

1 Sheriene Anne Ridenour  
Tax Counsel  
2 Board of Equalization, Appeals Division  
450 N Street, MIC: 85  
3 PO Box 942879  
Sacramento, CA 95814  
4 Tel: (916) 323-3108  
Fax: (916) 324-2618  
5

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**  
8 **STATE OF CALIFORNIA**  
9

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **YOURAM NASSIR AND** ) Case No. 739070  
13 **SHIRIN FARZADMEHR** )  
14 \_\_\_\_\_ )

15 Year Claim  
2011 For Refund  
16 \$93,479.92

17 Representing the Parties:

18 For Appellants: Allen M. Ullman, CPA  
19 For Franchise Tax Board: Andrew Loveland, Tax Counsel  
20

21 **QUESTION:** Whether appellants have shown reasonable cause for the abatement of the late filing  
22 penalty.

23 **HEARING SUMMARY**

24 For the 2011 tax year, appellants filed an untimely joint California tax return on  
25 November 15, 2012. On the return, the couple reported federal adjusted gross income (AGI) of  
26 \$9,421,300, California taxable income of \$9,691,272, total tax of \$983,497, withholding credits of  
27 \$536,598, California estimated tax payments of \$372,979, and tax due of \$73,920. Appellants  
28 self-imposed an underpayment of estimated tax penalty of \$6,099, a late payment penalty of \$5,914, and

1 \$1,337 in interest. The couple reported a total amount due of \$87,270, which was remitted on  
2 October 30, 2012.<sup>1</sup> (Resp. Opening Br., p. 1, Exhibits A and B.)

3 The Franchise Tax Board (FTB or respondent) accepted the return as filed and imposed a  
4 late filing penalty of \$93,479.92, plus interest, since the return was not timely filed. Appellants paid  
5 \$94,225.98 on January 8, 2013, and \$116.35 on February 15, 2013, satisfying the outstanding balance.  
6 Thereafter, appellants filed a claim for refund requesting the abatement of the late filing penalty, which  
7 the FTB denied based on a lack of reasonable cause. This timely appeal followed. (Resp. Opening Br.,  
8 p. 1, Exhibit B; Appeal Letter, attachment.)

### 9 Contentions

#### 10 Appellants' Contentions

11 Appellants contend that Internal Revenue Code (IRC) section 6651 "permits" the  
12 abatement of the late filing penalty based on reasonable cause "due to relying on professional advice for  
13 the preparation of tax returns." Appellants assert that they gave their accountant the necessary  
14 documents to prepare the returns, informed him of the Schedule K-1s needed, and instructed him to  
15 contact the "various entities" to obtain the necessary information to complete the returns. Appellants  
16 contend that they relied on the accountant to accurately compute the tax due and to "prepare accurate  
17 extension of time payments." Appellants assert that, when they were informed of a "corrected estimate  
18 of tax due" they paid "an additional" \$300,000, resulting in "an overpayment" for the 2011 tax year.<sup>2</sup>  
19 Appellants contend that "the underpayment of tax was caused by the inadvertence of the accountant"  
20 and that the late payment was due to reasonable cause, as opposed to the willful act of appellants.  
21 Appellants also contend that they have learned that the FTB is waiving penalties for non-electronic  
22 filing of payments for first time offenders, which appellants contend contradicts the FTB's claim that it  
23 only waives penalties for reasonable cause. (Appeal Letter, p. 1.)

24 \_\_\_\_\_  
25 <sup>1</sup> While it is not clear why appellants paid the amount due on October 30, 2012, but filed their return on November 15, 2012,  
26 staff notes that, even if appellants filed their return on October 30, 2012, the filing would still have been after the extended  
27 due date of October 15, 2012.

28 <sup>2</sup> Appellants made a \$300,000 estimated tax payment with an effective date of September 18, 2012. (Resp. Opening Br.,  
Exhibit B, p. 1.)

It is not clear, however, what overpayment to which appellants refer.

1                    Respondent's Contentions

2                    The FTB contends that it properly imposed the late filing penalty and that appellants  
3 failed to demonstrate reasonable cause. The FTB asserts that, when it imposes a late filing penalty, the  
4 law presumes that the penalty is correct, citing *Todd v. McColgan* (1949) 89 Cal.App.2d 509. The FTB  
5 notes that the late filing penalty pursuant to R&TC section 19131 is computed at five percent of the tax  
6 due, after allowing for timely payments, for every month that the return is late, up to a maximum of  
7 twenty-five percent. Accordingly, the FTB contends that it properly imposed the late filing penalty,  
8 unless appellants can show reasonable cause for the late return. The FTB contends that to establish  
9 reasonable cause, appellants must show that the failure to timely file the return occurred despite the  
10 exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary  
11 intelligent and prudent businessperson to have so acted under similar circumstances. (Citing *Appeal of*  
12 *Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027,  
13 Jan. 9, 1979.)<sup>3</sup> (Resp. Opening Br., pp. 2-3.)

14                    Regarding appellants' contention that their reliance on their accountant establishes  
15 reasonable cause for the late filing penalty, the FTB asserts that appellants have a non-delegable duty to  
16 timely file their 2011 tax return, citing the *Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134,  
17 decided by this Board on November 6, 1985. The FTB notes that, while a taxpayer may, under certain  
18 circumstances, show reasonable cause to abate penalties where the taxpayer relies on improper advice  
19 from an accountant or tax attorney as to a matter of tax law, such as whether the taxpayer had a tax  
20 liability, the Supreme Court stated that "one does not have to be a tax expert to know that tax returns  
21 have fixed filing dates and that taxes must be paid when they are due," citing to *United States v. Boyle*  
22 (1985) 469 U.S. 241. The FTB contends that appellants have provided no evidence as to why they could  
23 not file a timely return other than they relied on their accountant. The FTB further contends that  
24 appellants' allegation that the underpayment of tax was caused by the inadvertence of their accountant  
25 also does not establish reasonable cause to excuse appellants' obligation to file a timely return. The  
26 FTB argues that "appellants' proffered rationale of reliance on their accountant as to the filing of their  
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<sup>3</sup> Board of Equalization cases (designated "SBE") may generally be found at: [www.boe.ca.gov](http://www.boe.ca.gov).

1 return or as to the amount and timing of payments bears no relevance” to the couple’s personal and  
2 non-delegable obligation to file a timely return and, therefore, does not establish reasonable cause for  
3 the abatement of the late filing penalty. (Resp. Opening Br., pp. 2-3.)

4           Regarding appellants’ contention that the FTB’s reliance on reasonable cause as the only  
5 basis for the abatement of penalties is contradicted by “the so-called ‘first time offender’ waiver of the  
6 penalty” imposed for non-compliance with the electronic filing of tax payments (“EFT”), the FTB  
7 asserts that the EFT penalty, unlike the late filing penalty, recently became effective in 2009. The FTB  
8 contends that, since the penalty was new, prior to implementing the law, the FTB sought to educate the  
9 public by first providing notice to those taxpayers whose payments would meet the threshold for the  
10 EFT penalty and directing the taxpayers as to how to pay electronically. The FTB asserts that, unlike  
11 the EFT penalty, the late filing penalty is “a long established penalty and well known rule.” The FTB  
12 argues that a first-time failure to file a timely return will not establish reasonable cause for the abatement  
13 of the late filing penalty. (Resp. Opening Br., pp. 3-4.)

#### 14           Applicable Law

##### 15                   Burden of Proof

16           The FTB’s determination is presumed correct and an appellant has the burden of proving  
17 it to be wrong. (*Todd v. McColgan, supra; Appeal of Michael E. Myers*, 2001-SBE-001, May 31,  
18 2001.) In the absence of uncontradicted, credible, competent, and relevant evidence showing an error  
19 in the FTB’s determinations, respondent’s determinations will be upheld. (*Appeal of Oscar D. and*  
20 *Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

##### 21                   Late Filing Penalty

22           R&TC section 19131 provides that a late filing penalty shall be imposed when a  
23 taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late  
24 filing was due to reasonable cause and was not due to willful neglect. Taxpayers have until April 15th  
25 of the year following the tax year to file returns without triggering the penalty. (Rev. & Tax. Code,  
26 § 18566.) If taxpayers file by October 15th, they receive an automatic extension and the penalty is not  
27 triggered. (Cal. Code Regs., tit. 18, § 18567.) The late filing penalty is computed at a rate of 5 percent  
28 of the tax due for every month that the return is late, up to a maximum of 25 percent. (Rev. & Tax.

1 Code, § 19131, subd. (a).) The minimum amount of the late filing penalty for individuals is the lesser  
2 of \$100 or 100 percent of the tax required to be shown on the return. (*Id.* at subd. (b).) The tax amount  
3 upon which the penalty is based is the amount of tax required to be shown on the return, reduced by  
4 any amount of tax paid on or before the prescribed due date for the payment of the tax and any credit  
5 against the tax which may be claimed upon the return. (*Id.* at subd. (c); *Appeal of Mary Kay Cosmetics,*  
6 *Inc.*, 81-SBE-042, May 19, 1981.)

7 To establish reasonable cause, the taxpayer “must show that the failure to file timely  
8 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as  
9 would prompt an ordinary intelligent and prudent businessman to have so acted under similar  
10 circumstances.” (*Appeal of Howard G. and Mary Tons, supra.*) In previous appeals, the Board has  
11 determined that a taxpayer’s discovery of reportable income after the original due date (*Appeal of*  
12 *Elixir Industries*, 83-SBE-248, Dec. 14, 1983), a taxpayer’s difficulty in obtaining necessary  
13 information (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985), the complexity and  
14 problems in accumulating the information necessary to complete a return (*Appeal of*  
15 *Incom International, Inc.*, 82-SBE-053, Mar. 31, 1982), a taxpayer’s difficulty in resolving accounting  
16 problems (*Appeal of Cerwin-Vega International*, 78-SBE-070, Aug. 15, 1978), a taxpayer’s difficulty  
17 in determining income with exactitude (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983;  
18 *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979), a taxpayer’s unresolved business  
19 matters (*Appeal of Bild Industries, Inc.*, 82-SBE-212, Sept. 21, 1982), or the failure of the taxpayer’s  
20 accountant to properly account for income (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14,  
21 1982), did not constitute reasonable cause for abating penalties.

