

1 John O. Johnson
2 Tax Counsel
3 Board of Equalization, Appeals Division
4 450 N Street, MIC:85
5 PO Box 942879
6 Sacramento CA 95814
7 Tel: (916) 324-3140
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **CORPORATION FRANCHISE TAX APPEAL**
12 **MYERS POWER PRODUCTS, INC.**¹) Case No. 546913

<u>Tax Year Ended</u>	<u>Claim For Refund</u>
2/28/2009	\$34,902.24 ²

17 Representing the Parties:

18 For Appellant: William McCarthy, C.P.A.
19 For Franchise Tax Board: Jane Perez, Tax Counsel

21 **QUESTION:** Whether appellant has shown reasonable cause for the abatement of the late payment
22 penalty.

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26 ¹ Appellant was formerly located in Corona, Riverside County, California and is now headquartered in Ontario, San
27 Bernardino County, California. .

28 ² Appellant does not list the amount in controversy in its appeal letter, but specifies it is contesting the late payment penalty, which equals the amount shown here (breakdown provided in the staff comments below). At protest, appellant also contested the estimated tax penalty, but has not raised that issue on appeal.

1 HEARING SUMMARY

2 Background

3 Appellant's return for the tax year ending (TYE) February 28, 2009, was due on May 15,
4 2009. Appellant filed its tax return on November 15, 2009, within the extended due date period.
5 Appellant reported California net income of \$10,059,263, total tax of \$890,041, total payments of
6 \$456,963, and a net tax due of \$433,078. (Resp. Op. Br., exhibit A.) Appellant self-assessed an
7 underpayment of estimated tax penalty in the amount of \$3,633, and remitted \$436,711 with the return
8 for the net tax due and penalty amount.

9 Franchise Tax Board (FTB or respondent) accepted the self-assessed tax amount and
10 imposed a late payment penalty of \$34,902.24. Respondent issued a Return Information Notice (RIN) to
11 appellant on or about January 8, 2010. (Resp. Op. Br., p. 1; see also App. Op. Br., attachments.)
12 Appellant paid \$63,421.95 on January 21, 2010, to pay the remaining balance due and filed a claim for
13 refund.³ (App. Op. Br., attachments.) Respondent denied appellant's claim for refund and this timely
14 appeal followed.

15 Contentions

16 Appellant's Contentions

17 Appellant contends it has shown reasonable cause and the absence of willful neglect for
18 the abatement of the late payment penalty. Appellant presents a list of seven factors it submitted to
19 respondent at protest that appellant contends should be considered in determining whether a taxpayer
20 has shown reasonable cause for abatement. Appellant asserts respondent appears to have only
21 considered one factor when it denied the claim for refund. The seven factors are as follows.

- 22 1. The taxpayer's consolidated taxable income is apportioned based on the Schedule
23 R states activity;
- 24 2. The taxpayer's compliance history shows it has consistently made timely tax
25 filings and quarterly estimated tax payments;

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28 ³ This payment includes the late payment penalty amount, a corrected estimated tax penalty amount of \$17,747.13, and accrued interest.

- 1 3. The taxpayer timely calculated and paid estimate payments, with the intention of
2 paying the entire tax year's liability through these estimate payments, and
3 therefore did not focus on the safe harbor exceptions;
- 4 4. The taxpayer's TYE February 28, 2008 tax liability was \$239,232, it made total
5 quarterly payments for TYE February 28, 2009, of \$456,963, which would have
6 met the Form FTB 5806 Regular Corporation Exception A, and would have met
7 the requirements of that form's Exception B except for an error in the first quarter
8 calculation;
- 9 5. The taxpayer held more than sufficient funds at all times to make timely payments
10 of estimated taxes required under Large Corporation Estimated Tax Exception B
11 and pay the balance due at the original due date of the return in accordance with
12 Internal Revenue Service (IRS) Regulation 301.6651-1(c)(1), as cited in FTB's
13 Late Payment Reasonable Cause Abatement Law Summary;
- 14 6. The taxpayer has consistently undertaken proper, conscientious actions in prior
15 years and the year at issue to properly calculate and pay its estimated tax
16 liabilities as they came due; and
- 17 7. The taxpayer cannot calculate its final taxable income amount until apportionment
18 factors and the allocation of non-apportioned income items are determined, and
19 therefore the taxpayer's California taxable income can vary depending on the
20 level of activity of its various consolidated operating entities in each reporting
21 state.

22 (App. Op. Br., pp. 1-2.)

23 Respondent's Contentions

24 Respondent asserts appellant had an obligation to pay in full its tax liability for the TYE
25 February 28, 2009, by May 15, 2009, regardless of any extensions for filing. (Resp. Op. Br., p. 2.)
26 Respondent contends appellant failed to do so, and the late payment penalty was properly imposed.
27 Respondent alleges appellant's failure to pay the full tax liability timely is not due to reasonable cause,
28 and the resulting penalty is properly calculated and should not be abated. Respondent asserts appellant's

1 contentions do not establish reasonable cause because an inability to pay a tax timely due to a lack of
2 information or documents and complexity of the law are not valid reasonable cause arguments. (*Id.* at p.
3 3.) Likewise, respondent contends a history of compliance and errors in calculating estimate payments
4 do not constitute reasonable cause. (*Ibid.*) Respondent concedes that inability to pay may constitute
5 reasonable cause in some circumstances; however, illustrating an ability to pay despite failing to pay
6 timely does not constitute reasonable cause. (*Id.* at p. 4.)

