BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
HEROND N. AND MARIE SHERANIAN )

Appearances:

For Appellants: Nathan J. Neilson,
Attorney at Law

For Respondent: Burl D. Lack,
Chief Counsel

OPINION

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 claims of Herond N. and Marie Sheranian for refund of personal income tax and interest paid in the following amounts for the years indicated:

| Claimant | Tax | Interest | Total | Year |
|---|---|---|---|---|
| Herond Sheranian | $10.73 | $9.10 | $19.83 | 1947 |
| Marie Sheranian | 10.73 | 9.10 | 19.83 | 1947 |
| Herond and Marie Sheranian | 452.24 | 319.61 | 711.85 | 1949 |
| Herond Sheranian | 33.50 | 21.30 | 54.80 | 1950 |
| Marie Sheranian | 31.47 | 20.02 | 51.49 | 1950 |

Appellants are husband and wife. On January 29, 1957, Nathan J. Neilson, appellants' counsel, notified respondent in reply to an inquiry by respondent that a pending federal income tax matter involving appellants had been settled by a compromise agreement. Mr. Neilson was both an attorney and a partner in the firm of Neilson & Russell, Certified Public Accountants. Respondent dealt with Mr. Russell as well as Mr. Neilson in obtaining further information.

In June 1957, based upon the agreed federal deficiencies, respondent mailed notices of proposed assessments to appellants in care of Neilson & Russell at that firm's address, which was also the address of Mr. Neilson's law office. Approximately 10 days after the statutory 60 day period for filing a protest had expired, Mr. Neilson wrote respondent askingfor-additional time. Respondent replied that the assessments had become final and that to contest them it would be necessary to pay the amounts and file claims for refund. The manner of addressing the notices was questioned by Mr. Neilson and respondent then mailed duplicate notices directly to the appellants. Mr. Neilson filed a

protest against these notices, together with a power of attorney asking that copies of all notices be sent to him. An exchange of letters followed, ending in April 1958 with a request from Mr. Neilson to abate the assessments.

In November 1958, respondent wrote directly to the appellants stating that payment must be made to avoid collection action. Commencing in March 1960, respondent enforced collection from appellants' bank account, resulting in full payment by July 1960. In February 1961 Mr. Neilson filed refund claims on behalf of the appellants. Respondent acknowledged them in a letter of March 3, 1961, stating in part that "Formal denials will be mailed within the next few days."

Respondent alleges that on March 13, 1961, notices denying the claims were mailed to the appellants' address as shown on their refund claims. No copies were sent to Mr. Neilson. Appellants filed their appeal to us on October 19, 1961,

Appellants contend that the original notices of proposed assessments were invalid because they were not mailed directly to the appellants, because they do not set forth sufficient reasons and because they may not be based upon a compromise of federal taxes. Appellants also argue that the duplicate notices later sent to them directly were not timely. They raise no issue on the substantive question of whether they initially underpaid their taxes for the years involved.

Respondent disputes all of appellants' contentions and, in addition, takes the position that the appeal to us was not timely because it was made more than 90 days after the refund claims were denied. On the latter point, appellants' position is that the notices of denial were never mailed and that, after waiting for six months after their claims were filed they properly considered the claims disallowed and made a timely appeal pursuant to section 19058 of the Revenue and Taxation Code.

We must first resolve the question of whether,this appeal was timely. Section 19057 of the Revenue and Taxation Code provides that at the expiration of 90 days from the mailing of a notice denying a refund claim, the Franchise Tax Board's action is final unless an appeal is taken within the 90 day period. Thus, if the notices were mailed on March 13, 1961, as respondent states, then we have no jurisdiction to decide the other questions presented in the appeal..

In support of its position, respondent has submitted copies of the notices denying the refund claims. These copies are dated March 13, 1961, and bear the names and address of the appellants as they appear on the claims. Respondent has also submitted affidavits by a typist and two mail clerks stating that to the best of their knowledge and belief the notices were typed and mailed on March 13, 1961, in accordance with usual office procedure. On the other hand, appellant Herond Sheranian has submitted an affidavit stating that he occupies the office to which the notices were purportedly addressed and that he did not receive them.

If the notices were mailed to appellants the statutory requirements were met and the time began to run even though copies were not sent to Mr. Neilson. (Draper Allen, 29 T.C. 113; Pacific Gas and Electric Co, v. State Board of Equalization, 134 Cal. App. 2d 149 (285' P. 2d 305). ) That the notices were prepared on March 13, 1961, and properly addressed to appellants is evidenced by the copies that have been submitted, Having been prepared, 'it is logical to assume that they were mailed in the normal course of respondent's operations. Evidence of mailing based upon established custom or procedure is sufficient proof. (Hughes V. Pacific Wharf and Storage Co., 188 Cal. 210 (205 P. 105); Code Civ. Proc. Sec. 1963, subd. 20; Lake Finance Co., B.T.A. Memo., Dkt. No. 108888, July 30, 1942; Dov. B. Kasachkoff, T. C. Memo., Dkt. No. 76109, Nov. 25, 1960.)

Under the pertinent statute, the time starts to run from the date of mailing; it is not necessary that receipt be proved. (Rev, & Tax. Code, Sec. 1905'7, 25'; Code Civ. Proc., Sec. 1013.) It is presumed that a letter properly mailed is received. (Code Civ. Proc., Sec. 1963, subd, 24.) If appellants did not receive the notices, of course, that is some indication that they were not mailed. However, although appellants state that they did not receive the notices, the possibility remains that they were forgotten, misplaced or overlooked by appellants, There is ample authority that negative evidence of this kind is not conclusive of non-receipt. (Caldwell v. Geldreich, 137 Cal, App. 2d 78 (289 P.2d 832); Matthews v. Civil Service Commission, 158 Cal. App. 2d 169 (322 P. 2d 234); Jones v. United States, 226 F. 2d 24; Lake Finance Co., B.T.A. Memo., Dkt. No. 108888, July 30, 1942, shpra Dov B. Kasachkoff, T. C. Memo., Dkt. No. 76109, Nov. 25, 1960, supra.)

We conclude that the notices were properly mailed to appellants on March 13, 1961. Since this appeal was not filed within 90 days thereafter, it must be dismissed,

## 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, that the Appeal of Herond N. and Marie Sheranian from the action of the Franchise Tax Board in denying their claims for refund of personal income tax and interest paid in the following amounts for the years indicated be dismissed.

Appeal of Herond N. and Marie Sheranian

| Claimant | Tax | Interest | Total | Year |
|---|---|---|---|---|
| Herond Sheranian | $10.73 | $9.10 | $19.83 | 1947 |
| Marie Sheranian | 10.73 | 9.10 | 19.83 | 1947 |
| Herond and Marie Sheranian | 45'2.24 | 319.61 | 771.85 | 1949 |
| Herond Sheranian | 33.50 | 21.30 | 54.80 | 1950 |
| Marie Sheranian | 31.47 . | 20.02 | 51.49 | 1950 |

Done at Sacramento, California, this 7th day of January, 1964, by the State Board of Equalization.

Paul R. Leake, Chairman

Geo. R. Reilly, Member

John W. Lynch, Member

Richard Nevins, Member

_____, Member

ATTEST: H. F. Freeman, Secretary