BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 83R-218-KP
PHILIP C. AND ANNE BEROLZHEIMER)

For Appellant: Lee A. Snow
Attorney at Law

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 claim of Philip C. and Anne Berolzheimer for refund of personal income tax in the amount of $2,103.09 for the year 1981.

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

The issue on appeal is whether appellants have established the existence of reasonable cause and the absence of willful neglect to justify the cancellation of a penalty assessed for late payment of tax for the year at issue.

Appellants' 7981 income tax return was due on April 15, 1982. On the final day to file their return, respondent received an application for an extension of time. to file appellants' 1981 return. That request did not come directly from appellants hut was communicated through their agent, a New York law firm, Their agent, per statutory requirement, estimated appellants' tax liability for 1981 and enclosed a check for $27,500, Subsequently, a timely tax return was filed which indicated that appellants' 1981 tax liability was considerably more than was estimated on April 15, 1982. Appellants' underpayment of their tax liability came from a mistake made by their agent in the preparation of the request for an extension to file their return,

Due to a long relationship between the agent and appellants, the agent had not only provided Legal advice to appellants for, a number of years but had also prepared and filed appellants' state and federal tax returns. The agent prepared these returns with the aid of computers and special software programs. Due to a programming error, the agent miscalculated appellants' 1981 capital gains tax liability for federal tax purposes. The error was compounded when the agent used the erroneous figure to determined appellants' 1981 capital gains tax liability to California. Prior to the September 15, 1982, deadline granted appellants by virtue of their extension request, the agent discovered its mistake. The correct amount of tax was computed on appellants' timely filed return and a check for the balance of tax due was properly tendered,

Appellants' final payment of tax due for 1981 exceeded the.10 percent margin within which an underpayment of tax is presumed to result from reasonable. cause. Accordingly, respondent imposed a penalty for failure to pay tax pursuant to section 18684.2. Appellants paid the penalty, plus interest, and filed a claim for refund.. Respondent denied the claim and this appeal followed,

Personal income tax returns for calendar-year taxpayers are required to be filed with the Franchise Tax Board on or before the fifteenth day of April following

the close of the calendar year. (Rev. & Tax.. Code, § 18432.) An extension of time for filing a return may be granted by the Franchise Tax Board upon request of a taxpayer on or before the due date for filing the return. (Rev. & Tax. Code, § 18433, subd. (a).) An application for extension must show the full amount properly estimated as tax for the taxpayer, and the application must be accompanied by the full remittance of the amount properly estimated as tax which was unpaid as of the date prescribed for the filing of the return. (Cal. Admin. Code, tit. 18, reg. 18433.1, subd. (b)(4).) There is a presumption of reasonable cause with respect to underpayments of tax due during the period of extension of time for filing a return if the -excess of the amount of tax shown on the return aver the amount paid on or before the regular due date is not greater than 10 percent of the amount of tax shoun on the taxpayer's return. (Cal. Admin. Code, tit. 18, reg. 18433.1, subd. (c).)

Section 18684.2, subdivision (a), states, in pertinent part:

> In case of failure to pay the amount shown as tax on any return specified in this part on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless- it is shown that such failure is due to reasonable cause and not due to willful neglect, a penalty is hereby imposed. ...

The Supreme Court in United States v. Boyle, 469 U.S. ---[83 L.Ed.2d 622, 628] (1985), stated that:

> [T]he term "willful neglect" may be read as meaning a conscious, intentional failure or reckless indifference. (Citations.) Like "willful neglect," the term "reasonable cause" is not defined in the Code, but the relevant Treasury Regulation calls on the taxpayer to demonstrate that he exercised "ordinary business care and prudence" but nevertheless was "unable to file the return within the prescribed time." (Citations,)

Appellants contend that their failure to pay the correct amount of tax due by April 15, 1982, was due

to reasonable cause and not due to willful neglect. The basis of this contention is that appellants did everything within reason toward the completion of their return by the original due date by providing their agent with all of the information necessary to complete the return. Allegedly, it was the complexities of federal law and the new software program that contributed to their agent's failure to properly estimate the tax due. As their reliance on their agent for tax advice and preparation of their return was reasonable, and due to their inexperience in interpreting tax laws, appellants conclude that the penalty imposed by respondent is erroneous and should be reversed,

While this particular penalty issue has not previously been addressed by this board, we find that the issue of whether a taxpayer has demonstrated reasonable cause for failure to pay tax asks the same questions and weighs the same evidence as the inquiry of whether reasonable cause exists for failure to file a tax return. Consequently, judicial interpretations determining whether reasonable cause existed for failure to file a tax return are persuasive authority for determining whether reasonable cause existed for the failure to pay the tax on time,

The general rule regarding whether a taxpayer may reasonably rely on the advice of his attorney to avoid the imposition of a penalty for failure to file a return was recently articulated by the United States Supreme Court in United States v. Boyle, supra, 469 U.S. at --- [83 L.Ed.2d at 631], wherein the court stated:

> When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of the presumed expert in the first place. ... (Emphasis in the original;.)

A question of law requiring a tax expert's opinion does not arise by the mere fact that a "tax expert" completes a taxpayer's return. If that were the case, any mistake made by a preparer in completing a

return would excuse the taxpayer from any liability for the contents of that return. The instances alluded to in United States v. Boyle, supra, wherein a taxpayer may be found to reasonably rely on the advice of a tax expert, are those instances wherein a true question of tax law arises. For example, if a lay person relies upon a tax expert's advice that the taxpayer need not file a return at all due to the taxpayer's lack of tax liability, the taxpayer is not required to question the expert's advice and may reasonably rely on that opinion, (See, e.g., Estate of Buring v. Commissioner, ¶ 85,610 T.C.M. (P-H) (1985).) In contrast, a taxpayer has the imputed knowledge and ability to perform those tasks required of him by the tax code such as filing a return by the proper due date. The fact that the taxpayer was relying on an accountant or attorney to file the return does not relieve the taxpayer of liability for penalties should his agent fail to file the return on time. (See, e.g., United States v. Boyle, supra.) Thus, the question in the case before us is whether appellants' agent was advising appellants on a matter of tax law when the agent incorrectly estimated appellants' 1981 California tax liability.

In the present case, there is no question whether the gains realized from the sale of assets were capital gains. Furthermore, there is no issue as to the holding period of the capital assets, one to five years, Consequently, all of the issues requiring a legal opinion were resolved.- All that was left to be determined was the simple computation of tax due on the gain, 65 percent of the gains. (Rev. and Tax. Code, § 18162.5.) As this was a simple computational problem, not a legal interpretation, appellants cannot hide behind an 'expert" for the failure to properly determine the tax that was due, While the federal law may have been complex and in flux, California's law was simple and straightforward,

Even if we were to find that the issue called for an expert legal opinion, there is no basis in the record for concluding that the Hew York law firm retained by appellants had expertise in California tax law. We decline to hold that, as a matter of law, relying on the advice of an out-of-state law firm constitutes reasonable cause for failing to comply with California's tax laws, (Cf. Appeal of Estate of Marilyn Monroe, Dec'd, Cal. St. Bd. of Equal., Apr. 22, 1975.)

For the above stated reasons, respondent's action in this matter will be sustained.

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 Philip C. and Anne Berolzheimer for refund of personal income tax in the amount of $2,103.09 for the year 1981, be and the same is hereby sustained,

Done at Sacramento, California, this 19th day Of November , 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