



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
GREG L. DEXTER) No. **82A-2206-AJ**

Appearances:

For Appellant: Brad **Henschel**

For Respondent: Grace Lawson
Counsel

O P I N I O N

This appeal is made pursuant to section **18593^{1/}** of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Greg L. Dexter against a proposed assessment of additional personal income tax plus penalties in the total amount of **\$1,818.70** for the year 1981.

1/ Unless otherwise specified, all section references **are** to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The issue presented by this appeal is whether respondent properly imposed penalties for negligence and for failure to respond to notice and demand.

Appellant timely filed a 1981 Form 540, which provided some information concerning income but none concerning deductions. The document was signed, but appellant had altered the verification located above the signature line, which states that the taxpayer declares, under penalty of perjury, that the return is, to the best of his knowledge, "true, correct, and complete." Appellant erased the words "correct and complete" and replaced them with the word "estimate." Respondent determined that this document was not a valid return and demanded that appellant file a return. When no response was received, respondent issued a notice of proposed assessment of tax and imposed various penalties. On April 15, 1983, appellant filed a valid return for 1981 which provided additional financial information and which claimed a refund.

Based upon the information contained in that return, respondent reduced the amount of tax due and the amount of the penalties. Since the amount of the tax plus penalties was less than appellant's withholding credit, respondent agreed to refund the difference, with interest calculated from the date the valid return had been filed. Respondent's refusal to withdraw the penalties for failure to file after notice and demand (Rev. & Tax. Code, § 18683) and for negligence (Rev. & Tax. Code, § 18684) led to this appeal.

Appellant's first argument is that there should be no penalty for failure to file after notice and demand because he did file a timely return. Respondent contends that the first Form 540 appellant filed was not a valid return and that the penalty for failure to respond to notice and demand was properly imposed.

Section 18431 requires that an income tax return "shall contain, or be verified by, a written declaration that it is made under the penalties of perjury." This part of section 18431 is substantially similar to Internal Revenue Code section 6065. Therefore, interpretations of the federal code section are highly persuasive of the proper interpretation and application of the corresponding state statute. (Meanley v. McColgan, 49 Cal.App.2d 203, 209 (121 P.2d 45) (1942).)

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If a federal Form 1040 or a California Form 540 is not signed under penalties of perjury, it is not a valid return, and penalties for failure to file a return are properly imposed. (Cupp v. Commissioner, 65 T.C. 68 (1975), affd. by unpublished order, 559 F.2d 1207 (3d Cir. 1977); Appeal of Jan A. and Alice H. Michalski, Cal. St. Bd. of Equal., July 28, 1983.) Although appellant did not strike the words "under penalties of perjury" he rendered those words meaningless by declaring the return to be merely a "true estimate" rather than "true, correct, and complete." We conclude, therefore, that appellant failed to comply with section 18431 and that the form was not a valid return. Since appellant had not filed a return, he was obligated to do so upon respondent's demand and his failure properly led to the imposition of the demand penalty.

Appellant's second argument is that no negligence penalty should be imposed. Section 18684 imposes a penalty when any part of a deficiency is due to **negligence** or intentional disregard of rules and regulations. Appellant contends that there was no negligence, since he filed a timely return. This argument is clearly untenable, since, as discussed above, the **Form 540** originally filed was not a valid return. Appellant also contends that there was no deficiency since his credit for withholding exceeded his tax liability as finally ascertained and, therefore, there can be no negligence penalty. We must reject this argument. This board has held that a deficiency is the difference between the taxpayer's correct tax liability and the amount of tax shown on his original income tax return. In the case where a delinquent return is filed, the tax shown on such return does not reduce the amount of the deficiency. (Appeal of Frank E. and Lelia Z. Hublou, Cal. St. Bd. of Equal., July 26, 1977; Appeal of Emery I. and Ingrid M. Erdy, Cal. St. Bd. of Equal., Dec. 15, 1976; see also Middleton v. Commissioner, 200 F.2d 94 (5th Cir. 1952), **decided** when section 271 of the Internal Revenue Code and section 18684 of **the** Revenue and Taxation Code, which define a deficiency, were substantially the same.) Since appellant did not file a timely return, a deficiency existed in the amount of his total tax liability, and the negligence penalty was properly computed on that amount.

For the reasons expressed above, respondent's action, as modified by its agreement, must be sustained.

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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 Greg L. Dexter against a proposed assessment of additional personal income tax plus penalties in the total amount of **\$1,818.70** for the year 1981, be and the same is hereby modified in accordance with the Franchise Tax Board's agreement. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 6th day Of May , **1986**, by the State Board of Equalization, with Board **Members** Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

_____, Chairman
Conway H. Collis _____, Member
William M. Bennett _____, Member
Ernest J. Dronenburg, Jr.** _____, Member
Walter Harvey* _____, Member

*For Kenneth Cory, per Government Code section 7.9

**Abstained