

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20066314
SUMMIT HOSTING LLC)
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OPINION

Representing the Parties:

For Appellant: David A. Nash,
Certified Public Accountant (CPA)

For Respondent: Joel M. Smith, Tax Counsel III

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Summit Hosting LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claims for refund of \$1,500 and \$1,154, plus applicable interest, for the 2017 and 2018 tax years, respectively.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 for failing to timely file its 2017 tax return.
2. Whether appellant has established reasonable cause for failing to make a timely payment of the LLC fee and the LLC annual tax for the 2018 tax year.
3. Whether appellant has established that the underpayment of estimated LLC fee penalty should be abated for the 2018 tax year.
4. Whether appellant has established a legal basis to abate interest.

¹ The 2017 claim for refund consists of a late-filing penalty. The 2018 claim for refund consists of an underpayment of estimated limited liability company (LLC) fee penalty and a late-payment penalty.

FACTUAL FINDINGS

1. In 2017, appellant underwent a merger, and as a result, it became a single member LLC that was disregarded for tax purposes and solely owned by a pass-through entity taxed as an S corporation. Appellant was engaged in business in California for the 2017 and 2018 tax years and was a calendar-year taxpayer for those years.
2. Appellant's CPA was a senior tax manager at a firm based in Atlanta, Georgia (the Georgia firm).
3. Appellant did not file a timely California return for the 2017 tax year.
4. FTB received information from the Employment Development Department indicating appellant had a California filing requirement for the 2017 tax year. On May 24, 2019, FTB sent appellant a Demand for Tax Return, requiring that it reply no later than June 26, 2019, by either filing its tax return for 2017, or by completing a provided questionnaire to determine whether appellant had a California filing requirement.
5. On July 8, 2019, appellant filed an untimely 2017 LLC Return of Income (Form 568), as a disregarded single member LLC owned by a pass-through entity. Appellant reported California source income, an LLC fee of \$6,000, and an LLC annual tax of \$800, for a total amount due of \$6,800, which appellant remitted with its return.
6. On August 15, 2019, appellant filed a timely 2018 Form 568 within the automatic extension period. Appellant reported California source income, an LLC fee of \$6,000, and an LLC annual tax of \$800, and self-assessed penalties and interest of \$661, for a total amount due of \$7,461, which appellant remitted with its return.
7. On November 22, 2019, FTB sent appellant separate LLC–Notices of Balance Due (Balance Notice) for the 2017 and 2018 tax years. The 2017 Balance Notice reflected a late-filing penalty for the late-paid LLC fee, and applicable interest. The 2018 Balance Notice reflected a late-payment penalty for the late-paid LLC fee and the late-paid LLC annual tax, an underpayment of estimated LLC fee penalty, and applicable interest.
8. Subsequently, appellant paid its 2017 and 2018 outstanding balances, and filed claims for refund for both tax years, requesting abatement of the penalties, plus applicable interest.
9. By letter dated March 30, 2020, FTB denied the claims for refund. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause for failing to timely file its 2017 tax return.

In accordance with R&TC section 18633.5(i)(3)(B), every disregarded LLC doing business in California that is owned by a pass-through entity must file a California income tax return by the 15th day of the third month following the close of its taxable year.

R&TC section 19131 imposes a penalty when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. Appellant’s 2017 California LLC return was due on March 15, 2018, but appellant untimely filed its 2017 return on July 8, 2019, more than one year after the due date; therefore, pursuant to R&TC section 19131(a), FTB imposed the 25 percent late-filing penalty upon the \$6,000 late-paid LLC fee amount.² Appellant does not contest whether the late-filing penalty was properly imposed or computed.

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.) Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Taxpayers who fail to acquaint themselves with the requirements of California tax law have not exercised ordinary business care and prudence. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) Each taxpayer has a non-delegable obligation to file a tax return by the due date. (See *U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*).

In *Boyle*, the United States Supreme Court held that “[t]he 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” (*Boyle, supra*, at p. 252.) The Court, however, did observe that reasonable cause may exist if a taxpayer reasonably 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, even when such advice turned out to have been mistaken. (*Id.* at pp.

