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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeal of:

) **HEARING SUMMARY²**

) **CORPORATION FRANCHISE TAX APPEAL**

11
12 **VISTA PACIFIC TOWNHOMES**

) Case No. 522642

13 **ASSOCIATION, INC.¹**

14 _____
15 Tax Year Ending

Claim
For Refund

16 12/31/2007

\$7,058.76 plus interest

17 Representing the Parties:

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19 For Appellant:

Murray Greiff, Attorney at Law

20 For Franchise Tax Board:

Kenneth Davis, Tax Counsel III

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22 **QUESTION:** Whether appellant has demonstrated the late payment penalty should have been
23 abated by the Franchise Tax Board (FTB or respondent) due to reasonable cause.

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26 ¹ Appellant appears to be headquartered in Ventura County, California.

27 ² This appeal was originally scheduled to be heard by the Board of Equalization (Board) on June 22, 2011. Appellant's
28 representative requested that it be postponed due to a scheduling conflict with appellant's witness, so it was rescheduled to the October 25-28, 2011 oral hearing calendar for the Board's Culver City meeting.

1 HEARING SUMMARY

2 Background

3 Appellant filed its corporate tax return for 2007 in a timely manner on March 15, 2008.
4 Appellant reported tax liability of \$117,656, but no payment accompanied the tax return. On or about
5 March 28, 2008, respondent sent appellant a Notice of Balance Due, which stated the tax liability, plus a
6 late payment penalty and accrued interest. On April 30, 2008, appellant paid the tax liability. On
7 February 23, 2009, appellant paid the late payment penalty and accrued interest. On December 26, 2008
8 and again on October 26, 2009, appellant requested abatement of the late payment penalty, which
9 request was treated as a claim for refund. Respondent denied the claim for refund on January 30, 2010
10 and this timely appeal followed.

11 Contentions

12 Appellant is seeking a refund of the late payment penalty on the basis that the failure to
13 pay was due to reasonable cause and not willful neglect. Appellant is an incorporated, nonprofit
14 homeowners association that relied on a “professional management company” to file and pay its taxes.
15 Appellant asserts that the professional management company filed appellant’s tax returns on time, but
16 failed to pay the tax due, even though funds were available for that purpose. Appellant contends that it
17 used due diligence in retaining the professional management company and appellant has a history of
18 filing and paying its taxes in a timely manner. Appellant also contends that the ruling in *Klein v. U.S.* 94
19 F. Supp. 2d 838 (E.D.Mich. 2000) supports its position, particularly the court’s statement that the
20 precedent in *United States v. Boyle* (1985) 469 U.S. 241³ “does not require that a taxpayer consult with
21 an attorney or accountant in order to be found not negligent.”⁴ Appellant attached to the reply brief a
22 declaration of Norman Delgado, President, Vista Pacific Townhomes dated May 27, 2010, in which
23 Mr. Delgado states that he signed tax returns on behalf of appellant for 2007 and relied on “the expertise
24 of management and CPA consultants to make sure our financial matters are handled efficiently and
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26 ³ *United States v. Boyle, supra*, is discussed in more detail below in the Applicable Law portion of this hearing summary.

27 ⁴ *Klein v. U.S., supra*, is a published opinion from the federal district court for the Eastern District of Michigan, so it is not
28 binding legal authority in California. The case involved a motion for summary judgment, so the court did not rule on the
merits of the taxpayers’ position, but only whether the taxpayers were entitled to a trial to present their evidence. The
ultimate outcome of the subsequent trial, if such a trial occurred, has not been published.

1 accurately.” (Appeal Letter; App. Reply Br. and attachment.)

2 Respondent contends that appellant has not presented any evidence of a reasonable cause
3 for the late payment of taxes. With respect to the professional management company, appellant has not
4 shown it to be a tax professional with competency in tax law that might arguably justify appellant’s
5 reliance on the company in this matter. Furthermore, the FTB contends that a reasonable and prudent
6 officer of a homeowners association would have read the tax return and seen the tax liability of
7 \$117,656 and realized that a payment would have to be made by the due date for the return. Respondent
8 asserts that appellant has missed the “central issue of *Boyle*’s reliance test” which is that “the tax
9 professional must give affirmative advice of an issue of tax law.” In this regard, respondent argues that
10 appellant had a non-delegable duty to comply with the tax payment due date. Moreover, respondent
11 asserts that it is not clear who signed the 2007 return on behalf of appellant, it is not clear who allegedly
12 provided the advice to appellant’s officer-in-charge, and there was no affirmative statement of advice
13 provided by the tax professional as to an issue of tax law. (Resp. Reply Br., pp. 1-2.)

