

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19115489
E. MARSDEN AND)
M. MARSDEN)
_____)

OPINION

Representing the Parties:

For Appellants: Donald C. Lewellen, CPA, MBA

For Respondent: Sarah Fassett, Tax Counsel

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, E. Marsden and M. Marsden (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying E. Marsden’s claim for refund of \$5,359.90 and M. Marsden’s claim for refund of \$5,359.84 for the 2018 tax year.¹

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

ISSUES

1. Whether appellants have shown reasonable cause for the late payments of tax for the 2018 tax year.
2. Whether appellants are entitled to abatement of the underpayment of estimated tax penalties (estimated tax penalties).

FACTUAL FINDINGS

1. Appellants sold their property in the United Kingdom (UK) in the 2018 tax year.
2. Appellants submitted a letter dated January 30, 2019, to HM Revenue & Customs

¹ These claim for refund amounts include late payment penalties of \$3,807.90 and \$3,807.84 for E. Marsden and M. Marsden, respectively, and the underpayment of estimated tax penalties of \$1,552 for both E. Marsden and M. Marsden.

- (UK tax authority) to confirm whether they owed any capital gains taxes in the UK from the sale of their property in the UK.
3. On May 21, 2019, the UK tax authority replied in a written letter stating that “[b]ased upon the figures supplied in your NRCGT return,” there is no capital gains tax liability related to the disposal of the property in the UK.² Appellants claim that they received the May 21, 2019 letter on June 7, 2019.
 4. On June 13, 2019, E. Marsden (appellant-husband) and M. Marsden (appellant-wife) each timely filed separate 2018 California Resident Income Tax Returns using the married filing separately (MFS) filing status. On each MFS tax return, each appellant reported tax due and self-assessed late filing penalties, estimated tax penalties, and applicable interest. Appellants each paid the reported balance due (including the self-assessed interest and penalties) on June 12, 2019.
 5. On July 1, 2019, FTB reduced appellants’ reported late payment penalties, estimated tax penalties, and interest resulting in refunds to each appellant. FTB revised appellant-husband’s late payment penalty to \$3,807.90 and estimated tax penalty to \$1,552. FTB also revised appellant-wife’s late payment penalty to \$3,807.84 and estimated tax penalty to \$1,552.
 6. In a letter dated July 18, 2019, appellants jointly filed a claim for refund of the late payment penalties of \$3,807.90 for appellant-husband and \$3,807.84 for appellant-wife and the estimated tax penalties of \$1,552 for both appellant-husband and appellant-wife. Enclosed with the July 18, 2019 letter, appellants remitted an excess payment in the amount of \$4,116.43 which appellants assert was paid from their tax preparer’s personal funds.³
 7. On August 27, 2019, FTB issued two separate Notices of Action denying appellants’ claim for refund asserting that appellants failed to establish reasonable cause.
 8. This timely appeal followed.

² According to HM Revenue & Customs’ website, NRCGT refers to the non-resident Capital Gains Tax return (NRCGT return). (<https://www.gov.uk/guidance/capital-gains-tax-for-non-residents-uk-residential-property#CGT-report-pay>).

³ FTB states that this amount was erroneously credited to appellants’ 2017 tax year and is currently being held in suspense pending the conclusion of this appeal. The total of \$4,116.43 consist of the following amounts: \$1,552.00 in estimated tax penalty and \$506.21 in interest for appellant-husband; and \$1,522.00 in estimated tax penalty and \$506.22 in interest for appellant-wife.

DISCUSSION

Issue 1: Whether appellants have shown reasonable cause for the late payments of tax for the 2018 tax year.

R&TC section 19132 imposes a late payment penalty when taxpayers fail to pay the amount of tax shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (determined without regard to any extension of time for filing the return). (R&TC, § 19001.) Appellants do not dispute that their payment was late or that FTB properly calculated the late payment penalty amount. Thus, the only remaining issue is whether appellants have demonstrated reasonable cause for their failure to timely pay their required taxes in full.

The late payment penalty may be abated if the taxpayers show that the failure to make timely payments of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, taxpayers must show that the failure to make timely payments of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Friedman*, 2018-OTA-077P.) The taxpayers bear the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) In a late payment of tax case, a strong, and often determinative, factor in finding reasonable cause is to examine whether taxpayers have access to sufficient information upon which to base a reasonable estimate of their tax liabilities. (*Appeal of Moren*, 2019-OTA-176P.) Furthermore, the taxpayers must show more than an asserted lack of documentation or difficulty in calculating the tax liability. (*Ibid.*) Reasonable cause based on insufficient information requires the taxpayers to demonstrate the efforts made to retrieve records from third parties or acquire the information necessary to determine the tax liability. (*Ibid.*) In addition, to establish that the late payment of tax was not due to willful neglect, the taxpayers must prove the absence of a conscious, intentional failure or reckless indifference in failing to make timely payments. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

On appeal, appellants contend that they lacked the necessary information to calculate their tax liability when the tax payment was due. Appellants explain their reasons as follows:

(1) appellants were faced with a delay by Vanguard⁴ in its year-end calculations, which were not resolved until April 15, 2019; (2) appellants' 2018 total tax liability could not be assessed until appellants' tax preparer understood their exact tax position for the 2018 tax year, which included the UK tax liability from the sale of the property; and (3) the IRS acknowledged waiving penalties using a code based on appellants' good filing history which should be extended to appellants' California taxes. As a result, appellants believe that they have reasonable cause for the late payment of their taxes.

As to the first reason, appellants' contention provides no explanation as to why or how their issue with Vanguard held up a timely payment to FTB. It is asserted by appellant that the issue was resolved on April 15, 2019, but appellants have not indicated why the taxes could not have been estimated and paid on or before April 15, 2019, or shortly thereafter. Furthermore, appellants have not provided any evidence that despite the exercise of ordinary business care and prudence, appellants were unable to estimate their tax liability resulting from the losses produced by Vanguard. As such, the first argument is unpersuasive, and appellants failed to demonstrate reasonable cause.

With respect to the second reason, appellants' assertions also do not constitute reasonable cause. The inability to determine taxable income with exactitude is not reasonable cause. (*Appeal of Rougeau*, 2021-OTA-335P.) Furthermore, taxpayers have a duty to make a reasonably accurate estimate of their tax liability. (*Ibid.*) Moreover, appellants must establish that they could not have acquired the information necessary to make a reasonable estimate of their California tax liability. (*Appeal of Moren, supra.*) Here, nothing in the record supports the assertion that there was an absence of any information needed to reasonably estimate appellants' California tax liability. While appellants contend that their UK tax liability needed to be established with certainty before they could determine their California tax liability, appellants have not explained how their UK tax liability would impact their California taxes for 2018.⁵ On the contrary, appellants admit on appeal that they had a "thoroughly documented report on the increase/loss in value of the property over those final years," relating to their property in the UK.

⁴ Appellants assert that they set aside a portion of the sale proceeds for purposes of paying taxes in an investment account managed by an organization named Vanguard.

⁵ California generally does not allow for a deduction for foreign taxes paid, a foreign income exclusion, or other state tax credit for foreign taxes. (See, e.g., R&TC, §§ 17220(a) and 17024.5(b); Cal. Code Regs., tit. 18, § 18001-1(a).)

It also appears from the May 21, 2019 letter that appellants have sufficient information to draft and submit the NRCGT return, which suggest that appellants' tax preparer would have such information available to estimate or determine the gain on the sale of the UK property and the amount of California tax. On appeal, appellants have not explained why the figures used to draft the remitted NRCGT return could not be used to base a reasonable estimate of their California tax liability for purposes of remitting payment timely. As such appellants have not established that they made any effort to reasonably estimate the required California tax payments by the payment due date.

In response to appellants' third reason, FTB has no program that allows abatement of the late filing penalty for first-time offenders with a good filing and payment history, and California law allows abatement of the late filing penalty only on a showing of reasonable cause.⁶

Based on the above reasons, FTB properly denied appellants' claim for refund of \$3,807.90 for appellant-husband and \$3,807.84 for appellant-wife relating to the late payment penalty.

Issue 2: Whether appellants are entitled to abatement of the estimated tax penalties.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated and often referred to as a penalty, when an individual fails to timely pay estimated tax. (*Appeal of Johnson*, 2018-OTA-119P.) Subject to certain exceptions not relevant to the issue on appeal, R&TC section 19136 incorporates IRC section 6654. The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (See IRC, § 6654(a).) There is no general reasonable cause exception to the imposition of the estimated tax penalty. (*Appeal of Johnson*, *supra*.) The estimated tax penalty is mandatory unless the taxpayers establish that a statutory exception applies. (*Ibid.*)

Appellants simply want the Office of Tax Appeals (OTA) to consider the same reasonable cause argument made with respect to the late payment penalty for the abatement of the estimated tax penalty. However, unlike the late payment penalty, there is no authority to

⁶ The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.))

abate the estimated tax penalty based solely on reasonable cause.⁷ Therefore, we need not discuss appellants' reasonable cause argument as it relates to this penalty, and the estimated tax penalty cannot be abated.

Appellants also assert that their tax preparer made a personal contribution of \$3,104 because the tax preparer enclosed his personal company check in the amount of \$4,116.43 with the July 18, 2019 letter.⁸ Therefore, appellants hope that the \$3,104 estimated tax penalty will be refunded to their tax preparer. However, according to FTB, appellants' 2018 tax liabilities (including all interest and penalties) were already paid in full at the time the tax returns were filed on June 13, 2019; thus, the payment remitted by tax preparer was an excess payment. FTB indicates that this payment was mistakenly applied to appellants' 2017 tax year. Unfortunately, OTA does not have jurisdiction over this payment because it was applied to a different tax year that is not currently before OTA. However, FTB in its opening brief agreed to refund the excess payment to appellants in the amount of \$4,116.43, together with any interest allowed by law, and appellants can determine how to reimburse the tax preparer directly.

⁷ There are a few limited exceptions to the penalty (see, e.g., IRC, § 6654(e)(3)(A) & (B)) but appellants do not raise any of them here.

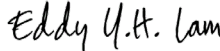
⁸ To reiterate, the total amount of \$4,116.43 consists of the following: \$1,552 in estimated tax penalty and \$506.21 in interest for appellant-husband; and \$1,522 in estimated tax penalty and \$506.22 in interest for appellant-wife. The total amount of \$3,104 consists of only the estimated tax penalty assessed to each appellant.

HOLDINGS


1. Appellants have not shown reasonable cause for the late payments of tax for the 2018 tax year.
2. Appellants are not entitled to abatement of the estimated tax penalties.


DISPOSITION

FTB’s action in denying appellants’ claims for refund is sustained.

DocuSigned by:

 Eddy Y.H. Lam
 Administrative Law Judge

We concur:

DocuSigned by:

 Andrea L.H. Long
 Administrative Law Judge

DocuSigned by:

 Huy "Mike" Le
 Administrative Law Judge

Date Issued: 5/10/2022