

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19074997
BENCHMARKPORTAL, LLC)
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OPINION

Representing the Parties:

For Appellant: Joseph A. Harris, CPA

For Respondent: Leoangelo C. Cristobal, Tax Counsel

For Office of Tax Appeals: Tyler Zepp, Graduate Student Assistant

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, BenchmarkPortal, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$3,965.35 for the 2014 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 to abate the late filing penalty imposed under R&TC section 19131.
2. Whether appellant has established reasonable cause to abate the late payment penalty imposed under R&TC section 19132.
3. Whether appellant has established reasonable cause to abate the per member penalty imposed under R&TC section 19172.

¹ This amount consists of a late filing penalty of \$1,500.00, a late payment penalty of \$200.00, a per member penalty of \$432.00, an underpayment of estimated limited liability company (LLC) fee penalty of \$600.00, and interest of \$1,233.35.

4. Whether appellant has established a legal basis to abate the underpayment of estimated LLC fee penalty imposed under R&TC section 17942.
5. Whether appellant has established a legal basis to abate interest.

FACTUAL FINDINGS

1. For the 2014 tax year, appellant was an LLC classified as a partnership for tax purposes. On January 28, 2019, FTB received appellant's untimely 2014 tax year LLC Return (Form 568).
2. Appellant's return reported a \$6,000 LLC fee, and an \$800 annual LLC tax. Appellant reported that the maximum number of members in the LLC during the year was "2."
3. Since appellant did not file its return in a timely manner, FTB imposed a late filing penalty, a late payment penalty, a per member penalty, an estimated LLC fee underpayment penalty, and interest, all of which totaled \$3,965.35.
4. FTB received two payments from appellant: (1) \$10,157.26 on January 31, 2019; and (2) \$608.09 on February 18, 2019. The two payments made by appellant satisfied its balance due, including the penalties and interest, for the 2014 tax year.
5. On March 15, 2019, FTB received appellant's claim for refund, requesting abatement of penalties and interest imposed due to reasonable cause.
6. In its claim for refund, appellant claims to be the victim of internal fraud. It states that a trusted employee responsible for the payroll, banking, financial, tax filing and account records embezzled over \$800,000 and failed to meet numerous Internal Revenue Service (IRS) and FTB deadlines and filing requirements. Appellant contends that the reason for the late filing of its 2014 tax return was due to the transgressions of the trusted employee, who was responsible for filing appellant's tax returns. Appellant argues that all its members believed that all tax compliance requirements had been fully met with FTB. In its claim for refund, appellant has included a letter from the Santa Barbara Police Department stating that the employee was suspected of stealing checks, forging signatures, and failing to carry out her tax filing responsibilities in order to conceal her embezzlement from appellant.
7. FTB denied appellant's claim for refund on April 10, 2019. This timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant has established reasonable cause to abate the late filing penalty imposed under R&TC section 19131.

In accordance with R&TC section 18633.5, for the tax year at issue, every LLC that is classified as a partnership and that does business in California must file a return by the 15th day of the fourth month following the close of its taxable year.

R&TC section 19131 imposes a penalty for a taxpayer's failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not willful neglect.² (R&TC, § 19131(a).) The amount of the late filing penalty imposed by R&TC section 19131 is five percent of the tax due, after allowing for timely payments, for every month or fraction of a month that the return is late, but the penalty may not exceed 25 percent of the amount of tax due. (*Ibid.*) Appellant does not dispute whether this penalty was properly imposed or computed. Rather, appellant asserts that reasonable cause exists to abate the penalty.

In the case where a taxpayer seeks to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P.)

In *United States v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*), the U.S. Supreme Court established a bright-line rule holding that the "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 did note 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. (*Id.* at p. 250-251.) However, the court concluded that "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a layperson on a lawyer [or an accountant] is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute." (*Id.* at p. 251.) Precedential decisions that bind this agency have consistently applied the precedent set forth in *Boyle*. (See, e.g.,

² FTB is not asserting willful neglect is present in this case with respect to this penalty or the R&TC section 19132 penalty below.

