

Appeal of Durao International Corporation

The issue for determination is whether respondent properly imposed an estimated tax penalty for the year in question.

Appellant was incorporated in California on April 29, 1977, and files its franchise tax returns on the basis of a fiscal year ending May 31. On August 15, 1978, appellant filed a delinquent return for the short income year ended May 31, 1977, and a timely return for the income year ended May 31, 1978. The 1977 return reflected the \$200.00 minimum tax liability, while the 1978 return reflected a total tax liability of \$4,898.00. An estimated tax payment of \$200.00 was made on May 2, 1978, for the income year ended May 31, 1978.

Respondent determined that appellant was subject to a penalty of \$253.82 for underpayment of estimated tax for the income year ended May 31, 1978, and notified appellant of the imposition of the penalty. After the due date for the original return, appellant filed an amended return which correctly reduced its tax liability for the income year ended May 31, 1978, from \$4,898.00 to \$441.00. Respondent treated the amended return as a claim for refund and disallowed the claim to the extent of the underpayment of estimated tax in issue. It is from respondent's action in partially disallowing the claim that appellant appeals.

Every corporation subject to the franchise tax is required to file a declaration of estimated tax and pay the estimated tax during the income year. (Rev. & Tax. Code, §§ 25561-25565.) In no event shall a corporation's estimated tax be less than the minimum tax. (Rev. & Tax. Code, § 25561.) If the amount of estimated tax exceeds \$200.00, it is payable in four equal installments. (Rev. & Tax. Code, § 25563, subd. (d).) If it does not exceed \$200.00, the estimated tax is payable on or before the 15th day of the fourth month of the income year. (Rev. & Tax. Code, § 25563, subd. (c).) Corporations which underpay their estimated tax are subject to a penalty which is computed at the specified rate of interest on the amount of the underpayment. (Rev. & Tax. Code, §§ 25951-25953.) The amount of the underpayment is defined as the excess of the amount of the installment which would be required to be paid if the estimated tax were equal to 80 percent of the tax shown on the return for the income year, over the amount actually paid on or before the due date of each installment. (Rev. & Tax. Code, § 25952.)

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Appellant first argues that respondent's calculation was wrong because it assumed the income was earned evenly throughout the year, and that the quarterly estimates equalled one-fourth of the total tax due at the end of the year, even though there was no way for appellant to estimate its first year's income, which was all earned in the last quarter. As we have indicated, every corporation must pay at least the minimum estimated tax of \$200.00 by the first installment date to avoid the imposition of any penalties. (See Appeal of Lumbermans Mortgage Company, Cal. St. Bd. of Equal., Dec. 15, 1976.) Appellant's first installment date was September 15, 1977, but payment of the \$200.00 minimum was not made until May 2, 1978, over seven months after the due date. Since no timely payment was made, respondent properly computed the penalty in accordance with the definition of the "amount of underpayment." (See Rev. & Tax. Code, §§ 25951 & 25952.) Appellant could have avoided the penalty for underpayment of estimated tax by filing a timely declaration of estimated tax and paying the minimum tax. Thereafter, since appellant generated no income before the last quarter of the income year, the remedial provisions of subdivision (c) (2) of section 25954 of the Revenue and Taxation Code would have been applicable. (See Appeal of Lumbermans Mortgage Company, supra.)

Appellant also argues that the penalty was calculated on the income as originally reported rather than on the corrected income as reported on the amended return submitted after the due date for the original return. Section 25952 of the Revenue and Taxation Code provides that the amount of the underpayment shall be computed with reference to the tax "shown on the return." The phrase "shown on the return" refers to the original return. If the tax shown on the original return was overstated, the amount of the underpayment of estimated tax is, nevertheless, determined by reference to the tax shown on the original return. (FTB LR 326, Feb. 28, 1968; see also Klinghamer v. Brodrick, 242 F.2d 563 (10th Cir. 1957); E. Wheeler Bryant, ¶ 63,199 P-H Memo. T.C. (1963).) If a revised or corrected return is filed on or before the due date for the original return, the amount of the underpayment is determined by reference to the tax on the revised or corrected return. However, an amended return filed after the due date of the original return does not affect the manner in which the amount of the underpayment is determined. (FTB LR 326, Feb. 28, 1968.) Since the estimated tax penalty was properly calculated based on the underpayment reflected on appellant's original return, respondent's action in this matter must be sustained.

