

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18010895  
)  
TRIPLE CROWN BASEBALL LLC ) Date Issued: February 12, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Richard Brush, TAAP<sup>1</sup>

For Respondent: Eric A. Yadao, Tax Counsel III

Office of Tax Appeals: William J. Stafford, Tax Counsel III

J. JOHNSON, Administrative Law Judge: This appeal is made pursuant to section 19324 of the Revenue and Taxation Code (R&TC) from the actions of respondent Franchise Tax Board (FTB) in denying appellant Triple Crown Baseball LLC’s claims for refund totaling \$1,139.03 for the tax years 2012 through 2016.<sup>2</sup>

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

**ISSUES**

1. Whether appellant has shown that the late payments of tax were due to reasonable cause and not willful neglect, pursuant to R&TC section 19132.

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<sup>1</sup> Appellant’s sole member, Mr. Leite, filed appellant’s appeal letter. Richard Brush of the Tax Appeal Assistance Program (TAAP) filed appellant’s reply brief.

<sup>2</sup> The amount at issue is comprised of the following: for the 2012 tax year, a late payment penalty of \$200.00; for the 2013 tax year, a late payment penalty of \$192.00; for the 2014 tax year, a late payment penalty of \$140.00; for the 2015 tax year, a late payment penalty of \$92.00; for the 2016 tax year, a failure to file a statement of information penalty of \$250.00; and applicable interest totaling \$265.03. Appellant’s claim for refund contested the interest on the late payment of tax, but no argument on that point was made in its appeal letter. FTB has agreed to reduce the late payment penalty by \$4, and to abate interest on that \$4 amount, for the 2013 tax year because it did not “acknowledge receipt of appellant’s payment of the minimum tax consistent with the remainder of appellant’s dated payments.”

2. Whether the Office of Tax Appeals (OTA) has jurisdiction to consider appellant's request for a refund of the penalty imposed under R&TC section 19141 for appellant's failure to file a statement of information with the Secretary of State's office (SOS).

### FACTUAL FINDINGS

1. Appellant, a single member limited liability company (LLC), registered with the California SOS to do business in California on June 20, 2012.
2. On July 3, 2012, FTB first contacted appellant by mail to verify appellant's mailing address. Subsequently, on September 19, 2012, FTB issued a Form 5954 advising appellant of the law requiring timely filing of returns and timely payment of tax and fees.
3. On October 4, 2012, appellant's sole member, Mr. Leite, was involved in a serious car accident requiring intensive care. Medical records indicate that, while there was "concern for head injury," he denied experiencing any cognitive difficulties, concussive symptoms, or posttraumatic amnesia as a result of the accident, and the examining physicians found that there was no acute trauma to the brain or any significant evidence of concussion-related cognitive difficulties.<sup>3</sup> Mr. Leite was discharged from the hospital to a rehabilitation facility on October 16, 2012, where his physical therapy continued thereafter.
4. Mr. Leite was unable to perform business activities for a period of up to one year after the accident, but thereafter resumed managing and operating appellant (as well as other business activities), albeit with some physical limitations.
5. On January 17, 2013, appellant's representative<sup>4</sup> contacted FTB requesting information about appellant's filing requirements. FTB advised appellant of the \$800 tax due for the 2012 tax year, and the requirements for cancelling the LLC with the SOS. In addition, FTB directed appellant to Publication 3556, which provides information on LLC filing and payment requirements.<sup>5</sup>

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<sup>3</sup> Mr. Leite's list of injuries included a concussion, but there was no effect on his memory as a result.

<sup>4</sup> Mr. Leite's wife acted as appellant's representative during his recovery period and thereafter by calling respondent on appellant's behalf to inquire about tax obligations and other matters. On the date of this call, Mrs. Leite is referred to in FTB's call log comments as the owner's wife, and in later calls in 2016 she is listed as either appellant's co-owner or manager.

<sup>5</sup> This publication was provided to appellant previously, on September 19, 2012, with Form 5954.

6. Not having received appellant's return for 2013, FTB mailed a notice dated April 13, 2016, requesting that appellant respond within 30 days by filing a return, providing a copy of a return already filed, or indicating why appellant did not have a filing requirement.
7. Appellant's representative contacted FTB on April 18, 2016, regarding the above-listed notice. In response, FTB provided appellant with information regarding missing returns, due dates, and balances owed for each year.
8. Appellant's representative then called FTB on two later dates, April 27 and May 13, 2016, explaining that the returns were late because appellant's manager, Mr. Leite, was in a car accident, was hospitalized for three years following the accident, and was in a coma.<sup>6</sup>
9. FTB advised appellant that it may qualify for relief due to hardship, instructed appellant to file its missing returns, and advised that it may submit a written request for abatement of the penalties and interest.
10. Appellant filed its returns for tax years 2012 through 2015 on May 15, 2016, and made payment of the \$800 annual tax with each return.
11. FTB later issued bills advising appellant that it owed a balance for interest on the late payment of tax, penalties on the late payment of tax, plus an amount of \$250 for failing to file a statement of information with the SOS for 2016.
12. Appellant paid the balances due and filed claims for refund, which FTB denied. This timely appeal followed.

