

STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2013-17

[INDIVIDUAL TAXPAYERS],

Petitioners

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Background

[Individual Taxpayers] (the “Taxpayers”), married Maine residents, appeal from Maine Revenue Services’ (“MRS’s”) assessment of interest and penalties in connection with: (1) the late filing of the Taxpayers’ [year 2] Maine joint income tax return; (2) the Taxpayers’ failure to timely pay in full their [year 2] Maine income tax liability; and (3) the Taxpayers’ failure to make estimated tax payments during [year 2]. The Taxpayers did not request an appeals conference, and consequently the Board’s decision is based solely on the written materials submitted by the parties.

The issue presented on appeal is whether, as the Taxpayers contend, the following issues warrant waiving or abating the penalties and interest assessed against them for the [year 2] tax year: (1) the fraudulent filing of the Taxpayers’ [year 2] federal income tax return by another individual and the related theft of their [year 2] federal refund; (2) MRS’s alleged complicity in the theft of the Taxpayers’ federal refund; and (3) the Taxpayers’ delayed receipt of a federal refund that was in a lesser amount than they anticipated. The Taxpayers have the burden of proof to show that it is more likely than not that MRS erred in assessing these penalties and interest. 36 M.R.S. § 151-D(10)(F).

II. Facts

During [year 2], the Taxpayers were on a payment plan with MRS for their outstanding [year 1] Maine income tax liability. [In November of year 2], MRS sent the Taxpayers an “Intent to Offset” notice. This informed them that if their [year 1] liability, which included tax [in excess of \$1,000], was not paid within 60 days, MRS would submit that liability to the U.S. Department of the Treasury to be offset against any federal tax refund the Taxpayers might receive. According to MRS, the Taxpayers paid their [year 1] Maine income tax liability in full [in February of year 3]. This pay-off is evidenced by a letter from MRS [of date].¹

Sometime in February of [year 3], the Taxpayers also attempted to file their [year 2] federal income tax return using the same online tax software they had employed [previously]. Instead of being able to file their return, however, they received a code indicating that their return had already been filed. [Mrs. Taxpayer] then contacted an MRS employee []. According to [Mrs. Taxpayer], she was told by [the MRS employee] that MRS had not taken the Taxpayers’ [year 2] federal refund as the agency had earlier notified the Taxpayers that it would (unless they paid their [year 1] tax liability), and that the Taxpayers should be concerned. MRS acknowledges that the Taxpayers called in February of [year 3] to notify the agency that their federal return for [year 2] had been fraudulently filed, but has provided no details of the conversation.

Inquiring with the Internal Revenue Service (“IRS”), the Taxpayers were informed that a return had been fraudulently filed in their names by an individual in another state (this was [State] according to the Taxpayers, but MRS reports that it was [a different state]) who had stolen [one if the Taxpayers’ identities]. The IRS further informed the Taxpayers that this

¹ The letter does not explicitly state that the [year 1] liability was paid in full, but does show that [] the Taxpayers’ payments matched the total amount listed as due for [year 1].

individual had received a refund of close to \$[amount] in their names. No further information could be provided about the individual who made the fraudulent filing due to IRS confidentiality regulations. Upon learning of this identity theft and the fraudulent return, the Taxpayers notified [law enforcement and others]. [Mrs. Taxpayer] also states that she again contacted [an employee of] MRS, who informed her that because the fraudulent return was filed in another state, MRS did not “flag” it.

The Taxpayers then filed their [year 2] federal return on April 15, [year 3]. What ensued, according to the Taxpayers, was almost a year of [attention from the IRS]. By the end of this period, in March of [year 4], the IRS had reduced the Taxpayers’ refund from the [amount] they had entered on their return []. The Taxpayers received a refund [of the reduced amount], plus [] interest, [in March of year 4].

