

Appeal of Harry W. Tepper

Appellant, a dentist, did not file personal income tax returns for 1977, 1978, and 1979. Respondent demanded that he file, but appellant did not respond. Notices of proposed assessment were then issued based upon information from appellant's 1976 return,, on which he reported income from his dental practice. Respondent determined that appellant was still practicing dentistry in 1977, 1978, and 1979. Therefore, appellant's 1977 income was estimated to be the same as his 1976 income; his 1978 and 1979 incomes were estimated by adding 15 percent for each year to his 1977 estimated income to allow for growth and inflation. The proposed assessments also included penalties for failure to file, failure to file upon notice and demand, failure to pay estimated income tax, and negligence.

After respondent issued notices of action affirming the proposed assessments, appellant filed return forms 540 which contained no income, deduction, or credit information. Respondent has acknowledged receipt of \$1,500 in estimated tax payments for 1977 and concedes that the penalty for failure to file for that year should be reduced to reflect receipt of those payments.

Respondent's determinations of tax and the penalties here involved are presumptively correct, and the taxpayer bears the burden of showing that they are incorrect; (Appeal of Ronald W. Matheson, Cal. St.. Bd. of Equal., Feb. 6, 1980; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.) Appellant has produced no evidence to show that respondent's determination was incorrect. Instead, he has argued that the income tax on wages is unconstitutional, that he had no income because he was paid in Federal Reserve notes, and that respondent's attempt to levy and collect tax from him violates his constitutional rights.

We are precluded from determining the constitutional issues raised by appellant both by article III, section 3.5, of the California Constitution, which prohibits us from declaring the statutes involved unconstitutional or unenforceable, and by our well established policy of abstention from deciding constitutional issues in appeals involving deficiency assessments. (Appeals of Fred R. Dauberger, et al., St. Bd. of Equal., March 31, 1982.) Appellant's argument that Federal Reserve notes are not-legal tender has consistently been held to be without merit. (See Appeals of Fred R. Dauberger, et al., supra, and cases cited therein.)

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We note that a modification must be made to the assessment for 1977 in addition to respondent's concession regarding the penalty for failure to file. Revenue and Taxation Code section 18557 requires that **estimated** income tax payments be considered payment on account of the income taxes imposed for the taxable year. Therefore, the \$1,500 in estimated tax payments which respondent has acknowledged receiving must be credited to appellant's account, reducing the amount of the 1977 deficiency assessment.

Subject to respondent's concession and the modification described above, respondent's action must 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 Harry W. Tepper against proposed assessments of personal income tax and penalties in the total amounts of **\$8,651.80, \$10,743.78, and \$12,638.12** for the years 1977, 1978, and 1979, respectively, is hereby modified to reflect a reduction in the deficiency for 1977 in the amount of the estimated tax payments made for that year and to reflect respondent's concession that the penalty for failure to file for 1977 be reduced. In all other respects, the action of the Franchise Tax Board is sustained.

Done at **Sacramento**, California, **this 28th** day of July , 1983, by the State Board of Equalization, with Board **Members** Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

William M. Bennett _____, Chairman
Conway H. Collis _____, Member
Ernest J. Dronenburg, Jr. _____, Member
Richard Nevins _____, Member
Walter Harvey* _____, Member

*For Kenneth **Cory**, per Government Code section **7.9**

