

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

R. BRAUTIGAM AND
N. BRAUTIGAM

) OTA Case No. 21037359
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)
)

OPINION

Representing the Parties:

For Appellants: Robert L. McCorkle, CPA

For Respondent: Brian Werking, Tax Counsel III

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Brautigam and N. Brautigam (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,251 for the 2016 tax year.

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

ISSUE

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

FACTUAL FINDINGS

1. Appellants are California residents who realized over \$150,000 of capital gain on the sale of a vacation home in Mexico in the 2016 tax year. Appellants’ return preparer prepared appellants’ joint 2016 federal income tax return.
2. Appellants’ return preparer previously prepared appellants’ federal and California income tax returns for the 2008 tax year. Appellants personally prepared their federal income tax returns for the 2009 through 2015 tax years and determined that California income tax returns were not required for those years because appellants’ income was not sufficient to create a California tax liability. Appellants’ return preparer indicated that it is not

- registered to prepare tax returns in California, does not seek tax preparation work outside of Washington, and prepares approximately three California income tax returns per year.
3. FTB obtained information indicating appellants received sufficient income for the 2016 tax year to prompt a return filing requirement.¹ FTB issued appellants a Request for Tax Return requesting that appellants respond or file a 2016 California income tax return.
 4. On August 15, 2020, appellants untimely filed a joint California income tax return for the 2016 tax year with the assistance of their return preparer and paid the reported tax due.
 5. FTB imposed a late filing penalty of \$2,251. Appellants paid the penalty, plus applicable interest, and filed a claim for refund requesting abatement of the penalty. FTB denied appellants' claim for refund.
 6. This timely appeal followed.

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 ordinary 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.)

¹ For the 2016 tax year, the filing threshold for married/registered domestic partners filing jointly taxpayers under 65 years of age with no dependents was California gross income of at least \$33,197 or adjusted gross income of at least \$26,558.

However, in *Boyle*, the U.S. Supreme Court 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, citing *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.)

To establish reasonable cause under *Boyle*, taxpayers must show they reasonably relied on a tax professional for substantive tax advice as to whether a tax liability exists and that the following conditions are met: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law; and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of relevant facts and documents. (*Boyle, supra*; *Appeal of Summit Hosting LLC, supra*.) By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra*, at 251.) In *Appeal of Berolzheimer, supra*, Board of Equalization (BOE) found that there was no basis in the record for concluding that the New York law firm retained by appellants in that case had expertise in California tax law and therefore declined to hold, as a matter of law, that relying on an out-of-state law firm constituted reasonable cause for failing to comply with California’s tax laws.²

Appellants contend that the late filing penalty should be abated because they exercised the requisite level of care by hiring a professional tax preparer. Appellants’ return preparer prepared and filed appellants’ 2016 federal income tax return and did not advise appellants that they had a California filing obligation. Appellants’ return preparer stated that it was unaware that appellants would be taxed by California on the sale of their vacation home because it was located in Mexico and that, even if the sale were taxable, the return preparer believed the gain on the sale would be offset by foreign taxes paid to Mexico.

The facts of this case demonstrate that appellants’ return preparer was fully informed of the relevant facts of the transaction giving rise to the taxable income and that the issues involved constituted substantive tax advice. However, appellants have not demonstrated that the return

² Prior to January 1, 2018, the adjudicatory functions now performed by Office of Tax Appeals (OTA) were performed by BOE, OTA's predecessor. California Code of Regulations, title 18, section 30501(d)(3), provides that precedential opinions of BOE that were adopted prior to January 1, 2018, may be cited as precedential authority to OTA unless a panel removes, in whole or in part, the precedential status of the opinion.

preparer had expertise in California tax law such that reliance on the return preparer's advice would constitute reasonable cause. Similar to BOE's holding in *Appeal of Berolzheimer, supra*, appellants' reliance on an out-of-state return preparer does not constitute reasonable cause for failing to comply with California's tax laws. Statements made by appellants' return preparer show that the return preparer does not regularly prepare California income tax returns or provide advice concerning California tax law. Appellants' return preparer had filed only one previous California income tax return for appellants and does not seek out work outside of Washington. In light of these facts, appellants have not demonstrated reasonable cause for failure to timely file their 2016 California income tax return.

HOLDING

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

DISPOSITION

FTB's denial of appellants' claim for refund is sustained.

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Veronica I. Long

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Veronica I. Long
Administrative Law Judge

We concur:

DocuSigned by:

Sara A. Hosey

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Sara A. Hosey
Administrative Law Judge

DocuSigned by:

Kenneth Gast

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Kenneth Gast
Administrative Law Judge

Date Issued: 1/25/2023