

Appeal of Howard G. and Mary Tons

The only issues in dispute are: (1) whether appellants should be subject to late filing penalties; and (2) whether interest should be imposed on the unpaid amounts of the tax deficiencies.

On January 27, 1969, appellants filed delinquent separate state income tax returns for the years 1966 and 1967. They had not made any requests for an extension of time to file late state returns. Such requests had been made to the Internal Revenue Service (IRS), but were denied. Appellants also filed delinquent federal returns for those years. During 1969 respondent received reports from the IRS disclosing several changes made by it with respect to the taxable income reported by appellants on those returns, and disclosing the imposition of penalties because of failure to file timely **federal** returns. Respondent issued notices of proposed assessment in which it made corresponding adjustments.

In 1971, respondent received a revised federal audit report for each appellant by which the additional federal tax liability for each spouse was reduced for the year 1966, left unchanged for 1967, and the penalties for both years reaffirmed. On March 31, 1972, respondent issued notices of action in which it revised its **proposed** assessments for 1966 in accordance with the federal changes, and affirmed its proposed assessments for 1967 and the imposition of **penalties** for delinquent filing for both years. In this appeal appellants object to the assessment of the penalties and accrued interest.

Section 18681 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. Section 25931 states an almost identical provision for the corporation franchise tax. The above statutes are substantially the same as section 6651(a) of the federal Internal Revenue Code of 1954.

Appellants contend that the delinquency penalties should not be imposed, relying upon the same reasons that they urged before the IRS. At the federal level, appellants had written the IRS stating that it was impossible to file timely returns for 1966 and 1967 because of litigation with the Farmers and Merchants Bank of Long Beach (Farmers). They alleged that the various existing lawsuits "were of the utmost importance in endeavoring to arrive at our proper tax losses for this period." They had admitted having in their files substantiation of the losses in the form of certain written documents but stated that:

Appeal of Howard G. and Mary Tons

. . . due to our complete lack of ability to determine the reason for the losses [we were] hesitant to file a return that could not be substantiated by the disbursements of funds above and beyond those that were recorded in our closing books of record for the business involved.

They asserted that every attempt was made, through innumerable requests to appropriate Farmers' officials, to obtain the records and information from Farmers, justifying its demand for funds above the amount of liabilities recorded on appellants' books. Appellants claimed that they were not obtained until early in 1970.

Appellants also alleged, at the federal level, that most of their necessary records, except for the original books of entry and the general ledger, were confiscated by the County of Los Angeles because of a tax sale at an earlier date.

Finally, appellants had also advised the IRS that, notwithstanding the refusal to grant extensions, "as we felt that there was no tax due, and we were having such difficulty trying to obtain the records to be able to file a return, we felt that there would be no penalty assessed for late filing."

A deficiency assessment issued by respondent on the basis of a federal audit report is presumptively correct: this rule also applies to penalty determinations. (Appeal of Robert R. Ramlose, Cal. St. Rd. of Equal., Dec. 7, 1970.) Moreover, even in the absence of a federal audit, it is well established that taxpayers have the burden of proving that the late filing of their state tax returns was due to reasonable cause and not due to willful neglect. (Appeal of Telonic Altair, Inc., Cal. St. Rd. of Equal., May 4, 1978; see also C. Fink Fischer, 50 T.C. 164 (1968).) Both conditions must exist. (Rogers Hornsby, 26 B.T.A. 591 (1932); Charles E. Pearsall & Son, 29 B.T.A. 747 (1934).)

On the basis of the record before us, there appears to have been no willful neglect. To establish the existence of reasonable cause, however, the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances. (Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den., 350

Appeal of Howard G. and Mary Tons

U.S. 967 [100 L. Ed. 839] (1956); Appeal of Loew's San Francisco Hotel Corp., Cal. St. Bd. of Equal., Sept. 17, 1973.)

Appellants have not introduced any evidence to prove their allegations, other than their prior self-serving written assertions to the IRS. Specifically, they have not established that records in their possession were insufficient to file accurate timely returns or to substantiate deductions, and, if insufficient, that their need to obtain information from Farmers (instead of maintaining complete records of their own) occurred notwithstanding the exercise of ordinary business care and prudence.

Moreover, they have not actually proved that it was impossible to obtain any necessary additional information from Farmers or from another source within the time required. (See Appeal of William T. and Joy P. Orr, Cal. St. Bd. of Equal., Feb. 5, 1968; The Nirosta Corp., 8 T.C. 987 (1947).) Nor have they established that government agencies impounded essential records and, if so, that they were denied access thereto at reasonable times. (See James J. Donohue, ¶66,149 P-H Memo. T.C. (1966), affd., 23 AFTR 2d 69-445 (7th Cir. 1967); Appeal of William T. and Joy P. Orr, supra.)

Furthermore, appellants have not explained why their requests for an extension of time to file federal returns were denied, or why they did not request extensions to file state income tax returns.

In view of all these circumstances, appellants clearly have not proved that the late filing of their state returns was due to a reasonable cause.

We must also reject appellants' contention that no interest should be imposed. Section 18688 of the Revenue and Taxation Code specifically provides that interest upon the amount assessed as a deficiency shall be assessed, collected and paid in the same manner as the tax from the date prescribed for the payment of the tax until the date the tax is paid. In the absence of circumstances of grave injustice, this board has no authority to waive mandated statutory interest. (Appeal of Virgil E. and Izora Gamble, Cal. St. Bd. of Equal., May 4, 1976; Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978.) Such circumstances are clearly absent here.

For the reasons stated above, respondent's action in this matter is sustained.

Appeal of Howard G. and Mary Tons

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 **Howard G. and Mary Tons** against proposed assessments of additional personal income tax and penalties against each of them in the total amounts of \$823.58 and \$942.73, plus interest, for the years 1966 and 1967, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of **January, 1979**, by the State Board of Equalization.

William D. Smith Chairman
W. L. King, Member
Geoff Hensley, Member
_____, Member
_____, Member