

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011293
)
THI BRIDGE, LLC) Date Issued: November 29, 2018
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)

OPINION

Representing the Parties:

For Appellant:	Frank R. Pope, Former Managing Member
For Respondent:	Samantha Q. Nguyen, Tax Counsel III

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ THI Bridge, LLC (“Appellant”) appeals an action by the Franchise Tax Board (“Respondent”) denying its claim for refund for \$2,160, plus applicable interest, for the 2012 tax year.

Office of Tax Appeals Administrative Law Judges Jeffrey I. Margolis, Teresa A. Stanley, and Alberto T. Rosas held an oral hearing in this matter on September 25, 2018, in Sacramento, California. Appellant’s representative did not appear at the hearing; therefore, the matter was submitted for a decision on the basis of the written record.

ISSUE

Did Appellant establish that it timely filed its 2012 tax return? If not, did Appellant establish reasonable cause for filing its return late?

FACTUAL FINDINGS

1. Appellant, a limited liability company (LLC), had ten (10) members during the tax year at issue.

¹ Statutory references are to the California Revenue and Taxation Code, unless otherwise noted.

2. On April 15, 2012, Appellant timely made an \$800 LLC tax payment for its 2012 tax year.
3. Appellant was taxable as a partnership and was required to file a 2012 Limited Liability Company Return of Income (Form 568) with the State of California by April 15, 2013.
4. There is no evidence that Appellant timely filed its California tax return for 2012.
5. Respondent received information from the Internal Revenue Service (IRS), in the form of an IRS Account Transcript, indicating Appellant also had not filed its federal 2012 tax return.
6. On March 21, 2015, Respondent issued a Payment Received – Missing Tax Return notice informing Appellant to either file a return, provide a copy of the filed return, or explain why it did not have a filing requirement.
7. On April 6, 2015, Appellant filed its 2012 Form 568.
8. Subsequently, Respondent issued a Limited Liability Company – Return Information Notice, which, among other things, imposed a late-filing penalty of \$2,160 pursuant to section 19172.
9. On October 30, 2015, Appellant’s former managing member, Frank R. Pope, made a payment of \$2,191.47, paying the penalty balance, plus interest, in full under protest.
10. Mr. Pope filed a claim for refund on behalf of Appellant, stating he personally mailed Appellant’s state and federal 2012 returns on April 5, 2013.
11. Respondent denied Appellant’s claim for refund. Appellant filed this timely appeal.

DISCUSSION

Did Appellant establish that it timely filed its 2012 tax return? If not, did Appellant establish reasonable cause for filing its return late?

Appellant states it timely filed its 2012 California tax return by mailing it on April 5, 2013, and, therefore, Respondent’s determination of the section 19172 late-filing penalty was erroneous. Appellant has the burden of proving error in Respondent’s tax determination. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow, supra.*) “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” (Evid. Code, § 115.) To satisfy this burden, a party 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.)

Appellant’s former managing member, Mr. Pope, stated in writing that he “personally mailed the returns”—Appellant’s federal and California tax returns for 2012—on April 5, 2013. Mr. Pope alleged he sent the returns via regular mail, and he conceded he did not have proof of mailing.

Respondent’s records indicate Appellant did not file a return on or about April 5, 2013, or, for that matter, at any time prior to the expiration of the filing deadline. Moreover, an IRS Account Transcript indicates Appellant also did not file a federal tax return for 2012.

Mr. Pope failed to appear at the duly noticed September 25, 2018 oral hearing and did not testify about the facts and circumstances surrounding his alleged filing of Appellant’s 2012 tax returns. He has not rebutted the documentary evidence showing Appellant failed to file its 2012 California tax return until April 6, 2015.

Respondent imposed a per-partner late-filing penalty pursuant to section 19172. This penalty is imposed on partnerships (and LLCs taxable as partnerships) that fail to timely file, unless it is shown that the late filing was due to reasonable cause. (§ 19172(a).)

Appellant needed to file its 2012 Form 568 by April 15, 2013. Instead, Appellant filed its 2012 Form 568 on April 6, 2015—approximately twenty-four (24) months late. During tax year 2012, Appellant had ten (10) members (treated as partners for tax purposes). Accordingly, the per-partner late-filing penalty was \$2,160.²

The penalty may be abated if the taxpayer establishes that the late filing was due to reasonable cause. (§ 19172(a)(2).) Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)

As stated above, Appellant failed to establish that its return was timely filed, which was the sole basis for Appellant’s appeal. Appellant made no attempt to establish that there was reasonable cause for its late filing. Accordingly, we uphold Respondent’s determination.


²The section 19172 late-filing penalty is calculated as follows: the number of months the LLC’s return was late (not exceeding 12 months) times \$18 times the number of partners (or LLC member treated as partners for tax purposes). (§ 19172(a)(2), (b).) Thus, the penalty amount was \$2,160 (12 months x \$18 x 10 members).

HOLDING

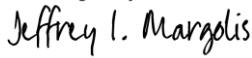
Appellant has not established that it timely filed its 2012 LLC tax return. Additionally, Appellant did not establish reasonable cause for filing its return late.


DISPOSITION

We sustain Respondent's action in full.

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Alberto T. Rosas
Administrative Law Judge

We concur:

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Jeffrey I. Margolis
Administrative Law Judge

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Teresa A. Stanley
Administrative Law Judge