



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FRANK **E.** AND LILIA Z. **HUBL**OU)

For Appellants: Frank E. **Hublou**, in pro. **per.**

For Respondent: Bruce W. Walker
Chief Counsel

Steven S. Bronson
Counsel

O P I N I O N

This appeal is made pursuant to section **19059** of the Revenue and Taxation Code from the action Of the Franchise Tax Board in denying the claim of Frank **E.** and Lilia **Z. Hublou** for refund of a penalty in the amount of \$53.25 for the year 1973.

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The sole issue presented by this appeal is whether respondent properly imposed a penalty pursuant to section 18683 of the Revenue and Taxation Code^{1/} for appellants' failure to file a tax return upon notice and demand.

Appellants failed to timely file a 1973 California personal income tax return. Appellants also failed to respond to respondent's notice and demand for the return. Consequently, pursuant to section 18648, respondent estimated appellants' 1973 income and issued a deficiency assessment for the tax determined to be due. In addition, pursuant to section 18683, respondent imposed a penalty equal to 25 percent of the estimated tax liability for appellants' failure to file a return upon notice and demand.

-Thereafter, on or about January 6, 1975, appellants filed a 1973 return wherein they reported tax liability of \$213.00. However, appellants also indicated that they were entitled to a credit of \$419.00 for tax previously withheld from appellant husband's salary during 1973. Therefore, appellants claimed a refund of \$278.00, the difference between the credit and the reported tax liability.

Respondent accepted as correct the information reported in the delinquent return. Respondent reduced the section 18683 penalty to 25 percent of the reported tax liability and deducted that amount, \$53.25, from the refund claimed by appellants. The remainder of the claimed refund was paid to appellants. Appellants' subsequent claim for refund of the \$53.25 was denied by respondent, and this appeal followed.

Section 18401 provides that every individual or married couple taxable under the Personal Income Tax Law must file an annual return unless the income

1/ Hereinafter, all statutory references are to the Revenue and Taxation Code.

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of the individual or couple is less than a specified amount. The record on appeal indicates that appellants were required to file a 1973 return under this statute.

Section 18683 provides, in pertinent part:

If any taxpayer ... fails or refuses to make and file a return required by this part upon notice and demand by the Franchise Tax Board, then, unless the failure is due to reasonable cause and not willful neglect, the Franchise Tax Board may add a penalty of 25 percent of the amount of tax determined pursuant to Section 18648 or of any deficiency tax assessed by the Franchise Tax Board concerning the assessment of which the information or return was required.

The record on appeal contains no evidence that appellants' failure to respond to the notice and demand was due to reasonable cause and not willful neglect. Appellants contend that their failure to respond to the notice and demand was due to the advice of a tax return preparation company and of an unidentified employee of respondent. Appellants allege that they were informed a 1973 return need not be filed since the amount of tax withheld from appellant husband's salary exceeded their tax liability. However, uncorroborated allegations of reliance upon the advice of a tax return preparation firm, or of an unidentified employee of respondent, is not sufficient to establish reasonable cause for a taxpayer's failure to respond to a formal notice and demand issued by respondent. (Cf. Appeal of Lee J. and Charlotte Wojack, Cal. St. Bd. of Equal., March 22, 1971; Appeal of Robert M. Catlin, Jr., and Esther H. Catlin, Cal. St. Bd. of Equal., Nov. 17, 1964.)

Appellants also contend that the penalty in question should not be imposed since respondent ultimately determined that no tax deficiency existed for 1973. However, the fact remains that appellants failed to respond to the formal notice and demand for the 1973 return. **It is the** failure of a taxpayer to respond to

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the notice and demand, and not the taxpayer's failure to pay the **proper** tax, that section 18683 was designed to penalize.

With respect to the computation of the section 18683 penalty, it is our opinion that respondent properly based the penalty upon the amount of tax determined to be due, which in this instance coincided with that reported on appellants' delinquent return. Section 18683 indicates that the penalty may be computed as 25 percent of the tax deficiency resulting from the taxpayer's failure to **file** a return. It is well established that in the case of a delinquent return the deficiency is the total correct tax liability as of the due date of the return, rather than the tax **shown** on the delinquent return. (See Herbert C. Broyhill, ¶ 68,025 P-H Memo. T.C. (1968); Appeal of Emery I. and Ingrid M. Erdy, Cal. St. Bd. of Equal., Dec. **15, 1976.**) Moreover, **the** tax deficiency exists regardless of whether **the** taxpayer is entitled to a credit for tax withheld from wages. (See Rev. & Tax. Code, § 18591.1, subd. **(b)(1).**) The credit merely operates to reduce or offset the tax liability that is established by the delinquent return.

For the reasons stated, we conclude that respondent's action in this matter must be sustained.


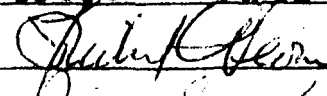


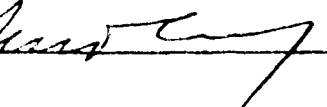
O R D E R

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Frank E. and Lilia Z. Hublou for refund of a penalty in the amount of \$53.25 for the year 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of July, 1977 by the State Board of Equalization.

 , Chairman
 , Member
 , Member
 , Member
 , Member