

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 231014575
LEVEL 10 CONSTRUCTION, LP)
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OPINION

Representing the Parties:

For Appellant: Tatyana Aprelenko, Representative

For Respondent: Sarah J. Fassett, Attorney

For Office of Tax Appeals: William J. Stafford, Attorney

S. Elsom, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Level 10 Construction, LP (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$98,897.57 for the 2021 tax year.

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).

ISSUES

1. Whether appellant has demonstrated that the late payment penalty may be abated.
2. Whether appellant has demonstrated that interest may be abated.

FACTUAL FINDINGS

1. Appellant, a limited partnership (LP), timely filed a 2021 California Partnership Return of Income (California Return), reporting total tax of \$2,706,382, the sum of the annual minimum LP tax of \$800 plus pass-through entity tax (PTET) of \$2,705,582; payments of \$2,706,382; and zero tax due.
2. Appellant made the following four payments, totaling \$2,706,382: a PTET payment of \$1,037,286, on December 23, 2021; an annual minimum tax payment of \$800 on

March 15, 2022; a PTET payment of \$1,495,436, on April 13, 2022; and a PTET payment of \$172,860, on April 18, 2022.

3. On February 10, 2023, respondent sent appellant a Notice of Balance Due, informing appellant that respondent had imposed a late payment penalty of \$92,620.58 plus applicable interest.
4. Appellant subsequently paid the balance due and filed a claim for refund.
5. On July 28, 2023, respondent issued appellant a notice of action denying appellant's claim for refund.
6. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has demonstrated that the late payment penalty may be abated.

Tax is due on the original due date of the return without regard to any extension to file. (R&TC, § 19001.) Every LP that does business in this state and is required to file a return must pay a minimum tax of \$800. (R&TC §§ 17935(a), 23153(d)(1).) The due date for an LP's payment of tax is the same as the filing date, which is the 15th day of the third month after the close of the taxable year (or March 15th, for a calendar-year taxpayer). (R&TC §§ 19001, 18633(a)(1).)

For tax years beginning on January 1, 2021, the PTET was enacted into California law, allowing certain pass-through entities (or, the qualified entity) such as partnerships to annually elect to pay an elective tax at a rate of 9.3 percent based on the qualified taxpayer's (or, a partner's) allocable share of the qualified entity's qualified net income. (R&TC, § 19900(a)(2)). This election is made on an original, timely filed return and is irrevocable for the taxable year (R&TC, § 19900(a)(1)). For the 2021 tax year, payment of the PTET is also due on or before the due date of the original return without regard to any extension of time for filing for the taxable year of the PTET election. (R&TC, § 19904(a)(1).) Therefore, the payment deadline for appellant's reported total tax due of \$2,706,382 (including the PTET) was March 15, 2022.

Calculation of Late Payment Penalty

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 the tax. The late payment penalty is the sum of two figures that may not exceed 25 percent of the unpaid tax. (R&TC, § 19132(a)(2).) The first part is five percent of the tax that remained unpaid as of the due date. (R&TC, § 19132(a)(2)(A).) The second part is 0.5 percent of the unpaid tax balance per month for each month, or portion of a month, that the tax remains unpaid after the due date, not to exceed 40 months. (R&TC, § 19132(a)(2)(B).)

On appeal, appellant contends that respondent incorrectly calculated the late payment penalty by failing to consider appellant's December 23, 2021 payment of \$1,037,286, and by treating appellant's payments, on April 13, 2022 of \$1,495,436, and April 18, 2022, of \$172,860, as untimely. Specifically, appellant asserts it is its "understanding [was that] if the [p]artnership return was put on extension, the last [two] payments on 04/13 and 04/15 would not be considered late."

Here, appellant made total timely payments of \$1,038,086, the sum of \$1,037,286 on December 23, 2021, and \$800 on March 15, 2022, which respondent credited to appellant. Thus, appellant left unpaid tax of \$1,668,296 as of the March 15, 2022 payment deadline. Therefore, respondent accounted for all of appellant's timely payments and correctly calculated a late payment penalty of \$92,620.58 based upon the late paid tax of \$1,668,296.¹ (R&TC § 19132(a)(1).)

Reasonable Cause to Abate Late Payment Penalty

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Moren*, 2019-OTA-176P.) The taxpayer bears the burden of proving that an ordinary intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

¹ The late payment penalty of \$92,620.58 consists of two parts, which respondent calculated as follows: (1) an underpayment penalty of five percent of the unpaid tax (i.e., $0.05 \times \$1,668,296 = \$83,414.80$) and (2) a monthly penalty of 0.5 percent per month, or a portion of a month, calculated on the total unpaid tax (i.e., $\$1,495,436 \times 0.005 \times 1 \text{ month} = \$7,477.18$; and $\$172,860 \times 0.005 \times 2 \text{ months} = \$1,728.60$).

Appellant asserts that: (1) finalized forms to calculate the PTET were unavailable at the time of appellant's return extension; (2) whether guaranteed payments were included in the amount of qualified net income on which the PTET calculation is based upon was unclear; and (3) some of appellant's partners made estimated tax payments towards their personal tax liabilities, and thus the total prepayments of tax were higher than the amount of payments that appellant reported on its 2021 California Return.

Respondent argues that the instructions for how to calculate the PTET are located on Form 3804, Pass-Through Entity Elective Tax Calculation. Specifically, respondent notes that the instructions defined "qualified net income" as the sum of the pro-rata share or distributive share of income and guaranteed payments subject to personal income tax of the electing PTE's qualified taxpayers. Respondent argues that this information was available prior to the payment due date for the 2021 tax year.

On February 7, 2021, California Senate Bill 113 (SB 113) amended R&TC section 19900(a)(2) to provide that qualified net income includes "any" guaranteed payments subject to California tax. The record in this appeal demonstrates that respondent updated its Form 3804 instructions in February of 2022 to define qualified net income to *include* guaranteed payments in accordance with amendments made to R&TC § 19900 by SB 113. Thus, the updated Form 3804 instructions clearly define qualified net income to include guaranteed payments as required under R&TC section 19900(a)(2) and were available for review by appellant prior to the March 15, 2022 payment deadline.

As stated above, appellant bears the burden of proving that an ordinary intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren, supra.*) Here, appellant does not provide correspondence with tax preparers, explanations of legal authority that it reviewed, correspondence with respondent, or any other information to demonstrate its efforts to calculate and pay the correct PTET amount *on or before* the payment due date, March 15, 2022. Therefore, appellant has not established reasonable cause to abate the late payment penalty.

Additionally, appellant appears to ask OTA to consider whether the late payment penalty may be abated because appellant's partners collectively made payments of their individual estimated tax in an amount that exceeded the total amount due by appellant. A taxpayer's payment of estimated tax is considered as paid on the due date of the respective tax return for that taxpayer. (R&TC, §§ 19002(c).) Therefore, the amount of estimated tax paid by appellant's partners is not relevant to the determination of whether appellant has timely paid its tax under

R&TC section 19904 or has established reasonable cause to abate the late payment penalty under R&TC section 19132.

Issue 2: Whether appellant has demonstrated that interest may be abated.

Interest is not a penalty but is merely compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Gorin*, 2020-OTA-018P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (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 relief from interest, a taxpayer must qualify under R&TC sections 19104 or 21012. (*Appeal of Gorin, supra.*) OTA has jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC sections 19104 and 21012, but R&TC section 21012 does not apply here because respondent did not provide appellant with any requested advice.


Here, appellant has not established interest abatement under R&TC section 19104 applies because appellant does not allege, and the evidence does not show, that the interest is attributable to any unreasonable error or delay by an officer or employee of respondent when performing a ministerial or managerial act. Therefore, appellant has not demonstrated any basis for interest abatement.

HOLDING

1. Appellant has not demonstrated that the late payment penalty may be abated.
2. Appellant has not demonstrated that interest may be abated.


DISPOSITION

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

Signed by:

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 Seth Elsom
 Hearing Officer

We concur:

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 Amanda Vassigh
 Administrative Law Judge

DocuSigned by:

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 Cheryl Akin
 Administrative Law Judge

Date Issued: 1/22/2026