



Appeal of Glenn V. Day

The questions presented by this appeal are whether appellant has shown that his failure to file a return on notice and demand was due to reasonable cause, making the imposition of a penalty improper, and if not, whether respondent properly computed the penalty imposed.

Appellant requested and was granted an extension of time, until October 15, 1979, in which to file his personal income tax return for 1978.. When his return was not filed by that time, respondent issued a notice, dated November 26, 1979, demanding that appellant file his 1978 return. He still did not file, and respondent, therefore, estimated his 1978 tax liability to be **\$2,270.00** and assessed penalties for failure to timely file (Rev. & Tax. Code, § 18681) and failure to file after notice and demand (Rev. & Tax. Code, § 18683). Notice of the proposed assessment was apparently sent to appellant in March 1980.

In June' 1980 appellant filed his 1978 return showing his status as married--filing separately. Respondent revised his 1978 tax liability assessment to **\$1,820.00**, the amount reported on, the delinquent return. The penalty imposed under section 18681 was cancelled, and the section 18683 penalty was reduced from 25 percent of the tax liability estimated by respondent to 25 percent of the self-assessed tax shown on the return. Appellant paid the resulting penalty, plus interest, and filed a claim for refund. The denial of that claim led to this appeal.

The subject penalty was imposed pursuant to section 18683 of the Revenue and Taxation Code which provides, in pertinent part:

If any taxpayer . . . fails or refuses to make and file a return required by this part upon notice and demand by the Franchise Tax Board, then, 'unless the failure is due to reasonable cause and not willful neglect, the Franchise Tax Board may add a penalty of 25 percent of the amount of tax determined pursuant to section 18648 or of any deficiency tax assessed by the Franchise Tax Board concerning the assessment of which the information or return was required.

Appellant contends that his failure to file was due to reasonable cause because he was in the process of obtaining a dissolution of his marriage in 1978 and could

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not determine his proper filing status. This argument is unpersuasive. Marital status, for purposes of filing returns, is determined as of the last day of the taxable year (unless one spouse dies during the year). (Rev. & Tax. Code, § 18402.5.) No interlocutory or final decree of dissolution had been entered by December 31, 1978. Therefore, appellant was clearly still married for taxable year 1978, and subsequent events would have no effect on that status. Appellant was certainly aware of this and, consequently, his failure to file cannot be considered due to reasonable cause.

Appellant next argues that the penalty imposed was inappropriate because his return, as eventually filed, showed more withholding credits than tax due. In essence, he is contending that the penalty should be imposed only on any additional taxes due after credits.

Respondent computed the section 18683 penalty based on the tax liability shown on appellant's return before applying the withholding credits. We have previously been presented with the question of the proper computation of this penalty and have decided that the method used by respondent is correct. (Appeal of Frank E. and Lilia Hublou, Cal. St. Bd. of Equal., July 26, 1977; Appeal of Sal J. Cardinali, Cal. St. Bd. of Equal., March 2, 1981.) The penalty imposed by section 18683 is designed to penalize the failure to respond to the notice and demand, and the tax deficiency by which it is measured is that shown on the return. The withholding credits merely reduce or offset the tax liability. (Appeal of Frank E. and Lilia Hublou, supra.)

Both the imposition and computation of the penalty, therefore, were proper and respondent's action is sustained.

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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 Glenn V. Day for refund of penalty in the amount of \$463.45 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 31st day of March , 1982, by the State Board of Equalization, with Board Members Mr. Reilly, Mr. Dronenburg and Mr. Nevins present.

\_\_\_\_\_, Chairman  
-George R. Reilly \_\_\_\_\_, Member  
Ernest J. Dronenburg, Jr. \_\_\_\_\_, Member  
Richard Nevins \_\_\_\_\_, Member  
\_\_\_\_\_, Member