



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
WOODVIEW PROPERTIES, INC.)

Appearances:

For Appellant: Robert C. Amy, Jr.
Certified Public Accountant

For Respondent: Eric J. Coffill
Counsel

O P I N I O N

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Woodview Properties, Inc., against a proposed assessment of additional franchise tax and penalties in the total amount of \$4,915 for the income year 1979.

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The issues presented for our resolution are:
(1) whether appellant is entitled to deduct a commission in the amount of \$55,000; and (2) whether penalties for failure to file a timely return and failure to furnish information upon request were properly imposed.

Appellant is -a California corporation which files its franchise tax returns on a calendar year basis under a-n accrual system of accounting. In computing its net income for the 19'79 income year, appellant claimed a business expense deduction in the amount of \$55,000 for an accrued commission payable to its accountant. Under an agreement made in 1979, appellant was obligated to pay the commission to the accountant for his performing certain financial and managerial services in connection with appellant's various real estate projects. However, apparently because financing for these projects failed to materialize, the accountant never performed these services and the parties mutually agreed to cancel the commission and concomitant liability in the following year. Respondent disallowed the claimed deduction in its entirety and issued the proposed assessment of additional tax. Respondent also imposed a 15-percent penalty for failure to file a timely return (Rev. & Tax. Code, § 25931) and a 25-percent penalty for failure to furnish requested information (Rev. & Tax. Code, § 25933). Appellant filed this appeal following denial of a protest against the proposed assessment.

Section 24681 of the Revenue and Taxation Code provides that a taxpayer is allowed a deduction for the income year which is the proper income year under the method of accounting used by the taxpayer in computing its income. This section is substantially the same as Internal Revenue Code section 461(a). Federal precedent is therefore persuasive of the proper interpretation of section 24681. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).)

A taxpayer using an accrual method of accounting may deduct an expense for the income year in which all the events have occurred that determine the fact of liability and fix the amount of such liability with reasonable accuracy. (United States v. Anderson, 269 U.S. 422 [70 L.Ed. 347] (1926); Putoma Corp. v. Commissioner, 601 F.2d 734 (5th Cir. 1979), aff'g, 66 T.C.52 (1976); Treas. Reg. § 1.461-1(a)(2); Cal. Admin. Code, tit. 18, reg. 24651, subd. (c)(1)(B); accord Appeal of Del Kern Cattle y, Cal. St. Bd. of Equal., Sept. 17, 1973.) Conversely, a liability which is contingent upon the

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occurrence of future events may not be properly deducted until that year when it becomes fixed, certain, and no longer contingent. (Security Flour Mills Co. v. Commissioner, 321 U.S. 281 [88 L.Ed. 725] (1944); Putoma Corp. v. Commissioner, supra.) The reason for this general rule is that there is no certainty that a conditional obligation will ever be paid or accrue. (Helvering v. Russian Finance & Construction Corporation, 77 F.2d 324, 327 (2d Cir. 1935); Southern Pacific Transportation co., 75 T.C. 497, 637-638 (1980).)

It is well settled that deductions are a matter of legislative grace, and the taxpayer has the burden of proving that it is entitled to the deduction claimed. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934); Appeal of James C. and Monablanché A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975.) It is equally well settled that respondent's determinations in regard to the disallowance of deductions and imposition of tax and penalties, other than the fraud penalty, are presumptively correct, and the taxpayer has the burden of showing error in those determinations. (Appeal of John A. and Julie M. Richardson, Cal. St. Bd. of Equal., Oct. 28, 1980; Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.)

First, appellant states that the commission payable to its accountant had properly accrued and was, therefore, deductible as a business expense for the income year at issue. The record in this appeal shows, however, that the commission, which was never earned and apparently never paid, was readily cancelled after appellant realized financial resources for its projects were not available. This indicates to us that appellant's liability to pay the commission was not fixed and definite in the income year at issue but contingent upon its acquisition of financing for the projects requiring the services of the accountant. As an obligation contingent upon the future financial condition of appellant, the commission had not accrued and was not deductible. (See Putoma Corp. v. Commissioner, supra.) Appellant has failed to introduce any evidence showing error in respondent's determination to disallow the deduction of the commission.

Second, appellant has not presented any evidence in opposition to the penalty for failure to file a timely return. Appellant was granted a six-month extension of time to file its 1979 return but nevertheless

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filed the return approximately three months after expiration of the extension. Where appellant has **offered** no evidence to show that the failure to file was due to reasonable cause and not willful neglect, we must assume that the penalty applies. (Appeal of Valley View Sanitarium and Rest-Home, Inc., Cal. St. Bd. of Equal., Sep Similarly, appellant has not made any argument against the penalty for failure to furnish requested information. The record indicates that on two different occasions respondent mailed letters to appellant requesting information and appellant failed to **respond** to either of these written requests. On appeal, appellant has simply apologized for its failure to respond to one of these requests. Where appellant has not denied its failure to reply to a request nor given any reason for such failure, we have no reason to disturb imposition of the penalty. (Appeal of Harold and Lois Livingston, Cal. St. Bd. of Equal., Dec. 13, 1971.)

For the foregoing reasons, we find that appellant has not carried its burden of proof. **Accordingly,** respondent's action in this matter will 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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of **Woodview** Properties, Inc., against a proposed assessment of additional franchise tax and penalties in the total amount of \$4,915 for the income year 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day Of October , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

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

*For **Kenneth** Cory , per Government Code section 7.9