

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 21037416  
F. D’AGOSTINO AND )  
J. D’AGOSTINO )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: David M. Skala, Attorney

For Respondent: Joel M. Smith, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, F. D’Agostino and J. D’Agostino (appellants) appeal actions by respondent Franchise Tax Board (FTB) denying appellants’ claims for refund of \$28,904.25 and \$10,097.25, for the 2014 and 2015 tax years, respectively.

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 2014 and 2015 tax returns.
2. Whether appellants have established reasonable cause for failing to timely reply to the Demands for Tax Return (Demands) for the 2014 and 2015 tax years.

**FACTUAL FINDINGS**

1. F. D’Agostino received a Request for Tax Return for the 2010 tax year dated February 8, 2012, followed by a Notice of Proposed Assessment (NPA) dated April 9, 2012, for the 2010 tax year, as well as a Demand for the 2011 tax year dated October 2, 2013, followed by an NPA dated December 9, 2013, for the 2011 tax year.
2. Appellants did not file a timely California return for the 2014 or 2015 tax year.

3. FTB received information indicating that F. D’Agostino received California source income and had a California filing requirement for the 2014 and 2015 tax years.
4. For the 2014 tax year, FTB sent F. D’Agostino a Demand on June 29, 2017, which required that he either file his 2014 tax return, provide evidence showing he already filed his return, or explain why he did not have a filing obligation for the 2014 tax year. When F. D’Agostino did not timely respond to the Demand, FTB issued F. D’Agostino an NPA on August 28, 2017. The NPA estimated F. D’Agostino’s California source income based on the information FTB received, and proposed a tax liability, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
5. For the 2015 tax year, FTB sent F. D’Agostino a Demand on May 30, 2017, which required that he either file his 2015 tax return, provide evidence showing he already filed his return, or explain why he did not have a filing obligation for the 2015 tax year. When F. D’Agostino did not timely respond to the Demand, FTB issued F. D’Agostino an NPA on July 31, 2017. The NPA estimated F. D’Agostino’s California source income based on the information FTB received, and proposed a tax liability, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
6. On March 1, 2020, appellants filed untimely joint 2014 and 2015 California Nonresident or Part-Year Resident Income Tax Returns (Forms 540NR). For each tax year, appellants self-reported a tax liability higher than the amount proposed on that year’s NPA,<sup>1</sup> self-assessed interest and penalties less than the amounts proposed on the NPA, and remitted payment with the return. FTB accepted appellants’ 2014 and 2015 returns as filed.
7. FTB issued appellants a State Income Tax Balance Due Notice on April 16, 2020, for the 2014 tax year, and also issued them the same notice on September 21, 2020, for the 2015 tax year. Each notice informed appellants that they had outstanding penalty amounts for the tax year, resulting in a balance due. Appellants’ outstanding liabilities were subsequently satisfied.
8. Appellants filed a claim for refund of \$28,904.25 for the 2014 tax year, which consists of a late-filing penalty of \$9,243.50 and a demand penalty of \$19,660.75. Appellants also

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<sup>1</sup> While the self-assessed tax exceeded the proposed tax for both tax years, FTB did not increase the demand penalty for either year.

filed a claim for refund of \$10,097.25 for the 2015 tax year, which consists of a late-filing penalty of \$1,225.25 and a demand penalty of \$8,872.00.

9. FTB denied appellants' claims for refund. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellants have established reasonable cause for failing to timely file their 2014 and 2015 tax returns.

California residents are taxed upon their entire taxable income (regardless of source), while nonresidents, such as appellants, are only taxed on income from California sources. (R&TC, §§ 17041, 17951.) R&TC section 18501 requires every individual subject to the Personal Income Tax to make and file a return with FTB “stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable.....” Absent an extension, taxpayers who file on a calendar year basis are required to file their income tax returns by April 15 of the following year.<sup>2</sup> (R&TC, § 18566.)

R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file their return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*U.S. v. Boyle* (1985) 469 U.S. 241, 246 (*Boyle*).)<sup>3</sup> The taxpayer carries the burden of establishing that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

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 acted under similar

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<sup>2</sup> FTB may grant a taxpayer up to six more months to file a tax return and the corresponding regulation provides for an automatic six-month extension without a written request. (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567.) However, if the return is not filed within six months of the original due date, no valid extension exists, and the late-filing penalty amount is computed by reference to the original due date of the return. (Cal. Code Regs., tit. 18, § 18567.)

<sup>3</sup> Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts’ interpretation of the “reasonable cause” standard is persuasive authority in determining the proper construction of these California statutes. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rhin v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

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. (*Boyle, supra*, at p. 250.) 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*, 2021-OTA-198P.)

