

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
)
SOUND AND THE FURY GENTLE FILMS)
LLC)
)
)

OPINION

Representing the Parties:

For Appellant: Todd Fertig, CPA

For Respondent: Eric A. Yadao, Tax Counsel IV

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Sound and The Fury Gentle Films LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) imposing a late filing penalty of \$331.50, a demand penalty of \$331.50, a filing enforcement cost recovery fee of \$85.00, and applicable interest, for the 2015 tax year.

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

ISSUES¹

1. Whether appellant has established that reasonable cause exists to abate the late filing penalty.
2. Whether appellant has established that reasonable cause exists to abate the demand penalty.
3. Whether FTB properly imposed the filing enforcement cost recovery fee.

¹ In its appeal letter, which serves as appellant’s opening brief in this appeal, appellant stated that it had not conducted business in California and indicated that it was contesting FTB’s proposed assessment of tax. During the course of this appeal, appellant modified its position and conceded that it did have a California filing requirement. As a result, the additional tax amount is not at issue in this appeal.

FACTUAL FINDINGS

1. FTB sent appellant a Demand for Tax Return (Demand), dated October 23, 2019, because its records indicated that appellant may have a California filing requirement but had not filed a 2015 California business entity tax return. The Demand required appellant to respond by November 27, 2019, by filing a 2015 tax return, providing evidence that a return had already been filed, or providing information on why appellant was not required to file a return.
2. Appellant did not respond to the Demand or file a 2015 tax return by the deadline provided.
3. On December 30, 2019, FTB issued a Notice of Proposed Assessment (NPA) to appellant proposing to assess tax, penalties, a fee, and interest on appellant's 2015 tax account. Appellant subsequently protested the NPA. By letter dated January 30, 2020, FTB informed appellant that after review of appellant's protest, it had determined that appellant had a California filing requirement for tax year 2015. FTB sent appellant a Notice of Action on Proposed Assessment dated April 6, 2020, affirming the NPA.
4. Appellant subsequently filed this timely appeal.
5. In its opening brief, appellant stated that "[n]o business has been conducted in CA."
6. In an email communication dated July 29, 2020, appellant informed FTB that it acknowledged it had a California filing requirement for 2015 and requested penalty relief since appellant sought to fully comply with FTB once it realized it had a California filing requirement.
7. Appellant then filed a 2015 Limited Liability Company Return of Income reporting tax due of \$800, which appellant paid with the return. FTB received the return and payment on August 3, 2020. FTB accepted the return as filed, and agreed reduce the tax per its NPA to \$800. FTB also agreed to reduce the late filing and demand penalties to \$200 each.
8. During the course of this appeal, Office of Tax Appeals (OTA) requested additional briefing from appellant, to clarify appellant's position and if applicable, why appellant believes the penalties and filing enforcement cost recovery fee should be waived or abated. Appellant was invited to provide documentation in support of its position. OTA

informed appellant that as an independent body, OTA only has the information and evidence provided to it by the parties.

9. Appellant’s response to OTA’s request for additional briefing was an email stating, “We are NOT appealing the position that the LLC has a CA filing requirement.”

DISCUSSION

Issue 1: Whether appellant has established that reasonable cause exists to abate the late filing penalty.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When 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 Xie*, 2018-OTA-076P.) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances he or she asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.)

To overcome the presumption of correctness attached to the penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*) To establish reasonable cause, a taxpayer must show that the failure to file a timely return 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 Belcher*, 2021-OTA-284P.)

On appeal, appellant has not provided any argument or evidence that would support a claim of reasonable cause. Appellant’s opening brief focuses on the argument that appellant did not have a California filing requirement, a position that appellant now concedes was in error and has retracted. To the extent appellant is asserting that the late filing of its return was the result of its mistaken belief that it did not have a California filing requirement for the 2015 tax year, OTA notes that ignorance of the law is not reasonable cause for the failure to comply with statutory requirements. (*Appeal of Porreca*, 2018-OTA-095P.)

FTB notes that in its communications with appellant before this appeal was filed, appellant expressed to FTB that it was asking for abatement of the penalties based on appellant's efforts to fully comply with its filing and payment obligations once it realized it had a California filing requirement. However, appellant did not make such a contention in this appeal. Even if appellant had contended in this appeal that it had reasonable cause for filing its tax return late, such a contention would not, on its own, demonstrate that appellant's failure to file a timely return 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. Such an assertion, if made, would need to be supported by a preponderance of the evidence. (*Appeal of Estate of Gillespie, supra.*)

OTA finds that appellant has not shown that there is reasonable cause to abate the late filing penalty.

Issue 2: Whether appellant has established that reasonable cause exists to abate the demand penalty.

R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. Since appellant did not file a 2015 tax return or otherwise respond to the 2015 Demand within the deadline provided, FTB properly imposed the demand penalty for the 2015 tax year.

To establish that reasonable cause exists to support abatement of the demand penalty, a taxpayer must show that the failure to timely respond to the Demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Wright Capital Holdings, LLC, 2019-OTA-219P.*) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc., 2020-OTA-057P.*)

As explained above, appellant has failed to demonstrate that it exercised ordinary business care and prudence in attempting to timely file its 2015 return or respond to the Demand, and as such, has not established reasonable cause to support abatement of the demand penalty.

Issue 3: Whether FTB properly imposed the filing enforcement cost recovery fee.

R&TC section 19254(a)(2) provides if a person fails or refuses to make and file a tax return within 25 days after FTB mails to that person a formal legal demand to file the tax return, then FTB shall impose a filing enforcement cost recovery fee. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; *Appeal of Wright Capital Holdings, supra.*)

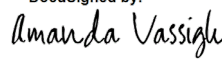
Here, FTB informed appellant in the Demand that the fee may be assessed if it did not timely respond. FTB properly imposed the fee after it did not receive a response within the prescribed period set forth in the Demand. Since the fee was properly imposed, there is no authority for the abatement of this fee. Therefore, OTA sustains FTB's imposition of the filing enforcement cost recovery fee.

HOLDINGS

1. Appellant has not established that reasonable cause exists to abate the late filing penalty.
2. Appellant has not established that reasonable cause exists to abate the demand penalty.
3. FTB properly imposed the filing enforcement cost recovery fee.

DISPOSITION

Consistent with its concession on appeal, FTB’s action is modified to reduce the proposed additional tax assessment to \$800, and the late filing and demand penalties to \$200 each, plus applicable interest. FTB’s action is otherwise sustained.

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Amanda Vassigh
 Administrative Law Judge

We concur:

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Cheryl L. Akin
 Administrative Law Judge

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Sheriene Anne Ridenour
 Administrative Law Judge

Date Issued: 5/4/2023