

Appeal of Elmer R. and Barbara Malakoff

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

Appellants requested, and were granted, an extension of time to October 15, 1979, in which to file their 1978 California personal income tax return. In 1980, respondent ascertained that appellants had not filed the subject return, and, therefore, on August 4, 1980, respondent issued a notice demanding that appellants file such a return. When appellants failed to reply, respondent issued a notice of proposed assessment, assessing tax in the amount of \$3,619. 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).

On April 1, 1981, appellants filed a 1958 return which indicated a tax liability of \$3,782. Upon receipt of the return, respondent revised its assessment to \$3,782, and cancelled the penalty imposed for failure to file a timely return because the amount of tax withheld from appellants' wages exceeded their tax liability. However, respondent refused to cancel the penalty imposed for failure to file after notice and demand. Respondent offset appellants' credit balance of \$375 as shown on their 1978 return and billed appellants for the balance of \$529.75, plus interest. Appellants paid that amount, then filed a claim for refund which respondent denied. This 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 similar 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 we upheld the imposition of the penalty, despite the fact that the taxpayers' withholding credit exceeded the amount of tax due.

Appellants also 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(b), specifically

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provides that the penalty is imposed on the amount of tax shown on the return reduced by the amount of 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.

Lastly, appellants contend that the subject penalty is unjustified because their failure to file after notice and demand was due to reasonable cause and not due to willful neglect. (See Rev. & Tax. Code, § 18683.) Appellants argue that a late 1978 burglary in which certain records (most notably, appellants' checkbook) were taken and the intense work pressures of appellant-husband, an attorney, should constitute reasonable cause so as to abate the subject penalty. Moreover, appellants add that they were not aware of the difference between federal and state law with respect to this penalty, and their lack of knowledge should also constitute reasonable cause.

We cannot agree. First, we note that it is well settled that the taxpayer has the burden of showing that the penalty was improper. (Appeal of Dare and Patricia Miller, Cal. St. Bd. of Equal., March 18, 1975; Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.) Reasonable cause means such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Appeal of Joseph W. and Elsie M. Cummings, Cal. St. Bd. of Equal., Dec. 13, 1960.) We note that appellants have offered no evidence to show that the circumstances of Mr. Malakoff's work pressures or the theft of the checkbook were such to prevent filing after notice and demand. Also, we note that it is well settled that ignorance of the law does not constitute reasonable cause. (Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958.) Accordingly, based upon the above noted standards, we must conclude that appellants have not shown the "reasonable cause" that is required to excuse the late filing penalty imposed by section 18683.

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

