



Appeal of Ronald A. Floria

The question presented is whether appellant's failure to file a 1979 California personal income tax return upon respondent's notice and demand was due to reasonable cause, thus making the imposition of the penalty improper.

Appellant failed to file a California personal income tax return for the year 1979. On November 17, 1980, respondent sent to appellant a demand that he file a 1979 return. When appellant did not respond to this demand, respondent estimated appellant's income tax liability to be \$5,791.00 and imposed 25 percent penalties for failure to file a return and failure to file after notice and demand. (Rev. & Tax. Code, §§ 18681 and 18683). Notice of the proposed assessment was mailed to appellant on February 17, 1981.

On March 13, 1981, appellant filed a 1979 return showing a tax liability of \$1,985.00 offset by credits of \$3,229.00 and claimed a refund of the difference. Respondent accepted appellant's return as filed, cancelled the penalty imposed under section 18681, and reduced the penalty imposed under section 18683 to reflect the reduced tax liability. Respondent deducted the penalty from appellant's claimed refund and refunded the balance. Appellant protested respondent's partial denial of the claimed refund and filed this timely appeal.

Revenue and Taxation Code section 18683 provides, in pertinent part :

If any taxpayer ... fails or refuses to make and file a return required by this part upon notice and demand by the Franchise Tax Board, then, unless the failure is due to reasonable cause and not willful neglect, the Franchise Tax Board may add a penalty of 25 percent of the amount of tax determined pursuant to Section 18648 or of any deficiency tax assessed by the Franchise Tax Board concerning the assessment of which the information or return was required.

The burden of proving that the failure to file upon notice and demand was due to reasonable cause is on the taxpayer. (Appeal of Howard G. and Mary Tons, Cal. St. Bd. of Equal., Jan. 9, 1979.) To meet this burden, he must prove that his failure to file occurred despite the exercise of ordinary business care and prudence or that, under similar circumstances, an ordinary, intelligent, and prudent businessman would have acted as the taxpayer did. (Appeal of Howard G. and Mary Tons, supra.)

Appellant advances several arguments in support of his contention that his failure to file upon notice and demand was due to reasonable cause. First, he claims that he did not receive the demand notice mailed by respondent on November 17, 1980, and since he filed

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the return shortly after receiving the notice of proposed assessment, no penalty should be imposed. This argument fails because appellant has not proved that the failure to receive the demand notice occurred despite his exercise of reasonable care. Appellant explains that he moved in May 1980 and attributes the non-receipt of the demand notice to this fact. Notice sent to the taxpayer's last known address is effective since it is the taxpayer's responsibility to take reasonable steps to ensure that he receives his mail. (Appeal of Winston R. Schwyhart, Cal. St. Bd. of Equal. ; April 22, 1975). **We have** no evidence that appellant either notified respondent of his new address or took any other steps to make sure that he would receive his mail. Therefore, appellant has not proved that he exercised ordinary care in this regard.

Appellant next argues that **his** failure to file was due to reasonable cause because he and his wife separated in September 1979, and there was a dispute **as** to whether the income he earned between September and December was community, or separate property. The character of the income was determined by the Superior Court on March 12, 1981. Appellant contends that it was reasonable for him to refrain from filing his **tax** return until that time since he recently moved to California and was **unfamiliar with** California law. Faced with such a situation, one **reasonable** course of action would have been to consult an expert familiar with California property and tax law. An assumption concerning the character of the income **could** have been made, a return filed, and, if necessary, an amended return filed when the dissolution of marriage proceedings were concluded. It seems that this would have been an easy course of action for appellant to take since he apparently retained an attorney in September 1979 to represent him concerning the dissolution of his marriage. Despite **this**, appellant has **produced** no evidence showing that he made any attempt to obtain advice which would enable him to file a timely tax return. **Under** these circumstances, appellant's failure to file was not reasonable, and the penalty cannot be excused.

Appellant further argues that he could not file his 1979 return because he could not determine his marital status. This **is** identical to the argument we found unpersuasive in the Appeal of Glenn V. Day, decided March 31, 1982. **We** see no reason to alter our holding in that case.

Appellant's final argument is that the penalty should, not be imposed because he telephoned respondent in February 1982, upon his receipt of the notice of proposed assessment, and was not informed that a penalty would be imposed. **This** argument is without merit. The Franchise Tax Board does not have the responsibility to inform taxpayers of the law. (Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958.) In any event, the telephone conversation

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occurred after the penalties had been imposed. Therefore, appellant could not have **relied** to his detriment on respondent's failure to inform him of the penalties imposed under California Law. (See Appeal of Winston R. Schwyhart, supra.)

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