² FTB did not impose the late-filing penalty with respect to the \$800 late-paid annual LLC tax.

250-251.) While good faith reliance on professional advice may provide a basis for a reasonable cause defense, it is not absolute. (*Repetto v. Commissioner*, T.C. Memo. 2012-168.) To establish that reasonable cause exists under *Boyle*, a taxpayer must show that it reasonably relied on a tax professional for substantive tax advice as to whether a tax liability exists and that the following conditions are met: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law; and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of relevant facts and documents. (*Boyle, supra.*) By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Id.* at 251.) Further, in *Appeal of Berolzheimer* (86-SBE-172) 1986 WL 22860, the Board of Equalization found that there was no basis in the record for concluding that the New York law firm retained by the appellants in that case had expertise in California tax law and therefore declined to hold, as a matter of law, that relying on an out-of-state law firm constituted reasonable cause for failing to comply with California’s tax laws.

Appellant argues that it has reasonable cause for its failure to file a timely 2017 California return because it relied on its CPA’s advice that appellant did not have a California filing requirement. Specifically, appellant contends that its CPA improperly advised appellant that as a disregarded single member LLC owned by a pass-through entity in 2017, appellant did not need to file a California tax return for 2017 because its California activity would instead be reported on the pass-through entity’s California returns and tax on appellant’s California source income would be paid at the pass-through entity level. Appellant’s CPA at the time was a senior tax manager at the Georgia firm who was assigned to appellant by the partners of the firm.³ Appellant states that the CPA has “over 20 years of experience with federal and state income tax laws and compliance requirements,” and “is a member of the AICPA and GSCPA.”⁴ Appellant notes that its representative in this appeal is a partner at the Georgia firm,

³ Appellant’s representative, Mr. Nash, is a partner at the Georgia firm. Regarding the senior tax manager’s (i.e., appellant’s CPA) eventual departure from the firm, Mr. Nash states that the person was not terminated and that their “overall abilities as a tax professional are and have not come into question.”

⁴ AICPA is the American Institute of Certified Public Accountants, and GSCPA is the Georgia Society of Certified Public Accountants.

and that by signing appellant's briefs stating to such, the firm is admitting that appellant's CPA had all the relevant facts and provided appellant improper advice.

As noted above, in order to show that appellant had reasonable cause for failing to timely file its 2017 tax return, appellant must establish that it reasonably relied on its CPA for advice on questions of substantive tax, that the CPA was competent in the subject tax law, and that the advice was based on appellant's full disclosure of relevant facts and documents. Appellant has not provided evidence of the actual advice it received from its CPA, such as written opinions by the CPA or any other similar documents, and that the CPA did in fact advise appellant that it did not have a California filing requirement, despite R&TC section 18633.5(i)(3)(B) indicating otherwise. In other words, appellant's conclusory statement that it did not have a filing requirement because it relied on its CPA's advice, without any supporting evidence to demonstrate the steps taken by its CPA to ascertain whether appellant was required to file a California return and pay California taxes, does not constitute reasonable reliance. While the CPA may have "over 20 years of experience with federal and state income tax laws and compliance requirements," without any evidence of the CPA's knowledge of, and experience in, California tax law, it would be unreasonable to conclude that the CPA is competent in California tax law. As such, we find that appellant has not demonstrated reasonable cause for its failure to file a timely return for 2017.

Issue 2: Whether appellant has established reasonable cause for failing to make a timely payment of the LLC fee and the LLC annual tax for the 2018 tax year.

