

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19034487
PEACH TREE INVESTMENTS, LLC)
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OPINION

Representing the Parties:

For Appellant: Robert Newkirk

For Respondent: Paul L. Kim, Tax Counsel

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Peach Tree Investments, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$1,519.17 for the 1999 tax year.

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

ISSUES

1. Whether the Office of Tax Appeals (OTA) has jurisdiction to decide whether FTB properly assessed the limited liability company (LLC) annual tax and the post-amnesty penalty for 1999.
2. Whether appellant has shown error in FTB's assessment of the late-payment penalty.
3. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

1. Appellant, an LLC, filed articles of organization on October 22, 1999, with the California Secretary of State (SOS), which accepted the articles of organization for purposes of R&TC section 17941(b)(1). Robert Newkirk, appellant's sole owner and representative in this matter, was the organizer on appellant's formation documents.

2. Robert and Lois Newkirk transferred residential rental real property to appellant on December 8, 1999.
3. Appellant did not file a timely California LLC income tax return (Form 568) or make a timely tax payment for 1999.
4. FTB suspended appellant on September 1, 2017, for failure to file a Statement of Information with the California SOS in 2016. Appellant applied for a certificate of revival, and in the process, FTB notified appellant that it needed to file a California income tax return for 1999 because disregarded LLCs organized in California are subject to the LLC annual tax and have a California filing requirement under R&TC section 23038(b)(2)(B)(iii).
5. On September 15, 2018, appellant filed its 1999 California LLC income tax return. Two days later, FTB sent appellant a notice informing appellant that it had an outstanding balance due, and on September 24, 2018, appellant made a payment of \$2,319.17 for the annual LLC tax of \$800, the late-payment penalty of \$200, and interest due.
6. Appellant paid an additional \$170.38 on November 29, 2018, for the post-amnesty penalty, which FTB erroneously omitted in its September 2018 letter regarding appellant's balance due.
7. Appellant filed an FTB Form Reasonable Cause – Business Entity Claim For Refund on January 1, 2019, requesting a refund of \$1,519.17. This amount consists solely of the late-payment penalty and applicable interest. Appellant did not request a refund of the annual LLC tax of \$800 or the post-amnesty penalty of \$170.38.
8. FTB denied appellant's claim for refund of \$1,519.17 in a letter dated January 17, 2019, which specified that it was denying the claim in the amount of \$200 (the amount appellant paid for the late-payment penalty), plus any applicable interest. FTB's refund claim denial letter makes no mention of denying a refund for the annual LLC tax of \$800 or the post-amnesty penalty of \$170.38.
9. Appellant filed a timely appeal.

DISCUSSION

Issue 1 – Whether OTA has jurisdiction to decide whether FTB properly assessed the LLC annual tax and the post-amnesty penalty for 1999.

OTA’s jurisdiction over franchise and income tax appeals is defined by statute, and OTA only has the powers granted to it by statute. (Gov. Code, § 15670 et seq.) “An administrative agency’s jurisdiction depends upon the provisions of the statute, or other act of delegation, from which its powers are derived; and it cannot validly act in excess of the limits of jurisdiction which have been conferred upon it.” (*Appeal of Schillace* (95-SBE-005) 1995 WL 671736.) Indeed, an administrative agency’s authority to act is limited, and it “has no powers except such as the law of its creation has given it.” (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 105, quoting *Conover v. Bd. of Equalization* (1941) 44 Cal.App.2d 283, 287.)

With respect to franchise and income tax matters, OTA’s jurisdiction is generally limited to hearing appeals from an FTB determination denying a protest of a proposed tax deficiency, and from FTB’s denial (or deemed denial) of a taxpayer’s tax refund claim. (See R&TC, §§ 19045-19048, 19324, 19331; Cal. Code Regs., tit. 18, § 30103(a); see also *Appeal of Schillace*, *supra*.) Consequently, as relevant here, if a taxpayer sought to appeal FTB’s denial of a tax refund claim, the taxpayer must have filed a valid refund claim.

In this appeal, appellant requests OTA grant a refund of the annual LLC tax of \$800 and the post-amnesty penalty of \$170.38 that it paid for 1999. However, appellant has not shown that it filed a valid refund claim for the tax and the post-amnesty penalty, and that FTB denied such a claim. Appellant’s refund claim, which is the basis for this appeal, only requests a refund of the amounts paid for the late-payment penalty and interest, and FTB’s denial also is limited in scope to a denial of the late-payment penalty and interest.

A taxpayer’s tax refund claim must “state the specific grounds upon which it is founded.” (R&TC, § 19322.) Indeed, “[t]he claim must set forth in detail each ground upon which a refund or credit is claimed and facts sufficient to apprise the Franchise Tax Board of the exact basis thereof.” (Cal. Code Regs., tit. 18, § 19322(a).) The filing of a refund claim is a “simple, straightforward statutory requirement.” (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* (1991) 235 Cal.App.3d 478, 495.) Courts have held that such a requirement is not necessarily a strict pleading requirement, but akin to a notice requirement – the taxpayer must

have given the government actual notice of the claim and its basis. (*J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 986.)

Here, appellant did not file a valid refund claim for the annual LLC tax or the post-amnesty penalty, and did not give FTB any other actual notice of its desire to claim such a refund. Appellant filed an FTB Form 2924 Reasonable Cause – Business Entity Claim For Refund and sought a refund in the amount of \$1,519.17. This is the amount appellant paid solely for the late-payment penalty and interest. The amount of appellant's refund claim did not include the \$800 LLC annual tax or the \$170.38 post-amnesty penalty.

Additionally, FTB Form 2924 instructs taxpayers to *not* use that form to request a refund of tax,¹ and indeed, appellant never disputed FTB's imposition of the annual LLC tax or the post-amnesty penalty on the form it submitted. Appellant provided no other evidence of giving actual notice of its refund claim of the tax and post-amnesty penalty before filing this appeal. Appellant's appeal letter, in which appellant requested a refund of the tax and post-amnesty penalty for the first time, is not sufficient notice. (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.*, *supra*, 235 Cal.App.3d 478.) Since appellant did not file a valid claim for refund for the tax and the post-amnesty penalty, and did not give FTB any other actual notice prior to filing this appeal, OTA does not have jurisdiction over these matters.

Issue 2 – Whether appellant has shown error in FTB's assessment of the late-payment penalty.

R&TC 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. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.)

Here, appellant did not satisfy its 1999 tax liability until September 2018, which is approximately 18 years and five months after the April 15, 2000 return due date. Appellant does not dispute FTB's calculation of the penalty, and we also find no evidence of error in FTB's calculation.

¹ The post-amnesty penalty does not have a reasonable cause exception, as FTB explains in its Penalty Reference Chart, which is also referenced in the instructions to Form 2924. In addition, OTA's review of a refund claim for a post-amnesty penalty is limited to a taxpayer's contention that FTB failed to properly compute the amount of the penalty. (R&TC, § 19777.5(e).)

Appellant disputes FTB's proposed penalty assessment for several reasons: 1) FTB's proposed assessment was not timely; 2) appellant did not have a 1999 filing requirement;² and 3) appellant had reasonable cause to abate the penalty because it relied on a tax professional's advice.³ However, appellant has not shown that it should prevail on any of these grounds.

First, FTB's proposed assessment on its September 2018 notice was timely. When a taxpayer does not file an income tax return, FTB may propose to assess a penalty "at any time." (R&TC, § 19087(a).) Appellant admitted that it did not file a timely income tax return for 1999. As such, although FTB proposed to assess the late-payment penalty 18 years after the tax return's due date, FTB's assessment was timely. Appellant argues that the "excessive time period" justifies abatement of the tax and penalties, but provides no legal support, and we find none, to support appellant's position.

Second, as a single-member LLC, appellant was a disregarded entity for California income tax purposes, but subject to the LLC annual tax and had a California filing requirement. (R&TC, § 23038(b)(2)(B)(iii).) Under R&TC section 17941(b), an LLC shall pay an annual tax if its articles of organization have been accepted by the California SOS. Although appellant states that the "business had no assets, no employees, no income and no activity in 1999,"⁴ it is uncontroverted that appellant filed its articles of organization with the SOS in October 1999, and consequently, had a California filing requirement pursuant to R&TC section 17941(b).

Third, the late-payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P; *Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause.

² Although OTA does not have jurisdiction to abate the \$800 annual LLC tax, the late-payment penalty is based on appellant's tax liability. Thus, we analyze appellant's tax liability only as it relates to the amount of the late-payment penalty at issue in this appeal.

³ Appellant alleges other purported FTB errors, such as notices sent to the wrong address and unjust enrichment. We reject all such contentions raised by appellant that are not explicitly discussed herein as without merit and/or irrelevant.

⁴ We note that Robert and Lois Newkirk transferred residential rental real property to appellant on December 8, 1999. Thus, appellant did have assets in 1999.

(*Appeal of Risser* (84-SBE-044) 1984 WL 16123.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.)

Taxpayers have a personal and nondelegable duty to file timely tax returns. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247, 251 (*Boyle*).) The nondelegable duty relating to late filing in *Boyle* also applies in the late-payment penalty context. (*Appeal of Berolzheimer* (86-SBE-172) 1985 WL 22860.) Reliance upon the advice of a tax professional on a matter of law, such as whether a tax liability exists or a return is required to be filed, can constitute reasonable cause. (*See Estate of La Meres v. Comm’r* (1992) 98 T.C. 294.) The taxpayer must show that full disclosure was made of the relevant facts and documents to the tax preparer, that the tax preparer was a competent professional with sufficient expertise, and that the taxpayer relied in good faith on the tax preparer’s advice. (*Boyle, supra.*)

Here, appellant states it relied on its tax preparer to prepare “all tax returns for 1999 and beyond.” Appellant’s preparer did not prepare a California tax return for 1999, and so, appellant asserts it had reasonable cause to justify its late payment. However, although appellant has shown that its tax preparer was a competent professional, appellant has not provided sufficient evidence to show that its reliance constitutes reasonable cause. Importantly, appellant failed to show that its preparer had full disclosure of the facts of the situation. There is no evidence in the record that appellant’s preparer knew that appellant filed its articles of organization in October 1999, and therefore, had a California filing requirement. Thus, appellant’s assertions of reasonable reliance are unsupported, and unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Consequently, we find appellant has not shown it had reasonable cause.

Issue 3 – Whether appellant is entitled to interest abatement.

R&TC section 19101 provides that interest shall be assessed upon any portion of the tax not paid on or before the date prescribed for payment. The imposition of interest is mandatory. (R&TC, § 19101; see also *Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty, but rather, it is compensation for the use of money from the time it was required to be paid to the state to the actual date of payment. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) Appellant makes a reasonable cause argument to justify interest abatement; however, there is no reasonable cause exception to the imposition of interest. (*Appeal of Shubert* (79-SBE-161) 1979

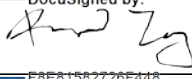
WL 4202.) Appellant makes no other arguments, and so, appellant has not shown that it is entitled to interest abatement. We also find no basis to grant interest abatement.

HOLDINGS

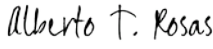
1. OTA does not have jurisdiction to decide whether FTB properly assessed the LLC annual tax and the post-amnesty penalty for 1999.
2. Appellant has not shown error in FTB's assessment of the late-payment penalty.
3. Appellant is not entitled to interest abatement.

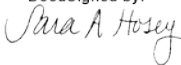
DISPOSITION

We sustain FTB's action on the late-payment penalty and interest in full.

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Richard Tay
Administrative Law Judge

We concur:

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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:

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Sara A. Hosey
Administrative Law Judge

Date Issued: 5/28/2020