OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. FISHER AND** **M. FISHER**	OTA Case No. 19105379

OPINION

Representing the Parties:

For Appellants: Jeffrey A. Barth, CPA

For Respondent: Christopher M. Cook, Tax Counsel III
Eric A. Yadao, Tax Counsel IV

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Fisher and M. Fisher (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of $29,454.25,[1] plus applicable interest, for the 2016 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Cheryl L. Akin, Sheriene Anne Ridenour, and Amanda Vassigh held an oral hearing for this matter in Cerritos, California, on May 19, 2022. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUE

Whether appellants have demonstrated reasonable cause to abate the late filing penalty.

[1] The Notice of Action (NOA) acknowledged appellants' claim amount of $34,925.67, which appeared to include interest. However, FTB clarified in its Opening Brief that it had assessed a late filing penalty in the amount of $29,454.25, as reflected in its Tax Year Detail report. The amount at issue in this appeal is the $29,454.25 late filing penalty plus applicable interest. Appellants also self-assessed an underpayment of estimated tax penalty of $2,502 on their return for the 2016 tax year, which is not at issue in this appeal.

FACTUAL FINDINGS

1. Appellants hired the services of a professional accounting firm to file their 2016 federal and California tax returns, and submitted their tax documents to their tax preparer. Appellants reviewed the return prior to the extended due date, and authorized their tax preparer to electronically file the return.
2. Within 72 hours of the filing deadline, appellants received a confirmation from an associate at the accounting firm, notifying them that their returns had been filed.
3. Appellants' federal and other state non-resident returns were timely filed and accepted by the IRS and the other states.
4. The software that appellants' tax preparer used would normally issue a confirmation or rejection notice after a tax return was submitted for electronic filing. In this case, the tax preparer did not receive any notice from the electronic filing system regarding appellants' California tax return.
5. In September 2018, during an audit of their 2014 through 2016 tax years, appellants learned that the 2016 California tax return had not been filed with FTB.
6. Appellants then filed their 2016 California tax return late in April 2019, reporting tax due.
7. FTB issued a Notice of Tax Return Change – Revised Balance on April 15, 2019, and assessed, as relevant here, a late filing penalty of $29,454.25.
8. Appellants subsequently paid the balance due for the 2016 tax year, including the tax, penalties, and interest.
9. Appellants requested abatement of the late filing penalty, which FTB treated as a claim for refund since the 2016 tax balance had been satisfied in full.
10. FTB denied appellants' claim for refund and appellants timely filed this appeal.

DISCUSSION

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness attached to the penalty, a

taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid*.) To establish reasonable cause, a taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc*., 2020-OTA-057P.)

It is well established that each taxpayer has a personal, non-delegable obligation to ensure the timely filing of a tax return, and thus, reliance on an agent to perform this act does not constitute reasonable cause to abate a late filing penalty. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*); *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.) In *Boyle*, the executor of an estate relied upon an attorney to timely file an estate tax return. However, due to a clerical error, the attorney did not timely file the return. The U.S. Supreme Court held that:

> The time has come for a rule with as "bright" a line as can be drawn consistent with the statute and implementing regulations. Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates . . . Congress has placed the burden of prompt filing on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations. (*Id.* at pp. 248-250.)

The law is clear: the fact that a tax preparer was expected to attend to a matter does not relieve a taxpayer of the duty to comply with the statute, and an agent's failure to file a tax return cannot constitute reasonable cause for the taxpayer. (*Boyle, supra* 469 U.S. at p. 252; *Henry v. U.S*., (N.D. Fla. 1999) 73 F.Supp.2d 1303; *McMahan v. Commissioner* (1997) 114 F.3d 366; *Denenburg v. United States*, (5th Cir. 1991) 920 F.2d 301; *Estate of Fleming v. Commissioner* (7th Cir. 1992) 974 F.2d 894.) OTA has consistently applied the above rule, set forth in *Boyle* and supported in subsequent caselaw, to income tax returns required to be filed with FTB. (See, e.g., *Appeal of Quality Tax & Financial Services, Inc.*, *supra; Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.)

Appellants argue that the late filing penalty should be abated because they exercised the requisite level of care in ensuring the timely filing of the return. Appellants point to the

following facts to illustrate their diligence: they hired a professional tax preparer; filed an extension with the IRS; provided necessary tax documents for the return to be filed; timely submitted an e-file authorization form to their tax return preparer and relied on the tax preparer to file the return by the extended due date; followed up with the tax preparer to receive copies of their filed returns; and made payments against the balances due shortly after they were erroneously informed their return had been filed.

While OTA is sympathetic to appellants' situation, longstanding precedent on this issue compels OTA to conclude that appellants have not established reasonable cause for the late filing of their 2016 California return. As explained above, the fact that appellants relied on their tax preparer to file their return does not relieve them of their responsibility to ensure that it is timely filed. Their tax preparer's failure to verify whether the return was filed when no confirmation was received does not constitute reasonable cause for appellants' late filing of their return. Moreover, the exercise of ordinary business care and prudence required appellants to do more than merely perform and/or delegate the tasks necessary to timely file the return. It also required appellants to personally verify the return had been successfully transmitted, and when it had not been, to take appropriate corrective action.[2] (*Appeal of Quality Tax & Financial Services, Inc.*, *supra*.) The record does not show appellants took such action, but they instead chose to rely solely upon their tax preparer.