7 Respondent also notes that while appellant has filed tax returns for the five years
8 preceding the tax year at issue, appellant has failed to timely pay the correct amount of tax during that
9 period. Respondent indicates it imposed estimated tax penalties for four of those five years and late
10 payment penalties for three of those years. (Resp. Op. Br., pp. 3-4 & fns. 6-7.) Respondent contends
11 filing timely within the extended due date is a separate and distinct requirement from paying the full tax
12 liability by the due date, and notes appellant only made estimated tax payments during the tax year of
13 \$453,763 when it had a tax liability of \$890,041.⁴ (*Id.* at fn. 5.)

14 Applicable Law

15 Pursuant to R&TC section 19132, a late payment penalty is imposed when a taxpayer
16 fails to pay the amount shown as due on the return on or before the due date of the return. However,
17 the penalty may be abated if an appellant can show the failure to make a timely payment of tax was
18 due to reasonable cause and in the absence of 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 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 reasonable cause exists.
24 (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

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28 ⁴ Respondent also notes appellant claimed an extension payment of \$3,200 on its return that respondent has no record of receiving. Respondent asserts it has no record of this payment and the amount is not included in the estimated payments total. (Resp. Op. Br., fn. 4 & exhibit B, p. 1.) Appellant has not contested this change or provided evidence of this payment on appeal.

1 R&TC section 19001 provides that, generally, the personal income tax imposed “shall
2 be paid at the time and place fixed for filing the return (determined without regard to any extension of
3 time for filing the return).”⁵ The complexity and problems in accumulating the information necessary
4 to complete a return does not constitute reasonable cause for the failure to make a timely payment of
5 the tax due. (*Appeal of Incom International, Inc.*, 82-SBE-053, Mar. 31, 1982.) Further, a taxpayer’s
6 difficulty in determining income with exactitude does not negate the requirement to make a timely
7 payment based upon a reasonably accurate estimate of its tax liability. (*Appeal of Roger W. Sleight*,
8 *supra*; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979.)

9 In *United States v. Boyle*, the United States Supreme Court held that the duty to file a
10 tax return by a statutory deadline could not be delegated to an agent, such as an accountant or attorney.
11 (*United States v. Boyle* (1985) 469 U.S. 241.) In contrast, the court stated that a taxpayer’s reliance on
12 an accountant or an attorney for advice on a *substantive matter of tax law*, such as whether a liability
13 exists, is reasonable since most taxpayers are not competent to discern error in the advice. (*Id.* at
14 p. 251.) The court reasoned that it would defeat the purpose of seeking counsel in the first place if a
15 taxpayer were required to seek a second opinion or attempt to monitor the original counsel. (*Ibid.*)

16 In *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, decided November 19,
17 1986, the Board extended the holding in *United States v. Boyle, supra*, (which involved a late filing
18 penalty) to the late payment penalty context, and determined that where there is no question of law and
19 where the issue involves a simple calculation of tax due, reliance on an expert does not constitute
20 reasonable cause for purposes of determining whether the late payment penalty should be abated.
21 Moreover, the Board has repeatedly stated that the complexity of, or difficulties in, accumulating the
22 information necessary to complete a return is not “reasonable cause” for a taxpayer’s failure to timely
23 pay tax. (*Appeal of J. B. and P. R. Campbell*, 85-SBE-112, Oct. 9, 1985 [delay in obtaining
24 partnerships’ records]; *Appeal of Roger W. Sleight, supra* [difficulty in computing recognized gain];
25 *Appeal of Elixir Industries*, 83-SBE-248, Dec. 14, 1983 [late discovery of additional income]; *Appeal of*
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28 ⁵ R&TC section 18567, subdivision (a), permits respondent to extend the time for filing a return, but subdivision (b) of that
section specifies that a filing extension does not also extend the time for payment of the tax shown on the return. (*Appeal*
of Roger W. Sleight, supra; *Appeal of M.B. and G.M. Scott, supra*.)

1 *Bild Industries, Inc.*, 82-SBE-212, Sept. 21, 1982 [unresolved business matters]; *Appeal of Avco*
2 *Financial Services, Inc.*, *supra* [difficulty in estimating tax due on worldwide income].)

3 STAFF COMMENTS

4 The only issue before the Board on this appeal is whether appellant has shown reasonable
5 cause for the abatement of the late payment penalty. According to the parties, appellant made payments
6 totaling \$453,763 by the due date of May 15, 2009, and had a total tax liability for the year at issue of
7 \$890,041, leaving an underpayment of \$436,278 at the time payment was due. The late payment penalty
8 is computed as five percent of the total tax unpaid as of the due date, \$21,813.90 (.05 x \$436,278.00),
9 plus half a percent of the unpaid tax for each additional month the liability is unpaid, \$13,088.34 (.005 x
10 \$436,278.00 x 6 months), for a total in this case of \$34,902.24. (Rev. & Tax. Code, § 19132, subd.
11 (a)(2).)

12 The late payment penalty may be abated if appellant meets the burden of proving there is
13 reasonable cause for the late payment of tax and the late payment is not due to willful neglect.
14 Appellant has provided seven factors to support its claim for reasonable cause. Appellant will need to
15 discuss how these factors prevented it from timely paying the full amount of the proper tax by the
16 May 15, 2009 due date. Appellant should also discuss the provided case law stating difficulty in
17 gathering necessary information or determining income with exactitude does not constitute reasonable
18 cause. Likewise, appellant should provide legal support for the assertion that a history of general
19 compliance with tax laws may constitute reasonable cause, and both parties should be prepared to
20 discuss the relevant compliance history of appellant's payment of tax by the deadline.

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