

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**M. REGISTER AND**  
**A. REGISTER**

) Case No. 220410208  
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**OPINION**

Representing the Parties:

For Appellants:

Michael B. Wilk, Attorney  
Timothy B. McDonnell, CPA

For Respondent:

Alisa L. Pinarbasi, Tax Counsel III  
Maria Brosterhous, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Register and A. Register (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying their claim for refund of \$70,875 for tax year 2020.

Office of Tax Appeals Administrative Law Judges Josh Lambert, Josh Aldrich, and Eddy Y.H. Lam held an electronic oral hearing for this matter on May 18, 2023. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

**ISSUE**

Whether the late filing penalty should be abated.

**FACTUAL FINDINGS**

1. Appellants have utilized Mr. McDonnell and his CPA firm to prepare their tax returns since 2004. Mr. McDonnell has prepared appellants’ California tax returns since they became California taxpayers approximately five years ago.

2. In November and December of 2020, Mr. McDonnell prepared income tax projections for appellants for the 2020 tax year, indicating no California tax due beyond their income tax withholdings which were already remitted to FTB.<sup>1</sup>
3. Appellants did not timely file their 2020 California return by the extended due date of October 15, 2021.
4. On November 1, 2021, Mr. McDonnell sent a completed joint 2020 California income tax return (Form 540) to appellants for discussion. Mr. McDonnell also sent appellants an e-file signature authorization form (FTB Form 8879), which they signed and returned.
5. On November 4, 2021, Mr. McDonnell e-filed appellants' Form 540, reporting a total amount due of \$316,146, which appellants paid on the same day.
6. On November 22, 2021, FTB sent appellants a Notice of Tax Return Change, imposing a late filing penalty of \$70,875, an underpayment of estimated tax penalty, and applicable interest.
7. Appellants paid the balance due and filed a claim for a refund for the late filing penalty, which FTB denied.
8. This timely appeal followed.

### DISCUSSION

R&TC section 19131 imposes a penalty when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. Typically, a personal income tax return is due on or before the 15th day of April following the close of the calendar year. (R&TC, § 18566.) FTB allows an automatic six-month extension if the return is filed within six months of the original due date. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.) Due to the COVID-19 pandemic, FTB postponed the filing due date for 2020 tax returns from April 15, 2021, to May 17, 2021. (*Appeal of Bannon*, 2023-OTA-096P.) Therefore, the original due date for appellants' 2020 return was postponed to May 17, 2021, and the automatic extension (which is calculated based on the statutory April 15, 2021 original due date without regard to the COVID-19 postponement) expired on October 15, 2021. (*Ibid.*) There is no dispute that appellants untimely filed their return on November 4, 2021.

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<sup>1</sup> In addition, one of Mr. McDonnell's staff prepared a draft copy of appellants' 2020 tax return in May 2021.

To establish reasonable cause, a taxpayer must show that the failure to timely file 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 Summit Hosting LLC*, 2021-OTA-216P (*Summit Hosting*)).

Taxpayers have a non-delegable obligation to file their tax returns by the due date. (See *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*)).

In *Boyle*, the United States Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing....” (*Boyle, supra*, 469 U.S. at p. 252.) The Court, however, did observe that reasonable cause may exist if a taxpayer reasonably relies on the advice of an accountant or attorney with respect to substantive matters of tax law, even when such advice turned out to have been mistaken. (*Id.* at pp. 250-251.)

To establish that reasonable cause exists based on reliance on a tax professional, a taxpayer must show that it reasonably relied on a tax professional for substantive tax advice 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. (See *Summit Hosting, supra*, citing *Boyle, supra*, 469 U.S. 241.) In contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra*, 469 U.S. at p. 251.)

Appellants contend that they have reasonable cause for failing to timely file because they timely submitted their tax information to their tax preparer, Mr. McDonnell, and reasonably believed that their return would be timely filed. Appellants assert that, prior to the due date, their CPA did not communicate to them that the tax return would not be timely filed. Appellants assert they did not know their return was not filed until weeks after the October 15, 2021 extended due date. Appellants also assert that the late filing was due to a mistake on the part of their tax preparer, complex tax issues in the tax return, and burdens placed on the tax preparer due to the COVID-19 pandemic.

