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**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | ) | OTA Case No. 18011343 |
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| **GE RIFFEL, LP** | ) | Date Issued: August 9, 2018 |
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**OPINION**

Representing the Parties:

For Appellant: Duane E. Bond, CPA
Mize, Houser & Company, PA

For Respondent: Parviz T. Iranpour, Tax Counsel

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,[1] GE Riffel, LP ("Appellant") appeals an action by the Franchise Tax Board ("Respondent") denying its claims for refund for $6,062.62, for the 2011 through 2014 tax years.[2] Appellant waived its right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Did Appellant establish reasonable cause to abate the per-partner late-filing penalties for tax years 2011 through 2013?
2. Did Appellant establish reasonable cause to abate the delinquent-filing penalties for tax years 2011 through 2013?
3. Did Appellant establish reasonable cause to abate the late-payment penalty for 2014?
4. Did Appellant establish that the collection cost recovery fee was imposed improperly?

[1] Statutory references are to the California Revenue and Taxation Code, unless otherwise noted.

[2] 2011, 2012, and 2013 (each) = a per-partner late-filing penalty of $1,728 plus a delinquent-filing penalty of $200. 2014 = a late-payment penalty of $52 plus a collection cost recovery fee of $226.

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## FACTUAL FINDINGS

1. Appellant, a limited partnership, had eight (8) partners during the tax years at issue. For 2011 through 2014, Appellant was required to file a California Partnership Return of Income (Form 565) and pay the $800 annual tax by April 17, 2012; April 15, 2013; April 15, 2014; and April 15, 2015, respectively. Appellant neither filed Form 565 nor paid the annual tax by these dates.
2. For tax years 2011 and 2012, Gwyn Riffel, who held approximately 90 percent of the partnership interest in Appellant during the years at issue, retained a California certified public account (CPA), Tim R. Cates, to prepare tax returns for other entities. Mr. Cates did not file Appellant's Form 565 for 2011 or 2012.
3. For tax year 2013, Mr. Riffel switched to another California CPA, Gregory R. Harrison, to prepare the tax returns for entities in which Mr. Riffel held majority interests. Mr. Harrison did not file Appellant's Form 565 for 2013.
4. In 2014, Appellant once again changed CPA firms. Mr. Riffel retained the current representatives (Mize, Houser & Company, PA) to prepare 2014 tax returns for entities in which he held majority interests.
5. On July 3, 2015, Appellant filed tax returns and paid the $800 annual tax for years 2011, 2012, 2013, and 2014.
6. Respondent sent Appellant a Notice of Balance Due dated August 7, 2015. For 2011 through 2013, Respondent imposed per-partner late-filing and delinquent-filing penalties. For 2014, Respondent imposed a late-payment penalty.[3] Per the Notice of Balance Due, Appellant owed penalties of $5,836 plus interest of $216.67.[4]
7. Appellant responded with a letter dated August 11, 2015, requesting that Respondent abate the penalties for 2011 through 2014 due to reasonable cause.
8. On September 18, 2015, Respondent sent Appellant a Past Due Notice, showing Appellant owed penalties of $5,836 plus interest of $239.74.[5]

[3] Unlike 2011 through 2013, the 2014 return was filed within the automatic six-month extension; thus, Respondent did not impose the per-partner late-filing or the delinquent-filing penalties for 2014.

[4] This notice advised that a $226 collection fee may be assessed if the balance was not paid within 30 days.

[5] This second notice advised that if Appellant failed to comply within 30 days, Respondent may take collection actions, which include imposing a collection fee.

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9. On November 6, 2015, Respondent sent Appellant a Final Notice Before Levy, showing Appellant owed penalties of $5,836 plus interest of $ 264.13, for a total balance due of $6,100.13. The due date on this final notice was November 21, 2015.[6]

10. On November 15, 2015, Appellant paid $6,105.14.

11. On January 4, 2016, Appellant filed three reasonable cause claim forms (Form 2924 – Reasonable Cause Claim for Refund) for the 2011 through 2013 penalties.

12. On December 15, 2016, Appellant paid $225.48.[7] On April 24, 2017, Respondent denied Appellant's refund claims for 2011 through 2013.[8] Appellant filed this timely appeal.

## DISCUSSION

Issue 1 - Did Appellant establish reasonable cause to abate the per-partner late-filing penalties for tax years 2011 through 2013?

