

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053148
JOY TOPS, LLC) Date Issued: September 4, 2019
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OPINION

Representing the Parties:

For Appellant: Noriel Zuazo, CPA

For Respondent: Greg W. Heninger, Specialist

For Office of Tax Appeals: Mai Tran, Tax Counsel IV

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Joy Tops, LLC (appellant) appeals an action by the Franchise Tax Board (FTB), denying appellant’s claim for refund of \$369.85 for the 2016 tax year.¹

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

ISSUES

1. Whether appellant established reasonable cause for the late payment of tax.
2. Whether the collection cost recovery fee may be abated.

FACTUAL FINDINGS

1. On April 17, 2015, appellant registered to do business in California with the California Secretary of State. Appellant is classified as a partnership for California tax purposes.
2. On September 12, 2016, appellant’s tax preparer contacted FTB to verify whether payments had been made for the 2015 and 2016 tax years and about any potential

¹ The amount of the claim for refund is comprised of a \$82.85 late payment penalty and a \$287.00 collection cost recovery fee.

penalties due for those years. FTB informed appellant's tax preparer that no payments had been made to either tax year and of the amounts due.

3. Appellant made a payment of \$963 for the 2015 tax year on September 15, 2016, which resulted in an overpayment. FTB applied the overpayment of \$38.41 to the 2016 tax year, with an effective date of September 15, 2016.
4. On March 8, 2017, FTB received appellant's 2016 tax return (Form 568). Appellant reported total income of \$4,671, a limited liability company (LLC) fee of \$0, and the minimum annual LLC tax of \$800. Appellant claimed a payment of \$38, and tax due of \$762. On March 15, 2017, appellant made a payment of \$762.
5. FTB sent appellant a billing notice on April 11, 2017.²
6. Appellant did not pay the balance due, and FTB initiated collection activity. FTB sent appellant a LLC Final Notice Before Levy on June 6, 2017, which informed appellant that the failure to pay the amount due within 15 days of the notice may result in additional collection activity and the imposition of the fee.
7. On July 18, 2017, FTB imposed a collection cost recovery fee of \$287. On September 26, 2017, FTB issued a bank levy to appellant's financial institution to collect the balance due for the 2016 tax year, which also included the collection cost recovery fee.
8. On October 15, 2017, FTB received a payment of \$37.76.
9. On November 1, 2017, appellant's accountant contacted FTB to inquire about the 2016 tax year. FTB informed appellant's accountant that appellant paid the 2016 tax late, which resulted in penalties and interest that have not yet been fully paid.
10. On November 21, 2017, appellant made a payment of \$356.48, which fully satisfied the balance due for the 2016 tax year.
11. On or about January 10, 2018, appellant submitted a Reasonable Cause – Business Entity Claim for Refund (Form FTB 2924) for \$356.48. Appellant stated that when it filed the 2016 tax return, there was a miscommunication about the amount of penalties and interest due. Appellant stated that it was unaware that a penalty would be imposed and because of that, appellant only paid the minimum tax of \$800. Appellant stated that once it

² FTB did not retain a copy of the notice, but alleges that it notified appellant that the late payment penalty was imposed. Appellant does not dispute that it received the notice.

became aware of the extra charges, appellant made the payment as soon as it could. Appellant further stated that it has been compliant since its formation.

DISCUSSION

Issue 1 - Whether appellant established reasonable cause for the late payment of tax.

R&TC section 17941, subdivision (c), requires every LLC that is not taxable as a corporation to pay the annual LLC tax on or before the 15th day of the fourth month of the taxable year. Since appellant filed on a calendar year basis, the LLC tax for 2016 was due on or before April 15, 2016.³ Appellant made a payment of \$38.41 on September 15, 2016, and a second later payment of \$762.00 on March 15, 2017. Thus, appellant's payments were untimely.

R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. The penalty is computed at 5 percent of the late paid tax plus 0.5 percent of the amount of tax due per month that the tax remains unpaid. The 5 percent underpayment portion of the penalty is \$40 (i.e., $0.05 \times \$800$). Since appellant's partial payment of \$38 was applied on September 15, 2016, monthly penalties were charged on the \$800 underpayment of \$20 (i.e., $\$800 \times 5 \text{ months} \times 0.005$). Additional monthly penalties were charged on the remaining underpayment of \$762 of \$22.86 (i.e., $\$762 \times 6 \text{ months} \times 0.005$) until full payment was made on March 15, 2017. FTB properly calculated a late payment penalty of \$82.86 (i.e., $\$40 + \$20 + \$22.86$).

The late payment penalty will be abated if a taxpayer demonstrates that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132, subd. (a); *Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scanlon*, 2018-OTA-075P; *Appeal of Curry* (86-SBE-048) 1986 WL 22783; *Appeal of Sleight, supra*.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Curry, supra*.) A failure to pay will be considered due to reasonable cause if the taxpayer makes a satisfactory showing that they exercised ordinary business care and

³ Since April 15, 2016 fell on Emancipation Day, a legal holiday in the District of Columbia, payments made by April 18, 2016, were considered timely and not subject to penalties or interest. However, for payments made after April 18, 2016, as here, the effective date for the calculation of interest and penalties is April 15, 2016.

prudence in providing for the payment of their tax liability and were, nevertheless, either unable to pay the tax or would suffer undue hardship if they paid on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Commissioner*, T.C. Memo. 2011-283.) The failure to timely pay a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P, citing *Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Here, appellant argues that its failure to timely pay was due to a change in its members and a mistaken belief that the tax liability had been timely paid already. Appellant further argues that, when it discovered that it had failed to make timely payment, it quickly rectified the problem.

Appellant, however, has not shown how a change of members resulted in the late payment. Furthermore, a taxpayer's failure to timely comply with payment deadlines due to the press of business affairs or work pressure is not reasonable cause for a taxpayer's late payment. (See *Appeal of Loew's San Francisco Hotel Corp.* (73-SBE-050) 1973 WL 2783.) Appellant has not provided any explanation as to its efforts to ascertain its tax liability prior to the due date of April 15, 2016, or its efforts to make payment prior to the due date. A mistaken understanding that taxes were timely paid does not in itself demonstrate reasonable cause. (*Appeal of Friedman, supra.*) Absent any explanation as to appellant's efforts to make a timely payment, we find that appellant has not shown reasonable cause for its late payment, and FTB properly imposed the late payment penalty.

Issue 2 - Whether the collection cost recovery fee may be abated.

R&TC section 19254, subdivision (a)(1), provides that a collection cost recovery fee shall be imposed if FTB mails a notice informing a taxpayer that the continued failure to pay an amount due may result in the imposition of such a fee. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254.)

FTB sent appellant a Final Notice Before Levy on June 6, 2017, which informed appellant that the failure to pay the amount due within 15 days of the notice may result in additional collection activity and the imposition of the fee. Appellant did not timely pay the amount due. Therefore, FTB properly imposed the fee, and there is no basis for abating the fee.

HOLDINGS

1. Appellant has not shown reasonable cause to abate the late payment penalty.
2. The cost recovery fee may not be abated.

DISPOSITION

FTB's action is sustained.

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Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
John O. Johnson
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John O. Johnson
Administrative Law Judge