

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
R. LOEB

) OTA Case No. 230212552
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OPINION

Representing the Parties:

For Appellant: R. Loeb

For Respondent: Eric R. Brown, Attorney

For Office of Tax Appeals: Sean Erdman, Graduate Student Assistant

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, R. Loeb (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$3,771.08 for the 2020 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.05.) Office of Tax Appeals (OTA) Administrative Law Judge Josh Lambert held an oral hearing for this matter electronically on February 22, 2024. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUE

Whether appellant has established reasonable cause for the late payment of tax for the 2020 tax year.

FACTUAL FINDINGS

1. On September 28, 2021, appellant filed a California resident income tax return for the 2020 tax year, reporting total tax of \$105,707, California withholdings of \$55,426, and tax due of \$50,281, which he remitted with the return.

2. On October 19, 2021, FTB issued to appellant a Notice of Tax Return Change - Revised Balance, which imposed a late payment penalty of \$3,771.08, plus interest.¹
3. Appellant paid the amount due. Subsequently, appellant filed a claim for refund for the late payment penalty, which FTB denied.
4. This timely appeal followed.

DISCUSSION

R&TC section 19132 imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (determined without regard to any extension of time for filing). (R&TC, § 19001.) FTB properly imposed the late payment penalty because appellant was required to pay his 2020 tax by May 17, 2021, and appellant did not satisfy his tax liability until September 28, 2021.²

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) 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.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

Each taxpayer has a personal, non-delegable duty to timely pay the amount of tax due. (*Appeal of Fisher*, 2022-OTA-337P; see also *U.S. v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*).)³ A taxpayer's reliance on a tax preparer or agent to timely pay tax does not constitute reasonable cause. (See *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P; see also *Boyle*, *supra*, 469 U.S. at pp. 249-251.) However, reasonable cause may be found when a taxpayer

¹ Appellant made a tax payment to the IRS on May 12, 2021, that did not satisfy his federal tax liability by the federal due date. The IRS imposed a federal late payment penalty, which was abated as part of the federal first time abate program based on appellant's good filing history.

² In response to COVID-19, FTB postponed the due dates for individuals for returns and 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>.)

³ This Opinion cites to various cases involving reasonable cause in the context of the late filing penalty; however, the same standards for reasonable cause are equally applicable to the late payment penalty.

relies on substantive advice from an accountant or attorney on a matter of tax law, such as whether a liability exists. (*Boyle, supra*, 469 U.S. at p. 251.) To establish that reasonable cause exists under *Boyle*, a taxpayer must show reasonable reliance 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 the relevant facts and documents. (*Appeal of Summit Hosting LLC*, 2021-OTA-216P.) 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.) In *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860, the Board of Equalization, OTA's predecessor stated that, because "all of the issues requiring a legal opinion were resolved" and the calculation of gain was a "simple computational problem, not a legal interpretation," the taxpayer had not shown reasonable cause based on advice received from a tax professional.

Appellant argues that there is reasonable cause for the late payment of tax. Appellant testified at the hearing that he retained a California CPA to prepare and file his federal and California tax returns. Appellant provided a receipt dated May 5, 2021 (before the tax payment due date), for retaining the services from the CPA located in California. Appellant stated that when he first met the CPA, he provided requested tax documents and discussed the complexity of his returns, and that the CPA provided him forms to submit additional payments owed to the IRS. Appellant also provided emails that he sent to the CPA indicating that paperwork was provided to the CPA. Appellant asserts in his briefing that the CPA told him he would receive a California refund for \$8,000 and provided an email he sent to the CPA on September 29, 2021, stating that the CPA previously told him that he would be owed a refund.⁴

Appellant testified that the CPA did not respond for several months, despite appellant's attempts at communication, and that appellant was unaware that the 2020 returns were not filed. Appellant also provided emails demonstrating numerous attempts to receive updates on the status

⁴ Appellant states that he met with the CPA, who advised him as to the federal payment and California refund, and that the advice was given before the May 17, 2021 deadline for California tax payments. There is no evidence in the record establishing the date any advice was given by the CPA as to a California refund. However, appellant's payment to the IRS was made on May 12, 2021. Therefore, if the CPA advised appellant as to both the federal payment and California refund at the same meeting as appellant asserts, and the federal payment was made before the California tax due date, then it appears any advice as to a California refund was given prior to the California tax due date.

of his 2020 returns from the CPA. Appellant stated that he eventually prepared and filed his own 2020 returns. Appellant asserted that he has no tax law background and that he does not know the reason for the error made by the CPA that resulted in appellant owing tax instead of being owed a refund from FTB. Appellant argued that, given the difference between the tax liability determined by his CPA and the actual tax liability, it is reasonable to conclude that the CPA's mistake was not based on a simple calculation, but rather on a misapplication of tax law.

The record indicates that the California CPA was competent in the subject tax law and was provided the relevant facts and documents. However, the record does not include evidence showing that appellant received advice based on a substantive issue of tax law. At the hearing, appellant stated that he did not know what errors were made by the CPA in advising him of the tax liability. Therefore, without more evidence, OTA cannot determine whether the advice was based on a substantive tax issue or a mistake based on a simple computation of tax. (See *Appeal of Berolzheimer, supra.*) Therefore, there is no basis here to determine whether any tax advice appellant received from the CPA was substantive, which is necessary to find reasonable cause based on advice of a tax professional. (*Ibid.*; *Appeal of Summit Hosting LLC, supra.*) As a result, appellant has not shown reasonable cause for failing to timely pay based on reliance on the advice of his CPA.⁵

⁵Appellant's federal late payment penalty was abated as part of the federal first time abate program based on appellant's good filing history. For the 2020 tax year, California did not have a first-time abatement program. R&TC section 19132.5 authorizes a first-time abatement of a late filing penalty for certain filers; however, that section only applies to tax years beginning on or after January 1, 2022, and thus is not applicable here.

HOLDING

Appellant has not established reasonable cause for the late payment of tax for the 2020 tax year.

DISPOSITION

FTB's action is sustained.

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Josh Lambert
Administrative Law Judge

Date Issued: 4/29/2024