OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of:	) OTA Case Nos. 18010761 & 18083566
MAXPATIENT	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Tax Appeals Assistance Program (TAAP)
For Respondent:	David Kowalczyk, Tax Counsel
For Office of Tax Appeals:	William J. Stafford, Tax Counsel III

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, MaxPatient (appellant) appeals actions by respondent Franchise Tax Board (FTB) in denying appellant's claims for refund of $432.00, $853.96, and $618.01 for the 2013, 2014, and 2015 tax years, respectively.[1]

Appellant waived its right to an oral hearing and therefore these consolidated appeals are being decided based on the written record.

ISSUES

1. Whether the Office of Tax Appeals (OTA) has jurisdiction to consider appellant's appeal for the 2014 tax year.[2]
2. Whether appellant has established reasonable cause to abate the S corporation late-filing penalties imposed under R&TC section 19172.5 for the 2013 and 2015 tax years, and the late-filing penalty imposed under R&TC section 19131 for the 2015 tax year.

[1] The amounts claimed in appellant's appeal letter of June 26, 2017, are $432.00, $892.86, and $623.99, for the 2013, 2014, and 2015 tax years, respectively. The actual amounts at issue are $432.00, $853.96, and $618.01, for the 2013, 2014, and 2015 tax years, respectively, as further detailed in the opinion below.

[2] As concluded below, OTA does not have jurisdiction over appellant's appeal for the 2014 tax year. Accordingly, the remaining issues will only address appellant's 2013 and 2015 tax years.

3. Whether appellant has established grounds for abatement of the underpayment of estimated tax penalty (estimated tax penalty) for the 2015 tax year.

FACTUAL FINDINGS

2013 Tax Year

1. Appellant, an S corporation, untimely filed its 2013 tax year California S corporation return (Form 100S) on January 15, 2017. After receiving the return, FTB imposed a late-filing penalty of $432.00 under R&TC section 19172.5, plus applicable interest. After paying the penalty and interest in full, appellant filed a timely claim for refund of the penalty amount. FTB denied the claim. Appellant then filed a timely appeal for the 2013 tax year.

2014 Tax Year

2. Appellant untimely filed its 2014 tax year California S corporation tax return on January 18, 2017. After receiving the return, FTB imposed a late-filing penalty of $432.00 under R&TC section 19172.5, a late-filing penalty of $200.00 under R&TC section 19131, a notice and demand penalty of $200.00,[3] and an estimated tax penalty of $21.96, plus applicable interest. Appellant paid the penalties and interest in full on April 13, 2017, and thereafter filed an appeal letter dated June 12, 2017, with the State Board of Equalization (BOE) (the predecessor to OTA) for refund of the penalties. However, at the time appellant filed its appeal for the 2014 tax year with the BOE, FTB had not yet received appellant's 2014 tax year claim for refund and had not issued a notice denying the claim. Appellant's appeal for the 2014 tax year was filed before the beginning of the statutory 90-day period within which to file an appeal following denial of a claim for refund under R&TC section 19324(a).
3. On July 18, 2017, the California Department of Tax and Fee Administration (CDTFA), on behalf of the BOE,[4] sent appellant a letter stating that the BOE did not have

[3] FTB issued a demand to which appellant did not timely respond. The particulars of the demand are not at issue and, therefore, will not be addressed further.

[4] It is our understanding that CDTFA was processing a number of appeal filings during the transition period in which the active appeal cases were eventually transferred from the BOE to OTA.

jurisdiction over appellant's 2014 tax year appeal because FTB had not yet issued a Notice of Action (NOA) denying appellant's claim for refund.

4. On March 8, 2018, FTB received appellant's 2014 tax year claim for refund letter which was dated April 4, 2017.
5. On March 8, 2018 (the same day FTB received the claim for refund), FTB mailed an NOA denying the 2014 tax year claim for refund. The NOA was sent to appellant at its last known address. The NOA stated that appellant had until June 8, 2018, to file an appeal with OTA.
6. In a March 8, 2018 email, the TAAP representative states that he was told by FTB to have "[appellant's CEO] wait for the Denial of Refund letter and to raise an appeal for it."
7. Subsequently, in a letter dated March 16, 2018, FTB informed both appellant and OTA[5] that FTB had issued an NOA dated March 8, 2018, denying appellant's 2014 tax year claim for refund. In that same letter, FTB requested that OTA extend the date for FTB to file an opening brief in relation to appellant's 2013 and 2015 tax years, so that appellant would have time to file an appeal to OTA for the 2014 tax year in relation to the NOA that was issued on March 8, 2018.
8. On March 26, 2018, OTA sent appellant and FTB a letter, deferring the appeal proceedings for the 2013 and 2015 tax years to allow time for appellant to appeal the 2014 tax year.
9. On June 21, 2018, appellant's representative emailed OTA stating that appellant "intends to appeal the 2014 refund denial and also plans to consolidate with 2013 and 2015." OTA responded the same day stating, "Thank you for the information. The appeal is currently deferred for this reason until June 24, 2018."
10. On July 18, 2018, appellant's representative sent an email to OTA stating, "We would like to add 2014 to the appeal with the same basis as 2013 and 2015. We believe FTB has no objection to this." This email was sent 132 days after the date of issuance of the NOA denying appellant's claim for refund.

[5] OTA assumed statutory jurisdiction over appeals from actions of FTB, such as the instant appeal, on January 1, 2018. (Cal. Code Regs., tit. 18, § 30106.)

2015 Tax Year

11. Appellant untimely filed its 2015 California S corporation tax return on January 26, 2017. After receiving the return, FTB imposed a late-filing penalty of $396.00 under R&TC section 19172.5, a late-filing penalty of $200.00 under R&TC section 19131, and an estimated tax penalty of $22.01, plus applicable interest. After paying the penalties and interest in full, appellant filed a timely claim for refund of the penalties, which FTB denied. Appellant then filed a timely appeal for the 2015 tax year.

DISCUSSION

Issue 1: Whether OTA has jurisdiction to consider appellant's appeal for the 2014 tax year.

The record shows that appellant's appeal letter dated June 12, 2017, for the 2014 tax year was filed well before FTB issued its NOA dated March 8, 2018, denying appellant's claim for refund and thus prior to commencement of the 90-day statutory period in which to file an appeal. The record also shows that appellant's email dated July 18, 2018, apparently attempting to resubmit the earlier 2014 tax year appeal and consolidate it with the 2013 and 2015 tax years, was filed after the statutory 90-day period had lapsed on June 8, 2018.

Once FTB sends out a notice denying a taxpayer's claim for refund, a taxpayer who wants to challenge it must file an appeal with OTA *within* 90 days. (R&TC, § 19324(a).) Time limits for submitting an appeal are to be strictly construed and neither party has the power to waive or extend the time limits. (*Appeal of Avril* (78-SBE-072) 1978 WL 3545.)

We begin by addressing the issue of proper notice to appellant of FTB's denial of appellant's claim for refund via mailing of the NOA. It is well-established law that notices sent by FTB to a taxpayer's last known address are presumed to have been received. (R&TC, § 18416; *Appeal of Floria* (83-SBE-003) 1983 WL 15390.) R&TC section 18416 (effective January 1, 2008) provides as follows: (a) unless expressly otherwise provided in this part, any notice may be given by first-class mail postage prepaid; (b) for purposes of this part, any notice mailed to a taxpayer shall be sufficient if mailed to the taxpayer's last known address; (c) the last known address shall be the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to FTB clear and concise written or electronic notification of a different address, or FTB has an address it has reason to believe is the most current address for the taxpayer.

If a taxpayer claims that he or she did not receive the notice, the taxpayer bears the burden of proving the notice was not mailed to the taxpayer's last known address. (See *Grencewicz v. Commissioner*, T.C. Memo. 1990-597.) What is relevant is FTB's knowledge of the taxpayer's last known address, rather than the taxpayer's actual most current address. (See *Reding v. Commissioner*, T.C. Memo. 1990-278, T.C. Memo. 1990-536.) If the taxpayer moves after filing his or her return, the taxpayer must take the necessary steps to ensure receipt of his or her mail. (*Appeal of Schwyhart* (75-SBE-035) 1975 WL 3519.)

