

Appeal of Gary O. Armstrong

The issues presented by this appeal are: (i) whether appellant has established error in respondent's proposed assessments of additional personal income tax and penalties, except the civil fraud penalties, assessed for the years in issue; and (ii) whether respondent properly imposed civil fraud penalties with regard to the years 1970 through 1974.

On his California personal income tax form 540 for the year 1970, appellant failed to disclose any information regarding his income, deductions, or credits. In the space provided for this information, appellant entered the statement "Under protest. I plead the Fifth Amendment . . ." Appellant did not file California income tax returns for the years 1971 through 1974.

In 1973, respondent requested that appellant file returns for the years 1970 and 1971. In response to this request, appellant replied that Federal Reserve notes were not "legal tender." He also stated that he did not have sufficient income to require him to file. Appellant's response led to an investigation by respondent which encompassed the taxable years 1970 through 1974. During the course of this inquiry, appellant stated that he had not filed California returns for the years under investigation because he had earned less than \$3,200 in each of those years and, therefore, was not required to file California personal income tax returns.

On the basis of the information obtained during its investigation, respondent determined that appellant had earned between approximately \$10,000 and \$20,000 in each of the years under inquiry. Those income determinations were based upon appellant's federal returns, employer information, financial institutions, and data acquired from the Department of Benefit Payments.

The findings of respondent's investigation eventually resulted in appellant's indictment and conviction on four felony counts of failure to file a state income tax return with intent to evade taxation. The conviction was for the taxable years 1971 through 1974. No indictment was sought for the year 1970 because the statute of limitations had run. Following appellant's criminal conviction, respondent issued the subject notices of proposed assessment which include penalties for failure to file, failure to furnish requested information, and fraud.

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With respect to the years 1977 and 1978, appellant submitted photocopies of California personal income tax returns on which he again refused to disclose information about his income, deductions, or credits. Respondent cited various constitutional grounds as the basis for his refusal to provide that information. When appellant failed to comply with respondent's request that he file valid returns or explain why he was not required to file, respondent issued notices of proposed assessment based upon information obtained from the California Employment Development Department and appellant's employers. The proposed assessments for 1977 and 1978 included penalties for failure to file, failure to file upon notice and demand, and failure to pay estimated tax.

Respondent's determinations 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 all but the civil fraud penalties assessed in this case. (See, e.g., Appeal of K. L. Durham, supra; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) No such proof has been presented here. The sole arguments advanced by appellant are: (i) that his Fifth Amendment privilege against self-incrimination would be jeopardized were he to file valid returns; (ii) that respondent's demand that he file such returns infringes on his Fourth Amendment right to be secure in his person, papers, and effects; and (iii) that Federal Reserve notes do not constitute legal tender. Previous decisions of the courts and this board have found arguments identical to those advanced by appellant to be without merit (see, e.g., United States v. Daly, 481 F.2d 28 (8th Cir. 1973), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); Richard M. Baker, ¶ 78,060 P-H Memo. T.C. (1978), affd. by unpub. order Dec. 29, 1980, 9th Cir., cert. den., 49 U.S.L.W. 3882 (1981); Appeal of Ronald W. Matheson, Cal. St. Bd. of Equal., Feb. 6, 1980); there is no reason to reach a different conclusion here.

We now turn our attention to the issue of whether respondent properly assessed the subject civil fraud penalties. Revenue and Taxation Code section 18685 provides for the assessment of a civil fraud penalty "[i]f any part of any deficiency is due to fraud with intent to evade tax. . . ." As the referenced section is substantively identical to its federal

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counterpart (Internal Revenue Code of 1954, section 6653(b)), federal case law is persuasive authority in the interpretation and application of the California statute. (Holmes v. McColgan, 17 Cal.2d 426 [110 P.2d 428] (1941); Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).) Circumstantial evidence may be used by respondent to carry its burden of proving fraud by clear and convincing evidence. (Cal. Admin. Code, tit. 18, reg. 5036; Appeal of Richard A. and Virginia R. Ewert, Cal. St. Bd. of Equal., April 7, 1964; Appeal of Herbert Tuchinsky, Cal. St. Bd. of Equal., July 1, 1970.)

As previously indicated, appellant was convicted on four felony counts of failure to file a state income tax return with intent to evade taxation for the years 1971 through 1974; no indictment was sought for 1970 because the statute of limitations had run. Appellant's conviction constitutes at least prima facie evidence of fraud (Stagecrafters' Club, Inc. v. District of Columbia Division of American Legion, 111 F.Supp. 127 128-129 (D.D.C. 1953)), and, unless rebutted, suffices to support the imposition of the fraud penalties. (Appeal of Robert C. Sherwood, Deceased, and Irene Sherwood, Cal. St. Bd. of Equal., Nov. 30, 1965.) As appellant has failed to offer any evidence in support of his position that the fraud penalties were improperly assessed, we conclude that respondent properly imposed the subject fraud penalties for the years 1971 through 1974. Moreover, as a result of his aforementioned criminal conviction, the doctrine of collateral estoppel bars appellant from challenging respondent's imposition of civil fraud penalties for those years. (John W. Amos, 43 T.C. 50 (1964), affd., 360 F.2d 358 (4th Cir. 1965).)

We also believe that respondent has carried its burden of establishing, through clear and convincing evidence, that it properly assessed the civil fraud penalty for 1970. The record of this appeal clearly and convincingly reveals that: (i) appellant was cognizant that he was required by law to file a California personal income tax return for that year and that he did not do so despite repeated demands from respondent; (ii) despite the fact that he reported substantial income on his 1970 federal return and had income substantially in excess of the minimum filing requirements for a single person, appellant falsely told respondent's investigators that his 1970 income was below the minimum filing requirements; (iii) appellant violated a condition of

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his probation by refusing to obey all laws and pay any taxes due respondent; (iv) appellant apparently attempted to conceal his income; and (v) appellant's failure to file a return cannot be attributed to his ignorance or inability to understand his obligation to file. In view of this evidence, we conclude that the deficiency assessed for 1970 was due to fraud with intent to evade tax.

For the reasons set forth above, respondent's action in this matter will be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Gary O. Armstrong against proposed assessments of additional personal income tax and penalties in the total amounts of \$799.86, \$621.58, \$2,254.92, \$1,703.76, \$2,581.56, \$2,685.29, and \$4,991.39 for the years 1970, 1971, 1972, 1973, 1974, 1977, and 1978, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of December, 1981, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Reilly, Mr. Bennett, Mr. Nevins and Mr. Cory present.

<u>Ernest J. Dronenburg, Jr.</u>	, Chairman
<u>George R. Reilly</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Kenneth Cory</u>	, Member