Mr. McDonnell, a licensed CPA located in Massachusetts, testified at the hearing. Mr. McDonnell stated that he has 45 years of experience as a CPA and that he has other clients in California, though he is more familiar with Massachusetts tax law. Mr. McDonnell stated that he began preparing appellants’ returns in 2004 and that they became California resident

taxpayers approximately five years ago; and since then; he has prepared appellants' California returns, which were timely filed prior to this year.<sup>2</sup> Mr. McDonnell stated that, in November and December of 2020, he prepared income tax projections for appellants, which indicated there was no expected tax due beyond the California withholding amount for appellants' 2020 federal and California income tax returns. Mr. McDonnell stated that, one of his staff prepared a draft copy of appellants' 2020 tax return in May 2021. Mr. McDonnell stated that he reviewed the draft return and projections in May 2021.

Mr. McDonnell stated that, in late September/early October 2021, it became evident to him that he would not be able to timely file all of his clients' tax returns. As a result, Mr. McDonnell stated: "I developed a triage of the remaining tax returns to determine which tax returns I will complete for a timely file and which tax returns would be filed late based on the draft copies of the tax returns prepared by my staff." Mr. McDonnell stated that, because appellants' draft return and projections showed no additional tax due, and therefore, no late filing penalty or interest, he "decided that [appellants'] tax returns would be filed late so that [he] can get other tax returns that may have had a tax liability done first."<sup>3</sup> Mr. McDonnell also stated: "I did not communicate to [appellants] at this time that I would be filing their tax returns late...."

Mr. McDonnell stated that, after October 15, 2021, he started reviewing and finalizing the tax returns that were to be filed late, and he discovered two issues that resulted in significant additional taxes being due for appellants: sales of restricted stock, not properly accounted for by his staff, and differences in California and federal tax law with respect to Internal Revenue Code (IRC) section 179, relating to expensing certain depreciable assets. Mr. McDonnell stated that, on November 1, 2021, he completed the returns and sent them to appellants, and that this was the first time he communicated to appellants that their tax returns were being filed late. Mr. McDonnell stated that appellants signed e-file authorization forms, and the tax returns were then e-filed by his office.

Mr. McDonnell stated there is reasonable cause for the late filing for additional reasons, including that Massachusetts, where he is located, declared a state of emergency due to COVID-19, and issued orders that impacted his workplace, such as recommendations for remote

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<sup>2</sup> Mr. McDonnell also stated that appellants' income varied year to year.

<sup>3</sup> OTA notes that a late filing penalty may still be imposed even if there is no late payment of tax. (See R&TC, § 19131(b).)

access work environments and social distancing. Mr. McDonnell stated there were varying filing extension dates for both federal and state purposes due to COVID-19. Mr. McDonnell further stated that COVID-19 also caused difficulty in obtaining tax documentation such as Forms 1099.<sup>4</sup> Mr. McDonnell also stated there were many changes in tax law for the 2020 tax year which resulted in numerous questions from clients and significant time spent by him and his staff to attend training seminars.

FTB argues that there is no evidence that appellants attempted to verify the return was timely filed or that they took any corrective action when the due date for the return had passed. FTB argues that appellants have not provided evidence that certain necessary documents related to appellants' return were received late or resulted in the inability to timely file. FTB argues that Mr. McDonnell prioritized other clients' returns and chose not to file appellants' return timely because his projections showed appellants had no additional tax due.

As noted above, Mr. McDonnell determined that appellants would owe no additional tax, and therefore, decided that appellants' return would be filed late because he believed there would be no penalties or interest due. It is well-established that such circumstances are not sufficient to show reasonable cause. In *Jackson v. Commissioner* (10th Cir. 1989) 864 F.2d 1521, 1527, the advice of the accountant was essentially that the taxpayer "would owe no tax because of the losses he had incurred thus far in the venture, and therefore he would face no penalty for failing to file a timely return." However, the court stated: "We do not believe Congress intended for the penalty provisions supporting that self-assessment system to be circumvented by the mere reliance on an expert's opinion that no tax is due." (*Id.* at pp. 1527-1528.)

Similarly, in *Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 316, the court noted, in cases such as *Jackson v. Commissioner, supra*, 864 F.2d 1521, that:

[T]he expert did not tell the taxpayers that they were not required to file a return or give erroneous advice concerning the proper filing date. Instead, the expert told the taxpayers that no addition to tax would be owed even if a required return was not timely filed. In this situation, the taxpayers were not reasonable in failing to file because the expert upon whose advice they claimed to rely did not tell them that they did not have to file a return.

In the present appeal, the tax preparer prepared tax projections and a draft return which indicated that no additional tax would be due. The tax preparer then chose not to timely file

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<sup>4</sup> Mr. McDonnell stated that he does not know if appellants received a Form 1099 for the year at issue.

appellants' return because no additional tax was due and because of workload constraints. Appellants were not notified until November 1, 2021, that their return was being filed late. Therefore, while appellants may have been previously advised that no additional tax was due, the tax preparer never advised appellants that they were not required to file a return. These circumstances do not establish reasonable cause. (See *Jackson v. Commissioner, supra*, 864 F.2d at p. 1527.) As a result, appellants have not shown reasonable cause for failing to timely file based on the tax preparer's mistaken belief that no additional tax was due.

Appellants provide a variety of other arguments to show reasonable cause for the late filing, such as that there were difficulties in obtaining information, such as Forms 1099, and burdens imposed by COVID-19. However, appellants do not provide evidence to establish that such difficulties prevented the timely filing of the return, despite the exercise of ordinary business care and prudence. In addition, difficulty in obtaining information alone does not constitute reasonable cause for the late filing of a return. (*Appeal of Xie*, 2018-OTA-076P.) Appellants also argue that the late filing was due to mistakes resulting from the complexity of the tax issues involved in the return. However, it is well settled that general difficulties in making computations or determining taxable income with exactitude does not constitute reasonable cause for filing late. (*Ibid.*) Here, Mr. McDonnell's decision to file appellants' tax return late was due to workload issues and his inability to timely file of all his clients' returns timely, not due to specific issues with appellants' return such as missing information (e.g., Forms 1099) or difficulties in computing tax due to the complexity of the tax issues on appellants' returns.

Furthermore, there is no evidence that appellants attempted to communicate with the tax preparer regarding the timeliness of their return, or what, if any, other steps were taken to ensure their return was timely filed. For instance, Mr. McDonnell stated that there was no communication between him and appellants leading up to the filing date or after, and that it was not until November 1, 2021, that he told them the return would be untimely filed. Appellants have not shown that they exercised ordinary business care and prudence by taking steps to ensure that their return was timely filed.

In addition, it was not until November 1, 2021, that the tax preparer provided the return to appellants for discussion and appellants signed the e-file signature authorization form (FTB Form 8879) so that the return could be e-filed by the tax preparer. Mr. McDonnell also stated that he has been filing appellants' returns since 2004 and their California returns for five years.

As a result, the evidence shows that appellants were aware of Mr. McDonnell’s tax filing process and knew that the return had not been filed, as they had not yet seen the return, and had not yet been provided e-file signature authorization form which would allow Mr. McDonnell to e-file their 2020 California return. The failure of the tax preparer to present them with the return for signature or the e-file signature authorization form before the extended filing deadline put appellants on notice that their reliance on the tax preparer is not justified.<sup>5</sup> (See *U.S. v. Kroll* (7th Cir. 1977) 547 F.2d 393, 396.)

Finally, appellants assert that the penalty should be waived, pursuant to IRS Notice 2022-36, which waived taxpayer federal late filing penalties for 2019 and 2020 federal tax returns, including appellants’ federal late filing penalty. Appellants assert that IRS Notice 2022-36 was based on the IRS’s determination that reasonable cause exists for all taxpayers and tax preparers because of the COVID-19 pandemic. FTB counters that it does not have the authority to follow the notice because the notice does not abate the penalties based on reasonable cause, and FTB only has authority to abate penalties for reasonable cause.

