

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
GENUINE ROSE, INC.

) OTA Case No. 18042850
)
) Date Issued: April 29, 2019
)
)
)

OPINION

Representing the Parties:

For Appellant: Arash Ben Kahen
For Respondent: David Kowalczyk, Tax Counsel
Maria Brosterhous, Tax Counsel IV

D. BRAMHALL, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Genuine Rose, Inc. (appellant) appeals an action by the respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$99,730.75 for the tax year ending November 30, 2010 (FYE 2010).

Office of Tax Appeals Administrative Law Judges Douglas Bramhall, Sara A. Hosey, and Nguyen Dang held an oral hearing for this matter in Los Angeles, California, on March 19, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether appellant has established that the late-filing penalty imposed under R&TC section 19131 for FYE 2010 should be abated for reasonable cause and in the absence of willful neglect.
2. If not abated, whether the amount of the late-filing penalty was correctly computed.

FACTUAL FINDINGS

1. Appellant is a corporation registered to do business with the California Secretary of State on January 21, 1982.

2. Appellant is a fiscal-year taxpayer and was required to file its tax return for FYE 2010 by February 15, 2011. However, appellant filed its tax return on October 10, 2011, which is eight months past the due date.
3. On September 29, 2015, FTB issued an Information Document Request for FYE 2010 requesting information regarding an Internal Revenue Service audit of appellant's federal income tax return for FYE 2010.
4. Appellant replied with the requested information on November 27, 2015, and on December 10, 2015, appellant filed its Amended Corporation Franchise or Income Tax Return (Form 100X) reflecting the federal changes. That amended return reported a total tax of \$399,723, payments of \$800, and an unpaid tax liability of \$398,923.
5. By letter dated December 23, 2015, FTB acknowledged receipt of appellant's amended tax return for FYE 2010 and accepted the amended tax return as filed.
6. On February 7, 2017, FTB issued an Amended Return Information Notice after processing appellant's tax return and imposed a \$99,730.75 late-filing penalty.
7. On March 8, 2017, appellant called FTB to inquire about its tax liability and why FTB issued a balance due notice more than one year after appellant filed its amended tax return. FTB records reflect that its agent explained the timeframe for processing amended tax returns and that appellant did not make a \$399,723 tax payment with its return, and thus, a penalty was assessed.
8. On March 15, 2017, appellant made a \$604,803.47¹ payment and FTB received appellant's claim for refund requesting abatement of the late-filing penalty. Appellant argued that FTB took too long to process appellant's amended tax return and appellant did not receive respondent's notice until late February because appellant moved to a new address.²
9. On March 22, 2017, FTB issued a Corporate Tax Due Notice. The notice showed a balance due of \$605,267.56, which included the \$99,730.75 late-filing penalty.³

¹ The payment consists of tax in the amount of \$398,932, a late-filing penalty of \$99,730.75 and interest of \$106,140.72. The penalty is the only amount at issue in this appeal.

² FTB's February 7, 2017 notice was mailed to appellant's prior last known address, before appellant updated it to its current address on March 29, 2017.

³ The record does not clarify why this notice was issued after appellant's payment of \$604,803.47 had posted in FTB's payment system on March 20, 2017

10. On November 13, 2017, FTB issued a Notice of Action denying appellant's claim for refund. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established that the late-filing penalty imposed under R&TC section 19131 for FYE 2010 should be abated for reasonable cause and in the absence of willful neglect.

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P, July 23, 2018; *Appeal of Michael E. Myers* (2001-SBE-001) 2019 WL 1187160.) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Beadling*, 77-SBE-021, Feb. 3, 1977.) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of Walshe*, 75-SBE-073, Oct. 20, 1975.)

R&TC section 19131 imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect.

Here, appellant filed its return over eight months late. The filing date is not disputed but appellant argues that at the time of filing, no tax was due, and therefore, it was reasonable not to be concerned about filing timely. Only after a federal audit that disallowed a tax shelter was appellant made aware that California tax was due, and that it was assumed FTB would provide notice of tax due following appellant's filing of the amended return.⁴ Further, appellant argues that FTB's delay in processing the amended return, appellant's dispute over the timing of the receipt of notices,⁵ and appellant's confusion regarding the basis of the penalty,⁶ all combine to

⁴ At the hearing, appellant argued that an FTB auditor advised appellant's representative during a telephone call that payment of the tax with the amended return should not be made until a notice was received from FTB. However, no substantiation of that conversation was provided, and further, the issue in this appeal is late filing, not late payment.

