

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Consolidated Appeals of: ) OTA Case Nos. 18073424 and 18093788  
RYAN MICHAEL DARLING, A )  
PROFESSIONAL CORPORATION; AND )  
R. DARLING )  
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**OPINION**

Representing the Parties:

For Appellants: David F. Miles, EA

For Respondent: Jean M. Cramer, Tax Counsel IV

For Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellants Ryan Michael Darling, a professional corporation (the Corporation), and R. Darling appeal respondent Franchise Tax Board’s (FTB) denial of their claims for refund for tax years 2012 through 2016 for the Corporation and tax years 2013 through 2016 for R. Darling.

Appellants waived their right to an oral hearing. Therefore, the consolidated matters are decided based on the written record.

**ISSUES**

1. Whether the Corporation’s claim for refund for 2012 or 2013 is barred by the statute of limitations.
2. Whether the Corporation is entitled to abatement of the late-filing penalties imposed under R&TC section 19131.
3. Whether the Corporation is entitled to abatement of the S corporation late-filing penalties imposed under R&TC section 19172.5.
4. Whether the Corporation is entitled to abatement of the estimated tax penalties.
5. Whether R. Darling is entitled to abatement of the late-filing penalties.

6. Whether R. Darling is entitled to abatement of the late-payment penalties.
7. Whether R. Darling is entitled to relief from the notice and demand penalties (demand penalties).
8. Whether R. Darling is entitled to abatement of the estimated tax penalty.
9. Whether R. Darling has established a basis for the abatement of the filing enforcement cost recovery fees (CRF).

### FACTUAL FINDINGS

#### The Corporation

1. On or about January 27, 2010, R. Darling incorporated the Corporation and began to practice law as a sole practitioner. The Corporation did not file timely returns for 2012, 2013, 2014, 2015, and 2016. On November 1, 2013, FTB suspended the Corporation for its failure to file a return and pay tax due for 2011.<sup>1</sup> On March 21, 2017, FTB reactivated the Corporation's corporate status.

#### 2012

2. On September 15, 2016, the Corporation filed an untimely 2012 California S corporation Franchise or Income Tax Return (S corp Return), which is based on a calendar year. FTB accepted the late-filed return as filed but imposed an S corporation late-filing penalty of \$216, a late-filing penalty of \$200, and an estimated tax penalty of \$23.58. The Corporation made two payments on January 6, 2017, and on February 17, 2017, which satisfied the total amount due.

#### 2013

3. On September 15, 2016, the Corporation filed an untimely 2013 S corp Return. FTB accepted the Corporation's return as filed and decreased the self-assessed, late-filing penalty to \$363.75, imposed an S corporation late-filing penalty of \$216, and increased the self-assessed estimated tax penalty to \$30.09, plus applicable interest. On February 17, 2017, the Corporation paid \$2,238.30, which satisfied the total amount due.

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<sup>1</sup> FTB's opening brief asserts that it suspended the Corporation from November 1, 2013, through March 20, 2017, but did not submit supporting evidence. We accept that assertion as the Corporation did not dispute it.

2014

4. On September 26, 2016, the Corporation filed an untimely 2014 S corp Return. FTB accepted the return as filed and decreased the self-assessed, late-filing penalty to \$399.75, imposed an S corporation late-filing penalty of \$216, and increased the self-assessed estimated tax penalty to \$32.67, plus applicable interest. On February 17, 2017, the Corporation paid \$2,373.11, which satisfied the total amount due. An attached Schedule K-1 shows that R. Darling, the 100-percent shareholder, received distributions of \$102,432 during 2014.

2015

5. On September 26, 2016, the Corporation filed an untimely 2015 S corp Return. FTB accepted the return as filed and increased the self-assessed late-filing penalty to \$423.25, imposed an S corporation late-filing penalty of \$126, and increased the self-assessed estimated tax penalty to \$34.47, plus applicable interest. On February 17, 2017, the Corporation paid \$2,391.79, which satisfied the total amount due. An attached Schedule K-1 shows that R. Darling, the 100-percent shareholder, received distributions of \$109,371 during 2015.

2016

6. On September 6, 2017, the Corporation filed an untimely 2016 S corp Return. FTB accepted the return as filed and imposed an S corporation late-filing penalty of \$108, a late-filing penalty of \$375, an estimated tax penalty of \$33.88, and applicable interest. The Corporation made three payments, one on September 7, 2017, and two on February 16, 2018, which satisfied the total amount due of \$2,062.13. An attached Schedule K-1 shows that R. Darling, the 100-percent shareholder, received distributions of \$97,732 during 2016.

Claims for Refund

7. On March 29, 2018, the Corporation filed claims for refund for its 2012, 2013, 2014, 2015, and 2016 tax years. The Corporation claimed that it had reasonable cause for the failure to timely file its returns and pay its taxes because the sole shareholder, R. Darling, suffered substantial stress and disruption to both his professional and personal life, based

on his termination from his father's law practice and an extended fight for custody of his son.

8. FTB denied the Corporation's claims for refund for 2012 and 2013 because they were received after the expiration of the relevant statute of limitations. FTB denied the Corporation's claims for refund for 2014, 2015 and 2016, asserting that the information provided failed to establish reasonable cause for the abatement of the penalties.
9. The Corporation filed this appeal.

#### R. Darling

##### 2013

10. R. Darling did not file a California personal income tax return for the 2013 taxable year. On March 5, 2015, FTB issued a Demand for Tax Return (demand notice), which stated that it had received information from the State Bar of California that R. Darling had an active professional/business license and that he had received income from Bank of America. The demand notice required that R. Darling file a return, provide FTB with a copy of the return if already filed, or explain why there was no filing requirement, by April 8, 2015.
11. R. Darling failed to respond to the demand notice by the due date. FTB estimated his income and issued a Notice of Proposed Assessment (NPA) dated May 11, 2015, which, as relevant here, proposed a late-filing penalty of \$1,806, a demand penalty of \$1,806, a CRF of \$76, and applicable interest. R. Darling failed to timely protest the NPA, and it became a final liability on July 10, 2015.
13. Subsequently, FTB took collection action and recorded a payment of \$11,597.81 on July 29, 2016, that satisfied the amounts due in full for 2013.
15. On September 15, 2016, R. Darling filed a 2013 Form 540, on which he reported tax due of \$4,683.
16. FTB accepted the return as filed and reduced the late-filing penalty to \$1,170.75 and the demand penalty to \$1,170.75, imposed a CRF of \$76, and recalculated interest, which resulted in an overpayment. FTB transferred the overpayment to appellant's 2014 account and applied it to the balance due.

17. FTB produced copies of a 2012 Request for Tax Return issued to R. Darling on January 30, 2014, and an NPA dated May 12, 2014, to support the imposition of the demand penalty.

#### 2014

18. R. Darling did not file a return for the 2014 taxable year. On February 9, 2016, FTB issued a demand notice, which stated that it had received information from the State Bar of California that R. Darling had an active professional license. The demand notice required that R. Darling file a return, provide FTB with a copy of the return if already filed, or explain why there was no filing requirement, by March 16, 2016.
20. R. Darling failed to respond to the demand notice by the due date. FTB estimated his income and issued an NPA dated April 11, 2016. As relevant here, the NPA proposed a late-filing penalty of \$1,851.50, a demand penalty of \$1,851.50, a CRF of \$79.00, and applicable interest.
21. On September 15, 2016, R. Darling filed a 2014 Form 540 and self-assessed penalties.
22. FTB accepted the return as filed and reduced the late-filing penalty to \$1,359 and the demand penalty to \$1,359, imposed a CRF of \$79, and recalculated interest. FTB transferred R. Darling's 2012 and 2013 overpayments to the 2014 account, which satisfied the balance due.
23. FTB produced copies of a 2012 demand notice issued to R. Darling dated January 30, 2014, and an NPA dated May 12, 2014, to support the imposition of the demand penalty.

