

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19064853
MIRTA MOYANO SKIN CARE, INC.) Date Issued: November 20, 2019
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OPINION

Representing the Parties:

For Appellant: Kathy Nesheiwat

For Respondent: Diane M. Deatherage, Specialist

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Mirta Moyano Skin Care, Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of an S corporation late filing penalty of \$540, plus interest, for the tax year ending December 31, 2017.

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

ISSUE

Whether the S corporation late filing penalty may be abated.

FACTUAL FINDINGS

1. Appellant untimely filed its California S corporation tax return for the tax year ending December 31, 2017, on December 20, 2018, reporting a total tax of \$800 and payments of \$800.
2. FTB imposed an S corporation late filing penalty of \$540, pursuant to R&TC section 19172.5, plus interest of \$3.12.
3. Appellant paid the balance due and filed a claim for refund of the penalty, which FTB denied. This timely appeal followed.

DISCUSSION

An S corporation is required to file its tax return on or before the 15th day of the third month following the close of the taxable year. (Rev. & Tax. Code, § 18601, subd. (d).) R&TC section 19172.5, subdivision (a), provides that, if any S corporation fails to file a return within the time prescribed (determined with regard to any extension of time for filing) or files a return that fails to show the information required under R&TC section 18601, then the S corporation shall be liable for a per-shareholder penalty unless that failure is due to reasonable cause.

The burden is on the taxpayer to establish reasonable cause for the untimely filing. (*Appeal of Tao Xie* (2018-OTA-076P).) To establish reasonable cause for failing to timely file, a taxpayer must show that the failure to timely file the return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Quality Tax Financial Services, Inc.* (2018-OTA-130P).)

Appellant does not contest the calculation of the penalty. Instead, appellant argues that reasonable cause exists for the failure to timely file. Specifically, appellant contends that its tax preparer failed to timely file the return by the March 15, 2018 due date as a result of a software error, which caused the return to be uploaded only and not filed with FTB. Appellant asserts that the error was later noticed and the return was filed as soon as possible.

These circumstances do not show reasonable cause; appellant cannot rely on its tax preparer to timely file its return, as each taxpayer has a personal and non-delegable obligation to timely file by the due date. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247.) Furthermore, an ordinarily intelligent and prudent businessperson would have viewed the e-file history and acknowledgment records to confirm whether the return had been timely transmitted and accepted. (*Appeal of Quality Tax & Financial Services, Inc., supra.*) Here, it was appellant's non-delegable duty to ensure that the return was timely filed. In the absence of confirmation that the return was filed, appellant should have checked its e-file history and acknowledgment records to verify the return was timely filed. (*Id.*) Appellant provides no evidence of steps that it took to make sure that its return was timely filed or that it exercised ordinary business care and prudence. Accordingly, appellant has not shown reasonable cause for the late filing of the return.

Appellant notes that the Internal Revenue Service (IRS) abated its federal late filing penalty. According to the IRS letter provided by appellant, the penalty was removed for first

time abatement. Under the IRS’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. Neither the California Legislature nor FTB have adopted a comparable penalty abatement program. Therefore, an IRS decision to abate a federal late filing penalty under IRS First Time Penalty Abatement program does not constitute grounds for abating the California late filing penalty, even if appellant had shown that it had a good California filing history.

HOLDING

The S corporation late filing penalty may not be abated.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge