

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18010923
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<b>ZOUBEK CONSULTING, LLC</b>	)	Date Issued: August 28, 2018
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**OPINION**

Representing the Parties:

For Appellant: Paul A Zoubek, President

For Respondent: Brad Coutinho, Tax Counsel III

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Zoubek Consulting, LLC (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$5,207.12<sup>2</sup> for the tax years ending (TYE) 2013-2015.

Administrative Law Judges Neil Robinson, Linda C. Cheng, and Douglas Bramhall heard this matter in Van Nuys, California, on May 29, 2018. The record was closed, and the case was submitted for decision on that same date.

**ISSUES**

1. Has appellant established that its failure to timely file its 2013 and 2014 tax returns is due to reasonable cause such that it is entitled to a refund of the delinquent filing penalties imposed under section 19131?

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

<sup>2</sup> This amount is comprised of: tax year 2013, delinquent filing penalty of \$225.00, LLC fee of \$900.00 plus interest of \$74.23; tax year 2014, delinquent filing penalty of \$225.00, 10% LLC estimate penalty of \$90.00, LLC fee of \$900.00, plus interest of \$39.57; and tax year 2015, 10% LLC estimate penalty of \$250.00, LLC fee of \$2,500, plus interest of \$3.32.

2. Does appellant have to pay limited liability company (LLC) fees on total income from all sources pursuant to section 17942?
3. Is section 17942 constitutional?

FACTUAL FINDINGS

1. Appellant is an LLC that registered to do business with the California Secretary of State (SOS) in January 2010.
2. Appellant made timely payments of its \$800 annual tax for each of the tax years on appeal.
3. Appellant's sole member timely filed his individual returns each of these years reporting his income earned from appellant.
4. Appellant filed its returns for all of these years on April 15, 2016.
5. For tax year 2013, appellant reported total income of \$272,304, a total tax and fee of \$1,700, less the timely paid annual tax, for a total amount due of \$900.
6. For tax year 2014, appellant reported total income of \$283,112, a total tax and fee of \$1,700, less the timely paid annual tax, for a total amount due of \$900.
7. For tax year 2015, appellant reported total income of \$679,820, a total tax and fee of \$3,300, less the timely paid annual tax, for a total amount due of \$2,500.
8. Appellant paid the reported balance due for each year on April 20, 2016.
9. Thereafter, on September 2, 2016, and on October 21, 2016, FTB issued notices advising appellant that because it had filed its 2013 and 2014 returns late reflecting balances due, FTB imposed a delinquent filing penalty for the 2013 and 2014 tax years under section 19131, a penalty of 10 percent on the underpayment of estimated LLC fee pursuant to section 17942(d)(2) for each year, and that the law further required the addition of statutory interest.<sup>3</sup>
10. Appellant paid the balances owed on October 21, 2016.
11. Appellant filed a claim for penalty abatement on November 11, 2016, which was denied by respondent on December 7, 2016.

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<sup>3</sup> FTB initially imposed a 10% estimated LLC fee penalty on the 2013 tax year, but has agreed to abate that penalty under the provisions of the safe harbor set forth in section 17942(d)(2).

12. Appellant timely filed its appeal of the denied claim for refund of penalties on February 8, 2017, and in that appeal letter additionally claimed a refund of the amount paid on October 21, 2016.<sup>4</sup>
13. The issue of the refund of the LLC fees, pursuant to section 17942, was not part of appellant's denied refund claim in the denial letter that was initially appealed; however, appellant raised this issue in its appeal. Respondent has agreed to consider the deemed denied claim as part of this appeal. Since the appeal was filed more than six (6) months ago, we accept jurisdiction as a deemed denied refund claim.<sup>5</sup> Respondent stated at the prehearing conference that it would not object to such treatment.

### DISCUSSION

Issue 1 - Has appellant established that its failure to timely file its 2013 and 2014 income tax returns is due to reasonable cause such that it is entitled to a refund of the delinquent filing penalties imposed under section 19131?

Sections 18633.5(i)(1) and (3) require every LLC disregarded for California tax purposes and doing business in California to file a tax return on or before the fifteenth day of the fourth month following the close of the taxpayer's taxable year. The LLC must file a return each year until such time that it cancels its status with SOS, regardless of economic activity.

As a single-member LLC, appellant is a disregarded LLC under California law and was thus required to file its returns by April 15th following the close of each taxable year for the 2013 and 2014 tax years. Thus, for the 2013 tax year, appellant's return was due on April 15, 2014, and for the 2014 tax year, appellant's return was due on April 15, 2015. California Code of Regulations section 18567 permits a six-month paperless extension to file a state tax return if the return is filed within six months of the original due date of the return; nevertheless, no extension exists if the return is not filed within the extension period. As set forth above, appellant did not file its 2013 and 2014 returns until April 15, 2016. Thus, its returns were not timely filed.

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<sup>4</sup> Appellant's claim is for all amounts paid, including penalties, LLC fees and interest. No arguments were advanced to support a refund of interest; however, FTB conceded that it will abate interest to the extent any penalty or fee is reduced by this appeal.

<sup>5</sup> Section 19331 provides that if the FTB has not acted upon a claim for refund within six (6) months after it is filed, a taxpayer may deem the claim disallowed and file an appeal.

Because appellant's tax year 2013 and 2014 returns were filed late, respondent properly imposed the delinquent filing penalty.

California imposes a penalty 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 and not due to willful neglect. (Section 19131.) A taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)<sup>6</sup> As a general matter, in order for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show 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. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Thus, for example, the United States Supreme Court concluded that each taxpayer has a personal, non-delegable obligation to file a tax return by the due date and, as such, a taxpayer's reliance on an agent to timely file a federal return does not constitute reasonable cause for a late filing. (*United States v. Boyle* (1985) 469 U.S. 241, 252 (*Boyle*).)

Here, respondent properly assessed a late-filing penalty equal to 25 percent of the tax and fee due, after applying the amount of all payments made on or before the date prescribed for payment, because appellant filed its 2013 and 2014 LLC tax returns more than five months late. Appellant offers that "different accounting advice [received] in April 2016, and as a result of growth of my company, I was told by a different accountant that I owed an additional \$4,300 for CY 13-15 as LLC tax is based on GROSS revenue. Previous accounting advice did not tell me that LLC tax is assessed this way." However, no evidence has been provided to explain why no timely returns were filed for 2013 and 2014 despite timely filings for prior years. Additionally, during the hearing on this matter, Mr. Zoubek acknowledged that no professional advice was given that returns were not required to be filed. It appears that appellant is arguing his lack of knowledge of the fee obligation constitutes reasonable cause. However, appellant has presented no evidence to establish that, based on the income levels realized by appellant during the appeal

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<sup>6</sup> Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, title 18, section 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>.

years, any specific filing advice was sought or given in connection with LLC fees. Likewise, appellant has produced no evidence showing that it received professional advice that LLCs are not required to file returns.

Consistent with the Supreme Court's holding in *Boyle*, we note that for California purposes, a taxpayer's reliance on a tax preparer to timely file a California LLC tax return does not constitute reasonable cause for a late filing. (*Boyle, supra*, 469 U.S. at 252; see also *Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985.) Further, we find that appellant has not met its burden to establish reasonable cause based on the evidence provided.

Accordingly, we conclude that appellant's failure to timely file its 2013 and 2014 LLC tax returns was not due to reasonable cause.

Issue 2 - Has appellant established that it is entitled to relief from the 10% underpayment of the estimated LLC fee imposed under section 17942(d)(2)?

For tax years beginning on or after January 1, 2009, section 17942(d)(1) requires that the LLC fee be estimated and paid on or before the fifteenth day of the sixth month of the current taxable year. Section 17942(d)(2) provides for a penalty of ten percent of the amount of the underpayment, which is equal to the difference between the total amount of the fee for the taxable year less the timely estimate payment under section 17942(d)(1).

Appellant's LLC fees were due June 15th of each tax year, and as set forth, appellant did not make timely payment of those fees for any of the appeal tax years. The amount of fees appellant owed for each year and was required to pay as timely estimates were \$900 for each tax year 2013 and 2014, and \$2,500 for tax year 2015. Accordingly, respondent properly imposed the penalty of 10% of each unpaid estimate amount.

The law allows for limited relief to the LLC fee estimate penalty wherein it states no penalty will apply if the amount of the timely estimated fee payment is equal to or greater than the LLC fee for the preceding taxable year. (Section 17942(d)(2).) Because appellant did not owe an LLC fee for tax year 2012, the LLC fee estimate penalty of \$90 imposed on tax year 2013 should be abated.<sup>7</sup> However, having made no timely estimated LLC fee payments for tax years 2014 and 2015, appellant is not entitled to any further relief under the law. Moreover, notwithstanding appellant's failure to establish reasonable cause, the penalty is not subject to

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<sup>7</sup>FTB has conceded it will abate this penalty amount at the conclusion of this appeal.

reasonable cause abatement. Therefore, imposition of LLC fee estimate penalties is affirmed as to the 2014 and 2015 tax years.

Issue 3 - Does appellant have to pay LLC fees on total income from all sources pursuant to section 17942?

