

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of )  
DON A. AND DIANE H. COOKSTON )

For Appellants: Don A. and Diane H. Cookston,  
in pro. per.

For Respondent: Jacqueline W. Martins  
Counsel

James T. Philbin  
Supervising Counsel

O P I N I O N

These appeals are made pursuant to section 18593 of the Revenue and Taxation **Code from the action** of the Franchise Tax Board on the protest of Don A. and Diane H. Cookston against proposed assessments of additional personal income tax and penalties in the total amounts of \$1,512.98 and \$1,262.97 for the years 1975 and 1977, respectively, and pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Don A. Cookston and Diane H. Cookston against proposed assessments of additional personal income tax and penalties in the total amounts of \$3,099.00 and \$1,033.50, respectively, for the year 1976.

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The sole issue presented by these appeals is whether Don A. and Diane H. Cookston (hereinafter referred to as "appellant-husband" and "appellant-wife", respectively, and collectively referred to as "appellants") have established error in respondent's proposed assessments of additional personal income tax or in the penalties assessed for the years in issue.

Due to a large deduction claimed as a result of an alleged theft loss, appellants reported no taxable income on their 1975 joint California personal income tax return. The claimed theft loss of \$500,000 arose from purported "political" burglaries at appellants' residence and appellant-husband's office in which certain records constituting evidence in pending litigation against, among others, a former mayor of San Francisco were stolen. Appellants computed the value of the stolen records by "capitalizing" the total amount of damages sought in their litigation, i.e., \$10 million.

Upon review of their return, respondent requested that appellants furnish additional information concerning their claimed theft loss deduction. Appellants were simultaneously notified that failure to provide the requested information would result in the issuance of a notice of proposed assessment of additional personal income tax. When they failed to reply, appellants were issued the subject proposed assessment for 1975; respondent also imposed a 25 percent penalty for failure to furnish the requested information.

Appellants subsequently protested respondent's action and, in response to a second request from respondent for information regarding the claimed theft loss deduction, stated that the stolen property consisted of business records, legal files and tape recordings worth \$500,000 prior to the purported theft. Upon consideration of appellants' protest, respondent affirmed its notice of proposed assessment based upon its conclusion that appellants had failed to: (i) substantiate that a theft had actually occurred, or (ii) establish the actual value of the property allegedly stolen.

A deduction is allowed for losses of property not connected with a trade or business (after a \$100 exclusion) if such losses arise from theft and are not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subs. (a) & (c)(3).) Section 17206 is based upon section 165(c) of the Internal Revenue Code of 1954 and is substantively identical to it in all

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respects material to the instant appeal. It is settled law in California that when state statutes are patterned after federal legislation on the same subject, the interpretation and effect given the federal provisions by federal courts are relevant in determining the proper construction of the California statutes. (Andrews v. Franchise Tax Board, 275 Cal.App.2d 653, 658 [80 Cal. Rptr. 403] (1969); Rihn v. Franchise Tax Board, 131 Cal. App.2d 356, 360 [280 P.2d 8931 (1955).])

Income tax deductions are a matter of legislative grace, and the burden is on the taxpayer to show by competent evidence that he is entitled to any deduction claimed. (Deputy v. du Pont, 308 U.S. 488 [84 L.Ed. 416] (1940); New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 13481 (1934).]) To prevail, appellants must show: (i) the theft of their property, (ii) the amount of loss they sustained, and (iii) that the year for which the loss is claimed is the year in which the loss was discovered, or if they had a reasonable prospect of recovery at the time the loss was discovered, the year in which they determined with reasonable certainty that no recovery would be had. (Naum S. Bers, ¶ 76,263 P-H Memo. T.C. (1976); Elwood J. Muldoon, ¶ 71,213 P-H Memo. T.C. (1971); Stanley J. Prescott and Lucille Prescott, ¶ 69,076 P-H Memo. T.C. (1969).) While appellants assert that their claimed theft loss deduction was improperly disallowed, they have failed to satisfy any of these requirements. Accordingly, we are compelled to conclude that appellants have failed to carry their burden of proof and that respondent's disallowance of the claimed theft loss was correct.

As previously noted, appellants failed to respond to respondent's initial request for certain specific information regarding the claimed theft loss deduction. It is well established that the burden is on the taxpayer to prove that a penalty for failure to provide information, imposed pursuant to section 18683, has been improperly assessed. (Appeal of John L. Sullivan, Cal. St. Bd. of Equal., Jan. 8, 1980; Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.) Since appellants have failed to present any evidence or argument in opposition to the penalty assessed for failure to provide information, we must conclude that they have failed to sustain their burden of proving that respondent's action in imposing that penalty was improper.

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Appellants did not file California personal income tax returns for the years 1976 and 1977. In their appeals from respondent's action with regard to those years, appellants simply state that they were not obligated to pay personal income tax.

On the basis of information obtained from the California Employment Development Department, respondent issued appellant-husband and appellant-wife separate notices of proposed assessment of additional personal income tax for the year 1976 in the amounts of \$2,066 and \$689, respectively. Respondent also imposed penalties totaling \$1,033 against appellant-husband, consisting of a 25 percent penalty for failure to file a return (Rev. & Tax. Code, § 18681) and a 25 percent penalty for failure to file upon notice and demand (Rev. & Tax. Code, § 18683). Identical penalties totaling \$344.50 were also imposed against appellant-wife. Information from the Employment Development Department also formed the basis of the notice of proposed assessment issued appellants for the year 1977. In addition to the proposed assessment of additional personal income tax in the amount of \$782.63, respondent also imposed penalties totaling \$400.45, consisting of a 25 percent penalty for failure to file upon notice and demand, a 25 percent delinquency penalty (Rev. & Tax. Code, § 18681), a 5 percent negligence penalty (Rev. & Tax. Code, § 18684), and a penalty in the amount of \$49.89 for failure to pay estimated income tax (Rev. & Tax. Code, § 18685.05).

It is well settled that respondent's determinations are presumptively correct, and the burden rests on the taxpayer to prove them erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case. (See Appeal of Harold G. Jindrich, supra; Appeal of Kenton A. Dean, Cal. St. Bd. of Equal., July 31, 1973; Appeal of Myron F. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) No such proof has been presented here.

On the basis of the evidence before us, we can only conclude that respondent correctly computed appellants' tax liability, and that the imposition of penalties was fully justified. Respondent's action in this matter will, therefore, be sustained.