California imposes a per-partner late-filing penalty on 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).) For tax years 2011 through 2013, Appellant needed to file partnership returns by April 17, 2012; April 15, 2013; and April 15, 2014, respectively. Instead, the 2011, 2012, and 2013 partnership returns were all filed on July 3, 2015—40 months late, 28 months late, and 16 months late, respectively. Appellant had eight partners during each part of these three taxable years. Accordingly, the per-partner late-filing penalty was $1,728 for each year.[9]

The penalty may be abated if the taxpayer establishes that the failure to file a timely partnership return was due to reasonable cause. (§ 19172(a)(2).) Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Robert T. and M. R. Curry*, 86-SBE-048,

[6] This final notice advised that if Appellant failed to comply within 30 days of the notice date, Respondent may take collection actions, which include imposing a collection fee.

[7] It is unclear why Appellant made this payment. It seems this was a payment of the collection-cost-recovery fee. However, the evidence is unclear as to when Respondent imposed this fee.

[8] Although Appellant did not file a Form 2924 – Reasonable Cause Claim for Refund for 2014, Appellant's letter dated August 11, 2015, included tax year 2014 in its refund claim. Respondent concedes that, because Appellant's 2014 claim for refund was deemed denied, there is jurisdiction to hear and decide the 2014 appeal.

[9] The late-filing penalty is calculated as follows: number of months the partnership's return was late (not exceeding 12 months) X $18.00 X number of persons who were partners in the partnership during any part of the taxable year. (§ 19172(a)(2), (b).) For each of tax years 2011-2013: 12 months X $18.00 X 8 partners = $1,728.

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Mar. 4, 1986; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) The U.S. Supreme Court pointed out that "Courts have frequently held that 'reasonable cause' is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken." (*United States v. Boyle* (1985) 469 U.S. 241, 250, internal citations omitted.) The U.S. Supreme Court "also has implied that, in such a situation, reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return." (*Ibid.*, citing *Commissioner v. Lane-Wells Co.* (1944) 321 U.S. 219 [remanded for determination whether failure to file return was due to reasonable cause, when taxpayer was advised that filing was not required].)

Specifically, the law provides that if a taxpayer relies on improper advice of an accountant or tax attorney as to a substantive matter of tax law, such as whether the taxpayer has a tax liability, failing to file a return in reliance on this advice may be considered reasonable cause if certain conditions are met. (*Rohrabaugh v. United States* (7th Cir. 1979) 611 F.2d 211, as cited in *Boyle, supra,* 469 U.S. at p. 241.) One of these conditions is whether the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents.[10] To satisfy this condition, Appellant must first establish that Appellant made full disclosure of the relevant facts and documents and, additionally, that the tax professional's advice is based on this full disclosure. Appellant makes the conclusory assertion that this condition was met, but Appellant does not satisfy its burden of proof.

A taxpayer has the burden of proving error in Respondent's tax determination. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, *supra*.) "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe*

[10] The other condition is whether the person relied on by the taxpayer is a tax professional with competency in the subject tax law. Although Mr. Riffel retained Mr. Cates for tax years 2011 and 2012, and he then retained Mr. Harrison for tax year 2013, the evidence does not show whether Mr. Cates and Mr. Harrison were retained to represent Appellant. Nevertheless, it is unnecessary to discuss whether these CPAs are tax professionals with competency in the subject tax law, because, as discussed herein, Appellant fails to establish that the advice was based on full disclosure.

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*and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

Appellant did not timely file returns for 2011 through 2013. Mr. Riffel stated on behalf of Appellant that he "relied on the improper advice of an accountant," Mr. Cates and Mr. Harrison, "as to a matter of tax law and tax liability." However, Appellant did not show that Mr. Cates and Mr. Harrison specifically advised Appellant that filing was not required for the tax years at issue. In other words, on the one hand, it is not known whether, when retained to prepare tax returns for Mr. Riffel's other entities, these CPAs inadvertently overlooked Appellant's California filing requirement. On the other hand, it is not known whether Appellant retained these CPAs and they then specifically advised Appellant that filing a California partnership return was not required.

In summary, Appellant did not establish by documentation or other evidence that it is more likely than not to be correct that: (1) Mr. Cates and Mr. Harrison specifically advised Appellant that filing was not required, and (2) this advice was based on Appellant's full disclosure of the relevant facts and documents. Therefore, Appellant failed to establish reasonable cause to abate the per-partner late-filing penalty for tax years 2011 through 2013.