R&TC section 19132(a)(1)(A) 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. Every LLC which is disregarded for tax purposes, owned by a pass-through entity (such as here, an S corporation), and doing business in California must file a return on or before the 15th day of the third month following the close of its tax year. (R&TC, §§ 18633.5(i)(1), (3)(B).) The LLC fee is due and payable on the date the return is required to be filed under R&TC section 18633.5. (R&TC, §17942(c).) For 2018, appellant was a calendar-year taxpayer; therefore, its LLC fee was due on March 15, 2019, without regard to any filing extensions. Appellant untimely paid its 2018 LLC fee of \$6,000 on August 15, 2019. Additionally, every LLC that is doing business in California is required to pay an annual tax to California for the privilege of doing business in California. (R&TC, §§ 17941(a) & 23101.) The LLC annual tax is due and payable on or before

the 15th day of the fourth month of the taxable year. (R&TC, § 17941(c).) Appellant untimely paid its 2018 LLC annual tax of \$800 on August 15, 2019. 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 Triple Crown Baseball LLC, supra.*)

Appellant does not contest whether the late-payment penalty was properly imposed or computed. Rather, appellant asserts that reasonable cause exists to abate the penalty. Appellant makes the same argument that it reasonably relied on the advice of its CPA that appellant did not have a California filing requirement as of the 2017 tax year. As discussed above, we find that appellant's assertion that it reasonably relied on its CPA's advice to be without merit because there is no evidence substantiating that appellant reasonably relied on its CPA for advice on questions of substantive tax, that the out-of-state CPA was competent in California tax law, and that the CPA's advice was based on appellant's full disclosure of relevant facts and documents. Accordingly, appellant has not established reasonable cause for failing to make a timely payment of the LLC fee and the LLC annual tax for the 2018 tax year.

Issue 3: Whether appellant has established that the underpayment of estimated LLC fee penalty should be abated for the 2018 tax year.

R&TC section 17942 imposes an LLC fee based on total California source income of LLCs that are doing business in California. The LLC fee is required to be estimated and paid on or before the 15th day of the sixth month of the taxable year. (R&TC, § 17942(d)(1).) Appellant does not contest whether the underpayment of estimated LLC fee penalty was properly imposed or computed. Appellant raises the same contention that it reasonably relied on its CPA's advice, which is a reasonable cause defense to the imposition of the penalty. The statute, however, does not provide for a reasonable cause exception to imposition of the underpayment of estimated LLC fee penalty. The only defense authorized by statute is the safe harbor provision, which provides that the penalty will not be imposed if the timely estimated LLC fee payment is equal to or exceeds the LLC fee due for the prior tax year. (R&TC, § 17942(d)(2).)

Appellant's 2018 LLC fee of \$6,000 is equal to appellant's LLC fee for the 2017 tax year. However, that alone does not meet the requirements of the safe harbor provision. The safe

harbor provision only applies to timely estimated LLC fee payments. (R&TC, § 17942(d)(2).) Appellant's estimated LLC fee for the 2018 tax year was due on June 15, 2018; however, appellant remitted its untimely \$6,000 payment on August 15, 2019, with its return. Therefore, we find that the safe harbor provision is inapplicable, and there is no basis for abating the penalty.

Issue 4: 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*.) There is no reasonable cause exception to the imposition of interest. To obtain relief from interest, appellant must qualify under R&TC section 19104, 19112, or 21012; however, based on the evidence and appellant's arguments, none of these statutory provisions apply.⁵ Thus, appellant has not established any basis for interest abatement for the tax years at issue.

⁵ Pursuant to R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Here, appellant does not assert any such errors or delays occurred. We also note that relief pursuant to R&TC section 21012 is not relevant here because FTB did not provide appellant with any written advice. Neither is relief pursuant to R&TC section 19112 relevant here because appellant does not allege extreme financial hardship caused by significant disability or other catastrophic circumstance, which we do not have authority to review. (See *Appeal of Moy*, 2019-OTA-057P.)

HOLDINGS

1. Appellant has not established reasonable cause for failing to timely file its 2017 tax return.
2. Appellant has not established reasonable cause for failing to make a timely payment of the LLC fee and the LLC annual tax for the 2018 tax year.
3. Appellant has not established that the underpayment of estimated LLC fee penalty should be abated for the 2018 tax year.
4. Appellant has not established a legal basis to abate interest.

DISPOSITION

FTB's denial of appellant's claims for refund is sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

Date Issued: 5/12/2021