

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011385
UNIQUE SPORTS ACCESSORIES, INC.) Date Issued: April 4, 2019
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OPINION

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)¹

For Respondent: Marguerite Mosnier, Tax Counsel IV

For Office of Tax Appeals: Sarah Fassett, Tax Counsel

P. KUSIAK, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324,² Unique Sports Accessories, Inc. (appellant) appeals an action by the Franchise Tax Board (FTB) denying appellant’s claims for refund totaling \$1,820.65³ for the 2011, 2012, 2013, and 2014 taxable years.

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

¹ Joel S. Wyenn, appellant’s president and sole stockholder, filed appellant’s opening brief. Subsequent representation was provided by TAAP.

² Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

³ Appellant’s claims for refund, for the tax years at issue, requested abatement of “all penalties.” Appellant did not request abatement of interest or fees. The total amount of penalties imposed for the tax years at issue is \$1,820.65. FTB’s opening brief did not indicate an amount at issue but did indicate that it will abate the late-filing penalties totaling \$1,230.00. Thus, the total amount of penalties at issue is \$590.65 (i.e., \$1,820.65 - \$1,230.00). 2011 is \$225.32; 2012 is \$223.58; 2013 is \$21.96; and 2014 is \$119.79.

ISSUES

1. Whether appellant has established that its failure to timely respond to FTB's Demand for Tax Return (Demand Notice) for 2011 and 2012 was due to reasonable cause and not due to willful neglect.
2. Whether appellant has established that the penalties for underpayment of estimated tax imposed for 2011 through 2014 should be abated.
3. Whether appellant has established that its failure to timely pay its tax for 2014 was due to reasonable cause and not due to willful neglect.

FACTUAL FINDINGS

1. Appellant is a California corporation that is registered to conduct business in this state with the California Secretary of State and elected to be treated as a subchapter S corporation ("S Corp") for income tax purposes.
2. For 2011, appellant did not timely file its 2011 California S Corporation Franchise or Income Tax Return (Form 100S) due on March 15, 2012. On August 29, 2014, FTB sent appellant a Demand Notice requiring appellant to either submit a 2011 Form 100S by October 1, 2014, send a copy to FTB if a return has already been filed, or explain why it was not required to file a return. Appellant requested three extensions for filing its 2011 return, which FTB granted. Appellant did not file its 2011 return by the extended deadline of January 1, 2015, and FTB issued a Notice of Proposed Assessment (NPA) on January 16, 2015. The NPA proposed additional tax, a late-filing penalty, a demand penalty, a S-Corp late-filing penalty, a filing enforcement cost recovery fee, and applicable interest. FTB received appellant's 2011 Form 100S on February 15, 2015, reporting the \$800 minimum tax. Appellant did not remit payment with the return. Upon processing the return, FTB reduced both the demand penalty and the late-filing penalty to \$200 each, and reduced the S Corp late-filing penalty to \$216. FTB also imposed a \$25.32 underpayment of estimated tax penalty and billed appellant for the unpaid tax, penalties, fee, and interest. FTB received full payment of all amounts owed for 2011.
3. For 2012, appellant did not timely file its Form 100S, due on March 15, 2013. On June 30, 2014, FTB sent appellant a Demand Notice. Appellant requested two extensions for filing its 2012 return, which FTB granted. Appellant did not file its return by the

extended deadline of September 28, 2014, and FTB issued a NPA on November 7, 2014. The NPA proposed additional tax, a late-filing penalty, a demand penalty, a S-Corp late-filing penalty, a filing enforcement cost recovery fee, and applicable interest. FTB received appellant's 2012 Form 100S on February 15, 2015, reporting the \$800 minimum tax. Appellant did not remit payment with the return. Upon processing the return, FTB reduced both the demand penalty and the late-filing penalty to \$200 each and reduced the S-Corp late-filing penalty to \$216. FTB also imposed a \$23.58 estimated tax penalty and billed appellant for the unpaid tax, penalties, fee, and interest. FTB received full payment of all amounts owed for 2012.

