

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
ACTIVE CONCEPTS LLC) OTA Case No. 230112308
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OPINION

Representing the Parties:

For Appellant: John R. Wheeler, CPA

For Respondent: Gi Jung Nam, Attorney

For Office of Tax Appeals: Ethan Choy, Graduate Student Assistant

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Active Concepts LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$9,095.24 for the 2021 tax year.

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

ISSUE

Whether appellant has established reasonable cause for the late payment of tax.

FACTUAL FINDINGS

1. Appellant, an LLC taxed as an S corporation, filed its 2021 return on April 13, 2022, reporting S corporation tax of \$24,836 and pass-through entity elective tax of \$153,982.¹

¹ For tax years beginning on or after January 1, 2021, and before January 1, 2026, a qualified entity doing business in this state, as defined in R&TC section 23101, and that is required to file a return under R&TC sections 18633, 18633.5, or 18601(a), may elect to annually pay an elective tax according to or measured by its qualified net income, defined in paragraph (2), computed at the rate of 9.3 percent for the tax year for which the election is made. (R&TC, § 19900(a)(1).)

Appellant made \$13,450 in estimated tax payments during 2021, leaving tax due of \$165,368.

2. The due date for appellant's tax payment was March 15, 2022.² However, appellant paid the tax due on April 15, 2022.
3. FTB imposed a late payment penalty of \$9,095.24. Appellant paid the amount due and filed a claim for refund for the penalty.
4. FTB denied appellant's claim for refund for the late payment penalty.³
5. This timely appeal of the late payment penalty followed.

DISCUSSION

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 tax. The late payment penalty may be abated if a taxpayer shows that its failure to timely pay was the result of reasonable cause and not willful neglect. (R&TC, § 19132(a)(1)(A).) Reasonable cause will be found where the taxpayer exercised ordinary business care and prudence but was nevertheless unable to pay the tax by the prescribed date. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) The taxpayer must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Xie*, 2018-OTA-076P.)

A taxpayer does not have to be a tax expert to know that there are fixed filing and payment deadlines. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251.)⁴ Each taxpayer has a personal,

² R&TC sections 19001 & 18601(d)(1).

³ FTB also imposed an underpayment of estimated tax (estimated tax) penalty of \$221.01, plus interest. Appellant also claimed a refund for the estimated tax penalty with FTB, and attached to the claim a Form 5806 which claimed an exception to the estimated tax penalty. The record does not indicate whether the estimated tax penalty was refunded. Appellant only appeals the denial of its claim for refund for the late payment penalty of \$9,095.24. Therefore, the Office of Tax Appeals only addresses the late payment penalty.

⁴ Because the relevant language of R&TC section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code (IRC) section 6651, the federal courts' interpretation of the reasonable cause standard is persuasive authority in determining the proper application of this California statute. (*Appeal of Jones*, 2021-OTA-144P.)

non-delegable obligation to pay tax by the due date. (See *Baccei v. U.S.* (9th Cir. 2011) 632 F.3d 1140, 1148.) To establish reasonable cause based on reliance on a tax advisor, a taxpayer must show that it reasonably relied on the tax advisor for substantive tax advice. (See *Appeal of Summit Hosting LLC*, 2021-OTA-216P, citing *Boyle, supra.*) In addition, it must be shown that the taxpayer relied on a tax professional with competency in the subject tax law, and the advice was based on the taxpayer's full disclosure of relevant facts and documents. (*Appeal of Summit Hosting LLC, supra.*)

Appellant does not dispute that its payment of the remaining tax of \$165,368 occurred after the March 15, 2022 payment deadline. Appellant argues that it has reasonable cause for the late payment due to a reorganization that occurred in 2021, as well as due to tax-free exchanges that occurred in 2021 prior to the reorganization. Appellant asserts that Active Concepts Holdings, Inc. was formed in September 2021 and, through a reorganization, acquired a 100 percent interest in Active Concepts, LLC, which elected to be treated as an S corporation. Appellant states that, pursuant to the Internal Revenue Code, Active Concepts Holdings, Inc. was able to file as an S corporation retroactively to January 1, 2021, due to the acquisition. Appellant states that Active Concepts, LLC also acquired the net assets of five separate LLC entities in tax-free exchanges.

Appellant contends that, due to the complexity of appellant's records related to the consolidation of the seven separate entities, the internal documentation needed to complete the return was not available until after the March 15 payment deadline. Appellant asserts that outside advisors were involved in the reorganization or tax-free exchanges, and not its tax preparer, so its tax preparer was not privy to the restructuring until the tax preparation process had begun. Appellant asserts that it was inadequately informed of the changes resulting from the reorganization and tax-free exchanges by its outside advisors. Therefore, appellant contends that, it was not until the due date had passed that appellant or the tax preparer could anticipate that the pass-through entity tax should be elected, which it contends was beneficial to appellant and its shareholders, but resulted in a larger than normal corporate tax liability.

Appellant provides insufficient evidence in support of its contentions. Appellant points to the complexity of the reorganization and tax-free exchanges but does not provide supporting documentation or records to establish the complications it faced, or of the steps taken to ensure it timely paid its tax. Appellant does not provide evidence establishing why it could not properly

coordinate with its advisors and tax preparer to ensure it would meet its obligation to timely pay tax. Appellant does not explain when the tax-free exchanges or reorganization occurred in 2021 and does not explain why it could not have consulted with its tax advisor/tax preparer at that time the transactions were being executed rather than waiting until the tax preparer began the tax return preparation for appellant.⁵

Appellant also does not sufficiently explain or provide evidence to show why its tax preparer was not provided adequate records until after the March 15 deadline. An ordinarily intelligent and prudent businessperson in similar circumstances would be expected to take steps to timely pay tax, such as sufficiently informing its tax preparer of the reorganization far enough in advance that the tax preparer would have the time necessary to complete the required tax computations before the payment deadline. Appellant has not shown why the necessary information could not have been provided to the taxpayer sooner such that the tax preparer would have sufficient time to compute appellant's tax and advise appellant as to whether or not it should elect the pass-through entity tax, especially considering the necessary information was contained in internal documentation. In addition, a lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Rougeau*, 2021-OTA-335P.) A taxpayer's difficulty in determining income with exactitude does not negate the requirement that taxpayers make payments of tax based upon a reasonably accurate estimate of their tax liability. (*Ibid.*)

Appellant contends that its late payment was due in part to the outside advisors failing to advise appellant about implications of the reorganization and tax-free exchanges, which resulted in appellant and its tax preparer being unable to consider the pass-through entity election before the payment due date. Therefore, appellant asserts there was an absence of advice as to the implications of the reorganization and tax-free exchanges. In addition, appellant does not contend that the tax preparer gave erroneous advice, but that the tax preparer could not give advice due to a lack of timely documentation as to the reorganization and tax-free exchanges. As a result, appellant has not shown that it reasonably relied on erroneous advice as to a substantive tax matter that could establish reasonable cause pursuant to *Boyle, supra*. Accordingly, appellant has not met its burden to show reasonable cause for the failure to timely pay tax.

⁵ Appellant's outside consultants and legal counsel as to the tax-free exchanges and reorganization were not providing appellant with substantive tax advice regarding its 2021 taxes.

HOLDING

Appellant has not established reasonable cause for the late payment of tax.

DISPOSITION

FTB’s action denying the claim for refund is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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Richard Tay
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Richard Tay
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

Date Issued: 11/15/2023