

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011403
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MEDIAMATE, LLC) Date Issued: October 8, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Dawn M. Kay, CPA

For Respondent: Meghan McEvilly, Tax Counsel

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ appellant Mediamate, LLC appeals from the action of the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$5,400 for the 2011 tax year.

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

ISSUE

Did appellant establish that its failure to timely file its 2011 California tax return was due to reasonable cause?

FACTUAL FINDINGS

1. Appellant is a limited liability company (LLC) registered to do business in California and is classified as a partnership for California tax purposes. Appellant paid the \$800 annual

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

- LLC tax in a timely manner on April 15, 2011 and made an additional payment of \$800 on September 2, 2011.
2. On March 27, 2012, appellant's certified public accountant attempted to e-file its California tax return, but the filing was rejected because one or more fields lacked required information. On April 4, 2012, appellant's certified public accountant again attempted to e-file its return, but the return was rejected for the same reason.
 3. On November 13, 2014, respondent issued a Request for Past Due LLC Return of Income for 2011. Appellant replied on November 19, 2014, stating that its records showed that it attempted to file its tax return on April 4, 2012 but the return was rejected. On December 15, 2014, respondent received appellant's 2011 income tax return, which was paper-filed. Appellant reported no California income and an annual LLC tax of \$800, which had been paid on April 15, 2011. The return reported that appellant had 25 LLC members.
 4. Respondent processed the return, accepted it as filed, and imposed a \$5,400 late-filing penalty pursuant to section 19172. The amount due was satisfied in full by application of a credit from tax year 2016, an overpayment from the 2011 tax year, and a payment of \$4,673.55 made on September 14, 2015.
 5. Appellant filed a claim for refund on November 17, 2015, requesting penalty abatement.
 6. Respondent denied the claim for refund on December 16, 2015. This timely appeal followed.
 7. On September 14, 2017, additional briefing was requested by the Board of Equalization (BOE).² BOE asked respondent and appellant to provide additional information about the specific circumstances surrounding the two failed attempts to e-file the 2011 tax return in a timely manner.
 8. The BOE letter asked appellant to specify the steps the accountant took to resolve the software errors that allegedly prevented the successful transmission of the tax return. Appellant did not respond. FTB's response noted that both rejections were the result of

² Pursuant to The Taxpayer Transparency and Fairness Act of 2017 (Assembly Bill 102, Stats. 2017, Ch. 16), as amended by Assembly Bill 131 (Stats. 2017, Ch. 252), the duty of processing administrative appeals of FTB determinations was transferred from the BOE to the Office of Tax Appeals.

an input error—i.e., the taxpayer identification number of one of the partners was missing, a required element of a complete return.³

DISCUSSION

Section 18633.5(a) provided, for 2011, that an LLC classified as a partnership shall file its return on or before the fifteenth day of the fourth month following the close of its tax year. Section 18567 permits a six-month extension for an LLC to file a return if the return is filed within six months of the due date. If the return is not filed within six months of its original due date, no extension exists.⁴

Section 19172 imposes a late-filing penalty when a partnership, including an LLC regarded as a partnership for tax purposes, fails to file a return by the prescribed date unless it is shown that the failure was due to reasonable cause. The amount of the penalty is calculated as \$18 multiplied by the number of persons who were partners in the partnership during any part of the tax year multiplied by the number of months the return was late, up to a maximum of 12 months.⁵

Appellant's return was ultimately filed on December 12, 2015, and on that return, appellant reported 25 LLC members. Accordingly, the penalty was correctly calculated, and appellant has not disputed the computation (i.e., \$18 x 25 members x 12 months = \$5,400).

To establish reasonable cause, a taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)⁶ It is well-settled law that a taxpayer's reliance on an agent to file his or her tax returns in a timely manner is not reasonable cause for late filing. (*United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*); *Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985 [citing *Boyle*].)

³ The FTB's response also stated that it has not received or heard any complaints regarding transmission failures due to the Lacerte software that appellant used for its unsuccessful attempts to e-file its tax returns.

⁴ Cal. Code Regs., tit. 18, § 18567.

⁵ Section 19172(a), (b).

⁶ Published BOE decisions, designated by "SBE" in the citation, can generally be found on BOE's website at: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

In *Boyle, supra*, the taxpayer was the executor of his mother's trust, but he was not experienced in taxation. He cooperated fully with his attorney and provided all the information needed to timely file the estate tax return. The Supreme Court noted that the taxpayer and his spouse contacted the attorney several times to check on the progress of the tax return and they were assured that the return would be filed "in plenty of time." (*Boyle, supra*, at p. 243.) However, the taxpayer subsequently contacted the attorney and learned that the return had not been filed by the deadline. On these facts, applying its holding that the duty to meet an unambiguous tax filing deadline was non-delegable, the Supreme Court held that the taxpayer had not shown reasonable cause for failing to meet the deadline.

The courts have consistently applied the bright line rule set forth in *Boyle*, even in circumstances where a taxpayer acted prudently in its dealings with its agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136 [finding that reliance on a payroll service to make payments was not sufficient to establish reasonable cause under *Boyle*]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [finding that reliance on the taxpayer's controller was not sufficient to establish reasonable cause].)

FTB's determination is presumed correct and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) 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.) In the absence of credible, competent, and relevant evidence showing error in respondent's determination, respondent's determination must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

Appellant argues that problems with the software provider created an "extenuating circumstance or impossibility," which establishes reasonable cause as a matter of law. However, no authority is cited, and we are unaware of any such authority, in support of such a position with respect to a late-filing penalty. Furthermore, no evidence was provided in support of the statement that there was a problem with the software provider.

When asked by BOE to expand upon the assertion of software provider problems, appellant failed to respond. Further, respondent documented that FTB, not the software provider, rejected both efforts to e-file the returns because the input data was incomplete. The error code notifications provided with appellant's appeal alerted appellant's preparer to the fact

that the return had not been filed with the first effort; yet no evidence has been provided to show whether appellant's preparer took any steps to correct the input deficiency, contact FTB for assistance, or to otherwise ensure timely filing following the second rejection notification.⁷

While we sympathize with appellant's contention that it relied on its accountant, we are compelled to apply the legal standard established by the United States Supreme Court in *Boyle, supra.*, which means that appellant remains liable for the actions or inactions of its accountant in failing to meet the filing deadline.

Finally, appellant contends that it has never received any other timeliness penalties and it has been current in all years since the 2011 late filing. Appellant's history of compliance is commendable, but we cannot waive the late-filing penalty based on appellant's compliance record because California law requires a showing of reasonable cause for penalty abatement.⁸ Therefore, because appellant has not demonstrated reasonable cause for the late filing, we cannot overturn respondent's determination denying the claim for refund.

HOLDING

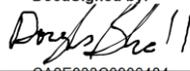
Appellant has not established reasonable cause for the late filing of its 2011 tax return.

⁷ We do note that the data missing from the attempted e-filing was included on the paper return ultimately filed in December 2014.

⁸ Appellant also indicated, in its claim for refund, that it has not had profitable years and a penalty of this size is a hardship on the business. We understand appellant's concern, but the amount of the late-filing penalty is set by statute and we have no power to modify or ignore the law.

DISPOSITION

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

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Douglas Bramhall
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:

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Kenneth Gast
Administrative Law Judge