



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
W. L. BRYANT)

For Appellant: W. L. Bryant,
in pro. per.

For Respondent: Terry Collins
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of W. L. Bryant for refund of a penalty in the amount of \$194.50 for the year 1979.

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The issue for determination is whether respondent properly imposed a penalty upon appellant W. L. Bryant for failure to file a personal income tax return after notice and demand.

Respondent, upon determining that **appellant** had not filed a California personal income tax return for 1979, issued a notice and demand for a return. **The** notice was sent on November 17, 1980, and requested appellant to file within ten days after that date. When **appellant** failed to respond, respondent issued a proposed assessment on February 17, 1981, based upon available information and showing a tax due amounting to \$1,343. Respondent also imposed 25 percent penalties for failure to file (Rev. & Tax. Code, § 18681) and failure to file after notice and demand (Rev. & Tax. Code, § 18683). On August 15, 1981, appellant filed a joint return for 1979 which showed a \$778 tax liability and \$1,199 in withholding and other credits against the tax. He requested a refund of the \$421 credit balance. Respondent thereupon withdrew the section 18681 penalty and reduced the section 18683 penalty to 25 percent of appellant's self-assessed \$778 tax liability, or \$194.50. Respondent credited appellant's overpayment against this penalty, in accordance with Revenue and Taxation Code section 19051. On September 23, 1981, respondent refunded all of the credit balance except for the amount of the penalty. Appellant seeks a cancellation and refund of the penalty amount.

Revenue and Taxation Code section 18683 imposes a penalty upon a taxpayer who fails to file a required return after notice and demand by the Franchise Tax Board, "unless the failure is due to reasonable cause and not willful neglect" The taxpayer bears the burden of proving that the failure to file after notice and demand was due to reasonable cause. To meet this burden, it must be shown that the failure occurred despite the exercise of ordinary business care and prudence. (Appeal of Ronald A. Floria, Cal. St. Bd. of Equal., Jan. 3, 1983; Appeal of Stephen C. Bieneman, Cal. St. Bd. of Equal., July 26, 1982.)

Appellant initially points out that he owed no tax after his credits were taken into account, and argues that the penalty should not be imposed where no tax was due: However, the penalty is 25 percent of tax **liability** determined before credits are subtracted, because section 18683 was designed to penalize "the failure of a taxpayer to respond to the notice and demand, and not the taxpayer's failure to pay the proper tax" (Appeal

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of Frank E. and LiHublou, Cal. St. Bd. of Equal., July 26, 1977.)

Appellant's second argument is that he received no notice. He explains that he was involved in lengthy and bitter divorce proceedings in 1980. When he moved out of his marital home that year, he apparently informed the U.S. Postal Service of his move. The record indicates that respondent mailed the notice and demand and the notice of proposed assessment (NPA) to appellant at the address from which he had moved in 1980. Appellant alleges that the Postal Service delivered the NPA to this old address rather than forwarding or returning it. Appellant claims that this notice was received by his estranged spouse, who failed to forward it. Respondent asserts that it did not know that appellant had moved because the notices were never returned to it. The address to which respondent sent the notices was the same as that shown on appellant's return when it was finally filed in 1981. Copies of the NPA and a billing dated May 19, 1981, were attached to that return.

The general rule is that respondent's mailing to a taxpayer's last known address is sufficient notice for purposes of section 18683. (See Appeal of A. J. Bima, Cal. St. Bd. of Equal., Aug. 17, 1982.) It is also the case that "[t]he standard of ordinary business care requires that a taxpayer take adequate steps to ensure that he will receive his mail." (Appeal of Winston R. Schwyhart, Cal. St. Bd. of Equal., April 22, 1975.) In this instance, appellant contends that, although he exercised proper care in arranging for the Postal Service to forward or return his mail, he never received the NPA because it was delivered to his estranged wife. However, appellant's arguments appear to relate to the NPA and not the original notice and demand which is the subject of this appeal. The notice and demand was not returned to respondent undelivered and appellant has not denied receipt of that document. Non-receipt of the NPA, if that was the case, would have no effect on the penalty for failure to respond to a notice and demand.

Appellant's third argument is that there was reasonable cause, under section 18683, for his failure to file. He asserts that, due to the divorce proceedings in 1980, his spouse withheld or destroyed his W-2 forms and other necessary tax documents, she refused to sign a joint return, and his marital status was clouded so that he did not know whether to file as a single or married individual.

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These arguments are not persuasive. He could have submitted a request for an extension of time to file (Rev. & Tax. Code, § 18433) while he sought copies of any missing tax documents. If his wife refused to sign a joint return, he could always have filed a separate return. (Rev. & Tax. Code, § 18402.) Finally, marital status for state income tax purposes is determined as of the close of the taxable year (Rev. & Tax. Code, § 18402.5), and appellant was still married as of December 31, 1979. His personal circumstances do not, in this particular case, constitute reasonable cause.

Appellant also argues that he thought he was not required to file a return because more than enough tax had been withheld from his wages in 1979. Everyone who is a California resident or who has received California-source income in the taxable year must submit a state personal income tax return if his or her adjusted gross income for that year exceeds certain minimum amounts as provided in Revenue and Taxation Code section 18401. (Appeal of David R. Bengtson, Cal. St. Bd. of Equal., June 29, 1982.) Appellant's adjusted gross income clearly exceeded the statutory minimums; he was therefore required to file a return on or before April 15, 1980. (Rev. & Tax. Code, § 18432.) The mere uninformed and unsupported belief of a taxpayer that he is not required to file a return is not sufficient to constitute a reasonable cause for failure to file. (Appeal of Sal J. Cardinall, Cal. St. Bd. of Equal., March 2, 1981; Appeal of Robert R. Ramlose, Cal. St. Bd. of Equal., Dec. 7, 1970.)

Appellant points out that respondent did not add interest to the portion of the credit balance that respondent returned to him. Section 19062 generally allows interest on overpayments. This includes excess credit for withheld tax, such as that due appellant. (Rev. & Tax. Code, § 19062.12.) However, if the overpayment is refunded or credited within ninety days after the return is filed or within ninety days after the last date for filing the return, whichever is later, then no interest is allowed. (Rev. & Tax. Code, § 19062.11.) Respondent sent appellant part of his refund, and credited the rest, on September 23, 1981, or 39 days after he filed his return. Therefore, no interest is allowed on the overpayment.

For the reasons stated above, we will affirm respondent's determination.

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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 W. L. Bryant for refund of a penalty in the amount of \$19'4.50 for the year 1979, be and the same is hereby affirmed.

Done at Sacramento, California, this 17th day of August , 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, **Mr.** Dronenburg, Mr. Nevins and Mr. Harvey present.

William M. Bennett , Chairman
Conway H. Collis , Member
Ernest J. Dronenburg, Jr. , **Member**
Richard Nevins , Member
Walter Harvey* , Member

*For Kenneth Cory, per Government Code section 7.9