

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21088430
 RJRSJ PROPERTIES, LLC)
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OPINION

Representing the Parties:

For Appellant: Zachary K. Fisher, Managing Member

For Respondent: Christopher T. Tuttle, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, RJRSJ Properties, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$2,592 for the 2017 tax year.¹

Office of Tax Appeals (OTA) Administrative Law Judges Asaf Kletter, Tommy Leung, and Veronica I. Long held an electronic oral hearing for this matter on January 27, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUE²

Whether appellant has shown reasonable cause for the late filing of its 2017 tax return.

¹ Appellant also appealed the 2018 and 2019 tax years in its appeal letter dated August 17, 2021, before full payment for those years and before FTB issued notices of action. Prior to its appeal, appellant requested informal FTB review of its penalty waiver requests for the 2018 and 2019 tax years. Following its appeal of the 2017 tax year, appellant paid the balances due. FTB determined that the payment converted the informal penalty waiver requests to claims for refund. Less than six months later, on December 20, 2021, FTB issued claim for refund denial letters for the 2018 and 2019 tax years. Pursuant to R&TC section 19324, FTB's actions on the claims were final unless within the 90-day period appellant appealed in writing to Office of Tax Appeals (OTA). No appeal was submitted to OTA for the 2018 and 2019 tax years. Therefore, OTA has no jurisdiction to consider the 2018 and 2019 tax years. (Cal. Code Regs., tit. 18, § 30103(a)(3).)

² At the hearing, FTB confirmed that the only penalty it imposed for the 2017 tax year was the late filing penalty.

FACTUAL FINDINGS

1. Appellant is a limited liability company (LLC) that is classified as a partnership for California tax purposes. Appellant has been doing business in California since the 2014 tax year. Appellant had 12 members for the 2017 tax year.
2. Appellant timely paid the annual minimum LLC tax of \$800 for the 2017 tax year. Appellant did not timely file its 2017 LLC Return of Income (return).
3. On February 20 2020, FTB sent appellant a notice of Payment Received – Missing Tax Return (Form 765) for the 2017 tax year, which requested that appellant respond to (1) request a refund of its payment, (2) provide information to help FTB locate the filed return, or (3) file a return. The notice was sent to appellant’s mailing address in North Carolina, included appellant’s six-digit suite number, and was not returned as undeliverable. Appellant did not respond to the notice.
4. On April 15, 2020, FTB received appellant’s 2017 return. FTB accepted the return, and subsequently issued appellant a Return Information Notice for the 2017 tax year reflecting a \$2,592 late filing penalty. The notice was returned as undeliverable.³
5. FTB subsequently issued an LLC Past Due Notice and a Final Notice Before Levy to appellant’s mailing address in North Carolina. These notices did not contain appellant’s six-digit suite number.⁴ Appellant did not respond to the notices. FTB issued an Order to Withhold (OTW) to appellant’s bank on March 19, 2021, to collect the balance due.
6. Appellant remitted payment on April 12, 2021. Appellant also mailed a letter dated April 7, 2021, explaining why its 2017 return was filed late. Appellant attached a paper copy of the return, signed and dated April 7, 2021, which it claimed was electronically filed but that FTB never received.
7. FTB treated appellant’s letter and payment as a claim for refund of the late filing penalty for the 2017 tax year. On August 4, 2021, FTB denied the claim.
8. This timely appeal followed.

³ The record does not provide the mailing address of the Return Information Notice.

⁴ The record does not indicate whether the notices were returned as undeliverable.

DISCUSSION

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 shall file its return on or before the fifteenth day of the third month following the close of its taxable year. (R&TC, §18633.5(a).) Alternatively, the LLC may file its return on or before the automatic extended due date, which is seven months after the original filing due date. (R&TC, § 18567(a)(2)(B).) However, if the return is not filed by the extended due date, no extension is allowed. (Cal. Code Regs., tit. 18, § 18567(a).)

R&TC section 19172 imposes a late filing penalty when a partnership (or an LLC treated 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 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).) When the FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to establish otherwise. (*Appeal of Fisher*, 2022-OTA-337P.)

The late filing penalty will be abated if it is established that the late filing was due to reasonable cause. (R&TC, § 19172(a).) To establish reasonable cause, the taxpayer must show the failure to timely file a return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Fisher, supra.*) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P.) In the absence of credible, competent, and relevant evidence showing error in FTB’s determination, it must be upheld. (*Appeals of F.A.R. Investments, Inc. and Arciero & Sons, Inc.*, 2022-OTA-395P (*Appeals of F.A.R. and Arciero.*))

Here, appellant was a calendar-year taxpayer, and its 2017 return was due March 15, 2018. Appellant had 12 members during the 2017 tax year, and filed its return on April 15, 2020, nearly two years past the original due date. Appellant claims that it timely filed its return for the 2017 tax year but provides no evidence to support its claim. Appellant’s opening brief concedes that, due to a filing error by appellant’s CPA, FTB “never received any paperwork.” FTB confirmed that it had no record of any returns filed prior to April 15, 2020, under appellant’s entity ID or the entity ID of any of its subsidiaries. The paper copy of

appellant's return is signed and dated April 7, 2021, and therefore is not evidence that appellant timely e-filed the return. In the absence of credible, competent, and relevant evidence showing error in FTB's determination, it must be upheld. (*Appeals of F.A.R. and Arciero, supra.*) Thus, FTB properly imposed a \$2,592 late filing penalty (\$18 x 12 members x 12 months).

Appellant asserts that the penalty should be abated for reasonable cause for several reasons. First, appellant argues that its CPA e-filed the return incorrectly. It is well established that each taxpayer has a personal, non-delegable obligation to ensure the timely filing of a tax return, and thus, reliance on an agent to perform this act does not constitute reasonable cause to abate a late filing penalty. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*); *Appeal of Fisher*, 2022-OTA-337P.) "It requires no special training or effort to ascertain a deadline and make sure that it is met," regardless of whether the return is paper filed or electronically filed. (*Boyle, supra*, 469 U.S. at p. 252, *Appeal of Fisher, supra.*) Thus, appellant's CPA's failure to verify whether the return was filed when no confirmation was received does not constitute reasonable cause for appellant's late filing of its return. (*Appeal of Fisher, supra.*) Moreover, the exercise of reasonable cause required appellant to do more than merely perform and/or delegate the tasks necessary to timely file the return. (*Ibid.*) It also required appellant to personally verify the return had been successfully transmitted, and on discovery that transmission was unsuccessful, to take appropriate corrective action.⁵ (*Ibid.*) The record shows that appellant relied entirely on its CPA to properly file. The record does not show that appellant verified that the return was filed. Thus, appellant has not established reasonable cause based on its reliance on its CPA.

Second, appellant argues that its e-filing mistake was in good faith and that it has a good filing history which supports first time abatement of the penalty. Appellant points to its timely payment of the annual minimum LLC tax, which supports its good faith intention to timely file. A history of timely payment may be considered for credibility and intent of the taxpayer, but it

⁵ OTA explained in its precedential opinion in *Appeal of Quality of Tax & Financial Services, Inc.* 2018-OTA-130P, that "in the absence of an acknowledgment that a return was transmitted, received, or accepted, an ordinarily intelligent and prudent businessperson would have viewed the E-File History and acknowledgment records to confirm whether the return had been timely transmitted, received by Intuit, and accepted. Moreover, an ordinarily intelligent and prudent businessperson, after viewing the E-File History and acknowledgment records, and noticing that the return had not been accepted, would have made other attempts to file prior to the end of the extension period."

does not, by itself, show reasonable cause. (*Appeal of Moren*, 2019-OTA-176P.) In other words, appellant’s good faith does not meet the reasonable cause standard set forth above.

Concerning abatement for good filing history, appellant refers to the IRS program called “First Time Abate” through which the IRS abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years. For the 2017 tax year, California had no legislation or other established means for abating late filing penalties based solely on a prior good filing history.⁶ (*Appeal of Xie, supra.*) Instead, for the 2017 tax year, the law provided that the California late filing penalty shall apply unless reasonable cause is shown. (*Ibid.*)

Third, appellant contends that it acted reasonably under the circumstances because FTB did not notify appellant that it had no record of appellant’s 2017 return, and when appellant became aware of the issue, appellant immediately filed the return. Specifically, appellant alleges that it did not receive any of FTB’s notices at its mailing address because FTB’s notices did not contain the complete six-digit suite number. Appellant contends that it only became aware that its 2017 return was not filed on or around March 19, 2021, when FTB issued the OTW to appellant’s bank. Appellant alleges that it filed its 2017 return immediately upon becoming aware of the late filing issue.

Appellant’s third contention appears to be based on several erroneous assumptions. First, as discussed above, the relevant notice to e-filing a return is a notification of successful e-filing through appellant’s tax filing software, not a notice imposing a late filing penalty. Second, appellant assumes that its return was successfully filed since it was not notified, but longstanding case law sets forth a different standard: an ordinarily prudent businessperson should not expect that his or her return was successfully filed without confirmation. Here, the record contains no e-filing acknowledgment or acceptance record indicating that appellant successfully filed its 2017 return. Third, lack of notice from FTB does not negate appellant’s duty of prudence and due care to timely file its return, which includes verifying that its e-filing was successful, and taking appropriate corrective action if the e-filing was not successful. (*Appeal of Scanlon*, 2018-OTA-075P; *Appeal of Fisher, supra.*) Appellant paper filed its return nearly two years late, on April 15, 2020. Appellant provided no proof of an earlier filing nor addressed whether,

⁶ R&TC section 19132.5(a), effective for tax years beginning on or after January 1, 2022, allows an individual taxpayer to request a one-time abatement of a timeliness penalty. As the 2017 tax year is at issue here, this newly enacted provision is inapplicable.

prior to April 15, 2020, it verified that the 2017 return was successfully filed. For these reasons, lack of FTB notification cannot establish that appellant satisfied the reasonable cause standard.

Finally, as a practical matter, the record contradicts appellant's claim that it did not receive notice from the FTB. FTB provided records showing that on February 20, 2020, it issued a Payment Received – Missing Tax Return notice to appellant's address with a six-digit suite number informing appellant that its 2017 LLC tax return was not on file. The address listed on the February 20, 2020 notice matches the address listed on the 2017 return filed by appellant. The February 20, 2020 notice was not returned as undeliverable. It is well established that notices sent by FTB to a taxpayer's last-known address⁷ are sufficient, even if not received by the taxpayer. (R&TC, § 18416; *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.)

Based on the foregoing, OTA finds that appellant has not established reasonable cause to abate the late filing penalty for the 2017 tax year.


⁷ The "last-known address" shall be the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to FTB clear and concise written or electronic notification of a different address, or FTB has an address that it has reason to believe is the most current address for the taxpayer. (R&TC, § 18416(c).) The parties do not appear to dispute that appellant's last-known address contains the six-digit suite number.

HOLDING

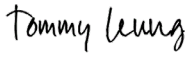
Appellant has not shown reasonable cause for the late filing of its 2017 tax return.

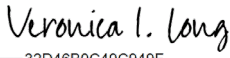
DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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Asaf Kletter
Administrative Law Judge

We concur:

DocuSigned by:

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Tommy Leung
Administrative Law Judge

DocuSigned by:

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Veronica I. Long
Administrative Law Judge

Date Issued: 2/23/2023