

Appeal of **Sunglass Products** of California

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The sole question for decision is whether a penalty should be imposed for underpayment of estimated tax for the income year ended August 31, 1978.

Appellant, a California corporation, commenced doing business in this state in 1956. It uses the accrual method of accounting and files California franchise tax returns on the basis of a fiscal year ending August **31**.

On January 15, **1978**, within an extended period granted by respondent for filing its return for the income year ended August **31**, 1977 (the income year prior to the appeal year), appellant reported a self-assessed tax liability of \$83,780. At the same time, it also reported estimated tax payments of \$88,437 and, **consequently**, an overpayment of tax in the amount of \$4,657. This return indicated that appellant desired that this credit balance be refunded to it, rather than being applied as estimated tax for the next income period. The \$4,657 refund was received by appellant on March 20, 1978,

For the income year ended August 31, 19'78, the period under appeal here, appellant made the following estimated tax payments:

	<u>Date Paid</u>	<u>Amount</u>	<u>Cumulative</u>
1st Installment	12/21/77	\$ 200	\$ 200
2nd Installment	5/15/78	26,650	26,850
3rd Installment	8/15/78	56,930	83,780

Appellant timely filed its return for the income year ended August 31, 1978, on November 15, 1978, showing a self-assessed tax liability of \$90,962. A payment of \$7,182, the difference between the self-assessed tax and the estimated tax payments, accompanied that return.

On the basis of the above schedule of estimated payments, respondent assessed a penalty of **\$2,264.55** for the income year 1978. However, upon review, respondent reduced the penalty to **\$1,175.73**. That action gave rise to this appeal.

It appears that respondent has properly computed the amount of the penalty assessment. Every corporation subject to the franchise tax is required to file a declaration of estimated tax and pay the estimated tax during the income year. (See Rev. & Tax. Code, **§§ 25561-25565**.)

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Section 25951 of the Revenue and Taxation Code prescribes a penalty for the underpayment of estimated tax at a rate of **12** percent of the "amount of underpayment." The "amount of underpayment" is defined as the excess of the amount of estimated tax that would be required to be paid on each installment if the estimated tax were equal to 80 percent of the tax shown on the return for the income year, over the amount actually paid on or before the due date of each installment. (Rev. & Tax. Code, § 25952.) Under the pertinent estimated tax provisions, appellant was required to estimate and prepay franchise tax by the following installment dates: December 15, 1977; February 15, 1978; May 15, 1978; and August 15, 1978.

However, since appellant generated losses for the first two periods of the year at issue, under the remedial provisions of subdivision (c)(2) of section 25954 of the Revenue and Taxation Code, appellant could have avoided the subject penalty by filing a timely declaration of estimated tax and paying the minimum tax. In order to avail itself of this provision, though, the minimum tax must be paid on or before the date it becomes due, here December 15, 1977. (Appeal of Oyiro al, Inc., Cal. St. Bd. of Equal., Jan. 7, 1975.) As indicated above, that minimum tax for the year at issue was not received by respondent until December 21, 1977. Accordingly, appellant is unable to rely upon the remedial provisions of **section 25954**.

Appellant nevertheless contends that since on December 15, 1977, it was entitled to a refund of \$4,657 for the previous income year, and since it did not receive that refund until March 20, 1978, respondent had the use of that sum until that time and that, accordingly, appellant constructively had paid the minimum tax of \$200 as of December 15, 1977.

Simply put, there is no statutory authority for appellant's position. (Appeal of Jhirmack Enterprises, Inc., Cal. St. Bd. of Equal., Dec. 11, 1979.) Accordingly, we **must sustain** respondent's action.

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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 25667 of the Revenue and Taxation **Code, that** the action of the Franchise Tax Board on the protest of **Sunglass** Products of California against a proposed penalty assessment in the amount of **\$1,175.73** for the income year ended August 31, 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 15th day Of September, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey **present.**

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

*For Kenneth Cory, per Government Code section 7.9