

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HELEN G. GESSELE)

For Appellant: A. R. Gessele

For Respondent: Bruce W. Walker
Chief Counsel

Jacqueline W. Martins
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Helen G. Gessele against a proposed assessment of additional personal income tax and negligence penalty in the amounts of \$422.50 and \$21.13, respectively, for the year 1972.

Appeal of Helen G. Gessele

The issue for determination is whether appellant has met her burden of establishing that a federal determination relied upon by respondent in issuing the proposed assessment of tax and negligence penalty was erroneous.

Appellant is a waitress. The Internal Revenue Service audited her 1972 federal income tax return and determined that she had failed to report as income \$7,977.25 in tips. In accordance with this determination, the Internal Revenue Service assessed a \$1,844.81 deficiency and a 50 percent fraud penalty. Subsequently, based on the federal action, respondent issued a notice of proposed assessment increasing appellant's income as reported on her 1972 state income tax return by \$7,977.25 in previously unreported tips and also assessed a 50 percent fraud penalty. This adjustment resulted in an increased state income tax liability of \$422.50 and a \$211.25 fraud penalty. Thereafter, appellant sent respondent a copy of the final federal audit report which reflected the same adjustment to income, but eliminated the fraud penalty in favor of a five percent negligence penalty. In accordance with the final federal audit report, respondent affirmed the \$7,977.25 adjustment to income, eliminated the fraud penalty, and imposed a five percent negligence penalty. It is from this action that appellant appeals.

Appellant has offered no evidence which would indicate that the federal determination was incorrect. Appellant does assert, however, that the federal action resulted in an overassessment which respondent failed to consider, and argues that the proposed state deficiency is therefore incorrect.

Section 18451 of the Revenue and Taxation Code provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a determination by the Franchise Tax Board, including the imposition of a negligence penalty, based upon a federal audit is presumed to be correct, and the burden is on the taxpayer to overcome that presumption. (Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414] (1949); Appeal of Joseph B. and Cora Morris, Cal. St. Bd. of Equal., Dec. 13, 1971; Appeal of Casper W. and Svea Smith, Cal. St. Bd. of Equal., April 25, 1975.) In this appeal, appellant has offered no evidence to indicate that the federal action was erroneous.

Appeal of Helen G. Gessele

According to the record in this appeal, appellant's assertion that the federal action resulted in an overassessment is incorrect. The final federal audit report indicates that, as a result of the income adjustment, appellant's corrected tax liability was **\$2,322.81**, and the **total** tax shown on the return was \$478.00. The result was a deficiency of **\$1,844.81**, not an overassessment.

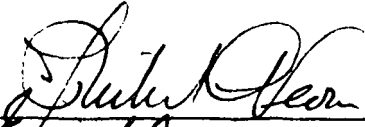

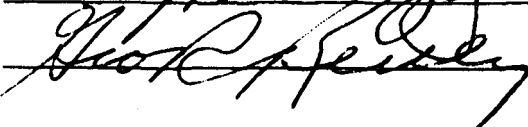
For the above reasons, we conclude that respondent's action in this matter must be sustained.

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 Helen G. Gessele against a proposed assessment of additional personal income tax and negligence penalty in the amounts of \$422.50 and \$21.13, respectively, for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of April, 1980, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member
_____, Member
_____, Member