



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
J. H. HOEPEL)

Appearances:

For Appellant: J. H. Hoepfel, in pro. per.

For Respondent: Burl D. Lack, Chief Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of J. H. Hoepfel for refund of personal income tax, penalties and interest in the amount of \$120.97 for the year 1951.

The files of the Franchise Tax Board reveal that it received a letter from John H. Hoepfel, dated February 12, 1952, stating that Appellant was a resident of California and inquiring whether the income he received from a New Mexico business was subject to California income tax, Respondent's reply, dated March 3, indicated that it was sending Appellant a copy of the California Personal Income Tax Law and appropriate tax return forms. The Franchise Tax Board explained that all the income of a California resident is subject to tax, regardless of source, and that returns for the taxable year 1951 would be due on April 15. Appellant did not file a return.

On September 9, 1953, Respondent requested Appellant to file his 1951 income tax return or supply certain information which would show that no return was required. On January 13, 1954, Appellant was sent a notice and demand for his 1951 return. The demand did not specify a time within which such return was to be filed. Because Appellant had not yet filed any information as to his income, the Franchise Tax Board issued an estimated assessment against Appellant on June 21, 1954. This assessment was based on an estimated net income for 1951 of \$6,000. In addition to a tax of \$40, Respondent imposed two 25 percent penalties of \$10 each (pursuant to Sections 18681 and 18682 of the Revenue and Taxation Code) plus 6 percent interest from April 15, 1952. Appellant paid the amount due, \$66.54, on September 15, 1954.

Following an audit of his records by a Franchise Tax Board representative, Appellant filed a delinquent return for 1951 on March 4, 1959, which reported an adjusted gross income of

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\$11,846.16 and a net income of \$10,777.94. No payment accompanied the return. On May 8, 1959, the Franchise Tax Board sent Appellant a statement based on this reported income showing a tax due in the amount of \$95.56 plus two 25 percent penalties of \$23.89 each (based on Sections 18681 and 18682) and interest of \$40.14. Respondent credited Appellant's 1954 payment of \$66.54 to the resulting total liability of \$183.48; this left a balance due of \$116.94. The Franchise Tax Board received payment in the amount of \$120.97, which included an additional \$4.03 interest, on January 25, 1960. Appellant now seeks a refund of that amount.

Appellant does not question the correctness of the Franchise Franchise Tax Board's computations. Appellant challenges the authority of the Franchise Tax Board to make a second collection at all. He argues that he settled his 1951 income tax liability once and for all when he paid the estimated assessment in 1954. He contends that his payment was a final settlement which was accepted by the Franchise Tax Board and that this prevents re-opening the year 1951 five years after such settlement in order to permit the imposition of a "duplicate" tax.

This Board decided long ago that the Personal Income Tax Act expressly authorized the Franchise Tax Board to propose a second deficiency assessment, even after a former assessment for the same year has been paid, (See Appeal of Louis Hozz and Ettie Hozz, Cal. St. Bd. of Equal., March-30, 1944.) The Legislature has amended the statutory provisions involved in the Hozz case (Stats. 1951, p. 252) without changing the language upon which we relied for our conclusion. (See Rev. & Tax. Code, §§18583 and 18584.) Accepting payment for one assessment does not foreclose the Franchise Tax Board's power to issue subsequent assessments for the same taxable year. The propriety of any deficiency assessment depends only upon its own validity and not upon whether collection has been made for some prior assessment.

The facts under consideration differ from the Hozz case in that here the Franchise Tax Board did not make the second assessment. The delinquent return which Appellant filed some seven years after it was due was a self-assessment which made a second deficiency assessment by Respondent unnecessary. The Franchise Tax Board merely enforced payment of Appellant's self-imposed assessment.

It is clear, however, that had Appellant chosen not to file a delinquent return the Franchise Tax Board could have proposed and collected a second deficiency assessment. Such an assessment would not have been barred under the applicable statutes of limitations. (See Sections 18586 and 18586.1 of the Revenue and Taxation Code.) Appellant cannot reasonably be permitted to avoid his just liability to this State by the mere act of filing a delinquent return.

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Appellant also objects to the penalties imposed by the Franchise Tax Board. Section 18681 penalizes any taxpayer who fails to make and file a return on or before the date it is due, unless reasonable cause is shown for such failure. Appellant contends that he did not think income earned outside the State was subject to California tax. This cannot be considered "reasonable cause" for failure to file a return when the taxpayer has been fully advised by the Franchise Tax Board on the question prior to the date the return was due.

Section 18682 imposes an additional penalty if the taxpayer fails to file a return upon notice and demand for such return by the Franchise Tax Board. Respondent's regulations provide, in part, "If the return is not filed within the time specified in the demand, the income of the taxpayer will be estimated and the tax assessed upon the basis of any available information. To the tax so assessed, a penalty of 25 percent . . . must be added." (Cal. Admin. Code, Tit. 18, Reg. 18681-18683(b).) Although the notice and demand which was sent to Appellant in January, 1954, did not specify a time within which the return should be filed, some reasonable time limit was obviously implied. The notice urged Appellant to reply promptly in order to avoid further penalties. Respondent's estimated assessment was not made until six months later. Under these circumstances, we feel the Franchise Tax Board properly applied a penalty under Section 18682. The amount of the penalty, however, is in error. Respondent's own regulations, which place a reasonable interpretation on the language of the statute, make it clear that the penalty is 25 percent of the estimated tax. That amount was \$40. The tax liability disclosed by Appellant's delinquent return was not an estimated assessment and cannot be used as the measure of the penalty imposed by Section 18682. Thus, only the \$10 penalty originally imposed is proper.

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 J. H. Hoeppe

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for refund of personal income tax, penalties and interest, in the amount of \$120.97 for the year 1951 be modified in that the penalty imposed under Section 18682 is to be reduced in accordance with the Opinion of the Board. In all other respects the action of the Franchise Tax Board is sustained.

Done at Pasadena, California, this 26th day of February, 1962, by the State Board of Equalization.

Geo. R. Reilly, Chairman
John W. Lynch, Member
Paul R. Leake, Member
_____, Member
_____, Member

ATTEST: Dixwell L. Pierce, Secretary