

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
FOERSTEL CONSTRUCTION COMPANY )

For Appellant: Stephen K. Lightfoot  
Attorney at Law

For Respondent: Mark McEvilly  
Counsel

O P I N I O N

This appeal is made pursuant to section **26075**, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Foerstel Construction Company for refund of a late payment penalty in the amount of \$1,000 for the income year ended May 31, 1978.

Appeal of Foerstel Construction Company

The sole issue for determination is whether respondent properly **imposed** a penalty for late payment of tax for the appeal year.

Appellant, a California corporation providing general contracting services, uses the completed contract accounting method and files its franchise tax returns on the basis of a fiscal year ending May 31. For the year prior to the appeal year, appellant's timely filed return reflected a gross income of \$44,900 and no taxable income. For that year appellant **paid** only the \$200 minimum tax. For the appeal **year, appellant's** return, which was timely filed within an extension period on November 15, 1978, reflected gross income of **\$2,421,171** and tax liability of \$22,324. A \$22,124 **payment** accompanied the return, the **\$200** minimum tax having been paid previously. Thereafter, since appellant had failed to pay the tax due on the due date of the return, August 15, 1978, respondent assessed a \$1,000 penalty for late payment of tax. **Appel-**lant paid the penalty and filed a claim for refund which respondent denied. It is from this action that appellant appeals.

Notwithstanding an extension of time in which to file, the time fixed for filing appellant's return and paying the tax was August 15, 1978. (See Rev. & Tax. Code, §§ 25401 & 25551.) **Unless** the taxpayer's failure to **pay** the tax **by** the due date was due to reasonable cause and not willful neglect, respondent **was** authorized to assess a penalty not in excess of \$1,000. (Rev. & Tax. Code, § 25934.2.)

Although it failed to pay \$22,124 of its tax liability by the return due date, appellant contends that there was reasonable cause for the failure. Appellant asserts that the major corporate **shareholder, who** had exercised almost solitary control over the **corporation**, died on December **10**, 1977. This untimely death created numerous problems which resulted in difficulty in obtaining the necessary information to complete the return and ascertain the amount of tax due.

Reasonable cause which will excuse a taxpayer's failure to pay the tax **on time** means 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. (Cf. Appeal of Loew's San Francisco Hotel Corp., Cal. St. Bd. of Equal., Sept. 17, 1973, and **the cases** cited therein.)

Appeal of Foerstel Construction Company


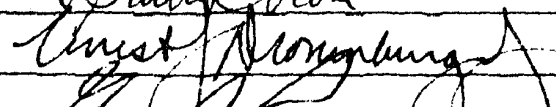
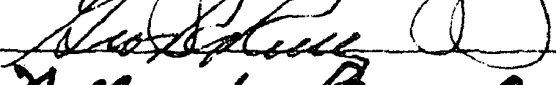
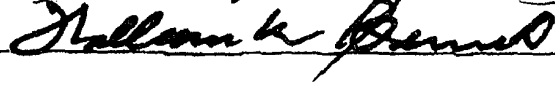
The death of appellant's major shareholder may have caused some difficulty in determining the exact amount of **income** for the income year. However, appellant had an eight month period after the shareholder's death to gather the necessary information, to prepare a reasonable estimate of the tax, and to pay that amount. Since appellant's gross income increased more than fifty times over the income from the previous year, it should have been apparent that some tax was probably due. Under these circumstances, we cannot conclude that appellant exercised ordinary business care and prudence. (See Appeal of Avco Financial Services, Inc., Cal. St. Bd. of Equal., May 9, 1979; Appeal of Normandy Investments Limited, Cal. St. Bd. of Equal., Sent. 12, 1968.) Accordingly, respondent's action in this matter must be sustained.

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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Foerstel Construction Company for refund of a late payment penalty in the amount of \$1,000 for the income year ended May 31, 1978, be and the same is hereby sustained.

Done at Sacramento, California, this **21st** day of May, 1980, by the State Board of Equalization.

  
\_\_\_\_\_, Chairman  
  
\_\_\_\_\_, Member  
  
\_\_\_\_\_, Member  
  
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