OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18042932
BANYANSIDE, INC.	) Date Issued: November 12, 2019

OPINION

Representing the Parties:

For Appellant: Vasudev Pulipati

For Franchise Tax Board: Anne Mazur, Specialist

For Office of Tax Appeals: Matthew D. Miller, Tax Counsel III

E. S. EWING, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Banyanside, Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of the following amounts for the 2014 tax year: a late-filing penalty of $200.00, an S corporation late-filing penalty of $216.00, a demand penalty of $200.00, an underpayment of estimated tax penalty (estimated tax penalty) of $21.96, interest of $94.44, and a filing enforcement cost recovery fee of $100.00.[1]

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 reasonable cause to abate: (1) the late-filing penalty under R&TC section 19131; (2) the S corporation late-filing penalty under R&TC section 19172.5; or (3) the demand penalty under R&TC section 19133.
2. Whether appellant has established that the estimated tax penalty should be abated.
3. Whether appellant has established that interest should be abated.

[1] The above amounts total $832.40. FTB denied appellant's claim for refund of $1,206.40, but it has since determined that it improperly imposed a $374.00 collection cost recovery fee. FTB has stated that it will cancel and refund the $374.00 collection cost recovery fee at the conclusion of this appeal.

4. Whether appellant has established that the filing enforcement cost recovery fee should be abated.

FACTUAL FINDINGS

1. Appellant was an S corporation that registered with the California Secretary of State (SOS) on June 28, 2005.
2. Appellant filed its 2013 Form 100S, "California S Corporation Franchise or Income Tax Return" on September 15, 2014, listing a Dublin, California address (Dublin address), and reporting that the corporation dissolved on December 31, 2013.
3. During a March 2, 2015 telephone conversation with an FTB employee regarding a penalty unrelated to this appeal, FTB informed appellant that since appellant did not file its dissolution forms with SOS, it was considered active in 2014.
4. On March 6, 2015, appellant filed a Certificate of Dissolution with SOS.
5. Appellant did not file a timely 2014 California tax return.
6. FTB sent appellant a Demand for Tax Return (Demand) dated October 13, 2016, requiring appellant to respond by November 16, 2016, by either filing a 2014 return or explaining why a 2014 return was not required.
7. When it did not receive appellant's response to its Demand, FTB issued a Notice of Proposed Assessment (NPA) on December 16, 2016. The NPA showed estimated California taxable income of $147,478.00,[2] tax of $2,212.17, a late-filing penalty of $533.04, an S corporation late-filing penalty of $432.00, a demand penalty of $533.04, and a filing enforcement fee of $100.00, plus applicable interest. Appellant did not respond to the NPA.
8. Appellant filed its 2014 California tax return on July 17, 2017, reporting no amount due.
9. FTB processed the return and revised appellant's tax liability to $800.00 and imposed an estimated tax penalty of $21.96. Based on the reduced self-assessed tax, FTB reduced the late-filing penalty to $200, the S corporation late-filing penalty to $216, and the demand penalty to $200.

[2] Under R&TC section 19087, FTB estimated appellant's taxable income based on information received from the Employment Development Department and average income amounts reported by businesses in appellant's industry type.

10. On August 15, 2017, appellant mailed FTB an uncashed $800 tax refund check made out to appellant for the 2010 tax year and requested that FTB apply it to any outstanding balance on appellant's account. FTB credited the $800 to appellant's 2014 account, with an effective date of July 13, 2017.
11. FTB received appellant's payment of $1,206.40 on December 22, 2017, which satisfied the balance due.
12. On December 22, 2017, appellant submitted a claim for refund requesting a refund of all penalties.
13. FTB denied the claim for refund. This timely appeal followed.

DISCUSSION

Issue 1. Whether appellant has established reasonable cause to abate: (1) the late-filing penalty under R&TC section 19131; (2) the S corporation late-filing penalty under R&TC section 19172.5; or (3) the demand penalty under R&TC section 19133.

FTB's determinations are presumed correct, and appellant bears the burden of proving error. (*Appeal of Brockett* (86-SBE-109) 1986 WL 22731; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) In the absence of credible, competent, and relevant evidence showing that FTB's determinations are incorrect, they must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

R&TC section 23151(a) provides that every corporation doing business within the limits of California and not expressly exempted from taxation by the provisions of California's Constitution or statute shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income or, if greater, the minimum franchise tax specified in R&TC section 23153, until the effective date of dissolution or withdrawal. (R&TC, § 23151(a).) The effective date of dissolution is the date on which a certificate of dissolution is filed with the SOS. (R&TC, § 23331(a).) This rule holds true even though the corporation may cease doing business prior to filing the certificate. (R&TC, § 23151; Cal. Code Regs., tit. 18, § 23151; *Appeal of Dimensions Unique, Inc.* (79-SBE-051) 1979 WL 4092.)

For 2014, the annual minimum tax was $800. (R&TC, § 23153(d).) In this case, appellant did not dissolve until March 6, 2015 and did not report any income in 2014; therefore, it was subject to a tax of $800.

For the 2014 tax year, an S corporation was 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) & (d).) R&TC section 18604(a) provides for a reasonable extension of time to file a return, not to exceed seven months after the due date for filing a return, in the "manner and form as the Franchise Tax Board may determine." (R&TC, § 18604(a).) Under FTB Notice No. 92-11, the extension of the time to file is conditioned upon filing the return within the automatic extension period. If the return is not filed by the extended due date, then no extension exists. (FTB Notice No. 92-11, p. 1.) In this case, the automatic extension period expired because the 2014 return was filed on July 17, 2017, more than 28 months after the due date of March 15, 2013.

Late-filing Penalty

R&TC section 19131 provides that a late-filing penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late-filing was due to reasonable cause and was not due to willful neglect. The late-filing penalty is specified as 5 percent of the tax due for each month that a valid tax return is not filed after it is due (determined without regard to any extension of time for filing the return), not to exceed 25 percent of the tax. (R&TC, § 19131(a).) Here, appellant filed its 2014 return more than 28 months after the due date of March 15, 2013. Therefore, FTB properly calculated appellant's late-filing penalty of $200 (i.e., $800 × 25 percent).

To establish reasonable cause for the late-filing of a return, a taxpayer must show that the failure to file timely occurred despite the exercise of ordinary business care and prudence, or that an ordinarily intelligent and prudent businessperson would have acted in the same manner under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Ignorance of the law does not excuse compliance with statutory requirements. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

Appellant contends that it did not file a tax return because it thought that indicating on its 2013 tax return that its dissolution on December 31, 2013, was sufficient to stop filing corporate tax returns. However, 13 days prior to the deadline for filing appellant's 2014 return, during a March 2, 2015 telephone conversation with an FTB employee regarding a penalty unrelated to

this appeal, FTB informed appellant that since appellant did not file its dissolution forms with SOS, it was considered active in 2014. Appellant acknowledged that it should have known the rules better, and its failure to file the 2014 return was an oversight. Ignorance of the law does not excuse compliance with statutory requirements. (*Appeal of Diebold, Inc., supra.)* As the Supreme Court held in *United States v. Boyle* (1985) 469 U.S. 241, 252), "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met." An ordinarily intelligent and prudent businessperson would have undertaken efforts and conducted research to determine California tax filing and payment requirements, and appellant has not presented evidence of any such efforts here. Appellant failed to exercise the ordinary care and prudence that an ordinarily intelligent and prudent businessman would have exercised under similar circumstances when it failed to acquaint itself with the California tax law requirements. (*Appeal of Tons, supra.*) Therefore, appellant has failed to establish reasonable cause for abatement of the late-filing penalty.

S Corporation Late-filing Penalty

R&TC section 19172.5(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. 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).) Here, appellant filed its 2014 return more than 28 months after the due date of March 15, 2013. Therefore, FTB properly imposed the penalty in the amount of $216 (i.e., $18 × 1 shareholder x 12 months).

To establish reasonable cause for the late-filing of an S corporation return, a taxpayer must show that the failure to file timely occurred despite the exercise of ordinary business care and prudence, or that an ordinarily intelligent and prudent businessperson would have acted in the same manner under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc*. (2018-OTA-130P); *Appeal of Tons, supra*.) Ignorance of the law does not excuse compliance with statutory requirements. (*Appeal of Diebold, Inc., supra*.)

Appellant's arguments do not distinguish between the S corporation late-filing penalty and the R&TC section 19131 late-filing penalty. We addressed appellant's arguments above in

our discussion of the R&TC section 19131 late-filing penalty, and, for the same reasons, find that appellant has not shown grounds to abate the S corporation late-filing penalty.

Demand Penalty

California imposes a penalty for the failure to file a return upon notice and demand, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The penalty is 25 percent of either: the total tax assessed pursuant to section 19087 (pertaining to a failure to file a return or the filing of a false or fraudulent return), or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (R&TC, § 19133.) Here, FTB sent appellant a Demand dated October 13, 2016, requiring appellant to respond by November 16, 2016, by either filing a 2014 return or explaining why a 2014 return was not required. Appellant did not respond to FTB's Demand; therefore, FTB properly calculated appellant's demand penalty of $200 (i.e., $800 × 25 percent).

The burden of proving reasonable cause for the failure to file upon notice and demand is on the taxpayer. (*Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) An appellant's failure to respond to a demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of Malakoff* (83-SBE-140) 1983 WL 15525.)

Appellant contends that it requested a change of address with FTB, but FTB never updated its address and sent the Demand to the Dublin address which was no longer in use; therefore, appellant never received the Demand. Appellant does not provide any documentation to support its purported change of address. Rather, appellant's 2014 tax return, filed on July 17, 2017, also indicates the Dublin address. Furthermore, information on file with the SOS identifies appellant's president as the sole manager of Hiforte Technologies, LLC (Hiforte), organized in 2013, and situated at the Dublin address.[3] FTB contends that because appellant's president continued to operate a business at the same address, appellant's argument that it never received notices from FTB regarding its filing requirement is without merit.

[3] FTB provided copies of the following documents from the California Secretary of State: 1) Business Search – Entity Detail, which indicates an entity address for Hiforte as the Dublin address, a business registration date of April 3, 2013, and appellant's president as the sole manager; 2) Articles of Incorporation of a Limited Liability Company (LLC) for Hiforte, filed April 5, 2013, which indicates the Dublin address, and appellant's president as the sole manager; 3) Statement of Information for Hiforte, filed March 6, 2015, which indicates the Dublin address, and appellant's president as the sole manager; and 4) Statement of No Change for Hiforte, filed March 15, 2017, which indicates the Dublin address, and appellant's president as Hiforte's Director.

The law provides that it is not necessary for FTB to prove that the notice was received by the taxpayer. (See *United States v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810, cert. den., 469 U.S. 830.) It is sufficient that the notice was mailed to the taxpayer's last-known address and that it was not returned to FTB as undelivered. (*Ibid.*) As a general rule, a taxpayer's last-known address is the address that appears on the taxpayer's most recently-filed tax return, unless FTB is given clear and concise notice of a different address. (*Appeal of Bryant* (83-SBE-180) 1983 WL 961596.) Here, FTB properly mailed the Demand and other notices to appellant's last known address shown on appellant's 2013 tax return (i.e., the Dublin address.)[4] There is no indication that a notice sent to appellant was returned to FTB as undelivered, and appellant has provided no evidence indicating that FTB failed to send appellant notices to its last-known address.

Furthermore, appellant's statements are inconsistent. In its claim for refund, appellant stated that the new occupant of the Dublin address forwarded the FTB notice in July 2017. Appellant's president stated, "[s]omehow I got one notice forwarded to me in July 2017 by the new occupant of that address [i.e., the Dublin address] which is how I came to know about the notice." However, after FTB identified appellant's president's business as the new occupant of the address, appellant disclosed that the Dublin address is a virtual office with a mail-forwarding service, and appellant ended its mail-forwarding service in 2013 and started a new mail-forwarding service for Hiforte.[5] However, appellant does not provide any evidence that it ended its mail-forwarding service at any time. Appellant has not presented any other argument to support its failure to respond to the Demand. Accordingly, appellant has failed to establish reasonable cause for abatement of the demand penalty.

Issue 2. Whether appellant has established that the estimated tax penalty should be abated.

A corporation subject to the tax imposed by Part 11 of the R&TC must file a declaration of estimated tax and pay the estimated tax for each year. (R&TC, §§ 19023 & 19025.) If the amount of estimated tax does not exceed the minimum tax, the entire amount of the estimated tax shall be due and payable on or before the fifteenth day of the fourth month of the taxable year. (R&TC, § 19025(a).) A corporation that underpays its estimated tax is

[4] Notices may be given by first-class mail and are sufficient if mailed to the taxpayer's last known address. (R&TC, § 18416.)

[5] Appellant submitted a virtual office service agreement for Hiforte, indicating a start date of June 7, 2013. It did not provide any documentation verifying that it ended mail-forwarding services for itself.

penalized by an addition to tax equal to a specified rate of interest applied to the amount of the underpayment unless a statutory exception applies. (R&TC, §§ 19142, 19144, 19147, & 19148.) A penalty for the underpayment of estimated tax is properly imposed where the taxpayer's installment payments are less than the amounts due at the end of the installment periods. (*Appeal of Bechtel, Inc.* (78-SBE-052) 1978 WL 3525.) There is no reasonable cause exception to the imposition of the underpayment of estimated tax penalty. (*Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.)