4. For 2013, appellant did not timely file its Form 100S, which was due on March 15, 2014. Appellant filed its 2013 Form 100S on February 15, 2015, and reported the \$800 minimum tax and a \$22 estimated tax penalty. Appellant did not remit payment with the return. Upon processing appellant's return, FTB imposed a \$200 late-filing penalty, a \$198 S-Corp late-filing penalty, and reduced the estimate tax penalty to \$21.96. FTB billed appellant for the unpaid tax, penalties, and interest, and received full payment for this tax year.
5. For 2014, appellant timely filed its Form 100S, reporting the \$800 minimum tax and a \$22 estimated tax penalty. Appellant did not remit payment with the return. FTB processed and accepted the return as filed, but reduced the estimated tax penalty to \$21.96 and imposed a \$97.83 late-payment penalty. FTB billed appellant for the unpaid tax, penalties, and interest, and received full payment for this tax year in July 2016.
6. Appellant submitted a Reasonable Cause – Business Entity Claim for Refund for all tax years at issue. The request asked for abatement and refund of all penalties imposed for 2011 through 2014 because the Internal Revenue Service (IRS) abated the penalties it imposed for tax years 2009 through 2013, and because during the tax years at issue, Mr. Wyenn had significant responsibilities caring for his daughter and his elderly parents.
7. On March 22, 2017, FTB issued separate notices denying appellant's claims for refund for 2011 through 2014. This timely appeal followed.
8. In its opening brief, and based on the IRS's reasonable cause abatement of the federal late-filing penalties imposed, FTB agreed to abate the late-filing penalties and refund appellant \$1,230 at the conclusion of this appeal. The \$1,230 consists of \$600 in section

19131 late-filing penalties and \$630 in section 19172.5 S-Corp late-filing penalties imposed for 2011 through 2013.

DISCUSSION

Issue 1 – Whether appellant has established that its failure to timely respond to FTB’s Demand Notices for 2011 and 2012 was due to reasonable cause and not due to willful neglect.

Pursuant to section 19133, FTB imposes a penalty against a taxpayer for failing to file a return or provide information after an FTB demand to do so, unless the failure to do so was attributable to reasonable cause and not to willful neglect. The penalty is computed as 25% of the total tax liability before any prepayments or credits are applied to reduce the tax liability, and is designed to penalize taxpayers who do not respond timely to a formal, legal demand from the FTB. (R&TC, § 19133; *Appeal of Scott*, 83-SBE-094, Apr. 5, 1983.)⁴

When FTB imposes a penalty against a taxpayer for failing to file a return or provide information after a demand to do so, the law presumes that the penalty is correct, and the burden of proof is on the taxpayer to show that the failure to do so was attributable to reasonable cause and not to willful neglect. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Beadling*, 77-SBE-021, Feb. 3, 1977.) To establish reasonable cause, a taxpayer must show that the failure to respond occurred despite the exercise of ordinary business care and prudence. (*Appeal of Bieneman*, 82-SBE-148, July 26, 1982.) A taxpayer’s reason for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Cummings*, 60-SBE-040, Dec. 13, 1960; *Appeal of Ferguson*, 58-SBE-024, Sept. 15, 1958.) Unsupported assertions are not sufficient to satisfy that burden. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) Additionally, appellant must provide credible and competent evidence to support a claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Walshe*, 75-SBE-073, Oct. 20, 1975; *Appeal of Beadling*, *supra*.)

Illness or other personal difficulties that prevent a taxpayer from filing a timely return, may be considered reasonable cause in very limited cases. “[T]he type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually

⁴ Pursuant to the Office of Tax Appeals Rules for Tax Appeals, Regulation 30501, subdivision (d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE’s precedential opinions are available for viewing on the BOE’s website: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

impossible for the taxpayer to comply—things like emergency hospitalization or other incapacity occurring around tax time.” (*Carlson v. United States* (7th Cir. 1997) 126 F.3d 915, 923.) Illness or other personal difficulties do not constitute reasonable cause when the difficulties simply caused the taxpayer to sacrifice the timeliness of one matter so that other matters could be pursued. (*Appeal of Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of Orr*, 68-SBE-010, Feb. 5, 1968.) To establish reasonable cause, the disability must render the taxpayer unable to meet the obligation to timely file during the overall time period relevant to the filing obligation. (*Tabbi v. Commissioner*, T.C. Memo. 1995-463; *Harbour v. Commissioner*, T.C. Memo. 1991-532 [reasonable cause was found when a taxpayer was hospitalized during the tax filing period].)

FTB granted appellant multiple deferrals and provided extended deadlines of January 1, 2015, and September 28, 2014, for appellant to file its 2011 and 2012 tax returns, respectively. Appellant failed to respond or file its returns by the extended deadlines. As a result, FTB imposed a \$200 demand penalty for both 2011 and 2012. Therefore, the only issue is whether appellant has demonstrated that its failure to timely respond to the Demand Notices was attributable to reasonable cause and not willful neglect.

Appellant asserts that its president and sole stockholder, Mr. Wyenn, had reasonable cause for failing to respond to the Demand Notices due to his responsibilities caring for his daughter and for his elderly parents. Appellant also asserts that FTB should abate the late-filing penalties because the IRS abated appellant’s federal late-filing penalties based on a finding of reasonable cause.

