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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **JEFFREY T. NOLAN & VIVIENNE NOLAN¹**) Case No. 552938

<u>Year</u>	<u>Claim For Refund</u>
2008	\$1,739

18 Representing the Parties:

19 For Appellants: Ashley Wistrom, TAAP²
20 For Franchise Tax Board: Jane Perez, Tax Counsel

22 QUESTION: Whether appellants have established reasonable cause for the abatement of the late
23 payment penalty.

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27 ¹ Appellants reside in Sacramento, California.

28 ² Appellants filed their own appeal letter. Subsequent representation has been provided by the Tax Appeals Assistance Program (TAAP), including appellants' reply brief filed by John Humphrey.

Appeal of Jeffrey T. Nolan
And Vivienne Nolan

1 HEARING SUMMARY

2 Background

3 Appellants filed their 2008 California tax return within the extended due date, reporting a
4 taxable income amount of \$371,829. The return self-assessed a total tax of \$29,830, applied
5 withholding credit of \$8,089, and calculated a tax due of \$21,741. (Resp. Op. Br., exhibit A, pp. 1-2.)
6 Appellants' return also added \$2,628 for self-assessed interest and penalties,³ and remitted the total
7 reported amount due of \$24,369 with the return. (*Id.* at exhibit A, p. 2, lns. 63 & 65.) Respondent
8 processed appellants' return and accepted the self-assessed tax due of \$21,741. Respondent revised
9 appellants' interest and penalty amounts, calculating a late payment penalty of \$1,739.28 and interest of
10 \$551.86. Respondent issued appellants a refund of \$336.86, the difference between the self-assessed
11 interest and penalty amount of \$2,628 and respondent's calculated amount of \$2,291.14 (\$1,739.28 plus
12 \$551.86). (*Id.* at exhibit B.)

13 Appellants filed a claim for refund of the late payment penalty. (Appeal Letter,
14 attachment: letter dated Oct. 28, 2009.)⁴ Appellants' claim for refund indicated they sold a home in
15 Australia, a unique transaction for appellants, and experienced difficulties in locating a qualified tax
16 preparer. Appellants stated they had a calculated refund at the federal level before taking into account
17 the foreign sale, assumed the taxes paid in Australia would cancel out federal taxes on the sale, and since
18 their state taxes have historically tracked their federal taxes, they expected to not owe any state taxes as
19 well. Appellants explained that they subsequently located and appointed a tax professional and learned
20 they owed significant taxes on both the federal and state side. (*Ibid.*) Respondent reviewed appellants'
21 claim for refund, determined they failed to show reasonable cause for the late payment, and denied the
22 claim for refund. (Appeal Letter, attachments.) This timely appeal followed.

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25 ³ This amount is entered on appellants' tax return under the category of "Interest, late return penalties, and late payment
26 penalties." (Resp. Op. Br., exhibit A, p. 2, ln. 63.) Although a breakdown of this amount is not provided, since appellants
27 filed their return within the extended filing deadline, it can be deduced that this amount is for interest and a late payment
penalty on the self-assessed \$21,741 in tax owed after the due date.

28 ⁴ Appellants state they contacted respondent prior to submitting their return and respondent's representative suggested they
file their return with the payment for the penalty and then submit a claim for refund of the penalty amount.

1 Contentions

2 Appellants contend there is reasonable cause for the abatement of the late payment
3 penalty. Appellants indicate appellant-husband lived out of state and out of country for several years,
4 but is otherwise a native and long time resident of California with a good history of tax compliance.
5 (App. Reply Br., p. 1.) Appellants assert they spent the period of January through March of 2009
6 working with an Australian accounting firm to determine their Australian tax liability, which they
7 contend they needed to complete their U.S. tax return. Appellants state that after the completion of their
8 Australian return in early March 2009, they used the “Premier” version of TurboTax to do their federal
9 and state taxes (as they had in prior years), without including the Australian capital gain. (*Ibid.*)
10 Appellants further state that “when [they] recognized this commonly used software could not report
11 foreign capital gain,” they visited H&R Block in April 2009, but determined the office did not have any
12 tax professionals qualified to assist them.⁵ (Appeal Letter, p.1; App. Reply Br., p. 2.) Appellants state
13 they were ultimately able to locate a tax specialist who determined appellants’ tax obligation was higher
14 due to differences in exchange rates and no allowances made in California for foreign taxes paid. (App.
15 Reply Br., p. 2 & attachment: Statement from Edward A. Melia, Attorney, CPA.)

16 Appellants assert they made a good faith effort to calculate and pay their state taxes in a
17 timely manner. Appellants contend they acted as reasonably prudent business persons by completing
18 their Australian tax return at least one month prior to the deadline for their state and federal returns.
19 (App. Reply Br., p. 2.) Appellants further contend they acted reasonably by expecting that they would
20 be able to prepare their return correctly with the latest Premier version of TurboTax and by hiring H&R
21 Block, and continuing to look for a different preparer when they determined that H&R Block was unable
22 to prepare their return.⁶ (*Id.* at pp. 2-3.) Appellants state they believe they paid more in capital gains tax
23 for the sale of the Australian property to California than to Australia due to variations in exchange rates

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26 ⁵ Appellants also state they contacted a friend of appellant-husband who is a Certified Public Accountant (CPA) specializing
27 in corporate law who suggested they should check online resources such as the California Society of CPA’s to find a
qualified professional. (App. Reply Br., attachment: Statement from Brian K. Byrne.) Appellants assert they sought this
advice on March 21, 2009. (*Id.* at p. 1.)

28 ⁶ Appellants indicate they had previously used TurboTax to file returns while they were renting the Australian property, and
expected that they would be able to use it to prepare their return when they sold the property. (App. Reply Br., attachment:
Statement from Jeffrey T. Nolan.)

1 and California not providing an allowance for foreign taxes paid. (Appeal Letter, p. 2.) Appellants
2 assert it is reasonably prudent to not expect to pay a greater amount of tax to California on gain from a
3 sale of real property in Australia than were paid to Australia. (App. Reply Br., p. 3.)

4 Appellants contend they did not make any estimated payments because they did not
5 expect to owe any state taxes. (Appeal Letter, p. 2.) Appellants state that when they applied for the
6 federal automatic extension they completed their federal return using TurboTax without accounting for
7 the capital gain from Australia. Appellants maintain that this return showed a refund would be due for
8 their federal taxes, and although it did not include the capital gain from the sale, they expected the
9 foreign tax credit for taxes paid in Australia would mostly cancel out any additional tax owed. Based on
10 this expectation, appellants state they did not make any estimated payments at the federal level, and they
11 claim that since their state taxes have historically tracked their federal tax obligations they did not expect
12 to owe any additional state tax and for that reason did not make estimated payments to the state as well.
13 (*Id.*) Appellants assert they have overcome respondent's presumption of correctness. (App. Reply Br.,
14 p. 3.)

15 Respondent contends the penalty is properly calculated and appellants have not shown
16 reasonable cause for abatement. Respondent asserts appellants had an obligation to pay the full amount
17 of their tax liability by the April 15, 2009 deadline, regardless of any extension for filing the return.
18 Respondent contends appellants' difficulty in determining income or accumulating necessary
19 information does not negate this obligation, and complexity of the tax law which leads to a delay in
20 computing tax liability is also not reasonable cause. (Resp. Op. Br., pp. 2-3.) Respondent notes that
21 appellants sold the Australia property for a capital gain amount of \$249,940 on August 12, 2008. (See
22 *Id.* at exhibit E, p. 1, Ins. 2 & 7.) Respondent contends appellants had time from the date of the sale to
23 the April 15, 2009 return due date to determine the state tax impact of this sale or at least make a more
24 accurate estimate of their tax liability, rather than discovering in mid-March of 2009 that they could not
25 use their tax preparation software and then making no estimation of the tax on the gain from the sale
26 until after the April 15, 2009 deadline. Respondent contends a reasonable and prudent businessperson
27 would have done the required calculations, checked their tax preparation software, and hired a tax
28 professional in a timelier manner. (*Id.* at p. 3.)

1 Applicable Law

2 R&TC section 19132, subdivision (a)(1)(A) imposes a late payment penalty when the
3 amount shown on any tax return is not timely paid. This payment is mandatory, unless it can be shown
4 that the failure was due to reasonable cause and not willful neglect. In the late payment penalty context,
5 reasonable cause exists if it can be shown that the taxpayers acted as ordinarily intelligent and prudent
6 businesspersons would have acted under similar circumstances. (*Appeal of Robert T. and M. R. Curry*,
7 86-SBE-048, Mar. 4, 1986.) The taxpayers bear the burden of proving reasonable cause exists and no
8 willful neglect exists.⁷ (*Appeal of M.B. and G.M. Scott*, 82-SBE-249 Oct. 14, 1982.) The Board has
9 held that taxpayers failed to meet their burden of proof by failing to substantiate that they “diligently
10 attempted” to obtain information necessary to determine the tax due. (*Appeal of J.B. and P.R.*
11 *Campbell*, 85-SBE 112, Oct. 9, 1985.)