### DISCUSSION

Issue 1: Whether appellant has shown that the late payments of tax were due to reasonable cause and not willful neglect under R&TC section 19132.

R&TC section 19132 imposes a penalty when a taxpayer fails to pay the tax shown on a return by the original filing deadline. It provides that respondent shall impose a late payment penalty of five percent of the initial underpaid tax amount plus one-half of one percent of the outstanding liability for each subsequent month or fraction thereof for a maximum of 40 months.

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<sup>6</sup>The extensive medical records provided on appeal do not show that Mr. Leite was ever in a coma or was hospitalized for three years.

Appellant was required to pay the annual tax on or before the 15th day of the fourth month of each taxable year. (R&TC, § 17941.) Because appellant did not make a timely payment of its liability for each of the appeal years, FTB imposed the late payment penalties.

The penalty is presumed correct unless the taxpayer can demonstrate that the late payment resulted from reasonable cause and not willful neglect. (R&TC, § 19132.) To establish reasonable cause the taxpayer must demonstrate that its failure to timely pay the proper amount of the tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Sleight*, 83-SBE-244, Oct. 26, 1983.)<sup>7</sup> Willful neglect is defined as a “conscious, intentional failure or reckless indifference.” (*Appeal of Berolzheimer*, 86-SBE-172, Nov. 19, 1986 [citing *United States v. Boyle* (1985) 469 U.S. 241, 245-246].) The reason for missing the deadline must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986.)

Notably, illness may establish reasonable cause where the taxpayer presents credible and competent proof that the circumstances of the illness prevented the taxpayer from complying with the law. (*Appeal of Seaman*, 75-SBE-080, Dec. 16, 1975.)<sup>8</sup> Moreover, inability to pay the tax due to financial hardship may also establish reasonable cause to abate the late payment penalty. (See Int.Rev. Code, § 6651; Treas. Reg. § 301.6651-1(c).) However, if the difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer’s affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Loew’s San Francisco Hotel Corp.*, 73-SBE-050, Sept. 17, 1973; *Appeal of Orr*, 68-SBE-010, Feb. 5, 1968.)

Appellant’s manager, Mr. Leite, asserts that he did not make timely payments because he did not recall that he had formed the LLC due to the injuries he suffered in the car accident in October 2012. Mr. Leite further asserts he did not remember that he had formed the LLC until he received the first late notice, which was dated April 13, 2016. Mr. Leite describes his

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<sup>7</sup> Precedential opinions of the State Board of Equalization (BOE) are generally available for viewing on the BOE’s website: <[www.boe.ca.gov/legal/legalopcont.htm](http://www.boe.ca.gov/legal/legalopcont.htm)>.

<sup>8</sup> Since the issue of whether a taxpayer has demonstrated reasonable cause for failure to pay tax asks the same questions and weighs the same evidence as the inquiry of whether reasonable cause exists for failure to file a tax return, decisions analyzing whether reasonable cause existed for failure to timely file a tax return are persuasive authority for determining whether reasonable cause existed for the failure to timely pay the tax. (*Appeal of Berolzheimer*, 86-SBE-172, *supra*.) When presenting evidence to show error in respondent’s determinations, such evidence must be credible, competent, and relevant. (*Appeal of Seltzer*, 80-SBE-154, Nov. 18, 1980; *Appeal of Xie*, 2018-OTA-076P, July 23, 2018.)

condition as “temporary amnesia.” In support, he provides extensive medical records showing the extent of his injuries.

Although appellant has established that its manager was seriously injured in an automobile accident, the evidence in the appeal record does not demonstrate that Mr. Leite suffered an injury that impacted his memory. Instead, the appeal record explicitly shows that Mr. Leite did not lose consciousness or suffer posttraumatic amnesia, and a treating neurologist did not see evidence of significant concussion-related cognitive difficulties. The record also reflects that in 2013 Mr. Leite resumed the business activities for which appellant was created, and earned income through appellant. Accordingly, the evidence does not support appellant’s assertion that its manager had temporary amnesia regarding the formation of appellant that lasted until April 2016.<sup>9</sup>

Appellant also asserts that, as a result of the accident, Mr. Leite suffered posttraumatic stress disorder (PTSD) and “other long-term injuries” (e.g., headaches and severe nerve pain in back and shoulder) which affected his ability to make timely payments. In addition, appellant contends that Mr. Leite was out of work for an extended period of time, which appellant argues created a financial hardship.<sup>10</sup> While Mr. Leite was in a period of recovery after the accident, we note that appellant, a single member LLC, continued to operate and earn income during each appeal year following Mr. Leite’s accident.<sup>11</sup> In addition, a review of Mr. Leite’s individual returns reflects that the accident did not impact the member’s ability to earn income over the appeal years, and timely joint returns were filed by Mr. Leite and his spouse on that income.<sup>12</sup>

Even if Mr. Leite’s accident and temporary absence from managing appellant could be deemed as reasonable cause for the failure to timely pay its tax obligations, an acceptable reason for failure to pay taxes “will excuse such failure only so long as the reason remains valid.”