Here, FTB did not receive appellants’ 2014 and 2015 tax returns until March 1, 2020; therefore, the returns were approximately five and four years late, respectively. Appellants contend that they reasonably relied on their previous CPA, who for decades filed the returns for appellants and appellants’ numerous corporate entities, to timely file appellants’ returns in all required jurisdictions, including California. Appellants assert that they submitted “all notices, tax filings, K1s, and other tax records” to their CPA, that they relied on the CPA’s expertise to properly report their taxes, and that their CPA timely filed their 2014 and 2015 federal returns. Appellants contend they are uncertain why their CPA did not timely file their 2014 and 2015 California returns, despite being engaged to do so, nor why he continued to not file their returns after appellants provided the CPA with appellants’ 2014 and 2015 Demands. Appellants assert that their reliance on their CPA, who was responsible for the withholding amounts and filing corporate tax returns for the California operations generating appellants’ California income, to also timely file appellants’ California returns is reasonable. Appellants also assert that they “withheld taxes at the relatively highest rate for the State of California to ensure the minimum taxes due by [appellants] to the State of California, *regardless of deductions or offsets to income.*” (Italics in original.) Appellants contend that it was reasonable for them to “assume that with [their] high withholding that they would therein not owe taxes to the State of California but have refunds due,” like their 2016 and subsequent tax years.<sup>4</sup>

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<sup>4</sup> Appellants argue in the alternative that the late-filing penalties should be abated to allow for an “equitable result.” Specifically, appellants assert that “California benefited tremendously in the effective tax rate for the year in question due to [appellants’] CPA firm not filing the proper deductions for the year in question therein increasing the tax due dramatically,” and that appellants: 1) have already been impacted by the high tax rate in 2014 and 2015; 2) always had a positive account balance with California; 3) “used withholding from all years and refunds due for years subsequent to 2014 and 2015 to ensure the account was paid timely”; and 4) are not requesting a refund of interest and penalty fees for either tax year. To overcome the presumption of correctness attached to the late-filing penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Appeal of Xie, supra.*) As these are not reasonable cause arguments for failing to file a return, they will not be addressed further.

In *Boyle*, the U.S. Supreme Court established a bright-line rule (*id.* at p. 248) and expressly 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……” (*Id.* at p. 252.) The Court concluded that “one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer [or an accountant] is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute.” (*Id.* at p. 251.)

California taxes the income of nonresidents that is derived from California sources. (R&TC, § 17041(i)(1)(B).) Here, F. D’Agostino received California source income in 2014 and 2015 and, therefore, had a California tax return filing requirement for both tax years. Despite appellants’ contentions, a taxpayer’s tax return filing requirement is not negated by the applicable tax rate, the tax withholdings for that tax year, or possible refunds due in future or prior years. R&TC section 18566 unambiguously required appellants to file their 2014 and 2015 returns by April 15, 2015, and April 15, 2016, respectively. Reliance on a third party to fulfill that duty does not relieve the taxpayer of the duty to comply with the unambiguous statute. (*Boyle, supra*, at p. 251.) Appellants’ reliance on their CPA to timely file their 2014 and 2015 returns, therefore, does not constitute reasonable cause. (*Ibid.*) Thus, based on the evidence, appellants are not entitled to abatement of the late-filing penalties.

Issue 2: Whether appellants have established reasonable cause for failing to timely reply to the Demands for the 2014 and 2015 tax years.

California imposes a penalty on taxpayers for failing to file a return or to provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from complying with the demand. (R&TC, § 19133.) For individuals, a demand penalty will only be imposed if FTB has previously proposed an assessment of tax after the taxpayer failed to timely respond to a request or demand for tax return at any time during the prior four taxable years preceding the taxable year for which the current demand is issued. (Cal. Code Regs., tit. 18, § 19133(b).) Because F. D’Agostino failed to respond to prior demands for tax returns for the 2010 and 2011 tax years, and FTB thereafter issued an NPA for each tax year that is within four taxable years preceding the taxable year of the respective current demand being issued for 2014

and 2015, FTB properly imposed the demand penalty for the 2014 and 2015 tax years. (*See Appeal of Jones*, 2021-OTA-144P.)

Appellants make the same arguments in support of their request for abatement of the demand penalties as they make in support of their request for relief of the late-filing penalties. Regarding appellants' contentions that they provided the Demands to their CPA, merely forwarding a Demand to their CPA is not responding to a Demand. Appellants, who had an obligation to respond to the Demands, failed to file a return or to provide information upon FTB's demand to do so. Appellants provide no other argument to show reasonable cause for failing to timely respond to the Demands. Therefore, the demand penalties were properly imposed.

#### HOLDINGS

1. Appellants have not established reasonable cause for failing to timely file their 2014 and 2015 tax returns.
2. Appellants have not established reasonable cause for failing to timely reply to the Demands for the 2014 and 2015 tax years.

#### DISPOSITION

FTB's actions denying appellants' claims for refund are sustained.

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*Sheriene Anne Ridenour*

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Sheriene Anne Ridenour  
Administrative Law Judge

We concur:

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*John O Johnson*

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John O. Johnson  
Administrative Law Judge

DocuSigned by:

*Andrew Wong*

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Andrew Wong  
Administrative Law Judge

Date Issued: 8/23/2022