

Appeal of W. Scott and Christy S. Supernaw

The issue presented by this appeal is whether respondent properly imposed a penalty for failure to file a return after notice and demand.

Appellants failed to file a 1978 California personal income tax return by the due date, April 15, 1979. Respondent issued a notice demanding that appellants file a return. When appellants failed to respond, respondent issued a notice of proposed assessment, assessing tax in the amount of \$3,300. Respondent also imposed 25 percent penalties for failure to timely file (Rev. & Tax. Code, § 18681) and for failure to file after notice and demand (Rev. & Tax. Code, § 18683). The proposed assessment became final on June 5, 1980.

On July 23, 1980, appellants filed a 1978 return showing a tax liability of \$4,025 and credit for withholding of \$4,402. Appellants requested a refund of \$377, the difference between these two amounts. Upon receipt of the return, respondent revised its assessment to \$4,025, and cancelled the penalty imposed for failure to file a timely return. However, respondent refused to cancel the penalty imposed for failure to file after notice and demand. It applied appellants' claimed overpayment of \$377 to payment of the penalty and billed appellants for the balance of \$448 plus interest. Appellants paid that amount, then filed a claim for refund which respondent denied. This timely appeal followed.

Appellants contend that a penalty under section 18683 should not have been imposed since it was ultimately determined that the amount of appellants' credit for withholding exceeded their tax liability. The situation presented in this appeal is essentially identical to those presented in the Appeal of Frank E. and Lilia Z. Hublou, decided by this board on July 26, 1977, and the Appeal of Glenn V. Day, decided by this board on March 31, 1982. In those appeals, we decided that the penalty under section 18683 is properly computed on the amount of the tax liability determined without applying the credit for withholding, and upheld the imposition of the penalty despite the fact that the taxpayers' withholding credit exceeded the amount of tax due.

Appellants argue that, when presented with this situation, the Internal Revenue Service imposes no penalty. This difference is explained by the fact that Internal Revenue Code section 6651, subdivision (b) specifically provides that the penalty is imposed on the amount of tax shown on the return reduced by the amount of

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tax paid as of the due date and any credits to which the taxpayer is entitled, whereas Revenue and Taxation Code section 18683 does not so provide.

For the foregoing reasons, the action of respondent must be sustained.

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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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of W. Scott and Christy S. Supernaw for refund of personal income tax in the amount of \$46,324 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of August, 1982, by the State Board of Equalization, with Board Members Mr. Elennett, Mr. Collis, Mr. Dronenburg, and Mr. Nevins present.

William M. Bennett - a - - - - , Chairman
Ernest J. Dronenburg, Jr. , Member
Richard Nevins , Member
_____, Member
_____, Member