

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010809
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KATTZMEOWCA, LLC) Date Issued: April 23, 2018
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_____)

OPINION

Representing the Parties:

For Appellants: Sandra Barnikel

For Respondent: Adam Susz, Tax Counsel IV¹

For Office of Tax Appeals: Josh Lambert, Tax Counsel

VASSIGH, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,² Kattzmeowca LLC (appellant) appeals an action by the Franchise Tax Board (FTB) in denying appellant’s claims for refund of: (1) \$1,550.26 for the 2012 tax year; (2) \$1,520.18 for the 2013 tax year; (3) 1,448.82 for the 2014 tax year; and (4) \$941.81 for the 2015 tax year.

Administrative Law Judges Grant S. Thompson, Teresa A. Stanley, and Amanda Vassigh, heard this matter in Sacramento, California, on January 22, 2018. The record was closed, and the case was submitted for decision that same date.

¹ We note that Sara A. Hosey, who was previously counsel for respondent in this matter, is now working for the Office of Tax Appeals as an administrative law judge. However, she was recused from hearing this matter, has had no contact with this case at the Office of Tax Appeals, and was not involved in any way in the hearing or deliberative process that led to this opinion.

² Unless otherwise indicated, further statutory references are to sections of the California Revenue and Taxation Code.

ISSUES

1. Is appellant liable for the limited liability company (LLC) annual minimum tax for the 2012 through 2015 tax years?
2. Has appellant shown reasonable cause to abate the penalties imposed for its failure to timely pay the tax shown as due on its return for tax years 2012 through 2015?
3. Has appellant shown reasonable cause to abate the penalties imposed for its failure to timely file tax returns for the 2012 through 2014 tax years?³

FACTUAL FINDINGS

1. Appellant was organized with the California Secretary of State (SOS) as an LLC on June 21, 2012, with two members.
2. The LLC's two members were Sandra Barnikel and Carol Offield. Ms. Barnikel had previous experience as a business owner, having incorporated and run a business in another state.
3. Ms. Barnikel received written information about the LLC's obligations from the Secretary of State, but did not read all of that information.
4. Appellant ceased activity shortly after its formation as an LLC.
5. Appellant received an LLC Final Notice Before Levy dated August 26, 2016 based on a \$250 penalty imposed for failure to file a "statement of information."⁴ Pursuant to Section 19141, the FTB assesses that fee when the SOS certifies that an LLC failed to file the statement required under Section 17713.09. Thereafter, the SOS abated the penalty.
6. On September 1, 2016, appellant untimely filed its LLC Returns of Income (Forms 568) for the 2012 through 2015 tax years. Appellant marked its 2015 return as its final return.
7. Appellant then paid the balances due for the 2012 through 2015 tax years, including the tax, penalties and interest assessed by the FTB. The penalties imposed by the FTB included late-filing penalties for tax years 2012 through 2014, and late payment penalties for tax years 2012 through 2015.

³ Respondent states that it imposed an LLC late-filing penalty for tax year 2015. However, it appears that a late-filing penalty was not imposed for 2015 because appellant timely filed its 2015 return.

⁴ The authority to excuse or abate the penalty remains with the SOS, and therefore, we have no jurisdiction to review it. Appellant testified that the \$250 penalty was abated by the SOS.

8. Appellant paid the tax balances using Ms. Barnikel's credit card and was charged a credit card processing fee of \$125.60 by a third-party merchant services provider.⁵
9. Appellant subsequently submitted claims for refund to FTB, explaining that it was unaware that it had to inform the SOS that its business had closed in 2012, and contending that it had not received notification of the taxes due until 2016.
10. Appellant filed a Certificate of Dissolution and a Certificate of Cancellation with the SOS on October 4, 2016.
11. FTB denied appellant's claims for refund for each of the tax years at issue by letters dated October 14, 2016.
12. By letter dated December 1, 2016, appellant timely filed this appeal.

DISCUSSION

Issue 1 – Is appellant liable for the LLC annual minimum tax for the 2012 through 2015 tax years?

