

Appeal of John B. Bosko

For the appeal years, appellant filed California personal income tax return forms disclosing no information concerning his income, deductions or credits. The spaces provided for the required information were filled in with the words "object: self-incrimination". Respondent notified appellant that the returns were not valid and demanded that appellant file proper returns. When appellant failed to file, respondent issued the notices of proposed assessment in issue. Included in the assessments for both years were penalties for failure to file a return, failure to file a return after notice and demand, and negligence. For 1979, respondent also asserted a penalty for failure to pay estimated tax,,

Although appellant has failed to offer any income information for the appeal years, he contends that respondent's proposed assessments are arbitrary and capricious since they lack any evidentiary basis. He also contends that his returns were properly filed and that he properly invoked his Fifth Amendment privilege against self-incrimination.

We first consider the claimed Fifth Amendment privilege against self-incrimination. We believe that section 3.5 to article III of the California Constitution precludes our resolution of this constitutional issue. Were we not so constrained, however, we would have no difficulty concluding that, based on the authority of United States v. Neff, 615 F.2d 1235 (9th Cir. 1980) relied on by appellant, the privilege against self-incrimination was improvidently claimed. (See also Appeal of N. Eugene and I. Shafer, Cal. St. Rd. of Equal., decided this date.) In Neff, the court noted that in order for the taxpayer to prevail, "there must be something peculiarly incriminating about his circumstances that justifies his reliance on the Fifth Amendment." (United States v. Neff, supra, at 1239.) The court also stated that it was for the court, and not the taxpayer, to determine the validity of the Fifth Amendment claim. (United States v. Neff, supra, at: 1240.) The court then pointed out that the questions on the income tax form did not, of themselves, suggest that the responses would be incriminating, and concluded that since Neff made no positive disclosure that his response to the tax form questions would have been self-incrimination, he could not prevail on his Fifth Amendment claim. (United States v. Neff, supra, at 1240.) Here, appellant, like Neff, has failed to provide a positive disclosure that his answers would be self-incriminating. Under these circumstances, appellant's Fifth Amendment claim is frivolous, at best.

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Next, we turn to the question whether appellant has established any error in respondent's determination. It is well established that respondent's determination of tax and penalties are presumptively correct, and that the burden of proving them erroneous is upon the taxpayer. (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.) In attempting to sustain his burden, appellant has alleged that the proposed assessments are excessive, arbitrary and capricious since they lack any evidentiary basis.

In determining the amount of appellant's income for 1978 and 1979, respondent used appellant's gross receipts from Schedule C of his 1977 return factored for inflation. Respondent also determined that appellant reported substantial interest income on his 1976 and 1977 returns. Accordingly, respondent included in appellant's gross income interest in the amount of \$7,466 and \$12,767 for the years 1978 and 1979, respectively. However, a review of the first pages of the Forms 540 for 1976 and 1977 submitted by appellant indicates that he only reported \$84 in interest for 1976 and no interest for 1977. The error is a result of respondent's use of the figures on line 13, "Income other than wages, dividends and interest," rather than the figure on line 12, "Interest." Accordingly, respondent's determination of tax and penalties must be modified by eliminating, in total, the interest income in the amount of \$7,466 and \$12,767 included in appellant's gross income for 1978 and 1979, respectively. Additionally, respondent failed to allow appellant the standard deduction for either of the appeal years; therefore, respondent's determination must be modified further by allowing the standard deduction for 1978 and 1979.

Appellant, however, has failed to offer any evidence of what his income was for the appeal years. Where the taxpayer fails to file a proper 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); Floyl Douglas, ¶ 80,066 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 I?-H Memo. T.C. (1979); see also Rev. & Tax. Code, § 18648.) In reaching their conclusions, 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

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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.) When the taxpayer fails to supply any information, he is in no position to be hypercritical of respondent's labors. (Floyd Douglas, supra.) Since appellant has failed to establish that respondent's determinations against him, as modified, were excessive or without foundation, we must conclude that he has failed to carry his burden of proof.

For the reasons set forth above, respondent's determination of tax and penalties for 1978 and 1979, as modified, must be sustained.

