

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

H. RISKO AND
S. RISKO

) OTA Case No. 220610536
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OPINION

Representing the Parties:

For Appellants:

H. Risko
S. Risko

For Respondent:

Alisa L. Pinarbasi, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, H. Risko and S. Risko (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying their claim for refund of \$1,772 for tax year 2020.

Appellants waived the right to an oral hearing. Therefore, this appeal is decided based on the written record.

ISSUE

Whether the underpayment of estimated tax penalty (estimated tax penalty) should be waived.

FACTUAL FINDINGS

1. Appellants filed a 2020 California income tax return (Form 540) on March 18, 2021, reporting total tax of \$217,035.
2. Appellants filed a superseding 2020 Form 540 on April 26, 2021. Appellants reported federal adjusted gross income (AGI) of more than \$2 million, California AGI of more

than \$1.9 million, total tax of \$216,849, estimated tax payments of \$122,533,¹ and tax due of \$94,316.² Appellants paid the tax due on May 13, 2021.³

3. FTB sent a Notice of Tax Return Change – Revised Balance, which reflected total tax of \$216,849 as reported by appellants on their superseding Form 540, and imposed a \$1,772 estimated tax penalty, plus interest. FTB issued a State Income Tax Balance Due Notice, which also reflected total tax of \$216,849, and a balance due for the estimated tax penalty and interest.
4. FTB's records indicate it calculated the estimated tax penalty of \$1,772.00 using an adjusted tax liability of \$217,035.00, and an estimate base amount of \$195,331.50 (90 percent x \$217,035.00).
5. Appellants paid the balance due and filed a claim for refund for the estimated tax penalty.
6. FTB denied the claim for refund, and this timely appeal followed.

DISCUSSION

Taxpayers bear the burden of proving entitlement to a refund claim. (*Appeal of Carr*, 2022-OTA-157P.) Unsupported assertions are insufficient to satisfy the taxpayers' burden of proof. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) FTB's determinations cannot be successfully rebutted when taxpayers fail to provide credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*)

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes a penalty for the failure to timely make estimated income tax payments at the end of the installment periods. (R&TC, § 19136(a); IRC, § 6654.) The penalty is like an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (*Appeal of Saltzman*, 2019-OTA-070P.)

¹ Appellants made estimated tax payments of \$85,773 on July 8, 2020, and \$36,760 on January 13, 2021.

² Appellants attached a Form 5805, Underpayment of Estimated Tax by Individuals and Fiduciaries, to their April 26, 2021 Form 540. The form states that they are not using the annualized income installment method and appellants did not complete the form, including Part III, Annualized Income Installment Method Schedule.

³ For tax year 2020 returns and payments originally due on April 15, 2021, FTB postponed the state tax filing and payment deadline for individual taxpayers to May 17, 2021. (<https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

Generally, to avoid this penalty, IRC section 6654(d)(1)(B) defines the required annual payment of estimated tax as the lesser of (i) 90 percent of the tax shown on the current year tax return (current year safe harbor rule), or (ii) 100 percent of the tax shown on the prior year tax return (prior year safe harbor rule). However, if the AGI shown on the prior year return exceeds \$150,000, the taxpayer must pay 110 percent of the tax shown on the prior year tax return. (IRC, § 6654(d)(1)(C).) But for California purposes, the prior year safe harbor provision in IRC section 6654(d)(1)(B)(ii) does not apply if the taxpayer's AGI for the current year is equal to or greater than \$1 million.⁴ (R&TC, § 19136.3.) Appellants' 2020 AGI was greater than \$1 million. Therefore, to meet the current year safe harbor rule and avoid imposition of the estimated tax penalty, appellants' required annual payment must have been calculated using 90 percent of their tax due for tax year 2020.

For California purposes, installment tax payments are generally due on April 15 and June 15 of the applicable tax year, and January 15 of the following tax year. (R&TC, § 19136.1; IRC, § 6654(c)(2).) Taxpayers must pay 30 percent of estimated tax by April 15 of the tax year, 40 percent by June 15 of the tax year, and 30 percent by January 15 of the following year. (R&TC, § 19136.1(a)(2); IRC, § 6654(d)(1)(A).) Due to the COVID-19 pandemic, FTB postponed the first and second quarter estimated tax payments for tax year 2020 until July 15, 2020.⁵ Therefore, appellants' estimated tax payments for tax year 2020 were due on July 15, 2020, and January 15, 2021, with 70 percent of the required annual payment due on July 15, 2020, and the remaining amount on January 15, 2021.