Mr. Wyenn cared for his daughter, who had severe mental health issues. Mr. Wyenn provided portions of his daughter’s medical records that show she was admitted to the hospital in June 2010 and again in January 2014. Appellant’s reply brief states that Mr. Wyenn, his wife, and ex-wife, were available to care for his daughter, and that his daughter worked at the same job from May 2012 to December 2013, and then from March 2013 through July 2013.

Mr. Wyenn also asserts that he was partially responsible for his elderly parents. His parents were in an assisted living facility from 2009 to 2011, and then moved to a long-term care facility. Mr. Wyenn also acknowledges that he and his brother shared the responsibility of tending to his parents’ needs. While Mr. Wyenn’s situation for the tax years at issue sounds difficult, he has not shown, with credible and competent evidence, that these personal difficulties

rendered the appellant corporation wholly unable to meet its filing obligation during the relevant times for filing timely returns or responding to the Demand Notices.

For the reasons mentioned above, appellant has not established that its failure to respond to the Demand Notices was due to reasonable cause.⁵ Accordingly, we have no basis for abating the demand penalties.

Regarding the IRS's abatement of the applicable federal late-filing penalties based on a finding of reasonable cause, FTB agreed to abate the late-filing penalties it imposed under sections 19131 and 19172.5 for 2011 through 2013, based on the IRS's reasonable cause abatement.

Issue 2 – Whether appellant has established that the underpayment of estimated tax penalties imposed under section 19142 for 2011 through 2014 should be abated.

A corporation subject to the franchise tax imposed by the Revenue and Taxation Code 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 franchise 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, subd. (a).) A corporation that underpays its estimated tax is liable for an addition to tax (i.e., a penalty) equal to a specified rate of interest applied to the amount of the underpayment. (R&TC, §§ 19142, 19144.) The underpayment of estimated tax penalty 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, July 26, 1978.) There is no general reasonable cause exception to the penalty. (*Appeal of Weaver Equipment Co.*, 80-SBE-048, May 21, 1980.) Appellant did not make any timely estimated payments for 2011 through 2014. Therefore, the estimated tax penalty was properly imposed.

⁵ A taxpayer bears the burden of proving both that the failure to respond to the Demand Notices was due to reasonable cause and not due to willful neglect. Because appellant has not shown reasonable cause, it is not necessary to address the separate issue of whether appellant has established that its failure to respond to the Demand Notices was not due to willful neglect.

Issue 3 – Whether appellant has established its failure to timely pay tax for 2014 was due to reasonable cause and not due to willful neglect.

Section 19132 imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. For these purposes, the due date for payment of the tax is determined without regard to any extension of time to file the return. (R&TC, § 19132, subd. (a)(1)(A).) Appellant’s 2014 Form 100S and payment for the full amount of its tax liability was due on March 15, 2015;⁶ however, appellant paid the liability in full more than fourteen months later in July 2016. Therefore, FTB imposed a late-payment penalty of \$97.83⁷ for the 2014 tax year.

The late-payment penalty, however, does not apply when the failure to pay is due to reasonable cause and not willful neglect. To establish reasonable cause for the late payment of tax, a taxpayer must show that its failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal Curry*, 86-SBE-048, Mar. 4, 1986.)

As discussed above, appellant did not establish reasonable cause for its failure to respond to the Demand Notices. Likewise, for the same reasons, appellant has not established reasonable cause for the failure to timely pay its tax for 2014.

HOLDINGS

1. Appellant did not establish its failure to respond to the Demand Notices for 2011 and 2012 was due to reasonable cause and not due to willful neglect.
2. Appellant has not established that the estimate penalties imposed for 2011 through 2014 should be abated.
3. Appellant did not establish that its failure to timely pay tax for 2014 was due to reasonable cause and not due to willful neglect.

⁶ Appellant is a calendar-year taxpayer, for 2014, its tax return was due on March 15, 2015 (Rev. & Tax. Code, § 18601, subd. (a).) Pursuant to section 19001, a taxpayer’s tax liability is required to be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

⁷ There is no issue raised as to whether the late-payment penalty was computed properly.

DISPOSITION

FTB’s action in denying appellant’s claim for refund is modified, as conceded by FTB on appeal, to refund the late-filing penalties, totaling \$1,230, for 2011 through 2013. FTB’s denial of appellant’s claim for refund is otherwise sustained.

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Patrick J. Kusiak
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Patrick J. Kusiak
Administrative Law Judge

We concur:

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Alberto T. Rosas
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