

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18010712
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<b>MT. WHITNEY FARMS, LLC</b>	)	Date Issued: October 2, 2018
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**OPINION**

Representing the Parties:

For Appellant:	Warren P. Felger
For Respondent:	Brian Werking

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Mt. Whitney Farms, LLC (appellant) appeals an action by the Franchise Tax Board (FTB) denying appellant’s claim for refund of \$432 for the 2013 tax year.

Administrative Law Judges M. Geary, J. Angeja, and J. Margolis appeared for an oral hearing of this matter in Sacramento, California, on June 26, 2018. Appellant did not appear. FTB appeared but declined to present argument or evidence, agreeing that we should decide the matter based on the written record. Consequently, we decide this matter based on the written record.

**ISSUE**

Whether appellant is liable for the late-filing penalty.

**FACTUAL FINDINGS**

1. During the entire year in question, appellant was a limited liability company (LLC), classified as a partnership for tax purposes, and was registered with the Secretary of State to conduct business in this state.
2. According to FTB, appellant paid estimated tax of \$800 on April 2, 2013, and LLC fees of \$2,500 on May 31, 2013, for the 2013 tax year.

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<sup>1</sup> Unless otherwise indicated, all statutory (section or §) references are to the Revenue and Taxation Code.

3. Appellant did not timely file its income tax return for the 2013 tax year, which, without an extension, was due on April 15, 2014.
4. On March 19, 2016, FTB notified appellant that it had received payments totaling \$3,300, but no return, for the 2013 tax year.
5. According to FTB, appellant contacted FTB on or about April 16, 2016, but did not establish that appellant was not required to file a 2013 return or that it already had filed such a return. By letter dated December 16, 2016, FTB instructed appellant to provide a copy of its 2013 return.
6. On December 23, 2016, FTB received appellant's 2013 return, which reported tax due of \$800 but no LLC fee due. The return indicated that appellant had two members during 2013.
7. FTB accepted the return as filed and treated it as a claim for refund of \$2,500. It assessed a late-filing penalty of \$432, and, on January 25, 2017, issued a \$2,068 refund to appellant. ( $\$3,300 - (\$800 + \$432) = \$2,068$ .)
8. By letter dated January 29, 2017, appellant asked FTB to "reconsider" the late-filing penalty. FTB treated the letter as a claim for refund, and notified appellant by letter dated March 24, 2017, that it was denying the claim. This timely appeal followed.

#### DISCUSSION

Appellant was required to file its 2013 return on or before April 15, 2014. (See former § 18633.5(a).) With certain limitations not relevant here, section 19172 requires FTB to impose a late-filing penalty when a partnership (or an LLC taxed as a partnership) does not file its return on or before its due date, unless the partnership shows that the late filing was due to reasonable cause. FTB may grant a taxpayer up to six more months to file a tax return (§18567(a)), and the corresponding regulation provides for an automatic six-month extension without a written request (Cal. Code Regs., tit. 18, § 18567). However, if the return is not filed within six months of the original due date, in this case by October 15, 2014, no valid extension exists and the late-filing penalty amount is computed by reference to the original due date of the return. (*Ibid.*) The penalty is computed as follows: \$18 per month per partner (or, in the case of an LLC taxed as a partnership, per LLC member), for a maximum of 12 months. Here, appellant's 2013 return was filed twelve or more months late, so the penalty imposed by FTB under section 19172 was \$432 (\$18 times 2 members/shareholders times 12 months).

Appellant argued that its accountants electronically filed the return on or before the due date. It provided a copy of a March 6, 2014 letter from its accountants, which said that the Internal Revenue Service had accepted the 2013 federal return filed on behalf of Tres Picos Land Company (Tres Picos), and a copy of appellant's FTB Form 8453-LLC. Appellant stated that after it received the refund check from FTB in January 2017, it contacted its accountants, who informed appellant that FTB had rejected the electronic filing of the 2013 return without explanation.

FTB notes that Tres Pecos is not appellant and argues that there is no evidence appellant filed its state return before December 2016, when appellant sent a copy of the return to FTB. It also states that its electronic filing system does not reject returns without explanation. FTB asserts that when a return is rejected, the system automatically generates a notice of the rejection and an explanation of the reason(s) for the rejection.

When we held a prehearing conference in this matter on June 6, 2018, it was agreed that appellant would submit an affidavit from an employee of its accountants to establish the timely filing of its 2013 return or that appellant's failure to timely file the return was due to was reasonable cause and not to willful neglect. The judge who presided at that conference and FTB provided input regarding the matters that the affidavit should cover, and Mr. Felger explained that he has been a practicing attorney for many years and understood what would be required. Appellant did not provide an affidavit, and no one appeared at the hearing to represent its interests or provide evidence.

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 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>2</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; *Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

There is no question that appellant had a nondelegable duty to file a tax return and pay the tax by the due date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985.)

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<sup>2</sup> Precedential opinions of the State Board of Equalization (BOE) are available for viewing on the BOE's website: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

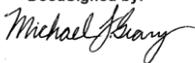
Appellant does not allege otherwise. Instead, it argues that its accountants attempted to file the return on or before the due date but failed, allegedly through no fault of the accountants or appellant. The problem with that argument is that there is no credible evidence to support it. Appellant had no direct knowledge of the alleged filing attempt. Appellant allegedly heard about the “rejected electronic filing” after appellant received the partial refund in January 2017, when Mr. Felger learned from the accountants that FTB had rejected the electronic filing without explanation. This assertion raised more questions about the facts and the credibility of evidence. If the accountants knew that the electronic filing had been rejected – and we infer from the evidence that such a notice would have been given at or very near the time of the attempted filing – why did the accountants wait until Mr. Felger contacted them almost three years later to tell appellant about the “rejected” return? More importantly, why did the accountants not do something about it immediately after it allegedly occurred? It was our hope that appellant would provide answers. Instead, it provided no evidence and failed to appear at the hearing. We find that appellant has not shown that its failure to timely file its 2013 return was due to reasonable cause and not to willful neglect. Consequently, appellant is liable for the late-filing penalty.

#### HOLDING

Appellant has failed to show that its failure to timely file a 2013 California income tax return was due to reasonable cause and not to willful neglect. Therefore, it is liable for the late-filing penalty.

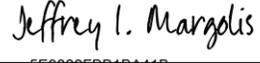
DISPOSITION

We sustain FTB's denial of appellant's claim for refund of \$432 for the 2013 tax year.

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Michael F. Geary  
Administrative Law Judge

We concur:

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Jeffrey G. Angeja  
Administrative Law Judge

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Jeffrey I. Margolis  
Administrative Law Judge