OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011331
	)	
KAZLIN INFINITE CARE, LLC	)	Date Issued: May 14, 2018
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellant: Erlinda I. Magliba, LLC Member

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Linda Frenklak, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,[1] Kazlin Infinite Care, LLC (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant's claim for a refund in the amount of $437.77 for 2011.[2]

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

ISSUES

1. Whether appellant's failure to timely file a return for 2011 was due to reasonable cause.
2. Whether appellant is entitled to the abatement of interest.

[1] Unless otherwise indicated, all "Section" references are to sections of the California Revenue and Taxation Code. Section 19324 states that taxpayers have 90 days to appeal FTB's action upon a taxpayer's protest to the board (Board of Equalization). As relevant, Section 20(b) provides that for appeals transferred to the Office of Tax Appeals on or after January 1, 2018: "Unless the context requires otherwise, as used in this code or any other code, 'board,' with respect to an appeal, means the Office of Tax Appeals."

[2] This is the amount listed in the FTB's refund denial notice dated December 30, 2016. According to respondent, this amount consists of a late-filing penalty of $432.00, plus interest of $5.77.

FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC), treated as a partnership, that registered with the California Secretary of State on July 25, 2011. Appellant remitted the applicable $800 annual tax for 2011, which respondent applied to appellant's 2011 account with an effective date of October 15, 2011.
2. On November 23, 2011, respondent mailed appellant FTB Form 5954, Requirements for Limited Liability Companies, which describes the tax, fee, and filing requirements for LLCs.
3. Because respondent had received a 2011 tax payment but not a 2011 tax return from appellant, on September 25, 2015, respondent mailed appellant FTB Form 765 (Payment Received – Missing Tax Return), stating that respondent received the $800 payment, but could not locate appellant's 2011 return.
4. On December 15, 2015, appellant filed a tax return for 2011, reporting a 2011 annual LLC tax paid of $800 and total amount due of $0. On lines 12 and 23 of Schedule B of its 2011 return, appellant reported total income of $0 and ordinary loss of $25,822.
5. Respondent accepted appellant's 2011 return as filed. Respondent imposed a late-filing penalty of $432 pursuant to Section 19172 because appellant filed its 2011 return after the extended due date of October 15, 2012.
6. After respondent mailed appellant several notices of the balance due, appellant requested waiver of the late-filing penalty in a July 20, 2016 letter.
7. On September 7, 2016, appellant paid the 2011 balance due of $437.77.
8. Respondent treated appellant's July 20, 2016 letter as a claim for refund. Respondent issued appellant a refund denial notice dated December 30, 2016, stating that appellant's request for waiver of the late-filing penalty was denied.
9. This timely appeal followed.
10. Appellant contends that it is entitled to the abatement of the late-filing penalty. Appellant states that in 2011, it "was barely registered for the very first time with the California Secretary of State . . . ." Appellant asserts that it filed a 2011 return before the end of

December 2015 after it became aware that it had not filed a 2011 return. Appellant states that it solely relied on the expertise and advice of its tax preparer due to "the complexity of the different tax laws." Appellant states that its tax preparer admitted "that he made a mistake and was willing to pay whatever late filing fees or other charges [were] being imposed on me." Appellant contends that it is entitled to penalty abatement because the Internal Revenue Service (IRS) also initially imposed a late-filing penalty against it for 2011, but later abated that penalty under its first time penalty abatement policy. Appellant contends that it is unfair for the FTB to impose a late-filing penalty.

11. As to the accrued interest, appellant contends that it "should have been made aware a lot sooner and could have settled [it] at that time to avoid interests [sic] being charged every year until late 2015." For this reason, appellant contends abatement of interest is warranted.

DISCUSSION

Issue 1 - Did appellant establish that its failure to timely file a tax return for the 2011 tax year was due to reasonable cause and not due to willful neglect?

For the year at issue, section 18633.5(a) provides that every LLC that is classified as a partnership for California tax purposes that is doing business in California, organized in California, or registered with the California Secretary of State shall file its return on or before the fifteenth day of the fourth month following the close of its taxable year.[3] Alternatively, the LLC may file its return on or before the automatic extended due date, which is six months after the original filing due date. (§ 18567, Cal. Code Regs., tit. 18, § 18567.)

Section 19172 imposes a late-filing penalty when a partnership (or an LLC treated as a partnership) fails to file a return at the time prescribed unless it is shown that the failure was due to reasonable cause. The late-filing penalty under section 19172 is computed at $18 multiplied

[3] Under Section 18567 and California Code of Regulations, title 18, § 18567(a), individuals, fiduciaries and partnerships are allowed an automatic six-month extension of time in which to file a return if the return is filed within six months of the original due date. However, "[i]f the return is not filed within six months of the original due date, no extension is allowed." (Cal. Code Regs., tit. 18, § 18567(a).)

by the number of partners (or LLC members) for each month, or fraction thereof, that the return is late, up to a maximum of 12 months. (§ 19172(b).)

