BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 84R-1198
GEORGE S. AND JEAN D. McEWEN)

For Appellants: George S. McEwen,
in pro. per.

For Respondent: Grace Lawson
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a),[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of George S. and Jean D. McEwen for refund of personal income tax in the amount of $198.41 for the year 1981.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

, The issue presented on appeal is whether appellants are entitled to a refund of an underpayment-of-estimated-tax penalty for the year in question.

This appeal has arisen from appellants' filing of a nonresident California return which reported as California-source income certain interest income they received from some interest-bearing certificates. During the appeal year, appellants were residents of Oregon, but apparently they had been California residents prior to moving to Oregon. In preparing their nonresident return, appellants reported the interest in question as California income because they thought this was required by the return's instructions which stated that all nonresidents should report "interest from securities and deposits with a business situs in California." Although it is unclear why appellants thought their certificates had a business situs in California, perhaps it was because the certificates were held in a California brokerage account or depository, In any event, appellants computed and paid a total tax liability of $3,108.

Respondent determined that due to the nature of the reported income, appellants should have filed a 1981 Declaration of Estimated Income Tax. Accordingly, respondent determined that appellants had underpaid their 1981 estimated tax and imposed a penalty based upon the reported tax liability. Appellants paid the penalty.

Subsequently, appellants discovered that almost all of the interest they reported as California income should have been reported as Oregon income. On July 5, 1983, almost 15 months after the deadline for filing an income tax return for 1981, appellants filed an amended return reporting an adjusted liability of $96, Appellants also filed a claim for refund of all of the amounts paid in excess of the adjusted liability, Respondent paid all of the claimed refund except for the amount imposed as a penalty. This appeal followed.

We begin by noting that residents and nonresidents who have a California tax liability in excess of $100 and who do not come within the exceptions listed in section 18415 must file a Declaration of Estimated Income Tax. (Rev. & Tax. Code, § 18415, subd. (i).) Payment of the estimated tax is required by section 18556. The penalty for underpayment of estimated taxes is imposed by section 18685.05, which provided that a penalty "shall be added to the tax." This penalty is mandatory upon a finding of an underpayment of estimated taxes; there is'

no exception upon a showing of reasonable cause. (Appeal of J. Ray Risser, Cal. St. Bd. of Equal., Feb. 28, 1984.)

We have held that if an amended return is filed on or before the due date for the original return, the amount of the underpayment is determined by reference to the tax on the amended return. However, if the amended return is filed after the due date of the original return, the amount of underpayment of estimated tax is determined by reference to the tax shown on the original return. (Appeal of J. Ray Risser, Opn. on Pet. for Rehg., Cal. St. Bd. of Equal., Aug. 1, 1984; see also, Appeal of Durao International Corporation, Cal. St. Bd. of Equal., May 21, 1980.)

Citing the exception provided by section 18415, subdivision (c)(1), appellants apparently argue that due to their true tax liability of $96, they were not liable for any estimated tax payments. Section 18415, subdivision (c)(1), stated that "[n]o declaration is required if the tax determined . . . is less than one hundred dollars ($100)."

Under the proper circumstances, appellants' true tax liability would allow them to come within the $100 reporting threshold exception provided by section 18415, subdivision (c)(1). It is crucial to note, however, that appellants' amended return was filed long after the due date of the original return. Therefore, respondent properly relied upon appellants' original return when it determined that appellants should have filed a declaration,,

Further, while we sympathize with appellants' unintentional error, we reiterate that, once assessed, the penalty is mandatory and we are unable to reverse its imposition. We realize that this is a harsh result but, due to the wording of the statute, it is the result dictated by section 18685.05. To change the result, the Legislature must change the statute.

Finally, appellants argue that respondent should be estopped from imposing the penalty as respondent provided the allegedly ambiguous instructions which lead to appellants' erroneous return.

This is not a case of estoppel because the Franchise Tax Board did not issue erroneous instructions for 1981's nonresident tax return. The difficulty appellants encountered was that the instructions stated that

nonresidents had to report as California income "interest from securities and deposits with a business situs in California."

It is settled that intangible property has a taxable situs at the domicile of its owner. (Miller v. McColgan, 17 Cal.2d 432 [110 P.2d 419) (1941); Southern Pacific v. McColgan, 68 Cal.App.2d 48 [156 P.2d 81] (1945).) It is equally well settled that an exception to this general rule exists when the intangible property acquires a situs for taxation other than the owner's domicile because it has become an integral part of some local business. As stated in Holly Sugar Corp. v. Johnson, 18 Cal.2d 218, 223-224 [115 P.2d 8] (1941), this "business situs"

> arises from the act of the owner of the intangibles in employing the wealth represented thereby, as an integral portion of the business activity of the particular place, so that it becomes identified with the economic structure of that place and loses its identity with the domicile of the owner. [Citation.]

Presently, both parties agree that appellants' interest-generating investments do not have a business situs in California. Unfortunately, appellants were unaware of the meaning of this term at the time they filed their original return, but that is not the fault of respondent. As stated in the Appeal of Ronald A. Floria, decided by this board on January 3, 1983, "[t]he Franchise Tax Board does not have the responsibility to inform taxpayers of the law."

Consequently, we agree with respondent that the estimated-tax penalty was properly imposed based upon the tax liability reported on appellants' original return. Accordingly, respondent's action in this matter will be sustained.

Appeal of George S. and Jean D. McEwen

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 George S. and Jean D. McEwen for refund of personal income tax in the amount of $198.41 for the year 1981, be and the same is hereby sustained.

Done at Sacramento, California, this 20th day Of August , 1985, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Nevins and Mr. Harvey present.

_____, Chairman

Conway H. Collis, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9