85-SBE-025

BEFORE TEE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MICHAEL J. AND)
DIANE M. HALABURKA)

For Appellants: Michael J. and Diane M. Halaburka, in pro. per.

For Respondent: Kendall E. Kinyon
Counsel

OPINION

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Michael J. and Diane M. Halaburka for refund of a penalty in the amount of $363.69 for the year 1978.

Appellants concede their liability for tax under the Personal Income Tax Law of California during the year in question. The sole issue presented by this appeal is whether appellants' delay in filing their return after notice and demand was due to reasonable cause.

Appellants' personal income tax return for the taxable year 1978 was due on April 15, 1979. Appellants have stated that at the time the tax return was due, they were aware that a refund was due to them. An accountant friend allegedly advised them that they did not have to file a return with the state if a refund was due. At this time Diane Halaburka, who prepared their returns, was pregnant and confined to complete bed rest. When their son was born on May 12, 1979, he was ill and had to spend over a year in the hospital.

On November 26, 1979, respondent issued a notice to appellants demanding that they file a return for 1978 or show why none was due. Receiving no response, respondent issued a proposed assessment with penalties for failure to file a timely return and for failure to file after notice and demand. On May 8, 1980, appellants filed their 1978 return. Respondent then canceled the 25-percent penalty for failure to file and adjusted the 25-percent demand penalty to reflect the information supplied on appellants' return. The result was a potential refund of $738.23 being reduced by the demand penalty to an actual refund of $374.54. On June 27, 1980, the refund was sent to appellants.

Appellants filed a claim for refund for the amount of the penalty. Respondent denied appellants' claim and this timely appeal followed. Appellants contend that the penalty should be excused because (1) they were waiting for receipts to be used in their return; (2) their newborn son was seriously ill for the first year of his life and appellants were physically and emotionally unable to file a return; and (3) they never received the demand letter dated November 26, 1979, so they assumed they did not need to file a return.

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

> If any taxpayer fails or refuses to . . . make and file a return . . . 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 . . . .

There is no evidence in the record before us that there was willful neglect on the part of appellants. The only issue remaining is whether the requisite reasonable cause was present. It is well established that the burden is on the taxpayer to prove that there was reasonable cause for their failure to file once respondent had demanded payment. (William M. Bebb, 36 T.C. 170 (1961); Appeal of American Photocopy Equipment co., Cal. St. Bd. of Equal., Dec. 18, 1964.) The phrase "reasonable cause," as it is used in similar federal legislation, has been construed to mean such cause as would prompt an ordinarily intelligent and prudent businessman' to have so acted under similar circumstances, or the exercise of ordinary business care and prudence. (Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den., 350 U.S. 967 [100 L.Ed. 839] (1956); Appeal of Electrochimica Corp., Cal. St. Bd. of Equal., Aug. 3, 1970.)

Appellants' initial contention is that they never received the demand notice mailed by respondent on November 26, 1979, and since they filed their return shortly after receiving the notice of proposed assessment, no penalty should be imposed. We cannot agree. Respondent mailed the notice and demand to 18411 Lexington Drive which was the last known address of appellants. The notice was not returned to respondent by the U.S. Postal Service. The same address was subsequently used to send the notice of proposed assessment which appellants acknowledge they did receive. The 18411 Lexington Drive address is also the address used for all correspondence regarding this appeal. As respondent's computer has verified that the notice was sent to the Lexington Drive address on November 26, 1979, and because appellants' address has remained the same, we must conclude that appellants have failed to show that they did not receive respondent's notice and demand. (See Appeal of A. J. Bima, Cal. St. Bd. of Equal., Aug. 17, 1982; and Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.)

Appellants' second contention is that they had reasonable cause for not responding to the notice and demand because they were waiting for receipts and data to be used to file their return. Appellants, however, have stated that the needed items were in their possession

after April 1, 1979. The notice and demand was not sent until November of 1979. Therefore, appellants would have had the informatioh'in their possession. While the unavailability of needed information may have been reasonable cause for not filing'a return prior to April 1, 1979, we cannot find that it is reasonable cause.for failing to file_ in November of 1979.

Appellants' final contention is that their son's illness was such that they were both physically and emotionally unable to file a return... In support of their position they submitted letters frbm Walter E. Pearson, M.D., who is Diane Halaburka's physician: M. Lawrence Honham, M.D., who was appellants' son's physician; and JoAnn LeMaistre, Ph.D., who was both of appellants' psychologist. All of these letters emphasize the severity of their son's illness and the stress'this illness placed on appellants.

Illness may constitute reasonable cause for not filing a return if it can be shown that the taxpayer is prevented from filing a return. (See Alma Williams, 16 T.C. 893, 906 (1951).) In the case of John Michael Hayes, ¶ 67,080 P-H Memo. T.C. (1967), a taxpayer found to have reasonable cause for filing a late return when his children had pneumonia, his wife had a ruptured appendix, and the taxpayer suffered a mental and physical collapse, all within five or six months. In addition, all the taxpayer's personal records necessary to complete the return were in Maine while the taxpayers were in California. In this case, it was found that the taxpayer's illness and the illnesses of his family prevented him from returning to Maine to obtain the documents necessary to file a return. The taxpayer thus. had "reasonable cause" for not filing.

In the present case, there is no evidence that appellants were continuously prevented from 'filing their return. The documents needed were at their immediate disposal and, although their son was hospitalized from October of 1979 through February of 1980, there is no evidence that both appellants were incapacitated for this entire period. (See Albert K. Tossas, ¶ 55,114 P-H Memo. T.C. (1955).) While we recognize that their son's illness was a great stress on both appellants, we cannot conclude that this illness prevented appellants from filing a return. (See John R. Hernandez, 72 T.C. 1234 (1979).)

For the above reasons, respondent's action must be sustained.

Appeal of Michael J. and Diane M. Halaburka

ORDER

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 Michael J. and Diane M. Halaburka for refund of a penalty in the amount of $363.69 for the year 1978, be and the same is hereby--sustained.

Done at Sacramento, California, this 9th day of April, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9