

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARVIN L. AND BETTY J. ROBEY)

Appearances:

For Appellants: Marvin L. Robey, in pro. per.

For Respondent: James C. Stewart
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 Marvin L. and Betty J. Robey against proposed assessments of additional personal income tax and penalties in the total amounts of \$302.59 and \$649.66 for the years 1971 and 1972, respectively, and on the protest of Marvin L. Robey against a proposed assessment of additional personal income tax and penalty in the total amount of \$286.21 for the year 1973.

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Appellants filed timely personal income tax return forms for 1971 and 1972 which did not disclose any information concerning income. On the 1971 form appellants wrote "No legal tender" in the space for reporting employee compensation and on the bottom was written "Signed under protest reserving our rights under the Constitutions of the United States and California, especially the IVth and Vth Amendments of the U.S." Appellants attached a statement to their 1972 return form asserting various constitutional grounds as the basis for omitting information concerning their income from the return form. The main thrust of the statement was that they had not received any income in constitutionally lawful dollars redeemable in gold or silver, and that the requirement to furnish income information violated their constitutional rights against self-incrimination.

Respondent informed appellants that the forms did not constitute valid returns and demanded that complete returns be filed within 30 days. Appellants were also advised of the possible imposition of penalties in the event such returns were not timely filed. When appellants failed to comply, respondent issued proposed assessments for 1971 and 1972 based upon Mr. Robey's wage statements which were received from his employer. A penalty for failure to file a timely return was added **to the assessments for both years and an additional penalty for failure to file after notice and demand was imposed for 1971.** (Rev. & Tax. Code, §§ 18681 & 18683.)

Respondent did not receive a return from Mr. Robey for 1973 and, consequently, a proposed assessment was issued on the basis of appellant's wages for that year. A 25 percent penalty for failure to file a timely return was also added.

Appellants protested the assessments and respondent's denial of that protest led to this appeal.

It is well settled that respondent's determination of a deficiency assessment is presumed correct and the burden of proving that the determination is erroneous is on the taxpayer. (Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414] (1949); Appeal of Pearl R. Blattenberger, Cal. St. Bd. of Equal., March 27, 1952.). Here; the only arguments advanced by appellants are directed toward the constitutionality of respondent's action. With respect to appellants' constitutional arguments, we believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California

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Constitution, 1/ precludes our determining that the statutory provisions involved are unconstitutional or unenforceable. In any event, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Rd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal. It is noteworthy, however, that in appropriate cases where these constitutional issues have been considered on the merits they have been rejected. (See, e.g., United States v. Sullivan, 274 U.S. 259 [71 L. Ed. 1037] (1927); United States v. Daly, 481 F.2d 28, 30 (8th Cir.), cert. den., 414 U.S. 1064 [38 L. Ed. 2d 469] (1973); Hartman v. Switzer, 376 F. Supp. 486 (W.D. Pa. 1974); Lou M. Hatfield, 68 T.C. 895 (1977); Appeal of Donald H. Lichtle, Cal. St. Bd. of Equal., Oct. 6, 1976.)

In cases of this type the penalties assessed by respondent uniformly have been upheld. (See, e.g., Appeal of Ruben B. Salas, supra; Appeal of Arthur W. Keech, Cal. St. Rd. of Equal., July 26, 1977.) No reason has been presented to suggest that we should depart from those holdings in this appeal.

1/ Section 3.5 of article III provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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Appellants also complain of the fact that they have not been afforded a trial by jury. The simple answer is that the course of action voluntarily elected by appellants when they filed their appeal was an administrative proceeding before an administrative body, not a legal action before a court of law. Should appellants desire to present their cause before a jury, they should comply with the proper procedure and select the appropriate forum.

For the reasons set forth above, we conclude that appellants have failed to carry their burden of proof. Therefore, respondent's action in this matter must be sustained.

