3. Respondent did not receive a timely response to the 2016 Demand. As relevant to this appeal, prior to the 2016 Demand, respondent had also issued appellant-husband a Demand for the 2015 tax year and a corresponding Notice of Proposed Assessment (NPA) for the 2015 tax year that imposed a demand penalty.
 4. Respondent issued an NPA for the 2016 tax year, and, as relevant to this appeal, imposed a late filing penalty \$18,807.25 and a demand penalty of \$97,637.25.
 5. On November 5, 2018, appellants untimely filed a 2016 California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) and remitted a payment of tax with their return. Respondent accepted and processed the return as filed and reduced the demand penalty to \$94,251.75 and the late filing penalty to \$15,421.75. Appellants satisfied the balance owed on February 4, 2020.
 6. Appellants filed a claim for refund to request an abatement of the 2016 demand penalty and the late filing penalty. Respondent denied the claim.
 7. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause for failing to timely file their 2016 tax return.

A late filing penalty will be imposed when taxpayers fail to file a tax return on or before its due date, unless the taxpayers establish that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) Respondent's imposition of the late filing penalty is presumed correct, and the burden of proof is on the taxpayers to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.) Here, it is undisputed that respondent properly computed the late filing penalty.

To establish reasonable cause, a taxpayer must show that the failure to file timely a return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) Unsupported assertions are insufficient to satisfy the taxpayer's burden of proof. (*Ibid.*)

Generally, ignorance of the law does not constitute reasonable cause because the taxpayer does not have to be a tax expert to know that tax returns have fixed filing deadlines. (*Appeal of Porreca*, 2018-OTA-095; *U.S. v. Boyle* (1985) 469 U.S. 241, 251.¹) The taxpayer who fails to acquaint him or herself with the requirements of California tax law has not exercised ordinary business care and prudence. (See *Appeal of Porreca*, *supra*.) Each taxpayer has a personal, non-delegable obligation to file the tax return by the due date. (*U.S. v. Boyle*, *supra*, at p. 247.)

Appellants argue that the facts and circumstances surrounding this appeal establish reasonable cause. Appellants contend that appellant-husband lived and worked in Europe until 2004 when appellants moved to the United States for the first time. Appellants returned to reside in the United Kingdom in 2009 and again moved back to the United States in 2015. Appellants assert that they had no background or experience in American taxation and relied on the advice and assistance of a tax preparer to ensure that they remained compliant with their United States tax obligations. Additionally, appellants assert that because appellant-husband traveled extensively, appellants relied on the advice and the assistance of a tax preparer. Appellants state that unbeknownst to them, their tax preparer had not prepared or filed the California 2016 return. Appellants assert that they became aware that their 2016 return had not been filed and immediately engaged an alternative accounting firm in February 2018 to prepare and file their return. Appellants contend that, due to the complexities of the law surrounding their international income, the return could not be filed until November 5, 2018.

Appellants' contentions of the facts and circumstances indicate that they were aware they had a California filing requirement for 2016. However, they do not explain what efforts, if any, appellants took to ensure that the 2016 return was timely filed by the 2016 filing due date (April 15, 2017). Appellants concede that they did not know that their tax preparer failed to file their return until 2018. A reasonably prudent businessperson would have taken steps to determine that their return was filed successfully. There is no evidence of any such steps here, such as attempts to confirm successful filing with their tax preparer. It requires no special training or effort to ascertain a deadline and make sure that it is met, and taxpayers have a

¹ Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, federal court interpretation of the reasonable cause standard is persuasive authority in determining the proper application of this California statute. (See *Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658.)

personal obligation to meet statutory deadlines. (*Appeal of Rogeau*, 2021-OTA-335P.) As such, appellants have not established reasonable cause to abate the late filing penalty.

Issue 2: Whether appellants have established reasonable cause for failing to timely reply to the Demand for the 2016 tax year.

Respondent may impose a penalty on a taxpayer for 25 percent of the amount of tax determined or assessed if the taxpayer fails to file a return or provide information upon a notice and demand from respondent. (R&TC, § 19133.) Respondent may only impose a demand penalty if two criteria are met: (1) the taxpayer fails to timely respond to a current Demand, and (2) at any time during the preceding four tax years, respondent issued an NPA following the taxpayer's failure to timely respond to a Request for Tax Return or a Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).) A "timely response" is a response within the time period specified in the Demand or Request for Tax Return. (Cal. Code Regs., tit. 18, § 19133(c)(3).) The demand penalty was designed to penalize the taxpayer's failure to respond to the Demand, not the taxpayer's failure to pay the proper tax. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.)

Here, appellants failed to timely respond to the 2016 Demand and also failed to timely respond to the 2015 Demand, which resulted in the 2015 NPA during one of the four tax years preceding the 2016 tax year. As both of the criteria are met, respondent properly imposed a demand penalty for the 2016 tax year. (See *Appeal of Jones*, 2021-OTA-144P.)

The demand penalty can be abated if the taxpayers establish that their untimely response was due to reasonable cause and not willful neglect. (R&TC, § 19133.) The burden of proof is on the taxpayers to show reasonable cause by demonstrating that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Jones*, *supra*.) An analysis of reasonable cause requires examining the taxpayers' actions leading up to the failure to timely respond, the timing of those actions, and whether they reflect ordinary business care and prudence such that an ordinarily intelligent and prudent businessperson would have acted similarly in the situation. (*Appeal of Moren*, 2019-OTA-176P.)

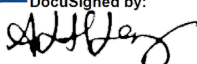
Appellants assert the same facts and circumstances stated previously. However, these assertions do not establish reasonable cause for the demand penalty either. Although appellants became aware that their 2016 return was not filed by February 2018, appellants provide no explanation as to why they could not respond to the Demand by March 28, 2018. Accordingly, the demand penalty cannot be abated.

HOLDINGS


1. Appellants have not established reasonable cause for failing to timely file their 2016 tax return.
2. Appellants have not established reasonable cause for failing to timely reply to the Demand for the 2016 tax year.

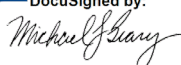
DISPOSITION

Respondent’s action in denying appellants’ claim for refund is sustained.

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Andrea L.H. Long
Administrative Law Judge

We concur:

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Asaf Kletter
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge

Date Issued: 6/1/2022