

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042904
STERLING HEALTH SERVICES, INC.) Date Issued: March 12, 2019
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OPINION

Representing the Parties:

For Appellant: Anthony T. Liang, Chu and Waters, LLP

For Respondent: Eric R. Brown, Tax Counsel III

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Sterling Health Services, Inc. (appellant) appeals an action by the Franchise Tax Board (FTB) denying appellant’s claim for refund of \$7,408 for 2015. Appellant waived its right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUE

Should the late-filing penalty imposed against appellant for tax year 2015 be abated for reasonable cause?

FACTUAL FINDINGS

1. Appellant is a corporation that elected to be taxed under Subchapter S of Chapter 1 of the Internal Revenue Code.
2. Appellant filed its California 2015 return (Form 100S) on July 13, 2017; however, the return was originally due by March 15, 2016.¹
3. Appellant’s California 2015 return was not timely filed.
4. Appellant paid \$7,408 to FTB by issuing a draft dated September 29, 2017, that was

¹ R&TC section 18601(a) requires corporations to file returns “on or before the 15th day of the third month following the close of its taxable year”

processed by FTB on October 11, 2017.

5. Appellant's timely Reasonable Cause – Business Entity Claim for Refund (FTB 2924) for 2015, where appellant is claiming a refund of \$7,408, was received by FTB on November 6, 2017.
6. On November 21, 2017, FTB denied appellant's claim for refund.
7. This timely appeal followed.
8. Appellant acknowledges that its 2015 return was late but contends reasonable cause exists for abatement of the late-filing penalty. Appellant alleges reasonable cause due to an oversight caused by a change of chief financial officers (CFOs) that resulted in a late-filed return. As another reason to abate the penalty, appellant states that it filed the return for 2015 immediately after discovering that it had not been timely filed and there is no history of appellant filing late.

DISCUSSION

California imposes a late-filing penalty on an S corporation for the failure to file a return on or before the due date, unless it is shown that the late-filing is due to reasonable cause. (R&TC, § 19172.5.) For each month, or fraction of a month, that the return is late (limited to 12 months), the penalty is calculated by multiplying \$18 by the number of people who were shareholders in the S corporation during any part of the taxable year. (R&TC, § 19172.5(b)(2).)² R&TC section 18601(a) requires an S corporation to file a return on or before the 15th day of the third month following the close of its taxable year. Pursuant to R&TC section 18604(a), S Corporations are granted a paperless extension for up to seven months from the original due date to file a return. However, no extension exists where, as here, the return is not filed within the extension period.

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 such 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.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of*

² FTB calculated the penalty based on appellant having 38 shareholders in 2015 as indicated on appellant's 2015 return. (38 shareholders x \$18 = \$684; \$684 x 12 months = \$8,208.) After deducting an overpayment credit of \$800, \$7,408 is the remaining amount of late-filing penalty subject to appellant's claim for refund. Appellant has not contested FTB's calculation of the late-filing penalty.

Aaron and Eloise Magidow, 82-SBE-274, Nov. 17, 1982; *Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

Appellant's return for 2015 was originally due on March 15, 2016, or on or before the extended date of October 15, 2016. Appellant filed its return on July 13, 2017, more than 15 months after the original due date. Appellant concedes that its return was filed late.

Appellant argues, without providing any supporting documentation, that the late-filing was primarily caused by the corporation changing its CFO in 2016. According to appellant, although K-1 forms were timely distributed to its shareholders ahead of the April 15, 2016 individual filing deadlines, the 2015 return was not filed because the incoming CFO assumed that the previous CFO had filed the return. Appellant states that, after discovering that no return was filed, appellant immediately filed its 2015 return.

During the transition to a new CFO, a businessperson exercising ordinary business care and prudence would ensure that all necessary returns are filed or that arrangements have been made to file them. Appellant submitted no evidence demonstrating what systems are in place to ensure timely preparation and filing of returns, yet it acknowledges that the CFO plays a pivotal role in ensuring that returns are timely filed. That an oversight occurred, even when understandable, is insufficient, even if proven, to establish that appellant acted with reasonable business prudence when failing to file a timely return for 2015. (*Appeal of Lillian Price Trust*, 94-SBE-011, Nov. 30, 1994 [A mistake is not reasonable cause for filing late].)

Finally, regarding appellant's reference to its history of compliance, we note that the Internal Revenue Service (IRS) administers a program called "First Time Abate" through which the IRS abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years. However, FTB has no such program, and, as previously stated, California law allows abatement of a late-filing penalty only when the taxpayer shows that it had reasonable cause for failing to timely file.

HOLDING

Appellant failed to show that it is entitled to abatement of the late-filing penalty.

DISPOSITION

We sustain FTB's denial of appellant's claim for refund.

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Grant S. Thompson
FC572D5881AE41B...
Grant S. Thompson
Administrative Law Judge

DocuSigned by:
Douglas Bramhall
CA2E033C0906484...
Douglas Bramhall
Administrative Law Judge