Issue 2 - Did Appellant establish reasonable cause to abate the delinquent-filing penalties for tax years 2011 through 2013?

California also imposes a delinquent-filing penalty on a taxpayer for the failure to file a return on or before the due date. (§ 19131(a).) Respondent imposed a delinquent-filing penalty of $200 for each of 2011, 2012, and 2013.[11] This penalty is imposed unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (§ 19131(a).) But, as discussed above, Appellant did not show that the late filing was due to reasonable cause.[12] Therefore, Appellant failed to establish reasonable cause to abate the delinquent-filing penalty for tax years 2011 through 2013.

[11] The delinquent-filing penalty is calculated as follows: 5% of the tax for each month or fraction thereof elapsing between the due date of the return (determined without regard to any extension of time for filing) and the date on which filed, but the total penalty may not exceed 25% of the tax. (§ 19131(a).) Here, the delinquent-filing penalty was $200 ($800 X 25% = $200) for each of these three years.

[12] A taxpayer bears the burden of proving both that the late filing is due to reasonable cause, and that it is not due to willful neglect. Here, because Appellant did not show that the late filing was due to reasonable cause, there is no need to discuss the issue of willful neglect.

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Issue 3 - Did Appellant establish reasonable cause to abate the late-payment penalty for 2014?

Section 19132(a) imposes a late-payment penalty on a taxpayer for the failure to pay its taxes on or before the due date. Respondent imposed a $52 late-payment penalty for 2014.[13] The penalty may be abated if the taxpayer establishes that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (§ 19132(a).)

Appellant changed CPA firms in 2014 and retained its current representative, but Appellant does not explain why it failed to pay its 2014 annual tax by April 15, 2015. Its main argument is that it did not file California partnership returns for 2011 through 2013 because it relied on improper advice from former accountants. However, Appellant did not show how, after hiring Mize, Houser & Company, PA in 2014, the failure to timely pay the $800 annual tax was due to reasonable cause and not willful neglect. Therefore, Appellant failed to establish reasonable cause to abate the late-payment penalty for 2014.

Issue 4 – Did Appellant establish that the collection cost recovery fee was imposed improperly?

Respondent assessed a $226 collection cost recovery fee.[14] Section 19254(a) provides that if a taxpayer "fails to pay any amount of tax, penalty, addition to tax, interest, or other liability . . . a collection cost recovery fee shall be imposed if the Franchise Tax Board has mailed a notice to that person for payment that advises that the continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee." (Emphasis added.)

Respondent sent Appellant three (3) notices before Appellant paid the penalties and interest in full.[15] Each of the three (3) notices advised that a collection fee may be assessed if the balance due was not paid. Although Appellant paid after the third and final notice, Appellant's balance due remained unpaid after the first and second notices and therefore the collection cost recovery fees were properly imposed.

[13] The late-payment penalty is calculated as follows: 5% of the unpaid total tax plus 0.5% for every month the tax payment was late. (§ 19132.)

[14] It is unclear when this collection fee was assessed.

[15] Respondent argues that on November 15, 2015, Appellant only paid the 2011 through 2013 penalties and not the 2014 penalty. But Respondent is mistaken. In examining the Final Notice Before Levy dated November 6, 2015, the total balance due was $6,100.13, which included the 2014 penalty ($52) plus interest due thereon ($5.34). In examining Respondent's Payments List, Appellant paid $6,105.14 on November 15, 2015.

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Moreover, although Appellant neither argued nor attempted to show that the collection cost recovery fee was imposed improperly, Appellant's entire argument is based on reasonable cause. However, there is no reasonable cause exception or any other provision in the statute allowing for relief from the imposition of the collection cost recovery fee. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Thus, the $226 collection fee was properly imposed.

## HOLDINGS

1. Appellant failed to establish reasonable cause to abate the per-partner late-filing penalties for tax years 2011 through 2013.
2. Appellant failed to establish reasonable cause to abate the delinquent-filing penalties for tax years 2011 through 2013.
3. Appellant failed to establish reasonable cause to abate the late-payment penalty for tax year 2014.
4. Appellant failed to establish that the collection-cost-recovery fee was imposed improperly.

## DISPOSITION

We sustain Respondent's action in full.

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Alberto T. Rosas
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

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John O Johnson
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John O. Johnson
Administrative Law Judge