

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DAVID A. AND BARBARA L. BEADLING)

Appearances:

For Appellants: David A. Beadling, in pro. per.
For Respondent: Jack Gordon
 Supervising 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 David A. and Barbara L. Beadling against a proposed assessment of additional personal income tax and penalties in the total amount of **\$2,336.61** for the year 1968. Since the filing of this appeal, the Franchise Tax Board has conceded that its proposed assessment of additional tax and penalties for 1968 should be reduced to **\$1,958.98.**

The sole issue is whether respondent's reduced assessment of personal income tax and penalties was proper.

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Appellants, husband and wife, became California residents in December of 1967 and remained such during 1968, the appeal year. Appellant husband's employer filed an information return for 1968 indicating it had withheld \$835.64 in state income taxes from appellant husband's wages during that year. In due course the withheld taxes were remitted by the employer to respondent. Upon receipt of the employer's information return, respondent searched its records to determine whether or not appellants had filed a California personal income tax return for 1968. Although joint returns were discovered for 1967 and 1969, no return for 1968 was located. Accordingly, on September 25, 1970, respondent wrote to appellants requesting that they file a return for 1968. Whether or not this correspondence was answered is not clear. Appellants state that it was, while respondent maintains that it **was** not. In any event, respondent sent appellants a follow-up letter on January 7, 1971. Since no response from appellants was forthcoming, on October 15, 1971, respondent issued a notice of proposed assessment of personal income tax and penalties based upon available information. (See Rev. & Tax. Code, § 18648.)

On December 13, 1971, appellants protested the proposed assessment and once again respondent requested that a return for 1968 be submitted. On November 22, 1972, respondent wrote a follow-up letter to appellants, again requesting that a 1968 return be filed. When no response to that letter was received, respondent denied appellants' protest on May 11, 1973. This timely appeal followed.

On June 4, 1974, appellants submitted a return for 1968 which they had allegedly filed on April 14, 1969. Respondent used the tax liability figure shown by appellants on this return and subtracted from that amount the \$835.64 previously withheld to arrive at the tax still due. Penalties for late filing (Rev. & Tax. Code, § 18681) and failure to file a return upon notice and demand (Rev. & Tax. Code, former § 18682) were **then added**. These computations resulted in the aforementioned reduction of respondent's original assessment.

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Appellants contend that the tax withheld from appellant husband's 1968 wages was withheld wrongfully since mandatory payroll withholding by employers was not in effect in California until 1972. (See Stats. 1971, 1st Ex. Sess., ch. 1, pp. 5023-37; Rev. & Tax. Code, § 18805 et seq.) In view of this so-called "wrongful" withholding, appellants maintain that they should be excused from any tax liability for 1968 in excess of the amount withheld.

We find no merit in appellants' position. Respondent's revised assessment granted appellants full credit for the taxes withheld in 1968. The so-called "wrongfulness" of the withholding is therefore immaterial to a determination of the issue before us. The only question to be answered is the propriety of respondent's assessment of additional tax and penalties for 1968 in excess of the withheld amount.

Respondent's determinations with respect to both tax and penalties are presumptively correct and the burden is on the taxpayer to prove them erroneous. (See Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Here, appellants did not contest the correctness of the tax aspect of respondent's assessment and have therefore failed to carry their burden of proving it erroneous. As to the penalty for untimely filing, we have only appellants' unsupported statement that a 1968 return was timely filed, contrasted with respondent's statement that no such return was received by them. Under these circumstances, we find appellants' unsupported statement insufficient to carry their burden of proof. Regarding the penalty for failure to file upon notice and demand, the record reveals that appellant first demanded that a return be **filed** in September of 1970, and that it repeatedly requested such a filing in subsequent correspondence directed to appellants. Nevertheless, no **return for** 1968 was submitted to respondent until June 1974, nearly four years after respondent made its initial demand. The long delay in responding to respondent's demand was unreasonable and therefore justified respondent's imposition of this penalty. (See Appeal of J. H. Hoeppel, Cal. St. Bd. of Equal., Feb. 26, 1962.) It

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follows that appellants have failed to carry their burden of proving the incorrectness of the penalty for failure to file upon notice and demand.

Based on the foregoing; we must sustain respondent's assessment of tax and penalties in this matter.

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 David A. and Barbara L. Beadling against a proposed assessment of additional personal income tax and penalties in the total amount of **\$2,336.61** for the year 1968, be and the same is hereby modified in accordance with the concession of the Franchise Tax Board. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 3rd day of February, 1977 by the State Board of Equalization.

William J. Smith, Chairman
John J. Seely, Member
Paul J. Hor, Member
Iris Sanchez, Member
_____, Member

ATTEST: *W. W. Dunlop*, Executive Secretary