

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 230713909
M. NOVOGRADAC AND)
B. FORSBERG-NOVOGRADAC (DEC'D))
_____)

OPINION

Representing the Parties:

For Appellants: Joe Abbott, CPA

For Respondent: Eric A. Yadao, Attorney

For Office of Tax Appeals: Louis Ambrose, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Novogradac and B. Forsberg-Novogradac (Dec'd) (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$29,861.96 for the 2020 tax year.

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

ISSUES

1. Whether appellants have established reasonable cause for the late payment of tax.
2. Whether appellants have established a legal basis for abatement of the underpayment of estimated tax penalty (estimated tax penalty).
3. Whether appellants have established a basis for abatement of interest.

FACTUAL FINDINGS

1. Appellants filed a timely 2020 tax year Resident Income Tax Return (return) reporting a total tax of \$961,848, total payments of \$825,527, tax due of \$136,321, and a total amount due of \$136,618, which included a self-assessed estimate penalty of \$297. Appellants paid their reported amount due on October 14, 2021.

2. On November 24, 2021, FTB issued appellants a Notice of Tax Return Change - Revised Balance, which advised appellants that they overstated their estimated tax and extension payments on their return by \$350,000, imposed a late payment penalty, and increased the estimated tax penalty. FTB then issued an Income Tax Due Notice on April 27, 2022, which advised appellants of the balance due.
3. By letter dated May 9, 2022, appellants requested that FTB waive the late payment penalties and interest. Appellants argued that the COVID-19 pandemic delayed the receipt of their estimated and final 2020 Schedule K-1s and that they made a good faith effort to pay the entire balance due. Appellants also stated that B. Forsberg-Novogradac was facing very serious health issues, and she passed away in early 2022 due to her health issues. Appellants maintained that these circumstances constitute reasonable cause for the late payment of tax.
4. Appellants paid the balance due on May 19, 2022. Appellants filed a claim for refund which FTB denied. Appellants filed this timely appeal.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause for late payment of tax.

It is undisputed that appellants failed to make timely payment of the tax and that the penalty was correctly calculated in accordance with the statute. The penalty is presumed correct unless taxpayers show that the failure to make timely payment was due to reasonable cause and not willful neglect. (R&TC, § 19132(a)(1).) Taxpayers have the burden of proof to show that reasonable cause exists to support abatement of the late payment penalty. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P.) To establish reasonable cause, taxpayers must show that the failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) Illness may establish reasonable cause where taxpayers present credible and competent proof that the circumstances of the illness prevented the taxpayers from complying with the law. (*Ibid.*) However, if the difficulties simply cause the taxpayers to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayers must bear the consequences of that choice. (*Ibid.*) Unsupported assertions are not sufficient to satisfy taxpayers' burden of proof. (*Appeal of Bindley*, 2019-OTA-179P.)

In the appeal letter, appellants state that B. Forsberg-Novogradac was diagnosed with a serious medical condition in March of 2019, and underwent extensive and frequent treatments throughout 2019, 2020 and 2021, which also required travel to Los Angeles and Germany. In addition to the foregoing, B. Forsberg Novogradac had other necessary medical procedures and appointments. Appellants state that dealing with her illness was a considerable burden on the family and that she passed away on March 16, 2022. Appellants contend that the circumstances surrounding B. Forsberg-Novogradac's serious illness and death constitute reasonable cause for late payment within the meaning of R&TC section 19132.¹

Appellants appear to argue that the circumstances of B. Forsberg-Novogradac's illness and required medical treatment, and their attendant responsibilities, consumed so much time that appellants were unable to determine the correct amount of tax owed prior to the payment deadline. Appellants also state that "due to the ongoing COVID-19 pandemic, there were delays in receiving income estimates, as well as estimated and final K-1's and other documents." However, lack of documentation or difficulty in calculating a tax liability does not, by itself, constitute reasonable cause for a late payment of tax. (*Appeal of Moren*, 2019-OTA-167P.) Taxpayers must establish that they could not have acquired the information necessary to make an estimate of their tax liability. (*Ibid.*) Moreover, while the OTA is sympathetic to appellants' circumstances, appellants' evidence does not show that they were continuously prevented from timely payment of tax. Appellants provided no evidence of their efforts to determine the correct amount of tax prior to the payment deadline or how their circumstances continuously prevented their payment of tax. Hence, appellants have not met their burden of proof to show reasonable cause to abate the penalty.

OTA further notes that information gathered by FTB indicates that during B. Forsberg-Novogradac's treatment, appellant M. Novogradac continued to operate a business which provides services including certified public accounting, valuation and consulting with an emphasis in real estate. Appellant M. Novogradac also hosted weekly "Tax Credit Tuesday" podcasts. These facts show that appellant M. Novogradac was attending to other daily affairs. A taxpayer's selective inability to perform tax obligations, while participating in regular business

¹ Appellants cite "Section 1138.40(b)(3)" as a relevant legal authority under which they have shown reasonable cause for the late payment of tax. Appellants are referencing California Code of Regulations, title 2, section 1138.40(b)(3), which is a regulatory provision concerning reasonable cause for abatement of a penalty for filing an untimely estate tax return with the Office of the State Controller. That provision has no application to the penalty for late payment of income tax or the estimated tax penalty at issue here.

activities, does not establish reasonable cause. (*Appeal of Head and Feliciano*, 2020-OTA-127P; *Watts v. Commissioner* (1999) T.C. Memo. 1999-416.) Thus, appellants have not shown that they failed to make timely tax payment despite the exercise of ordinary business care and prudence.

