

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19034423
AESTHETICARE MEDICAL)
CORPORATION) Date Issued: October 22, 2019
_____)

OPINION

Representing the Parties:

For Appellant: Ronald E. Moser, M.D., Medical Director

For Respondent: Diane Deatherage, Program Specialist III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Aestheticare Medical Corporation (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of a demand penalty of \$2,129.50, an S corporation late-filing penalty of \$216, and a filing enforcement fee of \$92¹ for the 2013 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 is liable for the S corporation late-filing penalty imposed under R&TC section 19172.5.
2. Whether appellant is liable for the demand penalty imposed under R&TC section 19133.

¹ Appellant makes no arguments regarding the filing enforcement fee. Therefore, the propriety of the filing enforcement fee will not be discussed.

FACTUAL FINDINGS

1. FTB issued a Demand for Tax Return (Demand) on July 24, 2015, requiring appellant, by August 26, 2015, to file a 2013 return, send a copy of the return if already filed, or explain why a return need not be filed. Appellant did not timely respond to the Demand.
2. On September 25, 2015, FTB issued a Notice of Proposed Assessment (NPA) for 2013 that was based on an estimate of appellant's income. The NPA proposed to assess tax of \$84,952.35, a late-filing penalty under R&TC section 19131 of \$17,238.08, a demand penalty under R&TC section 19133 of \$21,238.08, an S corporation late-filing penalty under R&TC section 19172.5 of \$432, a filing enforcement fee of \$92, and interest, based on an estimate of appellant's income.
3. On November 19, 2015, appellant filed a 2013 S corporation tax return and reported a tax liability of \$8,518, and claimed a refund of \$7,482. FTB accepted the return, reversed the tax and penalty determinations in its NPA (other than the \$92 filing enforcement fee), and imposed a demand penalty of \$2,129.50 and an S corporation late-filing penalty of \$216. This reduced the refund payable to \$5,044.50, which FTB paid.
4. Appellant filed a claim for refund for the penalties and imposed by FTB, which FTB denied. This timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant is liable for the S corporation late-filing penalty.

R&TC section 19172.5, subdivision (a), provides that, for returns required to be filed after January 1, 2011, 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 section 19133 provides that, if a taxpayer fails or refuses to make and file a return upon receipt of a Demand from FTB, then, unless the failure is due to reasonable cause, FTB may impose a demand penalty.

Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P; *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) There is a presumption of correctness that attaches to an FTB penalty determination. In order to overcome that presumption, appellant must provide credible and competent evidence to

support a claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

Appellant contends that the delay in filing was due to internal accounting problems which forced it to recreate all of its sales transactions and expenses. However, appellant does not provide any evidence in support of this contention or of the steps it took to obtain missing information and to timely file its return. Asserted lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause. (*Appeal of Moren*, 2019-OTA-176P.) Appellant has not explained how, much less established that, such missing information prevented it from timely filing its return. Taxpayers have an obligation to file timely returns with the best information, and then to subsequently file an amended return, if necessary. (*Appeal of Xie*, 2018-OTA-076P.) Therefore, there is no basis for us to hold that appellant had reasonable cause for the failure to timely file.

Issue 2 - Whether appellant established reasonable cause for failing to timely respond to the Demand.

R&TC section 19133 provides that, if a taxpayer fails or refuses to make and file a return upon receipt of a Demand from FTB, then, unless the failure is due to reasonable cause, FTB may impose a demand penalty. Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Halaburka, supra.*) As noted above, FTB's penalty determination is presumed to be correct. In order to overcome the presumption of correctness, appellant must provide credible and competent evidence to support a claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Myers, supra.*)

Appellant has not provided any excuse for its failure to timely respond to the Demand. Even if appellant was having difficulty in preparing its tax return, that does not constitute reasonable cause for appellant's failure to timely respond to the Demand.

HOLDINGS

1. Appellant is liable for the late-filing penalty imposed under R&TC section 19172.5.
2. Appellant is liable for the demand penalty imposed under R&TC section 19133.

DISPOSITION

FTB's action is sustained.

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Josh Lambert

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Josh Lambert

Administrative Law Judge

We concur:

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Alberto T. Rosas

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Alberto T. Rosas

Administrative Law Judge

DocuSigned by:

Nguyen Dang

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Nguyen Dang

Administrative Law Judge