



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ELIXIR INDUSTRIES)

For Appellant: Steve Solomon
Controller

For Respondent: Terry Collins
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Elixir Industries for refund of penalties in the amount of \$5,340.87 for the income year ended June 27, 1981.

Appeal of Elixir Industries

Appellant, a California corporation engaged in manufacturing, files its California franchise tax returns on the basis of a fiscal year. For the year ending June 27, 1981, appellant requested and received an extension of time in which to file its franchise tax return. The request for an extension indicated an expected tax liability of \$75,200 and total prepayments of \$200. A **\$75,000** payment accompanied the request for extension. Appellant timely filed its franchise tax return reflecting a franchise tax liability of \$108,469 within the **above-**noted extension period. On October 2, 1981, appellant also submitted an additional payment of tax for that income year of \$50,000.

Respondent's review of appellant's account disclosed that its estimated tax payments in 1981 had been made in the following manner:

	<u>Date Paid</u>	<u>Amount</u>	<u>Cumulative</u>
First Installment	3/15/81	\$ 200	\$ 200
Second Installment	9/15/81	75,000	75,200
Third Installment	10/2/81	50,000	125,200

On the basis of the above schedule, respondent determined that appellant was subject to penalties in the total amount of **\$5,340.87**, consisting of **\$4,340.87** for underpayment of estimated tax (Rev. & Tax. Code, § 25951) and \$1,000 for late payment of tax (Rev. & Tax. Code, § 25934.2). Respondent offset appellant's claimed credit balance against the penalties plus interest attributable to the late payment of tax and refunded the excess credit balance to appellant. Thereafter, appellant properly treated the offset as a partial denial of its claim for refund and filed this appeal.

Appellant argues here that respondent's assessment of the penalty for underpayment of estimated tax (Rev. & Tax. Code, § 25951) is in error because its estimated payments made in 1981 complied with the exception contained in subdivision (a) of section 25954 of the Revenue and Taxation Code,¹⁷ and **because** there was 'reasonable cause to excuse such underpayment. Appellant further contends that the penalty for late payment (Rev. &

¹⁷ All statutory references are to the Revenue and Taxation Code, unless otherwise noted.

Appeal of Elixir Industries

Tax. Code, § 25934.2) is also in error because there was reasonable cause to excuse such late payment within the meaning of section 25934.2, subdivision (a). We hold, however, that respondent has properly assessed both penalties.

A penalty for underpayment of estimated tax is imposed by section 25951, which stated in the year at issue:

In case of any underpayment of estimated tax, except as provided in Section 25954, there shall be added to the tax for the taxable year an amount determined at the rate of 12 percent per annum upon the amount of underpayment (determined under Section 25952) for the period of the underpayment (determined under Section 25953).

Under section 25952 there is no underpayment of estimated tax if the taxpayer has paid 80 percent of each installment otherwise due on each of the prescribed dates (here: 9/15/80; 12/15/80; 3/15/81; 6/15/81). Thus, under the general rule, if appellant had made four timely estimated tax payments, each in the amount of at least \$21,693 (80% x (25% x \$108,469)), there would have been no underpayment. As indicated above, however, appellant made only a single payment of estimated tax in the amount of \$200 on March 15, 1981.

The "period of the underpayment" runs from the installment due date to the date of payment or the return filing date, whichever is earlier. (Rev. & Tax. Code, § 25953.) No amount of any prepayment will be applied to any previous underpayment of estimated tax, except to the extent such payment exceeds 80 percent of the installment then due.²¹ (Rev. & Tax. Code, § 25953, subd. (b).) Under these provisions, respondent correctly determined the periods of underpayment of appellant's estimated tax.

27 Note that the "installment then due" is the amount determined under subdivision (a) of section 25952, based upon the actual tax liability shown on the return for the income year, not that of the preceding income year.

Appeal of Elixir Industries

It therefore appears that this penalty was properly computed and assessed; **unless** appellant qualifies for relief under section 25954.. That section provides, in substance, that no penalty will be imposed if the total amount of estimated tax payments made by each installment due date equals or exceeds the amount that would have been due-by such date if the estimated tax were the lesser of:

(a) the tax shown on the taxpayer's return for the Preceding income year:

(b) the tax computed at the rates for the current taxable year but otherwise on the basis of the facts and law applicable to the return for the preceding taxable year; or

(c) for income years beginning after December 31, 1971, an amount equal to 80 percent of the tax for the taxable year computed by placing on an annualized basis the taxable income for stated periods of the income year preceding each estimated tax installment due date.

Appellant contends that it qualifies for relief from the penalty assessment under subdivision (a) above due to its prior year's operating loss. In order to avail itself of this provision, though, the minimum tax must be paid on or before the date it became due, here September 15, 1980. (Appeal of Uniroyal, Inc., Cal. St. Bd. of Equal., Jan. 7, 1975.) As indicated above, that minimum tax for the year at issue was not received by respondent until March 1981. Accordingly, appellant is unable to rely upon the remedial provisions of section 25954. Moreover, we have oftentimes held that relief from the penalty for underpayment of estimated tax is not available upon a showing of reasonable cause or extenuating circumstances. (Appeal of Decoa, Inc., Cal. St. Bd. of Equal., April 5, 1976.) Therefore, we must conclude that the penalty for underpayment of estimated tax as computed by respondent was properly assessed.

As indicated above, respondent also assessed a \$1,000 penalty for the late payment of the tax. Appellant challenges the imposition of this penalty, arguing that the late payment was due to the fact that its auditor discovered additional income after the original due date which appellant promptly took into account by submitting the \$50,000 payment on October 2, 1981. Appellant alleges that this late discovery by its outside auditor constituted reasonable cause for its late payment.

Appeal of Elixir Industries

Section 25934.2 provides in pertinent part:

(a) If any taxpayer fails to pay the amount of tax required to be paid under Sections 25551 and 25553 by the date prescribed therein, then unless it is shown that the failure was due to reasonable cause and not willful neglect, a penalty of 5 percent of the total tax unpaid as of the date prescribed in Sections 25551 and 25553 shall be due and payable upon notice and demand from the Franchise Tax Board. ... In no case, however, may the penalty imposed under this section be less than five dollars (\$5) or more than one thousand dollars (\$1,000).

Section 25551, which is applicable to appellant, provides:

Except as otherwise provided in this chapter, the tax imposed by this part shall be paid not later than the time fixed for filing the return (determined without regard to any extension of time for filing the return).
(Emphasis added.)

The normal due date for filing appellant's return for the income year ended June 27, 1981, was September 15, 1981. (Rev. & Tax. Code, § 25401, subd. (a).) Since appellant failed to pay \$33,560 of its total franchise tax liability for that year until October 2, 1981, respondent's imposition of the penalty for late payment of tax was proper, unless such untimely payment was due to reasonable cause and not due to willful neglect. Appellant bears the burden of proving that both of those conditions existed. (Rogers Hornsby, 26 B.T.A. 591 (1932); see Appeal of Telonic Altair, Inc., Cal. St. Bd. of Equal., May 4, 1978.) In order to establish reasonable cause, the taxpayer must show that its failure to act occurred despite the exercise of ordinary business care and prudence.³⁷ (See Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den. 250 U.S. 967 [100

³⁷ Since appellant did not pay 90 percent of the tax shown on the return by the due date, the presumption of reasonable cause provided by regulation is inapplicable. (Former Cal. Admin. Code, tit. 18, reg. 25934.2 (repealer filed Nov. 29, 1982; Register 82, No. 49).)

Appeal of Elixir Industries

L.Ed. 839] (1956); Appeal of Citicorp Leasing, Inc., Cal. St. Bd. of Equal., JJa. 6 1 976.) In addition, the regulation interpreting section 25934.2 provided **that** in order to avoid the penalty, a taxpayer "must **make an** affirmative showing of all facts alleged as reasonable cause for his failure to pay such tax in the form of a written statement." (Former Cal. Admin. Code, tit. 18, **reg. 25934.2**, subd. (a) (repealer filed Nov. 29, 1982; Register 82, No. **49**).)

We find that appellant has not made **such** "an affirmative showing" as would fulfill its burden of proving reasonable cause. We have held that the difficulty resulting from resolving certain accounting problems arising from federal law does not constitute reasonable cause for late payment of tax. (Appeal of Cerwin-Vega International, Cal. St. Bd. of Equal., Aug. 15, 1978.) Appellant's contention here would appear to be but a variation **of this** rejected argument.'

For the reasons cited above, respondent's action in this matter must be sustained.

Appeal of Elixir Industries

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Elixir Industries for refund of penalties in the amount of **\$5,340.87** for the income year ended June 27, **1981**, be and the same is hereby sustained.

Done at Sacramento, California, this 14th day of December, **1983**, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and **Mr.** Harvey present.

William M. Bennett, Chairman
- Conway H. Collis --, Member
Ernest J. Dronenburg, Jr., Member
- Richard Nevins, Member
*Walter Harvey, Member

*For Kenneth Cory, per Government Code section 7.9