

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
D. GERMAN

) OTA Case No. 19125647
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OPINION

Representing the Parties:

For Appellant: D. German

For Respondent: Sarah J. Fassett, Tax Counsel

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. German (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$21,886.89, plus applicable interest, for the 2017 tax year.

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

ISSUES

1. Whether appellant has established reasonable cause to abate the late filing penalty.
2. Whether appellant has established reasonable cause to abate the mandatory electronic payment (e-pay) penalty.

FACTUAL FINDINGS

2. Appellant hired the services of his friend, a tax preparer, to file his 2017 California income tax return. Appellant’s tax return was filed on January 15, 2019, reporting a total balance due of \$88,834, consisting of tax in the amount of \$86,638 and a self-assessed underpayment of estimated tax penalty of \$2,196. Appellant also submitted a payment of this amount on January 15, 2019.

3. FTB processed the tax return, and sent appellant a Notice of Tax Return Change – Revised Balance, reducing the self-assessed underpayment of estimated tax penalty to \$0, and imposing a late-filing penalty of \$21,659.50, plus interest.
4. FTB issued to appellant an Income Tax Due Notice dated April 10, 2019, and then when appellant had not paid the balance due, FTB issued a Final Notice Before Levy and Lien dated May 15, 2019.
5. On July 1, 2019, FTB received a payment, via check, of \$22,807.79 from appellant.
6. FTB sent appellant a State Income Tax Balance Due Notice dated July 11, 2019, which indicated that appellant was required to submit all payments electronically, and that penalties apply if appellant pays by other means. Because appellant did not make the July 1, 2019 payment electronically, FTB imposed a mandatory e-pay penalty of \$228.31 pursuant to R&TC section 19011.5(c).
7. Appellant’s account balance was paid in full through his payment and FTB’s collection action. Appellant subsequently submitted a claim for refund requesting abatement of the penalties.
8. FTB denied appellant’s claim for refund and appellant timely filed this appeal.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause to abate the late filing penalty.

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 “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.” (*Boyle, supra*, at pp. 249-250.)

Appellant’s argument in this appeal is based upon his reliance on his tax preparer, and on appellant’s good filing and payment history. Appellant explains that he relied on his tax preparer friend to file his tax return, and that his friend filed it late. However, 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*, at p. 252.) The Office of Tax Appeals has consistently applied the above rule, set forth in *Boyle*, to income tax returns required to be filed with FTB. (*Appeal of Fisher*, 2022-OTA-337P, citing *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.)

While appellant sought the services of a tax preparer, the record does not show that he made any effort to confirm that his tax return had been timely filed. Appellant’s reliance solely on his tax preparer to timely file the tax return on his behalf does not establish reasonable cause for late filing his California tax return.

Regarding appellant’s request that the penalties be abated based on his good filing and payment history, FTB’s one-time abatement program, which would permit it to abate penalties based on the taxpayer’s good filing and payment history, only applies to the 2022 and subsequent tax years.¹ For the 2017 tax year, California law only permitted abatement of the late filing penalty on a showing of reasonable cause.

¹ See R&TC section 19132.5 [for tax years beginning on or after January 1, 2022, an individual taxpayer shall receive, under certain conditions, a one-time abatement of the late filing penalty under R&TC section 19131].

Issue 2: Whether appellant has established reasonable cause to abate the mandatory e-pay penalty.

R&TC section 19011.5 requires certain individual taxpayers to remit their payments electronically for payments made on or after January 1, 2009. This mandatory e-pay requirement is triggered for all future payments after taxpayers make an estimated tax or extension payment that exceeds \$20,000 for any tax year beginning on or after January 1, 2009, or after they file an original tax return with a tax liability that exceeds \$80,000 for tax years beginning on or after that date.² (R&TC, § 19011.5(a)(1)-(2).) Taxpayers required to electronically remit payment who make payment by other means must pay a penalty of 1 percent of the amount paid, unless it is shown that the failure to make an electronic payment was for reasonable cause and was not the result of willful neglect. (R&TC, § 19011.5(c).)

Appellant does not dispute the imposition or calculation of the e-pay penalty, and FTB has not alleged willful neglect; therefore, the only issue is whether there is reasonable cause to abate the penalty. To establish reasonable cause, a taxpayer bears the burden of proof to show that the failure to electronically remit a required payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Porreca*, 2018-OTA-095P.) The issue of whether a taxpayer has demonstrated reasonable cause for the mandatory e-pay penalty asks the same questions and weighs the same evidence as the issue of whether reasonable cause exists for failure to file a tax return or failure to make a timely payment of tax. (*Ibid.*)

Appellant does not provide an explanation as to why he paid the 2017 account balance by check instead of making an electronic payment. Appellant notes that he has “since returned to timely filings and payments” and asks for abatement of the penalties on a one-time basis. California’s one-time abatement program does not apply to the e-pay penalty, and as noted above, the one-time abatement program does not apply to the tax year at issue in this appeal. For the foregoing reasons, appellant has not established that the mandatory e-pay penalty should be abated.

² E-payments for all future payments become mandatory unless taxpayers either meet the requirements of R&TC section 19011.5(b) and make an election to discontinue making payments electronically, or taxpayers request and receive a waiver of the e-pay requirement under R&TC section 19011.5(d). Appellant does not argue these election and waiver provisions are applicable.

HOLDINGS

1. Appellant has not established reasonable cause to abate the late filing penalty.
2. Appellant has not established reasonable cause to abate the mandatory e-pay penalty.

DISPOSITION


FTB’s action denying appellant’s claim for refund is sustained in full.

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Amanda Vassigh
 Administrative Law Judge

We concur:

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Teresa A. Stanley
 Administrative Law Judge

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Kenneth Gast
 Administrative Law Judge

Date Issued: 3/27/2023