

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	) OTA Case No. 18011055
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<b>MT KEMBLE VALUE EQUITY FUND I, LLC</b>	) Date Issued: July 30, 2018
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**OPINION**

Representing the Parties:

For Appellant:	Mark DeLotto, Chief Operating Officer
For Respondent:	David Hunter, Tax Counsel IV

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Mt. Kemble Value Equity Fund I, LLC (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$6,336 for the 2015 tax year, consisting entirely of a penalty imposed under section 19172 for failing to file a return by the due date (the late-filing penalty). This matter is being decided based on the written record because appellant waived its right to an oral hearing.

**ISSUE**

Did appellant establish a basis for abatement of the late-filing penalty?

**FACTUAL FINDINGS**

1. Appellant untimely filed its final California Partnership Return of Income, Form 565 (tax return), with FTB on September 14, 2016.<sup>2</sup> The return covered a short period from January 1, 2015, through June 30, 2015, due to the termination of appellant’s business operations. Appellant’s return reported \$0 in payments, and \$0 in tax due. Appellant also untimely filed its federal income tax return on September 14, 2016.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

<sup>2</sup> We make no finding with respect to whether appellant properly filed using Form 565, as opposed to Form 568, Limited Liability Company Return of Income.

2. Appellant is a limited liability company (LLC) that is taxed as a partnership for federal and state tax purposes. Appellant reported having 32 partners (for tax purposes) during the tax period at issue.
3. FTB issued a Notice of Balance Due dated October 21, 2016, notifying appellant that FTB imposed a \$6,336 late-filing penalty under section 19172, which was due by November 7, 2016.<sup>3</sup>
4. On October 10, 2016, the Internal Revenue Service (IRS) notified appellant of a federal late-filing penalty assessed under Internal Revenue Code (IRC) section 6698 for the late filing. The IRS subsequently abated that penalty.
5. Appellant paid the late-filing penalty assessed by FTB in full via check dated November 4, 2016.
6. Appellant submitted a Reasonable Cause – Business Entity Claim for Refund, FTB Form 2924, dated November 2, 2016, requesting abatement of the California late-filing penalty on the basis that appellant had a good filing history with both the IRS and FTB. Appellant also explained that it had terminated its business in June 2015, disposed of all its investments, and had not received the investment information necessary to file the return until later in the year.
7. By Notice of Action (NOA) dated March 3, 2017, FTB denied appellant’s claim for refund on the basis that the information provided did not establish reasonable cause.
8. By letter dated June 1, 2017, appellant timely filed the instant appeal, reiterating the contentions raised in its claim for refund, and contending that since the IRS waived the federal late-filing penalty, the FTB should do the same with respect to the California late-filing penalty.

### DISCUSSION

California imposes a penalty on a partnership (or an LLC taxable as a partnership) for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause. (§ 19172(a) [incorporating § 18633.5, which delineates the return filing obligations of LLCs classified as partnerships].) The amount of the late-filing penalty is the

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<sup>3</sup>This amount represents \$18, multiplied by the number of reported partners (32), multiplied by the number of months late the return was filed as calculated from the original due date (i.e., 11 months, covering the period October 15, 2015, through September 14, 2016).

product of two multiplication factors. The two factors are: (1) eighteen dollars; and (2) the number of partners in the partnership during any part of the taxable year. (§ 19172(b).) The late-filing penalty amount applies for each month, or fraction of a month, not to exceed 12 months, during which the partnership's failure to file a required return continues. (§ 19172(a).)

Pursuant to section 18567(a), for the 2015 tax year, FTB had the authority to grant an extension of time to file a return for up to six months.<sup>4</sup> (§ 18567(a).) Pursuant to California Code of Regulations, title 18, section (Reg.) 18567, FTB provides for an automatic six-month extension of time to file; however, the extension is not allowed if the return is not filed within the extension period. (Reg. 18567(a).) In the case of an LLC electing to be taxed as a partnership, a return for the 2015 tax year is due on or before the fifteenth day of the fourth month following the close of the tax year.<sup>5</sup> (§ 18633.5(a).)

