



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
STEPHEN C. BIENEMAN)

For Appellant: Stephen C. Bieneman
in pro. per.

For Respondent: **Mark McEvilly**
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 on the protest of Stephen C. Bieneman against a claim for refund of personal income tax in the amounts of \$897.00 and \$152.00 for the years 1975 and 1976, respectively.

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Respondent having refunded the full amount claimed for 1976 and \$316.75 of the amount claimed for 1975, the sole question remaining to be decided in this appeal is whether respondent properly imposed on appellant a penalty in the amount of \$580.25 for failure to file his 1975 personal income tax return upon notice and demand.

Appellant failed to file his 1975 and 1976 California personal income tax returns. Respondent demanded that such returns be filed, but appellant did not respond to the demands. Proposed assessments were then issued, based on the income information available to respondent, and penalties of 25 percent each were imposed for delinquent filing and failure to file after notice and demand.

On April 3, 1978, appellant filed his 1976 return and on May 1, 1978, respondent received his 1975 return. Respondent, for purposes of this appeal, has accepted the tax liabilities shown on those returns as correct and credited appellant with the withholding credits shown there. All penalties, save that for failure to file the 1975 return after notice and demand, have been cancelled, and the amount of that remaining penalty has been reduced to \$580.25, reflecting the reduction in tax liability shown on appellant's 1975 return. As noted previously, all other amounts claimed have been refunded to appellant; leaving this single penalty still in issue.

Revenue and Taxation Code section 18683 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 return was required.

The burden is on appellant to prove that his failure to file upon notice and demand was due to reasonable cause. (Appeal of Winston h a r t , Cal. St. Bd. of Equal., April 22, 1975.) In order to establish reasonable cause, appellant must show that his failure to file occurred notwithstanding the exercise of ordinary

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business care and prudence. (Appeal of Byron C. Beam, Cal. St. Bd. of Equal., June 29, 1978.)

Appellant contends that his failure to file on respondent's demand was because of the unavailability of partnership records which were maintained in Illinois and Montana. Both this board and the United States Tax Court have held, however, that merely asserting that certain records were unavailable is insufficient to prove reasonable cause. (Raymond J. Beran, et al., ¶ 80,119 P-ii Memo. T.C. (1980); Appeal of Robert E. and Argentina Sorenson, Cal. St. Bd. of Equal., Jan. 6, 1981.) Although appellant has alleged that he made diligent efforts to obtain the partnership information, we do not know the extent or nature of his efforts, and thus cannot say that ordinary business care and prudence were used. (See Raymond J. Beran, et al., supra.) We conclude, therefore, that appellant has failed to show reasonable cause for his failure to file upon notice and demand.

Respondent's action is sustained.

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_____, Member