

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011158
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JOSEPH P. MARRA) Date Issued: March 29, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Stuart Tiplitsky,¹
Registered Public Accountant

For Respondent: Eric A. Yadao, Tax Counsel

THOMPSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,² Joseph J. Marra (appellant) appealed the action by the Franchise Tax Board (FTB or respondent) denying his claim for refund in the amount of \$8,438³ for the 2014 tax year.

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

ISSUE

Is appellant liable for a penalty under Section 19131 for filing his 2014 return late?

FACTUAL FINDINGS

1. Appellant was a partner of Blue Elephant Consumer Fund LP (Partnership). On or about September 15, 2015, the Partnership filed a California Partnership Return of Income

¹ Appellant filed his own appeal letter.

² Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

³ This is the amount of the late-filing penalty imposed.

showing income from trade or business activities of \$1,867,246. The return indicates that no tax withholding was paid by the Partnership.

2. Appellant filed a California Nonresident or Part-Year Resident Income Tax Return for the 2014 year on January 12, 2016.
3. The FTB imposed a late-filing penalty of \$8,438.
4. Appellant's representative wrote to the FTB and requested abatement of the penalty.
5. Appellant subsequently paid the penalty.
6. The FTB treated the correspondence from appellant's representative as a claim for refund,⁴ which it denied.

DISCUSSION

Section 19131 imposes a late-filing penalty for failure to file a tax return by its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. To establish that the late filing was due to reasonable cause, a taxpayer "must show that the failure to file [a] timely return[] occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)⁵

On appeal, appellant provides a Schedule K-1 and a California Resident and Nonresident Withholding Tax Statement on Form 592-B from the Partnership, each showing \$164,122 of California tax withheld. Appellant states that the Schedule K-1 was received on October 15, 2015.⁶ The Schedule K-1 shows appellant's share of ordinary income as \$521,257, with all of this amount constituting California-source income. Appellant asserts that he was not aware of the tax liability arising from the Partnership's California-source income, "but was made aware that the accounting firm had filed the withholding tax to cover any liabilities." Appellant

⁴ It appears the FTB treated the correspondence as an informal claim for refund that was subsequently perfected when appellant paid the full amount due.

⁵ Precedential opinions of the Board of Equalization, designated by "SBE" in the citation, may be found on the Board of Equalization's website at www.boe.ca.gov/legal/legalopcont.htm.

⁶ The documents show a date in the footer of June 8, 2015. The documents do not contain other dates that might show when they were issued or received.

contends he was not aware that tax payment had not been forwarded to California. He contends that it would be unfair to penalize him for an accounting error that was not his fault.

The FTB contends that, while appellant's arguments may explain his late payment, a late payment penalty was not imposed. The FTB argues that appellant has not provided an explanation showing that he had reasonable cause for not filing his 2014 tax return until January 12, 2016. The FTB further argues that appellant was involved in the management of the Partnership and therefore knew or should have known whether it withheld and paid tax to California. In support, the FTB provides a Form D, Notice of Exempt Offering of Securities, dated August 8, 2013, filed with the United States Securities and Exchange Commission, which identifies appellant as an "Executive Officer" of the Partnership. The FTB states that the Partnership filed a timely California Partnership Return of Income on September 15, 2015, and provides a dated copy of the return in support.⁷ Based on the foregoing, the FTB argues that appellant was aware by September 15, 2015, prior to the extended due date for the return, that no California tax had been withheld and paid on his behalf.

In response, appellant argues that he did not get a Schedule K-1 from Lehman Brothers, which he states went out of business in 2008. He also states that he was involved in two "additional" partnerships, Blue Elephant Partners, LLC and the Partnership.⁸ He argues that these were "startup partnerships" and that he was waiting for these partnerships to issue Schedules K-1, which had to be revised several times. Appellant contends that these factors made it "impossible to file on time or even estimate what the liability would be." Appellant further contends that an individual named "Eric A. Wadao" from the State Board of Equalization filed a petition on appellant's behalf, arguing that appellant had reasonable cause for failing to file a timely tax return, however there is no record of any such petition in the appeal.⁹

⁷The tax return is marked with a filed date of September 15, 2015, and reflects a signature date of September 14, 2015.

⁸The Partnership is the same partnership listed on the Schedule K-1 provided by appellant. It is not clear why appellant refers to it as an "additional" partnership.

⁹It is not clear, but appellant may be referring to Eric A. Yadao, who is the FTB's counsel in this matter and not employed by the Board of Equalization. Mr. Yadao has not filed a petition on appellant's behalf. On the contrary, Mr. Yadao's filings in this appeal oppose appellant's claim for refund. Appellant also states he is providing additional Schedules K-1 that were received after the filing dates. However, he has not provided any such additional Schedules K-1, or information showing when those schedules were issued.

Appellant has not shown that he had reasonable cause for failing to timely file a California tax return. He has not provided any evidence to show that he exercised ordinary business care and diligence or that he attempted to file a timely tax return. While he has asserted that he could not obtain sufficient information to estimate his income, he has provided no evidence that he made any attempts to obtain such information prior to the due date. As the Partnership filed a California tax return for the 2014 tax year on September 15, 2015, it appears appellant could have obtained any necessary information if he had sought it on a timely basis and timely filed his tax return by the extended due date of October 15, 2015. Appellant also has not shown how the bankruptcy of Lehman Brothers, which occurred six years prior to the tax year at issue, could have prevented him from filing a timely tax return if he had exercised ordinary business care and diligence.

HOLDING

Appellant has not shown that he had reasonable cause for late filing his 2014 return. Therefore, he is liable for the late-filing penalty determined by the FTB.

DISPOSITION

The FTB’s action denying appellant’s claim for refund is sustained.

DocuSigned by:
Grant Thompson
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Grant S. Thompson
Administrative Law Judge

We concur:

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[Signature]
0C90542BE88D4E7
Tommy Leung
Administrative Law Judge

DocuSigned by:
Neil Robinson
8A2E234444DB4A6...
Neil Robinson
Administrative Law Judge