

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of:) OTA Case Nos. 20035961 & 20036043
)
B. LOVAZZANO AND)
T. LOVAZZANO,)
G. LOVAZZANO AND)
J. LOVAZZANO)
 _____)

OPINION

Representing the Parties:

For Appellants: William Gekakis, CPA

For Respondent: Josh Ricafort, Tax Counsel
Ellen L. Swain, Tax Counsel IV

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellants B. Lovazzano and T. Lovazzano (B&T Lovazzano) and G. Lovazzano and J. Lovazzano (G&J Lovazzano) (collectively appellants) appeal the actions of respondent Franchise Tax Board in denying appellants' claims for refund of \$5,215.86 and \$5,878.86, respectively, for the 2018 tax year.¹

Office of Tax Appeals Administrative Law Judges John O. Johnson, Teresa A. Stanley, and Amanda Vassigh held an electronic oral hearing for this matter on June 22, 2022. At the conclusion of the hearing, the record was held open to allow respondent the opportunity to question appellants' affidants in writing. (See Cal. Code Regs., tit. 18, § 30214(b)(1).) Respondent subsequently waived that right, and this matter was submitted for an opinion when the record closed on August 31, 2022.

¹ As discussed herein, the claims for refund on appeal concern only late payment penalties of \$5,215.86 for B&T Lovazzano and \$5,878.86 for G&J Lovazzano. Other than the different amounts of the penalties at issue, the facts, arguments, and evidence are essentially identical for both sets of appellants, and these matters were therefore consolidated and heard as a single hearing. (See Cal. Code Regs., tit. 18, § 30212(a).)

ISSUE

Whether appellants have shown reasonable cause for the late payment of tax.

FACTUAL FINDINGS

1. Appellants' representative on appeal, Mr. Gekakis, was also their tax preparer for the year at issue. Appellants submitted affidavits indicating that they relied on his advice for all aspects regarding income tax matters and that they placed funds into a separate bank account through which Mr. Gekakis remitted estimated tax payments on their behalf.
2. Appellants filed their respective 2018 California tax returns on October 14, 2019, and both returns reflected an overpayment of tax and requested a refund.
3. Respondent reviewed the returns and found that both returns overstated the amount of estimated tax payments made by approximately \$75,000 each, the effect of which meant appellants had not fully paid their tax liability by the payment due date in April 2019.
4. Respondent issued Notices of Tax Return Change that each reported a balance due that included unpaid tax, a late payment penalty, an estimated tax penalty, and applicable interest.
5. Appellants paid the outstanding liabilities and filed claims for refund for the late payment penalty only.
6. Respondent denied the claims for refund, and 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 tax. When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) The late payment penalty may be abated if 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 tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted

similarly under the circumstances. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Scanlon*, 2018-OTA-075P.)

Reliance on a tax professional's advice for questions of substantive tax law, such as whether a liability exists, 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. (*U.S. v. Boyle* (1985) 469 U.S. 241, 250-251; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.)² By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*U.S. v. Boyle*, *supra*, 469 U.S. at p. 251.)

Appellants' affidavits and Mr. Gekakis's testimony at the oral hearing unanimously assert that appellants fully entrusted Mr. Gekakis to make required estimated tax payments by the applicable due dates. They also indicate that Mr. Gekakis has been preparing appellants' returns for over 20 years and that he has full access to all their business records and relevant tax information. These statements, along with the other facts and arguments in the record, tend to support a finding that Mr. Gekakis has competency in the subject tax law and that he had full disclosure of the relevant facts and documents when computing appellants' tax liabilities. Therefore, the remaining question is whether the error that caused the late payments of tax was based on a question of substantive tax law.

Appellants assert that they exercised ordinary business care and prudence by entrusting Mr. Gekakis to calculate and make the proper payments timely, and that the error that led to the underpayment of tax was solely based on the actions of Mr. Gekakis. Mr. Gekakis testified that the cause of the underpayment was due to him using the wrong schedule when determining whether to make additional estimated tax payments at the close of the year. Mr. Gekakis indicated he had created two versions of his tax schedules during the course of the tax year to determine the payments that needed to be made, and mistakenly used the wrong one which led to him not submitting the additional estimated tax payments that should have been made. When asked why the returns reported estimated payment amounts that were not actually made, Mr. Gekakis indicated that he based the payment amounts on the schedule he should have used

² Since the issue of whether a taxpayer has demonstrated reasonable cause for failure to pay tax asks the same questions and weighs the same evidence as the inquiry of whether reasonable cause exists for failure to file a tax return, decisions analyzing whether reasonable cause existed for failure to timely file a tax return, such as *Boyle*, *supra*, and *Appeal of Summit Hosting LLC*, *supra*, are persuasive authority for determining whether reasonable cause existed for the failure to timely pay the tax. (*Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P.)

and, for the year at issue, he did not verify whether those amounts were actually paid by checking the accounts from which payments were made. This, Mr. Gekakis explained, is why the returns overreported payments, and the underpayments were not noticed until respondent issued the Notices of Tax Return Change.

Based on testimony and arguments, it is clear that the mistake of not making the final estimated payments was not one that involved the interpretation or application of tax law, but instead was clerical in nature. Since the cause behind the late payment of tax did not involve a question of substantive tax law, appellants have not shown reasonable cause for the late payment of tax based on their reliance on a tax preparer. (See *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.) Furthermore, while appellants trusted Mr. Gekakis to submit their tax payments in a timely manner, the record does not show any other efforts on their part to exercise ordinary business care and prudence when it came to the timely payment of taxes.³

³ For example, there were only three estimated tax payments listed on the proper schedule for each set of appellants, with the missing \$75,000 payments accounting for over 30 percent of the total payment amounts. Accordingly, if appellants exercised ordinary business care and prudence with regard to the payment of their taxes, they should have noticed that their 2018 tax returns reported all three payments as being made when in fact only two of those payments were made, or in other words, noticed that the total estimated payment amounts listed on the returns were significantly more than the actual payments made. However, appellants did not seek to correct this computational error, which would have then revealed an underpayment of tax. While the record is not clear as to exactly what information was available to appellants as of the due date for the timely payment of taxes in April 2019, nothing in the record shows appellants took any steps to confirm timely payment other than fully relying on their tax preparer, which is a position that by itself does not constitute reasonable cause under *U.S. v. Boyle, supra*, and *Appeal of Summit Hosting, supra*.

HOLDING

Appellants have not shown reasonable cause for the late payment of tax.

DISPOSITION

Respondent’s actions denying appellants’ claims for refund are sustained.

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John O Johnson
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John O. Johnson
Administrative Law Judge

We concur:

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Teresa A Stanley
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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Date Issued: 11/30/2022