FTB computed appellants' required annual payment to be \$195,331.50 (90 percent x \$217,035.00). Therefore, FTB computed that appellants owed \$136,732.05 on July 15, 2020, ($[\$195,331.50 \times 30 \text{ percent}] + [\$195,331.50 \times 40 \text{ percent}]$) and \$58,599.45 on January 15, 2021, ($\$195,331.50 \times 30 \text{ percent}$). However, appellants made an estimated tax payment of only \$85,773.00 on July 8, 2020, leaving unpaid \$50,959.05 of the \$136,732.05 estimated tax payment due on July 15, 2020, which appellants did not pay by that due date. Appellants also

⁴ R&TC section 19136.3 states that, for tax years beginning on or after January 1, 2009, IRC section 6654(d)(1)(B) "is modified to additionally provide that clause (ii) shall not apply if the adjusted gross income shown on the return of the individual for the taxable year is equal to or greater than \$1 million....."

⁵ <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.

made an estimated tax payment of \$36,760.00 on January 13, 2021, which FTB applied to the first and second quarter estimated tax payments due on July 15, 2020, leaving \$14,199.05 unpaid (\$136,732.05 - \$85,773.00 - \$36,760.00). Appellants did not pay any of the \$58,599.45 estimated tax payment due on January 15, 2021. Based on this payment information, FTB imposed the estimated tax penalty in the amount of \$1,772.

However, in computing the required annual payment, FTB used appellants' reported tax of \$217,035.00 from their return filed March 18, 2021. That return was superseded by appellants' return filed April 26, 2021, which reported total tax of \$216,849.00. This total tax of \$216,849.00 is reflected in FTB's Tax Year Current Values Display for 2020, as well as the State Income Tax Balance Due Notice and Notice of Tax Return Change – Revised Balance. The Office of Tax Appeals (OTA) asked FTB whether it should have used the reported tax from the more recent return of \$216,849.00 in calculating the base amount. FTB agreed that the penalty should be recalculated using a required annual payment of \$195,164.10, which is 90 percent of \$216,849.00. Therefore, FTB reduced the required annual payment from \$195,331.50 to \$195,164.10 and reduced the estimated tax penalty from \$1,772.00 to \$1,767.71. Accordingly, FTB agrees to grant appellants a refund of \$4.29.

There is no general reasonable cause exception to the imposition of the estimated tax penalty. (*Appeal of Johnson*, 2018-OTA-119P.) However, IRC section 6654(e)(3) provides exceptions to the imposition of the estimated tax penalty. Under IRC section 6654(e)(3)(A), no estimated tax penalty is imposed if the taxing agency “determines that by reason of casualty, disaster, or other unusual circumstances the imposition of [the estimated tax penalty] would be against equity and good conscience.” The phrase “casualty, disaster, or other unusual circumstances” generally refers to unexpected events that cause hardship or loss such that, due to the circumstances, it would be inequitable to impose the estimated tax penalty. (*Appeal of Johnson, supra.*) The IRS has waived the estimated tax penalty in situations where a tax law change, disaster, required accounting method change, or a government action or inaction caused extreme difficulty in estimating the tax.⁶ (*Appeal of Mazdyasni*, 2018-OTA-049P.)

⁶ A second exception is found in IRC section 6654(e)(3)(B), which states that the IRS will not impose the estimated tax penalty if (i) during the applicable tax year or the preceding tax year, the taxpayer either retired after attaining the age of 62, or became disabled, and (ii) the underpayment was due to reasonable cause and not willful neglect. Appellants do not assert, nor is there any evidence, that they meet the requirements of this second exception. Thus, it will not be discussed further.


Appellants contend that a substantial capital gain was generated toward the end of tax year 2020 from sales of stock in order to fund the purchase of a home, which caused a one-time large tax liability. In *Appeal of Saltzman, supra*, the appellants received securities constituting a guaranteed payment for services from a partnership, which OTA concluded was not an unexpected hardship but a receipt of substantial income. Similar to *Appeal of Saltzman, supra*, rather than suffering an unexpected hardship, appellants received a payment of substantial income, which does not meet the requirements under IRC section 6654(e)(3)(A) to waive the estimated tax penalty. While the estimated tax penalty is often referred to as a penalty, it effectively imposes an interest charge to compensate the government for the time value of tax that is due but is not paid until a later date. (*Ibid.*) Imposing an interest charge on tax that was due on the payment received does not offend “equity and good conscience.” (*Ibid.*) Therefore, there is no basis to waive the estimated tax penalty.

HOLDING

The estimated tax penalty should not be waived.


DISPOSITION

FTB’s determination is revised to grant a claim for refund of \$4.29, as agreed to by FTB on appeal. FTB’s determination denying the remainder of the claim for refund is otherwise sustained.

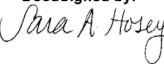
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Josh Lambert
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Sara A. Hosey
Administrative Law Judge

Date Issued: 8/29/2023