12 The Board has held that a taxpayer’s difficulty in determining income with exactitude
13 does not negate the requirement that taxpayers must make payments of tax based on a reasonably
14 accurate estimate of their tax liability. (*Appeal of M.B. and G.M. Scott, supra.*) Specifically, the
15 difficulty in determining or computing gain recognized on a disposition of property does not negate the
16 requirement to make payments based on a reasonably accurate estimate of the tax liability. (*Appeal of*
17 *Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) Furthermore, the complexity and problems in
18 accumulating the information necessary to complete a return is not reasonable cause for failure to pay
19 tax that is due in timely manner. (*Appeal of J.B. and P.R. Campbell, supra.*) However, a taxpayer’s
20 reliance on a tax professional’s advice for questions of substantive tax law, such as whether liability
21 exists, may constitute reasonable cause. (*Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172,
22 Nov. 19, 1986.)

23 STAFF COMMENTS

24 The parties disagree on whether appellants were acting in a manner consistent with an
25 ordinarily intelligent and prudent businessperson when they did not pay their California tax by the
26 April 15, 2009 due date. Respondent asserts that a reasonable and prudent businessperson would have
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28 ⁷ Willful neglect has been interpreted as conscious, intentional failure or reckless indifference. (*United States v. Boyle* (1985)
469 U.S. 241.)

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1 taken steps to find an appropriate tax preparer in a timelier manner. Appellants state that they were first
2 required to determine their Australian tax liability and complete their Australian return. They suggest
3 that one month was a reasonable amount of time to gather information and prepare the California return
4 under ordinary circumstances. Furthermore, they assert that they acted in a reasonable and prudent
5 manner (1) by continuing to search for a suitable tax preparer once they determined their tax preparation
6 software and local H&R Block firm were not adequate to prepare their returns and (2) by not remitting
7 additional estimated tax based on their expectation that the sale of property in Australia would not result
8 in state tax.

9 Respondent should be prepared to address appellants' position that they were first
10 required to determine their Australian tax liability before determining their state tax liability and whether
11 the steps they took in this regard demonstrate that they acted as would prudent businesspersons.

12 Although appellants take the position that one month is ample time to prepare their
13 California return under ordinary circumstances, they also suggested that the tax year in issue presented
14 extraordinary circumstances considering the unique transaction involved. Specifically, appellants state
15 they worked extensively with an Australian accounting firm from January through March of 2009, and
16 assert that calculating the California tax due was a lengthy and difficult process. Thus, appellants should
17 be prepared to explain how, under these circumstances, they acted reasonably by allowing only one
18 month to prepare the California return. In addition, respondent should address what actions would have
19 been prudent under these facts, where a taxpayer is aware of a unique transaction that may require
20 additional expertise to determine the state tax liability.

21 Appellants assert they expected a refund on their federal returns, without considering the
22 tax implications of the Australian sale. Appellants further expected the taxes they paid in Australia
23 would result in a foreign tax credit that would eliminate any additional federal tax due. Appellants
24 indicate their state taxes have traditionally tracked their federal tax obligations, and therefore they
25 assumed they would not owe any state tax. Appellants use this list of assumptions to assert it was
26 reasonable to not make any estimated tax payments. Appellants should be prepared to discuss whether
27 they relied on the advice of a tax professional informed of all the pertinent facts in forming their

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1 assumption that they would not owe state tax.⁸

2 Appellants provide rebuttal arguments asserting distinguishing elements between the
3 present case and decision cited by respondent. The parties should be prepared to detail why the decision
4 is or is not applicable to this appeal. For example, the parties should discuss *Appeal of Roger W.*
5 *Sleight, supra*. In that appeal, the taxpayer paid some expected tax in addition to his withholding at the
6 due date for payment. Subsequently, the taxpayer realized he owed additional tax, and remitted that
7 amount with his return filed within the extension period, then filed a claim for refund. The taxpayer
8 argued that he had difficulty in estimating his tax liability as of the April 15 deadline because “he was
9 unable to compute the gain to be recognized from the disposition of certain real property . . . because of
10 the complexity of the tax law and because of the lack of the relevant information upon which to compute
11 the tax.” (*Appeal of Roger W. Sleight, supra*.) The Board found that this reasoning did not constitute
12 reasonable cause and was not adequate grounds for abatement of the late payment penalty. Appellants
13 contend this case is distinguishable because the taxpayer did not provide evidence of his difficulty in
14 estimating his tax liability, whereas appellants have provided declarations concerning their lack of
15 information concerning the relevant California tax treatment and difficulty in finding a suitable preparer.
16 (App. Reply Br., p. 4.) Respondent, conversely, argues this case shows that complexity of the tax law
17 which leads to delays in computing the tax liability is not reasonable cause. (Resp. Op. Br., exhibit C, p.

18 1.)

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27 ⁸ The Board has found that reliance on a tax professional may result in reasonable cause under certain circumstances;
28 however, appellants state they attempted to use both a tax preparation software and a tax preparation firm, but ultimately
found both to be lacking, and thus it is not apparent to the Appeals staff that appellants relied on any advice from either
source.