

Appeal of Stanley E. Cerwinski

The question for determination is whether appellant has established any **error** in respondent's proposed assessment of personal income tax and penalties.

For 1977 appellant filed a California personal income tax Form 540 disclosing no information concerning his income, deductions or credits. The spaces provided for such information were filled in with "zero" or with asterisks. The latter led to a note attached to the return, which stated that appellant specifically objected to providing such information under the Fourth and Fifth Amendments to the United States Constitution. The form did report that \$1,036 had been withheld.

Respondent notified appellant that the Form 540 was not a valid return and demanded that appellant file a return containing the required **information**. Appellant did not file the requested return. Thereafter, based on information obtained from the Employment Development Department, respondent issued its notice of proposed assessment for the appeal year. Respondent also imposed a 25 percent penalty for failure to file a return (Rev. & Tax. Code, § 18681); a 25 percent penalty for failure to file a return after notice and demand (Rev. & Tax. Code, § 18683); and a 5 percent negligence penalty (Rev. & Tax. Code, § 18684). Appellant protested but refused to file a return. In due course, respondent affirmed its assessment and this appeal followed.

It is settled law that respondent's determinations of additional tax, **including the penalties** involved in this appeal, are presumptively correct and the burden is upon the taxpayer to prove them erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) The now-too-familiar general contention that to provide the financial information requested on the Form 540 would or could violate his constitutional rights is of 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 believe the addition of section 3.5 to Article III of the California Constitution precludes our determining that the statutory provisions involved are unconstitutional or unenforceable. Accordingly, respondent's determination of additional tax due from appellant for 1977 must be sustained.

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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 in this appeal. (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 this record, we conclude that penalties for failure to file a return, failure to file after notice and demand, and negligence were fully justified in this case as well.

In view of the fact that California personal income tax in the amount of \$1,036 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. An adjustment must also be made to reduce the penalty assessed for failure to file a 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. No adjustment of the other penalties is required.

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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 Stanley E. Cerwinski against a proposed assessment of personal income tax and penalties in the total amount of **\$2,863.00** for the year 1977, be and the same is hereby modified in that a credit shall be allowed against the proposed assessment of tax to reflect the amount of California personal income tax withheld in 1977, and the amount of the penalty imposed under section 18681 of the Revenue and Taxation Code shall be reduced to reflect such withholding. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 29th day of September, 1981, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Reilly and Mr. Nevins present.

Ernest J. Dronenburg, Jr. , Chairman
George R. Reilly , Member
Richard Nevins , Member
_____, Member
_____, Member