BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF **CALIFORNIA**

In the Matter of the Appeal Of)
)
JAMES A. **McAFEE**)

Appearances:

For Appellant: James A. McAfee, in pro. per.

For Respondent: Jack E. 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 James A. McAfee against a proposed assessment of additional personal income tax in the amount of $62.94 and a penalty of $15.74 for the year 1969.

Appeal of James A. McAfee

The issues presented are: (1) whether certain federal audit adjustments also apply for state income tax purposes; and (2) whether a penalty for failure to file a timely return should be imposed.

Appellant resides in Los Angeles, California, and is employed as a social worker by the County of Los Angeles. During 1969 his gross income was $8,481.32. The Intern-al Revenue Service disallowed deductions totaling $1,396 on his 1969 federal income tax return. Appellant paid the federal deficiency. Respondent thereafter issued its proposed assessment, revising appellant's taxable income in accordance with the federal changes.

The disallowed deductions included amounts allegedly totaling $645, which represented appellant's unreimbursed travel and transportation expenses while a member of the Social Services Union, 'Local 535. Appellant was a delegate to the union's State Executive Board during 1968, 1969, and thereafter. Delegates were, required to attend board meetings in various California cities on Saturday and Sunday of every sixth week. They were unsalaried and only reimbursed for airplane fare. Appellant's unreimbursed travel expenses included those for hotel rooms, meals and other transportation. Appellant incurred similar unreimbursed expenses as a member of the union's financial review committee.

As a member of the chapter's grievance committee in 1969, appellant also incurred automobile expenses while traveling to represent members. He was also not reimbursed for these expenses. The chapter president estimated that this responsibility required appellant to travel about 800 miles in 1969. Appellant deducted $100 for this expense.

Appellant contests respondent's disallowance of these two deductions. He asserts that he only paid the entire federal deficiency because he was not informed of his right to appeal.

Respondent's proposed assessment based on a federal audit report is presumed correct and the burden is on the taxpayer to prove it erroneous. (Appeal of Robert J. and Evelyn A. Johnston, Cal. St. Bd. of Equal., April 22, 1975; Appeal of J. Morris and Leila G. Forbes, Cal. St. Bd. of Equal., Aug. 7, 1967.) Moreover, deductions are a matter of legislative grace and the burden of proving the right thereto is upon the taxpayer. (Deputy v. du Pont, 308 U.S. 488 [84 L. Ed. 416] (1939).) Any unawareness of appeal rights would only explain appellant's reason for not contesting the federal deficiency. It would not have any significant bearing on whether the federal determination was correct. (See-Appeal of Donald D. and Virginia C. Smith, Cal. St. Bd. of Equal., Oct. 17, 1973.)

After reviewing the facts and the applicable law, we are forced to conclude that appellant has not carried his burden by showing that the federal determination was erroneous. Appellant simply has not shownthat the expenditures were proximately related to his business as a county employee. Under the circumstances, they must be considered to be personal rather than ordinary and necessary business expenses. (Deputy v. du Pont, supra.).

We next consider whether a penalty for failure to file a timely return should be imposed. In 1971, respondent learned of the adjustments to appellant's 1969 federal return. Appellant had filed a timely federal return but respondent's subsequent searches have failed to disclose any 1969 state return.

A corporation specializing in income tax work prepared appellant's 1969 state return on February 24, 1970. Consistent with its practice of delivering completed returns to taxpayers for signature and mailing, appellant was provided with the completed return on or before April 4, 1970. At the hearing, appellant explained that he signed the original and mailed it timely together'with a check payable to respondent. Appellant emphasized that he has always filed timely returns. His checking account book contains an entry for a check to respondent written and dated April 10, 1970, in an amount equal to the tax self-assessed on appellant's copy of the return. An examination

of the page where the entry was made clearly indicates that the entry was also timely, as was subtraction of the amount of the check in computing the bank balance.

Section X8681 of the Revenue and Taxation Code provides for a graduated penalty, not to exceed 25 percent of the tax due, for failure to file a timely return, unless it is shown that the failure is due to reasonable cause and not to willful neglect. The propriety of the penalty presents an issue of fact as to which the burden of proof is on the taxpayer. (Cal. Admin. Code, tit. 18, § 5036; Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966; Otho J. Sharpe, T.C. Memo., Nov. 26, 1956, appeal dismissed, 249 F.2d 447 (1957).)

We conclude, however, that appellant has met this burden. The preparer of the return delivered it to respondent well in advance of the due date. The entry in appellant's checking account record clearly indicates that on April 10, 1970, he made a check payable to respondent for the amount of the self-assessed tax. Appellant stated that he mailed the return timely and we have no reason to doubt his credibility. A letter properly mailed is presumed to have been received in the regular course of the mail. (Evid. Code, § 641.)

Under the circumstances, appellant is also entitled to the special tax credit provided for in section 17065 of the Revenue and Taxation Code, as it read in 1969. Respondent has agreed that appellant would be entitled to the credit if the penalty was not warranted.

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,

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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 James A. McAfee aaainst a proposed assessment of additional personal income tax in the amount of $62.94 and a penalty of $15.74 for the year 1969, be modified to reflect exclusion of the penalty and to provide for an allowance of the special tax credit. 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.

Chairman

Member

Member

Member

Member

ATTEST: W. W. Dunlop Secretary