In order to abate a late-filing penalty imposed pursuant to section 19172, a partnership must establish that its failure to timely file was due to reasonable cause. (§ 19172(a).) Existing precedential decisions of the Board of Equalization (BOE or board) interpret the meaning of what constitutes reasonable cause for late filing a return. (See, e.g., *Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 1979-SBE-027, Jan. 9, 1979.)<sup>6</sup> Although these decisions interpret what constitutes reasonable cause in the context of other penalty provisions of the Revenue and Taxation Code, those interpretations are equally applicable in determining whether reasonable cause exists for purposes of section 19172.<sup>7</sup>

Under these precedential authorities, a taxpayer seeking to establish that a failure to act

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<sup>4</sup>Section 18567 was amended by Statutes 2017, chapter 21 (Assembly Bill 119), to allow for extensions for up to seven months for certain partnerships filing a return for a reporting period beginning on or after January 1, 2017.

<sup>5</sup>Section 18633.5 was amended, effective January 1, 2017, by Statutes 2016, chapter 348 (Assembly Bill 1775) to shorten this due date by a month.

<sup>6</sup>Pursuant California Code of Regulations, title 18, section 30501(d)(3), precedential BOE opinions that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are viewable on the board's website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

<sup>7</sup>These decisions discuss abatement of a late-filing penalty in the context of statutory language similar to section 19131, which requires a taxpayer to establish two standards are met: (1) that the failure was due to reasonable cause; and (2) that the failure was not the result of willful neglect. Section 19172 does not require the second element, establishing lack of willful neglect; thus, we do not address willful neglect in this decision.

was due to reasonable cause, has the burden proving that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*United States v. Boyle*, 469 U.S. 214, 245; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001; *Appeal of Stephen C. Bieneman, supra*; *Appeal of Howard G. and Mary Tons, supra*.)

Respondent properly assessed a late-filing penalty because appellant's final return for the period ending June 30, 2015, was due on October 15, 2015; however, appellant did not file the 2015 return until 11 months later on September 14, 2016. The standard of reasonable business care and prudence imposes on taxpayers a general obligation to take reasonable measures to timely obtain and maintain the requisite documentation or other information necessary to file a required return by the due date. (See Reg. 19032(a)(5).) Thus, delay due to difficulty in accumulating documents or other necessary information generally will not constitute reasonable cause for purposes of abating the late-filing penalty. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, *supra* [alleged unavailability of records]; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968 [lack of necessary information or documents to file].) Furthermore, an allegation that a taxpayer was unable to obtain the information necessary to file a return, in absence of evidence establishing why the information was unavailable, and of the taxpayer's "continuity of his [or her] efforts to secure the necessary information" from the due date until the date the return was late-filed, does not constitute reasonable cause. (*Raymond J. Beran, et. al., v. Commissioner* (1980) T.C. Memo. 1980-119.)

Here, while appellant contends that it was unable to timely obtain investment information until after the due date to file a return, appellant provides no supporting documentation to show that it was prevented from obtaining necessary information from the due date of the return until the time it eventually filed a return 11 months later. Appellant has also not provided any evidence to show that it made timely attempts to obtain information necessary to file its final return during this time period, and to show why, notwithstanding reasonable business care and prudence, the information necessary to file a return was unavailable to appellant. In absence of such evidence, we have no basis upon which to find that appellant satisfied the standard of ordinary business care and prudence.

Appellant also contends that it had an exemplary filing history and requests abatement on the basis that the IRS waived the federal late-filing penalty for the same tax year. While the IRS

may abate the federal late-filing penalty for purposes other than reasonable cause under its first-time abatement policy, we lack statutory authority to make discretionary adjustments based on policy, such as deciding to waive the late-filing penalty based on appellant’s prior good filing history.<sup>8</sup> (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert*, 71-SBE-028, Sep. 13, 1971 [no authority to make adjustments based on a taxpayer’s ability to pay].) Our function at this stage in the appeals process is to determine the correct amount of the liability. (*Appeal of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.) The California Legislature has not seen fit to create an exception that would authorize abatement in the absence of reasonable cause. Therefore, appellant is not entitled to abatement of the late-filing penalty.

**HOLDING**


Appellant did not establish a basis for abatement of the late-filing penalty.

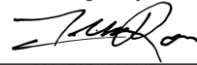
**DISPOSITION**

Respondent’s action in denying appellant’s claim for refund is sustained in full.

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Andrew J. Kwee  
Administrative Law Judge

We concur:

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Tommy Leung  
Administrative Law Judge

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Alberto T. Rosas  
Administrative Law Judge

<sup>8</sup>The IRS adopted a first-time abatement policy in 2001 for certain taxpayers with a good filing history, as provided in Section 20.1.1.3.3.2.1 of the Internal Revenue Manual, and this policy applies regardless of whether a late filing was due to reasonable cause. FTB does not have a comparable abatement policy.