

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19085198
ATHENA RESEARCH GROUP, INC.)
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)
)

OPINION

Representing the Parties:

For Appellant: Aurae Hawkins, Enrolled Agent

For Respondent: Nancy E. Parker, Tax Counsel IV

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Athena Research Group, Inc. (appellant) appeals an action by Franchise Tax Board (respondent) denying appellant’s claims for refund totaling \$8,624.05¹ for the tax years ending (TYEs) February 28, 2011 (02/2011), and 02/2013-02/2018.²

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

¹ This amount consists of the following: for TYE 02/2011, a late-filing penalty of \$857.25, a demand penalty of \$857.25, and an underpayment of the estimated tax penalty (estimated tax penalty) of \$88.72; for TYE 02/2013, a late-filing penalty of \$200, a demand penalty of \$200, and an estimated tax penalty of \$22.25; for TYE 02/2014, a late-filing penalty of \$200, a demand penalty of \$200, and an estimated tax penalty of \$21.96; for TYE 02/2015, a late-filing penalty of \$539.25, a nonqualified, suspended or forfeited (NQS) penalty of \$2,000, a demand penalty of \$539.25, and an estimated tax penalty of \$21.96; for TYE 02/2016, a late-filing penalty of \$200, a NQS penalty of \$2,000, a demand penalty of \$200, and an estimated tax penalty of \$22; for TYE 02/2017, a late-filing penalty of \$200, and an estimated tax penalty of \$24.88; and for TYE 02/2018, a late-filing penalty of \$200, and an estimated tax penalty of \$29.28.

² Appellant’s sole argument in its brief is that penalties should be abated due to reasonable cause and did not specifically argue that we abate interest and fees. As such, we will not address interest and fees in this Opinion. Additionally, although the Office of Tax Appeals acknowledged this appeal for TYEs 02/2011-02/2018, it appears appellant did not intend to appeal TYE 02/2012 because in the heading portion of its brief, appellant did not list TYE 02/2012 as a tax year at issue and it also did not attach the TYE 02/2012 refund claim as an exhibit. Thus, TYE 02/2012 is not at issue in this appeal.

ISSUES

1. Whether appellant filed its refund claim for TYE 02/2011 within the applicable statute of limitations.
2. Whether appellant has established reasonable cause to abate the late-filing penalties imposed for TYEs 02/2013-02/2018.³
3. Whether appellant has established reasonable cause to abate the demand penalties imposed for TYEs 02/2013-02/2016.
4. Whether appellant has established reasonable cause to abate the NQSF penalties imposed for TYEs 02/2015-02/2016.
5. Whether appellant has established a basis to abate the estimated tax penalties imposed for TYEs 02/2013-02/2018.

FACTUAL FINDINGS

General Background

1. Appellant was incorporated in California in 2002 and is taxed as a C corporation.
2. In May 2010, appellant's president was diagnosed with cancer. The president placed an employee in a position to run the business in her absence. However, appellant contends the employee mismanaged the business and committed fraud.
3. During the president's absence, the corporation continued to operate, generating annual gross receipts between \$400,000 and \$900,000, and paying salaries and wages for TYEs 02/2011-02/2016, even though it did not timely meet its tax obligations.
4. In January 2016, the president was well enough to return to work. Upon the president's return, appellant contends the employee abandoned the company and crashed the server that stored all of the financial data.

Tax Returns and Payments

5. For the tax years at issue, appellant filed untimely returns and made late payments.
6. For TYEs 02/2011 and 02/2013-02/2016, respondent issued Demands for Tax Return (Demands), indicating that appellant may have had a filing requirement due to income

³ Because we find, *post*, that appellant's refund claim for TYE 02/2011 was not filed within the applicable statute of limitations, we need not address abatement of penalties for this tax year.

received from various entities. After appellant failed to respond timely to those Demands, respondent sent Notices of Proposed Assessment (NPAs) in which it estimated appellant's taxable income and tax due.

7. Appellant ultimately filed its original returns on the following dates: TYEs 02/2011 and 02/2013-02/2014 on January 19, 2018; TYEs 02/2015-02/2017 on March 1-2, 2018; and TYE 02/2018 on February 11, 2019.
8. Respondent accepted appellant's untimely filed original returns. For TYEs for which an NPA was issued, appellant reported less taxable income on its original returns than what respondent had estimated in its NPAs.
9. For TYE 02/2011, respondent initiated involuntary collections and received payments of \$10,087.76 on December 15, 2016, and \$67.15 on August 15, 2017.
10. For TYEs 02/2013-02/2018, appellant paid the balances then due in June 2019.

Corporate Suspension

11. On October 1, 2014, respondent suspended appellant's corporate rights, powers, and privileges under R&TC sections 23301, 23301.5, and 23304.1(d) because it failed to file the required tax returns (Forms 100) and pay the balances due.
12. On June 3, 2019, appellant revived its corporate status (i.e., relieved from the suspension) after filing outstanding returns and paying the balances due.

Penalties

13. Respondent imposed late-filing penalties for TYEs 02/2011 and 02/2013-02/2018.
14. Respondent imposed demand penalties for TYEs 02/2011 and 02/2013-02/2016.
15. Respondent imposed NQSF penalties for TYEs 02/2015 and 02/2016.
16. Respondent imposed estimated tax penalties for TYEs 02/2011 and 02/2013-02/2018.

Claims for Refund

17. On June 29, 2019, appellant filed refund claims on form FTB 2924, Reasonable Cause – Business Entity Claim for Refund, for the tax years at issue. Respondent denied the refund claims.
18. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant filed its refund claim for TYE 02/2011 within the applicable statute of limitations.

R&TC section 19306(a) provides that no credit or refund shall be allowed or made after the later of (1) four years from the date the return is 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. Neither the ill health of a taxpayer nor any other unfortunate circumstance can extend the statute of limitations for filing a claim for refund. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.) The taxpayer has the burden of proof in showing entitlement to a refund and that the claim is timely. (*Ibid.*)

Here, since appellant's filing due date for TYE 02/2011 was May 15, 2011,⁴ and appellant did not file a return within the extended due date, the four-year statute of limitations to claim a refund expired on May 15, 2015. As to the one-year statute of limitations, since respondent received, through involuntary collections, \$10,087.76 on December 15, 2016, and \$67.15 on August 15, 2017,⁵ the one-year statute of limitations expired for the first payment on December 15, 2017, and for the second payment on August 15, 2018. Accordingly, both the four-year and the one-year statute of limitations expired because appellant untimely filed its TYE 02/2011 refund claim on June 29, 2019. Consequently, the issue of whether appellant has established a basis to abate the late-filing penalty, the demand penalty, and the estimated tax penalty for TYE 02/2011 is moot and will not be addressed in this Opinion.

Issue 2: Whether appellant has established reasonable cause to abate the late-filing penalties imposed for TYEs 02/2013-02/2018.

R&TC section 19131(a) 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. 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.

⁴ Corporation returns for taxable years beginning before January 1, 2016, must be filed on or before the 15th day of the third month following the close of the taxable year. (Former R&TC, § 18601(a), eff. Jan. 1, 2001.)

⁵ Although appellant made later payments, all such payments were transferred to other tax years to satisfy balances then due and to the Employment Development Department to pay outstanding debt at that agency.

(R&TC, § 19131(a).) Here, appellant does not dispute that respondent properly imposed and calculated the late-filing penalties but requests abatement due to reasonable cause and a lack of willful neglect.

To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent business[person] to have so acted under similar circumstances.” (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Reasonable cause is not established if difficulties simply caused the taxpayer to sacrifice the timeliness of one aspect of the taxpayer’s affairs to pursue other aspects. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) A late-filing penalty imposed by respondent is presumed to be correct, and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of GEF Operating, Inc.*, *supra.*)

Appellant asserts that it was unable to file its returns timely due to its president’s cancer diagnosis and other adverse health conditions. However, the president was not the sole person responsible to perform appellant’s tax functions. In fact, appellant asserts that due to the president’s health condition, the president “placed a trusted employee in the position to continue to run the [corporation] in [the president’s] absence.” Indeed, under this employee’s management, the corporation was still able to operate, generating annual gross receipts between \$400,000 and \$900,000, and paying salaries and wages for TYEs 02/2011-02/2016, even though it did not meet its tax obligations.

Nevertheless, appellant alleges, without supporting evidence, that this employee mismanaged the business, committed fraud, and, upon the president’s return, abandoned the company and crashed the server that stored all of the financial data. Although appellant may have assumed that its employee would file appellant’s returns, this is a matter between them and does not resolve the matter regarding appellant’s tax obligations. (*Conklin Bros. of Santa Rosa, Inc. v. U.S.* (9th Cir. 1993) 986 F.2d 315, 317.) Appellant has a nondelegable duty to file, pay, and deposit taxes, and appellant cannot avoid responsibility by merely relying on its agent or employee to comply with the statutes. (See *U.S. v. Boyle* (1985) 469 U.S. 241, 250-252 [establishing a bright-line rule 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"].) However, we do note that a corporate agent's or employee's failure to act may establish reasonable cause for the corporation if it can show that it was "disabled" from complying timely. (*Conklin Bros. of Santa Rosa, Inc. v. U.S.*, *supra*, 986 F.2d at p. 318.) Key to the disability assessment is the corporation's ability to control the action of the wrongdoer. (See *ibid.* [finding against disability because the controller's deficient and improper conduct was subject to being supervised by the corporation's president and outside accountants].) Here, appellant has not provided evidence on how its employee's wrongdoings "disabled" the corporation.

In addition, we note that the standard for reasonable cause based on illness is high, and evidence in the record indicates the president's illness does not establish reasonable cause. For instance, appellant states the president was healthy enough to return to work in January 2016 but submitted no evidence on why appellant still untimely filed its returns for TYEs 02/2016-02/2018. Further, we note that the president was able to file her personal California income tax returns timely during the relevant periods and the corporation was still able to operate. Accordingly, appellant has not established reasonable cause to abate the late-filing penalties imposed for TYEs 02/2013-02/2018.⁶

Issue 3: Whether appellant has established reasonable cause to abate the demand penalties imposed for TYEs 02/2013-02/2016.

