

BEFORE THE STATE BOARD OF EQUALIZATION
OF **THE** STATE OF CALIFORNIA

In the **Matter** of **the Appeal** of)
JOSEPH **K.** AND ELLA L. BORGES)

For Appellants: **Joseph K. Borges, in pro. per.**

For Respondent: Bruce W. Walker
Chief Counsel

John A. Stillwell, Jr.
Counsel

O P I N I O N

This **appeal** is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Joseph K. and Ella L. Borges against a proposed assessment of additional personal income tax and a late filing penalty in the amounts of \$433.70 and \$108.42, respectively, for the year 1971, and against a proposed assessment of additional personal income tax in the amount of \$42.24 for the year 1972..

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During the course of these proceedings, appellants paid the proposed assessments of tax; therefore, pursuant to section 19061.1 of the Revenue and Taxation Code, this appeal is treated as an appeal from the denial of claims for refund. Appellants did not pay the proposed assessment of interest which remains **due** to respondent in the event of a decision adverse to appellants. Respondent has agreed, however, to withdraw the **late** filing penalty.

Appellants' 1971 and 1972 federal income tax returns were audited by the Internal Revenue **Service** and certain adjustments were made. They petitioned the United States Tax Court, contesting the federal adjustments. Upon learning of the Tax Court action, respondent requested further information. In response, appellants sent respondent a copy of the Tax Court decision, but failed to send a copy of the working papers which reflected that decision. Therefore, respondent issued notices of proposed assessment which were based upon an extrapolation of the federal deficiencies as finally settled for **1971** and 1972. Eventually, on March 9, 1978, appellants furnished respondent with a copy of the requested Internal Revenue Service working papers. The adjustments made **therein** resulted in a revised federal taxable income that was nearly equal to that previously computed by respondent.

In protesting the proposed assessments, appellants offered to pay the assessments of tax if respondent would agree to refrain from charging interest. The settlement offer was rejected and the proposed assessments were affirmed. This appeal followed. Subsequently, on May 5, 1978, appellants sent two checks for the amounts of the proposed assessments of tax and attempted to condition their negotiation upon acceptance of them by respondent as full payment of the assessments, including interest. Respondent cashed the checks and credited appellants' account.

Here appellants have submitted no evidence to show that the federal determination was erroneous and we gather that they concede its accuracy and their resulting liability (Rev. & Tax. Code, § 18451). Consequently, the only **significant** issue remaining to be decided is whether the interest is applicable on the deficiencies.

We have consistently held that the imposition of interest upon a deficiency is mandatory under section 18688 of the Revenue and Taxation Code. (Appeal of Amy M. Yamachi, Cal. St. Bd. of, Equal., June 28, 1977.) Interest

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is not a penalty, but rather is compensation for the use of money. In addition, the assessment of interest is also not precluded by the fact that respondent negotiated checks received in payment of the proposed deficiencies. We have previously held that respondent's negotiation of a check tendered upon condition that it be accepted as full payment of a disputed tax does not effect a settlement in the absence of a statutory closing agreement. (Appeal of Melvin D. Collamore, Cal. St. Bd. of Equal., Oct. 24, 1972.)

For the reasons **stated**, we must sustain respondent's action.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Joseph K. and Ella L. Borges for refund of personal income tax in the amounts of \$433.70 and \$42.24 for years 1971 and 1972, respectively, and pursuant to section 18595 of the Revenue and Taxation Code, that the action of **the** Franchise Tax Board on the protest of Joseph K. and Ella L. Borges against a proposed assessment of penalty in the amount of \$108.42 for the year 1971 and the assessment of interest on the deficiencies for the years 1971 and 1972, be and the same is hereby modified in accordance with respondent's abatement of the 1971 penalty. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 25 day of September , 1979, by the State Board of Equalization.

Stallman by Benson, Chairman
Christ Monarburg, Member
Dick O'Connell, Member
George Kelly, Member
_____, Member