

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18103937
THE POUR HOUSE BREWERY, INC.)
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OPINION

Representing the Parties:

For Appellant: Kim R. Coyle, CPA

For Respondent: Leoangelo C. Cristobal, Tax Counsel

For Office of Tax Appeals: Sarah Fassett, Tax Counsel

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19331, The Pour House Brewery, Inc. (appellant) appeals the Franchise Tax Board’s (FTB) deemed denial¹ of appellant’s claim for refund of \$742.91² for the tax year ending December 31, 2016 (TYE 2016).

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

¹ In situations where a refund claim has been filed and the FTB fails to issue a notice of claim denial, a taxpayer may consider the claim denied after six months and appeal the “deemed denial” to the Office of Tax Appeals. (R&TC, § 19331.)

² Appellant has indicated the amount it is appealing is \$742.91, and this amount was acknowledged by this Office as the amount at issue. However, FTB notes that the total amount of penalties and interest paid by appellant for tax year ended (TYE) 2016 was \$746.83 (i.e., \$200.00 R&TC section 19131 late filing penalty; \$504.00 R&TC section 19172.5 S corporation late filing penalty; \$23.54 R&TC section 19142 underpayment of estimated tax penalty; and \$19.29 of interest).

ISSUES³

1. Whether appellant established that it is entitled to abatement of the late filing penalties imposed under R&TC sections 19131 and 19172.5.
2. Whether appellant established that it is entitled to a waiver of the underpayment of estimated tax penalty imposed under R&TC section 19142.

FACTUAL FINDINGS

1. Appellant, an S corporation, was required to file a California S Corporation Franchise or Income Tax Return (Form 100S) for TYE 2016 by March 15, 2017, or by the extended due date of September 15, 2017.
2. Appellant paid the \$800 minimum franchise tax due for TYE 2016 on May 8, 2017.
3. Appellant's return was accepted by FTB on October 10, 2017. Appellant did not remit payment for its outstanding TYE 2016 tax liability with its return. Appellant reported it had four shareholders in 2016.
4. FTB imposed two late filing penalties pursuant to R&TC sections 19131 and 19172.5, of \$200.00 and \$504.00, respectively, for TYE 2016. Since FTB did not receive any estimated tax payments from appellant for TYE 2016, FTB also imposed an underpayment of estimated tax penalty of \$23.54. In addition, FTB imposed applicable interest in the amount of \$19.29.
5. On December 15, 2017, FTB received appellant's reasonable cause claim for refund which requested abatement of the assessed late filing penalties.
6. Because appellant had yet to make a payment related to the penalties and interest, FTB treated appellant's December 15, 2017 claim for refund as a request for penalty waiver. On January 18, 2018, FTB issued a Penalty Waiver Denial.
7. On March 1, 2018, appellant filed a second copy of its reasonable cause claim for refund. Appellant attached a letter from the Internal Revenue Service (IRS) showing penalty relief for TYE 2016 based on appellant's good history of filing and paying on time (First Time Abatement). FTB treated appellant's correspondence as an informal claim for refund under R&TC section 19322.1.

³ Appellant's claim for refund included a request for a refund of interest, in addition to penalties, for TYE 2016. However, appellant has not provided a specific contention regarding interest abatement and we find no apparent grounds for interest abatement under the facts.

8. On March 7, 2018, appellant made a payment of \$746.83, which satisfied appellant's TYE 2016 tax account, and perfected appellant's March 1, 2018, claim for refund.
9. FTB took no action with respect to appellant's perfected refund claim, and appellant filed this timely appeal based on a deemed denial of its claim for refund.

DISCUSSION

Issue 1 – Whether appellant has established that the late filing penalties imposed under R&TC sections 19131 and 19172.5 should be abated.

For TYE 2016, an S corporation was required to file its tax return on or before the 15th day of the third month following the close of its tax year. (R&TC, § 18601(a).) R&TC section 18604 allows FTB to grant a reasonable extension of time for the filing of a corporate return. For the year at issue, FTB automatically granted S corporations a six-month extension of time to file a return provided the entity is in good standing in California on the original return due date. (R&TC, § 18604(a); FTB Notice 2016-04.) The Revenue and Taxation Code contains two penalties that are applicable to late-filed subchapter S corporation returns.

The first penalty, under R&TC section 19131, is computed with reference to the amount of the corporation's tax shown on the return. The penalty is five (5) percent of the amount of tax required to be shown on the return for every month that the return is late, without any regard to extensions of time for filing, up to a maximum of 25 percent. (R&TC, § 19131(a).) Because appellant owed the \$800 minimum tax for TYE 2016, and the return was filed over five months after the original due date, FTB properly imposed a late filing penalty of \$200 under R&TC section 19131 (appellant's \$800 minimum tax liability x 25 percent).

The second penalty, under R&TC section 19172.5, considers the fact that a subchapter S corporation is a pass-through entity. The penalty is based upon the number of its pass-through shareholders and the lateness of the return. The penalty is computed as follows: \$18 per month per subchapter S shareholder for a maximum of 12 months, determined with regard to any extension of time for filing. Here, as stated above, appellant filed its return on October 10, 2017, past the March 15, 2017 due date of the return and the extended due date of September 15, 2017.

Since appellant's return was not filed by the extended due date, no extension existed⁴ and the return was filed seven months late. Accordingly, respondent properly calculated the S corporation late filing penalty of \$504 (i.e., \$18 x 4 shareholders x 7 months) for the 2016 tax year. Appellant does not protest the calculation of the penalties but asserts that they should be abated based upon reasonable cause.

The late filing penalty under R&TC section 19131 will be abated if it is established that the late filing was attributable to reasonable cause and not willful neglect. (R&TC, § 19131(a).) The late filing penalty under R&TC section 19172.5 will be abated if the taxpayer establishes that the late filing was attributable to reasonable cause.⁵ (R&TC, § 19172.5(a).)

For purposes of abatement of the foregoing penalties, reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances.⁶ (*Appeal of Curry* (86-SBE-048) 1986 WL 22783; *Appeal of Tons* (79-SBE-027) 1979 WL 4068.) In other words, a taxpayer must show that the failure to file the return occurred despite the exercise of ordinary business care and prudence. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Tons, supra.*) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 251.) The burden of proof is on the taxpayer to show that reasonable cause exists to support abatement of the penalty. (*Appeal of David A. and Barbara L. Beadling* (77-SBE-021) 1977 WL 3831.) A taxpayer's reliance on an agent, such as an accountant, to file a return by the due date is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. at p.252.)

Here, appellant argues that it has established reasonable cause because it was its preparer's fault in not ensuring its TYE 2016 Form 100S was accepted by FTB by the extended due date of September 15, 2017. Appellant's representative claims she tried to e-file appellant's return on September 13, 2017, but inadvertently failed to actually transmit appellant's

⁴ R&TC section 18604(a) states that "[t]he Franchise Tax Board may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by Part 11 (commencing with Section 23001), in the manner and form as the Franchise Tax Board may determine," and as explained above, the automatic extension period for the tax year at issue in this case was 6 months.

⁵ Showing a lack of willful neglect is not required to abate the R&TC section 19172.5 per-partner, late filing penalty.

⁶ Although there are no formal Board of Equalization decisions or case law decisions interpreting the reasonable cause abatement provision of R&TC section 19172.5, the provisions of R&TC section 19131, allowing for the abatement of the late filing penalty due to reasonable cause, are substantially identical and relate to the same subject matter.

Form 100S and filed it shortly after noticing the return still in her “queue.” Appellant’s representative has not shown that the failure to timely e-file appellant’s return was anything but the result of her own oversight and provided no evidence of the transmission or acknowledgement records for appellant’s TYE 2016 returns. Regardless, appellant had a personal, non-delegable duty to file its return by the original or extended due date and cannot establish reasonable cause by foisting its responsibility to timely file its income tax return on its tax preparer. In the absence of an acknowledgment that a return was transmitted, received, or accepted, 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.

We note that the IRS waived appellant’s 2016 federal penalties. However, the IRS did not abate the federal penalties based on a finding of reasonable cause. Instead, it abated the penalties pursuant to an IRS administrative program called First Time Abate in which the IRS abates penalties if a taxpayer has timely filed returns and paid taxes due for the past three years. California law requires a finding of reasonable cause to abate late filing penalties, and neither the California Legislature nor FTB have adopted a comparable penalty abatement program. As a result, the IRS waiver of the penalty does not provide grounds to abate the penalty under California law.

Appellant has not provided evidence or argument that the late filing of its 2016 tax return was due to reasonable cause and therefore appellant is not entitled to abate the late filing penalty imposed under section 19131 or the per-shareholder late filing penalty imposed under section 19172.5.

Issue 2 – Whether appellant has established that the underpayment of estimated tax penalty imposed under R&TC section 19142 should be abated.

A corporation subject to the tax imposed by Part 11 of 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(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,

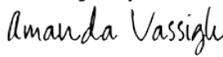
§§ 19142, 19144.) The underpayment of estimated tax penalty is properly imposed where the taxpayer’s installment payments are less than the amounts due at the end of the installment periods. (*Appeal of Bechtel, Inc.* (78-SBE-052) 1978 WL 3525.) There is no general reasonable cause exception to the penalty. (*Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) There are a few limited statutory exceptions to the penalty (see R&TC, § 19147), but there is no argument or evidence that any of these exceptions apply. Appellant did not make any timely estimated payments for TYE 2016. Therefore, the estimated tax penalty was properly imposed, and there is no basis on which to abate the penalty for underpayment of estimated tax.

HOLDINGS

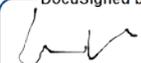
1. Appellant has not shown reasonable cause to abate the late filing penalties imposed under R&TC sections 19131 and 19172.5 for the 2016 tax year.
2. Appellant has not shown that the underpayment of estimated tax penalty imposed under R&TC section 19142 should be abated.

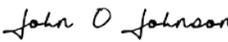
DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:

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 Amanda Vassigh
 Administrative Law Judge

We concur:

DocuSigned by:

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 Andrew J. Kwee
 Administrative Law Judge

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 John O. Johnson
 Administrative Law Judge

Date Issued: 1/28/2020