14 Respondent also states that Mr. Delgado’s declaration does not provide any indication of
15 the information provided by appellant’s officer to the tax advisor as to the tax liability on this one-time
16 sale of property. In addition, respondent states that there are no facts provided by the tax advisor
17 regarding appellant’s tax payments and filing requirements, which appears to form the basis for
18 appellant’s reliance claim. (Resp. Reply Br., p.2.)

19 Applicable Law

20 Burden of Proof

21 On appeal, taxpayers have the burden of proving error in respondent’s determination that
22 a penalty applies. (*Leuhsler v. Commissioner* (6th Cir. 1992) 963 F.2d 907; *Neely v. Commissioner*
23 (1985) 85 T.C. 934, 947; *Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.)⁵

24 Late Payment Penalty

25 Section 19132 of the Revenue and Taxation Code (R&TC) imposes a penalty for the
26 failure to pay a tax on or before the date due “unless it is shown that the failure is due to reasonable
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28 ⁵ Published decisions of the Board, such as *Appeal of Roger W. Sleight*, *supra*, are generally available on the Board’s website
at www.boe.ca.gov.

1 cause and not due to willful neglect.” The penalty is not named by statute, but it is commonly known as
2 the Late Payment Penalty or the Underpayment Penalty. The amount of the penalty is equal to five
3 percent of the total unpaid tax plus one-half of one percent of the remaining tax for every month the
4 payment is late, not to exceed 40 months. To meet their burden of proving “reasonable cause,”
5 taxpayers must show that the failure to pay the tax in a timely manner occurred despite the exercise of
6 ordinary business care and prudence. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

7 In *United States v. Boyle* (1985) 469 U.S. 241, the United States Supreme Court clarified
8 the definition of “reasonable cause” for penalty abatement in the context of the federal late filing penalty
9 set forth in Internal Revenue Code section 6651. The Court unanimously held that an executor was not
10 entitled to penalty abatement where he detrimentally relied on the estate attorney to file the estate tax
11 return in a timely manner, even though it was undisputed that the executor depended on the attorney for
12 guidance and the executor provided the attorney with all relevant information and records needed to file
13 the estate return. The Court stated, “Congress has placed the burden of prompt filing on the executor,
14 not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place
15 upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except
16 in a very narrow range of situations. . . That the attorney, as the executor’s agent, was expected to
17 attend to the matter does not relieve the principal of his duty to comply with the statute.” *Ibid.* p. 249.

18 In *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986, this Board
19 distinguished between relying on a tax professional’s expert advice about a matter of substantive tax law
20 and relying on a tax professional merely as an agent to file the return and pay taxes by the deadline.
21 “Reasonable cause” for late filing might exist where a taxpayer reasonably relied on the expert opinion
22 of a tax professional, even if that expert opinion was later determined to be incorrect. By contrast,
23 relying on an agent merely to file the return and pay taxes on-time is not considered “reasonable cause”
24 for purposes of penalty abatement because taxpayers have a personal, non-delegable obligation to file
25 their tax returns and pay their taxes in a timely manner. (*Appeal of Thomas K. and Gail G. Boehme*,
26 85-SBE-134, Nov. 6, 1985.)

27 STAFF COMMENTS

28 The precise relationship between appellant and the professional management company is

1 unclear. Appellant should be prepared to explain the nature of the relationship, particularly whether the
2 company provided tax advice as well as tax filing and payment assistance. The Declaration from
3 Norman Delgado does not address this relationship or whether appellant relied on incorrect tax advice
4 from a tax professional. If appellant detrimentally relied on incorrect tax advice from the professional
5 management company or anyone else, appellant should provide evidence of that advice, who gave it,
6 who received it, when it was given, and how it caused the late payment. In that circumstance, appellant
7 should provide information about the credentials of the person who gave the advice so that the Board
8 can determine whether such a person could be reasonably relied upon as a source of expert tax advice.

9 Appellant’s Reply Brief refers to a gain from the one-time sale of property, which “was
10 not done in the ordinary course of its business.” Since the tax liability was shown on the tax return,
11 which was filed in a timely manner, it is not obvious how such a transaction might be related to the late
12 payment of taxes. Appellant should be prepared to explain how this transaction might have created a
13 “reasonable cause,” or may relate to a “reasonable cause,” for the late payment (if such is the case).

14 If appellant wishes to provide additional information and documentation, it should be
15 provided at least fourteen days prior to the hearing to:

Claudia Madrigal, Board of Equalization
Board Proceedings Division
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Sacramento, California 94279-0080

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