2019 – OTA – 027
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18011300
VILLAGE VIEW LLC	Date Issued: February 8, 2019

OPINION

Representing the Parties:

For Appellant: Shea O'Gara (TAAP)[1]
Jordan Acosta (TAAP)

For Respondent: Nathan Hall, Tax Counsel III
Michael Cornez, Tax Counsel V

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Village View, LLC (appellant) appeals an action by respondent, the Franchise Tax Board (FTB), denying appellant's claim for refund of $1,359.33 for the 2014 tax year.[2]

Office of Tax Appeals (OTA) Administrative Law Judges Michael Geary, John Johnson, and Grant Thompson held an oral hearing for this matter in Sacramento, California, on October 30, 2018. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUES

1. Whether appellant was "doing business" in California, within the meaning of R&TC section 23101, such that it was required to file a 2014 income tax return in this state.

[1] The Tax Appeals Assistance Program (TAAP) provides free legal assistance to taxpayers on qualified appeals before OTA. Law students represent appellants under the supervision and direction of attorneys in FTB's Taxpayers' Rights Advocate's Office.

[2] The claim is for refund of $800.00 tax, a $200.00 late-filing penalty, a $200.00 demand penalty, a $100.00 filing enforcement fee, and $59.33 interest. By letter dated October 18, 2018, FTB confirmed its agreement to abate and refund or credit the $200 demand penalty and the $100 filing enforcement fee. Consequently, only the tax, late-filing penalty, and interest remain at issue.

2. Whether appellant is entitled to abatement of the late-filing penalty because its failure to file a 2014 income tax return was due to reasonable cause and not willful neglect.
3. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

1. Appellant was organized in Oregon in 2007. During 2014, most of appellant's members, including Mr. Read, lived in California.
2. Appellant's sole business activity during 2014 consisted of the ownership and operation of an apartment building in Oregon (the Property).
3. At all relevant times, Ms. Tice, of Advanced Property Management, managed the Property.
4. Mr. Read, who was the managing member of appellant during at least part of 2014, used his residence address in California for communications with the Internal Revenue Service and FTB.[3]
5. For the 2014 tax year, appellant filed a federal Form 1120 (a U.S. Corporation Income Tax Return).
6. On May 27, 2016, FTB sent appellant a "Demand for Tax Return" (Demand), which informed appellant that FTB believed appellant had a California income tax filing requirement for 2014. The Demand instructed appellant to provide a copy of its 2014 tax return (if one had already been filed, file its tax return), or provide information to show that appellant had no 2014 filing requirement. The Demand also informed appellant that, if appellant had a filing requirement, FTB would impose a late-filing penalty and interest, and, if appellant did not file its return by June 29, 2016, FTB also would assess a minimum tax or tax based on the best available income information, a $200 demand penalty, and a cost recovery fee.
7. Appellant did not file a 2014 California income tax return, continuing to assert that it had no California filing requirement.
8. FTB assessed the minimum tax of $800 and imposed a $200 late-filing penalty, a $200 demand penalty, and a $100 filing enforcement fee.

[3] There is some question about exactly when Mr. Read became the managing member, but the parties agree that he was the managing member during at least part of 2014.

9. Appellant paid the liability in full and thereafter filed a claim for refund of the entire amount paid, $1,359.33, consisting of the amounts referred to above, plus $59.33 interest. FTB denied the claim. This timely appeal followed.
10. FTB agrees to abate and refund or credit the $200 demand penalty and the $100 filing enforcement fee.

DISCUSSION

Issue 1 – Whether appellant was "doing business" in California, within the meaning of R&TC section 23101, such that it was required to file a 2014 income tax return in this state.

For the taxable year at issue, a limited liability company (LLC) that was classified as a corporation for California tax purposes, and that was doing business or organized in the state, or was registered with the Secretary of State, was required to file a California income tax return and pay the taxes due. Every foreign corporation that is qualified to transact intrastate business in California pursuant to chapter 21 of Division 1 of Title 1 of the Corporations Code is subject to the minimum franchise tax ($800) from the date of its qualification until the date it ceases to do business in this state or the date it files a certificate of surrender, whichever occurs later. (Rev. & Tax. Code, § 23153 (a), (b)(2), (d)(1).)

Since 2011, California law (Rev. & Tax. Code, § 23101) provides two alternative bases for finding a taxpayer is doing business in this state. Under subdivision (a) of R&TC section 23101, a taxpayer is doing business in California if it is "actively engaging in any transaction for financial or pecuniary gain or profit" in this state. Under subdivision (b) of section 23101, effective for tax years beginning on or after January 1, 2011, a taxpayer is considered to be "doing business" in California if, as relevant here, it is organized or commercially domiciled in this state. "Commercial domicile" means the principal place from which the trade or business is directed or managed. (Rev. & Tax. Code, § 25120.)

Appellant contends that it has owned the Property since 2007, and that Mr. Read became the managing member as a result of his foreclosure on a loan (secured by a deed of trust on the Property) after he determined that the former managing member mismanaged the Property. Appellant further contends that Mr. Read used his California address on occasion for convenience only, and primarily for the purpose of communicating with tax authorities. It also asserts that the Property is managed exclusively from Oregon by Ms. Tice and that Mr. Read did

not perform sufficient management duties in California during 2014 to warrant FTB's determination that appellant was doing business in California within the meaning of R&TC section 23101.

