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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 **MATTHEW ZISES**) Case No. 795292

13
14 Year Claim
15 2012 \$8,327.94

16 Representing the Parties:

17 For Appellant: James M. Parks, CPA

18 For Franchise Tax Board: Nancy E. Parker, Tax Counsel III

19
20 **QUESTIONS:** (1) Whether the late payment penalty imposed under Revenue and Taxation Code
21 (R&TC) section 19132 should be abated; and
22 (2) Whether the penalty for the underpayment of the estimated tax (estimated tax
23 penalty) should be abated.

24
25 HEARING SUMMARY

26 Background

27 Appellant filed a 2012 California tax return on May 13, 2013. On the return, appellant
28 reported federal adjusted gross income (AGI) of \$1,645,014 and taxable income of \$1,642,423, resulting

1 in a tax of \$189,121 after application of deductions and exemptions. After adding a mental health
2 services tax of \$6,424 and subtracting withholding credits of \$42,186, estimated tax payments of \$2,306,
3 an estimate tax transfer of \$2,254 (from appellant's 2011 tax year), and an extension payment of
4 \$10,000, appellant reported a self-assessed tax liability of \$138,799. Appellant also self-assessed \$343
5 in interest and \$962 for the estimated tax penalty. Appellant made a payment on his liability in the
6 amount of \$140,104 on May 16, 2013. (Resp. Opening Br., p. 1, Exs. A & B.)

7 Respondent accepted appellant's self-assessed the estimated tax penalty and interest.
8 Respondent assessed a late payment penalty of \$8,327.94 because appellant did not pay his self-assessed
9 tax liability by the due date. On July 9, 2013, respondent sent appellant a notice informing him of his
10 2012 revised outstanding balance. (Resp. Opening Br., p. 1, Ex. B.)

11 On or about September 30, 2013, appellant's tax representative contacted respondent and
12 requested a waiver of the late payment penalty due to an error on the part of appellant's CPA.
13 Respondent determined that appellant had not established reasonable cause to abate the penalty and
14 advised appellant to pay and file a claim for refund if he disagreed. Respondent subsequently began
15 collection action for the payment of the balance due. On November 20, 2013, appellant paid \$8,539.68.
16 Since appellant paid the balance due for the 2012 tax year, respondent treated appellant's September 30,
17 2013 request for a waiver as a claim for refund. On December 18, 2013, respondent denied appellant's
18 request for refund. (Resp. Opening Br., pp. 1-2, Ex. C.)

19 This timely appeal then followed.

20 Contentions

21 Appellant's Contentions

22 Appellant contends that he engaged Burr Pilger Mayer, Inc. to prepare and ensure that
23 appellant timely filed his 2012 tax return and to advise him with respect to estimated tax payments.
24 Appellant contends that the proposed assessment deals with penalties and interest assessed due to an
25 underpayment of taxes due with the extension of time to file. Appellant argues that he apprised his tax
26 preparer of all of the relevant facts and information, reasonably relied on his tax preparer to advise him
27 of the appropriate estimated tax payments and timely filed the payments that were subsequently
28 recommended to him. (App. Opening Br.)

1 Appellant argues that two conditions must be met for reasonable cause, including that:
2 (1) the person reasonably relied on by the taxpayer is a tax professional with competency in the subject
3 law; and (2) the tax professional's advice was based on the taxpayer's full disclosure of the relevant
4 facts and documents. Citing *B.J. O'Sullivan*, T.C. Memo. 1994-395, appellant argues that a taxpayer's
5 request for an extension of time to file an income tax return was deemed valid. Appellant asserts that
6 reasonable cause existed when the taxpayer relied upon the advice of an accounting firm, made a
7 reasonable estimate of the taxes due based upon the information provided from the accounting firm, and
8 had failed to pay the tax along with the request. Among other cases, appellant also cites *W.O. Harrison,*
9 *Jr.*, T.C. Memo. 1998-417, arguing that the taxpayers in that case were not liable for late filing penalties
10 since they reasonably relied on their accountant's advice that they had validly filed an automatic
11 extension of time to file their return. (App. Opening Br.)