Appeal of Goodwin (97-SBE-003) 1997 WL 258474 [“As a general rule, the responsibility for the mere filing of a tax return is a nondelegable personal duty which cannot be avoided by placing the responsibility with an agent”]; *Appeal of Orr* (68-SBE-010) 1968 WL 1640 [“It is the duty of the taxpayer to see that a timely return is filed, and the delegation of this responsibility will not serve to excuse late filing”].)

Appellant contends that the late filing of its tax return for the 2014 tax year was due to reasonable cause. Appellant argues that it tasked a trusted employee to handle its tax compliance duties, and the employee, while embezzling funds from the appellant, misled appellant to believe that its tax return had been filed in a timely manner in order to cover up her illicit activities. Appellant also contends that, but for the actions of this employee, its return would have been filed in a timely manner.

Courts have consistently applied the rule set forth in *Boyle*, even in circumstances involving the misconduct of an agent or employee of the taxpayer. (See, e.g., *Kimdun Inc. v. United States* (C.D. Cal. 2016) 202 F.Supp.3d 1136 [finding that reliance on payroll service to make payments was not sufficient to establish reasonable cause under *Boyle*, despite a third-party payroll service’s embezzlement of money that was intended to pay the employment tax obligations]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993) 986 F.2d 315 [finding that reliance on taxpayer’s controller to make payments was not sufficient to establish reasonable cause, despite the controller’s alleged intentional concealment of her failure to make payroll tax payments, because the corporation was not “disabled” from timely compliance].) Here, appellant provides no evidence to establish that it was disabled from timely compliance or that the actions of its employee prevented it from timely complying with its statutory duties.

Appellant has failed to substantiate what efforts, if any, it took to verify that its 2014 tax return had been filed in a timely manner. An ordinarily prudent person would have checked e-filing history and acknowledgment records for the return to confirm whether it had been transmitted, received and accepted. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) “It requires no special training or effort to ascertain a deadline and make sure that it is met.” (See *Boyle, supra*, 469 U.S. 241, 252.) Ultimately, it is the taxpayer’s duty to see that its tax return is filed in a timely manner, and the delegation of this responsibility will not serve to excuse late filing. (*Appeal of Orr, supra*.) Therefore, appellant’s reliance on its employee to

timely file its tax return for the 2014 tax year does not constitute reasonable cause to abate the late filing penalty.

Issue 2 - Whether appellant has established reasonable cause to abate the late payment penalty imposed under R&TC section 19132.

In accordance with R&TC section 19132, if a taxpayer does not pay the amount due on its tax return by the due date, FTB will impose a penalty for the late payment of tax. This penalty consists of the sum of two parts. These two parts are an underpayment penalty equal to five percent of the unpaid tax, and a monthly penalty equal to one half of a percent of the unpaid tax for each month (or part of a month) that the tax remains unpaid. (R&TC, § 19132(a)(2)(A)-(B).) Furthermore, when the late filing penalty has already been imposed, the late payment penalty is reduced by the amount of the late filing penalty. (R&TC, § 19132(b).) The sum of these two penalties may not exceed 25 percent of the total unpaid tax. (R&TC, § 19132(a)(3).) Appellant does not contest whether the late payment penalty was properly imposed or computed.

The late payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a).) To establish reasonable cause for the late payment of tax, the 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 Sleight* (83-SBE-244) 1983 WL 15615.) The taxpayer bears the burden of proving reasonable cause exists. (*Ibid.*)

Here, appellant's argument is the same as its argument for the previous issue. Appellant has failed to substantiate what efforts, if any, it took to verify that its 2014 tax payment had been made in a timely manner. Reasonably prudent taxpayers exercising due care and diligence would monitor their bank account and quickly ascertain whether payments were being made to the proper taxing authorities. (*Appeal of Scanlon*, 2018-OTA-075P.) For this reason, and the explanation above, we find that appellant has not shown reasonable cause to abate the late payment penalty.

Issue 3 - Whether appellant has established reasonable cause to abate the per member penalty imposed under R&TC section 19172.

R&TC section 19172 provides that if an LLC taxpayer classified as a partnership fails to file a tax return by the due date of the return, FTB shall also impose a per member penalty. This

per member penalty is equal to \$18 per month (or part of a month) that the return was unfiled (not to exceed 12 months), unless it can be shown that failure is due to reasonable cause. (R&TC, § 19172(a)(2).)

Here, appellant's return was filed over 12 months late and the LLC's maximum number of members was two. Thus, FTB imposed a \$432 penalty. Appellant does not dispute whether this penalty was properly imposed or computed. Instead, appellant asserts reasonable cause exists to abate the penalty, and makes the same argument as it does for the first issue section of this opinion. As stated above, appellant has not substantiated what efforts, if any, it took to verify that its 2014 tax return had been timely filed. Furthermore, it is the taxpayer's duty to see that its tax return is filed in a timely manner; the delegation of this responsibility will not serve to excuse its late filing. For these reasons, as explained above, we find that appellant has not shown reasonable cause to abate the per member penalty.

Issue 4 - Whether appellant has established a legal basis to abate the underpayment of estimated LLC fee penalty imposed under R&TC section 17942.

In accordance with R&TC section 17942, an LLC fee is imposed based on total California source income of LLCs that are doing business in California. Payment of this fee is required on or before the 15th day of the sixth month of the taxable year. (R&TC, § 17942(d)(1).) The statute also imposes an underpayment of estimated LLC fee penalty equal to ten percent of the unpaid portion of the LLC fee. (R&TC, § 17942(d)(2).) The statute does not provide for a reasonable cause exception to imposition of the penalty. The only defense authorized by statute is the safe harbor provision, which provides that the penalty will not be imposed if the estimated LLC fee payment is equal to or exceeds the LLC fee due for the prior tax year. (R&TC, § 17942(d)(2).) Here, appellant ultimately owed a \$6,000 LLC fee that needed to be paid on or before June 15, 2014. Appellant failed to pay the fee on time, and timely payments of zero cannot equal or exceed the LLC fee due for the prior year; therefore, FTB properly imposed a \$600 penalty. Since appellant only raised reasonable cause as a defense to the penalty, and FTB otherwise properly imposed the penalty, appellant has not established a legal basis for abatement of the penalty.

Issue 5 - Whether appellant has established a legal basis to abate interest.

If any amount of the tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) “Interest is not a penalty but is compensation for the taxpayer’s use of money which should have been paid to the state.” (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, *supra*.) Unlike R&TC sections 19131, 19132, and 19172, there is no reasonable cause exception to the imposition of interest. To obtain relief from interest, appellant must qualify under either R&TC section 21012 or 19104.

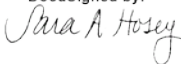
Here, the relief of interest under R&TC section 21012 is not relevant in this case, as FTB did not provide appellants with any written advice. In addition, appellant has not alleged, and the evidence does not indicate, that interest should be abated pursuant to R&TC section 19104 due to an unreasonable error or delay by an officer or employee of FTB in performing a ministerial or managerial act. Appellant did not pay its taxes for the 2014 tax year until 2019. This fact is undisputed, and appellant provides no facts or arguments to show that FTB’s interest assessment was improper. Therefore, we find no grounds to support an abatement of interest.

HOLDINGS


1. Appellant has not established reasonable cause to abate the late filing penalty imposed under R&TC section 19131.
2. Appellant has not established reasonable cause to abate the late payment penalty imposed under R&TC section 19132.
3. Appellant has not established reasonable cause to abate the per member penalty imposed under R&TC section 19172.
4. Appellant has not established a legal basis to abate the underpayment of estimated LLC fee penalty imposed under R&TC section 17942.
5. Appellant has not established a legal basis to abate interest.

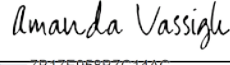
DISPOSITION

FTB’s action denying appellant’s refund claim is sustained.

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 Sara A. Hosey
 Administrative Law Judge

We concur:

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 Josh Lambert
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

Date Issued: 4/16/2020