

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011316
))
GERALD F. AND) Date Issued: October 10, 2018
))
BARBARA G. JOHNSON))
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DECISION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Barbara G. Johnson
Gerald F. Johnson

For Respondent: Anne Mazur, Specialist

G. THOMPSON, Administrative Law Judge: On March 27, 2018, we issued a decision sustaining the Franchise Tax Board's (FTB's) action denying appellants' claim for a refund in the amount of \$8,012.12¹ for the 2015 tax year. Pursuant to Revenue and Taxation Code section 19334,² appellants petitioned for a rehearing. Upon consideration of appellants' petition according to the standards expressed in *Appeal of Wilson Development, Inc.*, 94-SBE-007, October 5, 1994,³ and California Code of Regulations, title 18, section 30602(c)(5)(A)-(D), we conclude that the grounds set forth therein do not constitute good cause for a new hearing.⁴

In *Appeal of Wilson Development, Inc., supra*, the BOE determined that good cause for a new hearing may be shown where one of the following grounds exists and the rights of the complaining party are materially affected: 1) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its appeal; 2) accident or surprise, which

¹ This is the amount of an addition to tax, often referred to as an estimated tax penalty, paid by appellants. During appeal, FTB agreed to reduce the penalty to \$6,502 in order to properly take into account a real estate withholding payment.

² Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

³ Precedential opinions issued by the Board of Equalization (BOE) can be seen on its website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

⁴ See also *Appeal of Sjofinar Do*, 2018-OTA-002P, March 22, 2018.

ordinary prudence could not have guarded against; 3) newly discovered evidence, material for the party making the petition for rehearing, which the party could not, with reasonable diligence, have discovered and produced prior to the decision; 4) insufficiency of the evidence to justify the decision, or the decision is against the law; or 5) error in law. (See also Cal. Code Regs., tit. 18, § 30602, subd. (c)(5)(A)-(D).)

In their petition for rehearing, appellants primarily argue that they have not yet received the \$1,510.12 plus accrued interest that FTB conceded they were owed. While our opinion found that appellants are entitled to a refund in this amount, our opinion did not become final because appellants filed this petition for rehearing. FTB has not yet issued a refund to appellant because our opinion is not yet final and the refund claim is the subject of this pending appeal. Pursuant to Section 19334, our opinion in this matter will become final 30 days following our decision in this petition for rehearing. FTB will then issue a refund to appellants for the \$1,510.12 plus accrued interest.⁵ The fact that FTB has not issued a refund while the appeal is pending does not constitute an irregularity or other ground for rehearing.

Appellants also argue, for the first time, that one of the potential grounds for waiver of the estimated tax penalty, Internal Revenue Code (IRC) section 6654(e)(3)(B), applies to their situation.⁶ IRC section 6654(e)(3)(B) provides that the estimated tax penalty may be waived if the government determines that (i) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, and (ii) the underpayment was due to “reasonable cause” and not due to willful neglect.

Appellants argue that during 2015 and the appeal process they “*have been* retired and . . . over the age of 62. [emphasis added]” However, in order for IRC section 6654(e)(3)(B) to be potentially applicable, appellants would have to demonstrate that they retired *during* 2014 or 2015 (or that they became disabled in those years). This requirement was stated in our opinion, however appellants have not asserted or provided any evidence to show that it is satisfied.⁷ That

⁵ After the expiration of this 30-day period, appellants may wish to contact FTB to find out how long it will take FTB to process the refund.

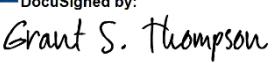
⁶ Subject to certain exceptions not relevant to the issues on appeal, Section 19136 incorporates IRC section 6654. In its briefing prior to our opinion, FTB noted the existence of these waiver provisions in a footnote, but appellants did not address the waiver provisions prior to our opinion.

⁷ Appellants’ birth dates indicate that they were over the age of 62 during 2014 and 2015, however there is no evidence that either appellant retired during 2014 or 2015. As a result, we do not address the issue of whether appellants would have been entitled to partial relief if one of them retired during 2014 or 2015.

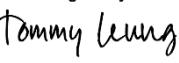
is, even if appellants were retired as of 2015, they have not provided evidence or argument to show that they retired during 2014 or 2015.⁸ Accordingly, appellants have not shown any error or other ground for rehearing.

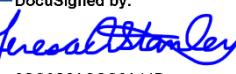
Appellants also repeat arguments they previously made that the estimated tax penalty can be abated based solely on a showing of reasonable cause and lack of “willful neglect.” However, this argument is not correct. As noted in our opinion, the applicable statutes do not allow for the estimated tax penalty to be abated based solely on reasonable cause and lack of “willful neglect,” and appellants have not shown that they come within one of the waiver provisions provided by IRC section 6654(e)(3).

For the foregoing reasons, appellants have not shown any ground for rehearing. Appellants’ petition for rehearing is denied.

DocuSigned by:

Grant S. Thompson
Administrative Law Judge

We concur:

DocuSigned by:

Tommy Leung
Administrative Law Judge

DocuSigned by:

Teresa A. Stanley
Administrative Law Judge

⁸ Even if such evidence were available, appellants would have to show that the evidence constituted newly discovered evidence that they could not, with reasonable diligence, have discovered and produced prior to our opinion. We also note that, in order for this provision to apply, appellants would have to show that they had reasonable cause for not making sufficient estimated tax payments. While we do not rule on this basis, we note that appellants provided no evidence to show that, prior to the due dates for their estimated tax payments, they consulted with a tax professional or took other reasonable steps to estimate the amount of estimated tax payments that would be required. In fact, appellants made no estimated tax payments and their real estate withholding covered less than one-third of the tax owed.