BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of:	)	
	)	Nos. 82A-1619-GO
CHARLES C. AND	)	and 84A-1212
ELYNOR W. RENSHAW	)	

Appearances:

For Appellants: Charles C. Renshan, in pro. per.

For Respondent: Grace Lawson, Counsel

O P I N I O N

These appeals are made pursuant to section 18593[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Charles C. and Elynor W. Renshaw against proposed assessments of additional personal income tax in the amounts of $373.95, $714.78, and $564.88 for the years 1977, 1978, and 1979, respectively.

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

The issues presented in these appeals are as follows:

(1) Whether respondent is barred from asserting the assessments for 1977 and 1978 for allegedly not complying with Hearing Procedure Regulation section 5030, (Cal. Admin. Code, tit. 18, reg. § 5030.)

(2) Whether respondent is barred pursuant to the doctrine of laches from *asserting all* of the assessments at issue as a result of its allegedly dilatory practices.

(3) To the extent that respondent is not so barred, whether respondent properly determined that appellants' horsebreeding activity was not engaged in for profit within the meaning of section 17233.

During the years at issue, Charles C. Renshaw, a successful attorney, along with his wife Elynor, owned a two-acre ranch home in the Del Mar area of San Diego County. In 1974, appellants began to claim a loss on their personal income tax returns resulting from a horsebreeding activity. Apparently, appellants used two horses in 1977, three horses in 1978 and two horses in 1974 for such endeavor. Appellants never declared any *gross* income from the horsebreeding activity and, during the years at issue, appellants' gross nonfarm income and income and deductions from the activity were reported as follows:

Year	Gross Nonfarm Income	Horse-breeding Income	Horse-breeding Deductions
1977	$ 45,477	-0-	$ 3,304
1978	71,613	-0-	6,498
1979	87,526	-0-	5,137
	$204,616	-0-	$14,939

Upon audit, respondent concluded that no evidence existed to show that appellants kept separate records of income or assets, maintained separate checking or savings *accounts,* or secured a business license. Notwithstanding this, appellants alleged that Charles, with his grandfather, had previously run a farm on which horses were bred and raised for profit and, in addition to obtaining a law degree, had studied genetics. Moreover, appellants

state that the time they spent was all that was required to raise the mares. (App. Br. at 3.)

However, based upon the history of losses, financial status of appellants, recreational elements associated with horsebreeding, and lack of businesslike conduct, on January 2, 1981, respondent determined that the subject activity was not operated for profit for the years 1977 and 1978 and, accordingly, limited the, resulting losses as required by section 17233. On January 9, 1981, appellants demanded a hearing which was not held until May 27, 1982, before a 'nearing officer. The hearing officer apparently recommended the allowance of the subject deductions, but by notices of action dated January 27, 1983, respondent issued the assessments For 1977 and 1973 disallowing the subject deductions pursuant to section 17233. On February 8, 1983, appellants filed their appeal with this board and requested an oral hearing for the years 1977 and 1978.

While the appeal for 1977 and 1978 was pending, appellants' 1979 personal income tax return containing, the same loss issue involving horsebreeding, was assigned for audit on December 22, 1983. On March 28, 1984, a notice of proposed assessment was issued for that year again determining that the horse'breeding activity was not operated for profit; Appellants protested and requested an administrative hearing which was held on June 20, 1984. On August 2, 1984, respondent affirmed its notice and, on August 16, 1984, appellants filed a timely appeal to this board for the year 1979.

By letter dated September 28, 1984, this board consolidated the appeal of the year 1979 with the appeal filed for the years 1977 and 1978. While no stipulation for extension was signed by appellants (Cal. Admin. Code, tit. 18, § 5030), no memorandum was filed by respondent until November 13, 1984, and the oral hearing was not held before this board until. October 1, 1985.

Appellants first argue that the failure of respondent to file a memorandum within a period not to exceed one year, presumably from the filing of this appeal (February 10, 1983), constitutes prounds to bar respondent from asserting the assessments for 1977 and 1978 pursuant to Bearing Procedure Regulation section 5030. (App. Ltr., Oct. 9, 1984.)

Hearing Procedure Regulation section 5030 provides as follows:

> Deferrals. The board may defer proceedings for an indefinite period upon the filing of a written stipulation between the appellant and the Franchise Tax Board or, depending on the circumstances, for a period not to exceed one year at the written request of either party.

(Cal. Admin. Code, tit. 18, § 5030.)

While appellants' argument is imaginative, it suffers from at *least* two major obstacles. First, Rearing Procedure Regulation section 5026 provides, in relevant part, that "[r]easonable extensions of time for the filing of memoranda may be granted upon written request." (Cal. Admin. Code, tit. 18, § 5026.) No definite time Limit is imposed by Bearing Procedure Regulation section 5026 with respect to the filing of memoranda, and we have never interpreted or applied Bearing Procedure Regulation section 5026 to require such a definite time Limit. As a matter of practice, we routinely grant both taxpayers and the Franchise Tax Board "[r] easonable extensions of time for the filing of memoranda." To interpret Bearing Procedure Regulation section 5030 as appellants do would severely limit our flexibility in administering orderly hearings and clearly emasculate Bearing Procedure Regulation section 5026. Neither of these results is appropriate.

Undoubtedly, this proceeding was not handled in the' most expeditious fashion, either before the Franchise Tax 3oard or while on appeal before this baard. However, part of the delay occurred because 1979 was audited after 1977 and 1978 had been appealed. Respondent did not file its initial brief until it was able to consolidate all the years. Furthermore, although this matter was ready for hearing in December 1984, the next available hearing date in San Diego, the location requested by appellants, was not until September 1985.

