

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18103942
LENG D’OR USA, INC.)
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OPINION

Representing the Parties:

For Appellant: Amedeo Luongo, CPA

For Respondent: Joel M. Smith, Tax Counsel

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Leng D’Or USA, Inc. (appellant) appeals an action by the respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$3,793.95 for the 2016 tax year.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 for failing to make a timely payment of tax.
2. Whether appellant has established that the estimated tax penalty should be waived.
3. Whether appellant is entitled to an abatement of interest.

FACTUAL FINDINGS

1. Appellant is a foreign corporation that was formed in the State of New Jersey during the tax year at issue.

¹ On appeal, we note the parties present different refund amounts at issue. FTB asserts that the amount is \$3,793.95, consisting of a minimum franchise tax of \$800, a late payment penalty of \$1,947.12, an estimated tax penalty of \$516.01, and interest of \$530.82. However, appellant’s brief shows \$3,781.94, which is the amount at issue acknowledged by the Office of Tax Appeals, although appellant’s refund claim filed with FTB requests yet a different refund amount of \$3,762.97. In any event, we will presume that the correct amount at issue is \$3,793.95 because, if the appeal were granted, the additional amount would be in appellant’s favor.

2. Appellant filed its 2016 California Corporation Franchise or Income Tax Return (Form 100) on October 16, 2017, and self-assessed an alternative minimum tax of \$23,289. Appellant remitted a payment of \$23,289 with its return.
3. FTB accepted the return as filed. FTB issued appellant a Return Information Notice dated November 30, 2017, which revised appellant's 2016 return by assessing a minimum franchise tax of \$800 and imposing a late payment penalty, and an estimated tax penalty.
4. FTB issued appellant a Notice of Balance Due dated December 22, 2017, for a total balance due of \$3,762.97. FTB then issued appellant a Corporation Past Due Notice dated February 5, 2018, which indicates a tax of \$24,089.00, a penalty of \$2,459.13, interest of \$522.81, and payments of \$23,289.00, for a total balance due of \$3,781.94. Appellant made a payment of \$3,781.94 on March 1, 2018.
5. Appellant subsequently submitted a Reasonable Cause – Individual and Fiduciary Claim for Refund (FTB Form 2924) dated June 6, 2018. It claimed a refund of \$3,762.97 for the 2016 tax year. Appellant contended that it had reasonable cause because it relied on the services of a certified public accountant (CPA) to navigate the complexities of income tax laws. Appellant also alleged that it has always been an exemplary taxpayer and has fully complied with all the tax laws and regulations.
6. In a letter dated August 14, 2018, FTB denied appellant's claim for refund because appellant did not demonstrate reasonable cause for the late payment of tax, there is no provision in the law to waive the estimated tax penalty, and there is no reasonable cause exception to abate interest.
7. This timely appeal followed. On appeal, FTB has agreed to withdraw its assessment of the minimum franchise tax and modify its calculation of the late payment penalty, estimated tax penalty, and interest accordingly.

DISCUSSION

Issue 1 – Whether appellant has established reasonable cause for failing to make a timely payment of tax.

R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return.² The late payment penalty may be abated if the taxpayer can show that the failure to make a timely tax payment was due to reasonable cause and was not due to willful neglect. (Rev. & Tax. Code, § 19132, subd. (a)(1).) To establish reasonable cause for the late payment of tax, the taxpayer must show that its failure to make a timely tax payment of the proper amount occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Id.*)

A taxpayer's failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Risser* (84-SBE-044) 1984 WL 16123.) Furthermore, a taxpayer's reliance on a tax professional to take care of the administrative act of filing a return or paying a tax due does not constitute reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 250.) If, however, the evidence establishes that: (1) the taxpayer consulted with a tax professional on a substantive question of law and provided the tax professional with all of the information needed to correctly answer the substantive question of law; (2) the tax professional provided the taxpayer with legal advice on the substantive question of law; and (3) the taxpayer reasonably relied on that legal advice and otherwise exercised ordinary and reasonable care with regard to the action taken in reliance on the legal advice, such evidence may establish reasonable cause. (*Id.* at pp. 250-251 [involving late-filing penalty]; see also *Knappe v. United States* (9th Cir. 2013) 713 F.3d 1164, 1170 [involving late-filing penalty of an estate tax return, "the question of whether a return is due is a

² R&TC section 19132 is modeled after Internal Revenue Code (IRC) section 6651(a)(2). When a statute is patterned after federal legislation on the same subject, the interpretation given the federal statute by the courts and administrative bodies are relevant in determining the proper construction of the California statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.)

matter of substantive tax law, and that a taxpayer acts with ordinary business care and prudence when he relies on an expert’s answer to that question”].³

It is undisputed that appellant paid its 2016 tax liability after the due date. However, appellant argues that its reliance on a tax professional constitutes reasonable cause for the failure to timely file its return. Appellant alleges that it was unaware of its filing requirement until it engaged its current CPA firm who explained that it had a filing requirement in California. Appellant relies on *Estate of La Meres v. Commissioner* (1992) 98 T.C. 294 (*La Meres*) for the notion that it is reasonable for a layperson to rely on the advice of a tax professional. Appellant asserts that it “exhibited good faith by relying on its outside advisors.”

In *La Meres*, the executor of a taxpayer’s estate sought the advice of an estate attorney with respect to the filing due date of an estate tax return. The executor was concerned that she would not be able to file an accurate estate tax return because she lacked adequate information for the return. The attorney advised her to request a six-month filing extension from the Internal Revenue Service (IRS), which was granted. When the extended filing due date approached, the executor was again concerned that she could not file an accurate return. After consulting with the estate attorney, the executor was again advised to file a second request for a six-month extension. However, the executor did not know that this advice was incorrect. The IRS subsequently imposed a late-filing penalty pursuant to IRC section 6651(a)(1). On appeal, the court found that, in light of the facts and analysis of the case, a prudent taxpayer would seek and rely on the advice of a tax expert and concluded that the executor’s reliance was reasonable. (*La Meres, supra*, 98 T.C. at p. 321.)

Unlike the executor in *La Meres*, appellant does not describe any events that would establish that its failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. Appellant has not provided any evidence to establish that it did in fact meet with a tax professional to inquire about its obligation for the 2016 tax year to file a California return and pay California tax or that it provided the tax professional with all the information needed to correctly answer its questions prior to April 15, 2017, the tax payment due date. Therefore, appellant has not established reasonable cause for its failure to timely pay the tax due.

³The late-filing and the late payment penalties generally deal with the same questions and weigh the same evidence for purposes of making reasonable cause determinations. (*Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860.)

It appears that appellant is requesting a one-time abatement of the late payment penalty by claiming it has a good history of tax compliance. The IRS administers a program called “First Time Abate” under which the IRS may administratively abate late payment and late-filing penalties if a taxpayer has timely filed returns and paid taxes due for the past three years. Neither the California Legislature nor the FTB has adopted a comparable penalty abatement program. Appellant’s claimed history of timely filing returns and timely paying its tax liabilities therefore cannot be used as a basis for abatement of the late payment penalty.

Based on the facts above, we conclude that appellant’s failure to timely pay its 2016 tax liability was not due to reasonable cause.

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

A corporation subject to the franchise tax must pay estimated tax. (Rev. & Tax. Code, § 19023.) When the amount of estimated tax does not exceed the minimum franchise tax of \$800, the entire amount of the estimated tax shall be due and payable on or before the 15th day of the fourth month of the taxable year. (Rev. & Tax. Code, § 19025, subd. (a).) When the amount of estimated tax exceeds the minimum franchise tax of \$800, then it generally is required to be paid in specified installments. (Rev. & Tax. Code, § 19025, subd. (b).)

A corporation that underpays its estimated tax is penalized by an addition to tax equal to a specified rate of interest applied to the amount of the underpayment. (Rev. & Tax. Code, §§ 19142, 19144.) 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 general reasonable cause exception to the estimated tax penalty. (*Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) There are a few limited statutory exceptions to the penalty, but appellant does not contend, and the evidence does not show, that any of these exceptions apply. (Rev. & Tax. Code, §§ 19147, 19148.) Therefore, FTB properly imposed the estimated tax penalty and there is no basis to waive it.

Issue 3 – Whether appellant is entitled to an abatement of interest.

Imposing interest on a tax deficiency is mandatory. (Rev. & Tax. Code, § 19101, subd. (a).) Interest is also charged for a late payment penalty from the original due date of the

return to the date the penalty payment is made. (Rev. & Tax. Code, § 19101, subd. (c)(2)(B).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

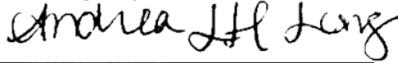
To obtain interest abatement, appellant must qualify under one of the following statutes: R&TC section 19104 or 21012. R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply because appellant does not allege, and the evidence does not show, that it relied on any written advice requested of FTB. Appellant has thus not demonstrated that it is entitled to interest abatement.

HOLDINGS

1. Appellant has not established reasonable cause for failing to make a timely payment of tax.
2. Appellant has not established that the estimated tax penalty should be waived.
3. Appellant is not entitled to an abatement of interest.

DISPOSITION

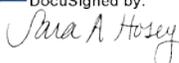
FTB’s action is modified in accordance with its concession on appeal to withdraw the assessed minimum franchise tax and to reduce the late payment penalty, the estimated tax penalty, and interest accordingly. FTB’s action is otherwise sustained.

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 Andrea L.H. Long
 Administrative Law Judge

We concur:

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 Kenneth Gast
 Administrative Law Judge

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 Sara A. Hosey
 Administrative Law Judge

Date Issued: 1/9/2020