



88-SBE-023-A

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
CHARLES W. FOWLKS) No. 86R-0799-RO

OPINION ON PETITION FOR REHEARING

On August 25, 1988, we reversed the action of the Franchise Tax Board in denying the claim of Charles W. Fowlks for refund of personal income tax in the amount of \$100 for the year 1983. Subsequently, the Franchise Tax Board filed a petition for rehearing in which it argues that, in view of both Revenue and Taxation Code sections 17034 and subdivision (d) of section 18681, this penalty provision was operative September 27, 1984, and it applies to any personal income tax return which was filed thereafter and more than 60 days after its due date. We have carefully reexamined the matter, and we still disagree with respondent's position.

First, at the time appellant failed to file a timely 1983 return, section 18681 did not impose a penalty upon taxpayers, like appellant, who were due a refund when they finally did file. (Stats. 1980, ch. 1007, § 18, p. 3220.) The absence of a penalty under such circumstances was a matter of common knowledge, and it induced many taxpayers to ignore the time periods specified in the statute for filing returns. This situation changed radically, however, upon the enactment of subdivision (d) of section 18681 in 1984. That subdivision imposed a penalty upon all failures to file within 60 days of the return's due date, regardless of whether the taxpayer was owed a refund.

The addition of subdivision (d) to section 18681 became effective on September 27, 1984, some 165 days after appellant's 1983 return was due. If this provision applies to appellant, as respondent contends, it means that he became liable for the

Appeal of Charles' W. Fowlks

penalty some 105 days before he could possibly have known that a penalty would apply to his failure to file. While this does not seem to trouble the respondent, we do not believe, and there is certainly no direct evidence to support the notion, that the Legislature intended to have this penalty provision apply to taxpayers who had no actual or constructive notice of it and, thus, no opportunity to conform their conduct to the requirements of the law so as to avoid it.

This consideration supplies ample justification for distinguishing between taxpayers in appellant's position and those who requested and were granted an automatic extension of time to file their returns by October 15, 1984. With respect to taxpayers whose returns were not yet due on September 27, 1984, the effective date of section 18681, subdivision (d), all of them were on notice of the new penalty as of that date, and all of them had a reasonable opportunity to file their returns in a manner that would exempt them from application of the penalty. This is manifestly not the case for appellant and all other taxpayers whose returns were due more than 60 days prior to September 27, 1984. For this latter group of people, application of the penalty provision to them would turn the statute into an ex post facto law.

Finally, the Franchise Tax Board has relied on several prior summary decisions by this board on the same issue as authority to support its denial of appellant's claim for refund. Summary decisions of this board are not citable authority and will not be relied upon or given any consideration by this board as precedent. In view of the foregoing, we must affirm our prior action in this case.

