

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
THE SPORTS AND WELLNESS GROUP,) OTA Case No. 20035958
LLC)
_____)

OPINION

Representing the Parties:

For Appellant: Andrew S. Greber, CPA

For Respondent: Eric A. Yadao, Tax Counsel III

For Office of Tax Appeals (OTA): William J. Stafford, Tax Counsel III

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, The Sports and Wellness Group, LLC (appellant) appeals actions by respondent Franchise Tax Board (FTB) denying appellant’s claims for refunds in relation to various penalty amounts for the 2009 through 2016 tax years.

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 the late filing of its tax returns for the 2009 through 2015 tax years under R&TC section 19131.
2. Whether appellant has established reasonable cause for the late payment of tax imposed for the 2016 tax year under R&TC section 19132.
3. Whether appellant has established reasonable cause for not timely complying with notices and demands (demands) issued by FTB for the 2010 and 2012 through 2014 tax years under R&TC section 19133.

4. Whether appellant has established a legal basis to abate the non-qualified, suspended, or forfeited entity (NQSFE) demand penalties imposed for the 2013 and 2014 tax years under R&TC section 19135.
5. Whether appellant has established a legal basis to abate the underpayment of estimated tax penalties (estimated tax penalties) imposed for the 2015 and 2016 tax years under R&TC section 19142.
6. Whether appellant has established a legal basis to abate the per-shareholder late filing penalty imposed for the 2015 tax year under R&TC section 19172.5.
7. Whether appellant has established a legal basis to abate the underpayment of limited liability company (LLC) fee penalties imposed for the 2010 through 2014 tax years under R&TC section 17942(d)(2).

FACTUAL FINDINGS

1. Appellant, a Delaware LLC, registered to do business in California on May 26, 2009.
2. For each of the 2009 through 2014 tax years, appellant did not timely file a Limited Liability Company Return of Income (Form 568). FTB sent demand notices to appellant for the missing Form 568 returns, but appellant did not timely respond.¹
3. FTB then issued Notices of Proposed Assessment (NPAs) for the 2009, 2010, and 2012 through 2014 tax years. Appellant did not file a timely protest of any of the NPAs; therefore, the NPAs, which imposed various penalties, became final.²
4. On January 24, 2013, a Final Notice Before Suspension was issued for the 2009 tax year, but appellant did not respond. On April 2, 2013, a Notice of Suspension or Forfeiture was issued, stating that appellant's California corporate rights, powers, and privileges were suspended because it failed to file a California tax return.
5. During the 2015 tax year, appellant changed its tax status from an LLC to a S corporation and appellant untimely filed a 2015 tax year California S Corporation Franchise or Income Tax Return (Form 100S).

¹ As relevant here, the demand notices were sent on April 1, 2016, for the 2013 tax year and November 10, 2016, for the 2014 tax year.

² OTA notes that FTB concedes that its "records do not show that it later issued an NPA" for the 2011 tax year. Nonetheless, the 2011 tax year was not timely filed.

6. FTB assessed various penalties for each of the following tax years:³

2009 Tax Year

FTB received appellant's 2009 Form 568 untimely on April 15, 2018, reporting a minimum tax of \$800 and an LLC fee of \$2,500. Upon processing the return, FTB assessed a late filing penalty of \$625 and a demand penalty of \$200, plus applicable interest.⁴

2010 Tax Year

FTB received appellant's 2010 Form 568 untimely on June 20, 2017, reporting a minimum tax of \$800 and an LLC fee of \$6,000. Upon processing the return, FTB assessed a late filing penalty of \$1,500, a demand penalty of \$425, and an underpayment of estimated LLC fee penalty of \$600, plus applicable interest.

2011 Tax Year

FTB received appellant's 2011 Form 568 untimely on June 20, 2017, reporting a minimum tax of \$800 and an LLC fee of \$6,000. Upon processing the return, FTB assessed a late filing penalty of \$1,500, and an underpayment of estimated LLC fee penalty of \$600, plus applicable interest.⁵

2012 Tax Year

FTB received appellant's 2012 Form 568 untimely on June 20, 2017, reporting a minimum tax of \$800 and an LLC fee of \$6,000. Upon processing the return, FTB assessed a late filing penalty of \$1,500, a demand penalty of \$200, and an underpayment of estimated LLC fee penalty of \$600, plus applicable interest.

