



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
RAYMOND O. AND BARBARA MACKEY)

For Appellants: Raymond O. Mackey, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Marvin J. Halpern
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 a claim for refund by Raymond O. and Barbara Mackey of penalty in the amount of \$461.20 for the year 1970.

Pursuant to sections 18412.5, 18414, 18556, and 18435 of the Revenue and Taxation Code, appellants were required to pay an estimated tax for 1970 of \$4,612 on or before October 31, 1970. In mid-September of 1970 respondent notified appellants of this obligation and supplied them with the appropriate form. Nevertheless, appellants failed to pay the required amount until November 6, 1970.

Appellants later overpaid their tax-for 1970 and filed a claim for refund. Respondent denied this claim to the extent of \$461.20, being 10 percent of the

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estimated tax required to be paid by October 31, 1970. This amount was a penalty added to the tax pursuant to section 18685.1 (now section 18685.01) of the Revenue and Taxation Code.

Section 18685.1 provided, in pertinent part:

In case of any underpayment of estimated tax required to be paid under Section 18556 by the date prescribed therein...a penalty of 10 percent of the amount of the underpayment shall be added to the tax for the taxable year and shall be due and payable upon notice and demand from the Franchise Tax Board unless it is shown that such underpayment is due to reasonable cause and not due to willful neglect.

The amount of the underpayment is determined by section 18685.7 of the Revenue and Taxation Code, and the failure to pay the estimated tax of \$4,612 by October 31, 1970, would be an underpayment subject to the above stated penalty unless a valid excuse can be shown.

Appellants do not attempt to establish that the underpayment was due to reasonable cause and not due to willful neglect. They admit that the late payment was due to an oversight, which would not alone constitute reasonable cause within the meaning of this section (See Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958; Appeal of Normandy Investments Limited, Cal. St. Bd. of Equal., Sept. 12, 1968), and concede that a penalty is appropriate. The whole basis of appellants' claim is that \$461.20 is too harsh a penalty for a delay of only six days in complying with the law. They suggest that a penalty of one percent would better reflect the gravity of their noncompliance.

Section 18685.1 provided that a 10 percent penalty "shall" be imposed when the condition therein described occurred. The word "shall" is mandatory and "may" is permissive when used in the Revenue and Taxation Code (See section 16). We have previously held with respect to section 18688 of the Revenue and Taxation Code that the statute stating condition under which interest shall be assessed is mandatory. (Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965.) Consequently we hold that when an underpayment of estimated tax occurs the 10 percent penalty provided by section 18685.1 is

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mandatory. Whatever merit there may be in appellants' argument, it should be addressed to the Legislature rather than to those who are charged with the duty of enforcing the laws as they are written.

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 a claim for refund by Raymond O. and Barbara Mackey of penalty in the amount of \$461.20 for the year 1970, by and the same is hereby sustained.,

Done at Sacramento, California, this 12th day of December, 1972, by the State Board of Equalization.

John W. Lynch, Chairman

Shirley B. ..., Member

..., Member

..., Member

ATTEST: W.W. ..., Secretary