OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Claim for Reimbursement of: **PARADIGM PUBLISHING, INC.;** **CSBT CORP.;** **CSBT ENTERPRISES, INC.**	OTA Case No. 21037431

OPINION ON CLAIM FOR REIMBURSEMENT

Representing the Parties:

For Claimants: Sean R. Kenney, Attorney

For Respondent: Gi Jung Nam, Tax Counsel

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 21013, Paradigm Publishing, Inc., CSBT Corp., and CSBT Enterprises, Inc. (collectively, claimants) seek recovery of fees and expenses from Franchise Tax Board (respondent).

Claimants waived their rights to an oral hearing; thus, we decide this claim for reimbursement of fees and expense based on the written record.

ISSUE

Whether claimants are entitled to recovery of fees and expenses.

FACTUAL FINDINGS

1. Claimants are S corporations, wholly owned by two shareholders (owners).
2. In December of 2014, claimants entered into an Asset Purchase Agreement (Purchase Agreement) to sell their assets to BNA Holdings, Inc.
3. The Purchase Agreement gave BNI Holdings the right to allocate the purchase price among the assets sold.
4. A certified public accountant (hereinafter, Advisor) served as claimants' tax consultant for the asset sale. Advisor had provided tax advice to claimants and owners for many years.

5. On December 12, 2014, owners requested guidance from Advisor as to whether claimants needed to pre-pay any taxes resulting from the asset sale. Advisor initially stated that she did not know how to allocate the tax liability among the three entities.
6. Subsequently, Advisor told owners to make an estimated tax payment on behalf of claimants to owners' California income tax account for the 2014 tax year, and later allocate a percentage of the tax prepayment to each claimant's income tax account after they received an allocation of the asset purchase price among the assets sold.
7. On December 30, 2014, following Advisor's instructions, owners made an estimated tax payment to their personal California income tax account for the 2014 tax year.
8. Before claimants' tax payments were due, Advisor attempted to obtain the asset purchase price allocation from BNI Holdings, but was unable to do so until on or about September 1, 2015.
9. On September 14, 2015, each claimant filed a California S corporation franchise income return (Form 100S) for the tax year ending December 31, 2014, but did not remit the balances owed with the respective returns. Advisor prepared the returns on behalf of claimants.
10. On December 1, 2015, Advisor called respondent and requested that respondent apply owners' income tax prepayment for the 2014 tax year to claimants' respective tax accounts for the same tax year. Respondent told Advisor that it was unable to do so.
11. Thereafter, respondent processed claimants' 2014 California returns and imposed late payment penalties. Claimants paid the balances due and filed claims for refund of the late payment penalties and interest. Respondent denied the respective claims for refund.
12. Claimants filed timely appeals to the Office of Tax Appeals (OTA). In their appeal letter, claimants argued that reasonable cause existed for abatement of the late payment penalties because: (1) they could not obtain a timely asset purchase price allocation from BNI Holdings, and (2) they relied upon the professional advice of Advisor.
13. Respondent filed its opening brief, asserting that claimants had not shown reasonable cause existed to excuse their late payments of tax. Respondent argued that claimants and owners are separate taxpayers, and that owners were unreasonable in their belief that a payment to their individual tax account could constitute payments to claimants' tax accounts. In addition, respondent argued that Advisor did not provide "substantive" tax

advice to claimants, as Advisor's guidance concerned a "simple calculation of tax," not a substantive issue of tax law. In addition, respondent argued that any alleged difficulty claimants (or Advisor) had in obtaining an asset purchase price allocation from BNI Holdings did not constitute reasonable cause.

14. On December 23, 2019, OTA issued an Opinion, holding that reasonable cause existed to abate the late payment penalties.

15. Respondent filed a petition for rehearing, asserting there was insufficient evidence to justify OTA's Opinion. Specifically, respondent argued that claimants did not provide evidence showing they made any efforts to obtain a revised allocation from BNI Holdings, and in the absence of the revised allocation, that claimants should have estimated the allocation and made tax payments before the payment deadline. Respondent also argued that claimants did not act reasonably in waiting over eight months to pay claimants' respective tax liabilities after Advisor was first notified that funds could not be transferred from owner's tax account to claimants' tax accounts. Respondent also argued that OTA's Opinion contained an error of law, as claimants had a nondelegable duty to pay their tax liabilities.

16. On July 28, 2020, OTA denied respondent's petition for rehearing, and its decision became final. Subsequently, claimants filed this claim for reimbursement of claimants' fees and expenses.

DISCUSSION

R&TC section 21013(a)(1) provides that a taxpayer is entitled to reimbursement of any reasonable fees and expenses related to an appeal if two conditions are met: (1) the taxpayer files a claim with OTA, and (2) OTA finds the action taken by respondent to have been unreasonable. R&TC section 21013(b)(1) provides that in determining whether respondent has been unreasonable, OTA "shall consider whether [respondent] has established that its position in the appeal was substantially justified."

There is no precedential case law that construes the term "substantially justified" as used in R&TC section 21013. However, because R&TC section 21013 and Internal Revenue Code (IRC) section 7430 are substantially identical, cases construing IRC section 7430 are persuasive. (See *Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838 [federal statute that was "substantially identical" to California statute could be used to interpret the California statute];

Appeal of Calegari, 2021-OTA-337P [federal and state statues were "substantially identical"].) Additionally, we receive guidance from the law interpreting R&TC section 19717, a California statute that is on a similar subject and uses identical or substantially similar language to R&TC section 21013. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122.)

Courts have defined a "substantially justified" position as a position that is "justified to a degree that could satisfy a reasonable person" and a position that has a "reasonable basis both in law and fact." (*Pierce v. Underwood,* (1988) 487 U.S. 552, 565; see also *Lennane v. Franchise Tax Board* (1996) 51 Cal.App.4th 1180, 1189; *McDonnell Douglas Corp. v. Franchise Tax Board* (1994) 26 Cal.App.4th 1789, 1798.) If reasonable minds may differ, respondent is substantially justified. (See *Lennane v. Franchise Tax Board*, *supra*, at p. 1189.) So long as the position is one that a reasonable person could think is correct, it may be substantially justified even in the face of conflicting evidence. (*Fujitsu IT Holdings, Inc. v. Franchise Tax Board* (2004) 120 Cal.App.4th 459, 487.)

Claimants assert that respondent's position was not substantially justified because respondent had no reasonable basis in law and fact to justify its position. Claimants argue that the law on reasonable cause is unambiguous, and that the facts and evidence of the appeal clearly demonstrated reasonable cause existed. Claimants further assert that respondent relied on inapposite cases to support its position on appeal and in its petition for rehearing. Thus, claimants conclude that they are entitled to an award of fees and expenses.

We disagree. Respondent's position on appeal and in its petition for rehearing was based on uncontroverted facts: claimants did not make a timely tax payment because their tax preparer erred, claimants relied on their tax preparer to make a timely tax payment based on advice they received from the preparer, and claimants made a late payment eight months after they were aware of the tax preparer's error. These facts could have led a reasonable person to conclude that reasonable cause did not exist to excuse claimants' late payment of tax.

Respondent also cited to relevant law to support its position. Citing *U.S. v. Boyle* (*Boyle*) (1985) 469 U.S. 241, respondent argued that claimants' reliance on their tax preparer to make a timely payment was unreasonable, and such "reliance cannot function as a substitute for compliance with an unambiguous statute." A review of the relevant precedential case law on reasonable cause reveals ample support for respondent's position; indeed, the corpus of relevant case law is replete with decisions against taxpayers who relied on a tax professional to make a

timely tax payment.[1] A position is substantially justified if a reasonable person could think that respondent was correct on the basis of precedent at that time, and we find that respondent's position had sufficient legal basis to have possibly persuaded a reasonable person. (*Swanson v. Commissioner*, T.C. Memo 2009-170.) Thus, we find respondent's position to be substantially justified.

Claimants assert that OTA's unanimous opinion against respondent on appeal and against respondent's petition for rehearing demonstrate respondent's position was not substantially justified. However, respondent can be incorrect in its position and still be substantially justified in holding that position "if a reasonable person could think it correct." (*Hennessey v. Commissioner*, T.C. Memo 2007-131.) As stated above, respondent's position met that standard. Claimants also assert that respondent acted in bad faith during the appeal and in filing the petition for rehearing. We find no evidence of bad faith or any other unreasonable action on the part of respondent during the course of the appeal.

Based on the foregoing, we find that respondent's actions during the appeal to have been reasonable, and thus, claimants are not entitled to recovery of fees and expenses.[2]

[1] See *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860 [taxpayer did not have reasonable cause based on judicial interpretations of reasonable cause as applied to the late filing penalty, which are persuasive authority for determinations of reasonable cause for the late payment penalty]; *Boyle*, *supra*; *Knappe v. U.S.* (2013) 713 F.3d 1164; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.

[2] Based on our holding, we do not have to consider whether claimants properly substantiated their alleged fees and expenses (with evidence such as receipts and billing statements) and whether such amounts were reasonable.

HOLDING

Claimants are not entitled to recovery of fees and expenses.

DISPOSITION

Claimants' claim for reimbursement of fees and expenses is denied.

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Richard Tay
Administrative Law Judge

We concur:

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John O. Johnson
Administrative Law Judge

DocuSigned by:
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Sheriene Anne Ridenour
Administrative Law Judge

Dated: 6/12/2023