



83-SBE-053

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
LORETTA L. HAMILTON)

For Appellant: Loretta L. Hamilton,
in pro. per.

For Respondent: James T. **Philbin**
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Loretta L. Hamilton against proposed assessments of additional personal income tax and penalties in the total amounts of **\$2,306.65** and **\$3,684.55** for the years 1978 and 1979, respectively.

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The sole issue presented by this appeal is whether appellant has established error in respondent's imposition of certain penalties for the years in issue.

Respondent received information indicating that appellant was required to file **California personal** income tax returns for the years 1978 and 1979. Respondent so advised appellant, and demanded that she file the required returns within 20 days; **appellant** did not comply. Thereafter, respondent issued notices of proposed assessment based upon information received from the California Employment Development Department. The proposed assessments included penalties for delinquency (Rev. & Tax. Code, **§ 18681**), for failure to file upon notice and demand (Rev. & Tax. Code, **§ 18683**), and negligence (Rev. & Tax. Code, **§ 18684**); a penalty for failure to pay estimated income tax was also assessed for **1978**.

Appellant protested respondent's action, contending that her withholding credits for 1978 totaled **\$2,094.12** and were in excess of the tax liability of **\$1,774.45** computed by respondent; appellant also asserted that **she** had withholding credits of **\$1,966.82** for the taxable year 1979. Respondent subsequently received a **copy of** appellant's Wage and Tax Statement for 1978 from her employer, and on that basis **allowed her total** withholding credits of **\$2,094.12**. The penalties previously assessed in the amount of **\$1,088.81** for **1978** were reduced to \$532.20, reflecting respondent's withdrawal of the penalties for delinquency and failure to pay estimated income tax. In the absence of any documentation to support appellant's contentions with respect to the taxable year 1979, respondent affirmed its proposed assessment for that year as it had originally been issued. This appeal followed.

Subsequent to the filing of this appeal, appellant submitted personal income tax returns for both appeal **years** to this board. Those returns were later reviewed by respondent. The latter determined that **appellant's** 1978 tax liability, together with the aforementioned penalties, exceeded her withholding credits by \$212.53, and that this amount was due from appellant. With respect to the year 1979, respondent concluded that appellant had a tax liability of **\$2,009.00**, of which **\$1,967.00** had already been withheld from her wages, leaving a balance due of \$42.00. Respondent accordingly reduced the previously assessed delinquency penalty of \$502.50 to \$10.50 (25 percent of **\$42.00**), and retained

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the penalties for negligence and failure to file upon notice and demand. Appellant subsequently paid the outstanding tax liability of \$42.00, leaving a total remaining liability of \$613.20 as a result of the aforementioned penalties.

Appellant has acknowledged that the delinquency penalty of \$10.50 for 1979 was properly assessed, but argues that the penalties for failure to file upon notice and demand and negligence were incorrectly assessed because she never arbitrarily refused to provide respondent with information, but merely exercised her Fifth Amendment right against self-incrimination. Moreover, she asserts that the penalties imposed under section 18683 were improperly computed and should reflect only 25 percent of her unpaid tax liability.

Section '18683 of the Revenue and Taxation Code 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 information or return was required.

During the years in issue, the regulations promulgated pursuant to section 18683 provided, in relevant part:

. . . 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.)

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It is well settled that respondent's determinations of tax are presumptively correct, and appellant bears the burden of proving them erroneous. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case. (Appeal of K. L. Durham, supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) No such proof has been presented here. Specifically, the record on appeal contains no evidence that appellant's failure to respond to the notice and demand within the time specified therein was due to reasonable cause and not willful neglect. Appellant's contention that the assertion of the Fifth Amendment privilege against self-incrimination constituted reasonable cause is without merit. (United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973).) Finally, we conclude that respondent correctly computed the penalties imposed pursuant to section 18683 upon the amount of tax determined to be due, rather than merely on that amount over the excess shown on appellant's returns. (Appeal of Irma E. Bazan, Cal. St. Bd. of Equal., Nov. 17, 1982; Appeal of A. J. Bima, Cal. St. Bd. of Equal., Aug. 27, 1982.)

For the reasons set forth above, we conclude that appellant has a remaining liability of \$212.53 and \$613.20 for the years 1978 and 1979, respectively.

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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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Loretta L. Hamilton against proposed assessments of additional personal income tax and penalties in the total amounts of **\$2,306.65** and **\$3,684.55** for the years 1978 and 1979, respectively, be and the same is hereby modified in accordance with this opinion.

Done at Sacramento, California, this 1st day of March 1983, by the State Foard of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

_____ , Chairman
Ernest J. Dronenburg, Jr. , Member
Conway H. Collis , Member
Richard Nevins , Member
Walter Harvey* , Member

*For Kenneth Cory, per Government Code Section 7.9