



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
M. B. AND G. M. SCOTT)

For Appellants: Jack B. Campbell
Certified Public Accountant

For Respondent: James T. **Philbin**
Supervising 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 M. B. and G. M. Scott for refund of a penalty in the amount of \$1,842.37 for the year 1979.

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Appellants requested and received an extension of time in which to file their **1979** joint California personal income tax return. The extension request showed an expected tax liability of \$4,000, which was more than **offset by appellants' \$5,899 in state withholding credits.**^{1/} Accordingly, no additional payment accompanied appellants' request for extension. Appellants' return was ultimately filed on October 15, 1980, which was within the extension period. Their return, which reflected a tax liability of \$28,905, was accompanied by a payment of \$23,006.

Upon review, respondent assessed a late payment penalty of **\$1,842.37** pursuant to Revenue and Taxation Code section 18684.2. Appellants paid the assessed penalty, and filed the subject claim for refund, which was subsequently denied by respondent. The propriety of **respondent's** action is now before us in this appeal.

Appellants challenge the imposition of the late payment penalty, arguing that the difficulty in estimating their 1979 tax liability constituted reasonable cause for the underpayment. Specifically, appellants assert that, as of April 15, 1980, their accountants had neither computed the gain realized from the sale of several rental units sold in 1979 nor the income derived from a corporation, liquidated on October **31**, 1979, in which appellants held a **90** percent interest. Finally, appellants allege **that** they lacked the relevant information with respect to their distributive share of income from two limited partnerships in which they invested in 1979.

In pertinent part, **section 18684.2** provides as follows:

(a) In case of failure to pay the amount shown as tax on any return specified in this part on or before the date prescribed for payment of such tax . . . , unless it is shown that such failure is due to reasonable cause and not due to willful neglect, a penalty is hereby imposed **consisting of:** (1) 5 percent of the total tax unpaid (as defined in subdivision (c)), and (2) an amount computed at the rate of 0.5 percent per month of the "**remaining tax**" (as defined in

1/ This figure includes a \$91 credit for excess state disability insurance.

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subdivision (d)) for each month during which the tax is unpaid (not exceeding 36 months).

* * *

(c) . . . total tax unpaid means the amount of tax shown on the return reduced by: (1) the amount of any part of the tax which is paid on or before the date prescribed for filing the return, and (2) the amount of any credit against the tax which may be claimed upon the return.

(d) . . . "remaining tax" means total tax unpaid reduced by the amount (if any) of any payment of the tax. (Emphasis added.)

Section 18551, which is applicable to appellants, provides as follows:

The tax imposed under this part shall be paid on the fifteenth day of April following the close of the calendar year, or, if the return is made on the basis of a fiscal year, on the fifteenth day of the fourth month following the close of the fiscal year.

Finally, while respondent is statutorily authorized to grant reasonable extensions of time for the filing of a return (Rev. & Tax. Code, § 18433, subd. (a)), the granting of such an extension does not operate to extend the time for the payment of any tax due. (Cal. Admin. Code, tit. 18, reg. 18433.1, subd. (b)(6).)

Since appellants failed to pay \$23,006 of their total personal income tax liability for the year in issue until October 15, 1980, respondent's imposition of the penalty for late payment of tax was proper, unless such untimely payment was due to reasonable cause and not due to willful neglect.. Appellants bear the burden of proving that both of those conditions existed. Rogers Hornsby, 26 B.T.A. 591 (1932); see Appeal of Telonic Altair, Inc., Cal. St. Bd. of Equal., May 4, 1978.) In order to establish reasonable cause, the taxpayer must show that his failure to timely pay the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (See Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den., 350 U.S. 967 [100 L.Ed. 8391 (1956)]; Appeal of Citicorp Leasing, Inc., Cal. St. Bd. of Equal., Jan. 6, 1976; Appeal of Loew's San Francisco Hotel Corp., Cal. St. Bd. of Equal., Sept. 17, 1973.)

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Section 18684.2 is, insofar as relevant to this discussion, the substantive counterpart to section 25934.2, which constitutes part of the Bank and Corporation Tax Law. The imposition of the penalty imposed under the Patter section was recently upheld in the Appeal of Cerwin-Vega International, decided August 15, 1978. In that case, the taxpayer, a domestic international sales corporation, was unable, because of federal law, to resolve certain accounting problems until six months after the close of its first fiscal year. In holding that the penalty was properly assessed, we concluded that such **difficulties** did not constitute **reasonable** cause for failure to comply with the applicable law. The record of this appeal presents much less compelling evidence of reasonable cause.

The information regarding the gain realized from both the sale of their rental units as well as from the aforementioned corporate liquidation was evidently available to appellants long before April 15, 1980. The mere fact that appellants' accountants did not compute that gain until August of that year does not constitute reasonable cause for the late payment of appellants' 1979 tax liability. (See Appeal of Cerwin-Vega International, supra.) Moreover, appellants have failed to support the assertion that they were unable to compute their distributive share of income from the aforementioned limited partnerships by April 15, 1980. The alleged difficulty encountered by appellants in determining their income with exactitude did not negate the requirement that they make timely payments based upon a reasonably accurate estimate of their tax liability. The record of this appeal reveals that, as of April 15, 1980, appellants had paid **only** approximately 20 percent of their ultimate tax liability for 1979; an 80 percent underpayment is not reasonably accurate.^{2/} [Ct. Appeal of Avco Financial Services, Inc., Cal. St. Bd. of Equal., May 9, 1979.)

^{2/} Respondent has promulgated regulations which are intended to mitigate the potential hardship of the subject penalty. The regulations recognize the difficulty of accurately estimating tax liability by the due date, and provide that reasonable cause will be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if at least 90 percent of the tax liability is paid on or before the regular due date for the return. (Cal. Admin. Code, tit. 18, reg. 18433.1, subd. (c).)

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Our conclusion that there was no reasonable **cause** for appellants' failure to pay the tax when due obviates the necessity of considering whether such failure was due to willful neglect.

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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 M. B. and G. M. Scott for refund of a penalty in the amount of **\$1,842.37** for the year '1979, be and the same is hereby sustained.

Done at Sacramento;, Califo'rnia, this 14th day of October , 1982, by the State Board of Equalization, with Board **Members** Mr. Bennett, Mr. **Collis**, Mr. Dronenburg and Mr. Nevins 'present.

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