

87-SBE-019

BEFORE THE STATE BOARD OF EQUALIZATION
OF **THE** STATE OF CALIFORNIA

In the Matter of the Appeal of)
MICHAEL K. SCEMIER, A) No. 85R-1118 SW
PROFESSIONAL CORPORATION)

Appearances:

For Appellant: Michael K. Schmier,
in pro. per.

For Respondent: B. (Bill) S. Heir
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a), 1 of the Revenue and Taxation Code, from the action of the Franchise Tax Board in denying the claim of Michael K. Schmier, A Professional Corporation, for refund of franchise tax in the amount of \$675.87 for the income year ended April 30, 1984.

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

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The issue presented in this appeal is whether a delinquent filing penalty was properly assessed.

Appellant is a professional corporation with a fiscal year that ends on April 30. For fiscal year ended April 30, 1982, appellant had overpaid its tax liability and had requested that this overpayment be applied to the estimated tax liability for the fiscal year ended April 30, 1983. A minimum tax of \$200 was applied to the 1983 fiscal year. There was, however, an overpayment balance of \$516 and appellant did not request that this overpayment be credited to the fiscal year ended April 30, 1984, estimated liability. Consequently, on April 17, 1984, this amount, plus interest, was refunded to appellant.

Appellant's return for fiscal year ended April 30, 1984, was due on July 15, 1984. During 1983, appellant had changed accountants. The new accountant filed an application for automatic maximum extension of time for filing a return. The form was dated April 13, 1984, and claimed a credit of \$200. No other payments were filed with the application. On July 27, 1984, the application was denied because respondent had refunded the \$516 overpayment some three months earlier. No credit was, therefore, available to be applied to the \$200 estimated minimum tax liability for the previous fiscal year. Appellant filed its return on January 28, 1985.

Respondent's initial position was that an estimate penalty should be assessed because appellant did not make a minimum payment of \$200 for the income year under appeal. Respondent now concedes that in accordance with the ruling in Appeal of NAPP Systems (USA), Inc., decided by this board on February 4, 1986, the \$112.32 estimate penalty should be refunded. The sole issue remaining in this appeal is whether the delinquent filing penalty was properly assessed.

Appellant corporation is required by section 23401 to file its return within two months and 15 days after the close of its income year. As its income year ended on April 30, the return should have been filed by July 15. The Application for Automatic Maximum Extension of Time for Filing Return was received by respondent on July 15, 1984. It was allegedly signed and dated by appellant's accountant on April 13, 1984. This application, even with the three-month discrepancy in the date the application was signed and the date it was received

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by respondent, was filed in a timely manner. Respondent on July 27, 1984, denied the application and sent appellant a **copy of** the denied application. Appellant contends that it never received a copy of the denial and assumed that the extension request had been granted.

Section 25931 provides that a failure to file a return by the due date will result in a penalty unless the failure to file is due to reasonable cause and not due to willful neglect. There is no evidence in the record before us that there was willful neglect on the part of appellant. The only issue remaining is whether the requisite reasonable **cause** was present. It is well established that the burden for proving that reasonable cause did exist is on the taxpayer. (Appeals of American Photocopy Equipment Co., etc., Cal. St. Bd. of Equal., Dec. 18, 1964.) "Reasonable cause," as it is used in similar federal legislation, has been construed to mean such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances or the exercise of ordinary business *care or* prudence. (Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den., 350 U.S. 967 [100 L.Ed. 839] (1956).)

In the present case, appellant had applied for, but did not receive the seven-month extension. Nevertheless, its *return* was *not* filed until January 28, 1985. Appellant contends that it did not receive the notice from respondent that the request had been denied. Initially, we note that respondent as a matter of routine, notifies all taxpayers when their requests for an extension have been denied. Appellant's address has not changed since the application for the extension was made and there is *no* other evidence that the denial was not sent to appellant. Furthermore, appellant, through its own records, should have been aware that the \$200 minimum tax **had** not been paid. On April 17, 1984, it received a refund of \$526.18. The overpayment of \$716 was a result of appellant's return for fiscal year ended April 30, 1982. If \$200 of this overpayment was used for the minimum tax for fiscal year ended April 30, 1983, and another \$200 was applied to the liability for the fiscal year at issue, the refund was \$200 too large. We cannot conclude that, given these facts, appellant acted reasonably in failing to file its return until January of 1985. We further note that reliance upon an accountant also is not reasonable cause for delinquent filing. (United States v. Boyle, 469 U.S. ____ [83 L.Ed.2d 622] (1985).)

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For the foregoing reasons, we must **sustain** respondent's action as to the delinquency penalty.

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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 **26077** of the **Revenue** and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Michael K. Schmier, A Professional Corporation for refund of franchise **tax** in the amount of **\$675.87** for the income year ended April **30, 1984**, be and the same is hereby modified in **accordance** with respondent's concession of the estimate penalty. In all other respects, the action of the **Franchise** Tax Board is sustained.

Done at Sacramento, **California**, this 3rd **day** of March **, 1987**, by the State Board of Equalization, with Board **Members** Mr. Collis, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

Conway H. Collis	, Chairman
William M. Bennett	, Member
Paul Carpenter	, Member
Anne Baker*	, Member
	, Member

*For Gray Davis, per Government Code section 7.9