

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 240215365
BLOWHOLE PRODUCTIONS LLC)
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OPINION

Representing the Parties:

For Appellant: Christina Lehman, Managing Member

For Respondent: David C. Cortez, Program Specialist

E. PARKER, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Blowhole Productions LLC (appellant) appeals actions by respondent Franchise Tax Board (FTB) denying appellant's claims for refund of \$482.22 for the 2020 tax year and \$543.97 for the 2021 tax year.¹

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellant has established a basis to abate the per-partner late filing penalty (per-partner penalty) for the 2020 or 2021 tax year.
2. Whether appellant has established a basis to abate the late payment penalty for the 2020 or 2021 tax year.

FACTUAL FINDINGS

1. Appellant is a California limited liability company (LLC) that is classified as a partnership for income tax purposes. It was formed, and began doing business in California, on April 29, 2020.

¹ For 2020, the total consists of a late payment penalty of \$44 and a per-partner late filing penalty of \$432, plus applicable interest. For 2021, the total consists of a late payment penalty of \$88 and a per-partner late filing penalty of \$432, plus applicable interest.

2. Appellant made an untimely annual LLC tax payment on August 9, 2020. FTB sent appellant a notice dated February 23, 2023, stating that the payment was received but a 2020 tax return had not been filed. FTB received appellant's untimely Limited Liability Company Return of Income (Form 568) for the 2020 tax year on March 15, 2023.
3. For the 2021 tax year, appellant made an untimely annual LLC tax payment on April 8, 2022, and filed an untimely Form 568 on February 28, 2023.
4. Due to the untimely payments and filing of returns, FTB assessed the per-partner penalty and the late payment penalty for both the 2020 and 2021 tax years.
5. Appellant paid the penalties and interest and filed claims for refund of those amounts.²
6. FTB denied the claims for refund, and appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant has established a basis to abate the per-partner penalty for the 2020 or 2021 tax year.

An LLC classified as a partnership for California tax purposes that is doing business in California must file a return on or before the 15th day of the third month following the close of its taxable year. (R&TC, § 18633.5(a).) R&TC section 19172 imposes a per-partner penalty when a partnership (or an LLC classified as a partnership) fails to file a timely return. The per-partner penalty will be abated if it is established the late filing was due to reasonable cause. (R&TC, § 19172(a).) Reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) The burden of proof is on the taxpayer to provide credible and competent evidence supporting a claim of reasonable cause. (*Appeal of Xie*, 2018-OTA-076P.)

On appeal, appellant requests a refund of the per-partner penalty for the 2020 and 2021 tax years due to reasonable cause. Appellant asserts that the 2020 tax return was mailed timely on July 17, 2021, but was lost in the mail during the COVID-19 pandemic. After receiving FTB's February 23, 2023 notice that a return was not filed for the 2020 tax year, appellant sent the return via certified mail. Regarding the 2021 tax return, appellant contends that the return was timely filed electronically on April 28, 2022. In support of its contention, appellant provided filing status reports printed on March 1, 2023, indicating appellant's 2021 California and federal 2021 returns were both accepted on April 28, 2022. Appellant asserts the IRS removed all

² On appeal, appellant does not provide arguments to abate interest. Therefore, interest abatement will not be considered in this Opinion.

penalties and interest for the 2021 tax year after confirming that it received the 2021 return on time. The IRS penalty dismissal letter was provided on appeal. Appellant requests the removal of the California penalty as well.

A return filed via U.S. mail is deemed filed as of the postmark date stamped on the envelope containing the return, or on the date it was mailed if there is satisfactory proof establishing it was mailed on an earlier date. (Gov. Code, § 11003.) A return filed with an authorized electronic return transmitter is considered filed on the date the electronic return transmitter receives the electronically filed document on its host system, as evidenced by an electronic postmark. (R&TC, § 21027(b) [incorporating Treas. Reg. § 301.7502-1(d)].)

For the 2020 tax year, appellant provides no evidence in support of its claim that the tax return was timely mailed on July 17, 2021, such as a certified mail receipt. For the 2021 tax year, in support of its argument that the return was timely filed, appellant provides filing status reports indicating an authorized electronic return transmitter submitted the 2021 federal and California returns on April 28, 2022. However, as FTB points out on appeal, the submission number noted on both reports is only associated with the California return filed on February 28, 2023.³ The filing history report seemingly conflicts with information contained in FTB's records,⁴ and based on the information provided, FTB's records present the more trustworthy evidence. Accordingly, appellant's report is not credible evidence to support its position that it filed the 2021 return on April 28, 2022.

Appellant's reliance on the IRS's removal of penalties as grounds to request removal of the per-partner penalty is misplaced. The IRS letter dated August 20, 2023, states the IRS removed penalties and interest for the 2021 tax year based on the postmark date of the return. Whether appellant filed a timely federal return does not satisfy the requirement to file a timely California return. As explained above, appellant has not shown it timely filed a California tax return for the 2021 tax year.

Appellant has failed to provide any credible evidence that the failure to timely file the 2020 and 2021 tax returns occurred despite having acted as an ordinarily intelligent and prudent

³ Submission numbers are unique and contain the date of submission within the sequence. Both the federal and California filing history reports provided by appellant, claiming the 2021 returns were filed on April 28, 2022, reference the same unique California submission identification number that was generated on February 28, 2023.

⁴ It is unclear whether the "Return Accepted" date of April 28, 2022, on appellant's report refers to the return being accepted by Intuit, as it directly follows the entries for the return being transmitted to and received by Intuit, or if this return accepted date refers to FTB accepting the return (although no similar entries are provided for the transmittal or receiving of the return by FTB). Either way, the report provided by appellant is either incomplete or conflicts with the information in FTB's records.

businessperson would have acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC, supra.*) Unsupported assertions are not sufficient to satisfy the burden of proof. (*Appeal of GEF Operating, Inc., 2020-OTA-057P.*) As such, appellant has not established a basis to abate the per-partner penalty for the 2020 or 2021 tax year.

Issue 2: Whether appellant has established a basis to abate the late payment penalty for the 2020 or 2021 tax year.

An LLC registered with the California Secretary of State must pay an annual tax of \$800 on or before the 15th day of the fourth month of the LLC's tax year. (R&TC, § 17941(b)(1), (c).) R&TC section 19132 imposes a late payment penalty on an LLC that fails to pay the annual LLC tax of \$800 by the due date unless it is shown that the failure is due to reasonable cause and not due to willful neglect. Similar to the issue discussed above, reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Triple Crown Baseball, LLC, 2019-OTA-025P.*) In other words, a taxpayer must show that the failure to meet its tax obligation occurred despite the exercise of ordinary business care and prudence. (*Ibid.*)

On appeal, appellant contends reasonable cause exists to abate the penalty for late payment of the annual LLC tax because it miscalculated when the first year annual LLC tax was due for the 2020 tax year. Appellant also asserts that a tax preparer misinformed appellant that the annual tax was not due for the first year of business. Since appellant had already made its first annual tax payment on August 9, 2020, for the 2020 tax year, appellant believed a credit balance existed that would apply toward a timely payment for the 2021 tax year. Accordingly, appellant believed it was current on its annual LLC tax payments.

Appellant was formed on April 29, 2020. As such, the first month of appellant's 2020 tax year was April 2020. Since the annual LLC tax is due the 15th day of the fourth month of the tax year, appellant's 2020 annual LLC tax was due July 15, 2020. The 2021 annual LLC tax was due April 15, 2021. (R&TC, § 17941(c).)⁵ The United States Supreme Court has held that, under certain circumstances, taxpayers may establish reasonable cause when they reasonably rely on substantive advice of a tax professional. (*U.S. v. Boyle* (1985) 469 U.S. 241, 250 (*Boyle*); see also *Appeal of Summit Hosting LLC, 2021-OTA-216P* [applying *Boyle* to the late payment penalty].) A taxpayer's reliance on a tax professional to take care of an administrative

⁵ R&TC section 17941(g)(1) provides that certain LLCs doing business in California that organize or register with the Secretary of the State on or after January 1, 2021, and before January 1, 2024, shall not be subject to the annual LLC tax for its first tax year. Since appellant began doing business in California on April 29, 2020, this provision does not apply.

act, including paying a tax, generally does not constitute reasonable cause. (*Boyle, supra.*) Reliance on a tax professional cannot function as a substitute for compliance with an unambiguous statute. (*Ibid.*) Moreover, to the extent that appellant's failure to meet its tax obligations was due to an oversight or ignorance of the law, it is well established that such reasons do not constitute reasonable cause for abating a penalty. (*Appeal of Red Vision Systems, Inc.*, 2023-OTA-561P; *Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

Here, appellant failed to pay the annual LLC tax for the 2020 and 2021 tax years by the unambiguous statutory due dates. (R&TC, § 17941(c).) Appellant's miscalculation of the 2020 annual LLC tax deadline was an administrative error due to an oversight or ignorance of the law. For the 2021 tax year, the inaccurate advice received from the tax preparer regarding appellant's payment obligation and supposed credit balance does not constitute substantive advice that establishes reasonable cause. (*Appeal of Summit Hosting LLC, supra.*) Appellant has not shown its failure to timely pay the tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC, supra.*) As such, appellant has not established reasonable cause to abate the late payment penalty for the 2020 or 2021 tax year.

HOLDINGS

1. Appellant has not established a basis to abate the per-partner penalty for the 2020 or 2021 tax year.
2. Appellant has not established a basis to abate the late payment penalty for the 2020 or 2021 tax year.

DISPOSITION

FTB's actions denying the claims for refund are sustained.

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Erica Parker
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Erica Parker
Hearing Officer

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Teresa A Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 1/7/2025