BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal

of

CHARLES R. PENINGTON

Appearances:

For Appellant: 'John M. Schurr, Public Accountant

For Respondent: Hebard P..Smith, Associate Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Charles R. Penington to proposed assessments of additional pcrconal income taxes as follows:

Charles R. and Alice L. Penington	1935	$ 25.06
Charles R. and Alice L. Penington	1936	$ 73.71
Charles R. Penington	1937	$ 64.73
Charles R. Penington	1938	$ 96.59
Charles R. Penington	1939	$168.73

Appellant contends (1) that the taxes in question are barred by the statute of limitations, (2) that his tax liability for the years in question has been settled by a closing agreement, and (3) that for the years 1935 and 1936 he had no taxable net income.

Appellant argues that his disclosures made to an auditor of the Franchise Tax Commissioner in 1946 constituted "returns", and as such started the period running after which the Franchise Tax Board could not make a deficiency assessment, so that as a consequence the purported deficiency assessments of December 13, 1950, were invalid.

The period within which a deficiency assessment may be issued is limited by Section 18586 of the Revenue and Taxation Code, which provides:

> "Except in the case of a fraudulent return . . . every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise fixed."

As to the form required for returns, Section 18431 of the Revenue and Taxation Code provides:

> "... returns required by this part, shall be in such form as the Franchise Tax Board may from time to time prescribe ..."

Pursuant to the authority granted by the code, the Franchise Tax Board has specified the form upon which a return must be made, by Franchise Tax Board Regulation, 18 Cal. Adm. Code 18401-18404(e), which states:

> "In the case of residents, the return shall be on Form 540."

The taxpayer did not file returns on Form 540 for the years in question until May 5, 1950.

The Franchise Tax Board mailed the notices of proposed deficiency assessments on December 13, 1950. Thus it is clear that the deficiency assessments are not invalid because of the failure to mail within four years after the filing of returns. Appellant's disclosures did not constitute "returns" as used in the code.

Appellant bases his second contention upon an arrangement entered into in 1946 with the Supervisor of Collections for the Franchise Tax Board for the payment of certain tax liability in installments of $100 a month. It is his position that the arrangement constituted a final settlement of his tax liability for 1941 and all preceding years.

Delinquent returns filed by Appellant for 1940 and 1941 disclosed a tax liability for those years in the amounts of $353.93 and $788.30, respectively, plus penalties and interest. Correspondence between Appellant and the Franchise Tax Board concerning the 1946 installment arrangement establishes

that it related only to the 1940 and 1941 taxes, and that in fact Appellant paid no more under that arrangement than the aggregate amount of his liability for those years.

While the Franchise Tax Board does have limited authority to enter into final settlement agreements with taxpayers, such agreements must meet the requirements of Section 19132 of the Revenue and Taxation Code, as follows:

> "The Franchise Tax Board or any person authorized in writing by the Franchise Tax Board is authorized to enter into an agreement in writing with any person (or of the person or estate for whom he acts) in respect of any tax levied under Part 10 of this code for any taxable period.
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> "If such agreement is approved by the State Board of Control, within such time as may be stated *in* the agreement, or later agreed to, such agreement shall be final and conclusive, and except upon a showing of fraud or malfeasance, or misrepresentation of a material fact
>
> "(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the State, and
>
> "(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

Appellant has not alleged or established facts sufficient to show compliance with Section 19132, supra. That circumstance, together with the lack of payment of any amounts in excess of his liability for the years 1940 and 1941, clearly disposes of Appellant's contention that the installment arrangement of 1946 discharged him of liability *for* taxes for the years 1935 to 1939, inclusive, for which returns had not been filed.

So far as Appellant's contention that he had no taxable income for the years 1935 and 1936 is concerned, it is sufficient to state that he has not furnished this Board with any evidence upon which it could determine his taxable income, or lack of such income, for those years.

It is well settled that the findings of the Franchise Tax Board in assessing taxes are prima facie correct, and that the taxpayer disputing an assessment has the burden of proving it incorrect. Todd v. McColgan, 89 Cal. App. 2d 509. See also Avery v. Commissioner, 22 F. 2d 6; Royal Packing Co. v. Commissioner, 22 F. 2d 536. This would seem particularly true where, as here, the taxpayer wrongfully failed to file returns until many years after they were due.

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tsx Board on the protests of Charles R. Penington to proposed assessments of additional personal income t-axes in the amounts of $25.06 and $73.71 against Charles R, Penington and Alice L. Penington for the years 1935 and 1936 respectively, and in the amounts of $64.73, $96.59 and $168.73 against Charles R. Penington for the years 1937, 1938, and 1939, respectively, be and the same is hereby sustained.

Dated at Sacramento, California, this 20th day of January, 1954, by the State Board of Equalization.

Geo, R. Reilly, Chairman

J. H. Quinn, Member

Paul R. Leake, Member

Wm. G. Bonelli, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary