

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 220810994
G. BOEHM AND)
S. CLARE)
_____)

OPINION

Representing the Parties:

For Appellants: John J. Rhind, CPA
G. Boehm
S. Clare

For Respondent: Matthew Miller, Tax Counsel IV
Brad Coutinho, Tax Counsel IV

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, G. Boehm and S. Clare (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$68,003.93 for the 2020 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Veronica I. Long, John O. Johnson, and Cheryl L. Akin held a virtual 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 appellants have established reasonable cause for the late payment of tax.

FACTUAL FINDINGS

1. Appellants timely filed a California Resident Income Tax Return for the 2020 tax year on October 14, 2021, and reported tax due of \$911,719 and self-assessed penalties and interest of \$82,673. Appellants paid the balance due on the date of filing.
2. FTB processed appellants’ return and reduced the self-assessed late-payment penalty and interest amounts to \$68,003.93 and \$11,247.46, respectively, for a total revised penalty

and interest of \$79,251.69.¹ Accordingly, FTB imposed a late-payment penalty of \$68,003.93, issued a Notice of Tax Return Change, and refunded appellants for their overpayment.

3. Appellants filed a claim for refund requesting abatement of the late-payment penalty. FTB denied the claim for refund on the basis that appellants did not establish reasonable cause for the late payment.
4. This timely appeal followed. On appeal, appellants submit copies of emails between them and their return preparer from March 11, 2021, through October 12, 2021, showing that they were in regular contact with their return preparer during this period. The emails also show communication between appellants and appellant-husband's partnership, and show that appellants inquired with the partnership to determine when tax forms would be available to enable him to determine his share of taxable income from the partnership.

DISCUSSION

California imposes a penalty for when a taxpayer fails to pay the amount of tax shown as due on the return on or before the due date of the return. (R&TC, § 19132.) 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.*) The late-payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (R&TC § 19132(a).) 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 (*Moren*).) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

The determination of whether reasonable cause exists for the late payment requires an analysis of appellants' actions leading up to the late payment, the timing of those actions, and

¹ It appears that appellants underreported their estimated tax payments by \$5,000.00 on their return. FTB gave appellants credit for this additional timely payment of \$5,000.00, reduced the late-payment penalty and interest accordingly, and refunded \$8,421.61 (the \$5,000.00 underreported estimated tax payment plus the \$3,421.61 total reduction to the self-assessed penalty and interest) to appellants on November 9, 2021.

whether they reflect ordinary business care and prudence, such as ordinarily intelligent and prudent businesspersons would have performed under similar circumstances. (*Moren, supra.*) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.)

While appellants' return was timely filed, appellants' payment was due by the postponed due date of May 17, 2021.² Appellants contend they exercised ordinary business care and prudence in meeting their tax obligations, and that this is their first time filing their return late. Appellants testified at the hearing and stated that appellant-husband became extraordinarily busy with work due to the COVID-19 pandemic, and appellant-wife was caring for ill family members and engaged in homeschooling appellants' children. An email provided by appellants dated April 6, 2021, shows that appellants asked their return preparer when they could expect their 2020 estimated tax amounts to be finalized. The return preparer responded to appellants the same day, indicating that the estimates were done and asking appellants if they could meet to go over them at appellants' convenience. It appears that appellants believed that they or their return preparer paid the tax timely for them before the original payment deadline. However, the tax was not timely paid, and appellants did not realize that they had failed to timely pay the tax due until October 14, 2021, when they filed their 2020 income tax return and paid the tax due.

In *Moren, supra*, OTA abated the late-payment penalty because the taxpayer established that he acted in the manner of an ordinarily intelligent and prudent businessperson. In that case, the taxpayer learned the day before the tax payment deadline that he had a potential tax obligation as the result of being a beneficiary of an estate. The taxpayer promptly asked for details of the tax obligation and repeatedly attempted to obtain the tax information from the estate's return preparer, but he received no response. The taxpayer used the best-available information to prepare a return and pay tax in a matter of weeks. In that case, OTA determined the taxpayer's efforts to acquire the necessary tax information and determine the tax liability, despite the nonresponsive nature of a third party in control of that tax information, demonstrated that the taxpayer acted in the manner of an ordinarily intelligent and prudence businessperson.

While OTA is sympathetic with appellants' circumstances, appellants' actions are distinguishable from the taxpayer in *Moren, supra*. In this case, appellants were aware of their

² In response to COVID-19, FTB postponed the due dates, for individuals, for payments to May 17, 2021. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

tax obligation far in advance of the payment due date. Appellants' return preparer had the information necessary to advise appellants on the amount of their estimated payment in advance of the tax due date, as demonstrated by appellants' April 6, 2021 email. Unlike the taxpayer in *Moren*, who made continuous efforts to determine and pay the necessary tax, and who paid the tax in a matter of weeks, appellants and their return preparer in this case failed to timely pay the tax due as an oversight and did not pay the tax until approximately five months after the due date.

To the extent that appellants assert that they relied on their return preparer to timely remit the tax payment to FTB, it is clear that each taxpayer has a non-delegable obligation to ensure statutory deadlines, such as the payment deadline in R&TC section 19001, are met. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252; *Appeal of Rougeau*, 2021-OTA-335P.) Reliance on an agent to perform this act does not constitute reasonable cause. (*Appeal of Rougeau, supra.*) Appellants' failure to timely remit the tax due by the May 17, 2021 payment due date, due to an oversight (whether theirs or their return preparer's) is not reasonable cause for the late payment of tax. (*Appeal of Friedman, supra.*)

While OTA understands appellants had challenging personal circumstances and business affairs to attend to during the time the payment at issue was due, the law provides that where "difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice." (*Appeal of Triple Crown*, 2019-OTA-025P). Accordingly, tending to other personal and professional matters does not constitute reasonable cause for an oversight when it came to timely paying tax appellants knew to be due by a deadline.³

³ Regarding appellants' history of tax compliance, OTA notes that for the taxable year at issue, California did not have a first-time abatement program like the IRS administers. Beginning with taxable year 2022, California has adopted a first-time abatement program, by statute. (R&TC, § 19132.5.) However, the statute does not apply retroactively such that appellants' late-payment penalty may be abated.

HOLDING

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

DISPOSITION

FTB’s denial of the claim for refund is sustained.

DocuSigned by:
Veronica I. Long
32D46B0C49C949F...
Veronica I. Long
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:
Cheryl Akin
1A8C8E38740B4D5...
Cheryl L. Akin
Administrative Law Judge

Date Issued: 8/8/2023