

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MATTHEW F. MCGILLICUDDY)

Appearances:

For Appellant: James R. Frolik
Attorney at Law

For Respondent: Paul J. Petrozzi
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Matthew F. McGillicuddy against proposed assessments of additional personal income tax and penalties in the amounts and for the years as follows:

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	<u>Years</u>					
	<u>1963</u>	<u>1964</u>	<u>1965</u>	<u>1966</u>	<u>1967</u>	<u>1968</u>
Tax	\$ 57.67	\$ 40.38	\$238.00	\$304.92	\$ 668.30	\$ 744.77
Failure to file penalties	28.83	20.19	119.00	76.23	167.08	186.19
Estimated tax penalty					20.55	29.79
Fraud penalty	<u>71.83</u>	<u>63.19</u>	<u>119.00</u>	<u>152.46</u>	<u>334.15</u>	<u>372.39</u>
TOTAL	\$158.33	\$123.76	\$476.00	\$533.61	\$1,190.08	\$1,333.14

On September 23, 1969, appellant filed returns for the years 1966, 1967, and 1968, and made payments which completely liquidated the tax liability, failure to file penalties, and accrued interest for those three years. Respondent has acknowledged receipt of those payments and has agreed that the amounts due must be adjusted accordingly,

In filing his appeal, appellant conceded the correctness of the assessments of additional tax and **failure to file penalties for the years 1963, 1964, and 1965**, and he has also conceded the propriety of the estimated tax penalties for 1967 and 1968. Consequently, the only issue remaining for decision is whether appellant is liable for the fraud penalties set forth above,

Appellant is a single man who has never been married. During the years in question, he assisted in the support of his mother, who lived with his sister and her children. Appellant came to California in 1955 and has been employed by various corporations since then. Except for a ten month period in 1964, appellant has been employed by Ampex since 1958.

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Respondent's initial involvement in this matter occurred during a follow-up procedure based upon employer's information' returns, Respondent discovered that appellant had filed no California personal **income** tax returns for any of the years in question, and had ignored all notices to file returns and to pay tax. He had, however., paid assessments when billed by respondent, As a result of its investigation, respondent assessed **additional tax** for the years in question, as well as the following penalties: (1) for each appeal year, a 25% penalty for failure to file a required return (Rev. & Tax., Code, § 18681); (2) for the years 1963, 1964, and 1965, an additional 25% penalty for failure to file a return after notice and demand by respondent (Rev. & Tax, Code, § 18682); (3) for each appeal year, a 50% penalty for fraud with intent to evade tax (Rev. & Tax, Code, § 18685); and (4) for the years 1967 and 1968, a 10% penalty for underpayment of estimated tax (Rev. & Tax, Code, § 18685.1, now § 18685.01). Appellant was also charged with violating section 19401 of the Revenue and Taxation Code for each of the taxable years 1966, 1967, and 1968. That section provides that it is a misdemeanor for any person, with or without intent to evade tax, to **fail to file any return** required by the Personal Income, Tax Law. On September 24, 1969, appellant **pleaded** guilty to the criminal, charges and **was** fined \$1,000 by the court,

As we have indicated **previously**, the **only** issue we are required to determine is appellant's liability for the fraud penalties, The burden of proving fraud is upon respondent,, and it must be established by something impressively more than a slight preponderance of the evidence, It must be proved by clear and convincing evidence. (Valetti v. Commissioner, 260 F.2d 185, 188; Appeal of George W. Fairchild, Cal. St. Bd. of Equal., Oct. 27, 1971.) Fraud implies bad faith, intentional wrongdoing and a sinister motive, (Jones v. Commissioner, 259 F.2d 300, 303; Powell v. Granquist, 252 F.2d 56, 60.) While it is true that fraud may be established by circumstantial evidence (Powell v. Granquist, supra at p. 61),

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it is never imputed or **presumed**, and it will not be sustained upon circumstances which, at **best**, create only suspicion, (Jones v. Commissioner, supra at p. 303,)

In our only previous case involving fraud penalties based on a taxpayer's failure to file returns, we held that mere failure to file, without more, was insufficient to sustain a finding-of fraud, (Appeal of George W. Fairchild, supra,) Respondent does not contest this holding, but rather contends that various actions by appellant constitute "badges of fraud" which, when coupled with his failure to file, are sufficient to establish his fraudulent intent. These actions allegedly were that he: (1) gave false information to his employers regarding his marital status and the number of his dependents for federal income tax withholding purposes; (2) maintained poor **records**; (3) falsely claimed that he did not have sufficient funds to pay his taxes at, or near, the times his returns and payments were 'due; and (4) made other false statements to **respondent's** investigators and, in general, demonstrated a pattern of duplicity in his entire **approach** to his obligation to pay taxes,

At the hearing respondent failed to establish any of these allegations. The cause of the erroneous **federal withholding information appearing in the files of appellant's** employers was not shown to have been anything other than clerical error, as appellant claimed in his testimony. Appellant admitted **that** he did not keep exemplary records. **However**, respondent failed to prove that the deficiencies were any worse than those of the typical nonbusiness taxpayer and certainly offered nothing to show that appellant kept fraudulent records, With respect to the allegations that he made false statements to **respondent's** investigators regarding his financial situation and other matters, appellant flatly denied at the hearing that he had made any false or misleading statements. Although his testimony on this point was contradicted to some extent by the testimony of **respondent's** Special Agent, the evidence *as a whole* does not compel the conclusion that appellant was deceitful in his dealings with respondent's agents.

