

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18010937  
NON-STOP CARRIERS, LLC )  
 ) Date Issued: August 16, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Oscar Cisneros, Chief Executive Officer

For Respondent: Jean M. Cramer, Tax Counsel IV

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Non-Stop Carriers, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$217.97 for the 2013 taxable year.<sup>1</sup>

Appellant waived its right to an oral hearing. Therefore, we decide the matter based on the written record.

**ISSUE**

Did FTB correctly impose the late-filing penalty under R&TC section 19172.5?

**FACTUAL FINDINGS**

1. Appellant, a single-member limited liability company (LLC), was taxed as an S corporation for income tax purposes during all relevant times.
2. Appellant timely paid its estimated taxes for 2013 in April 2013. The check for that payment referenced appellant’s California Secretary of State (SOS) file number and “2013.”
3. Appellant reported its 2013 tax liability using FTB’s California S Corporation Franchise or Income Tax Return (FTB Form 100S). The instructions for completing FTB Form

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<sup>1</sup> \$216 of that amount is a late-filing penalty. The rest is interest.

- 100S state that identifying information for the corporation must include the California corporation number (a seven-digit corporate ID number assigned by the SOS), the Federal employer identification number, the California SOS file number, the corporation's registered name, and the corporation's address.
4. Both appellant's and its tax preparer's signatures on appellant's 2013 tax return were dated January 22, 2014. The return referenced an incorrect California corporation number.
  5. Appellant wrote a January 27, 2014 check (number 1204) to pay its 2014 estimated tax liability. That check referred to its (presumably correct) SOS file number and "2014 payment."
  6. Appellant enclosed its 2013 return and its estimated tax voucher and payment for 2014 (check number 1204) in an envelope and mailed that envelope to FTB.
  7. FTB deposited check number 1204 on or before February 18, 2014. FTB has no record of receiving appellant's 2013 return by the due date.
  8. On February 20, 2016, FTB sent appellant a "Payment Received – Missing Tax Return" notice for the 2013 taxable year. It instructed appellant to file its 2013 return, show that it had already filed its tax return, or provide information to establish that it was not required to file a 2013 return.
  9. Appellant sent FTB a copy of its 2013 return, which FTB received on March 15, 2016.
  10. On July 19, 2016, FTB sent appellant a "Return Information Notice," which referred to appellant's corporate ID and notified appellant that a late-filing penalty of \$216 remained due.
  11. FTB received appellant's penalty payment plus interest, and a claim for refund of that amount, on November 14, 2016. FTB denied the claim for refund by notice dated September 23, 2017. This timely appeal followed.

#### DISCUSSION

An LLC taxed as a S corporation was required to file its 2013 income tax return on or before March 15, 2014. (R&TC, §§ 18601, 19001.) However, FTB would have allowed an automatic extension to file the return if it was filed by October 15, 2014. (R&TC, § 18604.) When an S corporation does not file a tax return by the due date, it is liable for a per-shareholder

late-filing penalty unless the evidence establishes that the failure was due to reasonable cause. (R&TC, § 19172.5.)

FTB received appellant's timely estimated tax payment for 2014, but states it has no record of receiving appellant's 2013 return. It notes, apparently as a possible explanation for its failure to process the return if it did receive it, that the return eventually provided by appellant does not refer to the correct corporate number.

Appellant asserts that it filed its return on time. It states that the return and payment were mailed to FTB in the same envelope, and that FTB did not process the return because FTB lost it. Appellant argues that FTB's receipt of check number 1204, the estimated tax payment for 2014, is direct evidence that FTB also received the return, and it contends that since it filed its 2013 return by the due date, a late-filing penalty (plus interest) is not warranted. Appellant further alleges that it has used the same identifying information on several returns before and after the return filed for 2013, and FTB was able to process those other returns and correctly credit payments made.

FTB does not contest appellant's assertions about the identifying information used in its filings for other years. Instead, FTB argues in rebuttal that the circumstances surrounding appellant's filings for other years have no bearing on the issues presented in this appeal.

The first question is whether the evidence establishes that appellant timely filed its 2013 return. Whether appellant timely filed its return is a question of fact on which appellant has the burden of proof. (*Appeal of La Salle Hotel Company* (66-SBE-071) 1966 WL 1412.)

According to the common-law mailbox rule, if someone proves proper mailing of a document, it is rebuttably presumed that the document was physically delivered to the addressee within the time that such a mailing would be expected to take. (*Schikore v. BankAmerica Supplemental Retirement Plan* (9th Cir. 2001) 269 F.3d 956, 961.) However, Internal Revenue Code section 7502 and Treasury Regulation section 301.7502-1 provide that, aside from proof of actual timely delivery, a postmarked envelope or a postmarked registered or certified mailing receipt are the only ways to prove the date a mailed income tax return was filed with the Internal Revenue Service (IRS).<sup>2</sup> (See also *Weisman v. Internal Revenue Service* (S.D.N.Y. 1997) 972 F.Supp. 185, 188-189; *Wood Estate v. Commissioner* (8th Cir. 1990) 909 F.2d 1155.) Treasury Regulation section 301.7502-1 is applicable to filings with FTB. (R&TC, § 21027(b).) While

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<sup>2</sup> R&TC section 21027 also allows for delivery using a "designated delivery service."

there is some disagreement among the Circuit Courts of Appeal regarding whether Treasury Regulation section 301.7502-1 abrogates the common-law mailbox rule, our Ninth Circuit has recently held that it does, at least in situations where the taxpayer has no direct proof that the return was actually delivered to the IRS. (*Baldwin v. United States* (9th Cir. 2019) 921 F.3d 836, 842; *contra, Sorrentino v. Internal Revenue Service* (10th Cir. 2004) 383 F.3d 1187, 1193; *Estate of Wood v. Commissioner, supra*, 909 F.2d at p. 1161.) Thus, we analyze whether there is any direct proof that FTB received the subject return.

Here, we have direct evidence of actual delivery of the return to FTB. We have FTB's acknowledgement that the envelope containing the 2014 estimated tax voucher and payment was received by FTB in February 2014, prior to the due date for the 2013 return, and we have appellant's statement that the same envelope also contained appellant's 2013 return.<sup>3</sup> Although FTB's instructions for delivery of the 2013 Form 100S (return) and the 2014 Form 100-ES (estimated tax voucher) prescribe delivery to a slightly different zip code, the addresses are otherwise identical, the only difference being the last two digits of the nine-digit zip code. We find it would have been reasonable for appellant to mail the return and estimated tax payment together. Although the estimated tax payment was not due until a month after the return, the return was dated January 22, 2014, check number 1204 was dated January 27, 2014, and FTB deposited the check in February 2014. Based on this evidence of actual delivery of appellant's return to FTB before the due date, we find that the return was timely filed. Therefore, we conclude the late-filing penalty is inapplicable.

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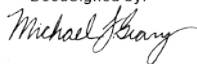
<sup>3</sup> We note that a postmarked envelope or a postmarked registered or certified mailing receipt would show the date on which an envelope or package is placed with the United States Postal Service for delivery to the recipient, in this case FTB. However, these would not prove the contents of the envelope.

HOLDING


Appellant established that it timely filed a 2013 tax return.

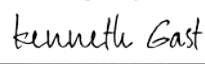
DISPOSITION

Appellant’s claim for refund shall be granted.

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Michael F. Geary  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Andrew J. Kwee  
Administrative Law Judge

DocuSigned by:  
  
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Kenneth Gast  
Administrative Law Judge