

Appeal of James H. Copeland

The issue presented by this appeal is whether appellant has established error in respondent's proposed assessment of additional personal income tax or in the penalties assessed for the year in issue.

On his California personal income tax return form 540 for the year 1979, appellant failed to disclose the required information regarding his income, deductions, or credits. In the space provided for this information, appellant noted his objection to providing the relevant data, based upon his Fifth Amendment privilege against self-incrimination. When appellant failed to comply with respondent's demand that he file a valid 1979 return, the subject proposed assessment was issued. Respondent based its estimation of appellant's 1979 income upon the income he reported on his 1977 return, plus a 15 percent growth and inflation factor for both 1978 and 1979; \$36,621 received by appellant from a partnership with which he was involved during the appeal year was also included in his 1979 income. The proposed assessment includes penalties for failure to file a return, failure to file upon notice and demand, failure to pay estimated income tax, and negligence. In his appeal from respondent's action in this matter, appellant has cited the Fifth Amendment privilege against self-incrimination; he also asserts the respondent's estimation of his income is in error.

Respondent's determinations of tax are presumptively correct, and appellant bears the burden of proving them erroneous. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) This rule also applies to the penalties assessed in this case, (Appeal of K. L. Durham, supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept., 10 1969) where the taxpayer files no return and refuses to cooperate in the ascertainment of his income, respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Memo. T.C. (1979).) In reaching this conclusion, the courts have invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.) To hold otherwise would establish skillful concealment as an invincible barrier to the determination of tax liability., (Joseph F. Giddio, supra.) Since appellant has failed to provide any evidence

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establishing that respondent's determinations were excessive or without foundation, we must conclude that he has failed to carry his burden of proof. Finally, we find without merit appellant's assertion that his Fifth Amendment privilege against self-incrimination excuses his failure to file a return for the year in issue. The privilege against self-incrimination does not constitute an excuse for a total failure to file a return. (United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 4691 (1973)].) Moreover, a blanket declaration of that privilege does not even constitute a valid assertion thereof. (United States v. Jordan, 508 F.2d 750 (7th Cir.), cert. den., 423 U.S. 842 [46 L.Ed.2d 621, reh. den., 423 U.S. 991 [46 L.Ed.2d 3111 (1975)].)

On the basis of the evidence before us, we can only conclude that respondent correctly computed appellant's tax liability, and that the imposition of penalties was fully justified. Respondent's action in this matter will, therefore, be sustained.