³ Appellant untimely filed its 2009 through 2015 tax returns. For the 2016 tax year, the return was timely filed, but had a tax balance due upon filing.

⁴ Appellant previously made installment payments for the late filing penalty and demand penalty. However, based on the timing of these payments, FTB determined that appellant was barred by the one-year statute of limitations under R&TC section 19306(a) from claiming a refund greater than \$525 with respect to the late filing penalty and completely barred with respect to the demand penalty. Therefore, only \$525 of the \$625 late filing penalty is at issue for the 2009 tax year. Appellant does not dispute FTB's determination.

⁵ FTB initially assessed a demand penalty of \$425 for the 2011 tax year, but discovered that an NPA was not issued for the 2011 tax year. Therefore, FTB notes that the demand penalty of \$425 may be refunded or credited, as appellant made payments for the 2011 tax year within one year of the date of the claim for refund.

2013 Tax Return

FTB received appellant's 2013 Form 568 untimely on June 20, 2017, reporting a minimum tax of \$800 and an LLC fee of \$6,000. Upon processing the return, FTB assessed a late filing penalty of \$1,500, a demand penalty of \$200, an underpayment of estimated LLC fee penalty of \$600, and a NQSF demand penalty of \$2,000, plus applicable interest.

2014 Tax Return

FTB received appellant's 2014 Form 568 untimely on June 20, 2017, reporting a minimum tax of \$800 and an LLC fee of \$6,000. Upon processing the return, FTB assessed a late filing penalty of \$1,500, a demand penalty of \$200, an underpayment of estimated LLC fee penalty of \$600, and a NQSF demand penalty of \$2,000, plus applicable interest.

2015 Tax Year

Appellant filed its 2015 Form 100S untimely on September 18, 2017, reporting a tax of \$3,062. Upon processing the return, FTB assessed a late filing penalty of \$765.50, an estimated tax penalty of \$59.70, and a per-shareholder late filing penalty of \$216, plus applicable interest.

2016 Year

For the 2016 tax year, appellant timely filed its Form 100S on August 3, 2017, but self-assessed additional tax due at the time of filing. Therefore, FTB assessed a \$203.76 late payment penalty and a \$49.10 estimate tax penalty, plus applicable interest.

7. After the penalties were paid in full, appellant filed claims for refund, which FTB denied. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause for the late filing of its tax returns for the 2009 through 2015 tax years under R&TC section 19131.

California imposes a penalty for failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect.⁶ (R&TC, § 19131.) When FTB imposes a late filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To establish reasonable cause, a 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 ordinar[ily] intelligent and prudent business[person] to have so acted under similar circumstances.” (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Ignorance of a filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Ibid.*) A taxpayer’s reliance on an agent (such as an accountant or a tax attorney) to file a return or make timely payment of tax is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241 (*Boyle*)). California follows *Boyle* in that a taxpayer’s reliance on a tax adviser must involve reliance on substantive tax advice and not on simple clerical duties. (*Ibid.*)

Appellant does not contest whether the late filing penalty was properly imposed or computed. Appellant appears to argue that the late filing of its tax returns for the 2009 through 2015 tax years was due to reasonable cause because it relied on the (incorrect) advice of a paid tax preparation firm regarding its California income tax filing obligations.

Appellant’s assertions do not demonstrate reasonable cause for the late filing of its 2009 through 2015 returns because, under the holding of *Boyle, supra*, appellant has a non-delegable duty to comply with tax deadlines.⁷ Therefore, appellant’s asserted reliance on a tax preparation firm, as its agent, to make timely tax filings does not constitute reasonable cause. Furthermore, the actions of making timely tax filings were clerical tasks and there is no evidence that appellant failed to timely file based on substantive tax advice. (See *Boyle, supra.*) Thus, appellant has not

⁶ For penalty purposes, the LLC fee is “collected and refunded in the same manner as the taxes imposed by this part [and is] subject to interest and applicable penalties.” (R&TC, § 17942(c).) Thus, the R&TC section 19131 penalty is also applicable to the amount of any unpaid LLC fee.

⁷ We note that on October 21, 2009, FTB issued a Form 5954, Requirements for Limited Liability Companies, which outlined appellant’s California tax filing and payment obligations.

met its burden of proof to abate late filing penalties for the 2009 through 2015 tax years under R&TC section 19131.

Issue 2: Whether appellant has established reasonable cause for the late payment of tax imposed for the 2016 tax year under R&TC section 19132.

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 that tax. The late payment penalty does not apply when the failure to pay is due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a)(1).) The taxpayer bears the burden of proving “reasonable cause,” which means the taxpayer must show that its failure to pay the tax in a timely manner occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.)

Appellant does not contest whether the late payment penalty was properly imposed or computed. Rather, appellant appears to assert that reasonable cause exists to abate the penalty because it relied on the (incorrect) advice of a paid tax preparation firm regarding its California income tax filing obligations.

Appellant’s assertions do not demonstrate reasonable cause for the late payment of tax. As stated above, reasonable cause did not exist because the act of making a timely tax payment was a clerical task and there is no evidence that appellant’s failure to timely pay tax was due to its reliance on substantive tax advice. (See *Boyle*, *supra*.) Thus, appellant has not met its burden of proof to abate the late payment penalties imposed for the 2016 tax year under R&TC section 19132.

Issue 3: Whether appellant has established reasonable cause for not timely complying with demands issued by FTB for the 2010 and 2012 through 2014 tax years under R&TC section 19133.

California imposes a penalty for the failure to file a return or provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from responding to the demand. (*Appeal of GEF Operating, Inc.*, *supra*.)

Appellant does not contest whether the demand penalties were properly imposed or computed. Rather, appellant argues that it relied on the advice of a tax preparation firm regarding its California income tax filing obligations.

Appellant has not provided any specific facts or evidence showing reasonable cause with regard to not timely complying with the demand notices issued by FTB. As such, we find that appellant has not met its burden of proof to abate the demand penalties issued by FTB for the 2010 and 2012 through 2014 tax years under R&TC section 19133.

Issue 4: Whether appellant has established a legal basis to abate the NQSF demand penalties imposed for the 2013 and 2014 tax years under R&TC section 19135.

California imposes a NQSF penalty, which is a demand penalty under R&TC section 19135. R&TC section 19135 imposes a \$2,000 penalty per taxable year on a foreign LLC that fails to qualify to do business in California when it is (1) doing business in this state within the meaning of R&TC section 23101, and (2) fails to make and file a return within 60 days after FTB sends the taxpayer a notice and demand to file the required tax return. The NQSF penalty is analogous to the demand penalty of R&TC section 19133, which, as discussed above, may also be abated only if the taxpayer demonstrates the existence of reasonable cause. The burden of proving “reasonable cause” for failure to file upon demand is on the taxpayer. (*Appeal of GEF Operating, Inc, supra.*)

Appellant does not contest whether the NQSF demand penalties were properly imposed or computed. Rather, appellant argues that it relied on advice of a tax preparation firm with respect to its California income tax filing obligations.

Here, appellant has not shown reasonable cause for abatement of the NQSF demand penalties imposed for the 2013 and 2014 tax years. As noted previously, appellant has not provided specific facts and evidence showing that its failure to timely comply with the demands was due to its reasonable reliance on substantive professional advice or other reasonable cause. (See *Boyle, supra.*) Thus, appellant has not met its burden of proof to abate the NQSF demand penalties imposed for the 2013 and 2014 tax years under R&TC section 19135.

Issue 5: Whether appellant has established a legal basis to abate the estimated tax penalties imposed for the 2015 and 2016 tax years under R&TC section 19142.

A corporation that underpays its estimated tax is penalized by an addition to tax equal to a specified rate of interest applied to the amount of the underpayment. (R&TC, §§ 19142, 19144.) There is no reasonable cause exception for an estimated tax penalty. (See *Appeal of Johnson*, 2018-OTA-119.)

Appellant does not contest whether the estimated tax penalties were properly imposed or computed. Rather, appellant appears to assert that reasonable cause exists to abate the penalties.

As noted above, the R&TC does not contain a reasonable cause or extenuating circumstances exception to the estimated tax penalties imposed on a taxpayer. (*Appeal of Johnson, supra.*) Here, we find no basis for abatement of the estimated tax penalties. Thus, appellant has not met its burden of proof to abate the estimated tax penalties imposed for the 2015 and 2016 tax years under R&TC section 19142.

Issue 6: Whether appellant has established a legal basis to abate the per-shareholder late filing penalty imposed for the 2015 tax year under R&TC section 19172.5.

R&TC section 19172.5 provides that a late filing penalty is to be imposed when an S corporation fails to file a tax return on or before the time prescribed, unless it is shown that the failure is due to reasonable cause. Reasonable cause requires a showing that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.)

Appellant does not contest whether the per-shareholder late filing penalty for the 2015 tax year was properly imposed or computed. Rather, as discussed above, appellant argues that it relied on the advice of a paid tax preparation firm with respect to its California income tax filing obligations.

Appellant's assertions do not demonstrate reasonable cause for the late filing of its 2015 return. As stated above, a taxpayer's reliance on an agent (such as an accountant or a tax attorney) to file a return or make timely payment of tax is not reasonable cause. (See *Boyle, supra.*) As such, appellant's asserted reliance on a tax preparation firm to make a timely tax filing does not constitute reasonable cause to abate the per-shareholder late filing penalty imposed for the 2015 tax year under R&TC section 19172.5.

Issue 7: Whether appellant has established that it is entitled to abate the underpayment of LLC fee penalties imposed for the 2010 through 2014 tax years under R&TC section 17942(d)(2).

R&TC section 17942(d)(1) requires that an LLC fee be estimated and paid on or before the 15th day of the sixth month of the current taxable year. The statute does not provide for a reasonable cause defense to imposition of the penalty. (*Appeal of Summit Hosting LLC*, 2021-OTA-216P.)

Appellant does not contest whether the underpayment of LLC fee penalties for the 2010 through 2014 tax years were properly imposed or computed. Rather, appellant appears to assert that reasonable cause exists to abate the penalties.

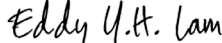
As noted above, the R&TC does not contain a reasonable cause or extenuating circumstances exception to the underpayment of LLC fee penalties. Thus, there is no basis for abatement of those penalties.

HOLDINGS

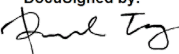
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2. Appellant has not established reasonable cause for the late payment of tax imposed for the 2016 tax year under R&TC section 19132.
3. Appellant has not established reasonable cause for not timely complying with demands issued by FTB for the 2010 and 2012 through 2014 tax years under R&TC section 19133.
4. Appellant has not established a legal basis to abate the NQSF demand penalties imposed for the 2013 and 2014 tax years under R&TC section 19135.
5. Appellant has not established a legal basis to abate the estimated tax penalties imposed for the 2015 and 2016 tax years under R&TC section 19142.
6. Appellant has not established a legal basis to abate the per-shareholder late filing penalty imposed for the 2015 tax year under R&TC section 19172.5.
7. Appellant has not established a legal basis to abate the underpayment of LLC fee penalties imposed for the 2010 through 2014 tax years under R&TC section 17942(d)(2).


DISPOSITION

FTB’s actions denying appellant’s claims for refund for the 2009 through 2016 tax years are sustained in full.

DocuSigned by:

 Eddy Y.H. Lam
 Administrative Law Judge

We concur:

DocuSigned by:

 Richard Tay
 Administrative Law Judge

DocuSigned by:

 Elliott Scott Ewing
 Administrative Law Judge

Date Issued: 8/9/2022