The late-filing penalty will be abated if it is established that the late filing was due to reasonable cause. (§ 19172(a).) For penalty abatement purposes, reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986.)[4] In other words, a taxpayer must show that the failure to meet its tax obligation occurred despite the exercise of ordinary business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252), the Supreme Court held that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing . . . ." The Supreme Court noted that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id*. at p. 251.)

Here, the California Secretary of State's records show that appellant was registered to do business in California in 2011. Appellant's 2011 return indicates that appellant had 2 members (which are treated as partners for tax purposes). Appellant does not dispute that, pursuant to Section 18633.5(a), it was required to file its 2011 return by April 15, 2012, and that it did not file that return until December 15, 2015. Thus, respondent properly imposed a late-filing penalty under Section 19172. Appellant also does not dispute that respondent correctly calculated the amount of the late-filing penalty under Section 19172 as $432 ($18 x 2 members x 12 months).

Next, there is no merit to appellant's argument that reasonable cause exists for the late filing of its 2011 return because it "was barely registered for the very first time with the California Secretary of State . . . ." Pursuant to Section 18633.5(a), appellant was required to timely file its 2011 return regardless of whether it was appellant's initial return.

Likewise, none of appellant's other arguments (appellant's asserted ignorance of its 2011 tax filing obligation, appellant's alleged lack of awareness that its 2011 return was not filed, the

[4] Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, tit. 18, §30501(d)(3), precedential opinions of the State Board of Equalization (BOE) 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 available for viewing on the BOE's website: http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion.

complexity of the tax laws, and appellant's purported reliance on a tax professional to file its return) establish reasonable cause for the late filing of appellant's return.

Moreover, the FTB mailed appellant a notice on November 23, 2011, informing it of its obligation to file a return. Appellant has not substantiated what efforts, if any, it took to satisfy its tax obligations for 2011 after receiving that notice. Thus, appellant has not shown that it failed to file a timely 2011 California return despite the exercise of ordinary business care and prudence, or that circumstances beyond appellant's control prevented it from timely doing so.

Appellant also argues that since the IRS abated the federal late-filing penalty it originally imposed against it, the FTB should abate the California late-filing penalty as well. Appellant has not provided us with information showing the basis upon which the IRS abated the federal late-filing penalty, but it is reasonable to assume (as respondent contends) that it was made pursuant the IRS's First Time Abate Program. Neither the California Legislature nor the FTB have adopted a comparable penalty abatement program, so the IRS penalty abatement cannot be used as a basis for abatement of the state late-filing penalty at issue here. Instead, appellant must establish that its failure to timely file its 2011 return was due to reasonable cause, which it has failed to do. Accordingly, appellant is liable for the late-filing penalty as determined by respondent.

Issue 2 - Whether appellant is entitled to the abatement of interest.

Section 19101 provides that taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). If tax is not paid by the original due date or if a deficiency assessment becomes due and payable, interest is charged on the balance due. (§ 19101.) The imposition of interest is mandatory. (*Appeal of Yamachi* 77-SBE-095, June 28, 1977; *Appeal of Jaegle*, 76-SBE-070, June 22, 1976.) Interest is not a penalty but is merely compensation for a taxpayer's use of the money after the due date of the tax. (*Appeal of Jaegle*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Ibid*.)

Section 19104 addresses interest abatement when the interest is attributable in whole or in part to an unreasonable error or delay committed by an officer or employee of the FTB in the performance of a ministerial or managerial act. (§ 19104(a)(1).) An error or delay can only be considered as warranting relief when no significant aspect of the error or delay is attributable to the appellant and after the FTB has contacted the appellant in writing with respect to the deficiency or payment. (§ 19104(b)(1).) This agency's jurisdiction for interest abatement is

limited by statute to a review of the FTB's determination for an abuse of discretion. (§ 19104(b)(2)(B).)

Here, appellant notes that it was not until September 25, 2015 that respondent mailed a Form 765 to appellant concerning the fact that it had received a payment, but not a return, from appellant with respect to its 2011 year. Respondent has not offered any explanation as to why it took four years to issue this notice. We believe it could have been issued sooner. However, in light of the fact that respondent had provided written notice to appellant of its filing obligation on November 23, 2011, more than four months *before* the due date of the return, we conclude that there was no unreasonable error or delay by respondent that caused appellant's failure to file. Accordingly, there is no statutory authority for abating the interest of $5.77 under Section 19104.

HOLDINGS

1. Appellant failed to establish that its failure to timely file a return for 2011 is due to reasonable cause; and
2. Appellant is not entitled to the abatement of interest.

DISPOSITION

Respondent's action in denying the claim for refund is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge