

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18093759
AUBURN OLD TOWN GALLERY, LLC)
) Date Issued: October 15, 2019
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OPINION

Representing the Parties:

For Appellant: Phillip Sharp, EA
Western Sierra Business Services, Inc.

For Respondent: David Kowalcyk, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Auburn Old Town Gallery, LLC (appellant) appeals an action by the Franchise Tax Board (FTB) in denying appellant’s claim for a refund in the amount of \$13,631.79 for 2014.¹

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

ISSUES

1. Whether appellant’s failure to timely file a return for 2014 was due to reasonable cause.
2. Whether the collection cost recovery fee can be abated.

FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC), treated as a partnership, that registered with the California Secretary of State on September 8, 2000. Appellant had 60

¹ The amount claimed on appeal is \$13,881.79, because appellant made a payment of \$13,881.79 on March 1, 2018, for tax years 2014 and 2017. However, \$250 of that amount was applied to the 2017 tax year, and the correct amount at issue for the 2014 tax year is \$13,631.79, consisting of a \$12,960 late-filing penalty, plus applicable interest, a \$287 collection cost recovery fee, and \$29.28 that FTB wrote off.

- members during the 2014 tax year. Appellant was required to file its 2014 tax return by April 15, 2015.
2. Appellant filed its 2014 LLC Return of Income on April 7, 2017, reporting a \$900 LLC fee, an \$800 annual LLC tax, payments of \$1,700, and no tax due.
 3. On May 18, 2017, FTB issued an LLC Notice of Balance Due, imposing a \$12,960 late-filing penalty, plus interest. On August 1, 2017, FTB issued an LLC Past Due Notice because appellant had not paid its account balance. The notice stated that if appellant did not pay the account balance, FTB would pursue collection efforts and impose a collection fee.
 4. On December 15, 2017, FTB issued an LLC Final Notice Before Levy because appellant had not paid its account balance. The notice stated that if appellant did not pay the account balance, FTB would pursue collection efforts and impose collection fees.
 5. On January 30, 2018, FTB imposed a \$287 collection cost recovery fee.
 6. On March 1, 2018, appellant paid the account balance in full. Appellant filed a timely claim for refund of the late-filing penalty, applicable interest, and the collection cost recovery fee. FTB denied the claim for refund, and this timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant's failure to timely file a return for 2014 was due to reasonable cause.

For the year at issue, R&TC section 18633.5(a) provides that every LLC that is 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 fifteenth day of the fourth month following the close of its taxable year. Alternatively, the LLC may file its return on or before the automatic extended due date, which is six months after the original filing due date. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.) However, if the return is not filed within six months of the original due date, no extension is allowed. (Cal. Code Regs., tit. 18, § 18567(a).)

R&TC section 19172 imposes a late-filing penalty when a partnership (or an LLC treated as a partnership) fails to file a return at the time prescribed unless it is shown that the failure was due to reasonable cause. The late-filing penalty under R&TC section 19172 is computed at \$18 multiplied by the number of partners (or LLC members) for each month, or fraction thereof, that

the return is late, up to a maximum of 12 months. (R&TC, § 19172(b).) Appellant had 60 members during the 2014 tax year, and filed its return nearly two years past the original due date of April 15, 2015. Therefore, FTB properly imposed a \$12,960 late-filing penalty (\$18 x 60 members x 12 months).

The late-filing penalty will be abated if it is established that the late filing was due to reasonable cause. (R&TC, § 19172(a).) For penalty abatement purposes, reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) In other words, a taxpayer must show that the failure to meet its tax filing obligation occurred despite the exercise of ordinary business care and prudence. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252, the 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” The Supreme Court noted that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.* at p. 251.)

On appeal, appellant contends that reasonable cause exists to abate the penalty. Specifically, appellant asserts that it timely paid its tax liability, and relied on its accountant to timely file its 2014 tax return. Appellant states that it did not know its 2014 tax return had not been e-filed until FTB notified appellant on April 6, 2017, that FTB had not received a 2014 tax return. Appellant asserts that the failure to timely file the return resulted from its accountant’s mere oversight, with no harm to the state because all taxes were paid. Further, appellant states that all 60 of its members timely filed their personal income tax returns, and therefore reasonable cause exists to abate the penalty under IRS Revenue Procedure 84-35, 1984-1 C.B. 509 (Rev. Proc. 84-35). Finally, appellant contends that reasonable cause exists to abate the penalty

because the Internal Revenue Service (IRS) abated the late-filing penalty based on appellant's good filing history.²

Here, appellant has not substantiated what efforts, if any, it took to verify that its 2014 tax return had been timely filed. Appellant asserts that the failure to file a timely return resulted from its accountant's mere oversight, but neither reliance on one's agent nor mere oversight qualify as reasonable cause. (See *Boyle, supra* at p. 251-252; *Appeal of Quality Tax & Financial Services, Inc., 2018-OTA-130P.*) In the absence of an acknowledgement that a return was transmitted, received, or accepted, an ordinarily prudent person would have its e-filing history and acknowledgment records for that return to confirm whether it had been transmitted, received, and accepted. (*Quality Tax & Financial Services, Inc., supra.*) Appellant has not established that it did so, and therefore, appellant has not shown that it failed to file a timely 2014 tax return despite the exercise of ordinary business care and prudence, or that circumstances beyond appellant's control prevented it from timely doing so.

Next, appellant's reliance on Rev. Proc. 84-35 is misplaced. In relevant part, that revenue procedure allows a domestic partnership *consisting of 10 or fewer partners* to be considered to have met the reasonable cause test if the partnership establishes that all of the partners have fully reported their shares of income, deductions, and credits of the partnership on their timely filed individual income tax returns. California does not conform to Rev. Proc. 84-35, and in any event, appellant had 60 partners during the 2014 tax year, in excess of the 10-partner limit set forth in Rev. Proc. 84-35. Accordingly, we conclude that appellant cannot establish reasonable cause on this basis.

² In appellant's reply brief, appellant's representative (Western Sierra Business Services, Inc. (Western Sierra)) asserts for the first time that Western Sierra actually filed this appeal on its own behalf, and that Western Sierra is in fact the appellant, because Western Sierra reimbursed appellant for the amounts appellant paid to FTB, and appellant agreed to repay Western Sierra when it received a refund. We reject this contention because the irrefutable facts establish that: appellant is the taxpayer that incurred the liability and paid the penalties; the timely appeal giving OTA jurisdiction over this matter was filed on behalf of appellant; Western Sierra clearly filed the appeal on behalf of appellant, as appellant's representative; and appellant executed a Power of Attorney form designating Western Sierra as its representative. The contractual agreement by which Western Sierra reimbursed appellant, and by which appellant agreed to repay Western Sierra if successful, does not transmute Western Sierra into the taxpayer whose claim for refund is at issue here. Moreover, if it were true that this appeal was filed on behalf of Western Sierra, OTA would be required to dismiss it for lack of jurisdiction because FTB has not issued any denial of a refund claimed by Western Sierra, and Western Sierra did not timely file an appeal of any such denial of its own claim for refund. (See Cal. Code Regs., tit. 18, §§ 30103(a); 30203(a).) In other words, Western Sierra's assertion would be fatal to this appeal, if it were true. The assertion is incorrect, and accordingly we decline to further address it.

Finally, although the IRS abated the federal late-filing penalty based on appellant's good filing history, neither the California Legislature nor the FTB have adopted a comparable penalty abatement program, so the IRS penalty abatement cannot be used as a basis for abatement of the state late-filing penalty at issue here.³ Instead, appellant must establish that its failure to timely file its 2014 return was due to reasonable cause, which it has failed to do. Accordingly, appellant is liable for the late-filing penalty.

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

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. The amount of the fee is adjusted annually to reflect actual enforcement costs. There is no reasonable cause defense to the imposition of the fee; thus, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the collection cost recovery fee.

Here, FTB issued two separate notices, dated August 1, 2017, and December 15, 2017, each of which informed appellant that failure to pay the liability may result in collection action and imposition of a collection cost recovery fee. The collection cost recovery fee was required to be imposed by R&TC section 19254 because appellant failed to pay the liability after receiving notice that continued failure to pay the liability may result in imposition of the fee. Appellant did not make payment until March 1, 2018. FTB has no authority to abate or modify this fee and appellant did not show that the fee was for any invalid or improper reason.⁴ Therefore, we sustain FTB's imposition of the collection cost recovery fee.

³ While the IRS has an administrative program called "First Time Abate," under which it will abate timeliness penalties if a taxpayer has timely filed returns and paid tax for the past three years, neither the California Legislature nor FTB has adopted a comparable penalty abatement program. The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement of timeliness-related penalties for taxpayers based solely on their history of timely filing and payment. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

⁴ Appellant does not appear to dispute the amount of the fee either, which is set by the Legislature in the annual Budget Act. (R&TC, § 19254(b)(1).)

HOLDINGS

1. Appellant failed to establish that its failure to timely file a return for 2014 is due to reasonable cause; and
2. Appellant is not entitled to the abatement of the collection cost recovery fee.

DISPOSITION

FTB's action in denying the claim for refund is sustained.

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Linda C. Cheng
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Linda C. Cheng
Administrative Law Judge

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge