

Appeal of Olin S. Gordon

The sole issue presented by this appeal is whether appellant has shown respondent's determination to be erroneous.

Respondent could not locate a **return for** appellant for 1979 and requested that appellant provide a copy. A copy of a form 540 was received with appellant's name and address and all other spaces filled in with the word "object.". Respondent notified appellant that this did not constitute a **valid** return and demanded that he file a valid return. Appellant later submitted an amended form 540 which was the same as **the** previous one except that exemption credits were **claimed** and some spaces were filled in with zeroes.

Respondent then issued a notice of proposed assessment. using income information **from** appellant's 1978 return. Various penalties were also imposed,. Based on appellant's 1978 figures, respondent estimated appellant's interest, rental, and retirement income. (The retirement income was later verified to be \$101.00 less than respondent's estimate.) Responderat also accelerated an installment sale reported in 1978, treating **the entire** balance as being received in 1979. Appellant protested, contending that his forms were correct as submitted. **When** respondent affirmed the assessment; appellant filed this appeal.

Respondent has noted **that** the penalties imposed were overstated by a **total** of \$65.22. It has agreed that the penalty amounts will be adjusted to reflect this overstatement.

It is well settled that respondent's determinations of tax and penalties are presumptively correct and the taxpayer bears the burden of showing that they are erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Arthur J. Porth, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.)

Appellant has presented no evidence showing **that his** income was **other** than **as** determined by respondent. He contends that respondent's determination, based on estimates of his income, was arbitrary and that the burden of proof, therefore, **must** be shifted to respondent.

The presumption of correctness which normally attaches to respondent's determinations ceases to exist

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when an assessment is shown to be arbitrary. (Helvering v. Taylor, 293 U.S. 507 [79 L.Ed. 623] (1935), affg. 70 F.2d 619 (2d Cir. 1934).) However, where no valid return has been filed, and the taxpayer refuses to cooperate in determining his income, respondent is allowed great latitude, and reasonable estimates may be used to determine the taxpayer's income. (Appeal of James H. Copeland, Cal. St. Bd. of Equal., Oct. 14, 1982.) We have previously found respondent's use of estimates based on prior years' income to be reasonable in appeals where the taxpayer has failed to provide any evidence regarding his income. (See, e.g., Appeal of James H. Copeland, *supra*; Appeal of Ruth Studley, Cal. St. Bd. of Equal., July 26, 1982.) We find that respondent's estimates in this appeal were not unreasonable or arbitrary and, therefore, reject appellant's contention that the burden of proof be shifted.

Respondent has acknowledged that appellant's retirement income and certain of the penalty amounts were overstated. Adjustments must be made reflecting the correct amounts. However, since appellant has presented no evidence to show that his income differed in any other respect from that determined by respondent, we have no basis for finding that respondent's determination was incorrect.

Appellant argues that the penalties were improperly imposed because he properly claimed his Fifth Amendment privilege, and that the assessment was invalid because not computed in "the money of account of the United States." This board has a well established policy of abstaining from deciding constitutional questions in appeals involving deficiency assessments. (Appeals of Fred R. Dauberger, et al., Cal. St. Bd. of Equal., March 31, 1982.) We note, however, that when these same arguments have been considered by the courts, they have been uniformly rejected as frivolous. (See cases cited in Appeals of Fred R. Dauberger, et al., *supra*.)

Subject to the adjustments to the amounts of retirement income and penalties mentioned in this opinion, we must sustain respondent's action.

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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 Olin S. Gordon against a proposed assessment of personal income tax and penalties in the total amount of **\$18,057.51** for the year 1979, be and the same is hereby modified to reflect the adjustments noted in the foregoing opinion regarding the amounts of retirement income and penalties. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 1st day of **March**, 1983, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

_____, Chairman
Ernest J. Dronenburg, Jr., Member
Conway H. Collis, Member
Richard Nevins, Member
Walter Harvey!, Member

*For Kenneth Cory, per Government Code Section 7.9