

Appeal of Thomas T. Crittenden

Appellant is a self-employed attorney. In 1969 the Internal Revenue Service issued an audit report which set forth substantial additions to the taxable income appellant had reported on his 1966 federal income tax return. Respondent received a copy of the report, and a search of respondent's records failed to reveal any evidence that appellant had filed a state return for the year 1966.

On June 16, 1970, respondent wrote to appellant to advise him that it had received a copy of the federal audit report and that it could not locate his state return for 1966. The letter requested appellant to do one of three things: (1) if he had filed a return, he was asked to send a copy of it to respondent along with a completed form FTB 3830 (Taxpayer's Statement of Previous Filing), a blank copy of which accompanied the letter; or (2) if he had not filed a return, he was asked to fill out the blank form 540 enclosed with the letter and to send it to respondent along with the appropriate tax, penalty, and interest; or (3) if he believed that he was not required to file a return, he was requested to furnish specific information to show that he did not fall within the filing requirements. When appellant failed to reply, respondent issued notice of a proposed assessment on October 30, 1970, based on the federal audit report; and added a 25 percent penalty for failure to file a timely return and an additional 25 percent penalty for failure to furnish information requested in writing.

On November 13, 1970, respondent received appellant's protest of the assessment, in which appellant said that he had filed a timely return. He enclosed an unsigned copy of a 1966 return, labeled "Preliminary", dated January 30, 1967, and showing self-assessed tax of \$165. He denied receiving any previous request for information. When a subsequent exchange of letters failed to produce any additional information, respondent affirmed its proposed assessment on April 15, 1971.

Respondent's notice of proposed assessment and notice of action affirming the proposed assessment were mailed to the same address of appellant as the address shown on the letter of June 16, 1970.

Section 18681 of the Revenue and Taxation Code pro -

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vides for a graduated penalty, not to exceed 25 percent of the tax due, for failure to file a timely return, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. During the year on appeal, section 18683 of that code provided that if any taxpayer fails or refuses to furnish any information requested in writing by the Franchise Tax ward., the Franchise Tax Board may add a penalty of 25 percent of any deficiency concerning the assessment of which the information was required. The propriety of the penalties presents issues of fact as to which the burden of proof is on the taxpayer. (Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10 1969; Boynnton v. Pedrick, 228 F. 2d 745, cert. denied., 351 U.S. 938 [100 L. Ed. 1465]; Otho J. Sharpe, T. C. Memo., Nov. 26, 1956, appeal dismissed., 249 F. 2d 547.)

On this record we can only conclude that appellant has failed to prove he filed a timely return for 1966. Respondent introduced evidence to show that a diligent search of its records had been made and that no return was found to have been filed in appellant's name for 1966. Although appellant has alleged that he filed his state return at the same time he filed his federal return, he has failed to produce any persuasive evidence of filing, despite numerous opportunities to do so. He did send respondent a copy of an unsigned "preliminary" return that he purportedly filed, but it has been held that production of a copy of a return without convincing evidence of mailing the original is insufficient to establish timely filing where official government records indicate that no return was filed. (Appeal of La Salle Hotel Co., supra.)

Appellant has also failed to sustain his burden of proving the impropriety of the penalty for failure to furnish information requested by the Franchise Tax Board. On appeal, appellant did not address himself specifically to this penalty. His only comment regarding it came in his letter of protest to respondent, in which he simply denied receiving the letter of June 16, 1970. However, a copy of the letter is contained in the record, and the subsequent notice of proposed assessment and notice of action affirming the proposed assessment posted to the same address were admittedly received. On the evidence before us, we must conclude that appellant did receive the letter of

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June 16, IWO, and it is undisputed that he never responded to it.

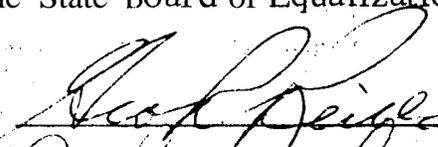
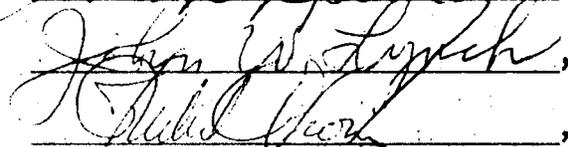
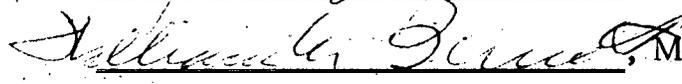
In accordance with the views expressed herein, we sustain respondent's action in imposing both penalties. However, since the amount of each penalty in this case must be measured by the amount of the tax due, the penalties assessed by respondent must be adjusted to reflect the agreement of the parties on appellant's revised tax liability.

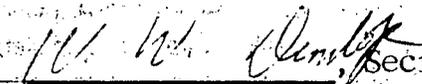
ORDER

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 Tax Board on the protest of Thomas, T. Crittenden against a proposed assessment of personal income tax in the amount of \$1,126.57 and penalties in the amount of \$563.28 for the year 1966, be and the same is hereby, modified to reduce the amount of tax liability in accordance with the agreement of the parties. The amount of each penalty is reduced to 25 percent of the amount of the tax liability as revised. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 7th day of October, 1974, by the State Board of Equalization.

 _____, Chairman
 _____, Member
 _____, Member
 _____, Member
_____, Member

ATTEST:  _____, Secretary