#### 2015

24. On September 15, 2016, R. Darling timely filed a 2015 Form 540. R. Darling did not include a payment with the return.
25. FTB issued a Notice of Tax Return Change, which accepted the return as filed and imposed a late-payment penalty of \$478.32, plus applicable interest. Thereafter, FTB applied a 2012 overpayment to the balance due and sent a Collection Status Notice showing the remaining balance due, which R. Darling paid on December 5, 2016.

2016

26. On September 6, 2017, R. Darling timely filed a 2016 Form 540, which self-assessed an estimated tax penalty of \$143, plus applicable interest. R. Darling remitted a payment of \$7,640 with the return.
27. FTB accepted R. Darling's 2016 return as filed and imposed a late-payment penalty of \$515.78 and estimated tax penalty of \$143.09, plus applicable interest. R. Darling's \$7,640 payment satisfied the 2016 taxable year liability in full.

Claims for Refund

28. R. Darling filed claims for refund dated March 28, 2018, for 2013, 2014, 2015, and 2016, which requested that all penalties be abated in full.<sup>2</sup> The reasonable cause claimed by the Corporation and by R. Darling are identical.
29. FTB denied the claims for refund, asserting that the information provided failed to establish reasonable cause for the abatement of penalties.
30. R. Darling filed this appeal.

DISCUSSIONIssue 1 – Whether the Corporation's claim for refund for 2012 or 2013 is barred by the statute of limitations.

The general statute of limitations for filing a refund claim is set forth in R&TC section 19306. Under that statute, the last day to file a claim for refund is the *later* of:

1. Four years from the date the return was filed, if filed within the extended due date;
2. Four years from the due date of the return, without regard to extensions; or
3. One year from the date of the overpayment.

For the 2012 and 2013 tax years, the Corporation untimely filed its S corp Returns after the extended due date. Therefore, under the four-year statute of limitations (without regard to extensions), the Corporation had until March 15, 2017 (four years from the original due date of March 15, 2013) for the 2012 tax year, and March 15, 2018 (four years from the original due

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<sup>2</sup> R. Darling initially appealed penalties assessed for the 2012 taxable year. For that year, FTB appears to have undertaken collection actions resulting in payments totaling \$9,695.53. When R. Darling filed his 2012 return on September 15, 2016, FTB transferred the resulting overpayment in part to R. Darling's 2014 taxable year, and the remainder to his 2015 taxable year pursuant to R&TC section 19108. As this action constituted a grant of R. Darling's claim for refund, the Office of Tax Appeals (OTA) lacks jurisdiction to consider the claim for that year.

date of March 15, 2014) for the 2013 tax year to file timely refund claims. However, the Corporation's refund claims were untimely because they were filed on March 29, 2018.

For the one-year statute of limitations, payments for the 2012 tax year were received by FTB on January 6, 2017, and on February 17, 2017. Full payment for the 2013 tax year was received on February 17, 2017. Therefore, the one-year statute of limitations expired for the first 2012 payment on January 6, 2018, and for the second 2012 payment and the 2013 payment on February 17, 2018. Thus, the Corporation's 2012 and 2013 claims for refund filed on March 29, 2018, were untimely.

Accordingly, the Corporation's claims for refund for 2012 and 2013 are time barred, and we need not address whether the penalties imposed for these years may be abated.

Issue 2 – Whether the Corporation is entitled to abatement of the late-filing penalties imposed under R&TC section 19131.

R&TC section 19131 imposes a penalty for the 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 due to willful neglect. (R&TC, § 19131(a).) The late-filing penalty is computed at five percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (*Ibid.*) Here, it is undisputed that FTB properly imposed and computed the late-filing penalty. Therefore, the only issue is whether the Corporation has demonstrated reasonable cause for the late filing.

To establish reasonable cause for the failure to timely file a return, a taxpayer must show that it acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) 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* (79-SBE-027) 1979 WL 4068.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*Appeal of Miller* (86-SBE-057) 1986 WL 22789.) Ignorance of the law does not show reasonable cause for failing to file a timely return. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

Illness and other personal difficulties may be considered reasonable cause if the taxpayer presents credible and competent proof that it was continuously prevented from filing a tax return or paying the tax. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of James* (83-

SBE-009) 1983 WL 15396; *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) The taxpayer must show that the difficulties experienced prevented the filing of a timely return. (*Appeal of Duff* (2001-SBE-007) 2001 WL 1674987.) If those difficulties merely made competing demands on the taxpayer's time, such that the taxpayer could have timely met the obligation but chose not to, then the taxpayer has not shown reasonable cause. (*Appeal of Bryant* (83-SBE-180) 1983 WL 961596.) A taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not excuse the failure to file timely. (*Watts v. Commissioner*, T.C. Memo 1999-416.) A mental or emotional disorder does not excuse a failure to file timely returns unless it is shown that the disorder rendered the taxpayer incapable of exercising ordinary business care and prudence during the period in which the failure to file occurred. (*Wilkinson v. Commissioner*, T.C. Memo 1997-410.)

Here, the Corporation failed to timely file its 2014, 2015, and 2016 returns, but contends it had reasonable cause because its principal, R. Darling, was litigating an extended custody fight for his son and the termination of his employment in 2010. The Corporation asserts that as a result of the custody fight, R. Darling was "suffering from depression, working inconsistently and regularly having to make choices like paying his child custody attorney over other expenses." While the Corporation produced copies of documents related to the custody litigation and the resulting legal fees (which were not provided as part of the appeal file), the Corporation does not explain how such events continuously prevented the Corporation from timely filing its 2014, 2015, and 2016 returns. (*Appeal of Halaburka, supra; Appeal of James, supra; Appeal of Seaman, supra.*) In short, the Corporation has failed to show that a custody battle, no matter how emotionally draining and damaging for its principal, continuously prevented the Corporation from timely filing its returns for three separate taxable years.

Moreover, there is substantial evidence that the Corporation earned significant revenues during 2014, 2015, and 2016. According to the Schedules K-1 (100S) for R. Darling that were filed with the S corp Returns, the Corporation made distributions to its sole shareholder of \$102,432 in 2014, \$109,371 in 2015, and \$97,732 in 2016. The fact that both the Corporation and R. Darling received significant income throughout this period contradicts the Corporation's assertion that it was continuously prevented from filing returns for 2014, 2015 and 2016. Instead, it appears that the Corporation could have timely met its tax obligations but chose



instead to focus on the practice of law and on R. Darling's child custody litigation, which does not constitute reasonable cause. (See *Appeal of Bryant, supra.*)

Finally, the Corporation contends that it has complied with all filing requirements for previous years and currently has a good compliance record. We note that the Internal Revenue Service (IRS) waived the Corporation's 2014 federal late-filing penalty, but it did not do so based on a finding of reasonable cause. Instead, it abated the penalty pursuant to an IRS administrative program called First Time Abatement in which the IRS relieves 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 the late-filing penalty, and neither the California Legislature nor FTB has adopted a comparable penalty abatement program. As a result, the IRS waiver cannot be used as a basis to abate the late-filing penalties at issue here. Accordingly, the Corporation is not entitled to abatement of the late-filing penalties.

Issue 3 – Whether the Corporation is entitled to abatement of the S corporation late-filing penalties imposed under R&TC section 19172.5.

