

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of **the Appeal** of)
RUSSELL GARNER) No. **82J-1885-SW**
)

Appearances:

For Appellant: Ray O. Womack
Attorney at Law

For Respondent: Lorrie K. **Inagaki**
Counsel

OPINION.

This appeal is made pursuant to section **18646^{1/}** of the Revenue and Taxation Code from the action of the **Franchise** Tax Board in denying the petition of Russell Garner for reassessment of a jeopardy assessment of personal income tax in the amount of **\$17,884** for the period January 1, 1981, to November 17, 1981..

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

Appeal of Russell Garner

The issue presented in this appeal is whether appellant has shown that his petition for reassessment was filed in a timely manner.

On November 17, 1981, appellant was arrested by the Riverside County Sheriff's Department for illegal bookmaking activities. Based on pay and owe sheets seized by the police which covered an eight-week period in **1981**, respondent terminated appellant's 1981 tax year and issued a jeopardy assessment. At the time of appellant's arrest, \$6,106 had been seized by the police from appellant and impounded.

Appellant's tax case was assigned to Ronald D. Maddox of the Franchise Tax Board, and he began making entries of events relating to this case. The following are notations made in appellant's case file by Maddox:

RDM **11/19/81** Bill **Lockey** called says he contacted (name deleted), Nevada Gaming Commission. Call him Tuesday Nov. 24, **1981-Taxpayer** made in excess of **\$100,000.00** in Nevada.

RDM **12/04/81** Received Supplementary Report-get Rapsheet.

RDM **01/18/82** Attorney called (I didn't take call) will petition within 60 day period (How?)
(Emphasis added.)

RDM **02/16/82** No petition to data [sic] - 60 days expired - Transfer money and send to close out. (Emphasis added.)

RDM **03/29/82** Transcript shows money transferred. Send to file.

(Resp. Br. at 4.)

The original assessment was based on information derived from pay and owe sheets seized by police on the day appellant was arrested. The information covered an eight-week period in 1981. The total of losing bets

Appeal of Russell Garner

was multiplied by the number of eight-week units contained in the taxable period to establish taxable income of \$557,351. The net tax was **\$60,122.61**.

The file notes indicate that on January 18, 1982, appellant's attorney called the office and stated that a petition would be filed within the 60-day period. Appellant contends that his attorney, Ray O. Womack, **mailed a** petition for reassessment on Monday, January 18, 1982. Mr. Womack has also stated that **on that** same date he sent a power of attorney to appellant, who signed it and returned it. Mr. Womack states that he then mailed it to respondent. Mr. Maddox's file notations show that on January 16, 1982, **60** days after the issuance of this jeopardy assessment, no petition for reassessment had been filed.

On **April 15**, 1982, appellant and his spouse filed a joint income tax return for 1981 in which they declared income of **\$45,000** from "gambling." The amount claimed as a refund was \$6,267, which approximately equals the amount respondent impounded on November 17, **1981**, plus interest. On July 23, 1982, respondent wrote appellant the **following letter**:

We are in receipt of your 1981 return signed under date of April 15, 1982, and requesting a refund of **\$6,267.00**. However, our jeopardy assessment, a copy of which is enclosed, was issued on November 17, 1981, without receipt of a petition within 60 days as specified in our notice.

Accordingly, we are unable at this time, to issue the refund claimed on your return of **\$6,267.00**. Your only statutory recourse is to pay the assessment of November-17, 1981, in full and then file a claim for refund.
(Emphasis added.)

(Resp. Hr. at 5.)

On August 6, 1982, Womack called Maddox and stated that he had mailed the petition for reassessment and the power of attorney in **January**. Copies of the documents allegedly sent in January were mailed to respondent *on* August 9, 1982. The petition for reassessment was dated **January 15**, 1981, (although it was obviously meant to be "**1982**"), and the power of attorney indicated that it had been signed by appellant on February 14, 1982.

Appeal of Russell Garner

Mr. Maddox apparently did not notice that the power of attorney was not executed by appellant until February 16, 1982, and he began to treat the copies of the petition for reassessment as if they had been received in a timely manner. He reduced the assessment from **\$60,122.61** to **\$17,884^{2/}**, and notified appellant by letter on March 9, 1983, that if he did not agree with the assessment as reduced, he could appeal within 30 days. Appellant filed this appeal on April 7, 1983. On **June 29, 1984**, respondent filed a motion to dismiss it for lack of jurisdiction.

Respondent maintains that, (1) no petition for reassessment was received by them until August 9, 1982, -whereas the appeal **period** expired on January 18, 1982; (2) no estoppel can lie against the respondent for not having caught the oversight earlier because the appellant has benefited handsomely from the reduction of the original assessment from **\$60,122.61** to **\$17,884.00**; (3) in order for the **appellant** to retain the benefit of the reduced **assessment**, the reassessment must be pursuant to section 19131 which does not grant new appeal rights; and (4) the parties cannot confer jurisdiction on this board where it does not exist by statute, and the only statutory right to **appeal** still open to appellant requires him to pay the balance of the reassessment of \$17,884 and file a claim for refund.

Appellant contends that the petition for reassessment was filed in a timely manner and that respondent has no evidence to support its position that appellant engaged in illegal activities or received taxable income not reported on his 1981 income tax return.

Section 18644 provides that within 60 days after the mailing of a jeopardy assessment, a taxpayer may file with the Franchise Tax Board a written petition for reassessment. If no petition is filed within the 60 days, the jeopardy assessment becomes final. In this case, appellant contends that the petition for reassessment was sent in a timely manner by his attorney on Monday, January 18, 1982. In support of this statement, appellant on August 9, 1982, sent respondent a copy of a

2/ The revised assessment of **\$17,884** is based on eight weeks of actual pay and owe records seized at the time of appellant's arrest. It has not been projected over the entire taxable period.

Appeal of Russell Garner

petition for reassessment dated January 15, 1981, and a copy of a **power** of attorney signed by appellant on February 4, 1982. Respondent has no record of having received either of these documents prior to receiving the above-mentioned copies in August of 1982. Appellant's position is that the documents were mailed but were either misplaced in the mail or by respondent upon receipt.

This board has previously held **that**, where evidence of mailing is unclear or where the only proof offered is the taxpayer's self-serving allegation that the document **was** timely mailed and the taxing agency's records indicate no document was ever received, it cannot be concluded that there is sufficient evidence to support the **taxpayer's** position. (See Appeal of Richard L. and Mary D. Marks, Cal. St. Bd. of Equal., May 4, 1976.) Appellant has **not** shown, through any direct evidence, that the **petition** was ever actually mailed. A copy of the purported petition, without convincing evidence of mailing, is insufficient to overcome respondent's records that no petition for reassessment was timely filed. (See Appeal of La Salle Hotel Company, Cal. St. Bd. of Equal., Nov. 23, 1966.) We cannot conclude that the petition for reassessment **was** timely.

The facts in this case do indicate that Mr. Maddox **accepted** the copies of the petition for reassessment **and** the subsequently signed power of attorney as a timely petition for reassessment. He ultimately reduced the original assessment. The question arises as to whether this action by Mr. Maddox estops respondent from taking the position that the petition for reassessment was not timely. We must conclude that it does not. As a general rule, the government is neither bound nor estopped by the acts of its officers and agents. (10 Mertens, Law of Federal Income Taxation, § 60.02, p. 73 (1984 Rev.). Estoppel will apply only when the necessary elements are present and when the case is clear and the injustice great. (United States Fidelity and Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384, 389 (303 P.2d 10341 (1956).) We do not find in this case the type of "injustice" which would warrant estoppel. Appellant has not met his burden of showing that he relied on the erroneous actions of Mr. Maddox and changed his position for the worse. **In** other words, the required detrimental reliance has not been shown. (Appeal of Arden K. and Dorothy S. Smith, Cal. St. Bd. of Equal., Oct. 7, 1974.) Since the jeopardy assessment became final in January of 1982, and

Appeal of Russell Garner

Mr. Maddox's revision occurred in March of 1983, appellant could not have relied to his detriment on Mr. Maddox's erroneous actions. The assessment was already final. If appellant wishes to contest the assessment further, he must pay the remaining amount due and then file a timely claim for refund. If respondent denies the claim, appellant may then file an appeal with this board.

For the reasons discussed above, this board lacks jurisdiction to determine the merits of the present appeal. Accordingly, the appeal must be dismissed.

Appeal of Russell Garner

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 appeal of **Russell** Garner from the action of the Franchise Tax Board in denying his petition for reassessment of a jeopardy assessment of personal income tax in the amount of \$17,884 for the period January 1, 1981, to November 17, 1981, be and the same is hereby dismissed for want of jurisdiction.

Done at Sacramento, California, this 20th day of August, 1986, by the State **Board** of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

Richard Nevins, 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