Although they timely filed their [year 2] federal return on April 15, [year 3], the Taxpayers did not file a Maine income tax return at that time. [In September of year 4], MRS sent a letter requesting that the Taxpayers file their [year 2] Maine return. When the Taxpayers did not comply, MRS sent them a “Demand for Filing” notice [in October of year 4] which informed the Taxpayers that they needed to file their [year 2] return within 60 days if they wished to avoid an increased penalty for failing to file and being subject to an estimated assessment. The Taxpayers filed their [year 2] Maine return [in December of year 4, within the 60-day period]. Included with the return was a [partial] payment [] against the [liability] shown on the return as tax due. The return showed the Taxpayers made no estimated tax payments during [year 2] and had no income tax withheld from their incomes that year. MRS adjusted this return by reducing the amount of tax [] to correct an error due to a miscalculation related to the tax tables [], but then assessed penalties [] for failure to file; [] failure to pay; and [] for the

underpayment of estimated tax. [Even after adjustment, the amount of tax due for year 2 was in excess of \$1,000]. [In December of year 4] MRS issued an assessment for [the adjusted tax amount, penalties, and interest, less the Taxpayers' earlier partial payment].²

[In early January of year 5], the Taxpayers notified MRS that they would be seeking reconsideration of this assessment on the basis of [Mr. Taxpayers's] stolen identity and that they would also begin paying their [year 2] tax liability [in March of year 5] under a payment plan.³ The Taxpayers filed a petition for reconsideration [later in January of year 5], requesting that MRS abate the penalties and interest contained in the assessment for [year 2]. The Taxpayers asserted that penalties and interest should be waived or abated because of the fraudulent filing of their [year 2] federal return and their belief that MRS was complicit in the theft of their [year 2] federal refund.

MRS upheld its assessment of tax, penalties, and interest in a Decision on Reconsideration [in June of year 5]. The Taxpayers then timely filed this appeal with the Board.

III. Law

All resident individuals in the State of Maine who are either required to file a federal income tax return for a taxable year or who have a Maine individual income tax liability for a taxable year are required to file an annual income tax return with MRS for that same taxable year. 36 M.R.S.A. § 5220(1). Such returns are due on or before the date on which the corresponding federal income tax return is due. 36 M.R.S.A. § 5227. Married couples, such as the Taxpayers, may file a joint return. 36 M.R.S.A. § 5221. The amount shown as due on a Maine return filed with MRS is deemed to be assessed against that person at the time of filing,

² As of June [year 5], the accrual of interest had [further] increased the total amount due [].

³ MRS reports that no payments were made under that plan.

and is payable on or before the date prescribed for filing the return, without regard to any extensions of the filing date. 36 M.R.S.A. § 141(1).

A person subject to Maine income tax is also required to make quarterly payments of the amount of tax that the person estimates to be due for the taxable year. 36 M.R.S.A. § 5228(2). These payments are due on the 15th day of the 4th, 6th, 9th and 13th months following the beginning of the person's fiscal year. 36 M.R.S.A. § 5228(4). This requirement to make payments of estimated tax due is waived if, [unlike in this case]: (1) the person's liability for the tax year, exclusive of withholdings, is less than \$1,000.00; or (2) that person had a tax liability of less than \$1,000.00 for the previous year. 36 M.R.S.A. § 5228(2).

Taxpayers who fail to file a Maine tax return when required are liable for a penalty, the amount of which depends on the length of the delay in filing. In cases where, as happened here, a taxpayer files a return within 60 days of receiving a formal demand from MRS, the penalty is \$25.00 or 10% of the tax due, whichever is greater. 36 M.R.S.A. § 187-B(1)(A). Similarly, any taxpayers who fail to pay the amount shown as due on a return when filed with MRS are also subject to a penalty. The amount of this penalty is "1% of the unpaid tax for each month, or fraction of a month during which the failure continues, to a maximum in the aggregate of 25% of the unpaid tax." 36 M.R.S.A. § 187-B(2)(A).

Under 36 M.R.S.A. § 187-B(7), MRS is required to waive or abate penalties for failure to file and failure to pay if there are "grounds constituting reasonable cause." Reasonable cause includes, but is not limited to the following: (1) receiving erroneous information from MRS; (2) the death or serious illness of the taxpayer or someone in the taxpayer's immediate family; (3) a natural disaster; (4) a return due monthly being filed and paid less than one month late when all of the taxpayer's returns and payments during the previous 12 months were timely; (5) a return

due other than monthly being filed and paid less than one month late when all of the taxpayer's returns and payments during the previous 3 years were timely; (6) substantial authority justifying the failure to file or pay; and (7) if the amount subject to a penalty is de minimis in relation to the amount otherwise paid, the reason for the failure to file or pay and the taxpayer's history of compliance. 36 M.R.S.A. § 187-B(7).

The failure to make estimated payments as required by 36 M.R.S.A. § 5228 is also subject to penalties. These accrue on the amount of any underpayment at the same rate established under 36 M.R.S.A. § 186 for interest on late payments of tax. 36 M.R.S.A. § 5228(5). The penalty for failing to make estimated payments may be waived or abated "for cause." *Id.*

Finally, any person who fails to pay income tax on or before the last day prescribed for payment is liable for interest on the amount of tax not paid. 36 M.R.S.A. § 186. This interest is applied at a rate derived from a statutory formula, compounded monthly. []. MRS may waive the interest if the failure to pay the tax at issue "is explained to the satisfaction" of MRS.⁴ *Id.*

IV. Analysis

The Taxpayers argue that the penalties assessed against them for the [year 2] tax year should be waived or abated because of: (1) the fraudulent filing of their [year 2] federal income tax return by another individual and the related theft of their [year 2] federal refund; (2) MRS's alleged complicity in the theft of that refund; and (3) their delayed receipt of a federal refund in a lesser amount than they anticipated.

⁴ Maine's tax statutes usually refer to the State Tax Assessor, the official who directs MRS, rather than the agency itself. To avoid confusion, however, we have replaced all references to the "Assessor" with "MRS" in all statutory language discussed or quoted herein.

The Taxpayers have the burden of showing that the issues they raise constitute reasonable cause for the waiver or abatement of the penalties assessed against them for failing to timely file their [year 2] return and pay the amount due. To do so, these issues must come within one of the examples of reasonable cause listed in 36 M.R.S.A. § 187-B(7), or, because that list is non-exclusive, have the same level of forcefulness as a reason for waiving or abating penalties as the listed examples. The Taxpayers also have the burden of showing that there is cause to waive or abate the penalties assessed for their failure to make estimated payments of tax and that they have “explained to the satisfaction” of MRS as to why they did not timely pay their [year 2] Maine income tax liability so that the interest assessed against them should be waived.

The Board first considers whether MRS can be held to be complicit in the theft of the Taxpayers’ [year 2] return. We then determine whether the Taxpayers have shown reasonable cause or an adequate explanation that warrants waiver or abatement of the penalties and interest assessed by MRS.

A. MRS’s alleged complicity in the theft of the Taxpayers’ [Year 2] federal refund

The Taxpayers’ contend that MRS, by failing to have their [year 1] tax liability offset against their [year 2] federal refund, as the agency indicated it would in its notice of November [of year 2], was complicit in the theft of that return by the individual who fraudulently filed a [year 2] federal return in their names. The Taxpayers’ theory appears to be that if MRS had their federal refund used for offset when the fraudulent return was filed, it would have been applied to their Maine income tax liabilities rather than being stolen.⁵

⁵ According to MRS, the agency did not receive any notice of the fraudulent filing of the Taxpayers’ return from the IRS, and normally would not receive any such notice in the event of a fraudulent filing. MRS, therefore, had no knowledge of the theft of the Taxpayers’ [year 2] federal return until the Taxpayers informed the agency after this event took place.

Neither party has informed the Board of the date of the fraudulent filing, which presumably must have occurred in January or early February of [year 3]. If the fraudulent filing took place after [the mid-February year 3] date on which the Taxpayers' paid off their [year 1] Maine income tax liability, MRS no longer had any reason or justification to take the Taxpayers' federal refund. The liability the refund would have been offset against had been eliminated by the Taxpayers themselves, and MRS could in no way be described as being complicit in the theft of that refund.

Even if the fraudulent return was filed prior to [mid-February of year 3], however, MRS was still not complicit in the theft of the Taxpayers' federal refund. The agency may have either: (1) decided not to have the Taxpayers' federal refund offset against their [year 1] Maine liability, which is within MRS's discretion;⁶ or (2) simply not yet submitted the Taxpayers' [year 1] Maine liability to the IRS for offset. Neither of these possibilities rises to the level of "complicity," *i.e.*, "the act or state of being an accomplice," with the person who stole the Taxpayers' [year 2] federal return. BLACK'S LAW DICTIONARY 324 (9th ed. 2009). Finally, even if MRS had submitted the Taxpayers' [year 1] Maine liability for offset, the IRS obviously failed to connect this with a return filed from [another state], which is not a failure on the part of MRS.

There also appears to be no possibility at the time the fraudulent return was filed that MRS intended to take the Taxpayers' [year 2] federal refund to offset against their [year 2] Maine income tax liability. At the time of the fraudulent filing, in January or February of [year 3], the Taxpayers had yet to file their [year 2] Maine return, and it was not due for more than two

⁶ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (U.S. Supreme Court acknowledging that it has recognized on several occasions that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *Lindemann v. Commission on Governmental Ethics and Election Practices*, 2008 ME 187, ¶ 16, 961 A.2d 538, 544 ("Furthermore, an agency charged with enforcing a particular statute or rule has the prerogative of electing not to take action.").

months. Thus, in January of [year 3] MRS could not have known what the amount of the Taxpayers' [year 2] Maine income tax liability would be, or even if there would be an unpaid liability at all. There would have been no reason or justification at that time for MRS to have taken any federal refund to offset against what was at most a potential Maine income tax liability the Taxpayers might have for [year 2].

Based on the evidence presented, the Board cannot find that MRS was complicit in the theft of the Taxpayers' [year 2] federal return.

B. Penalty for failing to file the Maine [Year 2] return

As noted above, the Taxpayers did not file their [year 2] Maine income tax return until December [of year 4], almost 20 months after that return was due. The Board acknowledges that the Taxpayers faced particularly difficult circumstances with regard to the fraudulent filing of their [year 2] federal return and theft of their refund. These circumstances do not, however, constitute reasonable cause under 36 M.R.S.A. § 187-B(7) for waiving the penalties for failing to timely file their [year 2] Maine return. The Taxpayers do not assert that they were unable to locate or compute any information needed to complete that return, and they do not describe any other factors that might have prevented them from filing. The difficulties that the Taxpayers faced in [year 2] and [year 3] certainly may have impacted their ability to *pay* their Maine tax liabilities, but they did not affect the Taxpayers' ability to *file* their [year 2] return.

Further, even while the Taxpayers were dealing with all of the fallout from the fraudulent filing of their federal return by another individual, they still managed to file their [year 2] federal return by April 15, [year 3]. The Taxpayers have articulated no reason why they could not have timely filed their [year 2] Maine return as well. The Board therefore declines to adjust the penalties assessed against the Taxpayers for failing to timely file their [year 2] Maine return

C. Penalty for failing to timely pay the [Year 2] Maine liability

To date, the Taxpayers have paid [a portion] of the tax, penalties and interest due with regard to the [year 2] tax year, leaving a balance due []. We find that the fraudulent filing of the Taxpayers' [year 2] federal return, the related theft of their refund, and the delay in finally receiving their [year 2 federal] refund do not constitute reasonable cause for waiving or abating the penalties assessed on the failure to pay their [year 2] liability when due. As described above, even with the fraudulent filing the Taxpayers could have timely filed their [year 2] Maine income tax return. The theft of their federal refund may have negatively impacted the Taxpayers' ability to pay what was due on that return, but they could have asked MRS to allow them to pay in installments under a payment plan and avoided some of the penalties they have incurred. When the Taxpayers finally received their federal refund in March of [year 4], they could have used [it] to pay their [year 2] liability, which they have yet to do in full. Additionally, had the Taxpayers' made the required estimated tax payments during [year 2], or had withholdings taken from their income, they may have avoided incurring a large unpaid liability for [year 2] in the first place.