Appellants note that FTB followed the IRS grant of postponements to pay tax and file returns for victims of severe winter storms, flooding, and mudslides in California in 2023.<sup>6</sup> Therefore, appellant argues, FTB relies on the IRS for the granting of postponements. However, the IRS granted its postponement related to severe winter storms, flooding, and mudslides pursuant to IRC section 7508A. And pursuant to R&TC section 18572(a), California conforms to IRC section 7508A, which relates to, as applicable to this discussion, postponement of federal deadlines due to federally declared disasters. Furthermore, FTB has authority to grant state of emergency postponements for tax-related acts under R&TC section 18572(b). (*Appeal of Bannon, supra.*)<sup>7</sup>

However, IRS Notice 2022-36 did not postpone the deadlines, but automatically abated the penalties. IRS Notice 2022-36 provides “relief for certain taxpayers from certain failure to file penalties...with respect to tax returns for taxable years 2019 and 2020 that are filed on or

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<sup>5</sup> Appellants do not contend that they were unaware of the extended filing due date.

<sup>6</sup> <https://www.irs.gov/newsroom/irs-announces-tax-relief-for-victims-of-severe-winter-storms-flooding-and-mudslides-in-california>; <https://www.ftb.ca.gov/file/when-to-file/Emergency-tax-relief.html>.

<sup>7</sup> R&TC section 18572 modifies IRC section 7508A to provide that postponements under this section apply to taxpayers affected by a state of emergency declared by the Governor of California, as opposed to a federally declared disaster. (*Appeal of Bannon, supra.*)

before September 30, 2022.” The relief provided by the notice “will allow the IRS to focus its resources more effectively, as well as provide relief to taxpayers affected by the COVID-19 pandemic.” The notice states: “The penalties listed in this section 3.A of this notice will be automatically abated...without any need for taxpayers to request this relief.”<sup>8</sup> Therefore, IRS Notice 2022-36 did not postpone the deadlines under IRC section 7805A. Accordingly, the automatic abatement of penalties under IRC Notice 2022-36 is not comparable to the postponements of deadlines due to severe winter storms, flooding, and mudslides.

FTB has not adopted the policies in Notice 2022-36, and has not issued any guidance or notices stating that it will grant a similar abatement of penalties. FTB provides its own guidance for 2020 returns, and that guidance does not provide the same penalty abatement provided by the IRS in IRS Notice 2022-36.<sup>9</sup> Therefore, IRS Notice 2022-36 is not applicable to this appeal.<sup>10</sup> Accordingly, appellants have not shown that the late filing penalty should be abated.

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<sup>8</sup> The Notice applies to IRC section 6651(a)(1), which is similar to R&TC section 19131, and generally imposes an addition to tax for a failure to file on or before the date prescribed.

<sup>9</sup> <https://www.ftb.ca.gov/about-ftb/newsroom/2020-tax-year-extension-to-file-and-pay-individual.html>

<sup>10</sup> Appellants also contend that the late filing penalty should be abated based on their history of timely filing. However, California law does not automatically abate late payment penalties based on a history of timely compliance. (See *Appeal of Xie, supra.*) Reasonable cause is generally required to abate the late filing penalty. (*Ibid.*) Although R&TC section 19132.5 authorizes first-time abatement of a late payment penalty for certain filers, that section applies only to tax years starting on and after January 1, 2022, and thus is not applicable in this appeal. (See R&TC, § 191325(f).)



HOLDING

The late filing penalty should not be abated.

DISPOSITION

FTB’s action in denying appellants’ claim for a refund is sustained.

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*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

We concur:

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*Josh Aldrich*  
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Josh Aldrich  
Administrative Law Judge

DocuSigned by:  
*Eddy Y.H. Lam*  
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Eddy Y.H. Lam  
Administrative Law Judge

Date Issued: 8/23/2023