

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19105349
WITMAN ENTERPRISES, LLC)
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OPINION

Representing the Parties:

For Appellant: S. Witman

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Oliver Pfof, Tax Counsel

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Witman Enterprises, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$914.06 for the 2016 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 is liable for the partnership late-filing penalty imposed under R&TC section 19172.
2. Whether appellant is liable for the late payment penalty imposed under R&TC section 19132.

FACTUAL FINDINGS

1. Appellant is a limited liability company (LLC) that is classified as a partnership for federal and California income tax purposes.
2. On May 13, 2016, FTB received a check from appellant for \$800 dated May 11, 2016, as

¹This amount consists of a late-filing penalty of \$864 and a late payment penalty of \$44, plus interest of \$6.06.

reflected on a printout of FTB's records.

3. FTB's records show that on April 6, 2017, an attempt was made to electronically file appellant's 2016 return, but that FTB rejected the submission because, although the transmitter's software indicated that there were eight documents in the submission, FTB computed only six documents.
4. On February 21, 2019, FTB issued appellant a notice, Payment Received - Missing Tax Return (FTB Form 765), which informed appellant that FTB received and applied appellant's payment of \$800 for the 2016 tax year but could not locate appellant's 2016 return.
5. On March 12, 2019, FTB received from appellant a partially completed page 4 of FTB Form 765 in which appellant alleged it timely filed its 2016 return on March 27, 2017, and listed its California Secretary of State file number.
6. Also on March 12, 2019, FTB received appellant's unsigned 2016 Limited Liability Company Return of Income (Form 568), bearing a date of March 27, 2017. The return states that appellant's tax year ended on December 31, 2016, and appellant had a maximum of four members at any time during 2016.
7. FTB accepted appellant's 2016 tax return as filed but imposed a late-filing penalty of \$864 pursuant to R&TC section 19172 and a late payment penalty of \$44 pursuant to R&TC section 19132, plus interest of \$6.06. The late payment penalty of \$44 is the sum of an underpayment penalty of \$40 and a monthly penalty of \$4, both of which are based on the untimely paid \$800 annual LLC tax.
8. On June 18, 2019, FTB issued appellant a Notice of Balance Due, crediting appellant the payment of \$800 received on May 13, 2016, resulting in a balance due of \$914.06.
9. Appellant paid FTB the balance due of \$914.06 by check on July 1, 2019.
10. On July 15, 2019, FTB received appellant's claim for refund. FTB denied appellant's claim for refund on September 19, 2019.
11. Appellant timely filed this appeal.

DISCUSSION

Issue 1. Whether appellant is liable for the partnership late-filing penalty imposed under R&TC section 19172.

Every LLC that is classified as a partnership for California tax purposes that is doing business in California, organized in California, or registered with the California Secretary of State must file a tax return on or before the 15th day of the third month following the close of the tax year. (R&TC, § 18633.5.) An LLC is provided an automatic extension to file, which is six months after the original filing date, so long as the return is filed within those six months. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.)

R&TC section 19172 imposes a late-filing penalty when a partnership (or an LLC classified as a partnership) fails to file a return when due. The penalty is computed at \$18 multiplied by the number of partners (or LLC members) during any part of the tax year for each month, or fraction thereof, that the return is late, up to a maximum of 12 months. (R&TC, § 19172(a)(2), (b).)

Here, appellant was an LLC classified as a partnership for California income tax purposes during the 2016 tax year. As indicated on appellant's 2016 return, appellant was registered with the California Secretary of State and had a December 31, 2016 taxable year-end. Appellant was therefore required to file a 2016 return by March 15, 2017, with an extended due date of September 15, 2017. We find, however, that FTB's records indicate appellant untimely filed its return on March 12, 2019, and not on March 27, 2017, as appellant alleges without any documentary support. In addition, appellant reported on its 2016 return that it had four members during the 2016 tax year. FTB thus properly imposed a late-filing penalty of \$864 (\$18 x 4 members x 12 months).

The late-filing penalty, however, may be abated if the taxpayer establishes that the late filing was due to reasonable cause. (R&TC, § 19172(a)(2).) For penalty abatement purposes, reasonable cause exists when a taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P; *Appeal of Curry* (86-SBE-048) 1986 WL 22783.) A taxpayer's reliance on an agent, such as a tax preparer, to timely file its return does not excuse the taxpayer's obligation to file timely and does not constitute reasonable cause for the late filing of a return. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252.) "In the absence of an acknowledgement

that a return was transmitted, received, or accepted, an ordinarily prudent person would have its e-filing history and acknowledgement records for [its] return to confirm whether [the return] had been transmitted, received, and accepted.” (*Appeal of Auburn Old Town Gallery, LLC, supra*, citing *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.)

Appellant’s tax preparer attempted to electronically file its 2016 return on April 6, 2017, but FTB rejected the transmission. Approximately two years later, appellant filed its 2016 return on March 12, 2019, in response to FTB Form 765, which FTB accepted. Appellant contends the late-filing penalty should be abated or assessed to its tax preparer because appellant relied on its tax preparer who represented to appellant that its 2016 return had been filed. However, appellant has not substantiated what efforts, if any, it took to verify that its 2016 return had been filed timely. Although appellant relied on the representation of its tax preparer that a 2016 return was filed, the tax preparer failed to complete the transmission attempted on April 6, 2017. Consequently, appellant has not established reasonable cause for the late filing of its 2016 return because reliance on its tax preparer does not constitute reasonable cause.

Issue 2. Whether appellant is liable for the late payment penalty imposed under R&TC section 19132.

An LLC registered with the California Secretary of State must pay an annual LLC tax of \$800 on or before the 15th day of the fourth month of the tax year. (R&TC, § 17941(b)(1), (c).) R&TC section 19132 imposes a late payment penalty on an LLC that fails to pay the LLC tax of \$800 by the due date. The late payment penalty is the sum of the following: an underpayment penalty equal to five percent of the unpaid tax, plus a monthly penalty equal to 0.5 percent of the unpaid tax for each month, or fraction thereof, the tax is unpaid. (R&TC, § 19132(a)(2)(A)-(B).)

Appellant is registered with the California Secretary of State and was therefore required to pay its annual LLC tax of \$800 on or before April 15, 2016. Appellant contends it made a timely payment of tax, stating it paid its “2016 taxes of \$800.00 on time in March 2017.” Appellant appears to assume, incorrectly, that this tax was due on or before the 15th day of the fourth month following the *close* of the 2016 tax year, rather than on or before the 15th day of the fourth month after the *beginning* of the 2016 tax year. Appellant otherwise failed to produce evidence supporting its contention that it timely paid the annual LLC tax. In contrast, FTB produced a copy of appellant’s check dated May 11, 2016, made payable to FTB in the amount of \$800 and a printout of FTB’s record that shows it received appellant’s 2016 payment of \$800

on May 13, 2016. We thus conclude that FTB properly imposed the late payment penalty because appellant failed to timely pay its annual LLC tax of \$800.

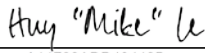
Lastly, the late payment penalty may be abated if appellant shows that the failure to make a timely payment of tax is due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) However, appellant did not argue or provide evidence demonstrating that the late payment of the annual LLC tax was due to reasonable cause. Rather, appellant merely contends that it timely paid the annual LLC tax by March 2017. Consequently, appellant has not established that it is entitled to the abatement of the late payment penalty.

HOLDINGS

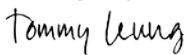
1. Appellant is liable for the partnership late-filing penalty imposed under R&TC section 19172.
2. Appellant is liable for the late payment penalty imposed under R&TC section 19132.


DISPOSITION

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

DocuSigned by:

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 Huy "Mike" Le
 Administrative Law Judge

We concur:

DocuSigned by:

 0C90542BE88D4E7...
 Tommy Leung
 Administrative Law Judge

DocuSigned by:

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 Keith T. Long
 Administrative Law Judge

Date Issued: 8/12/2020