

**BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA**

**In the Matter of the Appeal of)
IRMA E. BAZAN)**

**For Appellant: Irma E. Bazan,
in pro. per.**

**For Respondent: John A. Stilwell, Jr.
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 Irma E. Bazan for refund of personal income tax in the amount of \$86.00 for the year 1976.

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On December 2, 1977, respondent notified appellant that it had no record of her having filed a California personal income tax return for the year 1976, and demanded that she file the required return within 30 days. When appellant failed to comply with this demand, respondent issued her a proposed assessment on March 27, 1978, based upon information obtained from the Internal Revenue Service. The proposed assessment estimated appellant's tax liability to be \$350, and included penalties for failure to file a return (Rev. & Tax. Code, § 18681) and failure to file upon notice and demand (Rev. & Tax. Code, § 18683) in the total amount of \$175.

On May 25, 1978, appellant filed her return for the year 1976. On that return, she reported a tax liability of \$344 and asserted that her state withholding credits exceeded her tax liability by \$175; appellant simultaneously claimed a refund for the latter amount. Based upon the information contained in appellant's return, respondent withdrew its previously issued proposed assessment; \$86 of the previously assessed \$175 in penalties was retained for appellant's failure to file her return within the period specified in the aforementioned December 2, 1977 notification.^{1/} On September 11, 1978, appellant filed a claim for refund for the amount in issue. Respondent's denial of that claim has resulted in this appeal.

The issues presented by this appeal are the following: (i) whether respondent properly assessed appellant a penalty for failure to file upon notice and demand; and (ii) if so, whether respondent's computation of the amount of that penalty should be sustained.

Relying upon this board's decision in the Appeal of J.H. Hoeppel, decided on February 26, 1962, appellant contends that the subject penalty was improperly assessed because she filed her 1976 return within six months from the date of respondent's December 2, 1977 demand. Appellant's interpretation of our decision in the cited appeal is inaccurate and her argument in this regard is without merit. The law is clear in this area. During the year in issue, the regulations promulgated pursuant to section 18683 of the Revenue and Taxation Code provided, in relevant part:

^{1/} As further explained below, respondent incorrectly computed the subject \$86.00 penalty with reference to appellant's reported tax liability of \$344, rather than with reference to the estimated tax liability of \$350 reflected in the proposed assessment issued on March 27, 1978.

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. . . If the return is not filed within the time specified in the demand, the income of the taxpayer will be estimated and the tax assessed upon the basis of any available information. To the tax so assessed, a penalty of 25 percent . . . must be added. . . . A taxpayer who seeks to establish reasonable cause for failure to file a return after demand should submit with the return a signed statement under penalty of perjury setting forth the facts alleged as a reasonable cause for failure to file the return on time. (Former Cal. Admin. Code, tit. 18, reg. 18681-18683(b), repealed April 20, 1982.) (Emphasis added.)

As previously indicated, the record of this appeal reveals that respondent's December 2, 1977 demand specified that appellant's return was to be filed within 30 days; it was not filed until May 25, 1978, approximately six months from the date of the demand. Consequently, in the absence of reasonable cause for failure to file her return within the 30-day period, the imposition of the subject penalty must be upheld. Appellant contends that she was unable to promptly file her return because of her recent divorce and the fact that her husband had previously filed their joint returns. This assertion is unconvincing for at least the two following reasons: (i) appellant filed a federal income tax return for 1976, -and has not adequately explained why the filing of a California return posed any insuperable difficulties; and (ii) appellant has failed to offer any reasonable explanation why 30 days was insufficient time within which to file her return.

Finally, appellant is mistaken in interpreting our decision in the Appeal of J. H. Hoeppe, supra, as setting forth the general proposition that the filing of a return within six months from the date of a demand therefor precludes respondent from imposing the subject penalty. In the cited appeal, respondent's demand that the taxpayer file his return was not accompanied by a demand that it be filed within a specified period. Under those circumstances, we merely held that same reasonable time limit was obviously implied, and that respondent acted properly in imposing a penalty for failure to file upon notice and demand six months after the date of the original demand. That case is clearly distinguishable from the instant appeal wherein respondent's original demand specifically required that appellant's 1976 return be filed within 30 days.

Having concluded that the subject penalty was properly assessed, we now turn to the question of whether respondent's computation of the amount of that penalty should be sustained. Appellant has argued that the subject penalty should be computed with reference to the amount of tax due as of the due date of her return. Accordingly,

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she contends that no penalty should be imposed since her 1976 withholding credits exceeded her tax liability for that year. In support of her argument, appellant has cited respondent's former regulation 18681-18683(a), repealed April 20, 1982, which provided, in relevant part, as follows:

The penalties provided for in Sections 18681-85 are measured in terms of a percentage of the tax or the additional tax due under the law. If, because of the application of the provisions of Chapter 12 of the law (Section 18001 and following, credits against tax for net income taxes paid) no tax remains due and payable under the law, the penalty provisions of Sections 18681-85 are inoperative.

Again, after careful review of the relevant authority, we must conclude that appellant's argument is without merit.

Chapter 12 of the Personal Income Tax Law contains no reference to withholding credits. Since it was withholding, as opposed to any of the credits referred to in Chapter 12, which caused there to be no additional tax liability due from appellant as of the due date of her 1976 return, respondent's former regulation 18681-18683(a) is irrelevant to the instant appeal. The pertinent authority is found in former regulation 18681-18683(b) which, as quoted above, provides that the subject 25 percent penalty is to be imposed upon the taxpayer's estimated income tax liability. (See also Appeal of J. H. Hoeppel, *supra*.) As previously noted, respondent incorrectly computed the subject penalty with reference to the \$344. tax liability reported on appellant's return, rather than with reference to the \$350 tax liability estimated in the proposed assessment. of March 27, 1978. Appellant is in no position to complain about this error, however, since the correct computation would have resulted in a penalty in an amount greater than that in issue.

for the reasons set forth above, respondent's action in this matter will be sustained,

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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 Irma E. Bazan for a refund of personal income tax in the amount of \$96.00 for the year 1976, be and the same is hereby sustained.

Done at Sacramento, California this 17th day of November, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u></u>	, Member