Every LLC is required to pay an annual minimum tax to California for the privilege of doing business in this state if one of three requirements is met: (1) the LLC is doing business in this state as defined in § 23101; (2) the LLC's articles of organization have been accepted by the SOS; or (3) a certificate of registration has been issued by the SOS. (§ 17941(a), (b)(1).)

The annual minimum tax must be paid for each taxable year, or part thereof, until a certificate of cancellation of the LLC is filed with the SOS. (§ 17941(b)(1).) The annual minimum tax is due "on or before the 15th day of the fourth month of the taxable year." (§ 17941(c).) There is no "reasonable cause" exception to the imposition of the annual minimum tax.

A taxpayer is excused from the LLC annual minimum tax if one of the statutory exemptions set forth in Section 17946 or 17947 applies. Section 17946 provides an exemption if two conditions are satisfied: (1) the LLC did no business in this state during the year; and (2) the taxable year was 15 days or less. Section 17947 provides an exemption if the LLC: (1) files a timely final annual tax return for the preceding taxable year; (2) does no business in this state after the end of the taxable year for which the final annual tax return was filed; and (3) files a

⁵ Appellant raised the question of the credit card convenience fee during the hearing. We note that this was a fee charged by a third party, and not a tax, interest, or penalty. As a result, this body does not have jurisdiction to review that fee.

certificate of cancellation with the SOS before the end of the 12-month period beginning with the date the final annual tax return was filed. For the exemption under Section 17947 to apply, all three requirements must be satisfied.

Appellant was formed as an LLC with the SOS on June 21, 2012. Therefore, appellant was required to pay the LLC annual minimum tax until it filed, on October 4, 2016, a certificate of cancellation of the LLC with the SOS, pursuant to Section 17941. As noted above, appellant can only be excused from the annual minimum tax if one of the exemptions applies. The exemption provided by Section 17946 is not applicable because the second prong, requiring that the taxable year be 15 days or less, has not been satisfied. Here, appellant was eligible to do business for the entirety of each of the taxable years at issue. The exemption provided by Section 17947 does not apply because appellant does not meet the requirements of subdivision (a)(1) thereof, by filing a timely final tax return for a year preceding any of the tax years at issue. Therefore, appellant owed the annual LLC tax for 2012 through 2015 and did not qualify for exemption under either Section 17946 or 17947.

Issue 2 - Has appellant shown reasonable cause to abate the penalties for the failure to timely pay the LLC annual minimum tax for the 2012 through 2015 tax years?

Section 19132(a)(1)(A) imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for payment of the tax. The late payment penalty is computed as five percent of the total tax unpaid plus one-half of one percent for every month the payment of tax was late, not to exceed 40 months. (§ 19132.)

The late payment penalty may be abated if it is shown that the failure to pay was due to reasonable cause and not willful neglect. The taxpayer bears the burden of proving the existence of both conditions. (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) To establish reasonable cause, a taxpayer must show that its failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.) In other words, the taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

Ignorance of the law does not excuse noncompliance with statutory requirements; the exercise of ordinary business care and prudence requires a taxpayer to acquaint itself with the law. (*Appeal of Diebold, Inc.*, 83-SBE-002, Jan. 3, 1983.) A taxpayer that fails to acquaint itself

with the requirements of California tax law has not exercised ordinary business care and prudence. (*Ibid.*)

Appellant failed to pay its tax on time for tax years 2012 through 2015. For each of those years the tax was due on or before the 15th day of the fourth month of the taxable year. However, appellant did not pay the taxes due for the years at issue until September 1, 2016. Therefore, respondent properly imposed the late payment penalties.

Appellant has not established reasonable cause for its failure to comply with its statutory requirements. Specifically, appellant has not shown that it took any steps to timely ascertain and pay the tax due, by investigating the tax requirements that applied to it or by hiring a tax professional. During the hearing for this matter, one of appellant's two managing members, Ms. Barnikel, acknowledged that she did not read all of the information provided to her by the SOS when the LLC was formed. In its opening brief, appellant stated that: "The information that was given to us was impossible to read, and who takes the time when you're trying to start a business." However, we believe that a reasonable and prudent businessperson would have reviewed the materials it received when forming its business, and taken care to investigate and comply with the applicable tax requirements.

