



\$237,000, respectively. Appellants also made an extension payment on May 17, 2021, of \$50,000.

2. Appellants timely filed a California Resident Income Tax Return for the 2020 tax year on October 15, 2021, reporting tax of \$438,462 and payments of \$344,258.<sup>1</sup> Appellants untimely submitted the balance due on the date of filing.
3. FTB processed appellants' return and issued a State Income Tax Balance Due Notice that assessed a late-payment penalty of \$7,065.30 and an estimated tax penalty of \$742.
4. Appellants paid the balance due and filed a claim for refund requesting abatement of the late-payment and estimated tax penalties.
5. FTB denied the claim for refund.
6. This timely appeal followed.
7. On appeal, appellant Goldman testified at the hearing that during 2020:
  - He was a junior limited partner in Bluefin Holdings II, LP (Bluefin), a financial investment firm;
  - He received a small amount of base pay for which he received a W-2 annually, but the majority of his income was investment income from Bluefin and a guaranteed payment based on his trading unit's performance, which changed every year;
  - Bluefin was primarily focused on the derivatives market, had international offices, received foreign income, and invested in mixed straddles;
  - Because of Bluefin's complex investments, the computation of appellant Goldman's income was complicated, he was unable to compute his tax liability himself, and he had difficulty in finding an accounting firm willing to prepare his returns because of the complex nature of Bluefin's investments;
  - Appellants employed the services of NDH CPA (NDH), an accounting firm, to prepare their tax returns;
  - He did not have access to Bluefin's tax information until receiving his 2020 tax year Schedule K-1 in September 2021, which was after the May 17, 2021 payment due date for the 2020 tax year. However, Bluefin annually provided its stakeholders with tentative figures to assist them in determining their tax liability, which he

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<sup>1</sup> In addition to the 2020 tax year payments noted above, an estimated payment of \$12,591 from appellants' 2019 tax year was transferred to the 2020 year and appellants also had wage withholding of \$8,667.

received for the 2020 tax year on or around April 10, 2021, which was before the May 17, 2021 payment due date for the 2020 tax year;

- He provided NDH with the tentative figures from Bluefin and based on that information, NDH provided appellant Goldman with an estimate of his 2020 tax liability;
- He reviewed NDH's estimate, determined that it seemed similar to previous years' estimates, and relied on the estimate and made payments to FTB based on it;
- His final 2020 tax year Schedule K-1 differed slightly from the estimated numbers previously provided by Bluefin; and
- A late-payment penalty was imposed by the IRS; however, appellants received first-time penalty abatement from the IRS.

8. On appeal, Jeremy Dubow of NDH, appellants' tax preparer, also testified at the hearing that:

- NDH provided appellant Goldman with an estimate of his 2020 tax liability based on the information provided by Bluefin;
- This estimate included a 5 to 10 percent overpayment "cushion";
- NDH made "computational errors" in preparing the estimate;
- Bluefin's final 2020 tax year Schedule K-1 differed slightly from the tentative information it provided to appellant Goldman in April 2021; and
- The "majority of the difference" between NDH's estimate and appellants' actual tax liability was "the result of a computational error."

### DISCUSSION

Issue 1: Whether appellants have established reasonable cause to abate the late-payment penalty.

California imposes a penalty 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.*)

To establish reasonable cause, the 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 Scanlon*, 2018-OTA-075P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

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 whether they reflect ordinary business care and prudence, such as ordinarily intelligent and prudent businesspersons would have performed under similar circumstances. (*Appeal of Moren*, 2019-OTA-176P.) 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.)

