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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **FRANCHISE AND INCOME TAX APPEAL**
12 **PAULA PRESENT**) Case No. 935328

<u>Year</u>	<u>Claim For Refund</u>
2014	\$707.38 ¹

17 Representing the Parties:

18 For Appellant: Paula Present

19 For Franchise Tax Board: Maria Huseinbhai, Graduate Legal Assistant

21 **QUESTION:** Whether appellant has established reasonable cause, and the lack of willful neglect,
22 for failing to timely pay the tax due with her return.

24 HEARING SUMMARY

25 Background

26 For the 2014 tax year, appellant filed a timely California tax return. On the return,
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28 ¹ This is the amount requested by appellant in her claim for refund and the amount referenced by respondent in the denial of the claim for refund. However, the actual amount of the penalty imposed was \$1.00 less, \$706.38, such that \$706.38 is the amount at issue in this matter.

1 appellant reported federal adjusted gross income (AGI) of \$295,406, and taxable income of \$299,638,
2 resulting in a tax of \$25,773. Appellant reported a self-assessed tax liability of \$25,773, estimated tax
3 and other payments of \$14,000, and a tax due of \$11,773. (Resp. Opening Br., p. 1, Exhibits A and B.)

4 Appellant did not pay her tax liability of \$11,773.00 by April 15, 2015, and respondent
5 issued a Notice of State Income Tax Due, which indicated the tax amount due plus a late payment
6 penalty of \$706.38. On June 4, 2015, appellant paid the late payment penalty and the remaining tax
7 liability in full.² (Resp. Opening Br., p. 2, Exhibits C and D.)

8 On June 15, 2015, appellant requested a waiver of the late payment penalty. Appellant
9 asserted that her accountant miscalculated her 2014 estimate tax payment and that her accountant's letter
10 advising her of the balance due was lost in the mail. By a letter dated June 25, 2015, respondent denied
11 the waiver. Appellant filed claims for refund stating similar facts on August 5, 2015, September 15,
12 2015, and December 22, 2015, and also requested a one-time abatement of the late payment penalty
13 consistent with the abatement provided to her by the Internal Revenue Service (IRS). Appellant
14 included a letter from the IRS dated July 31, 2015, which indicated that the IRS abated a penalty based
15 on appellant's good filing history. (Resp. Opening Br., p. 2, Exhibits E, F, G, and H.)

16 Respondent denied appellant's request by letters dated December 14, 2015, and March 3,
17 2016, explaining that reasonable cause had not been established. This timely appeal followed. (Resp.
18 Opening Br., p. 2, Exhibits I and J; Appeal Letter, attachment.)

19 Contentions

20 Appellant's Contentions

21 Appellant requests that the late payment penalty of \$706.38 be waived. Appellant
22 contends that, since the IRS abated the late payment penalty, respondent should follow the IRS's
23 determination and abate the late payment penalty as well. Appellant asserts that she made all estimated
24 tax payments per the advice of her certified public accountant (CPA) whom she was working with at
25 that time. Appellant contends that she has an excellent record of timely tax return filings and tax
26 payments. Appellant asserts that this is the first time she has been subject to such a penalty and has
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28 ² Appellant's June 4, 2015 payment of \$12,530.28 included the payment of the following: (1) the remaining tax due of \$11,773.00; (2) the late payment penalty of \$706.38; and (3) accrued interest of \$50.90.

1 begun working with a new CPA in order to avoid complications of this kind. (Appeal Letter,
2 attachments.)

3 Respondent's Contentions

4 Respondent contends that it properly imposed the late payment penalty pursuant to
5 R&TC section 19132. Respondent asserts that the payment of tax is required to be paid by the original
6 due date of the return. Respondent contends that the instructions to the 2014 California return are clear
7 regarding the timely payment of tax. Respondent asserts that, when it imposes a late payment penalty,
8 the law presumes that the penalty is correct. Citing R&TC section 19132, subdivision (a)(1), respondent
9 states that the late payment penalty may be abated if a taxpayer establishes that the late payment was due
10 to reasonable cause and not due to willful neglect. Respondent contends that appellant has the burden of
11 establishing reasonable cause, which means that she must show that her failure to timely pay the proper
12 amount of tax occurred despite the exercise of ordinary business care and prudence. (Resp. Opening
13 Br., pp. 2-3, Exhibits K and L.)

14 In response to appellant's argument that her accountant's letter advising her of the tax
15 due was lost in the mail, respondent contends that a reasonable and prudent person would have read his
16 or her 2014 California tax return as well as the 2014 California tax return instructions and easily
17 concluded that the amount due is to be paid to respondent by April 15, 2015. Respondent contends that
18 a taxpayer does not need a separate letter from his or her accountant to indicate what amount is due to
19 respondent and when to pay it. (Resp. Opening Br., p. 3, Exhibit H.)

20 In response to appellant's argument that the IRS also imposed a late payment penalty
21 and subsequently abated the penalty, respondent asserts that the federal abatement was not for
22 reasonable cause. Respondent contends that appellant's Individual Master File (IMF) reflects an
23 abatement of the penalty due to appellant's good filing history and not reasonable cause. Respondent
24 contends that, if the penalty was abated for reasonable cause, it would be indicated with a no Penalty
25 Reason Code (PRC) of "062." Respondent also asserts that it does not have the authority to grant a
26 first-time abatement of a penalty due to a taxpayer's good filing history.

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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.) Self-serving, unsupported assertions are not sufficient to satisfy an
6 appellant's burden of proof. (See, e.g., *Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979;
7 *Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.) In the absence of
8 uncontradicted, credible, competent, and relevant evidence showing an error in the FTB's
9 determinations, respondent's determinations will be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*,
10 80-SBE-154, Nov. 18, 1980.)

11 Late Payment Penalty

12 R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer
13 fails to pay the amount shown as due on the return on or before the due date of the return. The late
14 payment penalty has two parts. The first part is a penalty of 5 percent of the unpaid tax. (Rev. & Tax.
15 Code, § 19132, subd. (a)(2)(A).) The second part is a penalty of 0.5 percent per month, or a portion of a
16 month, calculated on the outstanding balance. (Rev. & Tax. Code, § 19132, subd. (a)(2)(B).) The late
17 payment penalty may be abated if a taxpayer can show that the failure to make a timely payment of tax
18 was due to reasonable cause and was not due to willful neglect. (Rev. & Tax. Code, § 19132, subd. (a).)
19 The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*,
20 83-SBE-244, Oct. 26, 1983.) To establish "reasonable cause" for the late payment of tax, the taxpayer
21 must show that its failure to make a timely payment of the proper amount of tax occurred despite the
22 exercise of ordinary business care and prudence. (*Id.* See also *Appeal of Robert T. and M.R. Curry*,
23 86-SBE-048, Mar. 4, 1986.) The taxpayer bears the burden of proving that an ordinarily-intelligent and
24 prudent businessperson would have acted similarly under the circumstances. (*Id.* See also *Appeal of*
25 *M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) This Board has held that the fact that tax information
26 is lost, lacking, inaccurate, or difficult to obtain is not enough to establish reasonable cause. (*Appeal of*
27 *M. B. and G. M. Scott, supra.*)

28 In *United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*), the United States Supreme Court

1 held that the duty to file a tax return by a statutory deadline could not be delegated to an agent, such as
2 an accountant or attorney. In contrast, the court stated that a taxpayer's reliance on an accountant or an
3 attorney for advice on a substantive matter of tax law, such as whether a liability exists, is reasonable
4 since most taxpayers are not competent to discern error in the advice. (*Id.* at p. 251.) The court
5 reasoned that it would defeat the purpose of seeking counsel in the first place if a taxpayer were required
6 to seek a second opinion or attempt to monitor the original counsel. (*Ibid.*) The Supreme Court also
7 held that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes
8 must be paid when due. (*Id.*, at 251-252.) In the *Appeal of Philip C. and Anne Berolzheimer* (86-SBE-
9 172) (*Berolzheimer*), decided on November 19, 1986, this Board extended the holding in *U.S. v. Boyle*,
10 *supra* (which involved a late filing penalty), to the context of the late payment penalty. The Board
11 determined that, where there is no question of law and where the issue involves a simple calculation of
12 the tax due, the reliance on an expert does not constitute reasonable cause for purposes of determining
13 whether the late payment penalty should be abated. (*Appeal of Philip C. and Anne Berolzheimer*,
14 *supra.*)

15 STAFF COMMENTS

16 R&TC section 19132, subdivision (a), provides that the late payment penalty will be
17 applied unless a taxpayer can show that the failure to make a timely payment of tax was due to
18 reasonable cause and was not due to willful neglect. Under *Boyle* and *Berolzheimer*, appellant cannot
19 establish reasonable cause for any mistake or missteps had by her CPA. This Board has also held that
20 the fact that tax information is lost, lacking, inaccurate, or difficult to obtain is not enough to establish
21 reasonable cause. (*Appeal of M. B. and G. M. Scott, supra.*)

22 As for willful neglect on appellant's part, appellant is responsible for knowing the
23 amounts reflected on her return, including the amount of the tax due with the filing of her return. Here,
24 lines 111 and 114 on the signature page of appellant's California return (page 5 of Form 540) indicate an
25 "amount you owe" and an "total amount due", respectively, of \$11,773. Appellant signed the Form 540
26 on April 11, 2015, just a few inches below these lines on the return. As such, appellant was on notice of
27 the amount of the tax due with her 2014 return at the time of its filing.
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