

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
FSAQ, LP

) OTA Case No. 18011732
)
) Date Issued: May 28, 2019
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)
)

OPINION

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)¹

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Sarah Fassett, Tax Counsel

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, FSAQ, LP (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund in the amount of \$2,695.80,² for the tax years ended (TYE) December 31, 2013 (TYE 2013) and December 31, 2014 (TYE 2014).

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

¹ Stephen Westwood, the managing member of appellant’s general partner, FSAQ Capital Management, LLC, filed appellant’s opening brief. TAAP provided subsequent representation.

² This is the amount indicated on appellant’s claim for refund, dated January 17, 2017, which FTB denied. The \$2,695.80 indicated on appellant’s claim for refund includes \$13.08 that was refunded to appellant as an overpayment for TYE 2014. Therefore, the correct amount at issue is \$2,682.72 (i.e., \$1,355.83 in penalties and interest for TYE 2013 plus \$1,326.89 of penalties and interest for TYE 2014).

We note that appellant’s appeal letter sought a refund for a larger amount, \$5,271, based on its inclusion of an additional taxable year, TYE 2015. However, appellant did not file a claim for refund for TYE 2015. Thus, we have no jurisdiction over that year. In any event, FTB indicated in its opening brief that it did not impose any penalties or interest with respect to that year.

ISSUES

1. Whether appellant has established reasonable cause for the late filing of its TYE 2013 and TYE 2014 tax returns.
2. Whether appellant is entitled to abatement of interest.

FACTUAL FINDINGS

1. Appellant was a California limited partnership (LP) that filed its Certificate of Limited Partnership with the Secretary of State (SOS) on September 30, 2013.³ In this filing, appellant indicated that its general partner was FSAQ Capital Management, LLC.
2. Appellant filed its TYE 2013 California partnership tax return (Form 565) on July 15, 2016, after its due date of April 15, 2014.
3. Appellant filed its TYE 2014 California partnership tax return on July 7, 2016, after its due date of April 15, 2015.
4. On both its TYE 2013 and TYE 2014 returns, appellant indicated that it had five limited partners.
5. In September 2016, FTB sent appellant Return Information Notices for TYE 2013 and TYE 2014, correcting mistakes on appellant's returns and imposing, for each tax year at issue, an annual minimum franchise tax of \$800, a \$200 partnership late-filing penalty under section 19131, a \$1,080 late-filing penalty under R&TC section 19172, and applicable interest.
6. Subsequently, appellant made a payment of \$2,155.83, which satisfied the outstanding liability for TYE 2013, and made payments totaling \$2,126.89,⁴ which satisfied the outstanding liability for TYE 2014.
7. In January 2017, appellant filed a claim for refund for both tax years at issue.
8. Stephen R. Westwood is the managing member of appellant's general partner, FSAQ Capital Management, LLC. Mr. Westwood asserts he was prevented from timely filing appellant's returns because of injuries from accidents that occurred in September of 2012, and in May of 2015.

³ Appellant subsequently canceled its Certificate of Limited Partnership with the SOS on December 30, 2016.

⁴ Appellant made a second payment of \$13.08 for total payments of \$2,139.97 for TYE 2014.

9. On March 22, 2017, FTB issued separate letters denying appellant's claim for refund for TYE 2013 and TYE 2014, both stating that appellant had not shown reasonable cause for failing to timely file its returns.
10. Appellant timely filed this appeal by letter dated June 19, 2017.

DISCUSSION

1. Whether appellant has established reasonable cause for the late filing of its TYE 2013 and TYE 2014 tax returns.

For the tax years at issue, every limited partnership organized or commercially domiciled in this state, or "doing business" in this state, was required to file a return on or before the 15th day of the fourth month following the close its taxable year. (R&TC, §§ 18633, subd. (a)(2), 23101.) Appellant filed its TYE 2013 and TYE 2014 returns on July 15, 2016, and July 7, 2016, respectively, well after their due dates. Because appellant's returns were not timely filed, FTB imposed late-filing penalties for each tax year. Pursuant to R&TC section 19131, a late-filing penalty is imposed when a return is filed after the due date, unless the taxpayer can show that the failure to timely file a return was due to reasonable cause and not willful neglect.⁵

