



88-SBE-023

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
CHARLES W. FOWLKS ) No. 86R-0799-RO  
)

Appearances:

For Appellant: Charles W. Fowlks,  
in pro per.

For Respondent: Lazaro Bobiles  
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, sub-  
division (a), 1 of the Revenue and Taxation Code from the  
action of the Franchise Tax Board in denying the claim of  
Charles W. Fowlks for refund of personal income tax in the  
amount of \$100 for the year 1983.

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 issue here is whether respondent erred in assessing appellant a penalty for failing to file his 1983 tax return until 1984.

Appellant filed his 1983 tax return on October 4, 1985. Respondent determined that the return was due on April 16, 1984, and there was no record of appellant requesting an extension. Pursuant to subdivision (d) of section 18681, because of the late filing, respondent assessed appellant the minimum penalty of \$100. (Stats. 1984, ch. 1490, § 20, p. 5224.) This provision became effective on September 27, 1984, and provided as follows:

. . . [I]n the case of a failure to file a return of tax required by this part within 60 days of the date prescribed for filing that return (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the penalty under subdivision (a) shall not be less than the lesser of one hundred dollars (\$100) or 100 percent of the amount of tax required to be shown on the return.

As a consequence, appellant received a tax refund of \$185 instead of \$285.

Appellant's position is that respondent improperly applied subdivision (d) of section 18681 retroactively. Appellant contends that respondent should have imposed the "existing law when the infraction occurred: (Appeal Ltr. at 1.) Appellant refers to subdivision (a) of section 18681, which prescribes a penalty when the taxpayer fails to file his tax return by the return's due date. (Stats. 1980, ch. 1007, § 18, p. 3220.) Under subdivision (a), since appellant was owed a tax refund, he owed no penalty.

A retroactive application of a statute is one that affects rights, obligations, or conditions that existed before the time of the statute's enactment, giving them an effect different from that which they had under the previously existing law. (Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 153 [233 Cal.Rptr. 3081 (1981)] In short, legislation imposed retroactively applies "the new law of today to the conduct of yesterday.. (Pitts v. Perluss, 58 Cal.2d 824, 836 (27 Cal.Rptr. 191(1962).) In this instance, respondent's application of subdivision (d) of section 18681 was retroactive. Appellant was subject to the operative statute in

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existence, prescribing the penalty, at the time he failed to file his tax return when due. As of that due date, April 16, 1984, the operative statute prescribing the penalty was subdivision (a) of section 18681, which resulted in no penalty to appellant. However, respondent's application of subdivision (d) changed appellant's rights against being assessed a penalty for his past conduct of failing to file his 1983 tax return by the return's due date.

Respondent contends that subdivision (d) of section 18681 applies to any late filing occurring after its effective date of September 27, 1984, and that appellant's return was filed in October 1985. However, as discussed above, the crucial event which determined the operative penalty provision in this case is the date when appellant's tax return was due, not the date when he finally filed his tax return.

Having determined that the 1984 statute was applied retroactively, we must determine if such application was improper. If respondent's application was improper, it had no statutory authority to impose the penalty upon appellant.

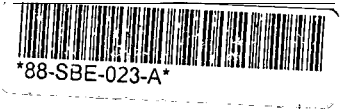
There is a "general presumption that legislative changes do not apply retroactively unless the Legislature expresses its intention that they should do so." (Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control, 65 Cal.2d 349 371 [55 Cal.Rptr. 231 (1966).]) The rule also applies to an amendment to a statute. (Cole v. Fair Oaks Fire Protection Dist., supra, 43 Cal.3d at 153.)

Our search for the legislative intent begins with the language of the amended statute. (In-Home Supportive Services v. WCAB, 152 Cal.3d 720, 734 [199 Cal.Rptr. 6971 (1984).]) In reviewing subdivision (d) of section 18681, we find that it contains no express language providing for retroactivity. We also note that this amended statute was contained in legislation which was passed as an urgency measure to implement a tax amnesty program as quickly as possible (Stats. 1984, ch. 1490; p. 5216); however, even after reviewing this entire legislation, we can still find no express language to provide for the amended statute's retroactive application. While the absence of an express declaration of retroactivity is not controlling, we find that it is a significant indication [that the Legislature] did not intend to apply the amendment retroactively. [Citation.]. (Perry v. Heavenly Valley, 163 Cal.App.3d 495, 500-501 [209 Cal.Rptr. 771] (1985)). Therefore, respondent's retroactive application of the amended statute was improper in this instance.

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Accordingly, in view of the foregoing, the action of **respondent** on the claim for **refund** of Charles W. Fowlks **must** be reversed.





88-SBE-023-A

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
CHARLES W. FOWLKS ) No. 86R-0799-RO

OPINION ON PETITION FOR REHEARING

On August 25, 1988, we reversed the action of the Franchise Tax Board in denying the claim of Charles W. Fowlks for refund of personal income tax in the amount of \$100 for the year 1983. Subsequently, the Franchise Tax Board filed a petition for rehearing in which it argues that, in view of both Revenue and Taxation Code sections 17034 and subdivision (d) of section 18681, this penalty provision was operative September 27, 1984, and it applies to any personal income tax return which was filed thereafter and more than 60 days after its due date. We have carefully reexamined the matter, and we still disagree with respondent's position.

First, at the time appellant failed to file a timely 1983 return, section 18681 did not impose a penalty upon taxpayers, like appellant, who were due a refund when they finally did file. (Stats. 1980, ch. 1007, § 18, p. 3220.) The absence of a penalty under such circumstances was a matter of common knowledge, and it induced many taxpayers to ignore the time periods specified in the statute for filing returns. This situation changed radically, however, upon the enactment of subdivision (d) of section 18681 in 1984. That subdivision imposed a penalty upon all failures to file within 90 days of the return's due date, regardless of whether the taxpayer was owed a refund.

The addition of subdivision (d) to section 18681 became effective on September 27, 1984, some 165 days after appellant's 1983 return was due. If this provision applies to appellant, as respondent contends, it means that he became liable for the

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penalty some 105 days before he could possibly have known that a penalty would apply to his failure to file. While this does not seem to trouble the respondent, we do not believe, and there is certainly no direct evidence to support the notion, that the Legislature intended to have this penalty provision apply to taxpayers who had no actual or constructive notice of it and, thus, no opportunity to conform their conduct to the requirements of the law so as to avoid it.

This consideration supplies ample justification for distinguishing between taxpayers in appellant's position and those who requested and were granted an automatic extension of time to file their returns by October 15, 1984. With respect to taxpayers whose returns were not yet due on September 27, 1984, the effective date of section 18681, subdivision (d), all of them were on notice of the new penalty as of that date, and all of them had a reasonable opportunity to file their returns in a manner that would exempt them from application of the penalty. This is manifestly not the case for appellant and all other taxpayers whose returns were due more than 60 days prior to September 27, 1984. For this latter group of people, application of the penalty provision to them would turn the statute into an ex post facto law.

Finally, the Franchise Tax Board has relied on several prior summary decisions by this board on the same issue as authority to support its denial of appellant's claim for refund. Summary decisions of this board are not citable authority and will not be relied upon or given any consideration by this board as precedent. In view of the foregoing, we must affirm our prior action in this case.

