

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18011013
	)	
<b>BCG INVESTMENT, LLC</b>	)	Date Issued: September 10, 2018
	)	
	)	
	)	

**OPINION**

Representing the Parties:

For Appellant: Matthew B. McClure, CPA

For Respondent: Bradley J. Coutinho, Tax Counsel

K. GAST, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324(a),<sup>1</sup> BCG Investment, LLC (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$648, plus interest, for the 2014 tax year.

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

**ISSUE**

Has appellant established the late-filing penalty imposed under section 19172 should be abated due to reasonable cause?

**FACTUAL FINDINGS**

1. Appellant is a three-member Limited Liability Company (LLC) that is classified as a partnership for federal and California income tax purposes. For the appeal year, its full calendar tax year ended on December 31, 2014.
2. On March 15, 2014, appellant timely paid the annual LLC tax of \$800.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code for the tax year at issue.

3. Because appellant had not filed its 2014 Form 568 by the original due date of April 15, 2015, or by the automatic six-month extended date due of October 15, 2015, respondent issued a Demand for Tax Return, dated June 10, 2016.
4. On September 9, 2016, almost a year and a half after the original due date, respondent received appellant's untimely filed 2014 Form 568. Respondent processed the return and accepted it as filed.
5. Since appellant's 2014 Form 568 was not timely filed, on September 23, 2016, respondent issued a Limited Liability Company - Notice of Balance Due, imposing a late-filing penalty under section 19172 of \$648.
6. By letter dated October 3, 2016, appellant's tax preparer/certified public accountant (CPA) requested penalty abatement, contending reasonable cause exists for the late filing because: (1) due to an administrative oversight, it inadvertently thought the return had been timely filed electronically; and (2) appellant has a history of always timely filing its California tax returns and acting in good faith when doing so. Because appellant had not yet paid the penalty, respondent treated this letter as an informal refund claim.
7. On November 30, 2016, respondent issued a Limited Liability Company Past Due Notice because appellant had not paid the penalty of \$648. This notice imposed interest of \$3.62, which brought the total due to \$651.62.
8. On December 13, 2016, appellant paid the penalty, plus interest.
9. By letter dated December 15, 2016, appellant, again, requested penalty abatement for the reasons set forth in its first penalty abatement request letter, dated October 3, 2016.
10. In its Notice of Action, dated June 12, 2017, respondent denied appellant's penalty abatement request. Respondent asserted that each taxpayer has a personal, non-delegable obligation to file its return by the due date, and appellant's stated reliance on an agent, such as its CPA, to file its return by the due date is not considered reasonable cause to abate the late-filing penalty. This timely appeal followed.

### DISCUSSION

For the 2014 tax year, section 18633.5(a) provided, in relevant part, that every LLC 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 15th day of the fourth month following the close of its taxable year.<sup>2</sup> 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(a); see also Cal. Code Regs., tit. 18, § 18567(a).) If the return is not filed within six months of the original due date, no extension is allowed. (Cal. Code Regs., tit. 18, § 18567(a).) Thus, for an LLC taxpayer with a December 31, 2014 calendar year-end, the original due date of its Form 568 was April 15, 2015, and the six-month automatic extended due date was October 15, 2015.

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 (determined with regard to any extension of time for filing), unless it is shown that the failure was due to reasonable cause. The penalty is computed at \$18 multiplied 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(a), (b).) Here, because appellant has three LLC members and its 2014 Form 568 was not filed within 12 months of the April 15, 2015 due date, respondent computed a penalty of \$648 (\$18.00 x 3 LLC members x 12 months). The parties do not dispute whether this penalty should have been imposed in the first place or the accuracy of this computation.

The late-filing penalty will be abated, however, if it is established that the late filing was due to reasonable cause. (§ 19172(a).) To establish reasonable cause, “the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such 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.)<sup>3</sup> A late-filing penalty imposed by the FTB is presumed to be correct and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Ibid.*)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252, the U.S. 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 . . .” To be sure, the court noted reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney

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<sup>2</sup> Section 18633.5(a) was amended, effective January 1, 2017, by Statutes 2016, chapter 348 (Assembly Bill 1775) to shorten this due date by a month.

<sup>3</sup> Board of Equalization (BOE) opinions are generally available for viewing on the BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

with respect to substantive matters of tax law or whether a return needs to be filed in the first place. (*Id.* at p. 251.) However, it concluded that “one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer [or an accountant] is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute.” (*Ibid.*) In sum, “[r]eliance on another to perform the ministerial task of filing or paying cannot be reasonable cause for failure to file or pay by the deadline.” (*Estate of Thouron v. United States* (3d Cir. 2014) 752 F.3d 311.)

In the present case, appellant contends it had reasonable cause for the late filing because: (1) its CPA, due to an administrative oversight, inadvertently thought the return had been timely filed electronically; and (2) it has always timely filed its California tax returns and acted in good faith when doing so. However, reasonable cause cannot be established when appellant relied on its tax preparer to perform a non-delegable duty of filing its return on time, as opposed to relying on its tax preparer as to a substantive matter of tax law. In addition, California does not permit penalty abatement due to good filing history.<sup>4</sup> Rather, reasonable cause must be shown, which is lacking here.

Furthermore, we note that before the April 15, 2015 original due date, appellant’s CPA was put on notice twice by its tax software that the California return was having issues being electronically filed with the FTB. Appellant’s tax return was first submitted electronically by its CPA on April 4, 2015, but was rejected that same day. The CPA tried again to file the return electronically on April 9, 2015, but it was still rejected a day later on April 10, 2015. This second rejection, according to appellant’s CPA, “is where our firm’s processing broke down,” as his staff did not catch the error, which went unnoticed until, over a year later, respondent directly contacted appellant about the missing, late return.

However, in the six months following the second rejection on April 10, 2015, until the October 15, 2015 extended due date, there is no indication in the record what steps, if any, appellant took to correct the issue, such as verifying with respondent if the return was timely

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<sup>4</sup> While the Internal Revenue Service has an administrative program called “First Time Abate,” under which it will abate timeliness penalties if a taxpayer has timely filed returns and paid tax for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program. The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement of timeliness-related penalties for taxpayers based solely on their history of timely filing and payment. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

filed or attempting to paper-file the return with an explanation attached as to why the return could not be filed electronically. Based upon the foregoing, we find appellant has not exercised ordinary business care and prudence or acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. Accordingly, appellant has not met its burden of proof of showing reasonable cause existed.

HOLDING

Appellant has not established the late-filing penalty imposed under section 19172 should be abated due to reasonable cause.

DISPOSITION

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

DocuSigned by:  
*Kenneth Gast*  
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Kenneth Gast  
Administrative Law Judge

We concur:

DocuSigned by:  
*Tommy Leung*  
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Tommy Leung  
Administrative Law Judge

DocuSigned by:  
*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge