

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011237  
)  
**DAVID LOWENBERG AND JACQUELINE** ) Date Issued: April 2, 2018  
**LOWENBERG** )  
)  
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**OPINION**

Representing the Parties:

For Appellant: Jack Lapidos, CPA

For Respondent: Samantha Q. Nguyen, Tax Counsel

For Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,<sup>1</sup> David and Jacqueline Lowenberg (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants’ claim for refund in the amount of \$2,699 for the 2015 tax year.

Appellants waived their right to an oral hearing and therefore the matter is being decided based on the written record.

**ISSUE**

Have appellants demonstrated that the underpayment of estimated tax penalty should be abated?

**FACTUAL FINDINGS**

1. Appellants timely filed a 2015 California Resident Income Tax Return (FTB Form 540), reporting federal adjusted gross income (AGI) of \$3,419,107, subject to California subtractions of \$10,013 and additions of \$36,453, for a reported California AGI of

<sup>1</sup> Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

\$3,445,547. Appellants claimed a standard deduction of \$8,088 and reported California taxable income of \$3,437,459 and a tax of \$395,650. After claiming another state tax credit of \$2,866 and self-assessing a mental health services tax of \$24,375, appellants reported a total tax of \$417,159. After claiming withholding credits of \$50,161 and California estimated tax and other payments of \$132,951 (resulting in total claimed payments of \$183,112), appellants reported a balance due of \$234,047. Appellants self-assessed an estimated tax penalty of \$3,305.

2. Appellants remitted a payment of \$237,352 shortly after filing the return, which satisfied the balance due in full.
3. FTB later determined that appellants made the following estimated tax payments, totaling \$194,451: \$56,979 on April 14, 2015; \$75,972 on June 8, 2015, \$56,979; and \$4,521 on December 28, 2015. By a Notice of Tax Change dated August 22, 2016, FTB advised appellants that it had adjusted their 2015 account by increasing their estimated tax payments from \$132,951 to \$194,451, an increase of \$61,500. As a result, FTB refunded appellants \$62,601.40<sup>2</sup> and reduced appellant's self-assessed estimated tax penalty from \$3,305.00 to \$2,699.33.
4. In a letter dated September 1, 2016, appellants requested a refund of the remainder of the estimated tax penalty, \$2,699. Appellants requested the remaining estimated tax penalty be abated, because: (1) they paid 100 percent of their prior year taxes; and (2) they did not receive their Schedules K-1 until March 2016.
5. In a letter dated January 19, 2017, FTB denied appellants' claim for refund. This timely appeal followed.

### DISCUSSION

FTB's determination is presumed correct and a taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001 SBE 001, May 31, 2001.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (See, e.g., *Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979; *Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

Section 19136 incorporates by reference, with certain modifications, Internal Revenue

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<sup>2</sup>This amount included an overpayment of \$62,105.67, as well as allowed interest of \$495.73.

Code (IRC) § 6654, which imposes an addition to tax if a taxpayer fails to make estimated tax payments in a timely manner of the “required annual payment” amount (defined below). The addition to tax is similar to an interest charge and applies from the dates the estimated tax payment were due until the dates they were paid. For the 2015 tax year, payments were due on April 15, 2015 (30% of the required annual payment), June 15, 2015 (40% of the required annual payment), September 15, 2015 (0% of the required annual payment) of the tax year, and January 15, 2016 (30% of the required annual payment). (IRC, § 6654(d)(1), as modified by Section 19136.1(a)(2).) The required annual payment amount is defined in IRC § 6654(d)(1)(B) as the lesser of:

- (i) 90 percent of the tax shown on the return for the taxable year (or, if no return is filed, 90 percent of the tax for such year), or
- (ii) 100 percent of the tax shown on the return of the individual for the preceding taxable year.

In 2008, however, California enacted Section 19136.3, which abrogated the “100 percent of last year’s liability safe harbor” provision for taxpayers who, like appellants, had adjusted gross income equal to or greater than \$1 million. Appellants, therefore, were required to pay installments of estimated taxes of 90 percent of the tax shown as due on their 2015 return. They failed to do this. Accordingly, appellants are liable for the estimated tax penalty determined by the respondent unless they establish they are entitled to relief pursuant to the terms of the applicable statutes.

Neither Section 19136 nor IRC § 6654 permits abatement of the estimated tax penalty upon a mere showing of “reasonable cause” or a “lack of willful neglect.” (*Appeal of Weaver Equipment Company*, 80-SBE 048, May 21, 1980; *Appeal of J. Ray Risser*, 84-SBE-044, Feb. 28, 1984.) There are only two bases for abating the estimated tax penalty; they are set forth in IRC § 6654(e)(3), to which California conforms. First, IRC § 6654(e)(3)(A) provides that the penalty will be abated if the government determines that by reason of *casualty, disaster, or other unusual circumstances* the imposition of the penalty would be *against equity and good conscience*. Second, IRC § 6654(e)(3)(B) provides for abatement if the government determines that: (i) the underpayment was due to “reasonable cause,” *and* (ii) either the taxpayer retired after having attained age 62, or the taxpayer became disabled in the taxable year for which estimated

payments were required to be made or in the previous taxable year.

In this case, it is undisputed that appellants underpaid their estimated tax for 2015. Appellants self-assessed the estimated tax penalty in the amount of \$3,305. Therefore, the estimated tax penalty is warranted, unless appellants have shown that they meet the statutory requirements for abating the penalty. Appellants argue that they qualify under the safe harbor provisions of IRC § 6654(d)(1)(B)(ii), since they made estimated payments equal to or greater than 100 percent of the tax shown on their return for the preceding taxable year. As previously noted, however, California law expressly abrogated that safe harbor provision for high-earning taxpayers in 2008. (Section 19136.3.) Therefore, the safe harbor provisions of IRC § 6654(d)(1)(B)(ii) do not apply here.


Appellants also contend that the penalty should be abated because they acted “in good faith and in a reasonable manner” and “have always timely paid [their] quarterly estimated tax payments.” Appellants state that they did not timely receive Schedules K-1 for several entities in which they were passive investors until March 2016, when it was too late to adjust their estimated tax payments for the unanticipated flow-through income. While appellant’s good faith and filing history are uncontested, the fact that accurate tax information is lacking, inaccurate or difficult to obtain generally is insufficient to establish reasonable cause. (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985 [appellants’ unsubstantiated assertion that they “diligently attempted to secure” information from partnerships upon which to estimate their income failed to establish reasonable cause for underpayment of tax]; *Appeal of Cerwin-Vega International*, 78-SBE-070, Aug. 15, 1978 [“It is settled law ... that relief from the penalty for underpayment of estimated tax is not available upon a showing of reasonable cause and lack of willful neglect, or extenuating circumstances.”]) Even if appellants had established reasonable cause for their underpayment of estimated tax, that would be insufficient, standing alone, to justify abating the penalty. Under IRC § 6654(e)(3), appellants must show that their underpayment of estimated tax was due to: (1) casualty, disaster, or other unusual circumstances that would make the imposition of the penalty against equity and good conscience pursuant; or (2) “reasonable cause,” and either the taxpayer retired after having attained age 62, or the taxpayer became disabled in the taxable year for which estimated payments were required to be made or in the previous taxable year. Appellants have not made that showing.

HOLDING


Appellants are not entitled to abatement of the estimated tax penalty.


DISPOSITION

Respondent's action in denying appellants' claim for refund is sustained in full.

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Sara A. Hosey  
Administrative Law Judge

We concur:

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Douglas Bramhall  
Administrative Law Judge

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Andrew J. Kwee  
Administrative Law Judge