

FACTUAL FINDINGS

1. Appellant did not file a timely 2018 California income tax return.
2. Appellant hired a CPA to prepare and file his 2019 return. On April 16, 2019, appellant received an email from his CPA asking him to review and sign a “2018 CA Individual Income Tax Declaration for eFiling” and, in a separate email, a message stating, “We have completed your 2018 Personal tax return.” However, FTB did not receive appellant’s 2018 California income tax return on that day.
3. When FTB did not receive appellant’s 2018 return, FTB issued a notice dated August 18, 2020, requesting appellant file his return.
4. On October 18, 2020, appellant filed his 2018 return. With his return, appellant remitted a payment for the tax due. Appellant also requested abatement of the late filing penalty.
5. FTB issued an Income Tax Due Notice dated December 28, 2020, showing appellant was still liable for the late filing penalty in the amount of \$3,265.25. When appellant did not respond, FTB initiated collection action.
6. After appellant’s balance was fully paid, appellant submitted a claim for refund dated October 3, 2022, for the late filing penalty.
7. FTB denied appellant’s claim for refund in a letter dated January 30, 2023.
8. Appellant filed a timely appeal. On appeal, appellant argues he was a victim of a fraudulent tax preparer.

DISCUSSION

FTB imposes a late filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date, unless it is shown that the failure was due to reasonable cause and not willful neglect. (R&TC, § 19131(a).) To establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) Here, appellant does not dispute the late filing and does not dispute the calculation of the penalty.

Rather, appellant argues reasonable cause existed to excuse the late filing of his 2018 California income tax return. The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the late filing penalty. (*Appeal of Xie, supra.*) To overcome the presumption of correctness that attaches to the penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*)

Appellant argues he was the victim of fraud and relied on a fraudulent preparer to file his return. The record shows appellant hired the CPA to prepare and file his 2018 California income tax return, and the record shows the preparer confirmed it had completed the return despite not having done so. However, appellant's reliance on his preparer, even if the preparer was fraudulent, does not constitute reasonable cause.

Every taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*U.S. v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*)). Indeed "one does not need to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due." (*Ibid.*) This means that a taxpayer cannot rely upon an agent to escape responsibility for failing to timely file a return.

This is true even in instances where a taxpayer acted prudently in dealing with an agent that committed some type of fraud. (See, e.g., *Kimdun Inc. v. U.S.* (C.D. Cal. 2016) 202 F.Supp.3d 1136, 1144 – 1146 [reliance on payroll service to make payments¹ insufficient to establish reasonable cause under *Boyle*, despite a third-party payroll service's embezzlement of money that was intended to pay the employment tax obligations]; *Conklin Bros. of Santa Rosa Inc. v. U.S.* (9th Cir. 1993) 986 F.2d 315 [reliance on taxpayer's controller to make payments was insufficient to establish reasonable cause, despite the controller's alleged intentional concealment of her failure to make timely payroll tax payments].)² Thus, appellant's reliance on his tax preparer to timely file his 2018 California income tax return is not consistent with ordinary business care and prudence. Appellant has not shown he exercised business care and

¹ The penalties for late filing and late payment are treated similarly when it comes to the reasonable cause analysis. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

² Because the relevant language of R&TC section 19132 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts' interpretation of the "reasonable cause" standard is persuasive authority in determining the proper construction of this California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

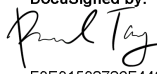
prudence, such as taking steps to ensure his return was properly filed. For these reasons, OTA finds appellant has not shown reasonable cause. Appellant may be entitled to some recompense for his tax preparer's alleged fraud; however, OTA is unable to provide any such remedy.

HOLDING

Appellant has not established reasonable cause to abate the late filing penalty for the 2018 tax year.

DISPOSITION

FTB's denial of appellant's claim for refund is sustained.

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Richard Tay
Administrative Law Judge

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