22 In *United States v. Boyle, supra*, the Supreme Court stated that it is reasonable for a  
23 taxpayer to rely on the advice of an accountant or attorney when that accountant or attorney advises a  
24 taxpayer as to a matter of tax law; however, the Supreme Court also stated that one does not need to be  
25 a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.*, at  
26 251-252.) In addition, the Supreme Court stated that a taxpayer’s reliance on an accountant or attorney  
27 cannot be a substitute for compliance with an unambiguous statute. (*Id.*)

28 In the *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986, the

1 Board distinguished between relying on a tax professional's expert advice about a matter of substantive  
2 tax law and relying on a tax professional merely as an agent to file the return and to pay taxes by the  
3 deadline. "Reasonable cause" for late filing might exist where a taxpayer reasonably relied on the  
4 expert opinion of a tax professional, even if that expert opinion was later determined to be incorrect. By  
5 contrast, relying on an agent merely to file the return and to pay taxes on-time is not considered  
6 "reasonable cause" for purposes of penalty abatement because taxpayers have a personal, non-delegable  
7 obligation to file their tax returns and pay their taxes in a timely manner. (*Appeal of Thomas K. and*  
8 *Gail G. Boehme, supra.*)

9 STAFF COMMENTS

10 Appellants' 2011 return was due on April 15, 2012, with an extended due date of  
11 October 15, 2012. Appellants filed their 2011 return on November 15, 2012. Because appellants did  
12 not file their 2011 return by October 15, 2012, appellants did not have an extension to file and their 2011  
13 return was filed seven months late.

14 Appellants contend that reasonable cause, not willful neglect, caused the late filing of the  
15 return. Appellants contend that they provided their accountant with the necessary documents and  
16 informed the accountant of the various Schedule K-1s needed to complete the return. While appellants  
17 do not specifically contend that their accountant was unable to obtain the necessary Schedule K-1s in a  
18 timely matter, we note that the Board has held that a taxpayer's difficulty in obtaining necessary  
19 information, and the complexity and problems in accumulating the information necessary to complete a  
20 return, is not reasonable cause for abating penalties. (*Appeal of J.B. and P.R. Campbell, supra; Appeal*  
21 *of Incom International, Inc., supra.*) Furthermore, the timeliness and correctness of Schedule K-1s  
22 potentially impacts a taxpayer's reported income and tax liability, but not a taxpayer's ability to file a  
23 timely return. At the hearing, appellants should be prepared to explain why they were unable to file  
24 their return by the extended due date of October 15, 2012.

25 The Board has held that relying on an agent merely to file the return and pay taxes  
26 on-time is not considered "reasonable cause" for purposes of penalty abatement because taxpayers have  
27 a personal, non-delegable obligation to file their tax returns and to pay their taxes in a timely manner.  
28 (*Appeal of Thomas K. and Gail G. Boehme, supra.*) Appellants should be prepared to clarify what, if

1 any, steps they took to mitigate the untimely filing. If appellants are asserting that their failure to timely  
2 file their return was due to reliance on their accountant for advice concerning a substantive matter of tax  
3 law, then appellants should be prepared to explain the matter of tax law advice that the accountant  
4 provided.

5 As the late filing penalty is calculated based on the amount of tax due on the due date  
6 of the return, appellants also appear to argue that their reliance on their accountant to accurately  
7 compute the estimated payments and tax due is reasonable cause to abate the penalty.<sup>4</sup> The Board has  
8 held that the failure of a taxpayer's accountant to properly account for income did not constitute  
9 reasonable cause for abating penalties. (*Appeal of M.B. and G.M. Scott, supra.*) At the hearing,  
10 appellants should be prepared to demonstrate how their reliance on their accountant to accurately  
11 calculate their estimated payments and tax due hindered appellants from timely filing their tax return.

12 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has  
13 any additional evidence to present, it should be provided to the Board's Board Proceedings Division at  
14 least 14 days prior to the oral hearing.<sup>5</sup>

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26 <sup>4</sup> The penalty was calculated as follows:  
27 \$983,497 (tax liability) – (\$536,598 in withholdings + \$72,952 2010 overpayment + \$27.34 November 2011 estimated tax  
28 payment) = \$373,919.66 (in tax unpaid) x 25 percent = \$93,479.92 penalty  
The penalty was large, as \$373,919.66 in tax remained unpaid as of April 15, 2012.

<sup>5</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Associate Governmental Program Analyst, Board Proceedings  
Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.