Appellant's original refund claim filed with the FTB only sought a refund of penalties imposed, and that claim was denied. In its appeal filed with the BOE on February 3, 2017, appellant also claimed a refund of the LLC fees paid for 2013-2015 on April 20, 2016. This claim was not denied by FTB, so we take jurisdiction under section 19331 as a deemed denied claim.

Appellant argues, in its brief, that since it is not taxable as a partnership, section 17942 does not apply to it and thus appellant seeks a refund of fees imposed by that section and paid by appellant. Section 24271(b) is cited as authority, as that section includes in gross income of a taxpayer the "distributive share of partnership gross income."

Section 17942(a) requires LLCs to pay a fee if the total income from all sources exceeds specified thresholds. Section 17942(b)(1)(A) states that total income from all sources means gross income, as defined in section 24271. Section 24271(a) defines gross income by applying Internal Revenue Code (IRC) section 61, which states gross income is all income from whatever source derived. As a single-member LLC, appellant is a disregarded entity for California tax purposes<sup>8</sup> and is not a partnership. However, its gross income is not limited to its distributive share from a partnership, and instead includes income from whatever source derived. As self-reported, that total income under section 17942 produces the fees paid and no refund is warranted.

During oral argument in this matter, appellant changed its rationale for its position that no fees were due under section 17942 in the years at issue. Appellant contends that section 17942(b)(1)(B) stands for the proposition that receipts from occasional sales as defined in section 25137<sup>9</sup> include any receipts of expense reimbursements appellant receives from clients. Section 17942(b)(1)(B) provides:

For purposes of this section, "total income from all sources derived from or attributable to this state" shall be determined using the rules for

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<sup>8</sup> See section 23038 and the regulations thereunder.

<sup>9</sup> Occasional sales are defined in tit.18, Cal. Code Regs., section 25137(c)(1)(A).

assigning sales under Sections 25135 and 25136 and the regulations thereunder, as modified by regulations under Section 25137, other than those provisions that exclude receipts from the sales factor.

Based on that provision, appellant argued that no fees were due after such exclusion was applied. However, no evidence of any amounts was provided. Furthermore, a closer reading of the cited provision shows that appellant misreads the statute. Exclusions from the sales factor are not considered in defining total income. The provision applies modifications to sales “other than those provisions that exclude receipts from the sales factor.”

We find that neither argument advanced by appellant has merit. Accordingly, appellant’s claim for a refund of the LLC fee paid for each year on appeal was properly denied.

Issue 4 - Is section 17942 constitutional?

Appellant has vigorously argued that the imposition of the LLC fee based on appellant’s total income from California sources and additional tax on appellant’s owner’s net income derived from appellant is unconstitutional double taxation.

Article III, section 3.5, subsections (a) and (b), of the California Constitution precludes the Office of Tax Appeals (OTA) from declaring a California statute unconstitutional unless an appellate court has made the determination that the statute is unconstitutional. Subsection (c) of Article III, section 3.5 of the California Constitution precludes OTA from refusing to enforce a California statute on the basis that federal law or federal regulations prohibit the enforcement of the California statute, stating in relevant part:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power ... (c) [t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or Federal Regulations.

Further, the authority of OTA to hear and decide appeals from respondent’s actions is set forth in Cal. Code Regs., title 18, section 30102. Regulation section 30102(b) specifies:

(b) Issues that will not be considered. OTA’s jurisdiction is limited to determining the correct amount owed by, or due to, the appellant for the year or years at issue in the appeal. OTA does not have jurisdiction to consider the following issues:

(1) Whether a California statute is invalid or unenforceable under the Federal or California Constitutions, unless a federal or California appellate court has already made such a determination.


No such determination has been made in connection with the applicable provisions of section 17942. Thus, appellant’s apparent claim that the LLC fee is unconstitutional is not subject to review by OTA.

HOLDINGS


1. Appellant failed to establish that its failure to timely file LLC tax returns for the 2013 and 2014 tax years was due to reasonable cause.
2. Except as to the 2013 tax year, appellant failed to establish grounds for relief from the penalty for underpayment of estimated LLC fees.
3. Appellant’s LLC fees are computed by reference to appellant’s total income from all sources pursuant to section 17942.
4. OTA lacks jurisdiction and thus declines to rule on the constitutionality of section 17942.

DISPOSITION

Respondent’s action in denying appellant’s claim for refund is modified to abate the estimated LLC fee penalty for 2013 but is otherwise sustained.

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 Douglas Bramhall  
 Administrative Law Judge

We concur:

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 Administrative Law Judge

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