R&TC section 19172.5 imposes a per-shareholder, late-filing penalty on an S corporation that fails to timely file a return, unless it is shown that the failure was due to reasonable cause. Here, the Corporation does not dispute whether this penalty was properly imposed or computed. Rather, it asserts reasonable cause exists to abate the penalty. However, the Corporation presents the same arguments to contend reasonable cause exists to abate this penalty as it does for the late-filing penalty under R&TC section 19131, discussed above. Accordingly, for the reasons expressed above, the evidence does not demonstrate the Corporation's failure to timely file was due to reasonable cause.<sup>3</sup>

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<sup>3</sup> The concurring and dissenting opinion on appeal provides a position that the penalty under R&TC section 19131 should not be imposed when the penalty under R&TC section 19172.5 is also imposed. Article III, section 3.5 of the California Constitution provides that an administrative agency, such as OTA, has no power to refuse to enforce a statute on the basis that enforcement of the statute is prohibited by federal law or regulations unless there is a determination from an appellate court declaring that the statute should not be enforced. While the minority opinion provides a thorough analysis in support of its position, the fact of the matter is that a simple reading of R&TC section 19131 and R&TC section 19172.5 show that both sections, by their unambiguous terms, each provide for a penalty under the facts of this appeal. We follow the clear language of the statutes and, as there is no appellate court authority stating that either penalty should not be enforced under these facts, we find that both apply here.

Issue 4 – Whether the Corporation is entitled to abatement of the estimated tax penalties.

A corporation subject to the franchise tax must pay the estimated tax for each year on or before the 15th day of the fourth month, which may not be less than the minimum franchise tax. (R&TC, §§ 19023, 19025.) A corporation that underpays its estimated tax is liable for a penalty equal to a specified rate of interest applied to the amount of the underpayment. (R&TC, §§ 19142, 19144.) There is no reasonable cause exception to this penalty. (*Appeal of Scanlon*, 2018-OTA-075P; *Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) There are a few limited statutory exceptions to the estimated tax penalty. (See R&TC, §§ 19147-19148.)

There is no dispute that the Corporation failed to make any 2014, 2015, or 2016 estimated payments by the due dates. The Corporation advances the same reasonable cause arguments it makes with respect to the late-filing penalties, which do not provide a basis for abating the estimated tax penalties. The Corporation does not argue, and there is no evidence to indicate, that any of the statutory exceptions to the estimated tax penalty apply. Therefore, FTB properly imposed the estimated tax penalties.

Issue 5 – Whether R. Darling is entitled to abatement of the late-filing penalties.

As discussed above, R&TC section 19131 provides that FTB shall impose a late-filing penalty when a taxpayer fails to file a return on or before its due date or extended due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect.

R. Darling raises the same arguments as the Corporation for the failure to timely file 2013 and 2014 personal income tax returns; namely, that he was involved in a long-term custody fight and that he suffered from depression and overwork that prevented him from filing until 2016. Like the Corporation, R. Darling has failed to explain how the custody litigation and the resulting emotional distress prevented timely filing. R. Darling's Schedules K-1 show that he received substantial compensation for the performance of legal services during 2013 and 2014, which belies the contention that R. Darling was continuously preoccupied with the child custody litigation and had no time to attend to his personal taxes.

Finally, R. Darling contends that he complied with all tax obligations for previous years and currently has a good record. R. Darling's 2013 federal account transcript shows that the IRS imposed a late-filing penalty and removed the penalty on the same day. As discussed above, FTB does not have a first-time abatement policy, and we lack the authority to abate a late-filing

penalty based on a good compliance history. Therefore, we find that R. Darling has failed to establish reasonable cause for the abatement of the late-filing penalty for 2013 or 2014.

Issue 6 – Whether R. Darling is entitled to abatement of the late-payment penalties.

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 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.) The late-payment penalty may be abated if a taxpayer can show 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).) Reasonable cause exists if it can be shown that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons, supra*; *Appeals of Cummings* (60-SBE-040) 1960 WL 1418.)

Here, it is undisputed that R. Darling's 2015 tax payment was due April 15, 2016, but was not fully paid until December 5, 2016. Likewise, R. Darling's 2016 tax payment was due April 15, 2017, but was not paid until September 6, 2017. R. Darling raises the same reasonable cause arguments as the Corporation with respect to the late-payment penalties. Although R. Darling conceded that by 2016 his mental state had improved, he does not explain how he was prevented from timely paying his 2015 or 2016 tax liabilities that were due during and subsequent to 2016.

For the reasons noted above, we lack the authority to abate the late-payment penalty based on a good compliance history, and R. Darling has not shown reasonable cause to abate the late-payment penalties for 2015 and 2016.

Issue 7 – Whether R. Darling is entitled to relief from the demand penalties.

R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. California Code of Regulations, title 18, section (Regulation) 19133 further provides that for individuals, the demand penalty will only be imposed if the following two conditions are satisfied:

- (1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
- (2) the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, *at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.*

(Cal. Code Regs., tit. 18, § 19133(b)(1)-(2), emphasis added.)

Here, to properly impose a demand penalty for the 2013 tax year, FTB must have proposed an assessment (i.e., issued an NPA) at any time during the 2009 through 2012 tax years, which is the four-taxable-year period preceding the 2013 tax year. Similarly, to properly impose a demand penalty for the 2014 tax year, FTB must have issued an NPA at any time during the 2010 through 2013 tax years. However, FTB failed to do that for either tax year at issue. Rather, FTB issued an NPA for the 2012 tax year that is dated May 12, 2014, which is not during four tax years preceding either 2013 or 2014. Accordingly, FTB has not met the second condition imposed by Regulation 19133 and improperly imposed the demand penalties.<sup>4</sup>

Issue 8 - Whether R. Darling is entitled to abatement of the estimated tax penalty.

R&TC section 19136 incorporates by reference, with certain modifications, Internal Revenue Code (IRC) section 6654, which imposes an addition to tax if a taxpayer fails to make

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<sup>4</sup> Example 2 in Regulation 19133(d) is provided with the purpose of “intending to illustrate” the provisions of the regulation (i.e., subdivision (b) as quoted above). The example provides a set of facts and outcome that appear to be inconsistent with the operative language in the regulation found in subdivision (b), which unambiguously provides a set of requirements for when the penalty will be imposed. While “examples set forth in regulations remain persuasive authority *so long as they do not conflict with the regulations themselves*,” here, Example 2 does create such a conflict. (*Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858, emphasis added.) Therefore, we conclude the operative language in the regulation is controlling.

estimated tax payment of the “required annual payment” by the due date. The addition to tax is similar to an interest charge and applies from the dates the estimated tax payments were due until the earlier of the date paid or the final payment due date for the tax year under R&TC section 19001. Neither R&TC section 19136 nor IRC section 6654 allows abatement of the estimated tax penalty upon a showing of reasonable cause. (*Appeal of Weaver Equipment Company, supra; Appeal of Risser* (84-SBE-044) 1984 WL 16123.) There are two bases for abating the estimated tax penalty; however, there is no evidence that either of these apply to R. Darling.<sup>5</sup>

R. Darling has not provided any allegations or evidence establishing that his failure to timely pay his 2016 estimated tax was due to any of the narrow circumstances prescribed by IRC section 6654(e)(3)(A) or (B). Accordingly, we find no grounds to abate R. Darling’s estimated tax penalty for 2016.

Issue 9 – Whether R. Darling has established a basis for the abatement of the CRF.

R&TC section 19254(a)(2) provides that FTB shall impose a CRF if a person fails or refuses to make and file a return within 25 days after a formal legal demand to file the tax return has been mailed to that individual by FTB. Once properly imposed, there is no statutory provision that would relieve the imposition of the CRF for any circumstance, including reasonable cause. Here, the fees were properly imposed for 2013 and 2014, because R. Darling failed to file 2013 and 2014 tax returns within 25 days of the above-referenced demand notices issued by FTB. Accordingly, there is no basis to abate them.