Here, the March 8, 2018 NOA was mailed to appellant at an address in Los Angeles, California (appellant's last known address of record per FTB's database), which was used on appellant's 2014 tax return. The appeal file contains no evidence that the NOA was returned by the Post Office as undelivered. There is no evidence in the record showing that appellant provided FTB with a different mailing address before the NOA was issued.[6] In fact, we note that appellant has continued to use the same address in Los Angeles as its address of record in these appeal proceedings. Based on the foregoing facts, we find that appellant was provided with proper notice of the denial of its claim for refund by mailing of FTB's NOA to appellant's address of record, and that the date of such notice was March 8, 2018.

Now that we have established proper notice was provided by issuance of the NOA on March 8, 2018, we turn to appellant's argument that the earlier appeal letter in combination with the later email requesting consolidation shows that appellant timely submitted its appeal. Appellant argues the appeal was timely because its appeal letter dated June 12, 2017, should be considered by OTA as submitted on the first date on which it would have been timely to do so, rather than the earlier date it was actually submitted. As noted above, OTA generally has jurisdiction over an appeal relating to a denial of a refund claim if the taxpayer submits a timely appeal to OTA within 90 days of FTB's denial. (R&TC, § 19324(a).) Here, in the case of appellant's appeal letter dated June 12, 2017, it was submitted to OTA *before* FTB issued its notice denying appellant's claim for refund.

[6] Appellant argues that its representative did not receive the NOA until June 2018. However, there is no evidence in the record indicating that FTB was given clear and concise notice of a change to a different address other than the last-known address as indicated in FTB's records. Appellant's representative was aware that the NOA would be sent to appellant's CEO at the last known address, and not to the representative. In a March 8, 2018 email from the representative, the representative states that he was told by FTB to have "[appellant's CEO] wait for the Denial of Refund letter and to raise an appeal for it." We note that appellant's CEO filed appellant's claim for refund that FTB received on March 8, 2018, using the same address as used on the NOA.

In addressing this situation, we note the statutory language in R&TC section 19324(a), which states that an appeal must be filed "within" the 90-day period beginning with issuance of the denial of a claim for refund by FTB: "[A]t the expiration of 90 days from the mailing of the notice, the Franchise Tax Board's action upon the claim is final unless *within* the 90-day period the taxpayer appeals in writing from the action of the Franchise Tax Board to [OTA]." (Emphasis added). We read the plain meaning of the term "within" as used in the statute as "occurring inside" a particular period of time. Thus, we find that R&TC section 19324(a) requires that, in order to be timely, an appeal must be filed at some point during the 90-day period, neither before nor after, in order for OTA to have jurisdiction to consider the appeal.

The NOA denying appellant's claim for refund was not issued until March 8, 2018, nearly nine months after appellant submitted its appeal. Further, we can find nothing in the record that indicates appellant took any action to resubmit its earlier appeal *within* the 90-day statutory period.

Regarding appellant's email dated July 18, 2018, appellant implies that this communication is essentially a resubmission of its 2014 tax year appeal and requesting it be consolidated with the appeal for tax years 2013 and 2015. Appellant's email states, "We would like to add 2014 to the appeal with the same basis as 2013 and 2015." Appellant's argument is that it did not receive timely notice of FTB's NOA denying appellant's 2014 tax year claim for refund until July 2, 2018, and therefore appellant should be treated as timely submitting its appeal to OTA via its email on July 18, 2018, because it did so within 90 days of the date that appellant asserts it received the NOA – i.e., July 2, 2018 – and not the date of the issuance of the NOA – i.e., March 8, 2018. Notwithstanding this argument, we have previously concluded herein that proper notice of the denial of the claim for refund was given on March 8, 2018. When appellant's email was sent to OTA on July 18, 2018 (132 days from March 8, 2018), it was some 42 days after the 90-day period in which to file an appeal had lapsed. Thus, to the extent the purpose of the email was to resubmit appellant's appeal filed earlier on June 12, 2017, the resubmission of the appeal via email was also not timely.

Appellant further argues that because FTB and OTA were on notice during the 90-day statutory period, as evidenced by FTB's request to OTA to defer proceedings to allow appellant to file an appeal once it issued a denial of appellant's claim for refund, the appeal should be considered by OTA to have been filed during the statutory period in which to file an appeal.

Appellant's rationale under this theory is that once the July 18, 2018 email was sent, albeit outside the 90-day period, it must somehow relate back to the date when FTB and OTA were put on notice of the intent to file an appeal via FTB's request to defer proceedings to allow appellant to file the appeal for the 2014 tax year. Similarly, appellant's representative emailed OTA on June 21, 2018, stating that appellant "intends to appeal the 2014 refund denial." However, we find no legal authority that the statutory requirement to file a written appeal within 90 days can be satisfied merely by notice of the intent to file an appeal during the time in which it is timely to do so. As discussed above, the 90-day period begins when FTB mails a denial of a claim for refund to a taxpayer's last known address on file with FTB. Here, we have concluded that notice of the denial of the claim for refund occurred on March 8, 2018. A written appeal must have been filed within 90 days in order for OTA to hear the appeal. That did not happen in this case.

Appellant also argues that OTA should be estopped from applying the 90-day statutory appeal filing period because appellant's representative did not timely receive the NOA. Equitable estoppel, however, is applied against the government only in rare and unusual circumstances when its application is necessary to prevent a grave injustice. (See *Appeal of Smith* (91-SBE-005) 1991 WL 280345.) The four elements of equitable estoppel are: (1) the government agency must be apprised of the facts; (2) the government agency must intend that the inaccurate representation shall be acted upon; (3) the relying party must be ignorant of the facts; and (4) the relying party must have detrimentally relied upon the representation of the government agency. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725; *Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544.) A taxpayer has the burden of proving that all of the elements of equitable estoppel are present. (*Appeal of Western Colorprint*, *supra*.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn*. (1983) 146 Cal.App.3d 1002, 1010.)

Appellant timely received the denial of the claim for refund, pursuant to the last known address rule. Additionally, in FTB's letter dated March 16, 2018, appellant and its representative were expressly placed on notice that FTB had issued a denial of appellant's claim for refund for the 2014 tax year on March 8, 2018, and that appellant had not yet filed an appeal to OTA for the 2014 tax year. Further, we note that in OTA's subsequent letter dated March 26, 2018, to appellant and its representative, OTA delayed appeal proceedings for appellant's 2013 and 2015 tax years "to allow time for appellant to appeal tax year 2014." However, appellant did not

timely file its appeal to OTA. Accordingly, based on the foregoing letters, we find that appellant and its representative have not demonstrated that they were ignorant of the facts, that there was an inaccurate representation made to appellant, or that there was detrimental reliance. Thus, the doctrine of equitable estoppel is not appropriate to apply in this case.[7]

Accordingly, we find that appellant filed an appeal for the 2014 tax year prior to the beginning of the 90-day statutory period within which to file an appeal, and that appellant then sent its email on July 18, 2018, requesting that the untimely appeal for tax year 2014 be consolidated with the timely appeals for the 2013 and 2015 tax years to OTA after the 90-day statutory period had lapsed. We therefore conclude that no appeal was filed during the statutory period to timely file an appeal with OTA and thus OTA does not have jurisdiction to consider appellant's appeal for the 2014 tax year.

Issue 2: Whether appellant has established reasonable cause to abate the S corporation late-filing penalties imposed under R&TC section 19172.5 for 2013 and 2015 tax years, and the late-filing penalty imposed under R&TC section 19131 for the 2015 tax year.

