

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
CASIANO LANCASTER INVESTMENTS, LLC) OTA Case No. 220811240
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OPINION

Representing the Parties:

For Appellant: Michael Schwartz, Manager

For Respondent: Christopher M. Cook, Attorney
Topher Tuttle, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Casiano Lancaster Investments, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$4,183.02 for the 2016 tax year, \$2,419.32 for the 2017 tax year, \$5,933.49 for the 2018 tax year, and \$1,141.31 for the 2019 tax year for each respective tax year.¹

Office of Tax Appeals (OTA) Panel Members Asaf Kletter, John O. Johnson, and Seth Elsom held a virtual oral hearing for this matter on August 13, 2024. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUES²

1. Whether appellant has established reasonable cause to abate the late filing penalties.
2. Whether appellant has established reasonable cause to abate the notice and demand (demand) penalties.

¹ The refund amounts for each tax year include interest. Appellant requests a refund totaling \$13,550.19 as of the respective dates of the balance due notices for the tax years at issue. Additional interest of \$126.95 accrued between the dates of the notices and the respective dates that appellant paid the liabilities.

² Appellant concedes that it is subject to the limited liability company (LLC) annual tax and fee.

3. Whether appellant has established reasonable cause to abate the late payment penalties.
4. Whether appellant has established a legal basis to abate the underpayment of the estimated limited liability company (LLC) fee penalties (estimated LLC fee penalties).
5. Whether appellant has established that FTB did not properly impose the filing enforcement cost recovery fees (filing enforcement fees).
6. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

Background

1. Appellant was an LLC that filed its LLC Articles of Organization with the California Secretary of State in 2012.³ Appellant was classified as a partnership for California income tax purposes.
2. Appellant timely filed its FTB Form 568, LLC Return of Income (return) and paid the \$800 LLC annual tax for the 2013 through 2015 tax years.⁴
3. As relevant to this appeal, for the 2015 tax year, appellant determined that it owed an LLC fee of \$2,500. Appellant also reported having four LLC members for that tax year.

2016 and 2018 Demands for Tax Return and Notices of Proposed Assessment (NPAs)

4. Appellant did not timely file returns for any of the tax years at issue. For the 2016 and 2018 tax years, FTB issued appellant a Demand for Tax Return (Demand) on March 27, 2019, and July 21, 2021, respectively. FTB did not issue appellant Demands for the 2017 and 2019 tax years.
5. Appellant did not respond to the 2016 and 2018 Demands. FTB issued appellant NPAs for the 2016 and 2018 tax years on May 24, 2019, and September 27, 2021, respectively. For the 2016 tax year, FTB proposed to assess the LLC annual tax, an LLC fee of \$900, a late filing penalty of \$225, a per-partner late filing penalty of \$432, a demand penalty of \$425, a filing enforcement fee of \$88, and applicable interest. For the 2018 tax year, FTB proposed to assess the LLC annual tax, an LLC fee of \$6,000, a late filing penalty of \$1,500, a per-partner late filing penalty of \$432, a demand penalty of \$1,700, a filing enforcement fee of \$97, and applicable interest.

³ Appellant filed a certificate of dissolution on January 28, 2019.

⁴ The record does not contain a copy of appellant's returns for the 2013 or 2014 tax years.

Appellant Filed Returns for All Tax Years at Issue; FTB Revised NPAs and Imposed Penalties

6. In November 2021, appellant filed returns for all tax years at issue. On the return for each tax year at issue, appellant reported that it had four members, that it was not a disregarded entity, and its LLC annual tax liability. As relevant to this appeal, appellant reported an LLC fee of \$6,000 for the 2016 and 2018 tax years, and an LLC fee of \$2,500 for the 2017 tax year.
7. On December 28, 2021, FTB issued appellant a balance due notice for the 2016 tax year (2016 Balance Due Notice) that revised the LLC fee to the amount appellant reported on the 2016 return, the late filing penalty to \$1,500, and the per-partner late filing penalty to \$864, and revised the interest calculation accordingly. FTB imposed an estimated LLC fee penalty of \$600. FTB did not revise the other penalties and fees in the 2016 NPA.
8. Also on December 28, 2021, FTB issued appellant a notice for the 2017 tax year (2017 Balance Due Notice) that imposed a late payment penalty of \$76, a late filing penalty of \$625, a per-partner late filing penalty of \$864, and an estimated LLC fee penalty of \$250.
9. On January 6, 2022, FTB issued appellant a notice for the 2018 tax year (2018 Balance Due Notice), that revised the per-partner late filing penalty to \$864 and the interest and added an estimated LLC fee penalty of \$600. FTB did not revise the other penalties and fees listed in the 2018 NPA.
10. On January 7, 2022, FTB issued appellant a notice for the 2019 tax year (2019 Balance Due Notice) that imposed a late payment penalty of \$172⁵ and a per-partner late filing penalty of \$864.
11. Appellant subsequently paid in full its tax liabilities for the tax years at issue.

Appellant's Claim for Refund and Appeal

12. On January 19, 2022, appellant filed a claim for refund for all tax years at issue.
13. On June 3, 2022, FTB denied appellant's claim for refund.
14. Appellant timely filed this appeal.

⁵ FTB ultimately imposed a late payment penalty of \$176 because an additional monthly penalty amount accrued prior to FTB's receipt of appellant's payment.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause to abate the late filing penalties.

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 15th day of the third month following the close of its taxable year. (R&TC, § 18633.5(a).) California imposes a late filing penalty and a per-partner late filing penalty when a partnership (or LLC classified as a partnership) fails to file a return on or before the prescribed due date for filing the return. (R&TC, §§ 19131(a), 19172(a).)

Here, it is undisputed that appellant untimely filed the returns for the tax years at issue, and accordingly, FTB imposed late filing and per-partner late filing penalties for all tax years at issue. As an initial matter, appellant asserts that it is a single-member LLC (SMLLC), and not a four-member LLC, as it reported on its returns for the tax years at issue and for the 2015 tax year. Therefore, appellant appears to contest the calculation of the per-partner late filing penalties. The burden of proof is generally on appellant as to all issues of fact and requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a), (b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Smith*, 2023-OTA-069P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

On appeal, appellant provides the LLC Operating Agreement dated June 15, 2012, a First Amendment to the LLC Operating Agreement dated May 14, 2015,⁶ and a letter from its CPA. The LLC Operating Agreement defines an initial member and signatory, but Section 8.4 allows for the admission of new members. Therefore, the LLC Operating Agreement does not establish that appellant was an SMLLC during the tax years at issue nor does it contradict appellant's returns for the tax years at issue and its 2015 return, which reported four members and reported that appellant was not a disregarded entity. Thus, the documentation appellant provides on appeal does not meet appellant's burden of proof. (See *Appeal of Smith*, *supra*.)

Appellant's CPA also asserts that appellant is a SMLLC but provides no evidence for her assertion. Appellant's CPA claims that she erroneously marked that the entity was not a disregarded entity but provides no evidence to support her assertion. Unsupported assertions

⁶ The amendment concerns the purpose of the LLC and appears to have no relevance to the determination of the number of LLC members.

are insufficient to satisfy appellant's burden of proof. (*Ibid.*)⁷ Appellant's manager testified that appellant was a SMLLC, and states that its CPA "screwed up." Appellant's manager did not provide any evidence to corroborate his testimony and did not explain why appellant filed returns for five consecutive taxable years that consistently reported four LLC members. Therefore, on the record before it, OTA finds that appellant has not met its burden of proof to establish that it was a SMLLC or a disregarded entity. (See *Appeal of Smith, supra.*)

Appellant primarily asserts reasonable cause on appeal. To establish reasonable cause for late filing penalties, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily prudent businessperson to have acted under similar circumstances. (*Appeal of Head and Feliciano, 2020-OTA-127P; Appeal of Auburn Old Town Gallery, LLC, 2019-OTA-319P.*)

Appellant argues that it was unaware of the California requirement to file a return for an entity disregarded for tax purposes. Appellant also asserts that it had reasonable cause to file its returns late because it relied on its CPA and it was unaware that its tax returns were not filed. Appellant also relies on the CPA's statement that the returns for the tax years at issue were not filed because they were erroneously deleted from her system.

However, even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of Summit Hosting, 2021-OTA-216P.*) Taxpayers who fail to acquaint themselves with the requirements of California tax have not exercised ordinary business care and prudence. (*Ibid.*) Each taxpayer has a non-delegable obligation to file a tax return by the due date. (*Ibid.*)

Moreover, the failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent. (*Appeal of Auburn Old Town Gallery, LLC, supra.*) One does not need to be a tax expert to know that tax returns have fixed filing dates and taxes must be paid when due. (*Ibid.*) However, reasonable cause may exist if the taxpayer reasonably relies on the advice of an accountant or attorney with respect to substantive matters of tax law or whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Appeal of Summit Hosting LLC, supra.*)

Further, appellant provides no evidence to substantiate that it relied on its CPA for advice on questions of substantive tax law. The CPA's letter states that "for whatever reason,

⁷ The CPA's letter states that she is attaching proof of the status of the entity, but no proof was attached to the letter. In response to OTA's inquiry regarding the missing attachment, appellant stated that the CPA sent no enclosures and that no attachments were needed.

the California return was not included on our [firm's] annual return schedule, and therefore was not prepared." However, the failure to file a return due to an oversight does not constitute reasonable cause. (*Appeal of Summit Hosting LLC, supra.*)⁸

Appellant also argues that the penalties and interest are egregious relative to the amount of taxes owed, and that penalties do not serve their intended purpose. However, OTA has no legal basis to make discretionary adjustments to the amount of the liability. (*Appeal of Robinson, 2018-OTA-059P.*)⁹

Issue 2: Whether appellant has established reasonable cause to abate the demand penalties.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's notice and demand to do so, unless it is shown that the failure was due to reasonable cause and not willful neglect.¹⁰ FTB properly imposed the demand penalties for the 2016 and 2018 tax years because FTB issued appellant Demands for the 2016 and 2018 tax years which respectively notified appellant that FTB had no record of appellant's 2016 and 2018 tax returns, and appellant did not timely respond in the prescribed manner, by filing the required tax returns by the due dates of May 1, 2019, and August 25, 2021. Thus, the demand penalties were properly imposed for the 2016 and 2018 tax years.

Appellant does not contest the calculation of the 2016 or 2018 demand penalties; instead, appellant asserts reasonable cause. The burden of proving reasonable cause for the failure to respond to FTB's Demands is on the taxpayer. (*Appeal of GEF Operating, Inc., 2020-OTA-057P.*) An appellant's failure to respond to a Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) Neither appellant nor its CPA have explained what efforts, if any, they made to timely respond to the 2016 or 2018 Demands. OTA has reviewed the record, which lacks any evidence to support a finding of reasonable cause. Therefore, appellant has not established reasonable cause to abate the demand penalties for the 2016 and 2018 tax years.

⁸ The letter also makes a general assertion that appellant "relies on my firm for tax advice and tax preparation," but does not establish what advice, if any, was provided for the tax years at issue.

⁹ This statement equally applies to the late filing penalties, demand penalties, late payment penalties, estimated LLC fee penalties, filing enforcement fees, and interest. OTA does not repeat it below. OTA addresses appellant's argument concerning the timeliness of FTB's enforcement actions under Issue 6, below.

¹⁰ Cal. Code Regs., tit. 18, § 19133(b) imposes additional requirements for the imposition of the demand penalty on an individual; however, here, the demand penalty was imposed on an entity. (See also, *Appeal of Patient Comfort Services, LLC, 2021-OTA-300P* [SMLLC is an entity, not an individual].)

Issue 3: Whether appellant has established reasonable cause to abate the late payment penalties.

Every LLC doing business in California shall pay a tax of \$800 annually to the state for the privilege of doing business in this state. (R&TC, §§ 17941(a), 25153(d).) The tax is due and payable on or before the 15th day of the fourth month of the taxable year. (R&TC, § 17941(c).) California imposes a penalty when a taxpayer fails to pay the amount required to be paid by R&TC section 17941. (R&TC, § 19132(a)(1)(D).)

On appeal, FTB concedes the late payment penalty for the 2017 tax year. Therefore, OTA only addresses the 2019 tax year. It is undisputed that appellant untimely paid the LLC annual tax for the 2019 tax year, and FTB accordingly imposed the late payment penalty on appellant. Appellant does not contest the imposition or calculation of the late payment penalty. Rather, appellant asserts reasonable cause.

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of the LLC annual tax was due to reasonable cause and not due to willful neglect. (R&TC, § 19132(a).) To establish reasonable cause for the late payment of tax, the taxpayer must demonstrate that its failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

Appellant argues that it was unaware of the California requirement to file a return for a disregarded LLC. Appellant also argues that it had reasonable cause to pay its taxes late because it relied on its CPA and was unaware that its tax liability was unpaid. OTA addressed both arguments above and found them not to meet the reasonable cause standard. Appellant provides no further reasonable cause argument for the late payment of tax. Accordingly, appellant has not established reasonable cause untimely paying the 2019 LLC annual tax.

Issue 4: Whether appellant has established a legal basis to abate the estimated LLC fee penalties.

R&TC section 17942(a) imposes an LLC fee based on the total California source income of an LLC that is doing business in California. The LLC fee is required to be estimated and paid on or before the 15th day of the sixth month of the taxable year. (R&TC, § 17942(d)(1).) For each of the 2016, 2017, and 2018 tax years, FTB accepted the LLC fee reported by appellant.

An estimated LLC fee penalty of 10 percent is added to any underpayment of the LLC fee, which equals the difference between the total fee imposed for the taxable year and the amount timely paid. For the 2016 tax year, the LLC fee was required to be paid on or before

June 15, 2016, but appellant did not make the payment until January 12, 2018.¹¹ For the 2017 and 2018 tax years, the LLC fee was required to be paid on or before June 15, 2017, and June 15, 2018, respectively, but appellant did not make the payments until January 19, 2022. Accordingly, FTB properly imposed estimated LLC fee penalties for the 2016, 2017, and 2018 tax years.

Appellant asserts that the LLC, which was a restaurant, never made any money, and that there were losses each year. However, the LLC fee is computed based on gross income, as defined in R&TC section 24271, plus the cost of goods sold that are paid or incurred in connection with the trade or business of the taxpayer. (R&TC, § 17942(b)(1)(A).) Moreover, appellant reported total income from California sources that correspond to the respective LLC fee reported by appellant, and accepted by FTB, for each of the 2016, 2017, and 2018 tax years.¹² Appellant provides no evidence on appeal to show that the LLC fees are incorrect, and OTA's review of the record supports the LLC fee for each of the respective tax years. Therefore, OTA sustains FTB's calculation of the estimated LLC fee penalty.

Appellant again argues that its CPA is at fault for the failure to timely pay the estimated LLC fee. However, the statute provides no reasonable cause exception to the imposition of the estimated LLC fee penalty. (R&TC, § 17942; *Appeal of Summit Hosting LLC, supra.*) Therefore, there is no legal basis to abate the estimated LLC fee penalties.

Issue 5: Whether appellant has established that FTB did not properly impose the filing enforcement fees.

FTB shall impose a filing enforcement fee if a taxpayer fails or refuses to file a required tax return within 25 days after FTB mails the taxpayer a formal legal demand to file the tax return. (R&TC, § 19254(a)(2).)¹³ Once properly imposed, the statute provides no grounds, including reasonable cause, upon which the fee may be abated. (R&TC, § 19254; see *Appeal*

¹¹ The R&TC provides a safe harbor which states that the penalty will not be imposed if the timely estimated LLC fee payment equals or exceeds the LLC fee due for the prior tax year. (R&TC, § 17942(d)(2).) However, evidence in the record shows that the safe harbor does not apply in this matter because appellant did not timely pay any amount of the 2016 LLC fee payment, which does not equal or exceed appellant's timely 2015 estimated LLC fee payment of \$2,500.

¹² For the 2016 and 2018 tax years, appellant reported an amount that corresponds to the \$6,000 LLC fee and for which FTB imposed a \$600 (i.e., 10 percent) estimated LLC fee penalty. (See R&TC, § 19742(a)(3), (d)(2).) For the 2017 tax year, appellant reported an amount that corresponds to the \$2,500 LLC fee and for which FTB imposed a \$250 (i.e. 10 percent) estimated LLC fee penalty. (See R&TC, § 19742(a)(2), (d)(2).)

¹³ FTB adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act.

of *Auburn Old Town Gallery, LLC, supra.*) Therefore, OTA's inquiry is limited to whether FTB complied with the statutory notice requirements for imposing the filing enforcement fee.

Here, FTB issued appellant Demands for the 2016 and 2018 tax years which respectively notified appellant that: (1) appellant had filing requirements for the 2016 and 2018 tax years, (2) FTB had no record of appellant's 2016 or 2018 tax returns, and (3) FTB would impose filing enforcement fees for the 2016 and 2018 tax years if appellant failed to file the required tax returns by the respective due dates of May 1, 2019, and August 25, 2021. Appellant filed the 2016 and 2018 returns in November 2021, long after the due dates. Therefore, FTB properly imposed the filing enforcement fees for the 2016 and 2018 tax years and there is no legal basis to abate the fees.

Issue 6: Whether appellant is entitled to interest abatement.

The imposition of interest is mandatory and accrues on a tax deficiency regardless of the reason for the underpayment. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) To obtain interest relief, appellant must qualify under either R&TC section 19104, pertaining to unreasonable error or delay by FTB in the performance of a ministerial or managerial act, or R&TC section 21012, pertaining to reasonable reliance on FTB's written advice.¹⁴ (*Ibid.*)

Here, appellant alleges that FTB notified appellant only in 2021 of the liabilities for the 2016, 2017, and 2018 tax years. R&TC section 19104(b)(1) states that an error or delay shall be taken into account only after FTB has contacted the taxpayer in writing with respect to that deficiency or payment. The record shows that FTB first contacted appellant in writing regarding the liabilities for the tax years at issue as follows: for the 2016 tax year, on May 24, 2019; for the 2017 tax year, on December 28, 2021; for the 2018 tax year, on September 27, 2021; and for the 2019 tax year, on January 7, 2022. Therefore, no interest prior to these dates may be abated for the respective tax years.

¹⁴ OTA does not have jurisdiction to review FTB's denial of request to waive interest under R&TC section 19112, pertaining to extreme financial hardship caused by significant disability or other catastrophic circumstance. (*Appeal of Moy, supra.*)

Moreover, appellant fails to identify an unreasonable error or delay by FTB after FTB contacted appellant in writing. The record does not reveal any error or delay by FTB for the tax years at issue.¹⁵ Moreover, R&TC section 19104 requires that no significant aspect of any error or delay be attributable to the taxpayer. Here, appellant failed to timely file returns for the years at issue, failed to respond to the 2016 and 2018 Demands and failed to respond to the 2016 and 2018 NPAs. Appellant's inaction significantly contributed to the delay and the accrual of interest. Therefore, interest may not be abated.

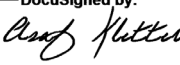
¹⁵ FTB issued appellant the 2016 and 2017 Balance Due Notices in December 2021, less than two months after appellant filed the 2016 and 2017 returns. FTB issued appellant the 2018 and 2019 Balance Due Notices in January 2022, about two months after appellant filed the 2018 and 2019 returns. FTB denied appellant's January 19, 2022 claim for refund for the tax years at issue in June 2022, about five months later.

HOLDINGS

1. Appellant has not established reasonable cause to abate the late filing penalties.
2. Appellant has not established reasonable cause to abate the demand penalties.
3. Appellant has not established reasonable cause to abate the late payment penalties.
4. Appellant has not established a legal basis to abate the estimated LLC fee penalties.
5. Appellant has not established that FTB did not properly impose the filing enforcement fees.
6. Appellant is not entitled to interest abatement.

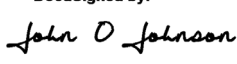
DISPOSITION

The late payment penalty under R&TC section 19132 of \$76 is abated, as modified to reflect FTB’s concession on appeal. FTB’s action denying appellant’s claim for refund is otherwise sustained.

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 Asaf Kletter
 Administrative Law Judge

We concur:

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 John O. Johnson
 Administrative Law Judge

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 Seth Elsom
 Hearing Officer

Date Issued: 11/19/2024