



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
EDWIN Y. WEBB III)

For Appellant: Edwin Y. Webb III,
in pro. per.

For Respondent: James T. **Philbin**
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Edwin Y. Webb III against a proposed assessment of additional personal income tax and penalty in the total amount of \$2,270.18 for the year 1977.

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The question for decision is whether appellant has established error in respondent's proposed assessment of additional tax and penalties.

Appellant submitted a blank, unsigned personal income tax Form 540 for the taxable year 1977. In an attached letter, appellant stated that he could not give respondent the financial information requested on the Form 540 because such data could be turned over to the Internal Revenue Service and could be used against him in a lawsuit, in violation of the protections guaranteed him under the Fourth and Fifth Amendments to the United States Constitution. Respondent notified appellant that the aforementioned blank Form 540 did not constitute a valid return, and demanded that he file a proper return for 1977. Appellant's only response to that demand was a letter stating that he believed his constitutional rights were being violated. He also insisted that he had paid his correct taxes and therefore should not be subject to any penalty.

Thereafter, respondent issued a notice of proposed assessment of personal income tax **due for 1977 in the amount of \$1,464.63. The tax deficiency was computed on the basis of a copy of the 1977 Wage and Tax Statement (Form W-2) issued to appellant by his employer, indicating that in that year he had been paid \$21,596.71 in wages. Included in the proposed assessment were penalties for failure to file a timely return (Rev. & Tax. Code, §18681), failure to file after notice and demand (Rev. & Tax. Code, §18683), and negligence (Rev. & Tax. Code, § 18684). Appellant protested but never filed a return. In due course, respondent affirmed its assessment and this timely appeal followed.**

It is settled law that respondent's determinations of additional tax, including the penalties involved in this case, are presumptively correct and the burden rests upon the taxpayer to prove them erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 4141 (1949); Appeal of Ottar G. Balle, Cal. St. Bd. of Equal., Feb. 6, 1980; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) The now-too-familiar contention that to provide the financial information requested on the Form 540 would or could violate his constitutional rights is of absolutely no avail to the taxpayer in sustaining that burden. (See Appeal of Marvin L. and Betty J. Robey, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978.) Even if that were not the case, we

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believe the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to Article III of the California Constitution, precludes our determining that the statutory provisions involved are unconstitutional or unenforceable. Moreover, this board has a well established policy of abstaining from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Leon C. Harwood, Cal. St. Bd. of Equal., Dec. 5, 1918; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) Accordingly, respondent's determination of **additional tax due from appellant for 1977 will be sustained.**

With respect to the penalties, we point out that in cases of this type we have consistently upheld penalty assessments **such as those issued against appellant herein. (Appeal of Donald W. Cook, Cal. St. Bd. of Equal., May 21, 1980; Appeal of Arthur J. Porth, Cal. St. Bd. of Equal., Jan. 9, 1979)** On the basis of the record before us, we conclude that penalties for failure to file a timely return, failure to file after notice and demand, and negligence were fully justified in this case as well.

Finally, it should be noted that the 1977 Form W-2 issued to appellant by his employer indicates that California personal income tax in **the amount of \$1,295.12** was withheld from his salary during 1977. Respondent has agreed that appellant will be allowed a credit against the amount of the tax deficiency to reflect that withholding. A downward adjustment must also be made in the penalty assessed for failure to file, a timely return since, under the provisions of section 18681 of the Revenue and Taxation Code, the amount of tax prepaid through withholding **reduces** the base upon which that penalty is computed.⁴ No adjustment of the other penalties is required.

1/ Although appellant claims that he made an additional payment to respondent in the amount of \$163.98 for 1977, he has provided no cancelled check or other proof of payment and respondent has no record of any such remittance. If such evidence were presented by appellant, respondent presumably would be willing to make further appropriate adjustments in the amount of tax due and in the delinquent filing penalty assessed for 1977.

