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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:

) **HEARING SUMMARY**

) **CORPORATION FRANCHISE TAX APPEAL**

12 **J.L.E. ENTERPRISES, INC.**¹

) Case No. 796714

14 Year
2011

13 Claim
For Refund
\$432.60²

16 Representing the Parties:

17 For Appellant: Jeffrey L. Eisikowitz, President

18 For Franchise Tax Board: Natasha S. Page, Tax Counsel III

20 QUESTION: Whether appellant has shown reasonable cause for the abatement of the S corporation
21 late payment penalty for 2011.

23 HEARING SUMMARY

24 Background

25 For the 2011 tax year, appellant filed an untimely California S Corporation income tax
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27 ¹ Appellant is headquartered in California.

28 ² This amount consists of a \$432.00 late filing penalty and \$0.60 in interest.

1 return (Form 100S) on April 15, 2013. Since appellant made a timely estimated tax payment of \$800 on
2 March 15, 2011, no tax was due with the untimely return. The Franchise Tax Board (FTB) issued a
3 Notice of Balance Due on June 21, 2013, requesting that appellant pay a late filing penalty of \$432.
4 Thereafter, appellant submitted a second payment for \$800.00, and the FTB issued appellant a refund for
5 \$367.40 (i.e., \$800.00 - \$432.00 - \$0.60 in interest). (Resp. Opening Br., pp. 1-2, Exhibits A, B, C, and
6 D.)

7 Appellant filed a claim for refund requesting the abatement of the late filing penalty.
8 Appellant asserted that, although it has been filing late returns for approximately six years, it has never
9 owed money since it allows tax refunds to roll over to tax years with liabilities. Appellant noted that the
10 S corporation late filing penalty is calculated based on the number of shareholders and contended that
11 the original shareholder (Mr. Eisikowitz) added his wife as a shareholder merely to protect her interests
12 should Mr. Eisikowitz predecease her. Appellant asserted that, while it is guilty and should be
13 penalized, appellant believes that it should be charged based on the calculation of one shareholder since
14 Mr. Eisikowitz's wife is a shareholder merely as a formality. The FTB responded to appellant's claim
15 for refund stating that it denied the claim based on a lack of reasonable cause. This timely appeal
16 followed. (Resp. Opening Br., p. 2, Exhibit E.)

17 Contentions

18 Appellant's Contentions

19 On appeal, appellant contends that that it has been in business since January of 2001 and
20 that each year it immediately pays the \$800 S corporation fee. Appellant contends that it has no idea
21 how the \$800 payment for the 2011 tax year did not get paid. Appellant asserts that it is a small
22 business that takes care of its employees, and that it cannot understand the level of punishment for a
23 simple error. Appellant asserts that it does not make sense that the \$432 late filing penalty is more than
24 half of the \$800 tax due for 2011, especially in light of appellant's corporate history. (Appeal Letter.)

25 In its reply brief, appellant asserts that the 2011 tax return was late because appellant
26 could not "get to it," and that appellant thought that filing the return late would not be a major issue
27 since the tax was paid. Appellant contends that, due to the filing extension, the "worst case scenario" is
28 that appellant's tax return is seven, as opposed to thirteen, months late, and requests that six of the

1 thirteen months be withdrawn from the penalty calculation. Appellant notes that, in the FTB's
2 January 22, 2014 letter denying appellant's August 14, 2013 claim for refund, the FTB apologizes for
3 the delay in replying. Appellant contends that the penalty should be reduced since four and a half
4 months to issue a letter denying a claim for refund is unacceptable. Appellant attached with its reply
5 brief a copy of an email from its accountant concerning the filing of federal Form 7004 (Application for
6 Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns)
7 along with a copy of appellant's 2011 federal Form 7004. (App. Reply Br., attachments.)

8 Respondent's Contentions

9 The FTB contends that, pursuant to Revenue and Taxation Code (R&TC) section 18601,
10 appellant was required to file a 2011 tax return on or before the 15th day of the third month following
11 the close of its taxable year. The FTB asserts that, while appellant paid its tax liability by March 15,
12 2011, appellant is subject to tax under R&TC section 23153, and, therefore, appellant is required to file
13 a return pursuant to R&TC section 18601, even if no additional tax was due for the 2011 tax year. The
14 FTB states that appellant was required to file a 2011 tax return by March 15, 2012, but that the FTB did
15 not receive appellant's 2011 tax return until April 15, 2013, 13 months after the due date. The FTB
16 argues that, since appellant filed its tax return after the due date, the S corporation late filing penalty was
17 correctly imposed in accordance with R&TC section 19172.5, which imposes a late filing penalty on
18 S corporations that fail to file a return on or before the time prescribed, unless it is shown that the failure
19 is due to reasonable cause. (Resp. Opening Br., pp. 2-3.)

20 The FTB contends that the late filing penalty was properly calculated. The FTB states
21 that appellant's 2011 tax return was due on March 15, 2012, and that pursuant to R&TC section
22 19172.5, subdivision (b), the applicable late filing penalty is \$18 per shareholder per month or fraction
23 thereof that the return was late, up to a maximum of 12 months.³ As appellant indicated on its return
24 that it had two shareholders, the FTB imposed the maximum fee of \$18 per shareholder for 12 months,
25 totaling \$432. (Resp. Opening Br., p. 2.)

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27 ³ The FTB states that R&TC section 19172.5 was added by section 49 of SB 401 (Stats. 2010, ch. 14) and applies to returns
28 required to be filed after January 1, 2011, the effective date of SB 401. The FTB asserts that this explains why appellant had
not received late filing penalties in prior years. (Resp. Opening Br., p. 5.)

1 The FTB contends that appellant failed to demonstrate reasonable cause for an abatement
2 of the late filing penalty. The FTB states that, to establish reasonable cause, a taxpayer must show that
3 the failure to timely file occurred despite the exercise of ordinary business care and prudence, and that
4 the taxpayer acted in a manner such that an ordinarily intelligent and prudent businessperson would have
5 acted similarly under the circumstances. The FTB contends that appellant did not offer any explanation
6 to show that the failure of filing a timely return was due to reasonable cause. The FTB asserts that
7 appellant's contentions that it has been working hard to grow as a business and does not know why the
8 timely filing of the return was overlooked, does not meet the burden of establishing reasonable cause.
9 The FTB contends that appellant has not shown that another ordinarily intelligent and prudent
10 businessperson would have acted similarly under the circumstances. The FTB argues that appellant has
11 admitted that, while it pays its taxes before the deadline, it has not filed a timely California
12 S Corporation income tax returns for many years. The FTB contends that appellant has not provided
13 sufficient legal arguments to excuse its late filing and appellant has not shown reasonable cause to abate
14 the penalty. (Resp. Opening Br., pp. 2-3.)

15 Applicable Law

16 An S corporation is required to file its tax return on or before the 15th day of the
17 third month following the close of its taxable year. (Rev. & Tax. Code, § 18601.) R&TC section
18 18604, subdivision (a), provides for a reasonable extension of time to file a return, not to exceed
19 seven months after the due date for filing a return. R&TC section 18604 further provides that an
20 extension to file may be granted in the "manner and form as the Franchise Tax Board determines."
21 Pursuant to FTB Notice No. 92-11, the extension of the time to file is conditioned upon filing the return
22 within the automatic extension period. If the return is not filed by the extended due date, then no
23 extension exists. (FTB Notice No. 92-11, p. 1.)

24 R&TC section 19172.5, subdivision (a), provides that, for returns required to be filed
25 after January 1, 2011, if any S corporation fails to file a return within the time prescribed (determined
26 with regard to any extension of time for filing), then the S corporation shall be liable for a penalty unless
27 that failure is due to reasonable cause. The amount of the penalty is calculated as \$18 multiplied by the
28 number of persons who were shareholders in the S corporation during any part of the taxable year

1 multiplied by the number of months the return is late, up to 12 months. (Rev. & Tax Code, § 19172.5,
2 subd. (b).)

3 When the FTB imposes a late filing penalty, the law presumes that the penalty was
4 imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) The burden is on the taxpayer to
5 establish reasonable cause for the untimely filing. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249,
6 Oct. 14, 1982.)⁴ To establish reasonable cause to abate the S Corporation late filing penalty,⁵ a taxpayer
7 must show that the failure to file timely returns occurred despite the exercise of ordinary business care
8 and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson
9 to have so acted under similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027,
10 Jan. 9, 1979.)

11 Each taxpayer has a personal, non-delegable obligation to file a tax return by the due
12 date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985; *Appeal of Roger D. and*
13 *Mary Miller*, 86-SBE-057, Mar. 4, 1986.) Ignorance of the filing requirement does not excuse the late
14 filing penalty. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.) A taxpayer's
15 misunderstanding of the law does not constitute reasonable cause. (*Id.*) The mere uninformed and
16 unsupported belief of a taxpayer, no matter how sincere that belief may be that he is not required to file
17 a tax return is insufficient to constitute reasonable cause for his failure so to file. (*Appeal of J. Morris*
18 *and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967, citing *Robert A. Henningsen*, 26 T.C. 528.) The
19 burden of prompt filing is a fixed and clear duty on the taxpayer, not on some agent or employee of the
20 taxpayer. (*Appeal of Thomas K. and Gail G. Boehme, supra*, citing *United States v. Boyle* (1985)
21 469 U.S. 241.)

22 STAFF COMMENTS

23 Appellant's 2011 return was due on March 15, 2012, with an extended due date of
24 October 15, 2012. Appellant filed its 2011 return on April 15, 2013. Because appellant did not file its
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26 ⁴ Board of Equalization cases (designated "SBE") may generally be found at: www.boe.ca.gov.

27 ⁵ Although there are no formal Board decisions or case law decisions interpreting the reasonable cause abatement provision
28 of R&TC section 19172.5, the provisions of R&TC section 19131, allowing for the abatement of the late filing penalty due
to reasonable cause and its federal counterpart, are substantially the same and relate to the same subject matter.

1 2011 return by October 15, 2012, appellant did not have an extension of time to file such that its 2011
2 return was filed 13 months late. According to appellant's 2011 tax return, it had 2 shareholders.
3 Therefore, the FTB properly calculated a penalty of \$432 (i.e., \$18 x 2 partners x 12 months).

4 At the hearing, appellant should be prepared to meet its burden of establishing that it had
5 reasonable cause for the untimely filing. Appellant asserts that the 2011 tax return was filed late
6 because appellant could not get to that task and appellant thought that filing the return late would not be
7 a major issue since the tax was paid. Staff notes, however, that ignorance of the filing requirement does
8 not excuse the late filing penalty and a taxpayer's misunderstanding of the law does not constitute
9 reasonable cause. (*Appeal of Diebold, Incorporated, supra.*)

10 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has
11 any additional evidence to present, it should be provided to the Board's Board Proceedings Division at
12 least 14 days prior to the oral hearing.⁶

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28 ⁶ Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.