

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18093846
CINDER CREEK PARTNERS II SC, LLC) Date Issued: October 18, 2019
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OPINION

Representing the Parties:

For Appellant: Carrie S. Lanning, CPA

For Respondent: Eric A. Yadao, Tax Counsel III

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, Cinder Creek Partners II SC, LLC (appellant) appeals an action by respondent Franchise Tax Board denying appellant’s claim for refund of \$1,256¹ for the 2015 tax year.

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

ISSUES

1. Whether appellant has established the late filing of its 2015 return was due to reasonable cause.
2. Whether appellant has established its failure to timely pay tax for the 2015 tax year was due to reasonable cause and not willful neglect.

FACTUAL FINDINGS

1. Respondent received information from Cheltenham Chula, LLC, that indicated appellant may have had a 2015 tax year filing requirement, as it was a 13.7 percent member of a

¹ The \$1,256 includes: R&TC section 19172 late filing penalty of \$1,080, and R&TC section 19132 late payment penalty of \$176.

- limited liability company (LLC) doing business in California. On May 23, 2017, respondent issued a Demand for Tax Return advising appellant it should file a 2015 tax return, provide a copy of a return already filed, or explain why it had no filing requirement.
2. By letter dated June 9, 2017, appellant replied and stated that because the California K-1 it received reported only a California loss, and because there was no taxable income or liability, it chose not to file a California tax return.
 3. Respondent, in a letter dated July 10, 2017, advised appellant that because it was an entity that was a member of an LLC doing business in California, appellant had a filing requirement and to avoid additional fees and penalties, it should file a return no later than August 6, 2017.
 4. Appellant filed its 2015 California Limited Liability Company Return of Income (Form 568) on August 4, 2017, reporting total income from sources derived from or attributable to California of \$17,575, and zero due for tax and fees. Appellant reported on its 2015 return that it had five partners.
 5. Respondent issued a Notice of Proposed Assessment (NPA) on September 22, 2017, before it recognized and processed appellant's Form 568. Appellant replied asserting that it determined it was not doing business in California because it was a non-managing member of a number of limited liability companies which held commercial real estate across the country.
 6. Respondent then issued an LLC - Return Information Notice on October 25, 2017, which imposed an LLC fee of \$800, an LLC annual tax of \$800, and asserted that there was a total balance due of \$2,116.34. Appellant replied by letter dated November 15, 2017, and again argued that it should not be held responsible for the California LLC annual tax, penalties and interest because it invests in partnerships that hold commercial real estate across the country, has no interest in the specific property, and was a non-managing member of those partnerships.
 7. After processing appellant's return, respondent issued a Revision or Withdrawal of NPA, on October 30, 2017, which withdrew the LLC fee of \$800, but maintained the LLC annual tax of \$800, the late filing penalty, the late payment penalty, and applicable interest.

8. On February 13, 2018 appellant paid its balance due for the 2015 tax year and filed a claim for refund. Respondent denied appellant's claim for refund because it determined that appellant had not established that the late filing of its 2015 return and late payment of tax was due to reasonable cause.
9. Appellant filed this timely appeal.

DISCUSSION

Issue 1 - Whether appellant has established the late filing penalty for the 2015 tax year should be abated.

For the 2015 tax year, R&TC section 18633.5, subdivision (a), provided, in relevant part, that every LLC classified as a partnership for California tax purposes that is doing business in California, organized in California, or registered with the California Secretary of State shall file its return on or before the 15th day of the fourth month following the close of its taxable year. Thus, for an LLC taxpayer with a December 31, 2015 taxable year-end, the original due date of its LLC Return of Income (Form 568) was April 15, 2016. Here, appellant filed its 2015 income tax return untimely on August 4, 2017. Consequently, respondent assessed the late filing penalty and correctly computed the penalty based on appellant's filing date of August 4, 2017.² Appellant has not contested the computation of the penalty.

Appellant also does not contest respondent's determination that appellant had a California filing requirement or respondent's assessment of the LLC annual tax. On appeal, appellant only disputes the assessment of penalties and interest, and requests a one-time abatement of the penalties. Thus, the first issue is whether appellant has shown reasonable cause to abate the penalties.

The late filing penalty will be abated if it is established that the late filing was due to reasonable cause. (R&TC, § 19172, subd. (a).) 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 [ordinarily] intelligent

² The late filing penalty is calculated as follows: number of months the partnership's return was late (not exceeding 12 months) x \$18.00 x number of persons who were partners in the partnership during any part of the taxable year. (R&TC, § 19172, subds. (a)(2), (b).) Accordingly, respondent imposed a \$1,080 (i.e., 12 months x \$18.00 x 5 partners) late filing penalty for the 2015 tax year.

and prudent businessman to have so acted under similar circumstances.” (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252, the U.S. Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing . . .” Reliance by a lay person on a lawyer [or an accountant] is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute.” (*Id.* at p. 251.) The court noted reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney with respect to substantive matters of tax law or whether a return needs to be filed in the first place, if the taxpayer shows: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law, and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of the relevant facts and documents. (*Id.* at pp. 250-251.)

Appellant contends that it should be excused for the late filing due to circumstances which caused its tax preparer to miss the filing deadline. Specifically, Ms. Lanning, appellant’s preparer, explains that she did not file a 2015 Form 568 because she was “incorrectly advised” that appellant had no California filing requirement, and that she did not discover the oversight until respondent notified appellant about the non-filing. She states that she promptly brought appellant into compliance after she discovered the error. However, Ms. Lanning’s explanation does not show appellant had reasonable cause: it is not clear what advice was given, by whom, whether they were qualified to advise on a substantive tax issue, or when the advice was given (specifically, was it provided prior to the deadline for filing the 2015 tax return).

Appellant raises *Appeal of Amman & Schmidt Finanz AG, et al.* (96-SBE-008) 1996 WL 281551 (*Amman & Schmidt*), as the basis for the advice that the taxpayer was not liable for the LLC annual tax. However, appellant does not dispute that it had a filing requirement and owed the LLC annual tax, as explained above. Although it is not entirely clear, it appears appellant may be raising legal issues similar to those discussed in *Amman & Schmidt* (and subsequently in *Swart Enterprises, Inc. v. Franchise Tax Bd.* (2017) 7 Cal.App.5th 497) to illustrate that the advice it allegedly received was something that it could reasonably rely upon. However, as noted above, appellant has not provided evidence of the actual substantive advice given, the qualifications of the advisor, or that appellant exercised ordinary business care by considering these issues prior to the deadline for filing its 2015 tax return.

As to appellant's request for one-time abatement, we note that under the Internal Revenue Service's First Time Penalty Abatement program, a taxpayer may be relieved of a federal late filing penalty based on previous good filing behavior, rather than reasonable cause. However, neither the California Legislature nor respondent have adopted a comparable penalty abatement program.

Therefore, appellant has not established the late filing of its 2015 California return was due to reasonable cause.

Issue 2 - Whether appellant has established the late payment penalty for the 2015 tax year should be abated.

R&TC section 19001 provides that the personal income tax "shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)." With respect to appellant's claim for refund of a late payment penalty, R&TC section 19132 provides that a late payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. Because appellant failed to make payment of the \$800 LLC annual tax by the April 15, 2016 due date, the penalty was properly imposed.³ The penalty amount appears to have been properly calculated, and appellant has not disputed the amount or the calculation method.

The late payment penalty may be abated if the taxpayer shows 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)(1).) When respondent imposes a penalty for the late payment of tax, the law presumes that the penalty was imposed correctly. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.)

As discussed above, appellant has not established reasonable cause for the late filing of its 2015 tax return, and for the same reasoning, appellant has not established the late payment of its 2015 tax was due to reasonable cause.

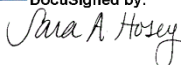
³ Per R&TC section 17941, all LLCs must pay a yearly minimum tax (the amount is determined by reference to R&TC section 23153, subdivision (d)) for the privilege of doing business in California.

HOLDINGS


1. Appellant has not established that the late filing penalty should be abated.
2. Appellant has not established that the late payment penalty should be abated.

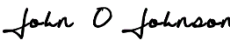
DISPOSITION

Respondent's action is sustained in full.

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Sara A. Hosey
Administrative Law Judge

We concur:

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Richard Tay
Administrative Law Judge

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John O. Johnson
Administrative Law Judge