

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 231214914
	)	
B. SAFDEYE AND	)	
D. ASHEAR	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants:	Eli Mendlowitz, CPA
-----------------	---------------------

For Respondent:	Tristen Thalhuber, Attorney
-----------------	-----------------------------

G. TURNER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, B. Safdeye and D. Ashear (appellants) appeal an action by the Franchise Tax Board (respondent) denying appellants' claim for refund of \$21,817.50 plus applicable interest for the 2020 tax year.

Appellants waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides this matter based on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUE

Whether appellants have established a basis to abate the late-payment penalty.

FACTUAL FINDINGS

1. Appellants are New York residents.
2. Appellants held a 12.5 percent minority interest in E.S. Originals, Inc. (ESO), an S corporation, which operated in New York and California.
3. On or about December 31, 2020, ESO recognized a significant gain on the sale of certain business assets. ESO timely filed an extension for the 2020 tax year.
4. ESO provided appellants with a projected 2020 California Schedule K-1, Shareholder's Share of Income, Deductions, Credits, etc. (Schedule K-1) on or around April 6, 2021.
5. On May 12, 2021, appellants remitted an extension payment of \$3,500 toward their 2020 California nonresident personal income tax obligation, which appellants' representatives

stated was based on prior year apportionment percentages between California and New York.

6. ESO did not provide appellants a final Schedule K-1, which included the final California source income inclusive of the significant gain, to its shareholders until September 2021. Appellants assert that the final Schedule K-1 reported a significantly larger apportionment to California than in prior tax years due to ESO's sale of California assets in 2020.¹ Appellants further assert that the apportionment resulted in a substantial underpayment of California tax and a substantial overpayment of New York tax.
7. On October 15, 2021, appellants timely filed their 2020 California Nonresident or Part-Year Resident Income Tax Return, with married filing jointly status.
8. On that return, appellants reported total tax of \$294,400, minus \$3,500 paid with their extension, for a total tax balance of \$290,900.
9. Appellants reported a self-assessed underpayment of estimated tax penalty in the amount of \$6,471, for a total amount due of \$297,371 (\$290,900 total tax due plus \$6,471), which they remitted on October 15, 2021.
10. Upon processing the return, respondent assessed a late-payment penalty of \$21,817.50 for failure to timely remit payment of the 2020 tax liability.
11. On February 3, 2022, appellants paid the liability plus interest.
12. On March 16, 2022, appellants filed Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, for abatement of the late-payment penalty.
13. On September 7, 2023, respondent denied appellants' claim for refund, and this timely appeal followed.
14. On appeal, appellants provide a copy of a letter from ESO dated July 25, 2024, indicating that the apportionment of gain from the sale in December of 2020 "was not discernable" until the final Schedule K-1 was issued.
15. OTA requested additional briefing from appellants, asking them to provide additional information regarding the projected Schedule K-1 from ESO and any information or records demonstrating appellants' knowledge of, or communication with, ESO seeking information on appellants' proper apportionment of their distributive share of income.
16. In response, appellants provide a copy of a Schedule K-1, which is stamped "Draft for Ext," and shows federal ordinary business income of \$103,950, a California source amount of \$103,950, a California depreciation subtraction of \$1,876, a federal Internal

¹ Copies of the ESO final and prior-year Schedule K-1 were not in the record.

Revenue Code (IRC) section 1231² gain of \$6,250,000, and California source IRC section 1231 gain of \$874,512.³

DISCUSSION

R&TC section 19132(a)(2)(A) imposes a late-payment penalty when taxpayers fail to pay the amount shown as due on the return by the date prescribed for the payment of tax.

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.) R&TC section 19132(a)(2)(B) also imposes a monthly penalty equal to 0.5 percent of the “remaining tax” for each month (or part of a month) the tax remains unpaid, not to exceed 40 months. When respondent imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Red Vision Systems, Inc.*, 2023-OTA-561P.) The late-payment penalty may be abated if the failure to timely pay was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).)

To establish reasonable cause for the late payment of tax, taxpayers 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.) Generally, the most important factor in determining whether the taxpayer acted with reasonable cause and in good faith is the extent of the taxpayer's effort to assess their proper tax liability. (*Appeal of Moren, supra*; Treas. Reg. § 1.6664–4(b)(1); Internal Revenue Manual 20.1.5.7.2 (07-01-2008); *Frias v. Commissioner*, T.C. Memo. 2017-139, *16-17.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren, supra*.) Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Ibid.*) Unsupported assertions are insufficient to satisfy taxpayers’ burden of proof. (*Ibid.*) As to appellants’ burden of proof, the applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).)

Appellants do not dispute that they paid their 2020 tax liability late or that respondent properly calculated the penalty amount. Rather, appellants seek abatement of the penalty because they assert that the failure to timely pay was due to reasonable cause and not willful

² IRC section 1231 generally refers to capital gain or loss treatment on the sale of real or depreciable business property held for more than a year. R&TC section 18151 generally incorporates IRC section 1231.

³ The reported California source income of \$874,512 appears smudged masking what might be \$1,874,512, which is more in line with ESO’s apportionment factor of 29.99% applied on lines 1 and line 15 (\$6,250,000 x .299921 = \$1,874,506).

neglect. Appellants contend that they are nonresidents of California and received an unexpected increase in California source income reported on the final Schedule K-1 well after the payment deadline for the 2020 tax year.