FTB contends that appellant was required to file a California income tax return for the 2014 tax year because it was commercially domiciled here by virtue of the managing member's residence, and his exercise of managerial functions, in California. FTB further argues that appellant places undue emphasis on the role of Ms. Tice and that her role as an independent, local manager of the Property should be distinguished from Mr. Read's role as the managing member of appellant, Ms. Tice's employer.

The evidence establishes that appellant's business was managed by Mr. Read from California. Ms. Tice managed the Property for appellant. While the Property may be the sole asset and business of appellant, there is no evidence that Ms. Tice has any responsibility for management of the LLC itself. On the contrary, Mr. Read, as the sole managing member of the LLC, would have exclusive authority to manage it. Regardless of whether Ms. Tice took any specific direction from Mr. Read during 2014, everything she did with the property, and everything that was done by or on behalf of appellant, was done pursuant to the authority of Mr. Read during at least part of 2014. While Mr. Read was the managing member, real control over the LLC existed only in the place where he resided, and that place was California. Based on the evidence, we find that appellant was commercially domiciled in California during at least some of 2014 and, therefore, it was "doing business" in California within the meaning of R&TC section 23101 and was thus required to file a 2014 income tax return in this state.

Issue 2 – Whether appellant is entitled to abatement of the late-filing penalty because its failure to file a 2014 income tax return was due to reasonable cause and not willful neglect.

An LLC taxed as a corporation was required to file its 2014 income tax return and pay the taxes due on or before March 15, 2015. (Rev. & Tax. Code, §§ 18601, 19001.)[4] FTB allowed an automatic extension to October 15 to file a return. (Rev. & Tax. Code, § 18604.) FTB must impose a late-filing penalty when a taxpayer fails to file a tax return by the due date, unless the evidence establishes that the failure was due to reasonable cause and not to willful

[4] A 2016 amendment to R&TC section 18601, effective January 1, 2017 and applicable to returns for taxable years beginning on or after January 1, 2016, changed the due date to April 15th following the close of the taxable year.

neglect. (Rev. & Tax. Code, § 19131.) "Willful neglect" is indicated by evidence of a conscious, intentional failure or reckless indifference. (*United States v. Boyle* (1985) 469 U.S. 241, 245.) A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of Tao Xie*, 2018-OTA-076P, July 23, 2018 [citations].)[5, 6] Whether appellant's failure to file its return was due to reasonable cause and not to his willful neglect, are questions of fact on which appellant has the burden of proof. (*Appeal of La Salle Hotel Company*, 66-SBE-071, Nov. 23, 1966.)[7] To establish reasonable cause, the taxpayer must show the failure to timely file returns or make tax payments occurred despite the exercise of "ordinary business care and prudence." (*Appeal of Sidney G. Friedman and Ellen Friedman*, 2018-OTA-077P, August 23, 2018 [citations].) 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.)

Appellant argues that it had a reasonable and good-faith belief that it was not required to file a return for 2014. However, the language of R&TC sections 23101 and 25120 is clear. A reasonable conclusion from reading those statutes would have been that Mr. Read managed appellant's business from California, and, therefore, appellant was required to file an income tax return. Ignorance of the law does not excuse a failure to file a tax return or pay taxes. (*Appeal of David and Marilee Duff*, 2001-SBE-007, Dec. 20, 2001; *Appeal of Oxford Liquor, Inc.*, 79-SBE-052, Mar. 7, 1979.) Under the circumstances shown by the evidence, reasonable business care should have caused Mr. Read to file a return. Thus, we find that appellant is not entitled to abatement of the late-filing penalty.

Issue 3 - Whether appellant is entitled to interest abatement.

Interest is not a penalty. It is compensation to the state for a taxpayer's use of the funds, and the law requires FTB to collect interest on past-due taxes. There is no reasonable cause exception to the imposition of interest. (Rev. & Tax. Code, § 19101(a); *Appeal of Amy M.*

[5] Because the "reasonable cause" standard set forth in the various penalty statutes at issue is identical, we can rely on authorities discussing that standard as it applies to any one of the penalties.

[6] Precedential opinions issued by the Office of Tax Appeals can be seen on its website at https://ota.ca.gov/opinions/.

[7] Formal and memorandum opinions issued by the Board of Equalization can be seen on the Board's website at http://www.boe.ca.gov/legal/legalopcont.htm.

Yamachi, 77-SBE-095, June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) FTB can abate interest when the interest is attributable to unreasonable error or delay by an FTB officer or employee while performing a ministerial or managerial act in his or her official capacity. (Rev. & Tax. Code, § 19104(a).) However, appellant has not alleged or proved unreasonable error or delay by an FTB officer or employee. It argues that there is reasonable cause to abate interest, but that is not a basis for abatement. Consequently, we conclude that appellant is not entitled to interest abatement.

HOLDINGS

1. Appellant was commercially domiciled in California during at least some of 2014 and, therefore, it was "doing business" in California within the meaning of R&TC section 23101 and was thus required to file a 2014 income tax return in this state.
2. Appellant is not entitled to abatement of the late-filing penalty.
3. Appellant is not entitled to abatement of interest.

DISPOSITION

We accept FTB's concessions of the demand penalty and filing enforcement fee; in all other respects we sustain FTB's denial of the claim for refund.

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Jeffrey I. Margolis,
Supervising Administrative Law Judge,
on behalf of Michael F. Geary,
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Grant S. Thompson
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Grant S. Thompson
Administrative Law Judge