Respondent may add a penalty of 25 percent of the amount of tax determined if a taxpayer fails or refuses to make and file a tax return after notice and demand by respondent, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The penalty is designed to penalize a taxpayer for failing to respond to a notice and demand, not for failing to pay the proper tax. (*Appeal of Bryant* (83-SBE-180) 1983 WL 961596.)

Here, appellant does not dispute that respondent properly imposed and computed the demand penalties. Instead, appellant generally requests abatement of all penalties associated with the relevant tax periods due to reasonable cause and a lack of willful neglect. We addressed appellant's reasonable cause arguments above in our discussion of the R&TC section 19131 late-

⁶ Because appellant has not established reasonable cause, we need not determine whether willful neglect was present, as applicable to the penalties in this appeal.

filing penalty; thus, for those same reasons, we find appellant has not established reasonable cause to abate the demand penalties.

Issue 4: Whether appellant has established reasonable cause to abate the NQSF penalties imposed for TYEs 02/2015-02/2016.

R&TC section 19135 requires, for purposes of this appeal, respondent to impose a penalty of \$2,000 per tax year when a domestic corporation that has been suspended is “doing business” in this state (within the meaning of R&TC section 23101) and fails to make and file a return within 60 days after respondent sends the taxpayer a notice and demand to file the required tax return, unless the failure is due to reasonable cause and not willful neglect.

Here, similar to the preceding sections, appellant does not dispute that respondent properly imposed and computed the NQSF penalty.⁷ Instead, appellant generally requests abatement of all penalties associated with the relevant tax periods due to reasonable cause and a lack of willful neglect. We addressed appellant’s reasonable cause arguments above in our discussion of the R&TC section 19131 late-filing penalty; thus, for those same reasons, we find appellant has not shown the NQSF penalty should be abated based on reasonable cause.

Issue 5: Whether appellant has established a basis to abate the estimated tax penalties imposed for TYEs 02/2013-02/2018.

A corporation subject to the tax imposed by Part 11 of the Revenue and Taxation Code must file a declaration of estimated tax and pay the estimated tax for each year. (R&TC, §§ 19023, 19025.) If the amount of estimated tax does not exceed the minimum franchise tax, the entire amount of the estimated tax shall be due and payable on or before the fifteenth day of the fourth month of the taxable year. (R&TC, § 19025(a).) A corporation that underpays its estimated tax is liable for an addition to tax (i.e., a penalty) equal to a specified rate of interest applied to the amount of the underpayment. (R&TC, §§ 19142, 19144.) The estimated tax penalty is properly imposed where the taxpayer’s installment payments are less than the amounts due at the end of the installment periods. (*Appeal of Bechtel, Inc.* (78-SBE-052) 1978 WL 3525.) Relief from the estimated tax penalty is not available upon a showing of reasonable

⁷ Appellant, a domestic corporation, was suspended from October 1, 2014, to June 3, 2019. Respondent mailed its Demands for TYEs 02/2015 and 02/2016 returns on October 13, 2016, and June 7, 2017, respectively, for which respondent received no timely responses.

cause, and a few limited statutory exceptions to the penalty exist. (*Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976; see, e.g., R&TC, §§ 19147, 19148.)


Here, appellant does not dispute that respondent properly imposed and computed the estimated tax penalties. Instead, appellant generally requests abatement of all penalties associated with the relevant tax periods due to reasonable cause and a lack of willful neglect. However, no general reasonable cause exception for the penalty exists, and appellant does not argue or provide evidence that the limited statutory exceptions to the penalty apply. Accordingly, respondent properly imposed the estimated tax penalties for TYEs 02/2013-02/2018, and there is no basis for abatement.

HOLDINGS

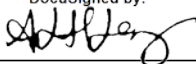
1. Appellant did not file its refund claim for TYE 02/2011 within the applicable statute of limitations.
2. Appellant has not established reasonable cause to abate the late-filing penalties imposed for TYEs 02/2013-02/2018.
3. Appellant has not established reasonable cause to abate the demand penalties imposed for TYEs 02/2013-02/2016.
4. Appellant has not established reasonable cause to abate the NQSF penalties imposed for TYEs 02/2015-02/2016.
5. Appellant has not established a basis to abate the estimated tax penalties imposed for TYEs 02/2013-02/2018.

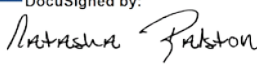
DISPOSITION

We sustain respondent’s denial of the refund claims in full.

DocuSigned by:

 Huy "Mike" Le
 Administrative Law Judge

We concur:

DocuSigned by:

 Andrea L.H. Long
 Administrative Law Judge

DocuSigned by:

 Natasha Ralston
 Administrative Law Judge

Date Issued: 11/4/2020