Appellant also argues that the FTB is at fault here for "waiting" four years to contact appellant regarding the unfiled returns and unpaid liabilities. However, it is not the FTB's duty to remind appellant to file returns and pay taxes. Appellant had a non-delegable duty to file its returns and pay the tax amounts due. (*United States v. Boyle* (1985) 469 U.S. 241.) Ignorance of the law does not establish reasonable cause. (*Appeal of Diebold, Inc., supra.*) An ordinarily intelligent and prudent businessperson would have undertaken efforts and conducted research to determine the tax consequences arising from the formation and operation of an LLC rather than relying on receiving a reminder from the taxing agency. The exercise of ordinary business care and prudence would have required appellant to proactively look into the tax requirements that apply to a California LLC. Appellant, however, has not presented evidence that it undertook any such actions.

Ms. Barnikel required a knee replacement surgery subsequent to forming the LLC, but it does not appear that her health issues prevented her or the LLC from paying its taxes on time. There was another managing member of the LLC who could have ensured that appellant paid its taxes on time. Consequently, respondent properly imposed the late payment penalty for the 2012

through 2015 taxable years, and appellant has not established reasonable cause for its failure to timely pay its tax obligations.

Issue 3 - Has appellant shown reasonable cause to abate the penalties for its failure to timely file tax returns for the 2012 through 2014 tax years?

Section 18633.5(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 original due date. If the return is not filed within six months of its original due date, however, no extension exists. Section 19172 imposes a late-filing penalty when a partnership fails to file a return by the prescribed date unless it is shown that the failure was due to reasonable cause. The amount of the penalty is calculated in an amount equal to \$18 multiplied by the number of persons who were partners in the partnership during any part of the taxable year, and then multiplied by the number of months the return is late, up to a maximum of 12 months. (§ 19172(b).)

Appellant failed to file its returns for 2012 through 2014 on time. Therefore, respondent properly imposed LLC late-filing penalties for 2012 through 2014. Respondent did not impose a late-filing penalty for 2015 because appellant timely filed its 2015 tax return on September 1, 2016 (the 2015 return was not due until the extended due date of October 15, 2016).

When the FTB imposes a late-filing penalty, the taxpayer has the burden of showing that the late filing was due to reasonable cause and not due to willful neglect. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) A taxpayer's reason for failing to timely file must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Joseph W. and Elsie M. Cummings*, 60-SBE-040, Dec. 13, 1960.) As noted previously, ignorance of the law does not excuse compliance with statutory requirements as the exercise of ordinary business care and prudence requires a taxpayer to acquaint itself with the law. (*Appeal of Diebold, Inc.*, *supra*.)

Appellant has acknowledged a lack of knowledge regarding its tax filing obligations. While we are sympathetic and find Ms. Barnikel to be sincere and credible, "there is no uncertainty as to the settled rule that uninformed and unsupported belief or an innocent mistake does not of itself constitute reasonable cause." (*Henningsen v. C.I.R.* (4th Cir. 1957) 243 F.2d

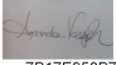
954, 959.) For the reasons we discussed above with respect to the late payment penalties, we find that appellant failed to show reasonable cause for the late filing.

HOLDINGS


1. Appellant is liable for the LLC annual tax for the 2012 through 2015 tax years.
2. Appellant has not shown that reasonable cause exists to abate the penalties for its failure to timely pay the annual LLC tax for the 2012 through 2015 tax years.
3. Appellant has not shown that reasonable cause exists for its failure to timely file tax returns for the 2012 through 2014 tax years.

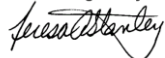
DISPOSITION

Respondent's action in denying appellant's claims for refund is sustained.

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Amanda Vassigh
Administrative Law Judge

We concur:

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Grant S. Thompson
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge