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3 **BOARD OF EQUALIZATION**
4 **STATE OF CALIFORNIA**
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6 In the Matter of the Appeal of:) **SUMMARY DECISION**
7) **LIMITED LIABILITY COMPANY TAX**
8 **MARGATE PROPERTIES, LLC**) **APPEAL**
9) Case No. 592006
10) Adopted: December 17, 2013

11 Representing the Parties:

12 For Appellant: Zachary Nathan, Member

13 For Franchise Tax Board: Nancy E. Parker, Tax Counsel III

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15 Counsel for the Board of Equalization: William J. Stafford, Tax Counsel III
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17 This appeal is made pursuant to section 19324 of the Revenue and Taxation Code
18 (R&TC) from the action of the Franchise Tax Board (FTB or respondent) in denying appellant's claims
19 for refund of \$338.28¹ for the 2009 tax year and \$121.13² for the 2010 tax year. The issues presented in
20 this appeal are (i) whether appellant has demonstrated reasonable cause for a refund of the 2009 late
21 filing penalty imposed under R&TC section 19172, (ii) whether appellant has demonstrated reasonable
22 cause for a refund of the 2009 and 2010 late payment penalties imposed under R&TC section 19132,
23 and (iii) whether appellant has shown that interest should be refunded.

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28 ¹ This amount is comprised of (i) a late payment penalty of \$124.00, (ii) a limited liability company (LLC) late filing penalty of \$150.00, and (iii) interest of \$64.28.

² This amount of comprised of (i) a late payment penalty of \$88.00, and (ii) interest of \$33.13.

1 FINDINGS AND DISCUSSION

2 Background

3 Appellant, a California limited liability company (LLC), was formed in April of 2009.
4 Appellant filed its 2009 and 2010 California returns in April of 2011. On each return, appellant reported
5 a minimum tax due of \$800. Included with each tax return was a payment of \$800. Appellant did not
6 self-assess any penalties or interest. After receiving appellant's 2009 and 2010 California returns, the
7 FTB imposed (i) an LLC late filing penalty for the 2009 tax year, (ii) late payment penalties for the 2009
8 and 2010 tax years, and (iii) interest. In summary, appellant was subject to the following tax, penalty,
9 and interest amounts for 2009 and 2010 the tax years:

10 2009 Tax Year

11	\$ 800.00	Annual LLC tax
12	\$ 64.28	Interest
13	\$ 124.00	Late payment penalty
14	\$ <u>150.00</u>	LLC late filing penalty
15	\$1,138.28	Total

16 2010 Tax Year

17	\$ 800.00	Annual LLC tax
18	\$ 33.13	Interest
19	\$ <u>88.00</u>	Late payment penalty
20	\$ 921.13	Total

21 Appellant paid the above-listed amounts in full and filed timely claims for refund in relation to the
22 penalties, including interest thereon, which combined totaled \$338.28 for 2009 and \$121.13 for 2010.

23 *Claims for Refund*

24 In its claims for refund, appellant's member, Zachary Nathan, provides the following
25 facts and contentions: Mr. Nathan states that, in 2008, he and his two sisters inherited their father's
26 home in Los Angeles. Afterwards, they allegedly fixed up the home, with the intent of renting it out in
27 2009. After reviewing the matter, their attorney, Hugh Sommers, allegedly advised them to set up an
28 LLC for purposes of renting the home. In June of 2009, Mr. Nathan and his sisters decided to sell the
home instead of renting it out. Accordingly, Mr. Nathan states that he "put a hold on the legal services
in progress related to the LLC." The home was sold shortly thereafter in September of 2009.

Mr. Nathan states that he and his sisters did not file state tax forms for the LLC until

1 2011 because the LLC had no assets, it never did any business, it had no income, it never opened a bank
2 account, and their attorney never advised them that it was necessary to file state tax forms. Mr. Nathan
3 states that, once they realized that it was necessary to file California tax forms, they promptly filed the
4 proper forms and paid all of the taxes, penalties, and interest allegedly due. Mr. Nathan asserts that, had
5 their attorney advised them correctly, they would have dissolved the LLC in 2009 and not incurred the
6 \$800 annual LLC fees. Mr. Nathan contends that none of the LLC's members had prior experience with
7 LLCs so they had to rely on Mr. Sommers' advice.

8 On July 15, 2011, the FTB denied appellant's claim for refund, asserting that the facts
9 Mr. Nathan provided did not constitute reasonable cause for a refund of the penalties or an adequate
10 basis for a refund of interest. In response, appellant filed this timely appeal.

11 Contentions

12 Appeal Letter

13 In its appeal letter, appellant reasserts the same contentions made above by Mr. Nathan in
14 the claim for refund filed.

15 The FTB

16 The FTB makes four arguments.

17 First, the FTB argues that it correctly calculated the late filing penalty for 2009. (The
18 FTB did not impose a late filing penalty for 2010.) Specifically, the FTB argues that R&TC section
19 19172 provides that a late filing penalty is to be imposed when a partnership (or a LLC electing to be
20 taxed as a partnership) fails to file a tax return timely. The FTB asserts that the penalty is the product of
21 the following: ten dollars (\$10) multiplied by the number of partners in the partnership during any part
22 of the taxable year. In addition, the FTB asserts that the penalty is computed for each month during
23 which the failure to file continues, up to a maximum of five months, citing R&TC section 19172,
24 subdivisions (a)(2) and (b). Next, the FTB contends that appellant had three members during the appeal
25 year. Accordingly, the FTB asserts that the late filing penalty for 2009 was correctly calculated as
26 equaling \$150 (i.e., \$10 x 3 partners x 5 months).

27 Second, the FTB argues that it correctly calculated the late payment penalties for 2009
28 and 2010. Specifically, the FTB argues that R&TC section 19132 imposes a late payment penalty when

1 a taxpayer fails to pay the amount shown as due on the return by the date prescribed for payment of that
2 tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without
3 regard to extensions of time for filing) which, for the years at issue, was April 15th of each year. (Rev.
4 & Tax. Code, § 19001.) The FTB starts that it received the annual tax for 2009 (2 years late) and 2010
5 (1 year late) in April 2011. The FTB asserts that it properly calculated the late payment penalties for
6 2009 and 2010.

7 Third, the FTB argues that appellant has not shown reasonable cause for a refund of the
8 penalties. The FTB asserts that appellant bears the burden of showing reasonable cause for a refund of
9 the late filing penalty for 2009 and the late payment penalties for 2009 and 2010, citing to, among other
10 Board decisions, the *Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982 and the *Appeal of*
11 *Roger W. Sleight*, 83-SBE-249, Oct. 14, 1982.³ The FTB asserts that appellant has not provided any
12 evidence as to (i) whether Mr. Sommers was a competent professional in the subject matter of California
13 LLC taxation, (ii) whether Mr. Sommers was advised of all of the facts, and (iii) what advice (including
14 documentation thereof, if any) Mr. Sommers provided appellant concerning the filing and payment
15 requirements. In addition, the FTB asserts that reliance on a professional cannot function as a substitute
16 for compliance with an unambiguous statute and filing obligation, citing *Boyle v. United States* (1985)
17 469 U.S.241. The FTB notes that, in *Boyle*, the Supreme Court stated that “. . . one does not have to be
18 an expert to know that that tax returns have fixed filing dates and that taxes must be paid when they are
19 due.” (*Id.*, at 251.) The FTB asserts that the principle that a taxpayer may reasonably rely upon the
20 advice of a tax professional relates to matters of substantive law, which is not applicable in this appeal
21 because appellant’s filing and payment requirements were plainly set forth in the law.

22 Finally, the FTB argues that appellant has not shown that interest should be refunded.
23 Specifically, the FTB argues that interest is required to be assessed from the date when the payment of
24 tax is due, through the date that it is paid and there is no reasonable cause exception to the imposition of
25 interest. Thus, the FTB asserts that interest cannot be abated on the basis of Mr. Sommer’s alleged
26 failure to advise appellant of its filing and payment obligations. The FTB contends that, while the law
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28 ³ Board of Equalization cases are generally available for viewing on this Board’s website (www.boe.ca.gov).

1 authorizes the abatement of interest under certain circumstances, appellant has advanced no arguments
2 that would establish a basis for the abatement of interest. For example, the FTB contends that appellant
3 has not alleged that the FTB committed an error or delay in the performance of a ministerial or
4 managerial act, and thus, interest cannot be abated under R&TC section 19104, subdivision (a).

5 Appellant's Reply Brief

6 Mr. Nathan asserts that although one does not have to be a tax expert to know that taxes
7 must be paid, it is not intuitive that one should pay taxes on a business with no income.

8 Next, Mr. Nathan asserts that although Mr. Sommers is a reputable attorney with over
9 50 years of experience, Mr. Sommers is an octogenarian who is in poor health and appears to have
10 simply forgotten to forward filing and tax documents to Mr. Nathan and other members of the LLC. In
11 addition, Mr. Nathan contends that (i) the members did not receive any correspondence from
12 Mr. Sommers from June 23, 2009 through April of 2011, (ii) Mr. Sommers failed to inform Mr. Nathan
13 and the other members that, when Mr. Sommers filed the LLC papers with the California Secretary of
14 State, appellant had an obligation to file both state and federal income tax forms for the LLC, and
15 (iii) Mr. Sommers did not tell Mr. Nathan and the other members to dissolve the LLC when they
16 informed him in June of 2009 that they intended to sell the home instead of using it as rental property.

17 Discussion

18 Burden of Proof—In General

19 The FTB's determination of tax is presumed to be correct, and a taxpayer has the burden
20 of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Aaron and Eloise*
21 *Magidow*, 82-SBE-274, Nov. 17, 1982.) Unsupported assertions are not sufficient to satisfy a
22 taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

23 Late Filing Penalty

24 R&TC section 19172 imposes a late filing penalty when a partnership (or an LLC
25 treated as a partnership) fails to file a return at the time prescribed unless it is shown that the failure was
26 due to reasonable cause. The late filing penalty under R&TC section 19172 is computed at \$10 per
27 partner per month, or fraction thereof, that the return is late, up to a maximum of five months. To
28 establish reasonable cause for the late filing of the return, a taxpayer "must show that the failure to file

1 timely returns occurred despite the exercise of ordinary business care and prudence, or that cause
2 existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar
3 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979; *Appeal of Stephen*
4 *C. Bieneman*, *supra.*)

5 Appellant has not shown reasonable cause for a refund of the late filing penalty. First,
6 the statute’s filing deadlines are unambiguous. Second, appellant’s argument that its attorney failed to
7 inform appellant of the filing obligations and deadlines is not a basis for showing reasonable cause.
8 (*Boyle v. United States*, *supra.*) The principle that a taxpayer may reasonably rely upon the advice of a
9 tax professional generally relates to matters of substantive law, which is not applicable in this appeal
10 because appellant’s filing obligation was plainly set forth in the law. (*Id.*)

11 Late Payment Penalties

12 R&TC section 19132, subdivision (a)(1)(A), imposes a late payment penalty when a
13 taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of
14 that tax. Generally, the date prescribed for the payment of the tax is the due date of the return (without
15 regard to extensions of time for filing). (Rev. & Tax. Code, § 19001.) The late payment penalty does
16 not apply when the failure to pay is due to reasonable cause and not due to willful neglect. The taxpayer
17 bears the burden of proving reasonable cause, which means it must show that its failure to pay the tax in
18 a timely manner occurred despite the exercise of ordinary business care and prudence. (*Appeal of*
19 *M. B. and G. M. Scott*, 82-SBE-249, Oct. 14, 1982.)⁴ Financial difficulties may constitute reasonable
20 cause for the failure to timely pay. (*Fran Corp. v. United States* (2nd Cir. 1999) 164 F.3d 814, 819.)

21 Appellant has not shown reasonable cause for a refund of the late payment penalties.
22 Here, the statute’s payment deadlines are unambiguous. In addition, appellant’s argument, that its
23 attorney failed to inform appellant of the payment obligations and deadlines, is not a basis for showing
24 reasonable cause. (*Boyle v. United States*, *supra.*) The principle that a taxpayer may reasonably rely
25 upon the advice of a tax professional generally relates to matters of substantive law, which is not
26 applicable in this appeal because appellant’s payment obligations were plainly set forth in the law. (*Id.*)
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28 ⁴ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 Relief of Interest

2 Interest is required to be assessed from the date when the payment of tax is due, through
3 the date that it is paid. (Rev. & Tax. Code, § 19101.) The imposition of interest is mandatory; it is not a
4 penalty, but is compensation for an appellant's use of money after it should have been paid to the state.
5 (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause exception to
6 the imposition of interest. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

7 To obtain relief from interest, appellant must qualify under one of three statutes:
8 R&TC sections 19104, 19112, or 21012. R&TC section 21012 is not applicable because there has been
9 no reliance on any written advice requested of the FTB. R&TC section 19112 requires a showing of
10 extreme financial hardship caused by significant disability or other catastrophic circumstance. However,
11 there is no provision in R&TC section 19112 or other law that gives the Board jurisdiction to determine
12 whether R&TC section 19112 applies in this instance. However, the Legislature did provide the Board
13 with jurisdiction over appeals of denied interest abatement requests under R&TC section 19104, as
14 discussed below.

15 Under R&TC section 19104, for tax years beginning on or after January 1, 1998,⁵ this
16 Board may only abate or refund interest on appeal.

17 [T]o the extent that interest is attributable in whole or in part to any unreasonable error or
18 delay by an officer or employee of the Franchise Tax Board (acting in his or her official
19 capacity) in performing a ministerial or managerial act.

(Rev. & Tax. Code, § 19104, subd. (a)(1) [emphasis added].)

20 Further, the error or delay can be taken into account only if no significant aspect is
21 attributable to the taxpayer, and the error or delay occurred after respondent contacted the taxpayer in
22 writing about the underlying deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1).) In the *Appeal of*
23 *Michael and Sonia Kishner* (99-SBE-007), decided on September 29, 1999, the Board adopted the
24 language from Treasury Regulation section 301.6404-2 (b)(2), defining a "ministerial act" as:

25 A procedural or mechanical act that does not involve the exercise of judgment or
26 discretion, and that occurs during the processing of a taxpayer's case after all
27 prerequisites to the act, such as conferences and review by supervisors, have taken place.
A decision concerning the proper application of federal tax law (or other federal or state
law) is not a ministerial act.

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⁵ For years prior to January 1, 1998, managerial acts were not included as a reason for the abatement of interest.

1 This Board has not yet adopted a definition for the term “managerial act.” However,
2 when a California statute is substantially identical to a federal statute (such as, with the interest
3 abatement statute in this case), we may consider federal law interpreting the federal statute as highly
4 persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.) In this regard, Treasury
5 Regulation section 301.6404-2 (b)(1) defines a “managerial act” as:

6 [A]n administrative act that occurs during the processing of a taxpayer’s case involving
7 the temporary or permanent loss of records or the exercise of judgment or discretion
8 relating to management of personnel. A decision concerning the proper application of
9 federal tax law (or other federal or state law) is not a managerial act.

9 Here, appellant has advanced no argument that would establish a basis for a refund of
10 interest. As noted above, there is no reasonable cause exception to the imposition of interest. (*Appeal of*
11 *Audrey C. Jaegle, supra.*) For example, appellant has not alleged or shown that the FTB caused the
12 accrual of interest because of a delay in the performance of a ministerial or managerial act. In addition,
13 appellant has not alleged or shown any other basis for a refund of interest.

14 CONCLUSION

15 For the foregoing reasons, the FTB’s denials of appellant’s claims for refund are
16 sustained.

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