

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
TERRY R. LASH) No. 83R-273-PD

For Appellant: Terry R. Lash,
in pro. per.

For Respondent: **Vicki McNair**
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), 1 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Terry R. Lash for refund of personal income tax in the amounts of \$769.75 and \$434.25 for the years 1980 and 1981, respectively.

1 Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

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At issue in this appeal is whether appellant has established: (a) reasonable cause for his failure to file a return for 1980 in response to respondent's notice and demand that he file; and (b) reasonable cause for his failure to file a timely return for 1981.

Appellant's state income tax return for 1980, due April 15, 1981, was not filed, and, on August 16, 1982; respondent mailed a notice and demand that he file his return within 10 days. The notice and demand letter was mailed to appellant's then current address in respondent's records, Dillon, Colorado. Although appellant denies receiving the notice and demand, the notice was **not** returned by the United States Postal Service as undeliverable. A 25 percent penalty was imposed for failure to respond to the notice and demand.

Appellant's 1981 state income tax return, due April 15, 1982, was not timely filed, and respondent imposed a 25 percent delinquency filing penalty for taxable year 1981.

On November 1, 1982, appellant and his wife filed joint resident returns for both 1980 and 1981. Appellant had not requested extensions of time in regard to filing either return. After the returns were filed, the 1980 notice and demand penalty was revised to \$769.75, and the 1981 penalty for delinquent filing was revised to \$434.25. **On** March 7, 1983, appellant paid the penalties. His letter accompanying the payment was treated by respondent as a claim for refund. On April 19, 1983, respondent denied appellant's claim on the ground that he had not established that reasonable cause existed for the waiver of the penalties. Appellant then filed this appeal. Appellant and his wife were divorced in December 1982; his former **wife is** not a party to this appeal.

Appellant contends that he did not receive the notice and demand for the return for 1980, which had been **mailed to his Colorado address, and that payment of the penalty imposed a substantial hardship upon him.**

Section 18683 authorizes respondent to assess a 25 percent penalty where a taxpayer fails to file a return after notice and demand unless the failure is due **to** reasonable cause and not willful neglect. The propriety of the penalty presents an issue 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 La Salle Hotel Co., Cal. St. Bd. of

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Equal., Nov. 23, 1966.) The phrase "reasonable cause," has been construed to mean such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances, in other words, 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.)

Respondent mailed the notice and demand to appellant's Colorado address, which was the address that respondent had for appellant at that time. The notice was not returned to respondent by the U.S. Postal Service. It appears to us that the ordinarily intelligent and prudent businessman would both notify authorities, such as respondent, of his changes of address as they occurred and would arrange for all mail to be immediately forwarded to him from prior addresses. Accordingly, it does not appear to us that appellant has proved that his failure to respond to the notice and demand was due to reasonable cause and not to willful neglect. The imposition of a penalty by the statute upon a taxpayer for failing to take a certain required action is necessarily burdensome. Therefore, the fact that a hardship was sustained by the taxpayer because of the imposition of such a penalty would not constitute good cause why the penalty should be withdrawn.

Appellant contends that his failure to file a timely return for 1981 resulted from a combination of circumstances. He started a job at the Keystone Center, near Dillon, Colorado, in the spring of 1980. That job ended in July 1981. After searching for work in Dillon, appellant moved to Oregon and began looking for independent consulting work from there. In May 1982, he moved to New York City to take a full-time job, and in September 1982, he moved to Weehawken, New Jersey. Appellant explains that because of these moves and his separation from his wife, he did not have ready access to documents necessary for preparing his returns. Further, because he was uncertain how to report income he earned in Colorado and how to report income earned by mutual funds that he and his wife owned jointly, he was eventually forced to hire professional assistance to prepare his California return. Appellant argues also that the penalty should be withdrawn because its imposition constitutes a hardship upon him.

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Section 18681 of the Revenue and Taxation Code provides for a graduated penalty, not to exceed 25 percent of the tax **due**, for failure to file a timely return, unless it **is** shown that the failure is due to reasonable cause and not willful neglect. Here also, the propriety of the penalty presents an issue of fact as to which the burden of proof is on the taxpayer. (Sharpe v. Commissioner, ¶ 56,262 T.C.M. (P-H) (1956); Appeal of La Salle Hotel Co., supra.) Again, the ordinarily intelligent and prudent businessman standard applies to determine what is reasonable cause for failure to file a timely return.

It seems to us that the standard would require appellant to secure and retain the necessary tax records throughout his moves and to hire any professional tax assistance necessary to file timely tax returns. So the failure to secure and maintain the necessary records and the failure to secure timely tax assistance is not good cause for failure to file timely tax returns. **Also**, for the reason set forth above, hardship is not in itself good cause for withdrawing a penalty.

For the above reasons, respondent's action 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 Terry R. Lash for refund of personal income tax in the amounts of \$769.75 and \$434.25 for the years 1980 and 1981, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of February, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

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

*For Kenneth Cory, per Government Code section 7.9