When a partnership fails to file a return on or before the due date, California also imposes a per-partner late-filing penalty, unless it is shown that the late filing was due to reasonable cause. (R&TC, § 19172, subd. (a).) Because appellant filed its partnership returns for TYE 2013 and TYE 2014 more than one year after their due dates,⁶ FTB imposed a \$1,080 penalty for each year pursuant to R&TC section 19172 (a).⁷ FTB may abate the penalty if appellant

⁵ The late-filing penalty under section 19131, subdivision (a), is calculated as 5 percent of the tax due for each month that a tax return is not filed after it is due (without regard to any extension of time for filing a return), not to exceed 25 percent of the tax due. Appellant filed both its TYE 2013 and TYE 2014 returns more than 12 months after the applicable due date. Accordingly, FTB properly calculated a late-filing penalty of \$200 (i.e., 25% of \$800) for each tax year.

⁶ While it appears appellant had, at minimum, six partners (including its general partner, FSAQ Capital Management, LLC) during the tax years at issue, FTB calculated the partnership late-filing penalty using five partners, as reported on appellant's TYE 2013 and TYE 2014 returns.

⁷ The partnership late-filing penalty is calculated as follows: number of months the partnership's return was late (not exceeding 12 months) x \$18 x number of persons who were partners in the partnership during any part of the taxable year. (R&TC, § 19172 (a)(2), (b).) While it appears appellant had, at minimum, six partners (five limited partners and one general partner) during the tax years at issue, FTB calculated the per-partner late-filing penalty assuming there were only five partners.

establishes that its failure to file timely its returns was due to reasonable cause. (R&TC, § 19172, subd. (a).)

When FTB imposes a late-filing penalty, the burden of proof is on the taxpayer to show that reasonable cause for the late filing of the tax return exists.⁸ (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to satisfy that burden. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930; *Appeal of Porreca*, 2018-OTA-095P, Aug. 23, 2018.) Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068; *Appeal of Xie*, 2018-OTA-076P, July 3, 2018.) As discussed below, illness or other personal difficulties that prevent a taxpayer from filing a timely return may be considered reasonable cause in some situations.

To show reasonable cause by reason of illness, the taxpayer must present credible and competent proof that the circumstances of the illness continuously prevented either the preparation or the signing of a timely return. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) “The type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually impossible for the taxpayer to comply--things like emergency hospitalization or other incapacity occurring around tax time.” (*Carlson v. United States* (7th Cir. 1997) 126 F.3d 915, 923.) Illness or other personal difficulties do not constitute reasonable cause when the difficulties simply caused the taxpayer to sacrifice the timeliness of one matter so that other matters could be pursued. (*Appeal of Halaburka, supra*; *Appeal of Orr* (68-SBE-010) 1968 WL 1640.) The taxpayer has the burden to prove that the difficulties experienced prevented the taxpayer from complying with its tax obligations. (*Appeal of Myers* (2001-SBE-001) 2019 WL 1187160; *Appeal of James* (83-SBE-009) 1983 WL 15396; see also *Stine v. United States* (Fed.Cl. 2012) 106 Fed.Cl. 586 [requiring “continuous incapacity”]; *Appeal of Halaburka, supra* [requiring “continuously prevented”].) Serious illness has been rejected as meeting the reasonable cause standard when the duration of the illness did not approximate that of the failure to timely file.

⁸ R&TC Section 19172 requires a taxpayer to show the failure to timely file was due to reasonable cause. R&TC Section 19131 requires a taxpayer to show that the failure to timely file was due to reasonable cause and not due to willful neglect. Taxpayers bear the burden of proving the late filing was due to reasonable cause, and when applicable, not due to willful neglect. Here, with respect to the R&TC section 19131 penalties, as discussed below, appellant has not shown that its late filing was due to reasonable cause, and thus, there is no need to discuss whether appellant has shown that its late filing was not due to willful neglect.

(*Wright v. Commissioner*, T.C. Memo. 1998-224; *Stine v. United States*, *supra*.) To establish reasonable cause, the disability must render the taxpayer unable to meet the obligation to timely file during the overall time period relevant to the filing obligation. (*Tabbi v. Commissioner*, T.C. Memo. 1995-463; *Harbour v. Commissioner*, T.C. Memo. 1991-532 [reasonable cause was found when a taxpayer was hospitalized during the tax-filing period].)

Here, Mr. Westwood (appellant's general partner's managing member) has acknowledged that he knew of the requirement to file timely partnership returns on appellant's behalf and that he failed to do so. Mr. Westwood claims that his medical injuries and financial hardship prevented him from timely filing appellant's TYE 2013 and TYE 2014 tax returns. Financial difficulties generally do not constitute reasonable cause for failing to file a timely tax return. (*Barber v. Commissioner*, T.C. Memo. 1997-206.) As discussed above, a taxpayer must show that his illness or disability continuously prevented him from complying with his filing requirement. Mr. Westwood has provided medical records showing that he was involved in an accident in September of 2012, and another in May of 2015, and asserts that the injuries from those accidents prevented him from timely filing appellant's returns. However, the records show that the first accident occurred more than one year before Mr. Westwood organized appellant, and the second occurred in 2015, after the due date for appellant's TYE 2014 tax return. Additionally, the evidence concerning the first accident does not show Mr. Westwood's medical impairment extended past the end of September 2012. Mr. Westwood did not provide any documentation showing further medical treatment or on-going symptoms that relate to the tax filing periods at issue. Mr. Westwood's evidence of his illness and injuries is either inadequate or not pertinent to the tax years at issue, and does not show that he was continuously prevented from timely filing appellant's TYE 2013 and TYE 2014 tax returns.

Mr. Westwood argues that FTB should abate the late-filing penalties because the Internal Revenue Service (IRS) abated appellant's federal late-filing penalties, apparently pursuant to IRS Revenue Procedure 84-35, 1984-1 C.B. 509. However, the only documentation appellant provided in support of this contention pertains to TYE 2015, which is not a tax year at issue.⁹ However, even if the IRS granted relief for the years at issue under IRS Revenue Procedure 84-

⁹The record contains a copy of the IRS notice removing the federal late-filing penalty for TYE 2015. The IRS account transcripts for TYE 2013 and 2014 that were attached to FTB's brief, however, do not indicate that the federal per-partner late-filing penalties were imposed, or abated, for those years. Nevertheless, for purposes of this appeal, we will assume that the IRS imposed federal per-partner late-filing penalties under Internal Revenue Code section 6698, and abated them pursuant to IRS Revenue Procedure 84-35.

35, it did so improperly, since that revenue procedure does not apply if any partner is not an individual. (Rev. Proc. 84-35, § 3.02.) Appellant’s general partner was not an individual; it was FSAQ Capital Management, LLC.

Thus, we find that appellant has not shown that its failure to timely file its TYE 2013 and TYE 2014 tax returns was due to reasonable cause.

2. Whether Appellant is entitled to abatement of interest.

The imposition of interest on a tax deficiency is mandatory. (R&TC, § 19101, subd. (a); *Appeal of Balch*, 2018-OTA-159P, Oct. 9, 2018.) Interest is not a penalty but is compensation for a taxpayer’s use of money which should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest accrues on a deficiency assessment regardless of the reason for the assessment. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

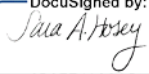
To obtain relief from interest, a taxpayer must qualify under the provisions of either R&TC sections 19104, 21012, or 19112. R&TC Section 19104 provides for an abatement when the interest is attributable to any unreasonable error or delay by an officer or employee of FTB in performing a ministerial or managerial act. These circumstances are neither alleged nor shown to be present here. The relief of interest under R&TC section 21012 is not relevant here, as respondent did not provide appellant with any written advice. Finally, R&TC section 19112 permits a waiver of unpaid interest when a taxpayer makes a showing that its inability to pay interest constitutes “extreme financial hardship caused by a significant disability or other catastrophic circumstance.” It is unclear whether we have jurisdiction to review R&TC section 19112 claims. However, the interest has already been paid in this case, so R&TC section 19112 is clearly inapplicable.

HOLDINGS

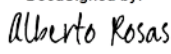
1. Appellant failed to establish reasonable cause for the late filing of its TYE 2013 and TYE 2014 tax returns.
2. Appellant has not demonstrated that it is entitled to abatement of interest.


DISPOSITION

FTB's action in denying appellant's claims for refund is sustained in full.

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Sara A. Hosey
Administrative Law Judge

We concur:

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Alberto T. Rosas
Administrative Law Judge

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Neil Robinson
Administrative Law Judge