



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
ESTATE OF ANNA, ARMSTRONG, DECEASED }

Appearances:

For Appellant: Belmore T. Martin,
Attorney at Law

For Respondent: Burl D. Lack,
Chief Counsel

O P I N I O N

This, appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of the Estate of Anna Armstrong, Deceased, against a proposed assessment of additional personal Income tax and penalty in the total amount of \$6,322.55 for the year 1949.

Anna Armstrong, a resident of Ohio, inherited a one-sixth undivided interest in 934 acres of undeveloped California land under the will of Harry Fryman of Los Angeles, who died on August 15, 1946. Louise Wessel, Mrs. Armstrong's daughter and also a resident of Ohio, received a one-sixth interest in this same land. The remaining two-thirds interest was devised to Mrs. Armstrong's nephew, Russell Wagener, a California resident and executor of Mr. Fryman's estate.

On October 12, 1949, shortly after the property had been distributed to the heirs, it was sold to Chapman College. All of the negotiations for this sale were handled by Mr. Wagener in California.

In exchange for her one-sixth interest, Anna Armstrong received a note, together with a deed of trust, from Chapman

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College in the amount of 3225,000, Beginning in 1949, payments on the note were made by the college until the sales price was fully paid in 1957.

At the time of the sale, Anna Armstrong was 84 years of age and in failing health, Her son-in-law, Alfred Wessel, through Russell Wagener, asked the California accountant for the Fryman estate, a certified public accountant, whether there were any items of income or expense that Mrs. Armstrong and Mrs. Wessel should take on their 1949 income tax returns. The accountant's reply, dated February 13, 1950, set forth all of the income and expense data related to the property and its sale.. It did not specify, however, that a California return should be filed.

Anna Armstrong passed away on March 8, 1950. Her son, David Armstrong, was appointed executor of her estate, which consisted solely of the Chapman College note. Although he was an attorney, David Armstrong was not experienced in tax matters and he immediately employed E. S. Evans, Sr., C.P.A., of Lima, Ohio, to handle all tax matters relative to Anna's estate.. In this connection, federal and Ohio tax returns were duly filed. Both David Armstrong and E. S. Evans, Sr., have since passed away. The above mentioned letter of February 13, 1950, was located in the files of E. S. Evans, Jr, C.P.A.

No timely nonresident California personal income tax return for the year 1949 was filed' on behalf of Anna Armstrong. As the result of an inquiry by the Franchise Tax Board, delinquent nonresident returns for 1949 and later years, reporting the gain from the sale of the California property on the installment basis, were filed on December, 13, 1960; The income from the sale was the sole amount subject to tax,

The Franchise Tax Board denied appellant the right to use the installment method, treating the entire gain on the sale as taxable in the year 1949, and imposed a 25 percent penalty for failure to file a return, pursuant to section 18681 of the Revenue and Taxation Code,

The installment method permits a taxpayer to return as income in any year that proportion of the payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price. (See Rev. & Tax. Code, § 17532 (now 17578) and § 17531 (now 17577).) It is not disputed that the sale in question meets all of the requirements for treatment under the installment method set forth in the above cited sections of the Revenue and Taxation Code and applicable regulations. (See Cal. Admin. Code, tit, 18, reg. 17531-17533(c) (now reg.: 17577-17580 (e)) .)

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Respondent contends, however, that the installment method may not be used because an election to use that method was not made on a timely filed return for the year of sale. This is the rule which was adopted and followed for a considerable period of time by the United States Tax Court when interpreting federal provisions substantially identical to those which concern us here. (See Sarah Briarly, 29 B.T.A. 256; W. T. Thrift, Sr., 15 T.C. 366; W. A. Ireland, 32 T.C. 994.) Following this line of decision, we adopted the same principle in the Appeal of Estate of Worth G. Murdock, Cal, St. Bd, of Equal., June 22, 1956.

In the Appeal of Robert M. and Jean W. Brown, Cal. St. Bd. of Equal., Dec. 10, 1963, however, we pointed out that the rule has-been-weakened in recent years by exceptions both in the Tax Court and other federal courts. (See John F. Bayley, 35 T.C. 288; Jack Farber, 36 T.C. 1142, aff'd on other grounds, 312 F.2d 729, cert. denied, 374 U.S. 828 [10 L. Ed. 2d 1051]; Nathan C. Spivey, 40 T.C. 1051; John P. Reaver, 42 T.C. 72; United States v. Eversman, 133 F.2d 2261; Scales v. Commissioner, 211 F.2d 133; Hornberger v. Commissioner, 289 F.2d 602; Baca v. Commissioner, 326 F.2d 189.) The Court of Appeals for the Fifth Circuit held in Baca v. Commissioner, supra, that the privilege of installment reporting will not be denied a taxpayer even though he negligently failed to file a timely return. The same view has recently been adopted by the Tax Court in F. E. McGillick Co., 42 T.C. No. 83.

Based upon these authorities, it is clear that the failure to file a timely return does not bar appellant from reporting the gain from the sale of California acreage on the installment basis, Since there was no prior election--to use some other method of reporting, and since it is undisputed that the requirements of the code and regulations have been made in other respects, appellant's use of the installment method is permissible.

The second issue is whether appellant is liable for an addition to tax for failure, "without reasonable cause and due to wilful neglect," to file a timely return, (Rev. & Tax. Code, § 18681,) Reasonable cause, such as to excuse a taxpayer's failure to file on time, is nothing more than the exercise of ordinary business care and prudence, or such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Orient Investment & Finance Co. v. Commissioner, 166 F.2d 601; Charles E. Pearsall & Son, 29 B.T.A. 747; Appeal of J. B. Ferguson, Cal, StSt. Bd. of Equal., Sept. 15, 1958.)

The only authority cited by respondent in support of its position is the Appeal of J. B. Ferguson, supra. In sustaining the imposition of a penalty for failure to file nonresident returns, however, we specifically noted in Ferguson that if a taxpayer relies upon the advice of counsel, his

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omission may possibly be excused. This was in recognition of the fact that, while construing similar statutory language, **the federal** courts have often relieved a taxpayer of the penalty where the omission was due to his reliance upon a competent tax adviser. (McIntyre v. Commissioner, 272 F.2d 188; In-re Fisk's Estate, 203 F.2d 358; Orient Investment & Finance Co. v. Commissioner, 166 F.2d 601; Hatfried Inc. v. Commissioner, 162 F.2d 628.)

Respondent relies upon the point that it has not been shown that the taxpayer inquired specifically regarding the necessity of filing a California return. It has been held, however, that where a taxpayer employs a competent tax expert, supplies him with all necessary information and asks him to prepare the necessary tax returns, the taxpayer has done all that ordinary business care and prudence can reasonably demand. (Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769, 771.)

Here, Anna Armstrong's son-in-law sought competent professional advice on her behalf as to the income tax consequences of the sale in question. Thereafter, her son, as her executor, employed and relied upon a certified public accountant to handle all tax matters relative to his mother's estate. Neither the competence of E. S. Evans, Sr., as a tax adviser, nor the fact that he was supplied with complete information has been questioned by respondent. The requirement of filing a nonresident return in this situation cannot be said to be such a simple and fundamental matter that an untutored layman would be unjustified in relying upon his adviser to call the requirement to his attention. We conclude, therefore, that appellant's failure to file a return within the time prescribed by law was due to reasonable cause. (Haywood Lumber & Mining Co. v. Commissioner, supra, 178 F.2d 769; Estate of Michael Collino, 25 T.C. 1026; Portable Industries, Inc., 24 T.C. 571; Reliance Factoring Corp., 15 T.C. 604; Estate of Corra Baer, T.C. Memo., Dkt. No. 59769, Nov. 7, 1957.)

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of the Estate of Anna Armstrong, Deceased, against a proposed assessment of additional personal. Income tax and penalty in the total amount of \$6,322.55 for the year 1949, be and the same is hereby reversed.

Done at Sacramento, California, this 27th day of October, 1964, by the State Board of Equalization.

Paul R. Leake, Chairman
John W. Lynch, Member
Richard Olson, Member
_____, Member
_____, Member

Attest W. H. H. H. H., Secretary