R&TC section 19172.5 provides that a per-shareholder late-filing penalty is to be imposed when an S corporation fails to file a tax return on or before the time prescribed, unless it is shown that the failure is due to reasonable cause. R&TC section 19131 also provides for imposition of a late-filing penalty for failure to file a return by its due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

To establish reasonable cause, a taxpayer must show that the failure to timely file the return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) In *United States v. Boyle* (1985) 469 U.S. 241, 252, the United States Supreme Court held that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing . . . ." The court, however, did observe

[7] We note that, even though appellant requested an appeal for the 2014 tax year with OTA and the matter was eventually submitted to an OTA panel for consideration, whether OTA has jurisdiction over the 2014 tax year is an issue which an OTA panel has the authority to determine in an opinion. Pursuant to California Code Regulations, title 18, section 30105(c), "[i]f there is an issue regarding the timeliness of the appeal or OTA's jurisdiction to hear the appeal, the appeal may be assigned to a Panel." Therefore, while the appeal for the 2014 tax year was assigned to an OTA panel, it is within our authority as an OTA panel to determine in an opinion whether the appeal to OTA was timely and, as a result, within our jurisdiction.

that reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney with respect to substantive matters of tax law or whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Id*. at pp. 250-251.) If a taxpayer relies on improper advice of an accountant or tax attorney as to a substantive matter of tax law, failing to file a return in reliance on that advice may be considered reasonable cause if two conditions are met: (1) the person relied on is a tax professional with competency in the subject tax law; and (2) the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents. (*Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 315-318.)

Appellant does not dispute that its returns were filed late and that FTB calculated the penalties properly. Appellant argues, however, that the penalties should be abated because it relied upon the advice of a non-tax professional who stated that all of appellant's tax reporting requirements would flow through to its founder's personal tax returns. Appellant also contends that the IRS abated federal penalties and that we should do likewise.

However, appellant has not demonstrated reasonable cause for the late filing of its returns, as appellant relied on the advice of a non-tax professional and has not argued (nor provided any documentation) that it attempted to confirm that advice by researching the issue itself or consulting with a tax professional. Thus, appellant has not demonstrated that it acted as an ordinary and prudent businessperson would have acted. Further, we note that there is no authority to abate penalties based on good filing history (as can the IRS), and the record does not indicate that IRS abated applicable federal penalties for reasonable cause.

Issue 3: Whether appellant has established grounds for abatement of the estimated tax penalty for the 2015 tax year.

A corporation subject to the franchise tax imposed by Part 11 of the R&TC must file a declaration of estimated tax and pay the estimated amount of tax for each income year, and the estimated tax cannot be less than the minimum franchise tax. (See R&TC, §§ 19023, 19025.) The failure to timely pay any estimated tax will subject the taxpayer to the penalty. (*Appeal of Uniroyal, Inc*. (75-SBE-003) 1975 WL 3264.) The law does not contain a reasonable cause or extenuating circumstances exception to the underpayment of estimated tax penalty. (*Appeal of Decoa, Inc*. (76-SBE-032) 1976 WL 4048.)

As noted above, appellant argues that the estimated tax penalty should be abated because it relied upon the advice of a non-tax professional who stated that all of appellant's tax reporting requirements would flow through to its founder's personal tax returns. The law, however, does not provide any reasonable cause exception for abatement of the penalty.

HOLDINGS

1. OTA does not have jurisdiction to consider appellant's appeal for the 2014 tax year.
2. Appellant has failed to show reasonable cause to abate the S corporation late-filing penalties imposed under R&TC section 19172.5 for the 2013 and 2015 tax years, and the late-filing penalty imposed under R&TC section 19131 for the 2015 tax year.
3. Appellant has not established grounds for abatement of the estimated tax penalty for the 2015 tax year.

DISPOSITION

FTB's denials of appellant's claims for refund for the 2013 and 2015 tax years are sustained in full. OTA does not have jurisdiction to consider appellant's appeal for the 2014 tax year.

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Elliott Scott Ewing
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Elliott Scott Ewing
Administrative Law Judge

We concur:

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

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Date Issued: 4/8/2020