Appellant does not dispute that it failed to remit estimated payments during the tax year at issue by the due date, nor does it argue that FTB failed to properly compute the underpayment of estimated tax penalty. None of the statutory exceptions to imposition of the estimated tax penalty apply to appellant. Therefore, appellant has not established that the estimated tax penalty should be abated.

Issue 3. Whether appellant has established that interest should be abated.

Under California law, taxes are due and payable as of the original due date of the taxpayer's return without regard to the extension to file the return. (R&TC, §§ 18567(b), 19001.) If tax is not paid by the original due date, or if FTB assesses additional tax and that assessment becomes due and payable, R&TC section 19101 requires the charging of interest on the resulting balance due. Interest is not a penalty but is simply compensation for a taxpayer's use of money after the due date of the tax. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) The imposition of interest is mandatory. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905; *Appeal of Jaegle*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle*, *supra*.)

To obtain relief from the imposition of interest, under the facts presented, a taxpayer must establish eligibility for waiver or abatement of interest under provisions of R&TC sections 21012 or 19104. The relief of interest under R&TC section 21012 is not relevant here, as FTB did not provide appellant any written advice. Under R&TC section 19104, FTB is authorized to abate interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Such abatement can only occur if no significant aspect of the error or delay can be attributed to the taxpayer, and after FTB first contacts the taxpayer in writing with respect to the deficiency or payment. (R&TC, § 19104(b)(1).)

Appellant contends that after filing its 2014 return in July 2017, it found an uncashed tax refund check for $800 that was mailed in 2011 for appellant's 2010 tax year, which it subsequently returned to FTB on August 15, 2017. Appellant contends that this shows that it had a credit with FTB since 2011, and therefore interest should not have accrued on appellant's 2014 liability. If FTB determines that there has been an overpayment of tax, it may credit the overpayment on any amounts then due by the taxpayer and refund the balance to the taxpayer. (R&TC, § 19301.) However, FTB is not required to credit the overpayment on any amounts then due. (See *Weber v. Commissioner* (2012) 138 T.C. 348, 2012 WL 1585702.) Here, appellant filed its 2010 return on August 15, 2011. After payments of $2,400 were applied to satisfy appellant's 2010 tax of $800, appellant had an overpayment of $1,600. FTB applied $800 as an estimated tax payment for 2011 and issued appellant a refund check of $800 on August 25, 2011. Appellant does not contend that it had any additional amounts due at that time, or any open tax year to which to apply an $800 credit. As requested, FTB credited the $800 to appellant's 2014 account with an effective date of July 13, 2017, once appellant returned the check to FTB on August 15, 2017. Appellant does not allege that FTB committed an error or delay in this matter or provide any basis for which an abatement of interest may occur in this appeal. Therefore, appellant has not overcome its burden of showing error in FTB's determination not to abate interest.

Issue 4. Whether appellant has established that the filing enforcement cost recovery fee should be abated.

R&TC section 19254(a)(2) provides that if any person fails or refuses to make and file a return after FTB mails to that person a formal Demand, FTB is required to impose a filing enforcement cost recovery fee. Once properly imposed, there is no provision in the R&TC which would excuse FTB from imposing the filing enforcement cost recovery fee under any circumstances. Here, FTB informed appellant in the Demand and in the Determination of Filing Requirement that appellant might be subject to the filing enforcement cost recovery fee if appellant did not file a tax return. FTB did not receive a return from appellant within the prescribed period in the Determination of Filing Requirement and subsequently in the Demand. Therefore, FTB properly imposed the filing enforcement fee, and there is no basis to abate this fee.

HOLDINGS

1. Appellant has failed to show reasonable cause to abate the late-filing penalty, the S corporation late-filing penalty, and the demand penalty.
2. Appellant has failed to establish that the estimated tax penalty should be abated.
3. Appellant has failed to establish that interest should be abated.
4. Appellant has failed to establish that the filing enforcement cost recovery fee should be abated.

DISPOSITION

FTB's action is modified, in accordance with FTB's concession on appeal, to remove the $374 collection cost recovery fee; otherwise, the action is sustained.

DocuSigned by:
Elliott Scott Ewing
2D8DE82EB65E4A6...
Elliott Scott Ewing
Administrative Law Judge

We concur:

DocuSigned by:
Sara A. Hosey
6D3FE4A0CA514E7...
Sara A. Hosey
Administrative Law Judge

DocuSigned by:
3CADA62FB4864CB...
Andrew J. Kwee
Administrative Law Judge