

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
D. A. CONCRETE, INC.

) OTA Case No. 18073416
)
) Date Issued: July 10, 2019
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)
)

OPINION

Representing the Parties:

For Appellant: Dana Johnson, President

For Respondent: David Kowalczyk, Tax Counsel

For Office of Tax Appeals: Sheriene Anne Ridenour, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D.A. Concrete, Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$648¹ for the taxable year 2015.

Appellant waived its right to an oral hearing; therefore, we decide the matter based on the written record.

ISSUE

Has appellant established reasonable cause for failing to timely file its 2015 tax return?

FACTUAL FINDINGS

1. Appellant is an S corporation. Appellant paid its minimum franchise tax of \$800 for 2015, but did not file a timely 2015 California S Corporation Franchise or Income Tax return (Form 100S) return prior to the March 15, 2016 deadline.

¹ At protest, appellant requested a refund of \$639.10, based on a notice of balance due from FTB dated April 19, 2018. FTB, however, denied appellant’s claim for refund in the amount of \$648, which is the amount of the late-filing penalty and the amount requested by appellant on appeal. Appellant does not appear to dispute the underpayment of estimated tax penalty, and we do not discuss it herein.

2. On February 22, 2018, FTB sent appellant a Payment Received – Missing Tax Return notice (Form 765), stating that FTB received the \$800 payment, but could not locate appellant’s tax return for 2015.
3. On February 26, 2018, appellant filed its 2015 tax return reporting three shareholders, tax paid of \$800, total tax due of \$0, and penalties and interest due of \$15, which appellant remitted with its return.
4. FTB sent appellant a billing notice that included the \$648 late-filing penalty at issue here.
5. Thereafter, appellant paid its late-filing penalty and filed a claim for refund, which FTB denied. This timely appeal followed.
6. As relevant to this appeal, appellant electronically filed returns for 2011, 2012, and 2014, each of which was accepted and acknowledged by FTB.

DISCUSSION

An S corporation is required to file its tax return on or before the 15th day of the third month following the close of its taxable year. (R&TC, § 18601(a).)² R&TC section 18604(a) provides for a reasonable extension of time to file a return, not to exceed seven months, in the “manner and form as the Franchise Tax Board may determine.” Pursuant to FTB Notice No. 92-11,³ corporations are granted an automatic seven-month extension of time to file, conditioned upon filing the return within the automatic extension period. If the return is not filed by the extended due date, then the liability, including penalties and interest, is calculated based on the original due date.

For taxable year 2015, if any S corporation fails to file a return within the time prescribed (determined with regard to any extension of time for filing), then the S corporation shall be liable for a penalty, unless that failure is due to reasonable cause. (R&TC, § 19172.5.) The amount of the penalty is calculated as \$18 multiplied by the number of persons who were shareholders in the S corporation during any part of the taxable year multiplied by the number of months the return is late, up to 12 months. (R&TC, § 19172.5(b).) According to FTB’s records, appellant’s 2015 return, which was due on March 15, 2016, was received on February 26, 2018, almost two

² This refers to the version of R&TC section 18601 that was effective during the taxable year at issue.

³ FTB Notice No. 92-11 may be found at https://www.ftb.ca.gov/law/notices/1992/ftbn92_11.pdf (as of 6/19/2019).

years after the due date. Appellant reported three shareholders on its 2015 tax return. Therefore, FTB properly calculated the late-filing penalty of \$648 (i.e., \$18 x 3 partners x 12 months).

When FTB imposes a late-filing penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224; *Appeal of Miller* (86-SBE-057) 1986 WL 22789, at p. *3.) The burden is on the taxpayer to establish reasonable cause for the untimely filing. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) To establish reasonable cause to abate the S corporation late-filing penalty, a taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances.⁴ (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.)

Appellant contends that it reasonably believed that its 2015 California return was timely electronically filed. Appellant asserts its return was prepared and electronically filed before the deadline, and that it was unaware that the electronic filing was unsuccessful. In support of its assertion, appellant provides a copy of a California e-file Return Authorization for Corporations, Form 8453-C, dated February 17, 2016. Appellant contends that it has a history of timely filing its returns and paying its taxes.

The untimely filing of a tax return as a result of a mistaken belief that the return was timely filed does not constitute reasonable cause. The United States Supreme Court held that “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met.” (*United States v. Boyle*, (1985), 469 U.S. 241, 252.) Appellant’s error in failing to take steps to confirm that the return was timely filed does not relieve appellant of the unambiguous and precisely defined duty to comply with the statute. (*Ibid.*)

Appellant has not presented any evidence to show that its failure to file on time occurred despite the exercise of ordinary business care and prudence. While appellant provides a Form 8453-C, dated February 17, 2016, in support of its position that it timely filed its return, the instructions for Form 8453-C state that the “form *does not serve as proof of filing* an electronic return – the acknowledgment containing the date of acceptance for the return is that proof.”

⁴ Although there are no precedential decisions interpreting the reasonable cause abatement provision of R&TC section 19172.5, the provisions of R&TC section 19131 (allowing for the abatement of the late-filing penalty due to reasonable cause) and its federal counterpart, are substantially the same and relate to the same subject matter.

(Emphasis added.) Moreover, the portion of that document that would show that a person or entity authorized to electronically transmit appellant's return is neither filled in nor signed. For 2015 appellant has not asserted, and the record does not indicate, that appellant was sent an acknowledgement of acceptance. Appellant has a history of electronically filing its returns for 2011, 2012, and 2014, all of which FTB accepted and acknowledged. This history suggests that appellant was aware that FTB sends an acknowledgment of acceptance for electronically filed returns. An ordinarily intelligent and prudent businessperson would have confirmed that the return was timely filed.

Furthermore, on the Form 8453-C, appellant authorized FTB to make an electronic funds withdrawal of \$15, effective February 17, 2016, from a designated bank account, and there is no evidence that the \$15 was withdrawn by FTB until February 26, 2018. An ordinarily intelligent and prudent businessperson would have confirmed the payment was successful, as an indication that the return was received by FTB. The record contains no evidence of steps appellant took to confirm filing or payment on or about February 17, 2016. Furthermore, although appellant contends that the failure to file was most likely caused by an unspecified "glitch in the system," an ordinarily intelligent and prudent person would have taken steps to ensure that a "glitch" had not occurred. Appellant has not presented any evidence of steps that it took to confirm that its 2015 tax return was timely filed, or shown that appellant exercised ordinary business care and prudence in filing the return. Accordingly, we find that appellant has failed to show reasonable cause for failing to timely file its 2015 tax return.

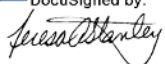
Appellant also contends that the late-payment penalty should be abated in accordance with the federal abatement of the corresponding penalty. In support, appellant submitted information showing that the Internal Revenue Service (IRS) abated its late-filing penalty for 2015. The IRS administers a program called "First Time Abate" under which the IRS may administratively abate penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the past three years. (See Internal Revenue Manual (IRM) Part 20.1.1.3.3.2.1.) Neither the California Legislature nor FTB has adopted a comparable penalty abatement program, so the IRS penalty abatement and appellant's history of timely filing and paying California taxes cannot be used as a basis for abatement of the late-payment penalty at issue here. Since California law requires the existence of reasonable cause, which has not been shown here, there is no basis to reverse FTB's determination not to abate the penalty.

HOLDING

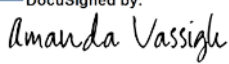
Appellant has not established reasonable cause for failing to timely file its 2015 tax return.

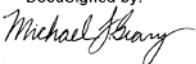
DISPOSITION

FTB's action is sustained.

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

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Amanda Vassigh
Administrative Law Judge

DocuSigned by:

1A9B52EF88AC9C7
Michael F. Geary
Administrative Law Judge