

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011708  
1315 SOUTH PACIFIC STREET, LLC ) Date Issued: September 12, 2018  
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## OPINION

## Representing the Parties:

For Appellant: Bruce H. Bandemer, CPA

For Respondent: Gi Nam, Tax Counsel

ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> 1315 South Pacific Street, LLC (appellant), appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant's claim for refund in the amount of \$480 for the 2016 tax year.

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

## ISSUE

Is appellant liable for the late payment penalty?

## FACTUAL FINDINGS

1. On February 16, 2017, appellant timely filed its 2016 California LLC tax return (FTB Form 568) reporting a Limited Liability Company (LLC) fee in the amount of \$6,000<sup>2</sup> and a 2016 annual LLC tax in the amount of \$800.

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

<sup>2</sup> The amount of the LLC fee is determined pursuant to section 17942(a), which requires a fee of \$6,000 when the total income of the LLC attributed to California from all sources is \$1,000,000 or more but less than \$5,000,000. Appellant's total income as reported on its 2016 return was \$1,640,990.

2. Appellant reported payments of \$6,800 on its return. Appellant submitted an \$800 payment on March 1, 2016. Appellant did not remit the remaining \$6,000 prior to notice from respondent requesting payment.
3. Respondent sent to appellant a Return Information Notice on April 24, 2017, stating that the appellant's return reported payments of \$6,800 but only \$800 was received by FTB. This notice informed appellant of a new balance due of \$6,578.37 consisting of the \$6,000 LLC fee, a \$300 underpayment penalty, a \$180 monthly penalty,<sup>3</sup> and \$98.37 in interest.
4. Appellant paid the balance owed by paying \$6,098.37 on May 4, 2017, and \$486.88 on May 17, 2017.
5. Appellant filed its claim for refund on July 7, 2017.
6. On July 7, 2017, respondent denied appellant's claim for refund.
7. Appellant filed a timely appeal.

#### DISCUSSION

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley*, 82-SBE-154, July 26, 1982.) California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”<sup>4</sup> Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Section 19132 imposes a late payment penalty when a taxpayer fails to pay the tax shown as due on the return by the date prescribed for payment of that tax.<sup>5</sup> Generally, the date

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<sup>3</sup> Both the 5-percent underpayment penalty and the 0.5-percent monthly penalty are components of the section 19132 late payment penalty.

<sup>4</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

<sup>5</sup> The penalties applicable to late-paid taxes are made applicable to the LLC fee by section 17942, subdivision (c), which provides as follows: “The fee assessed under this section shall be due and payable on the date the return of the limited liability company is required to be filed under Section 18633.5, shall be collected and refunded in the same manner as the taxes imposed by this part, and shall be subject to interest and applicable penalties.”

prescribed for payment of the tax is the due date of the return, without regard to extensions of time for filing. (§ 19001.) The late payment penalty does not apply when the failure to pay is due to reasonable cause and not due to willful neglect. (§ 19132(a)(1).) The taxpayer bears the burden of proving reasonable cause, which means that the taxpayer must show that its failure to pay the tax in a timely manner occurred despite the exercise of ordinary business care and prudence. (*Appeal of M. B. and G. M. Scott*, 82-SBE-249, Oct. 14, 1982.)

When examining whether a penalty may be abated based on reliance on a tax professional to file tax returns timely, the United States Supreme Court in *United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*) created a two-part test: (1) that the person relied upon by the taxpayer is a tax professional with competency in the subject of tax law, and (2) that the tax professional's advice is based upon a full disclosure of the relevant facts and documents. However, this test is applied only to a tax professional's substantive legal advice upon which a taxpayer detrimentally relied and generally cannot be used to excuse a failure to file a return or a failure to timely pay tax.

In *Boyle, supra*, the administrator of an estate hired an attorney to probate an estate and prepare the estate tax return, but the attorney failed to file the return timely. The IRS assessed a late-filing penalty against the estate, which the taxpayer paid with interest. The taxpayer then made a claim for refund of the late-filing penalty and interest associated therewith contending that he had relied upon a professional to file the return timely and thus there was reasonable cause to abate the penalty. It was uncontested that the taxpayer hired a tax professional and had provided the professional with all of the information required to file the return. The court reasoned that although a taxpayer may reasonably rely upon a tax professional for substantive tax advice, "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." (*Boyle, supra*, 469 U.S. at p. 251.) Thus, a tax professional's failure to timely file tax returns on behalf of a taxpayer generally cannot constitute reasonable cause to abate a late-filing penalty. The same analysis applies when a taxpayer contends, as here, that it should have its late payment penalty abated because it relied on a tax professional to pay tax timely.

In *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986 (*Berolzheimer*), the Board of Equalization (BOE) applied the *Boyle* analysis to late payment penalty assessed in a situation where the taxpayers underpaid their tax liability as a result of computational and programming errors by a law firm upon which the taxpayers relied in making

an estimated tax payment for the year at issue. The BOE, utilizing the reasoning of *Boyle*, concluded that since the taxpayers were not relying on the law firm for advice on an issue of substantive tax law, they had not shown reasonable cause to abate the late payment penalty.

[A]ll of the issues requiring a legal opinion were resolved. All that was left to be determined was the simple computation of tax due on the gain . . . As this was a simple computational problem, not a legal interpretation, appellants cannot hide behind an ‘expert’ for the failure to properly determine the tax that was due.

(*Berolzheimer, supra.*)

Here, appellant relied upon a certified public accountant to prepare its tax return for the year at issue. The tax preparer admits that an inadvertent error occurred in the preparation of the return. The returns were prepared utilizing tax preparation software and timely filed, although an erroneous computer input caused the return to reflect that the \$6,000 LLC fee had been paid when it had not. As a result, the payment voucher to inform appellant of the amount remaining due did not print when the paper returns were printed. The taxpayer claims it was unaware that it had not paid the \$6,000 LLC fee identified in the return when the preparer filed the return. Appellant’s mistake in failing to pay the LLC fee was the result of inadvertence and not reliance on advice from a tax professional on a substantive legal issue.

Reasonable cause penalty abatement requires the taxpayer to show that the failure to timely pay the amount shown on the return occurred despite the exercise of ordinary business care and prudence. (*Appeal of M.B. and G.M. Scott, supra; Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) Ordinary business care and prudence requires taxpayers to scrutinize the returns prepared by a professional and their business records to ensure that they make appropriate payments. Appellant had access to all of the information needed to discern that it had not paid the \$6,000 LLC fee indicated on the return. Thus, appellant has failed to meet its burden of proof to show reasonable cause for failing to timely pay the LLC fee.

Since we have determined that there is no reasonable cause to excuse the failure to timely pay the LLC fee in the amount of \$6,000, we do not need to analyze the element of willful neglect.

## HOLDING

Appellant has failed to prove reasonable cause to abate the late payment penalty.

## DISPOSITION

Respondent's denial of appellant's claim for refund is sustained.

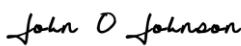
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Neil Robinson  
Administrative Law Judge

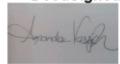
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