



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ROBERT J. AND ROSEMARIE R. GENTRY)

For Appellants: John Gigounas
Attorney at Law

For Respondent: M a r k **McEvilly**
Counsel

OPINION

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 claims of Robert J. and Rosemarie R. Gentry for refund of personal income tax in the amounts of **\$1,336.00** and **\$9,254.00** for the years 1973 and 1974, respectively.

Appeal of Robert J. and Rosemarie R. Gentry.,

Rosemarie R. Gentry is a party to this appeal solely because she filed joint returns with her husband for the years in issue. Accordingly, only Robert J. **Gentry will** hereinafter be referred to as "appellant."

The sole issue presented by this appeal **is** whether appellant's claims for refund are barred by the statute of limitations set forth in section 19053 of the Revenue and Taxation Code.

Appellant was a stockbroker during the **years** in issue; he was transferred by his employer in mid-1974 from Los Angeles to New York. In January 1974, after having failed to respond to respondent's demand that he file a 1972 return, appellant was issued a notice of proposed assessment based upon his unreported, 1972 income; the proposed assessment included a 25 percent penalty for failure to file upon notice and demand. Respondent finally **filed** his 1972 return on June 15, 1974, and **requested** that the refund amount be sent to his residence in Northridge, California. Appellant alleges that his accountants improperly used his Northridge address, and that by June 15, 1974 he had already moved to New Jersey. Appellant admittedly did not file timely 1973 and 1974 returns, and the date that these returns were filed constitutes the central factual issue presented by this appeal.

Having failed to receive appellant's 1973 and 1974 returns, despite repeated requests therefor, respondent assigned appellant's case to one of its district offices in May 1976. During the ensuing seven months, four filing requests were sent to appellant, two to **his** last known address in Northridge and **two** to his **employer's** address in New York. In addition, three letters were sent to **appellant's** employer inquiring as to his location. Appellant did not respond to any of **these** communications, and contends **that** none of these letters were forwarded to him, and that they were all sent either to his former address **or** former employer. The latter contention, however, appears to be inconsistent with appellant's admission that he retained his position with his New York employer until September 1978. Notices of proposed assessment were issued appellant, **for** both appeal years in early 1977; these became final without protest from appellant. Appellant's account was then assigned to respondent's collection unit which, after several unsuccessful attempts to **communicate** with appellant, filed a lien in Los Angeles County to protect the state's creditor interest.

Appellant acknowledges that he did not file timely 1973 and 1974 returns, but contends that the data he needed to file those returns was packaged and transported to **New** Jersey in mid-1974, and that he failed to find those records until sometime in 1976. Upon locating this data, appellant alleges that he contacted his accountants

Appeal of Robert J. and Rosemarie R. Gentry

in California, sent them the necessary information, and requested, that they prepare California personal income tax returns for the years in issue. Appellant further maintains that he had received no communications from respondent up to this time. It should be noted in this regard that, as previously indicated, respondent successfully located appellant's employer in New York and sent appellant numerous communications to that address. Appellant's assertion that **none** of those letters were "forwarded" to him is in direct contradiction to his statement that, he maintained his, employment at that address until September 1978. Finally, appellant is in no position to complain that respondent made less than good faith efforts to locate him: it was his responsibility to take adequate steps to ensure that he would receive **his** mail. (See Appeal of Winston R. Schwyhart, Cal. St. Bd. of Equal., April 22, 1975) .) In any event, respondent's communications simply informed appellant of something he already knew, i.e., that he had not filed 1973 and 1974 returns.

Appellant claims that he **received** his first communication from respondent in November 1976, at which point he realized that his accountants had neglected to prepare and file his returns. Appellant has acknowledged that he had received no communication from his accountants after allegedly requesting them to file his 1973 and 1974 returns. Therefore, it is **incomprehensible** how appellant, a stockbroker, could expect his accountants to **file his** returns when they had never sent him the completed returns for his signature. Nevertheless, appellant claims that, for the specific purpose of expediting the filing of those returns, he traveled to Los Angeles on December 14, 1976 to confer with his accountants. Appellant then asserts that he supplied his **accountants** with the **data** needed to file his returns and signed blank returns. Finally, appellant contends that he agreed with his accountants that the anticipated refunds for both years be credited to future tax **liability** because he "anticipated doing business in California in 1977." **Since** his accountants allegedly refused to accept his personal check, appellant paid for their services in travelers' checks, and requested that they send copies of **his** returns to his residence in New Jersey. Appellant then states that **he** returned to New Jersey "assuming" that his returns would be filed by his accountants, apparently without his first reviewing them as is normal practice; appellant asserts that his accountants sent him copies of the completed returns in early 1977. Appellant has failed to explain why he paid for his accountants' services in advance, and if this was their practice, why he did not pay for their services earlier in 1976 when he contends that he requested that they file his returns.

Appellant next alleges that in late December 1976 he received a demand from respondent that he file his 1974 return. While appellant contends that he returned this form to respondent, indicating that he had recently **filed his** returns, respondent states that it has no record

Appeal of Robert J. and Rosemarie R. Gentry

that appellant responded. Appellant also asserts that he telephoned one of respondent's representatives and **asked** that the refund amounts be sent to him rather than be credited to future tax liability. From this point in time until his next contact from respondent in March 1979, a period of over two years, appellant contends that he simply awaited his refunds.

By letter dated **March 28, 1979**, **respondent** notified appellant that he had not filed returns **for** the years in **issue**. In response, appellant contends that he telephoned one of respondent's representatives and was assured that the "confusion" could be readily resolved if he would simply send copies of **his** returns. **At** this point, appellant states that he contacted the successor firms to his **former** accountants and asked both firms to retrieve copies of **his** 1973 and 1974 returns in order to ascertain if they had been filed; appellant does not indicate what response, if any, he received.

Appellant acknowledges that he received another communication from respondent dated June 7, 1979, and marked received on June 12, 1979. Appellant states that in response to this letter he telephoned respondent on **June 8, 1979** and offered to **file** "reconstructed" versions of the relevant returns, but was told to obtain copies of his actual returns. Appellant's assertion in this regard is obviously inaccurate; he could not possibly have responded to the communication on June 8, 1979 when he did not even receive it until four days later.

Finally, again in June 1979, appellant, while, purchasing property in Arizona, discovered that respondent had **filed** the above referenced lien in Los Angeles County. **Appellant** immediately prepared "**reconstructed**" returns and sent them on **June 9, 1979**; appellant has a receipt noting the posting of his returns. Appellant contends that he later again contacted the -successor firms to his former accountants and found that both firms had allegedly destroyed his records. In January 1981, appellant found the copies of his returns that he had been sent by his accountants in early 1977. Those **copies** are a **part** of this record and reveal that they were: **(i)** never signed by their supposed preparer; and **(ii)** bear no date next to **appellant's** signature.

The "reconstructed" returns sent by appellant **on** June 9, 1979 were received by respondent two days later; the 1973 return reported withholding credits of \$3,125 and claimed a refund of \$1,336; the 1974 return reported withholding credits of \$10,445 and claimed a refund of \$9,254. After releasing the lien recorded in Los Angeles County, respondent notified appellant **that** his claims for refund had not been filed within the period prescribed by Revenue and Taxation Code section **19053** and that, consequently, they were barred by the **statute** of limitations.

Appeal of Robert J. and Rosemarie R. Gentry

In pertinent part, section 19053 provides as follows:

No credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of the period a claim **therefor** is filed by the taxpayer

In numerous prior appeals' we have held that the statute of limitations set forth in section 19053 must be strictly construed **and** that a taxpayer's **failure** to file a claim for refund within the statutory period bars him from doing so at a later date. (See, e.g., Appeal of Wendell Jenkins, Sr., Cal. St. Bd. of Equal., June 23, 1981; Appeal of Manuel and Ofelia C. Cervantes, Cal. St. Bd. of Equal., Aug. 1, 1974.) Moreover, the taxpayer must sustain his burden of proof that a timely claim for refund was filed. (Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.) After careful review of the record on appeal, we can only conclude, that appellant **has** failed to prove he filed timely claims for refund.

With the exception of appellant's response to **its** communication of June 7, 1979, respondent has 'no record that appellant answered any **of the numerous** letters he was sent, or that he **filed** returns prior to June 11, 1979.' Appellant has submitted copies of the returns **that he allegedly** "assumed" were filed in December- 1976. It has been held, however, that the production of a copy of a return without convincing evidence of mailing the original **is** insufficient to establish timely filing where government+ records indicate that no return was filed. - (Appeal of LaSalle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.) No such evidence has been supplied by **a p p e l l a n t .**

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