12 On reply, appellant contends that his tax preparer is a reputable accounting firm that has
13 expert knowledge in the areas of accounting, tax, and finance and that the firm has been certified with
14 the California Board of Accountancy under its current name since 2009. Appellant contends that his tax
15 preparer, Jim Parks, has been a partner with the firm since 2007, and has been a CPA since 1979.
16 Appellant contends that he submitted all his 2012 tax information to the firm on March 8, 2013, which
17 included a completed informational organizer sent from the firm and all related tax forms. Appellant
18 contends that the firm subsequently prepared an estimated return based off of that information.
19 Appellant contends that the estimated tax liability calculated for extension purposes was approximately
20 \$150,000 but that, due to an inadvertent oversight, an extension payment of only \$10,000 was
21 recommended to appellant and he paid that amount.

22 Appellant attaches the following documents on reply: (1) a copy of Burr Pilger Mayer,
23 Inc.'s current license information; (2) a copy of Jim Park's current license information; (3) a copy of
24 appellant's 2012 tax information that he provided to his preparer; (4) a copy of the tax return prepared to
25 estimate appellant's taxable income and tax liability; (5) a copy of appellant's extension letter, filing
26 instructions, and voucher he received from the firm on April 12, 2013, instructing him to make a
27 \$10,000 payment; (6) a copy of respondent's confirmation sent to appellant, indicating that a \$10,000
28 extension payment was received and applied to the 2012 tax year on April 15, 2013; and (7) a copy of a

1 signed statement from appellant stating that he relied in good faith on the judgment of his tax advisor.
2 (App. Reply Br.)

3 Respondent's Contentions

4 Respondent contends that the late payment penalty was imposed properly because
5 appellant failed to pay the remaining tax balance due by the due dates and appellant has not shown that
6 his failure to do so was due to reasonable cause and in the absence of willful neglect. Pursuant to R&TC
7 section 19132, respondent contends that it properly computed the penalty as five percent of the total
8 unpaid tax plus one-half percent for every month the payment of tax was late, up to 40 months. (Resp.
9 Opening Br., p. 2, Ex. D.)

10 Respondent contends that the taxpayer bears the burden of proof that reasonable cause
11 exists to support the abatement of the late payment penalty. Respondent argues that a taxpayer must
12 show that the failure to pay the amount shown as tax on the return occurred despite the exercise of
13 ordinary business care and prudence. Respondent argues that reasonable cause may be established if a
14 taxpayer relies on the improper substantive advice of an accountant or a tax attorney as to a matter of tax
15 law. Citing *United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*), respondent contends the conditions that
16 must be met include: (1) the person reasonably relied on by the taxpayer is a tax professional with
17 competency in the subject law; and (2) the tax professional's advice is based on the taxpayer's full
18 disclosure of the relevant facts and documents. Respondent argues that appellant has not provided any
19 evidence from his tax professional that the professional has competency in the subject matter, that
20 appellant's reliance on the tax professional was justified, and that appellant's reliance was in good faith.
21 (Resp. Opening Br., pp. 2-3, Ex. D.)

22 On reply, respondent contends that, in an effort to understand why the amount of the
23 extension payment recommended (\$10,000) and the amount of tax due (\$150,000) varied by over
24 \$140,000, respondent contacted appellant's tax preparer. Appellant's tax preparer indicated that the
25 amount of tax due on appellant's estimated return was correctly calculated as \$150,000. Respondent
26 contends that appellant's preparer asserted that a clerical error committed by an associate in the
27 accounting firm caused the amount of the estimate payment required to be erroneously furnished to
28 appellant as appellant's extension payment due for the 2012 tax year. Respondent contends that

1 appellant has not demonstrated reasonable cause to abate the penalty because he did not rely on the
2 substantive advice of a tax professional. (Resp. Reply Br., pp. 1-2.)

3 Citing *Boyle*, respondent argues that, if a taxpayer relied on improper substantive advice
4 of a CPA or a tax attorney as to a matter of tax law, such as whether the taxpayer has a tax liability,
5 failing to pay the tax shown on the return may be considered reasonable cause if certain conditions are
6 met. Respondent contends that the court in *Boyle* distinguished the duty to timely file a tax return from
7 a case in which a taxpayer relies on the erroneous advice of counsel regarding a substantive question of
8 law. Respondent notes that it is reasonable for a taxpayer to rely on the substantive advice of an
9 accountant or an attorney because most taxpayers are not competent to discern an error in the
10 substantive advice of an accountant or an attorney. Respondent contends that, when a taxpayer relies on
11 a tax professional, the general rule is that reasonable cause is not established merely because a tax
12 professional completes a tax return, but rather will only be established when the tax professional is
13 interpreting substantive tax law. Citing the *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172,
14 decided by this Board on November 19, 1986,¹ respondent contends that the Board stated that an error in
15 a simple computational problem, not a legal interpretation, by a tax expert would not constitute
16 reasonable cause. (Resp. Reply Br., p. 2.)

17 Respondent contends that the CPA's clerical error in which the wrong amount was
18 provided to appellant does not involve a tax preparer's interpretation of substantive law. Respondent
19 contends that the CPA's work involved the computation of income or gain from various transactions and
20 did not include interpreting whether the various provisions of the law applied to appellant. Respondent
21 contends that the case here involves a clerical error in applying the wrong year's estimated tax data to
22 the current year. Respondent contends that, if appellant can provide a statement, signed under penalty of
23 perjury, from the CPA who prepared the return demonstrating that the difference was due to the
24 interpretation of substantive tax law, it will review that statement. Accordingly, respondent argues that
25 appellant's reliance on his CPA does not demonstrate reasonable cause to abate the penalty. (Resp.
26 Reply Br., pp. 2-3.)

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¹ Board of Equalization cases are generally available for viewing on the Board's website
(<http://www.boe.ca.gov/legal/legalopcont.htm>).

1 Applicable Law

2 Burden of Proof

3 The FTB's determination is presumed correct and an appellant has the burden of proving
4 it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,
5 2001-SBE-001, May 31, 2001.) In the absence of uncontradicted, credible, competent, and relevant
6 evidence showing an error in the FTB's determinations, respondent's determinations will be upheld.
7 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

8 Late Payment Penalty

9 R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer
10 fails to pay the amount shown as due on the return on or before the due date of the return. The late
11 payment penalty has two parts. The first part is 5 percent of the unpaid tax. (Rev. & Tax. Code,
12 § 19132, subd. (a)(2)(A).) The second part is a penalty of 0.5 percent per month, or a portion of a
13 month, calculated on the outstanding balance. (Rev. & Tax. Code, § 19132, subd. (a)(2)(B).) The late
14 payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of tax
15 was due to reasonable cause and was not due to willful neglect. (Rev. & Tax. Code, § 19132, subd. (a).)
16 The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*,
17 83-SBE-244, Oct. 26, 1983.) To establish "reasonable cause" for the late payment of tax, the taxpayer
18 must show that its failure to make a timely payment of the proper amount of tax occurred despite the
19 exercise of ordinary business care and prudence. (*Id.* See also *Appeal of Robert T. and M.R. Curry*,
20 86-SBE-048, Mar. 4, 1986.) The taxpayer bears the burden of proving that an ordinarily-intelligent and
21 prudent businessperson would have acted similarly under the circumstances. (*Id.* See also *Appeal of*
22 *M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

23 In *U.S. v. Boyle, supra*, the United States Supreme Court held that the duty to file a tax
24 return by a statutory deadline could not be delegated to an agent, such as an accountant or attorney. In
25 contrast, the court stated that a taxpayer's reliance on an accountant or an attorney for advice on a
26 substantive matter of tax law, such as whether a liability exists, is reasonable since most taxpayers are
27 not competent to discern error in the advice. (*Id.* at p. 251.) The court reasoned that it would defeat the
28 purpose of seeking counsel in the first place if a taxpayer were required to seek a second opinion or

1 attempt to monitor the original counsel. (*Ibid.*) In the *Appeal of Philip C. and Anne Berolzheimer*,
2 *supra*, this Board extended the holding in *U.S. v. Boyle, supra* (which involved a late filing penalty), to
3 the context of the late payment penalty. The Board determined that, where there is no question of law
4 and where the issue involves a simple calculation of tax due, the reliance on an expert does not
5 constitute reasonable cause for purposes of determining whether the late payment penalty should be
6 abated. (*Appeal of Philip C. and Anne Berolzheimer, supra.*)

7 Underpayment of Estimated Tax Penalty

8 R&TC section 19136 incorporates by reference, with certain modifications, IRC
9 section 6654, which imposes a penalty for the underpayment of estimated tax if a taxpayer fails to make
10 estimated tax payments in a timely manner. The amount charged is similar to an interest charge and
11 applies from the date the estimated tax payment was due until the date it is paid.

12 Neither R&TC section 19136 nor IRC section 6654 provides for a general reasonable
13 cause exception or a “lack of willful neglect” for the estimated tax penalty. (*Appeal of George S. and*
14 *Jean D. McEwen*, 85-SBE-091, Aug. 20, 1985; *Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.)
15 Rather, IRC section 6654(e)(3) provides for a waiver of the penalty based on specified circumstances as
16 follows:

- 17 • the IRS determines that, by reason of casualty, death or other unusual circumstances, the
18 imposition of the penalty would be “against equity and good conscience;” (Int.Rev. Code,
19 § 6654(e)(3)(A)); or
- 20 • the taxpayer retired after attaining the age of 62 or became disabled, in the taxable year for which
21 the estimated tax payments were required to be made, or in the preceding taxable year, and the
22 underpayment was due to “reasonable cause and not to willful neglect.” (Int.Rev. Code,
23 § 6654(e)(3)(B).)

24 In relation to IRC section 6654(e)(3)(A), the Internal Revenue Manual (IRM)² states,
25 “The penalty for underpayment of estimated tax cannot be removed or waived for reasonable cause
26 alone.” (IRM, § 20.1.3.1.6.1.1 (December 10, 2013).) The IRM also states:

28 ² Although the IRM merely represents the IRS’s policy, rather than binding law, these provisions provide useful guidance.
(Pertinent provisions of the IRM can be located at http://www.irs.gov/irm/part20/irm_20-001-001r.html et seq.)

1 The waiver provisions of IRC section 6654(e)(3)(A) are not equivalent to reasonable
2 cause. For example, reliance on the advice of a competent tax advisor may constitute
3 reasonable cause that would warrant relief from other penalties, but it does not provide a
basis for a waiver of the estimated tax penalty under IRC section 6654(e)(3)(A).

4 (IRM, § 20.1.3.2.2.1.2 (Dec. 10, 2013).

5 STAFF COMMENTS

6 With regard to the late payment penalty on this appeal, the issue is whether appellant has
7 shown reasonable cause for the late payment. Appellant will want to provide evidence demonstrating
8 that he provided all relevant information to a competent tax adviser, and that the late payment resulted
9 from the reasonable reliance on his CPA's advice with regard to a substantive matter of tax law in
10 connection with the 2012 tax year. Appellant asserts that the estimated tax liability, calculated for
11 extension purposes, showed that he had a tax liability of approximately \$150,000. This calculation
12 ultimately was accurate. As such, appellant should also be prepared to address how the error that
13 occurred was nothing more than a clerical error by the accounting firm and not a determination based on
14 a substantive matter of tax law.

15 With regard to the estimated tax penalty, there is no reasonable cause exception to this
16 penalty, as relief from the penalty is not available upon a showing of "extenuating circumstances,
17 "reasonable cause," or "a lack of willful neglect."³ (*Appeal of Weaver Equipment Company*,
18 80-SBE-048, May 21, 1980.) Appellant should be prepared to provide legal authority to support his
19 position that the estimated tax penalty can be waived in this matter.

20 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has
21 any additional evidence to present, they should provide their evidence to the Board Proceedings
22 Division at least 14 days prior to the oral hearing.⁴

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27 ³ Of course, as noted above, there are limited exceptions to the imposition of the penalty for a casualty, disaster, or other
unusual circumstance, or the taxpayer is disabled or retired at the age of 62 or older.

28 ⁴ Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879 MIC: 80, Sacramento, California 94279-0080.