Secondly, and more importantly, there is no provision in Hearing Procedure Regulation section 5030 which mandates that an appeal be dismissed or that the Franchise Tax Board's action be barred for any claimed infraction. Accordingly, to interpret that section as appellants do would' clearly be unwarranted on our part, Therefore, we hold that appellants' first argument is without merit.

Appellants advance another novel theory contending that the doctrine of laches prevents respondent

from asserting any of the assessments due to its alleged dilatory practices in processing these appeals. In general, laches is defined as the neglect or faiiuce of a plaintiff to assert a right for such a period of time which results in prejudice to defendant requiring that the plaintif-f's cause of action be barred in equity. (Swart v. Johnson, 48 Cal.App.2d 829, 833 [120 P.2d 699] (1942).) Whether any delay by a plaintiff in bringing an action was unreasonable is a question of fact, (Williams v. Marshall, 37 Cal.2d 445 [235 P.2d 372] (1951).) The application of the doctrine is based upon the fact that material changes of condition may have taken place between the parties during the period of neglect. (Verdugo Canon Water Co. v. Verdugo, 152 Cal, 655, [93 P. 1021] (1908).) Moreover, the defense of laches depends not only upon a plaintiff's delay in asserting a right, but also upon an injury to the defendant occasioned by that delay, since a mere laps2 of time, without prejudice to the -defendant therefrom, is in itself insufficient to constitute laches in equity. (Butler v. Holman, 146 Cal.App.2d 22, [303 P.2d 5733 (1956).)

Assuming, arguendo, that-this board is empowered to apply the Doctrine of Laches, in our opinion, no such equitable relief is available to appellants under the facts of this case. First, nothing in the record indicates that any delay in these proceedings was unreasonable in Length, (Williams v. Marshall, supra.) Respondent was quite amenable and prompt in granting appellants two administrative hearings and much of the lengthening of these appeals was caused by appellants properly exercising their complete and full appeal rights. More importantly, there is no evidence that the purported delay injured appellants in any way. Appellants argue that the delay prevented them from providing two witnesses, a veterinarian and a profes-sional trainer, whose whereabouts are now unknown. (App. Br. at 3.) Certainly, appellants' own recounting of these peoples' activities would be sufficient in these appeals and, in an appropriate case, we have previously found that activities were engaged in for profit as evidenced by the expertise of a taxpayer's advisors without the testimony of those advisors. (See, e.g., Appeals of William C. and Jane J. Kellogg, Cal. St. Bd. of Equal., June 25, 1985.)

The first two issues having been decided adversely to appellants, we must now review the horse-breeding activity itself. Section 17233 provides, in relevant part, that if an activity is "not engaged in for

profit," only those deductions allowable regardless of a profit objective (e.g., taxes or interest) may be allowed. Accordingly, the disputed deductions with respect to the horsebreeding are allowable only if appellants had an actual and honest profit objective for engaging in that activity. (Appeal of Paul J. and Rosemary Henneberry, Cal. St. Bd. of Equal., May 21, 1980; Appeal of F. Seth and Lee J. Brown, Cal. St. Bd. of Equal., Aug. 16, 1979.) The taxpayer's expectation of profit need not be a reasonable one, but there must be a good faith objective of making a profit. (Allen v. Commissioner, 72 T.C. 28 (1979).) Of course, whether the activity was engaged in primarily for such profit-seeking motive is a question of fact upon which the taxpayer has the burden of proof. (Appeal of Guy E. and Dorothy Hatfield, Cal. St. Bd. of Equal., Aug. 1, 1980; Appeal of Clifford R. and Jean G. Barbee, Cal. St. Bd. of Equal., Dec. 15, 1976.)

The regulations provide a list of factors relevant in determining whether a taxpayer has the requisite profit motive. While all facts and circumstances with respect to the activity are to be taken into account, no one factor is determinative in making this determination. (Treas. Reg. § 1.183-2(b).) Among the factors which normally should be taken into consideration are the following: (1) manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors: (3) the time and effort expended by the taxpayer in carrying on the activity; (4) an expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity: (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation. After carefully reviewing the facts and circumstances involved here and considering the relevant cases in light of the applicable regulations, we are convinced that appellants did not possess the requisite profit motive with respect to the subject activity so that the disputed deductions are nut allowable.

While the record is not exactly replete with facts, those facts which are evident point ta the conclusion that the activity before us was not engaged in for profit. There is no evidence that appellants carried on the activity in a businesslike manner. No separate business records, business checking or savings accounts or

business licenses were maintained.. While the activity apparently began in 1974 and encompassed five years, appellants met with little, if any, demonstrated success. No gross income was generated, and losses were sustained in each year. Moreover, appellants appear to have substantial income from other sources and the activity involved recreational or personal elements. While Charles may have had some background with respect to breeding and raising horses and appellants may have personally performed all labor required to maintain the mares, these two factors alone do not distinguish the activity from a hobby and do not outweigh the preponderance of factors outlined above.

Accordingly, based on the record presented, the conclusion is inescapable that appellants have not met their burden of proving that the horsebreeding activity was engaged in primarily for profit. Therefore, respondent's action in these appeals must be sustained.

Appeals of Charles C. and Elynor W. Renshaw

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 protests of Charles C. and Elynor W. Renshaw against proposed assessments of additional personal income tax in the amounts of $373.95, $714.78, and $564.88 for the years 1977, 1978, and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of November, 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