Here, appellants untimely paid the balance of the tax due for the 2020 tax year on October 15, 2021, after the payment due date on May 17, 2021.<sup>2</sup> FTB thus properly imposed the late-payment penalty and appellants do not dispute the calculation of the penalty for the 2020 tax year. Rather, appellants assert that there is reasonable cause to abate the late-payment penalty because they contend that they exercised ordinary business care and prudence in meeting their tax obligations by relying on their tax preparer's estimate of their 2020 tax liability. Appellants also contend that this is their first time paying their taxes late and they should be eligible for a first-time penalty abatement.<sup>3</sup>

During the hearing, appellant Goldman testified that his income varies annually and is largely from derivatives, mixed straddles, and other income sources, the tax calculations of which are complex. Appellant Goldman testified that his 2020 tax year Schedule K-1, which included most of his income, was not available until September 2021, after the May 17, 2021 payment due date. Due to the nature of the complex computation and the delayed availability of Bluefin's Schedule K-1, Mr. Dubow, appellants' CPA and representative in this appeal,

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<sup>2</sup> In response to COVID-19, FTB postponed the 2020 tax year 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>.)

<sup>3</sup> Although R&TC section 19132.5 authorizes a first-time abatement for the late payment penalty imposed under R&TC section 19132 under certain circumstances, that section only applies to tax years beginning on or after January 1, 2022, and thus is not applicable here.

estimated their tax obligation with a small “cushion” to enable appellants to make estimate payments in excess of their tax liability by the May 2021 payment due date.

During the hearing, Mr. Dubow testified that for 2020, his accounting firm, NDH, prepared an estimate of appellants’ 2020 tax year liability to enable appellants to make a timely payment of the correct amount. Appellants’ 2020 FTB payment ledger reflects a payment of \$50,000 on May 17, 2021, corroborating appellants’ reliance on NDH’s estimate. Mr. Dubow stated that NDH’s estimate was based on initial figures provided by Bluefin to appellant Goldman, which was then provided to NDH. Mr. Dubow stated that while the initial data differed slightly from the final 2020 tax year Schedule K-1, NDH itself had made a computational error and miscalculated appellants’ estimated tax liability. Mr. Dubow further stated that the majority of appellants’ underpayment of tax was due to NDH’s error.

It is well settled that a taxpayer’s failure to make a timely payment or file a return is not excused by the taxpayer’s reliance on a tax preparer because a taxpayer has a personal, non-delegable obligation to meet statutory deadlines. (See *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*); see also *Appeal of Rougeau*, 2021-OTA-335P [applying *Boyle*, a case involving a late-filing penalty, to the late-payment penalty].)

In *Boyle*, the U.S. 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 *Appeal of Summit Hosting LLC*, 2021-OTA-216P, 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.)

In *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860 (*Berolzheimer*), OTA's predecessor, the Board of Equalization (BOE), considered the application of *Boyle* where a taxpayer's underpayment of tax arose from the erroneous estimation made by their agent.<sup>4</sup> In that case, BOE reasoned that the question was whether the taxpayer's agent was advising them on a matter of tax law when the agent incorrectly estimated the taxpayer's tax liability. In that case, the income source was the sale of assets and there was no issue requiring a legal opinion to resolve. BOE observed that "[w]hile the federal law may have been complex and in flux, California's law was simple and straightforward," requiring only a simple computation of tax due on the gain at a rate of 65 percent. (*Berolzheimer, supra.*) Since this was a simple computation, BOE concluded that the taxpayers could not "hide behind an 'expert' for the failure to properly determine the tax that was due." (*Ibid.*) BOE further stated that even if the issue did require an expert legal opinion, the taxpayers had not shown that their agent, a New York law firm, had expertise in California tax law.

In *Knappe v. U.S.* (9th Cir. 2013) 713 F.3d 1164 (*Knappe*), the Ninth Circuit Court of Appeals considered the application of *Boyle* to the late-filing penalty imposed by the IRS. In *Knappe*, the Court distinguished between two types of cases: those in which a taxpayer delegated a task to an expert agent who failed to timely complete the task, and those in which a taxpayer relied on an expert agent's erroneous advice. As applied to the late-filing penalty, cases on this second category "stand for the principle that the question of whether a return is due is a matter of substantive tax law, and that taxpayer acts within ordinary business care and prudence when he [or she] relies on an expert's answer to that question." (*Knappe, supra*, at p. 1170.) The court stated that *Boyle* had drawn "a sharp distinction between substantive advice on tax law, on which [taxpayers] may reasonably rely, and non-substantive advice, on which [taxpayers] may not rely." (*Id.* at p. 1171.) This is because "[w]hen an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney." (*Ibid.* (emphasis in original), citing *Boyle, supra*, at pp. 251-52.)