Specifically, appellants contend that, at the time the tax was due on May 17, 2021,⁴ it was reasonable for them to rely on prior year apportionment percentages to determine their California tax liability. Appellants assert that they were informed that the person responsible for providing the apportionment information for the year at issue was unable to do so due to the COVID-19 pandemic. In addition, appellants submit letters from ESO and its CPA firm indicating that the information appellants needed was “not discernable” until the Schedule K-1 was issued in September 2021, well after the California payment deadline. Consequently, when filing their 2020 return, appellants contend they relied on prior year apportionment percentages to determine the income attributable to California. Such reliance, appellants contend, was evidenced by the satisfaction of their federal tax obligation and their substantial overpayment of tax to the State of New York. As soon as appellants received the final Schedule K-1, they filed their joint personal income tax return with California and paid the tax owed.

The assertion that taxpayers lacked the necessary information or documentation, or difficulty in calculating a tax liability with available documentation, does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Moren, supra.*) A taxpayer’s difficulty in determining income with exactitude does not negate the requirement that taxpayers make payments of tax based upon a reasonably accurate estimate of their tax liability. (*Appeal of Rougeau, 2021-OTA-335P.*) However, reasonably estimating a tax liability requires that a minimum level of information is available to the taxpayer, whether from their own records or from information available upon request. (*Appeal of Moren, supra.*) A strong, and often determinative, factor is whether the taxpayer has access to sufficient information upon which to base a reasonable estimate of their tax liability. (*Ibid.*)

Here, appellants were provided with a projected Schedule K-1 they assert was relied upon to satisfy their federal tax obligations. Respondent argues that appellants’ satisfaction of their federal liability shows that they had sufficient information to estimate and pay their California tax liability. However, satisfying their California tax burden required knowledge not simply of their distributive share of income, but the division of that income among the states in which the business operated. The specific issue here is whether appellants could have

⁴ “Due to the COVID-19 pandemic, FTB postponed the individual taxpayer filing and payment deadlines for the 2020 tax year to May 17, 2021.” (*Appeal of Bannon, 2023-OTA-096P*)

reasonably known the amount apportioned to California, or whether appellants as minority interest holders in ESO either had reasonable access to the information, could have reasonably recreated it, could have maintained it independently, or upon inquiry reasonably could have obtained the information from ESO. (See *Appeal of Moren, supra*.)

Appellants could not reasonably have been expected to independently maintain the information necessary to ascertain the actual assignment of income to California. Nor does this appeal present a situation in which the proportion of California taxable income could be ascertained through other investigative methods. The entire determination of apportioned California income was under the control of ESO. The central point of the impossibility of appellants' task is not simply that the records necessary to construct an accurate apportionment were maintained by ESO or that appellants were minority shareholders, but because the character of the determination of apportionment would necessitate an intimacy with ESO's entire books and records. Perhaps more importantly, however, is ESO's acknowledgement that the information did not exist. As the Court in *Frias, supra*, and OTA in *Appeal of Moren, supra*, make clear, reasonable cause is measured not by perfunctory inquiries for information, but looking at all the facts and circumstances to determine whether the taxpayer's efforts to assess their own liability were reasonable.

Appellants, however, were not without any information. The projected Schedule K-1 reports California source net IRC section 1231 gains of \$874,512.⁵ Appellant's decision to pay only \$3,500 for their estimated tax liability in the face of an obviously much higher liability, stands at odds with their asserted reasonable cause based on the lack of available information for the ultimate underpayment of tax they owed.

Underpayment penalties cannot be partially abated. (See *In re Sanford* (11th Cir. 1992) 979 F.2d 1511, 1513; see also *Service Employees Intern. Union v. U.S.* (9th Cir. 2010) 598 F.3d 1110, 1113; *A Better Plumbing Service, Inc. v. U.S.* (N.D. Ga. 2008) 533 F.Supp.2d 1233, 1238.⁶) Consequently, even if appellants had a reasonable cause for failing to pay the actual amount due, because the underpayment penalty cannot be partially disallowed, reasonable cause must consider all the facts and circumstances of appellants' underpayment and determine whether in light of all those facts and circumstances, appellants acted reasonably.

⁵ But see *ante*, fn. 2.

⁶ The federal late-payment penalty statute, IRC section 6651(a)(2), is substantially similar to R&TC section 19132. Where the IRC and California law are substantially similar, California has long considered federal authority interpreting the IRC section as "highly persuasive." (*Appeal of Pifer*, 2021-OTA-338P.)

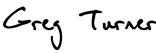
(See, e.g., *Zaimes v. Commissioner*, T.C. Memo. 2023-121.) Appellants' payment of \$3,500, while knowing even their estimated liability was much higher, challenges their claim that a lack of information caused the underpayment. Reasonable cause does not demand perfection, but it requires taxpayers to act on the information available to them, and appellants did not do that here.

HOLDING

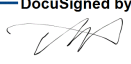
Appellants have failed to establish a basis to abate the late-payment penalty.

DISPOSITION

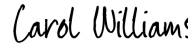
Respondent's action denying appellants' claim for refund of the late-payment penalty is sustained.

Signed by:

1B8F50433F1D4D5...

Greg Turner
Administrative Law Judge

We concur:
DocuSigned by:

8A4294817A67463...

Andrew Wong
Administrative Law Judge

Signed by:

6163EEBC3DA94BF...

For
Teresa A. Stanley
Administrative Law Judge

Date Issued: 6/17/2026