

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20116911
ALMARK PROPERTIES, LLC)
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)

OPINION

Representing the Parties:

For Appellant: Samuel Babcock, CPA

For Respondent: Brian Werking, Tax Counsel III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Almark Properties, LLC (appellant) appeals actions by the Franchise Tax Board (respondent) denying appellant's claims for refund of \$632 and \$608,¹ plus applicable interest, for the 2015 and 2017 tax years.²

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

¹ Appellant's claim for refund for 2017 states that the amount at issue is \$632, and requests abatement of the per-partner late-filing penalty and the late-payment penalty for 2017. Respondent imposed a per-partner late-filing penalty of \$432 and a late-payment penalty of \$176. Thus, the amount at issue for the 2017 tax year is \$608. (\$432 + \$176 = \$608.)

² In its appeal letter to the Office of Tax Appeals (OTA), appellant stated that it also was appealing respondent's denials of its claims for refund for the 2016 and 2018 tax years. As relevant here, OTA has jurisdiction to hear and decide timely appeals of claims for refund for which respondent has issued a Notice of Action (NOA), denying any portion of the perfected claim for refund or where respondent has failed to act on a claim for refund within six months after the claim was filed with respondent. (Cal. Code Regs., tit. 18, § 30103(a)(3) and (4).) Furthermore, in every appeal from an action of respondent, appellant must provide a copy of respondent's notice from which the appeal is made (e.g., the NOA), unless respondent has failed to act on a claim for refund. (Cal. Code Regs., tit. 18, § 30201(g)(3).) Here, respondent asserts that at the time appellant filed its appeal with OTA (on or about November 4, 2020) respondent had not yet issued NOAs for the 2016 and 2018 tax years. Appellant has not provided a copy of an NOA for either 2016 or 2018. Further, appellant's claims for refund for 2016 and 2018, were filed with respondent on August 17, 2020. Because appellant filed its appeal for these years with OTA only three months later on November 4, 2020, the claims cannot be deemed denied pursuant to R&TC section 19331 and OTA does not have jurisdiction pursuant to California Code of Regulations, title 18, section 30103(a)(4). As such, appellant's appeals for tax years 2016 and 2018, are not properly before OTA and we do not have jurisdiction to hear appeals for these tax years.

ISSUES

1. Whether appellant has established reasonable cause to abate the per-partner late-filing penalty for the 2015 and 2017 tax years.
2. Whether appellant has established reasonable cause to abate the late-payment penalty for the 2015 and 2017 tax years.

FACTUAL FINDINGS

1. Appellant is an active Limited Liability Company (LLC), taxed as a partnership and organized in the State of California on March 27, 2015.
2. Appellant filed its 2015 return late on February 10, 2020, reporting annual tax due of \$800³ and stating that it had two members. Appellant paid the \$800 tax due with its return on February 10, 2020.
3. Subsequently, respondent imposed a per-partner late-filing penalty of \$432, based on two members as reported by appellant, and a late-payment penalty of \$200 for the 2015 tax year.
4. Appellant filed its 2017 return late on January 21, 2020, reporting annual tax due of \$800⁴ and stating that it had two members. Respondent received appellant's \$800 payment for the 2017 tax year on February 10, 2020.
5. Respondent then imposed a per-partner late-filing penalty of \$432 and a late-payment of \$176 for the 2017 tax year.
6. Appellant subsequently paid the amounts due and filed claims for refund for 2015 and 2017 requesting abatement of the penalties based on reasonable cause.
7. Respondent denied appellant's claims for refund for the 2015 and 2017 tax years and this timely appeal followed.

³ The \$800 tax due, reported on appellant's return is the annual LLC tax of \$800.

⁴ The \$800 tax due, reported on appellant's return is the annual LLC tax of \$800.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause to abate the per-partner late-filing penalties for the 2015 and 2017 tax years.

For the years at issue, R&TC section 18633.5(a) provides that 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 is required to file an annual return.⁵

R&TC section 19172 imposes a per-partner late-filing penalty when a partnership (or an LLC taxed as a partnership) fails to file a return at the time prescribed unless it is shown that the failure was due to reasonable cause. The per-partner late-filing penalty under R&TC section 19172 is computed at \$18 multiplied by the number of partners (or LLC members) for each month, or fraction thereof, that the return is late, up to a maximum of 12 months. (R&TC, § 19172(b).) Appellant had two members during the 2015 tax year and filed its return approximately four years late on February 10, 2020. Therefore, respondent properly imposed a \$432 per-partner late-filing penalty (\$18 x 2 members x 12 months) for the 2015 tax year. Appellant also had two members during the 2017 tax year and filed its return approximately two years late on January 21, 2020. Thus, respondent properly imposed a per-partner late-filing penalty of \$432 (\$18 x 2 members x 12 months) for the 2017 tax year.

The per-partner late-filing penalty will be abated if it is established that the late filing was due to reasonable cause. (R&TC, § 19172(a).) For penalty abatement purposes, reasonable cause exists when the 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.) In other words, a taxpayer must show that the failure to meet its tax filing obligation occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson

⁵ Revenue and Taxation Code § 18633.5 was amended to change the original due date of a return required by an LLC that is classified as a partnership for California tax purposes from the 15th day of the 4th month following the close of the taxable year to the 15th day of the 3rd month following the close of the taxable year, for tax years beginning on or after January 1, 2017. (See R&TC, § 18633.5(a) effective January 1, 2006, to December 31, 2016, and R&TC, § 18633.5(a) effective January 1, 2017.) Thus, for tax year 2015, appellant's return was due on the 15th day of the 4th month following the close of the taxable year, and appellant's 2017 return was due on the 15th day of the 3rd month, following the close of the taxable year.

would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P).⁶ In *United States v. Boyle* (1985) 469 U.S. 241, 252, the 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” The Supreme Court noted that one does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.* at p. 251.) Reliance on a tax professional’s advice for questions of substantive tax law, such as whether a liability exists or whether it is necessary to file a return, may constitute reasonable cause, where certain conditions are met, including where the tax professional has competency in the subject tax law and the tax professional’s advice is based on the taxpayer’s full disclosure of the relevant facts and documents. (*Id.* at p. 250, *Appeal of Summit Hosting, LLC*, 2021-OTA-216P). By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*United States v. Boyle*, *supra*, 469 U.S. at p. 251.) Furthermore, the tax preparer must not only be competent in tax law in general, but must specifically be competent in California tax law. (*Appeal of Summit Hosting, LLC*, *supra.*)

On appeal, appellant contends that reasonable cause exists to abate the per-partner late-filing penalties for the 2015 and 2017 tax years. Specifically, appellant asserts that its managing member relied on improper advice from appellant’s former tax professional as to this “matter of law.” Appellant further contends that the managing member was unaware of the filing requirements and the annual LLC tax liability, and that appellant filed its returns and paid the tax liability as soon as it was made aware of the error.

While appellant argues that it was unaware of the annual filing requirement as well as the annual LLC tax due, every taxpayer has a personal, non-delegable duty to file a return on time and to pay taxes when due. (*United States v. Boyle*, *supra* 469 U.S. at p. 247.) Furthermore, appellant has not asserted nor established what specific improper advice was provided to appellant by the former tax professional. Additionally, appellant has failed to assert or establish that its tax professional was competent in California tax law or that it provided its tax preparer with a full disclosure of the relevant facts and documents. Without this information we are unable to determine whether appellant exercised ordinary business care and prudence such that

⁶ For purposes of the facts and issue in this appeal, an analysis of whether there is reasonable cause for a failure to timely file a tax return is substantially the same as an analysis of whether there is reasonable cause for a failure to timely pay tax. Thus, authorities persuasive or controlling in one analysis may be equally persuasive or controlling in the other. (See *Appeal of Moren*, *supra*; *Appeal of Triple Crown Baseball, LLC*, 2019-OTA-025P.)

an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Auburn Old Town Gallery, LLC, supra; Appeal of Moren, supra.*) Further, while we commend appellant for filing its returns and paying the taxes due as soon as it was aware of the error, this does not constitute reasonable cause for appellant's failure to timely file its returns.

Issue 2: Whether appellant has established reasonable cause to abate the late-payment penalty for the 2015 and 2017 tax years.

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 the 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 penalty may be abated if the taxpayer shows that the failure to timely file the return was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).)

Appellant does not dispute that it failed to timely pay the annual LLC tax for the 2015 and 2017 tax years, but rather, appellant makes the same arguments for abatement of the late-payment penalty as it does for abatement of the per-partner late-filing penalty. Namely, appellant asserts that it had reasonable cause for the late payment because it relied on erroneous advice from its former tax professional.

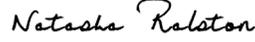
For the reasons discussed above with respect to the per-partner late-filing penalty, we also find that appellant has also failed to meet its burden to establish reasonable cause for its late payment of the annual LLC tax for the 2015 and 2017 tax years.

HOLDINGS

1. Appellant has failed to establish that reasonable cause exists to abate the per-partner late-filing penalty.
2. Appellant has failed to establish that reasonable cause exists to abate the late-payment penalty.

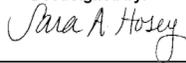
DISPOSITION

Respondent’s actions denying appellant’s claims for refund for 2015 and 2017 are sustained.

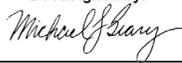
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 Natasha Kalston
 Administrative Law Judge

We concur:

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 Sara A. Hosey
 Administrative Law Judge

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 Michael F. Geary
 Administrative Law Judge

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