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<sup>9</sup> Furthermore, Mr. Leite’s spouse acted as appellant’s representative on several occasions, specifically regarding appellant’s tax obligations, in January and April 2013 (prior to the due date for the first year’s return), and in April and May 2016 (in response to respondent’s notice). Appellant has not explained why Mr. Leite’s spouse, who repeatedly acted as appellant’s representative for tax matters, was not able to direct the payment of appellant’s tax liabilities timely.

<sup>10</sup> Specifically, appellant asserts that due to Mr. Leite’s injuries, he was out of work for an entire year and thereafter could only return to work on a limited schedule.

<sup>11</sup> Appellant’s returns reported income of \$22,613, \$21,142, \$15,715, and \$3,115 for tax years 2012, 2013, 2014, and 2015, respectively.

<sup>12</sup> According to FTB’s records, Mr. Leite and his spouse filed timely joint California returns listing income earned by Mr. Leite outside of appellant’s operations for each year on appeal.

(*Steven Bros. Foundation, Inc. v. Commissioner* (1962) 39 T.C. 93, 130, affd. in part & revd. in part on other grounds.)<sup>13</sup> Appellant has not shown why payment for the 2012 tax year was not remitted once Mr. Leite had recovered sufficiently to resume business activities, i.e., in late 2013. Furthermore, during subsequent tax years on appeal, appellant and Mr. Leite were clearly conducting business, but failed to pay appellant's tax obligations timely. As such, it appears appellant chose to pursue other aspects of its business affairs instead of timely paying its taxes. Accordingly, appellant has not shown that the late payments of tax were due to reasonable cause and not willful neglect.

Issue 2: Whether the OTA has jurisdiction to consider appellant's request for refund of the penalty imposed under R&TC section 19141 for appellant's failure to file a statement of information.

Corporations Code section 1502 requires every corporation to file an annual statement containing certain information. Corporations Code section 2204 provides that, after fulfilling certain notice requirements, the SOS shall certify to FTB the name of any corporation which fails to file the required statement. (Corp. Code, § 2204(a).) Upon certification, FTB is required to assess a penalty of \$250 against the corporation. (R&TC, § 19141; Corp. Code, § 2204(b).) A penalty assessed under section 19141 is a final assessment due and payable immediately, subject only to the authority of the SOS to waive the penalty if it determines that the corporation's failure to file the annual statement was excusable "because of reasonable cause or unusual circumstances that justify the failure" to file. (Corp. Code, § 2204(f); R&TC, § 19141.)

Appellant asserts that the OTA has jurisdiction over tax appeals, and therefore has jurisdiction to consider this penalty as part of appellant's tax appeal. Appellant further argues that there is reasonable cause or unusual circumstances for its failure to timely file a statement to the SOS due to his medical issues. However, administrative agencies, such as the OTA, have only the powers conferred on them, either expressly or by implication, by Constitution or statute. (See *Appeal of Benjamin R. Du and Carmela L. Du*, 2007-SBE-001-A, Feb. 26, 2008 [citing

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<sup>13</sup> In *Steven Bros. Foundation, Inc.*, the taxpayer had a certificate of exemption that excused it from the standard tax return filing obligations. However, that certificate was subsequently revoked, retroactively, and the Tax Court determined that, at that point, the revoked certificate of exemption could no longer constitute reasonable cause for the failure to file returns for the years prior to the date of revocation. The Eighth Circuit of the U.S. Court of Appeals affirmed this determination. As stated earlier, although that decision dealt with the late filing of returns rather than the late payment of tax, the analysis of reasonable cause is still persuasive. (See *Appeal of Berzolheimer*, 86-SBE-172, *supra*.)


*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042].) Here, there are no provisions in the R&TC or other authority granting the OTA jurisdiction to abate the penalty for failure to file appellant’s annual statement with the SOS. Accordingly, we have no jurisdiction to consider whether this penalty was properly imposed.

HOLDINGS


1. Appellant has not shown that the late payments of tax were due to reasonable cause and not willful neglect.
2. The OTA does not have jurisdiction to consider appellant’s request for refund of the penalty imposed under R&TC section 19141.

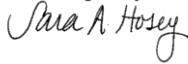
DISPOSITION

FTB’s actions in denying appellant’s claims for refund are modified, as conceded by FTB on appeal, such that the late payment penalty for the 2013 tax year is reduced by \$4, from \$192 to \$188. Otherwise, FTB’s actions in denying appellant’s claims for refund are sustained.

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 John O. Johnson  
 Administrative Law Judge

We concur:

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 Teresa A. Stanley  
 Administrative Law Judge

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 Sara A. Hosey  
 Administrative Law Judge