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<sup>5</sup> The penalty will be abated if FTB determines that by reason of casualty, disaster, or other unusual circumstances the imposition of the penalty would be against equity and good conscience. (IRC, § 6654(e)(3)(A).) Additionally, FTB may abate the penalty if it determines that: (i) the underpayment was due to “reasonable cause,” and (ii) either the taxpayer retired after having attained age 62, or the taxpayer became disabled in the taxable year for which estimated payments were required to be made or in the previous taxable year. (IRC, § 6654(e)(3)(B).)

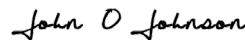
HOLDINGS

1. The Corporation's claim for refund for 2012 and 2013 is barred by the statute of limitations.
2. The Corporation failed to establish it is entitled to abatement of the late-filing penalties.
3. The Corporation failed to establish that it is entitled to abatement of the S corporation per-partner, late-filing penalties imposed under R&TC section 19172.5.
4. The Corporation failed to establish a basis to abate the estimated tax penalties.
5. R. Darling failed to establish that his failure to timely file a 2013 and 2014 return was due to reasonable cause and not due to willful neglect.
6. R. Darling failed to demonstrate reasonable cause for his failure to make timely payments of tax for 2015 or 2016.
7. R. Darling is not subject to the demand penalties because they were improperly imposed and shall be deleted from the proposed assessments.
8. R. Darling has failed to establish that the estimated tax penalty should be abated.
9. R. Darling has failed to establish a basis for the abatement of the filing enforcement CRF.

DISPOSITION

FTB's actions denying R. Darling's refund claim with respect to the demand penalties for 2013 and 2014 are reversed. In all other respects, FTB's actions are sustained.

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John O. Johnson

Administrative Law Judge

I concur:

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Kenneth Gast

Administrative Law Judge

T. STANLEY, concurring in part and dissenting in part:

I concur in all parts of the majority decision except for the imposition of the late-filing penalty under Revenue and Taxation Code (R&TC) section 19131.

R&TC section 19131 provides that Franchise Tax Board (FTB) shall impose a late-filing penalty when a taxpayer fails to file a return on or before its due date or extended due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. As relevant here, the S corporation late-filing penalty is imposed for the same reason. (R&TC, § 19172.5 [when an S corporation fails to file a return on time, the S corporation is liable for a penalty unless reasonable cause is shown].) It is undisputed that the S corporation's returns were filed late. However, FTB assessed two separate penalties for the same misdeed by the same entity.

The statutes at issue in this appeal (R&TC sections 19131 and 19172.5) were adopted in California using substantially the same language as their federal counterparts (Internal Revenue Code (IRC) sections 6651(a)(1) and 6699, respectively). California enacted R&TC section 19172.5 in 2010, mirroring the previously enacted IRC section 6699. R&TC section 19172.5 was added as an amendment to Senate Bill 401 three days prior to the bill's enrollment. (See Assem. Com. on Rev. and Tax., Rep. on Assem. Bill No. 401 (2009-2010) Reg. Sess., as amended April 5, 2010, Sec. 49.) The bill's analysis shows only an intent to "conform state tax laws to ever-changing federal tax laws." (*Id.* at preamble.) The intent of the California Legislature when adopting R&TC section 19172.5, therefore, clearly was to conform to the corresponding federal penalty found in IRC section 6699.

"Our Legislature has generally followed the federal statutes in designing California's personal income tax system, making federal decisions interpreting substantially identical statutes unusually strong persuasive precedent on construction of our own laws." (*People v. Hagen* (1998) 19 Cal.4th 652, 661; see also *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881.) "In instances where federal law and California law are the same, . . . rulings and regulations dealing with the IRC are persuasive authority in interpreting the California statute." (*J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 984, fn. 1.) "The obvious parallelism of the federal and state statutes . . . requires that one wishing to comply with the state provision look to the federal counterpart for guidance." (*Spurgeon v. Franchise Tax Bd.* (1984) 160 Cal.App.3d 524, 530.) "This policy makes available to the state a ground work of relevant

federal experience and judicial pronouncements.” (*Holmes v. McColgan* (1941) 17 Cal.2d 426, 430; see also *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.) Furthermore, when material provisions of federal and state statutes are substantially identical, interpretation of the federal statute guides construction of the state statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) State statutes that are “in substance, exact counterparts of the federal rules,” must have been intended to have the “same meaning, force and effect as have been given the federal rules by the federal courts.” (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 384.)

