

Appeal of Robert Scott

Accordingly, the sole issue presented by this appeal is whether respondent properly imposed a penalty pursuant to section 18683 of the Revenue and Taxation Code^{1/} for appellant's failure to file a tax return upon notice and demand for the year 1977.

Appellant failed to file a timely 1977 California personal income tax return; Appellant also failed to respond to respondent's notice and demand for the return. Consequently, pursuant to section 18648, respondent estimated appellant's 1977 income and issued a deficiency assessment for the tax determined to be due. In addition, pursuant to section 18683, respondent imposed a penalty equal to 25 percent of the estimated tax liability for appellant's failure to file a return upon notice and demand.

Thereafter, on or about May 20, '1980, appellant filed a 1977 return wherein he reported tax liability of \$1,105.00. However, appellant also indicated that he was entitled to credits of \$1,271.00 for tax previously withheld and a personal exemption. Therefore, appellant claimed a refund of \$166.00, the difference between the credits and the reported tax liability.

Respondent accepted as correct the information reported in the delinquent return. Respondent reduced the section 18683 penalty to 25 percent of the reported tax liability and deducted that amount (\$276.25) from the refund claimed by appellant. The difference was paid by appellant. Appellant's subsequent claim for refund of the \$276.25 was denied by respondent, and this appeal followed.

Section 18401 provides that every individual or married couple taxable under the Personal Income Tax Law must file an annual return unless the income of the individual or couple is less than a specified amount. The record on appeal indicates that appellant was required to file a 1977 return under this statute.

Section 18683 provides, in pertinent part:

^{1/} Hereinafter, all statutory references are to the Revenue and Taxation Code.

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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 propriety of the penalty presents issues of fact as to which the burden of proof is upon the taxpayer. (Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974; Appeal of LaSalle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.) Appellant has not submitted any significant evidence or arguments in refutation of the penalty determination. Certainly, appellant's allegations that he **has been** "emotionally drained" by respondent's assessment and collection procedures and that he has now "learned from this experience" cannot be construed to establish that his failure to file the return was due to reasonable cause, the only statutory basis for relief from the penalty. Nor would such reasonable cause be established by showing that another state department had information with respect to the proper credits, as appellant apparently contends. Accordingly, appellant has failed to carry his burden of proving the penalty erroneous, and it must be upheld. (Appeal of Ronald Ippolito, Cal. St. Bd. of Equal., Nov. 18, 1980; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.)'

Appellant also contends that the penalty in question should not be imposed since respondent ultimately determined that no tax deficiency existed for 1977. However, the fact remains that appellant failed to respond to the formal notice and demand for the 1977 return. It is the failure of a taxpayer to respond to the notice and demand, and not the taxpayer's failure to pay the proper tax, that section 18683 was **designed to** penalize.

With respect to the computation of the section 18683 penalty, it is our opinion that respondent properly based the penalty upon the amount of tax determined to be due, which in this instance coincided with that reported on appellant's delinquent return. Section 18683 indicates that the penalty may be computed as 25

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percent of the tax deficiency resulting from the taxpayer's failure to file a return. It is well established that in the case of a delinquent return the deficiency is the total correct tax liability as of the due date of the return, rather than the tax shown on the delinquent return. (See Herbert C. Broyhill, ¶ 68,025 P-H Memo. T.C. (1968); Appeal of Frank E. and Lilia Z. Hublou, Cal. St. Bd. of Equal., July 26, 1977; Appeal of Emery I. and Ingrid M. Erdy, Cal. St. Bd. of Equal., Dec. 15, 1976) Moreover, the tax deficiency exists regardless of whether the taxpayer is entitled to a credit for tax withheld from wages. (See Rev. & Tax. Code, § 18591.1, **subd.** (b)(1).) The credit merely operates to reduce or offset the tax liability that is established by the delinquent return.

For the reasons stated, we conclude that respondent's action in this matter for 1977 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 claims of Robert Scott for refund of penalties in the amounts of \$276.25 and \$264.25 for the years 1977 and 1978, respectively, and interest in the amount ~~of~~ \$215.57 for the year 1978, be and the same is hereby modified to reflect respondent's concession regarding the penalty and interest for 1978. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 5th day of April , 1983, by the State Board of Equalization, with Board Members Mr. Bennett., Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code Section 7.9