The Taxpayers' receipt of a smaller [year 2] federal refund than they anticipated also does not constitute reasonable grounds for the waiver or abatement of penalties for the failure to timely pay their [year 2] Maine tax liability. Although the Taxpayers may disagree with the outcome of the IRS's audit, the Service evidently determined that the Taxpayers were not entitled to a refund in the amount they originally claimed. The Board cannot find that the expectation of receiving a federal refund in an amount larger than what is appropriate constitutes reasonable cause for the waiver or abatement of penalties.

Finally, in their submissions to the Board, the Taxpayers also mention that [Mrs. Taxpayer] suffers from a [condition], and this could potentially fall within one of the statutory examples of reasonable cause for the waiver or abatement of penalties. Under 36 M.R.S.A. § 187-B(7)(B), when the failure to pay a tax liability is due to “the death or serious illness of the taxpayer or a member of the taxpayer’s immediate family,” this may constitute reasonable cause. The Chief Appeals Officer inquired about the nature of [Mrs. Taxpayer’s condition] but the Taxpayers declined to provide any additional information, citing privacy concerns. Therefore, the Board cannot find that the Taxpayers have met their burden to show that this [condition] constituted reasonable cause for waiving the penalty for the Taxpayers’ failure to timely pay their [year 2] Maine income tax liability.

The Board declines to adjust the penalties assessed against the Taxpayers for failing to timely pay their [year 2] Maine income tax liability.

D. Penalty for failing to make estimated payments during [Year 2]

The Taxpayers failed to make any payments of estimated tax during [year 2] as they were required to under 36 M.R.S.A. § 5228 because their liabilities for both that tax year and the preceding [year 1] tax year were more than \$1,000.00.⁷ Under 36 M.R.S.A. § 5228(5), the penalty assessed against them for this failure may be waived “for cause.” The Taxpayers have not, however, advanced any reasons for failing to make such payments, or explained why they had no withholdings taken from their income. The issues raised by the Taxpayers in their appeal, concerning their [year 2] federal return and refund, all occurred in [year 3] and had no bearing on their ability to make estimated payments or have withholdings taken from their income during

⁷ The Taxpayers’ Maine liability for [year 1] was \$[amount]. Their Maine liability for [year 2] was \$[amount].

[year 2]. The Board therefore finds that cause does not exist for waiving or abating the penalty assessed against the Taxpayers for failing to make estimated payments.

E. Waiver or abatement of interest on the unpaid [Year 2] Maine liability

Finally, the Taxpayers contend that they should only be liable for interest on their unpaid [year 2] Maine income tax liability beginning in April of [year 4], which is when they finally received their [year 2] federal return. Interest may be waived “[i]f the failure to pay a tax when required is explained to the satisfaction of [MRS].” 36 M.R.S.A. § 186. “This statutory language indicates legislative intent to confer upon the assessor broad discretion to waive or abate the interest due on an unpaid tax when the delayed payment is satisfactorily explained.” *Victor Bravo Aviation, LLC v. State Tax Assessor*, 2012 ME 32 ¶ 8, 39 A.3d 68. In practice, this standard may often prove to be more difficult to satisfy than that for penalties.

Here, the Taxpayers have not raised any issues that warrant the waiver or abatement of penalties in this case. Thus, the Board finds that they have also not provided a satisfactory explanation for their failure to timely pay their [year 2] Maine income tax liability. The Board declines to adjust the interest assessed against the Taxpayers for failing to timely pay their [year 2] Maine income tax liability

IV. DECISION

Based upon the evidence presented, the assessment is upheld in full.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board’s rules, available at <http://www.maine.gov/boardoftaxappeals/lawsrules/>, for more information on when the Board may grant reconsideration. If no motion for reconsideration is

filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the Taxpayers may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Taxpayers with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: October 28, 2013