

Appeal of Breneman, Inc.

The sole issue for determination is whether respondent properly imposed a penalty upon appellant for failing to file its franchise tax return for the appeal year on time.

Appellant's 1978 franchise tax return was due on or before March 15, 1979. On March 26, 1979, respondent received an extension request. Since the request was not received until after the filing date for the return, respondent denied the extension request. Although the request was not timely received, it indicated on its face that it had been prepared by February 22, 1979. Appellant contends **that** the delay in mailing the extension request resulted from a clerical oversight in its office. Appellant's return for 1978 was finally filed on July 31, 1979, four and one-half months late. Appellant maintains that the return could not be filed on time because all the necessary information was not available and because the new controller had been with the corporation for only two months.

Respondent imposed the penalty in issue for late filing in accordance with sections 25931 and 25931.3 of the Revenue and Taxation Code. Appellant protested on the basis that the late filing was due to reasonable cause. After appellant's protest was denied this appeal followed.

Section 25931 of the Revenue and Taxation Code provides that if a taxpayer fails to file a timely return, a five percent penalty per month shall be added to the tax unless the failure to file was due to reasonable cause and not willful neglect. It is undisputed that both the return and the extension request were filed late. Appellant argues, however, that the extension request should have been granted even though it was not timely.

In 1976 section 25402 of the Revenue and Taxation Code was amended to conform to the federal method of granting extensions to file returns contained in section 6081 of the Internal Revenue Code. Among the federal regulations promulgated thereunder, Treasury Regulation section 1.6081-3(a)(2) requires that the extension request be filed on or before the **due date for filing the return. Since, during the year in issue, the state had issued no regulations under section 25402 of the Revenue and Taxation Code, the federal regulations were applicable.** (Cal. Admin. Code, tit. 18, reg. 26422; see Cal. Admin. Code, tit. 18, reg. 25401, **effective** Feb.

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15, 1980.) Thus, it is apparent that the extension request must be filed on or before the return due date. It is equally apparent that the extension request was not timely filed. Since there is no provision for granting an untimely extension request, we must conclude that respondent's action in denying the request was proper.

As previously indicated, it is also appellant's position that the late filing of its return was due to reasonable cause and not due to willful neglect. (See Rev. & Tax. Code, § 25931.) It is well established that the burden of proving the existence of both conditions is upon the taxpayer. (See, e.g., Appeal of Telonic Altair, Inc., Cal. St. Bd. of Equal., May 4, 1978.) Reasonable cause which will excuse a taxpayer's failure to file a timely return means nothing more than the exercise of ordinary business care and prudence, or such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Sanders v. Commissioner, 225 F.2d 629, 636 (10th Cir. 1955), cert. den., 350 U.S. 967 [100 L.Ed. 2d 839] (1956); Appeal of Loew's San Francisco Hotel Corp., Cal. St. Bd. of Equal., Oct. 17, 1973.)

Appellant advances three reasons why the return was filed late: (1) a clerical error caused the extension request to be late; (2) necessary information was unavailable because the annual certified audit was conducted concurrently; and (3) the controller who was responsible for filing the return was new to the company. In prior appeals we have held that none of those three reasons constituted reasonable cause. (Appeal of Telonic Altair, Inc., supra; Appeal of Electrochimica Corp., Cal. St. Bd. of Equal., Aug. 3, 1970; Appeal of Normandy Investments Limited, Cal. St. Bd. of Equal., Sept. 12, 1968.) In Appeal of Telonic Altair, Inc., supra, we concluded that a clerical oversight did not constitute reasonable cause. We also held in Appeal of Normandy Investments Limited, supra, that the existence of information-gathering problems did not justify a company in filing its franchise tax return late. Finally, in Appeal of Electrochimica Corp., supra, we decided that personnel turnover and the inexperience of new employees did not constitute reasonable cause for filing a late return. For the reasons set forth in those decisions, we conclude that appellant's failure to file a timely return was not due to reasonable cause. Therefore, respondent properly assessed the penalty for late filing and its action must be sustained.

