

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
C. BERCUN AND )  
B. SIEGEL )  
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OTA Case No. 230112294

**OPINION**

Representing the Parties:

For Appellants: C. Bercun and B. Siegel

For Respondent: Topher Tuttle, Attorney

For Office of Tax Appeals: Kaleigh Adams, Graduate Student Assistant

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Bercun and B. Siegel (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$2,805.79<sup>1</sup> and applicable interest for the 2021 tax year.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Office of Tax Appeals (OTA) Administrative Law Judge Andrea L.H. Long held an electronic oral hearing for this matter on September 22, 2023. At the conclusion of the hearing, OTA held the record open to allow the parties to submit additional briefing and evidence. On November 15, 2023, OTA closed the record, and this matter was submitted for an opinion.

**ISSUES**

1. Whether appellants have established reasonable cause to abate the late payment penalty.
2. Whether appellants are entitled to a waiver of the estimated tax penalty.

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<sup>1</sup> This amount consists of a late payment penalty of \$2,071.79 and an estimated tax penalty of \$734.

FACTUAL FINDINGS

1. On April 15, 2021, appellants made an electronic payment of \$12,700, which FTB applied to appellants' 2020 tax year account. On April 22, 2021, FTB issued a refund of \$12,702 to appellants.
2. On June 15, 2021, appellants made a second electronic payment of \$16,934, which FTB applied to appellants' 2020 tax year account. On June 22, 2021, FTB issued a refund for the same amount.
3. On April 15, 2022, appellants timely filed their joint 2021 California income tax return, reporting a total tax due of \$38,420, estimated tax payments of \$29,634, and a self-assessed estimated tax penalty of \$37. Appellants remitted a payment of \$8,823 at the time they filed their 2021 return.
4. On July 26, 2022, FTB sent appellants a Notice of Tax Return Change—Revised Balance notifying appellants that FTB calculated appellants' estimated tax payments to be \$0. Based on this adjustment, FTB calculated an outstanding tax liability of \$29,597,<sup>2</sup> and imposed a late payment penalty of \$2,071.79, an estimated tax penalty of \$734, and accrued interest of \$261.62.
5. On August 2, 2022, appellants paid the outstanding balance for the 2021 tax year. Appellants then filed a Reasonable Cause—Individual and Fiduciary Claim for Refund Form, requesting a refund of \$3,067.41 and explained that they inadvertently posted their payments to the wrong tax year through FTB's online Web Pay system. FTB denied the claim. This timely appeal followed.

DISCUSSIONIssue 1: Whether appellants have established reasonable cause to abate the late payment penalty.

In general, R&TC section 19001 provides that personal income tax imposed “shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).” The late payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the payment due date. (R&TC, § 19132(a).)

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<sup>2</sup> Total tax due of \$38,420 less payment of \$8,823 equals outstanding tax liability of \$29,597.

## 2024-OTA-106SCP Nonprecedential

The late payment penalty may be abated if the taxpayer is able to show that the failure to make a timely payment was due to reasonable cause and not to willful neglect. (R&TC, § 19132(a)(1).) Reasonable cause is established for a late payment of tax if the taxpayer shows the untimely payment occurred despite exercising ordinary business care and prudence. (*Appeal of Scanlon*, 2018-OTA-075P.) Taxpayers have the burden of proof to show that a businessperson of ordinary intelligence and prudence would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P.) The failure to timely pay tax caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Friedman*, 2018-OTA-077P.)

Appellants argue that there is reasonable cause for their untimely payment of tax. Appellants contend that they exercised ordinary business care and prudence because their actions of making payments on April 15, 2021, and June 15, 2021, indicate their intention to comply with the law but had inadvertently selected the wrong tax year. FTB's Web Pay system requires a taxpayer to select the tax year from a drop-down menu, which appellants contend is an easy mistake to make because the Web Pay system is not clear. Appellants also state that when FTB issued refunds of \$12,702 and \$16,934 on April 22, 2021, and June 22, 2021, respectively, there was no indication as to why FTB was returning these funds, and as such, appellants were unaware why they were receiving the checks. Appellants do not contend, and the evidence does not show, that they made any efforts to ascertain the reason for these refunds.

FTB verified at the hearing that the checks appellants received as refunds would not have any identifying information or the tax year listed on them. However, there is no duty for FTB to inform taxpayers of an overpayment or any other information related to it. (See *Appeal of Matthiessen* (85-SBE-077) 1985 WL 158656.) Appellants' oversight in selecting the wrong tax year when making the electronic payments does not establish reasonable cause.

### Issue 2: Whether appellants are entitled to a waiver of the estimated tax penalty.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated and often referred to as a penalty, when taxpayers fail to timely make estimated tax payments. Subject to certain exceptions not relevant here, R&TC section 19136 conforms to IRC section 6654. (IRC, § 6654(e); R&TC, § 19136.) The estimated tax penalty is similar to an interest charge and applies from the due date of the estimated tax payment until the date it is paid. (IRC, § 6654(b)(2).)

## 2024-OTA-106SCP Nonprecedential

Unlike the late payment penalty discussed above, abatement of the estimated tax penalty is not available based solely on a finding of reasonable cause. (*Appeal of Saltzman*, 2019-OTA-070P.) The estimated tax penalty is mandatory unless a taxpayer shows that a statutory exception applies. (*Appeal of Johnson*, 2018-OTA-119P.) Under IRC section 6654(e)(3)(A), an estimated tax penalty may be waived if “by reason of casualty, disaster, or other unusual circumstances the imposition of [an estimated tax penalty] would be against equity and good conscience.” A second exception is found in IRC section 6654(e)(3)(B), which states that the estimated tax penalty will not be imposed 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 to willful neglect.

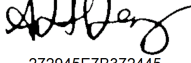
Appellants do not protest the imposition or computation of the estimated tax penalty. Instead, they argue that the penalty should be abated based on IRC section 6654(e)(3)(B), because appellant Bercun retired after having attained age 62. FTB agrees that this first prong of the second exception is met. However, appellants do not make a separate reasonable cause argument for their failure to timely pay estimated taxes. As discussed above, appellants’ mistake in entering the wrong tax year in FTB’s Web Pay system does not constitute reasonable cause. Because the same reasonable cause standard applies for both the late payment penalty and the estimated tax penalty, appellants have not established reasonable cause for the estimated tax penalty. Thus, this penalty cannot be waived.

HOLDINGS

1. Appellants have not established reasonable cause to abate the late payment penalty.
2. Appellants are not entitled to a waiver of the estimated tax penalty.

DISPOSITION

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

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Andrea L.H. Long  
Administrative Law Judge

Date Issued: 12/19/2023