



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOHN NOEHL SCHMITZ)

Appearances:

For Appellant: John Noehl Schmitz, 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 John Noehl Schmitz against proposed assessments of additional personal income tax and penalties in the total amounts of \$779.20, \$825.42, \$905.79, \$964.62 and \$1,570.84 for the years 1970, 1971, 1972, 1973 and 1974, respectively.

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Appellant, a California resident, did not file a California personal income tax return for the years 1970 through 1973. For 1974 appellant filed a return form reporting that he had received no income. Thereafter, respondent obtained copies of appellant's W-2 forms from his employer showing that appellant had received \$13,493.38 in 1970, \$13,836.53 in 1971, \$14,431.83 in 1972, \$14,867.65 in 1973, and \$18,702.18 in 1974. Respondent then notified appellant that he had failed to file returns for 1970 through 1973 and demanded that he file such returns. Respondent also explained that appellant's 1974 return was not valid because it did not contain any information concerning his income, deductions or credits for that year and demanded that he file an appropriate return. Appellant failed to file the requested returns, although he did submit another return form for 1974 containing the same information as the original return form for that year. Respondent issued proposed assessments for each of the years based on the income reported by appellant's employer. Appellant was allowed the standard deduction and a personal exemption credit for each year. Included in the proposed assessments were penalties for failure to file a timely return and for failure to file a return after notice and demand pursuant to Revenue and Taxation Code sections 18681 and 18683, respectively. Appellant protested the proposed assessments and his protest was denied. This appeal followed.

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 argument advanced by appellant consists of a broad based constitutional attack on the personal income tax and the United States monetary system. 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 Constitution, 1/precludes our determining that the statutory provisions involved are unconstitutional or

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:

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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. Bd. 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 constitutional issues similar to those raised by appellant have been considered on the merits, they have been rejected. (See, e.g., 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. Bd. of Equal., July 26, 1977.) No reason has been presented to suggest that we should depart from those holdings in this appeal.

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

1/ (Cont.)

(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.