⁵ Based on appellant's agents' discussions with FTB, it is clear that appellant received the February notice, albeit potentially somewhat delayed due to a change of address. However, it is also clear that the notice was mailed to appellant's last known address.

⁶ During the appeal hearing, FTB made it clear that the penalty was based on the original return being filed late. Information provided prior to the appeal hearing suggests appellant understood the penalty to have been assessed because the tax balance on the amended return was not paid with the amended return.

support its position that reasonable cause for the abatement of the late-filing penalty has been established.

FTB notes that appellant's FYE 2010 return was filed nearly eight months late. Pursuant to R&TC section 19131, a late-filing penalty is mandated in such case and appellant has failed to show reasonable cause for its failure to timely file its return.

In this case, it is undisputed that appellant failed to file its FYE 2010 California income tax return on or before the due date. To establish reasonable cause, the taxpayer must show "the exercise of ordinary business care and prudence, or such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Loew's San Francisco Hotel Corp.*, 73-SBE-050, Sept. 17, 1973.) Willful neglect is defined as a conscious, intentional failure or reckless indifference to the filing requirement. (*United States v. Boyle* (1985) 469 U.S. 241, 245-246.)

While appellant offers various arguments concerning the timing of FTB's amended return processing and assessment notices, it offers no reason for not filing timely except that it owed no additional tax as of the due date and that it relied on a competent professional to handle its tax matters.⁷

A taxpayer's reliance upon a professional to file a timely return does not constitute reasonable cause. (*United States v. Boyle, supra.*) While reliance upon the advice of a tax professional on a matter of law, such as whether a tax liability exists or a return is required to be filed, can constitute reasonable cause (see *Rohrbaugh v. United States* (7th Cir. 1979) 611 F.2d 211, discussed in *United States v. Boyle, supra*, at pp. 247-252), that is not the situation alleged here.

As noted in *Boyle, supra*, the timely filing of a tax return is a non-delegable obligation of a taxpayer. Appellant's original return, when filed, disclosed an \$800 liability, which had been timely paid, and thus establishes the requirement that a return was due on a timely basis. (R&TC, § 18601.) Appellant cites no authority, and we are aware of none, that excuses the timely filing of a required return based on owing no additional tax as of the due date of that return. In fact, we find that a return, if required, must be timely filed even if no additional tax is

⁷ We recognize some confusion over whether appellant was told the late-filing penalty was imposed because it failed to pay the balance when filing its amended return. However, even if provided with that information earlier, FTB's brief and the applicable law clearly indicate a late-filed original return as the basis to support the imposition of the penalty at issue in this appeal.

due and that it is unreasonable not to do so. (See *Wolfgram v. Commissioner*, T.C. Memo. 2010-69.)

Accordingly, we find that appellant has failed to establish reasonable cause for its failure to timely file its FYE 2010 corporation tax return.⁸

Issue 2: If not abated, whether the amount of the late-filing penalty was correctly computed.

The late-filing penalty is calculated at 5 percent of the tax for each month or fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax.⁹ The amount of tax on which the penalty is based is the amount of tax required to be shown on the return, reduced by the amount of any part of the tax which is paid on or before the due date.¹⁰

Appellant argues that its return was only two months late (after the extended due date). However, for a return not filed within the extended filing period, the extension period does not apply in determining the measure of delinquency (Cal. Code Reg. tit. 18 § 18567). Therefore, as established by the record in this matter, the original return was eight months late and the amount of tax required to be shown and not timely paid was \$398,923. Accordingly, pursuant to R&TC section 19131(c), a penalty of 25% of the unpaid tax is \$99,730.75, the amount assessed by FTB. Accordingly, we find that the late-filing penalty was correctly computed.

HOLDINGS

1. Appellant has not shown reasonable cause for the late filing of its FYE 2010 tax return.
2. Appellant has not shown error in FTB's computation of the late-filing penalty.

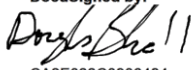
⁸ Based on our finding that appellant failed to establish reasonable cause, we do not address whether appellant established a lack of willful neglect, which is the second element required to abate the penalty.

⁹ R&TC section 19131(a).

¹⁰ R&TC section 19131(c).

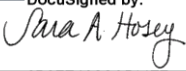
DISPOSITION

FTB's action in denying appellant's refund claim is sustained.

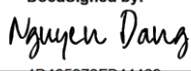
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Douglas Bramhall
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

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Nguyen Dang
Administrative Law Judge