

Appeal of Charles W. Fowlks

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.