No federal case law has issued with respect to this issue because the Internal Revenue Service (IRS) has declined to aggregate the general and specific late-filing penalties. An IRS Program Manager Technical Advice Memorandum (Memorandum) states that IRC section 6699 “was added to the Code because Congress believed that there was previously no effective penalty regime for the failure to file an S corporation return.” (See PMTA 2013-15 -- Section 6651 – Failure to File Tax Return or to Pay Tax, citing H.R. Rep. No. 110-426, at 35 (2007).) In that Memorandum, the IRS concluded there was nothing in the legislative history of IRC section 6699 to imply that Congress intended to penalize a particular entity twice for the same failure, and therefore it declined to assess the general late-filing penalty against an S corporation when the more specific per-partner, late-filing penalty applied. Although the Memorandum postdates adoption of R&TC section 19172.5, deference should be given to the IRS interpretation of legislative intent of the federal statute upon which the California statute was based.

Furthermore, when a penalty is both duplicative and ambiguous, the “rule of lenity” applies. The rule of lenity is an interpretive canon providing that “[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant’s favor.” (*Mohamed v. Commissioner*, T.C. Memo. 2013-255, at p. 25 (*Mohamed*), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012) page 296.) *Mohamed* considered the application of a tax penalty statute and held that “[IRC] section 6651(f) imposes an addition to tax . . . [thus,] any ambiguity in its application is resolved by the rule of lenity.” (*Mohamed, supra*, at p. 26.) “A tax provision which imposes a penalty is to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it.” (*Bradley v. United States* (9th Cir. 1987) 817 F.2d 1400, 1402-1403, citing *Commissioner v. Acker* (1959) 361 U.S. 87, 91.) Applying the penalty statutes strictly, lenity applies, and FTB may not simultaneously apply both the

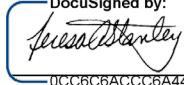


S corporation late-filing penalty and the general R&TC section 19131 late-filing penalty against the same entity, for the same act.

The principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) also applies here. The Legislature clearly articulated that the per-shareholder late-filing penalty may be aggregated with another penalty (the criminal penalty sanction imposed under section 19706). (R&TC, § 19172.5(a).) The absence of similar language with respect to R&TC section 19131 implies the absence of such intent. In other words, the inclusion of the phrase “in addition to the penalty imposed by Section 19706” in R&TC section 19172.5(a) shows that the Legislature intentionally excluded other penalties that might be applicable to the same act, with respect to one subset of taxpayers.

A final principle of note when reconciling the application of the two statutes is codified in section 1859 of the Code of Civil Procedure: “[W]hen a general and particular provision are inconsistent the latter is paramount to the former. So, a particular intent will control a general one that is inconsistent with it.” Further, it is a “fundamental principle of statutory construction that a new law supersedes an old law on the same subject.” (*Appeal of West Valley Land Management Co.* (93-SBE-014) 1993 WL 409833, citing *Union League Club v. Johnson* (1941) 18 Cal.2d 275.) Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.” (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.) Thus, the more specific late-filing penalty statute (R&TC section 19172.5(a), which applies only to subchapter S corporations “required to file a return under R&TC section 18601”) is properly applied instead of the general late filing provision (R&TC section 19131) where, as here, the penalized act was by an S corporation.

Based on the foregoing, I would find that FTB improperly applied the penalty under R&TC section 19131, when it should exclusively apply the S corporation per-partner, late-filing penalty when an S Corporation files its return late.

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Teresa A. Stanley  
Administrative Law Judge

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