



Appeal of Richard L. and Mary D. Marks

Appellants are former California residents who now reside in Fort Worth, Texas. Having failed to receive a 1971 personal income tax return from appellants, respondent Franchise Tax Board contacted the taxpayers. They forwarded a document which purported to be a copy of their original 1971 return. It was signed but undated. Still finding no evidence that a timely return had been filed for the year 1971, respondent billed appellants on August 14, 1973, for tax, penalty and interest totaling \$654.30.^{1/}

Thereafter appellants remitted \$394.00, the amount of liability allegedly disclosed on their original 1971 return and urged that, since apparently the return and check had either been lost in the mail or mislaid by respondent, they should not be assessed a late filing penalty or interest. Respondent credited the \$394.00 payment to appellants' account and demanded payment of the balance due. Subsequently, appellants discovered that the original check had not been cashed and the money had remained in their account. Consequently, they acquiesce in the assessment of interest. Admittedly, appellants had a joint checking account which was a "constant disaster". However, they still protested the 25 percent penalty for failure to file. While the record is not clear, we gather that the penalty and interest assessed for 1971 were paid early in 1974. On March 26, 1974, appellants filed a \$266.19 refund claim to recover "1971 tax penalties". The claim was denied and this appeal followed.

Section 18681, subdivision (a), of the Revenue and Taxation Code pertains to the penalty for failure to file a timely return. It provides:

If any taxpayer fails to make and file a return required by this part on or before the due date of the return or the due date as extended by the Franchise Tax Board, then, unless it is shown that the failure is due to reasonable cause and

^{1/} We understand the \$654.30 represents \$394.00 in self-assessed tax liability, a \$98.00 tax credit which was determined not to be available because the 1971 tax was not paid on time, a \$123.00 late filing penalty, and the balance in interest.

Appeal of Richard L. and Mary D. Marks

not due to willful neglect, 5 percent of the tax shall be added to the tax for each month or fraction thereof elapsing between the due date of the return and the date on which filed, but the total penalty shall not exceed 25 percent of the tax. The penalty so added to the tax shall be due and payable upon notice and demand from the Franchise Tax Board.

Appellants urge that their failure to file a timely return for the year 1971 was due to reasonable cause. In support of this contention they insist that the original 1971 return and the check for the amount of liability disclosed on the return were either lost in the mails or mislaid by respondent. Under the federal income tax law it has been held that where there is clear evidence that a return was placed in the mail, with correct postage affixed, and that return was not received by the taxing authority, those facts are sufficient to establish reasonable cause to relieve the taxpayer from imposition of penalties for failure to file. (Walter M. Ferguson, Jr., 14 T. C. 846; Ralph C. Weiss, T. C. Memo., Feb. 14, 1963.) Where the evidence of mailing is unclear, however, or where the only proof offered is the taxpayer's self-serving allegation that the return was timely mailed, and the taxing authority's records indicate no such return was ever received, it has been held that there is insufficient evidence to show reasonable cause. (Irvine F. Belser, 10 T.C. 1031, aff'd, 174 F. 2d 386, cert. denied, 338 U. S. 893 [94 L. Ed. 549]; see also Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.)

Applying the above standards to the instant fact situation, we must conclude that appellants have failed to establish that their failure to file a timely 1971 tax return was due to reasonable cause. Respondent's action is therefore sustained.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Richard L. and Marv D. Marks

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 Richard L. and Mary D. Marks for refund of personal income tax in the amount of \$1.00 or more for the year 1971, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of May, 1976, by the State Board of Equalization.

William L. Bryant, Chairman
George J. Fuller, Member
Paul L. Dean, Member
_____, Member
_____, Member

ATTEST: W. W. Hendon, Executive Secretary