

OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 231214956
<b>BRIAN R. GANTWERKER, M.D., A MEDICAL</b>	)	
<b>CORPORATION</b>	)	
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**OPINION**

Representing the Parties:

For Appellant:	Russell H. Saffer, CPA
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For Respondent:	Yadi Li, Graduate Student Assistant
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S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Brian R. Gantwerker, M.D., A Medical Corporation (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$829.25<sup>1</sup> for the 2021 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 panel member. (Cal. Code Regs., tit. 18, § 30209.05(b).) Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

**ISSUE**

Whether appellant has demonstrated reasonable cause to abate the late filing penalty imposed under R&TC section 19131 or the S corporation per shareholder late filing penalty (shareholder late filing penalty) imposed under R&TC section 19172.5 for the 2021 taxable year.

**FACTUAL FINDINGS**

1. Appellant elected to be taxed as an S corporation and had one shareholder in 2021.

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<sup>1</sup> This amount consists of: (1) a late filing penalty of \$613.25 imposed under R&TC section 19131; and (2) an S corporation per shareholder late filing penalty of \$216 imposed under R&TC section 19172.5.

2. On August 31, 2023, appellant untimely filed its 2021 California S Corporation Franchise or Income Tax Return (Form 100S), reporting an amount due, which appellant remitted with the return.
3. FTB processed appellant's return and imposed a late filing penalty and a shareholder late filing penalty since appellant did not timely file its tax return. FTB sent a Notice of Balance Due notifying appellant of the imposed penalties and outstanding balance due.
4. Appellant paid the amount due and filed a claim for refund, which FTB denied.
5. This timely appeal followed.

### DISCUSSION

California imposes a penalty for the failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) Under R&TC section 19131, the late filing penalty is 5 percent of the amount of tax required to be shown on the return for every month that the return is late, without any regard to extensions of time for filing, up to a maximum of 25 percent. (*Ibid.*)

R&TC section 19172.5(a) provides that if any S corporation fails to file a tax return within the time prescribed, then the corporation shall be liable for a penalty unless that failure is due to reasonable cause. The amount of the penalty is calculated as \$18 multiplied by the number of persons who were shareholders in the S corporation during any part of the taxable year multiplied by the number of months (or fraction thereof) the return is late, up to 12 months. (R&TC, § 19172.5(b).)

When FTB imposes a late filing penalty, the penalty is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome the presumption of correctness. (*Ibid.*) To establish reasonable cause, a taxpayer must show that the failure to timely file 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 GEF Operating, Inc.*, 2020-OTA-057P.)

Here, appellant does not dispute the imposition or computation of the penalties; rather, appellant contends that its untimely filing was unintentional, and reasonable cause exists to abate the penalties. Specifically, appellant contends that due to COVID-19, it was unable to gather the necessary books and records in a timely manner to complete and file its 2021 tax return. Appellant asserts that the personnel responsible for preparing the books were out sick

for a prolonged period with COVID-19, and appellant immediately filed its tax return once the books became available. Appellant argues that it exercised ordinary business care by securing help; however, due to the impact of COVID-19, it could not meet the filing deadline.

Taxpayers have an obligation to file timely returns with the best available information, and to then subsequently file an amended return, if necessary. (*Appeal of Xie, supra.*) Difficulty in obtaining information or calculating a tax liability does not constitute reasonable cause for the late filing of a return. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc., supra.*) Therefore, contrary to appellant's decision to wait and untimely file its return upon the gathering of its records and the preparation of its books, the law dictates that the appropriate path is to file a timely return and amend it later, if needed. "To hold otherwise would be to make the [late filing penalty]<sup>2</sup> optional for any taxpayer who claims to have delayed filing based on attorney advice that the return must be true, correct and complete." (*Estate of Campbell v. Commissioner*, T.C. Memo. 1991-615.) Accordingly, appellant's decision to not timely file with the information available as of the filing due date, and to instead wait until its records were gathered and its books prepared, does not constitute reasonable cause to abate the late filing or the shareholder late filing penalties.<sup>3</sup>

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<sup>2</sup> The tax court in this decision referenced Internal Revenue Code section 6651(a), which is the federal corollary to California's late filing penalty statute, R&TC section 19131.

<sup>3</sup> R&TC section 19132.5 authorizes taxpayers to request one-time abatement of a timeliness penalty (i.e., a late filing penalty imposed under R&TC section 19131), but it is only available for individuals (not corporations); therefore, R&TC section 19132.5 is not applicable for purposes of this appeal.

HOLDING

Appellant has not demonstrated reasonable cause to abate the late filing penalty imposed under R&TC section 19131 or the shareholder late filing penalty imposed under R&TC section 19172.5 for the 2021 taxable year.

DISPOSITION

FTB's action denying appellant's claim for refund is sustained.

DocuSigned by:

*Sheriene Anne Ridenour*

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Sheriene Anne Ridenour  
Administrative Law Judge

Date Issued: 2/13/2025