

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
5 FRIENDS FOODS INC.) OTA Case No. 230914223
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OPINION

Representing the Parties:

For Appellant: Jose Antionio Rodrigues Miranda
For Respondent: Tristen Thalhuber, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, 5 Friends Foods Inc. (appellant) appeals actions by respondent Franchise Tax Board (FTB) denying appellant’s claims for refund of \$1,080 for the 2018 tax year and \$1,080 for the 2019 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.05.) 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 to abate the per shareholder late-filing penalty for the 2018 tax year or the 2019 tax year.

FACTUAL FINDINGS

1. Appellant, an S corporation, which incorporated on April 9, 2018, was required to file California S corporation Franchise or Income Tax Returns (Forms 100S) for tax years

- 2018 and 2019 on or before March 15, 2019, and July 15, 2020, respectively.¹ On its 2018 and 2019 returns, appellant reported a maximum of five shareholders.
2. Appellant's 2018 and 2019 returns were both filed on September 29, 2021.
 3. FTB accepted appellant's returns as filed and imposed a per shareholder late-filing penalty of \$1,080 for each tax year. FTB issued an Annual Notice for each tax year and, when the penalty was unpaid, issued a Business Entity Final Notice Before Levy.
 4. Appellant remitted payment of the balance due and filed a claim for refund seeking abatement of the per shareholder late-filing penalty for each tax year.
 5. FTB denied appellant's claim for refund for each tax year.
 6. This timely appeal follows.

DISCUSSION

California imposes a per-shareholder late filing penalty on an S corporation for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause. (R&TC, § 19172.5(a).) The penalty is imposed for each month (or fraction thereof) that the tax return is late and is calculated for each month (but not to exceed 12 months) by multiplying the number of shareholders by \$18.² 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; *Appeal of Quality Tax & Financial Services, Inc.* 2018-OTA-130P.) 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. (*Appeal of Xie, supra.*) 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 ordinary intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

It is well established that each taxpayer has a personal, non-delegable obligation to ensure the timely filing of a return by the due date. (*Appeal of Quality Tax & Financial Services, Inc.*,

¹ Due to the COVID-19 pandemic, the original 2019 return deadline of March 15, 2020, was postponed to July 15, 2020. (<https://www.ftb.ca.gov/about-ftb/news-releases/2020-3-state-postpones-tax-deadlines-until-july-due-to-the-covid-19-pandemic.html>; see also R&TC, 18572.)

² FTB calculated each penalty as \$1,080 by multiplying \$18 per month x 12 months x 5 shareholders.

supra.) A taxpayer's reliance on an agent, such as an accountant or an attorney, to file its return does not constitute reasonable cause. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251-252 (*Boyle*)). In contrast, a taxpayer's reliance on substantive tax advice from a tax adviser may constitute reasonable cause. (*Ibid.*) Furthermore, ignorance of a filing requirement or a misunderstanding of the law generally does not excuse the late filing of a return. (*Appeal of GEF Operating, Inc., supra.*)

Appellant's 2018 and 2019 returns were due on March 15, 2019, and July 15, 2020, respectively, but were not filed until September 29, 2021. Appellant does not dispute that the penalties were properly imposed and computed. Instead, appellant asserts it acted reasonably and in good faith by engaging and relying upon a return preparer to timely file its returns.³ As support, appellant asserts that it paid the accountant and believed that the returns had been timely submitted.

Appellant has not established reasonable cause for the late filing of its California return. As explained above, the fact that appellant relied on a tax preparer to file its return does not relieve appellant of responsibility to ensure the return is timely filed. The late filing penalty will not be abated merely by showing that the taxpayer relied upon a return preparer who filed the return late; the issue is instead whether the taxpayer reasonably relied on the advice of the return preparer concerning a question of law, such as whether it is unnecessary to file a return. (*Boyle, supra* at pp. 250-251; *McMahan v. Commissioner, supra*; *Estate of Fleming v. Commissioner, supra.*) No such question of law was present in this case.

The exercise of ordinary business care and prudence required appellant to do more than merely delegate the tasks necessary to timely file the return. (*Appeal of Fisher, supra.*) Each of these returns has a different filing deadline and both were filed on the same date, September 29, 2021. Appellant has not produced evidence showing the dates it retained the tax preparer to file its 2018 and 2019 returns prior to the filing. Assuming appellant retained the tax preparer to file each of the returns prior to its respective filing deadline, appellant has not produced evidence showing the efforts it made, if any, to verify the returns had been successfully filed, and when they had not been, to take appropriate corrective action. (*Appeal of Quality Tax*

³ Appellant does not contest the imposition or calculation of the late filing penalty and only argues that the penalties should be abated based on reasonable cause.

& Financial Services, Inc., supra.) The record does not show appellant took such action, but instead chose to rely solely upon the return preparer.

For the reasons explained above, OTA finds that appellant has not shown that there is reasonable cause for failing to timely file its 2018 or 2019 return.

HOLDING

Appellant has not demonstrated reasonable cause to abate the late filing penalty for tax year 2018 or tax year 2019.

DISPOSITION

FTB's actions are sustained.

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Veronica I. Long
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Veronica I. Long
Administrative Law Judge

Date Issued: 4/16/2024