

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011753
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BJSK, LLC) Date Issued: March 14, 2018
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OPINION

Representing the Parties:

For Appellant: **Beverly Boyd, Member**

For Franchise Tax Board: Meghan McEvilly, Tax Counsel III

For Office of Tax Appeals: Sheriene Anne Ridenour, Tax Counsel III

BRAMHALL, Administrative Law Judge: This appeal is made pursuant to section 19324 of the California Revenue and Taxation Code¹ from the action of the Franchise Tax Board (FTB or respondent) in denying appellant's claim for refund in the amount of \$432 for the year ended (TYE) December 31, 2013 (TYE 2013).

Appellant waived its right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUE

1. The issue presented in this appeal is whether appellant has established reasonable cause for failing to timely file a return for TYE 2013 and thus should be granted its requested refund.

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

FACTUAL FINDINGS

1. Appellant is a limited liability company (LLC) that registered with the California Secretary of State's Office on April 9, 2012.
2. On April 15, 2013, appellant submitted an LLC Tax Voucher (Form 3522) for the 2013 tax year and remitted payment of \$800 for the applicable LLC annual tax.
3. On March 9, 2016, the FTB issued appellant a Request for Past Due LLC Return of Income (Request), requesting that appellant file a TYE 2013 return, explain why it was not required to file a return (by completing an attached questionnaire), or provide a copy of the return if already filed. Thereafter, the FTB issued appellant a Payment Received - Missing Tax Return notice, dated March 19, 2016, notifying appellant that while the FTB received payments totaling \$800 for appellant's TYE 2013, the FTB did not have a TYE 2013 tax return on file for appellant.
4. In response, appellant submitted the questionnaire attached to the Request, asserting that appellant filed its TYE 2013 return on March 19, 2014.
5. On April 11, 2016, appellant filed its TYE 2013 tax return, reporting zero income, self-assessing an \$800 LLC annual tax, and reporting total tax due of \$800. Appellant indicated on the return that it had two members for the TYE 2013. Since appellant made a timely estimated tax payment of \$800 on April 15, 2013, no tax was due with the untimely return.
6. The FTB accepted the return as filed and imposed a late-filing penalty of \$432 pursuant to Section 19172, plus interest. The FTB sent appellant a notice reflecting the late-filing penalty and balance owed.
7. Appellant responded by a letter dated April 29, 2016, asserting that it was surprised to learn that its TYE 2013 return had not been filed and requesting abatement of the late-filing penalty.
8. Since appellant had not paid the late-filing penalty, the FTB treated appellant's request as an informal claim for refund pending the payment of the penalty.
9. On July 15, 2016, appellant submitted a payment of \$432 towards its TYE 2013 account.²

² After applying the \$432.00 payment, appellant's account reflected an outstanding balance of \$2.74, which the FTB wrote off pursuant to Government Code section 13943.1.

10. Upon appellant's payment of the late-filing penalty, the FTB considered appellant's claim for refund, which it denied based on a lack of reasonable cause. In August of 2016, appellant filed this timely appeal.
11. In letters dated November 22, 2016, and December 16, 2016, the FTB invited appellant to provide additional evidence.

DISCUSSION

The FTB's determination is presumed correct and a taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (See, e.g., *Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979; *Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

Section 18633.5, subdivision (a), provides, in part, that an LLC classified as a partnership shall file its return on or before the 15th day of the fourth month following the close of its taxable year. Section 18567 permits a six-month extension for an LLC to file a return if the return is filed within six months of the return due date. If the return is not filed within six months of its original due date, no extension exists. Section 19172 imposes a late-filing penalty when a partnership fails to file a return by the time prescribed unless it is shown that the failure was due to reasonable cause. The amount of the penalty is calculated as \$18 multiplied by the number of persons who were partners in the partnership during any part of the taxable year multiplied by the number of months (including partial months) the return is late, up to 12 months. (Section 19172, subd. (b).)

Here, appellant's TYE 2013 return was due on April 15, 2014, with an extended due date of October 15, 2014. Appellant filed its TYE 2013 return on April 11, 2016. Since appellant did not file its TYE 2013 return by October 15, 2014, appellant did not have an extension of time to file such that its TYE 2013 return was filed nearly two years late. According to appellant's TYE 2013 tax return, it had 2 partners. Therefore, the FTB properly calculated a penalty of \$432 (i.e., \$18 per month x 2 partners x 12 months).

When the FTB imposes a late-filing penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan*, *supra*.) The burden is on the taxpayer to establish reasonable cause for an untimely filing. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish reasonable cause for the late filing, a taxpayer must show that the failure to file timely occurred despite

the exercise of ordinary business care and prudence, or that an ordinarily intelligent and prudent businessperson would have acted in the same manner under similar circumstances. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

In its appeal letter, appellant contended that it thought its TYE 2013 return was “included in the electronic packet accepted by the [FTB],” and that its TYE 2013 tax return was not properly filed due to an issue with a software system used by appellant’s tax preparer. The assertion of a software system problem was, according to uncontradicted statements in FTB’s letter to appellant, clarified by appellant’s tax preparer as a preparer misunderstanding as opposed to a software system issue.³ Further, despite FTB’s invitation to provide additional documentation, none was provided.

Appellant’s apparent reliance on its tax preparer to timely file its tax return is not reasonable cause for the untimely filing. Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985; *Appeal of Roger D. and Mary Miller*, 86-SBE-057, Mar. 4, 1986.) A taxpayer’s reliance on another to file a return by the due date is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241.) Despite many opportunities to provide evidence, appellant has provided no evidence or documentation that establishes reasonable cause. Accordingly, appellant has failed to meet its burden of proving that respondent erred in denying its claim for refund.

In reaching the holding herein, we considered all arguments made by the parties, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.

HOLDING

1. Appellant failed to establish that its failure to timely file its LLC tax return for the 2013 tax year was due to reasonable cause and not willful neglect.

³ It is not clear whether appellant is still arguing that there was a software error. Appellant filed its appeal letter in August of 2016. On November 22, 2016, the FTB sent appellant a letter stating that, in November 8, 2016 telephone conversation, appellant’s tax preparer explained that the software system did not have an error and that appellant’s tax return was untimely filed due to a misunderstanding.

Nonprecedential

DISPOSITION

The FTB's action in denying appellant's claim for refund is sustained in full.

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Douglas Bramhall
Administrative Law Judge

We concur:

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Linda C. Cheng

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Linda C. Cheng
Administrative Law Judge

DocuSigned by:

Grant Thompson

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Grant S. Thompson
Administrative Law Judge