

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
EUGENE C. FINDLEY) No. **85R-89-SW**

For Appellant: Eugene C. Findley,
in pro. per.

For Respondent: Israel Rogers
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 claim of Eugene C. Findley for refund of personal **income** tax in the amount of \$483.25 for the year 1982.

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

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The sole issue presented in this appeal is whether appellant has shown that his failure to file a 1982 personal income tax return **after notice and demand by respondent was due to reasonable cause.**

Appellant failed to file a 1982 personal income tax return by the due date. Respondent, on November 14, 1983, therefore, sent a notice to appellant that his return had not been received. This notice demanded that appellant respond within 10 days **and** was mailed to the address supplied by appellant and which is shown as a current address on respondent's records. Appellant did not respond and the notice was not returned to respondent by the United States Postal Service.

On January 30, 1984, respondent issued a proposed assessment which included a penalty for failure to file a return and a penalty for failure to file after notice and demand. This notice was also mailed to appellant's current address.

Appellant's return was received by respondent on April 3, 1984. An overpayment of \$676 was claimed.

In reviewing this return, respondent canceled **the delinquent filing penalty because there were enough withholding credits to cover the tax.** However, the **25-**percent penalty for **failure to file** after notice and demand was assessed on the total tax liability without regard to tax withheld. Appellant paid the penalty through withholding credits and filed a claim for refund. Respondent denied the claim and this appeal resulted.

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 appellant. 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 his failure to file once respondent had **demand**ed payment. (Bebb v. Commissioner, 36 T.C. 170)

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(1961); Appeal of American Photocopy Equipment Company, etc., 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.)

a Appellant contends that he never received the demand notice mailed by respondent on November 14, 1983, and that he should not, therefore, be subject to the penalty. We cannot agree. Respondent mailed the notice and demand to 460 Madison Drive in San Jose, California, which was the last known address of appellant. The notice was not returned to respondent by the U.S. Postal Service and the same address was subsequently used to send the refund check which appellant admittedly received. As respondent's records indicate that the notice was sent to 460 Madison Drive on November 14, 1983, and because appellant's address has remained the same, we must conclude that appellant has failed to show that he did not receive respondent's notice and demand. (Appeal of Michael J. and Diane M. Halaburka, Cal. St. Bd. of Equal., Apr. 9, 1985.)

Because appellant has failed to carry his burden of proof, the action of respondent 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 claim of Eugene C. Findley for refund of personal income tax in the amount of **\$483.25** for the year 1982, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of May, 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