

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOHN M. SHUBERT)

For Appellant: John M. Shubert, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Jacqueline W. Martins
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 John M. Shubert for refund of interest and penalty in the amount of \$165.77 for the year 1970.

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The question presented in this appeal is whether respondent correctly assessed interest and a penalty on appellant's 1970 income tax liability.

Appellant was employed in California during 1970. In April of 1971 appellant left California and the country for employment overseas without filing an income tax return for 1970. In 1973 appellant, while still overseas, received notice from respondent that he owed \$316.00 in tax for 1970 and a penalty of \$79.00 for 'failure to file' a timely return. Appellant thereupon mailed to respondent payments from overseas towards his 1970 tax deficiency, but ceased making such payments after August of 1973.

In 1978 appellant filed his return for 1970 and self-assessed his tax to be \$235.00. Upon receipt of the late return, respondent accepted appellant's self-assessment and abated the previously assessed tax and penalty. Respondent then assessed interest and penalty on the newly determined tax. Interest of \$92.58 and penalty of \$58.75 were determined to be owed by appellant. Appellant paid the remaining balance of his tax together with the assessed interest and penalty. However, appellant thereafter claimed a refund for the amounts he paid for interest and penalty. ^{1/} Respondent denied appellant's claim for refund.

In regard to the claim for refund of interest we conclude that respondent's action was correct. Appellant should have paid his tax by April 15, 1971. (Rev. & Tax. Code, § 18551.) Instead, he paid his tax in various installments subsequent to that date, the first of which was not paid until July of 1973. Under these circumstances interest is required to be assessed upon the unpaid tax from the date the tax was due until the time actually paid. (Rev. & Tax. Code, § 18686.)

^{1/} Appellant originally claimed a refund for \$1.65.77, despite the fact that the assessed interest and penalty total \$151.33 (\$92.58 plus \$58.75.). Subsequently, however, he reduced his claim to \$117.77. In doing so, appellant appears to, have relied on a Feb. 17, 1978 letter from respondent which inaccurately indicated that the then remaining balance (of appellant's tax liability) of \$117.77 represented interest. However, since appellant has consistently stated an objection to the imposition of any interest, or other related charges, for purposes of this appeal the amounts in controversy shall be \$92.58 for interest and \$58.75 for penalty.

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Appellant argues, however, that he had reasonable cause for making a late payment of tax and that interest therefore should not be assessed in his case. He contends that the failure of respondent to send him receipts for his tax payments from overseas justified his termination of further payments. In his view, the assessment of interest on his late payment of tax is tantamount to the imposition of an unauthorized penalty.

Appellant's contention must be rejected. It is well established that interest is not a penalty; rather, it is merely compensation for the use of money. (See Appeal of Frank R. and C. A. Moothart, Cal. St. Bd. of Equal., Feb. 8, 1977; Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976; also see Bos v. United States, 148 F. Supp. 330 (D. Mass., 1957).) Moreover, there is no defense of due care to an interest assessment. Once it is determined that the proper payment was not made on or before the date prescribed for payment, the imposition of interest is mandatory. (See Appeal of Thomas P. E. and Barbara Rothchild, Cal. St. Bd. of Equal., March 27, 1973; Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965.) Since appellant did not pay his tax by the prescribed date, interest accrued was properly assessed on the unpaid tax from the time the tax was due until the time it was actually paid.

Respondent's action with respect to the claim for refund of assessed penalty also was proper. Pursuant to section 18432 of the Revenue and Taxation Code, appellant was required to file his tax return by the fifteenth of April following the close of the year. However, appellant did not file his return for 1970 until March of 1978. His failure to file a return on a timely basis subjects him to a penalty. (Rev. & Tax. Code, § 18681.) The assessment of this penalty must be sustained unless the taxpayer establishes that the failure to file timely was due to reasonable cause and not due to willful neglect. (See Appeal of Leon C. Harwood, Cal. St. Bd. of Equal., Dec. 5, 1978; Appeal of Arthur W. Keech, Cal. St. Bd. of Equal., July 26, 1977.) Reasonable cause, such as to excuse a taxpayer's failure to file on time, is nothing more than the exercise of ordinary business care and prudence, or such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Orient Investment & Finance Co. v. Commissioner, 166 F. 2d 601 (1948); Charles E. Pearsall & Son, 29 B.T. A. 747 (1934);

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Appeal of Estate of Anna Armstrong, Deceased, Cal. St. Bd. of Equal., Oct. 27, 1964; Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958.) In the above regard, appellant has merely asserted that he left the country in April of 1971 for employment overseas and did not return to California until November of 1976. We are of the opinion that such absence does not constitute reasonable cause for failure to file an income tax return.

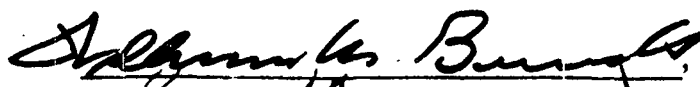
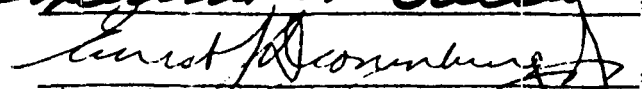
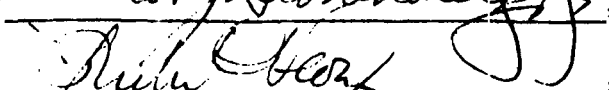
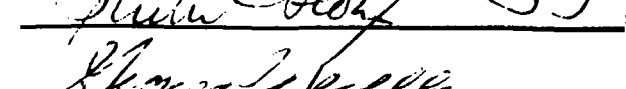
Appellant's situation can be analogized to that which existed in Appeal of J. B. Ferguson, supra, wherein the taxpayer was not excused from the obligation to file a return and pay the tax merely because he was a non-resident. The obligation to file a return in Ferguson, and in the instant case, arises from the receipt of income from a California source. (Also see Rev. & Tax. Code, § 17041.) The fact of non-residence or absence, alone, does not constitute reasonable cause for failure to file a timely return. Consequently, respondent properly imposed the statutory penalty in this case.

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 1.9060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of John M. Shubert for refund of interest and penalty in the amount of \$165.77 for the year 1970, be and the same is hereby sustained.

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

 Chairman
 Member
 Member
 Member
_____, Member