

- schedule); and (2) a schedule titled “Estimated State Taxable Income and State Withholding/Composite Tax Payments for Extension Purposes” (estimated state income schedule).
- a. The estimated federal income schedule includes estimated federal income information and K-1 footnote disclosures based on appellant G. Gilbert’s ownership share in Rock Holdings.
 - b. Column one of the estimated state income schedule lists appellant G. Gilbert’s estimated state taxable income or loss for 40 states. For California, column one estimates appellant G. Gilbert’s taxable income attributable to Rocket Holdings to be \$3,674,786.
 - c. Column two of the estimated state income schedule records appellant G. Gilbert’s estimated payments towards 2020 composite and/or non-resident withholding tax liability for each of the listed states. There is no amount listed for California, instead column two notes that appellant G. Gilbert is a resident of this state.
3. Prior to filing their joint California Resident Income Tax Return for the 2020 tax year (return), appellants made payments totaling \$1,537,883 during the period July 15, 2020, through May 17, 2021.¹
4. To calculate the extension payment, appellants’ CPA prepared a draft version of appellants’ federal and California income tax returns.² The draft California return shows appellants’ estimated federal adjusted gross income (AGI),³ which was then reduced by California adjustments of \$48,346,633. The draft return also shows an estimated tax liability of \$3,581,851, which was then reduced by an other state tax credit, resulting in a projected total tax of \$1,468,465.⁴ After application of appellants’ July 15, 2020, and September 15, 2020 estimated payments, the draft return showed a tax balance of \$347,922. The draft return also shows a self-assessed estimated tax penalty \$1,484. As noted above, appellants made a payment of \$400,000.

¹ In response to the COVID-19 pandemic, FTB postponed the due date to make payments of tax from April 15, 2021, 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>.)

² On appeal, appellant provided a copy of the draft returns. In addition to the above-mentioned returns, appellants also provided draft returns for the States of Illinois, Michigan, Nebraska, New York, Ohio, South Carolina, and Utah.

³ Appellants’ estimated federal AGI is calculated in the draft federal return.

⁴ This amount includes an increase for the mental health services tax.

5. On October 15, 2020, appellants filed a timely California Resident Income Tax return within the extension period. On the return, appellants reported a tax liability of \$9,511,219, which after applying an other state tax credit and the mental health services tax, resulted in a reported total tax of \$7,051,374. After subtracting appellants' estimated tax and extension payments totaling \$1,537,883, appellants calculated a tax liability of \$5,513,491. Appellants also self-assessed an underpayment of estimated tax penalty and interest. Appellants made a payment upon filing the return, which satisfied the reported amount due.
6. On November 5, 2021, FTB issued appellants a State Income Tax Balance Due Notice, which, as relevant here, imposed a late payment penalty, plus additional interest. Appellants made payments of \$397.91 on November 18, 2021, and \$417,660.06 on April 22, 2022, which satisfied the balance due.
7. Appellants filed a claim for refund requesting abatement of the late payment penalty, which FTB denied.
8. This timely appeal followed.
9. At the oral hearing, appellants' CPA D. Hirsch testified that:
 - a. Mr. Hirsch became a CPA in 1980. Mr. Hirsch is not licensed as a CPA in California, but, as part of his practice, he works with individual and business clients from California, including appellants. Mr. Hirsch has prepared California income tax returns for at least 15 years.
 - b. Appellants have been clients of Mr. Hirsch's accounting firm since approximately 2008. Appellants provided Mr. Hirsch with all the necessary information to make an accurate estimate of tax for the 2020 tax year.
 - c. When asked whether Mr. Hirsch was "generally aware that a California resident" would be taxed on all of their income, less credits and other adjustments, Mr. Hirsch stated, "that is correct."⁵ Mr. Hirsch also stated that in California "all source income is reported" and credits are received for taxes paid in other jurisdictions, and thus an understanding of substantive tax law is required to make a determination of appellants' tax liability.
 - d. When asked to "verbalize what advice was asked with respect to substantive California tax law," Mr. Hirsch stated, "[t]o prepare an accurate extension payment, a calculation."

⁵ Mr. Hirsch also indicated that he held this knowledge "for many, many years."

- e. With respect to the extension payment, Mr. Hirsch explained that he prepared a draft return using information from the April 6 letter and other tax documents to project appellants' total income. Mr. Hirsch then "subtracted out from the income" to include only the California source income of \$3,674,786, as shown on the estimated state income schedule. When asked, "why did you do that?" Mr. Hirsch stated that he "surmised that would have been the taxable income in the State of California." Based on the draft return, Mr. Hirsch recommended that appellants make an extension payment of \$350,000.⁶ Mr. Hirsch acknowledged that the draft return contained "a mistake in the calculation."
10. Appellant G. Gilbert also testified at the oral hearing. Appellant G. Gilbert's testimony included the following information:
- a. Mr. Hirsch handled appellants' tax matters including the calculation of estimated payments for approximately 17 years.
 - b. Each year, appellants and their investment manager, B. Divney, would compile appellants' tax information and provide it to Mr. Hirsch. Appellant G. Gilbert stated that prior to 2020 there had never been a problem with their tax return.
 - c. For 2020, appellants' estimated tax liability from the draft return was approximately 50 percent more than their prior year tax liability in California, and appellants had no reason to believe the extension payment amount was incorrect.
 - d. Due to the length and complexity of their return, appellants did not have the ability to calculate their own tax liability for the 2020 tax year.

DISCUSSION

California imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on their tax return on or before the date prescribed for the payment of tax. (R&TC, § 19132.) Generally, the date prescribed for the payment of tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) The late payment penalty may be abated if the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, §19132(a)(1).) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the taxpayer has the burden of proving that reasonable cause exists to support abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

⁶ Appellants later provided testimony from investment manager B. Divney that appellants paid more than the recommended amount to provide a "cushion." There is no dispute that appellants made a payment of \$400,000.

To establish reasonable cause for the late payment of tax, 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 Moren*, 2019-OTA-176P.)

On appeal, there is no dispute that appellants failed to make a timely payment of tax by the due date of May 17, 2021. Accordingly, FTB properly imposed the late payment penalty. However, appellants assert that reasonable cause exists for the late payment. Appellants argue that they reasonably relied on their CPA's substantive tax advice to make an extension payment. Appellants assert that despite their CPA's expertise, the calculated extension payment was insufficient to cover their tax liability. In this instance, appellants assert that the calculation of their tax liability is a question of substantive tax law because it requires an analysis of nearly every state's income tax codes; appellants assert, "[t]here can be no calculation without the determination of the legal issue of what is taxable in the State of California."

Reasonable cause may be established when a taxpayer shows reasonable reliance on the advice of an accountant or attorney on a matter of substantive tax law, such as whether a liability exists. (*U.S. v. Boyle* (1985) 469 U.S. 241, 250-251 (*Boyle*)). To establish that reasonable cause exists under *Boyle*, a taxpayer must show that he or she reasonably relied 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-198P.) 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.) Furthermore, a question of law does not arise by the mere fact that a 'tax expert' completes a taxpayer's return. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860 (*Berolzheimer*))

In *Berolzheimer, supra*, OTA's predecessor, the Board of Equalization (BOE), considered the application of *Boyle* where a taxpayer's underpayment of tax arose from an erroneous estimation made by the taxpayer's agent.⁷ 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. (*Appeal of Berolzheimer, supra*.) In *Berolzheimer*, BOE noted that the income source was the sale of assets and there was no issue

⁷ Precedential decisions from BOE may be relied upon by OTA unless removed as precedent. (Cal. Code Regs., tit. 18, § 30504.)

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. (*Ibid.*) 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.*)

Here, Mr. Hirsch testified that he has been a CPA for over 40 years. Mr. Hirsch testified that he was asked “[t]o prepare an accurate extension payment, a calculation,” and that he had all of the necessary information to make the calculation. Regarding the substantive tax law, Mr. Hirsch confirmed that he was “generally aware that a California resident” would be taxed on all of their income less credits (including credits for tax paid to other states) and other adjustments. This awareness generally reconciles with R&TC section 17041 which imposes “upon the entire taxable income of every resident of this state” and R&TC section 18001, which in certain instances allows a credit for taxes paid to other states. As such, there was no legal question as to whether appellants would be taxed on all of their income. There is also no evidence that Mr. Hirsch advised appellants otherwise.

Despite the simple and straightforward nature of R&TC section 17041, Mr. Hirsch prepared a draft California return, which did not calculate the estimated tax liability based upon appellants’ entire income. Instead, the draft California return excluded all non-California source income from appellants’ total income for California purposes.⁸ This is an error which Mr. Hirsch confirmed to be “a mistake in the calculation.” OTA agrees that the erroneous reduction of appellants’ taxable income to exclude non-California source income is a mistake in the calculation, or a simple computation error. That appellants’ return was otherwise lengthy and complicated does not change this fact. Accordingly, appellants have not demonstrated that they relied on their CPA for substantive tax advice and thus have not shown reasonable cause exists for their late payment. Accordingly, OTA finds no basis to abate the late payment penalty.

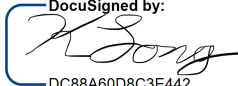
⁸ This reduction does not appear to have any relation to the other state tax credit, which the draft return calculates separately.

HOLDING

Appellants have not established reasonable cause for the late payment of tax for the 2020 tax year.

DISPOSITION

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

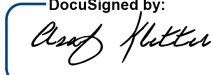
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Keith T. Long
Administrative Law Judge

We concur:
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Steven Kim
Administrative Law Judge

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Asaf Kletter
Administrative Law Judge

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