Appellants attempt to distinguish *Boyle* on grounds that it was decided many years before electronic filing was instituted. However, the courts have so far been unwilling to distinguish or reinterpret *Boyle* in electronic filing cases, and OTA is bound to follow the established law. (See *Intress v. U.S.* (M.D. Tenn. 2019) 404 F.Supp.3d 1174 (*Intress*) and *Oosterwijk v .U.S.* (D. Md., January 27, 2022, No. CCB-21-1151) 2022 WL 255348 (*Oosterwijk*)[3].) "The crux of the *Boyle* opinion is that Congress assigned *to the taxpayer* the duty to file timely taxes, and that reliance

[2] OTA explained in its precedential opinion in *Appeal of Quality Tax & Financial Services, Inc.*, *supra*, that "in the absence of an acknowledgment that a return was transmitted, received, or accepted, an ordinarily intelligent and prudent businessperson would have viewed the E-File History and acknowledgment records to confirm whether the return had been timely transmitted, received by Intuit, and accepted. Moreover, an ordinarily intelligent and prudent businessperson, after viewing the E-File History and acknowledgment records, and noticing that the return had not been accepted, would have made other attempts to file prior to the end of the extension period."

[3] OTA notes that *Oosterwijk* is an unpublished U.S. District Court case and generally is not citable as precedential authority. This case is not binding on OTA and is instead cited and discussed by OTA for its persuasive value only.

on an agent to fulfill this duty is unjustified when the agent does nothing the taxpayer could not do himself." (*Intress*, *supra,* 404 F. 3d at p. 1177, italics in original.) In *Intress*, the U.S. District Court acknowledged that the "IRS tax filing procedure has changed significantly since *Boyle* was decided in 1985" yet held that *Boyle* was still applicable to electronic filing because "taxpayers are not obligated to use tax preparation services" and are "not required to use e-file software." (*Id.* at pp. 1178-1179.) The court concluded that because "a taxpayer is just as free to paper-file a professionally prepared return . . . as they were in 1985," the taxpayer can meet the exact "nature and degree of personal responsibility *Boyle* requires of taxpayers....." (*Id.* at p. 1179.)

In *Oosterwijk*, the court went so far as to state that even if the IRS encourages e-filing, the same means available to the *Boyle* taxpayer was available to the taxpayers in *Oosterwijk*. Thus, the court concluded that the taxpayers' reliance on their agent to timely file an electronic extension request did not establish reasonable cause for the late filing of such request.[4] (*Ibid.*) Likewise, the option of filing paper tax returns was available to appellants in this appeal,[5] and their personal responsibility did not shift as a result of filing the return electronically. (See *Intress*, *supra*, 404 F.3d at p. 1179.)

Among several reasons expressed in *Boyle* for placing responsibility fully upon the taxpayer for ensuring that a tax return is timely filed, is because "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met." (*Boyle*, *supra*, 469 U.S. at p. 252.) This remains true even where a tax return is electronically filed. The exercise of ordinary business care and prudence requires that taxpayers do more than merely perform and/or delegate the tasks necessary to electronically file. It also requires the taxpayer to personally verify that the tax return was successfully transmitted, and, where it has not been, to take the appropriate corrective actions. (*Appeal of Quality Tax & Financial Services, Inc*., *supra*.) Here, appellants chose to rely solely on the representations of their tax return preparer that the return had been filed, and while OTA recognizes that appellants intended to meet their tax obligation, their actions do not establish reasonable cause for late filing of the California tax return.

Appellants also assert that their tax return preparer's attempt to electronically file their return should be considered the present-day equivalent of mailing a tax return to FTB. OTA is

[4] In *Oosterwijk*, the court did contemplate that if e-filing were to become mandatory, its conclusion might change.

[5] FTB's website includes instructions on filing paper tax returns by mail. (https://www.ftb.ca.gov/file/ways-to-file/paper/index.html.)

not persuaded by appellants' analogy, since taxpayers attempting to prove that a paper return was timely mailed would have to show evidence, such as a registered or certified mail receipt, that the return was timely mailed and thus, timely filed with FTB. (Gov. Code, § 11003; R&TC, § 21027; Cal. Code Regs., tit. 18, § 30219(a); *Appeal of La Salle Hotel Co.* (66-SBE-071) 1966 WL 1412.) In this case, appellants' tax preparer stated that he did not receive any confirmation of filing from the tax preparation software. Appellants have no evidence of submitting the tax return to FTB, and do not dispute that the return was not submitted as intended.

For the reasons explained above, OTA finds that appellants have not shown that there is reasonable cause to abate the penalty.

HOLDING

Appellants have not demonstrated reasonable cause to abate the late filing penalty.

DISPOSITION

FTB's action denying the claim for refund is sustained.

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

Date Issued: 8/1/2022