

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
OMER W. ROSS, DECEASED ) No. **8GR-159-VN**

**For** Appellant: W. Douglas Weigand, Jr.  
Attorney at Law

**For** Respondent: Terry Collins  
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), 17 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Omer W. Ross, **Deceased, for** refund of personal income tax in the amounts of \$764.06, \$747.44, \$613.81, \$77.80, and \$315.91 for the years 1972, 1973, 1974, 1976, and 1977, respectively, and in the amount of **\$3,966.66** for the taxable year ended August 31, 1975.

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

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The issue presented for our decision is whether respondent properly denied appellant's claims for refund for the years. 1972 through 1977, inclusive.

Between May 1974 and December 1976, pursuant to an order to withhold tax issued under section 18817, the Franchise Tax Board levied upon appellant's retirement pay from Lockheed Corporation and thereby collected **\$4,002.66** in delinquent taxes. Subsequently, on February 12, 1979, appellant filed claims for refund of taxes paid from 1972 to 1977, alleging that overpayments of tax resulted from the combination of both the levy upon his pension and the withholding of excess tax during the years in question. Upon review, respondent determined that appellant was not entitled to any refunds and denied the claims on May 29, 1980. Thereupon, appellant filed this timely appeal.

In order to recover on a refund claim disallowed by the Franchise Tax Board, a taxpayer bears the burden of proving not only **that respondent's** determination of his tax liability is erroneous but also the correct amount of tax that he believes he owes. (Appeal of Edward Durley, Cal. St. Bd. of Equal., July 26, 1982.) In these proceedings, appellant's principal contention is that the amount of taxes collected by the Franchise Tax Board from 1972 to 1977 surpassed his actual tax liability for those taxable years. On his refund claim forms (form FTB **3543**), appellant set forth the correct amount of taxes that were withheld or garnished and his corresponding tax liabilities, demonstrating that there were overpayments in each of the appeal years.

However, section 19051 provided, in part, when a tax refund must be made to a taxpayer:

If the Franchise Tax Board or the board, as the case may be, finds that there has been an overpayment of tax, penalty, or interest by a taxpayer for any year for any reason, the amount of the overpayment shall be credited against any taxes then due from the taxpayer under this 2 part and the balance refunded to the taxpayer. 2

2/ Section **19051** was amended in 1976 and 1979. (Stats. **1976**, ch. 150, § 12, p. 242; Stats. 1979, ch. 292, § 24, p. 1085.)

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As is evident from the language of the statute, a refund was authorized only after any overpayment of taxes, penalties, or interest was first applied to any past or presently due taxes owed by the taxpayer. The California Personal Income Tax Law contains no other provision for refunds. (Appeal of Robert L. Pickett, Cal. St. Bd. of Equal., July 31, 1973.)

In the present matter, respondent has demonstrated that the overpayments in the first three years, 1972 to 1974, were credited against outstanding tax liabilities from prior taxable years. With regard to appellant's claim of **\$3,966.66**, which was apparently for refund of taxes collected through the garnishment upon his retirement pay, respondent's records show that the **\$4,002.66** actually collected through that procedure was used to pay off appellant's delinquent taxes from 1965, 1968, 1969, 1970, and 1971. Finally, respondent has shown that the remaining overpayments from 1976 and 1977 were refunded to appellant. Because appellant does not dispute that he had outstanding tax liabilities from years prior to the ones under review, we must conclude that respondent properly credited the overpayments of tax against those liabilities as required by section 19051. Moreover, we must assume that appellant received the refunds of the overpayments in 1976 and 1977 since he has not denied receiving those sums. Appellant thus has not provided any reason for us to question the propriety of respondent's action in these respects.

Appellant argues; however, that he was entitled to tax refunds in 1973, 1974, and 1975 because the **over-**payments in those years were applied to offset penalties that were not properly assessed. Respondent has informed us that the 1973 penalty of \$233.14 was a 25-percent penalty assessed under section 18683 for appellant's failure to file a tax return after notice and demand. To establish that that penalty was improper, appellant has the burden of proving that his failure to file was due to reasonable cause and not willful neglect. (Appeal of Ronald A. Floria, Cal. St. Bd. of Equal., Jan. 3, 1983.) Here, because appellant has not denied his failure to file following receipt of the notice and demand nor given any excuse for such failure, we must assume that the penalty was applied correctly. (Appeal of Harold and Lois Livingston, Cal. St. Bd. of Equal., Dec. 13, 1971.) On the other hand, respondent has discovered that the penalty of \$30.00 assessed in 1974 and the penalty of \$14.75 assessed in 1975 were erroneously imposed. Accordingly, the overpayments that were credited to these

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two penalties must be refunded to appellant, Except for this modification, respondent's action in denying appellant's claims for refund will 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 19067 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Omer W. Ross, Deceased, for refund of personal income tax in the amounts of \$764.06, \$747.44, \$613.81, \$77.80, and \$315.91 for the years 1972, 1973, 1974, 1976, and 1977, respectively, and in the amount of **\$3,966.66** for the taxable year ended August 31, 1975, be and the same is hereby modified in accordance with respondent's concession regarding the penalties for 1974 and 1975. In all other respects, the action of the Franchise Tax Board **will be** sustained.

Done at Sacramento, California, this 10th day of June , 1986, by the State Board of Equalization, with Board **Members** Mr. Nevins, Mr. **Collis**, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Walter Harvey*</u>	, Member

\*For Kenneth Cory, per Government Code section 7.9