Issue 2: Whether appellants have established a legal basis for abatement 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, where an individual fails to timely pay estimated tax.² Subject to certain exceptions not relevant to the issues 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 applying the applicable interest rate to the underpayment of estimated tax. (See IRC, § 6654(a) [calculating the estimated tax penalty by reference to the interest rate imposed on underpayments]; R&TC, § 19136(b) [referring to R&TC section 19521 which, with modification, conforms to the federal interest provisions in IRC section 6621].) When the adjusted gross income on a return is equal to or greater than \$1 million, as in this case, the required annual payment must be 90 percent of the tax shown on the current year tax return. (R&TC, § 19136.3.)

There is no general reasonable cause exception to imposition of the estimated tax penalty. (*Appeal of Johnson*, 2018-OTA-119P.) The estimated tax penalty is mandatory unless the taxpayer establishes that a statutory exception applies. (*Appeal of Saltzman*, 2019-OTA-070P.) Although there is no provision allowing for abatement of the estimated tax penalty based solely on reasonable cause, IRC section 6654(e)(3)(A) provides that the taxing agency may waive the estimated tax penalty if it 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.” IRC section 6654(e)(3)(B) also provides for waiver of the penalty where the taxing agency 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.

² Where estimated tax payments are due, Section 19136.1(a)(2) generally requires, for California income tax purposes, that the payments be made in installments on or prior to April 15 and June 15 of the applicable tax year, and January 15 of the subsequent tax year.

Appellants argue that the estimated tax penalty should be waived pursuant to either of these provisions because B. Forsberg-Novogradac's health issues constituted unusual circumstances under IRC section 6654(e)(3)(A) and she became disabled due to her health issues within the meaning of IRC section 6654(e)(3)(B)(i).

The phrase "casualty, disaster, or other unusual circumstances" generally refers to unexpected events that cause a hardship or loss such that, due to the circumstances, it would be "against equity and good conscience" to impose the penalty. (*Appeal of Saltzman, supra.*) Appellants state that, despite "challenging personal circumstances", they endeavored to estimate and make the required estimated tax payments by using prior year income, with discernible adjustments. Appellants state that due to the COVID-19 pandemic there were delays in receiving income estimates, as well as estimated and final Schedule K-1s and other documents. They assert that, as evidence of their good faith efforts, they made additional payments when they received additional information regarding their 2020 tax year income before filing the final return by the extended due date. Regardless of their efforts, the inability to timely obtain information necessary to calculate a tax liability does not constitute an unusual circumstance warranting abatement of the penalty. (*Appeal of Mazdyasni, 2018-OTA-049P.*) Moreover, the fact that a taxpayer acted in good faith or acted reasonably under the circumstances is not relevant to a waiver of the estimated tax penalty. (*Ibid.*)

OTA acknowledges that B. Forsberg-Novogradac's illness and extensive treatment was an emotional hardship; however, it did not constitute an unexpected event such that, under the circumstances, imposition of the estimated tax penalty would be against equity and good conscience. While failure to make an estimated tax payment due to death or serious illness may constitute a basis for penalty waiver, there is no evidence that B. Forsberg-Novogradac's illness and treatment had any bearing on the timely payment of estimated tax. Rather, appellants assert that they were unable to make timely estimated tax payments due to delays in the receipt of necessary income information. Thus, there is no basis for application of IRC section 6654(e)(3)(A).

Appellants allege that B. Forsberg Novogradac became disabled because of her illnesses and suggest that, therefore, the estimated tax penalty should be abated based on reasonable cause. However, the evidence shows that appellant M. Novogradac was able to perform the

tasks necessary to make a determination of required estimated tax payments. Consequently, there is no basis to find that appellants qualify for a waiver under IRC section 6654(e)(3)(B).

Issue 3: Whether appellants have established a basis for abatement of interest.

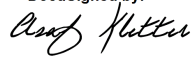
On appeal, appellants do not make any specific arguments for interest abatement. Generally, to obtain waiver of interest, taxpayers must qualify under R&TC section 19104, 19112, or 21012. However, the Office of Tax Appeals (OTA) lacks jurisdiction to abate interest under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Appellants do not allege that any of the three statutory provisions are applicable to the facts of this appeal; and based on the record, OTA concludes that none of these provisions apply. Accordingly, OTA will not address interest abatement further.

HOLDINGS

1. Appellants have not established reasonable cause for the late payment of tax.
2. Appellants have not shown a legal basis for waiver of the estimated tax penalty.
3. Appellants have not established a basis for abatement of interest.

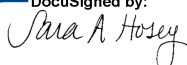
DISPOSITION

FTB’s action denying appellant’s claim for refund is sustained.

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 Asaf Kletter
 Administrative Law Judge

We concur:

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 Sara A. Hosey
 Administrative Law Judge

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 Huy “Mike” Le
 Administrative Law Judge

Date Issued: 7/26/2024