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<sup>4</sup> Precedential decisions from BOE may be relied upon by OTA unless removed as precedent. (Cal. Code Regs., tit. 18, § 30504.)

Accordingly, the question of whether a taxpayer's reliance on an expert agent's opinion can constitute reasonable cause for abatement of the late-payment penalty turns on whether the agent has provided the taxpayer with advice in a matter of substantive tax law. In contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute.

In this case, appellants relied on their CPA's tax advice regarding the computation of a complex tax liability, and their CPA stated that there were "computational errors" in the estimated tax liability prepared by his firm. Critically, it is unclear whether the mistake involved a simple computational error, which does not constitute reasonable cause for abatement of the late-payment penalty, or whether the mistake may have involved a matter of substantive tax law, which can constitute reasonable cause to abate the penalty. Based on the testimony of appellants' CPA, it appears that the error was likely a simple computational error. Accordingly, appellants have not demonstrated that they relied on their CPA for substantive tax advice and the late-payment penalty cannot be abated.

Issue 2: Whether appellants have established a basis to abate the estimated tax penalty.

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes an addition to tax, which is treated and often referred to as a penalty, where taxpayers fail to timely pay estimated tax.<sup>5</sup> The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpaid estimated tax. (See IRC, § 6654(a); R&TC, § 19136(b); *Appeal of Johnson*, 2018-OTA-119P.) IRC section 6654(e)(3) provides limited exceptions to the imposition of the penalty if either of the following conditions are satisfied: (1) "by reason of casualty, disaster, or other unusual circumstances the imposition of [the penalty] would be against equity and good conscience"; or (2) the underpayment was due to reasonable cause and not willful neglect, and the taxpayer retired at the age of 62 or older in the year at issue or the prior year, or, alternatively, the taxpayer became disabled in the tax year for which the estimated tax payments were required to be made or in the preceding tax year.

Appellants do not dispute the calculation of the estimated tax penalty imposed for the 2020 tax year. Instead, appellants contend that the estimated tax penalty should be abated for the

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<sup>5</sup> Where estimated tax payments are due, R&TC section 19136.1(a)(2) generally requires, for California income tax purposes, that the payments be made in installments on or prior to April 15 and June 15 of the applicable tax year, and January 15 of the subsequent tax year. For federal income tax purposes, an additional installment is also due by September 15 of the applicable tax year. (IRC, § 6654.)

same reasons provided for abatement of the late-payment penalty. However, as noted above, the estimated penalty may not be abated based solely on a finding of reasonable cause. (*Appeal of Johnson, supra.*) Appellants offered no other argument or evidence to support their failure to make timely estimated tax payments for the 2020 tax year. The burden is on appellants,<sup>6</sup> and they have not demonstrated that they are entitled to the relief provided by IRC section 6654(e)(3). Therefore, appellants have not shown that the estimated tax penalty for the 2020 tax year should be abated.

HOLDINGS

1. Appellants have not established reasonable cause to abate the late-payment penalty.
2. Appellants have not established a basis to abate the estimated tax penalty.

DISPOSITION

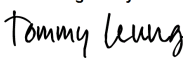
FTB’s action denying appellants’ claim for refund is sustained.

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Veronica I. Long  
 Administrative Law Judge

We concur:

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Tommy Leung  
 Administrative Law Judge

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Kenneth Gast  
 Administrative Law Judge

Date Issued: 4/30/2024

<sup>6</sup> *Appeal of Saltzman*, 2019-OTA-070P.