BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JOHN E. **VANDERPOOL**)

For Appellant: John E. **VanDerpool,** in pro. per.

For Respondent: James W. Hamilton
Acting Chief Counsel

James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of John E. **VanDerpool** against a proposed assessment of additional personal income tax and penalties in the amounts of $76.46 and $38.24, respectively, for the year 1967.

Subsequent to the filing of this appeal, respondent conceded that appellant did not fail to file a return after notice and demand, within the meaning of former section 18682 of the Revenue and Taxation Code. As a consequence, the only penalty remaining in dispute is the one in the amount of $19.12 for failure to file a timely return. (Rev. & Tax. Code, § 18681.)

The primary question presented for decision is the propriety of respondent's disallowance of a claimed theft loss.

Respondent received a federal audit report in 1971 which disclosed that the Internal Revenue Service made certain revisions to the deductions claimed on appellant's 1967 federal income tax return. Included was the disallowance of a claimed theft loss. Respondent issued the proposed tax assessment at issue based on the federal audit report. Appellant duly protested this action. Respondent denied the protest and this appeal followed.

Reviewing the material facts under consideration, we find that appellant reported to the police that his apartment was burglarized and certain contents stolen while he was absent from the premises. He reported that these events occurred the evening of November 29, 1967, between the hours of 7:30 p.m. and 9:30 p.m. The police were notified the next day.

The subsequent police investigation established that the burglar or burglars entered through an unlocked bedroom door, and removed a color television set from a stand in the bedroom and a tape recorder from the apartment hallway.[1] It was also indicated in the

1/ Statements in the federal audit report indicate that appellant did not provide the Internal Revenue Service with a copy of the police burglary report in which the results of the police investigation were explained.

police report that the approximate values of the color television set and tape recorder equipment, at the time of the theft, were $400 and $100, respectively. Two other assets were also listed as stolen. According to the report, the total estimated loss amounted to $1,425.

In support of a deductible property loss uncompensated by insurance or otherwise, appellant submitted a schedule with his 1967 state income tax return, listing the assets claimed stolen and showing his estimate of their individual fair market values at the time of the alleged theft. On this schedule he valued the color television set and tape recorder at $325 and $425, respectively. The other assets listed were items not mentioned in the police report. The total loss estimated was $1,652.

A deduction is allowed for losses by theft of property not connected with a trade or business (after a $100 exclusion), if not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subds. (a) & (c) (3).)

By regulation, the loss is limited to the lesser of either an amount equal to the fair market value of the property immediately before the theft reduced by any fair market value immediately after the theft, or the adjusted basis for determining loss from the sale or other disposition of the property involved. (Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2) (A).) The applicable federal statute and regulation are similar. (Int. Rev. Code of 1954, § 165; Treas. Reg. 1.1657(b) (1).)

In challenging appellant's right to any loss deduction, respondent relies upon the well-established rule that the burden of proof is imposed upon the taxpayer to overcome affirmatively the presumptive correctness of a federal determination. (Rev. & Tax. Code, § 18451; Appeal of Jack E. and Corinne Phillips, Cal. St. Bd. of Equal., Jan. 7, 1975; Appeal of Harry and Tessie Somers, Cal. St. Bd. of Equal., March 25, 1968; Appeal of J. Morris and Leila G. Forbes, Cal. St. Bd. of Equal., Aug. 7, 1967; Appeal of Precious Frank Thompson, Cal. St. Bd. of Equal., Sept. 17, 1975.)

Respondent emphasizes that a taxpayer does not meet that burden by the mere unsupported assertion that the federal action is incorrect. (Appeal of Merlin L. Hartdegen, Cal. St. Bd. of Equal., Sept. 12, 1968.) In this appeal, respondent also specifically relies upon the discrepancy between the items and values listed in the tax return schedule and those shown in the police report.

We conclude, however, that unlike the circumstances in the appeals cited above, appellant has met his burden of proof, to the extent of establishing his right to a partial deduction of the claimed loss arising from theft. The results of the police investigation, and appellant's prompt reporting of the event to the police, substantiate appellant's claim that theft of the television set and tape recorder occurred. (See Edna M. Oatis, T.C. Memo., May 27, 1947.) It is also clear that the theft of other assets has not been proved.

As a consequence, we conclude that appellant is entitled to a deduction arising from theft based upon the fair market values of the above two stolen items. (See Jim and Mattie McNamee, T.C. Memo., Oct. 6, 1953; see also Louis F. Tucker, Sr., T.C. Memo., Oct. 31, 1950; James E. Wood, T.C. Memo., May 27, 1971; Arnold Roy Bushey, T.C. Memo., June 21, 1971.) Upon the basis of the entire record, we find that the fair market values of the television set and tape recorder equipment, when stolen, were $325 and $100, respectively. Thus, appellant is entitled to a $325 deduction ($425, less the $100 statutory exclusion) for property loss arising from theft.

With respect to the penalty at issue, the material facts are as follows: Appellant's income for 1967 was sufficient to require the filing of a return but the return was filed in March of 1970, almost two years late, and only after respondent issued a proposed assessment of tax and a 25 percent penalty for failure to file a timely return. Appellant paid the tax and penalty when he filed the tardy return. Subsequently,

after receiving the federal report, respondent issued an additional proposed assessment, including the penalty at issue in the amount of 25 percent of the additional tax assessment.

The applicable code section provides for a penalty if the taxpayer fails to file a timely return "unless it is shown that the failure is due to reasonable cause and not due to willful neglect." (Rev. & Tax. Code, § 18681, subd. (.a).) In view of this express statutory language, it is clear that a penalty applies where there is failure to file a timely return unless the taxpayer proves reasonable cause. (See Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Appellant has presented no facts or set forth any reasons in this appeal justifying the late filing of the 1967 return.

Pursuant to the provisions of section 18681, as they read in 1967, the penalty is in the amount of 5 percent of the tax for each 30 days or fraction thereof elapsing between the due date of the return and the date on which filed, but not in excess of 25 percent of the tax. Because of those provisions, the late filing penalty should be based on 25 percent of the correct tax ultimately found to be due. (See Plunkett v. Commissioner, 118 F.2d 644.) Therefore, the additional late filing penalty at issue was properly imposed but the amount thereof must be reduced because of the revision to the latest proposed assessment of additional personal income tax which was based upon federal adjustments.

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,

Appeal of John E. VanDerpool

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 John E. VanDerpool against a proposed assessment of additional personal income tax and penalties in the amounts of $76.46 and $38.24, respectively, for the year 1967, be and the same is hereby modified in accordance with the opinion of this board and in accordance with respondent's concession.

Done at Sacramento, California, this 6th day of October, 1976, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Executive Secretary