BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)
	)
DONALD W. COOK	)

Appearances:

For Appellant:	Donald W. Cook, in pro. per.
For Respondent:	James T. Philbin Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code[1/] from the action of the Franchise Tax Board on the protest of Donald W. Cook against proposed assessments of additional personal income tax and penalties

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1/ Statutory references are to the provisions of the Revenue and Taxation Code.

in the total amounts of $248.90 and $330.82 for the years 1976 and 1977, respectively.

The primary issue presented concerns the applicability of penalties for failure to file a return, for failure to file a return upon notice and demand, for negligence, and for failure to pay estimated tax.

On or before the due date for filing returns for each of the years in question, appellant submitted a personal income tax Form 540. On those forms he provided no information concerning his income, deductions, or tax liability other than a claim for a $25.00 personal exemption credit and a $37.00 renter's credit. In the space provided for all other financial information, appellant entered the words "Object self-incrim."

Attached to appellant's Form 540 for the year 1976 was an affidavit and a detailed statement alleging that appellant properly refrained from providing specific financial information because of the constitutional privilege against self-incrimination. He also explained the reasons, principally on constitutional grounds, for his opinion that it is impossible to determine what a dollar is, and the amount of dollars earned. Therefore, he claimed that it is not possible to provide the financial information, or even to know whether a return must be filed, for a particular year. He emphasized that section 18401 conditions filing requirements upon dollars of income. He urged that, under the circumstances, he had filed a valid return.

Upon receiving each Form 540, respondent notified appellant that a tax form which does not show items of gross income and deductions is not a valid return, and requested that appellant file a valid return. In each instance, no return was subsequently filed.

As no information on appellant's finances for 1976 was available, respondent computed appellant's 1976 tax liability as follows: His 1975 adjusted gross income of $7,258.00 was multiplied by a 10 percent inflation and growth factor to produce a 1976 adjusted gross income of $7,983.80. Applying the tax table for single individuals, less a personal exemption credit of $25.00, respondent determined a tax liability of $155.00 for 1976. Because information on his finances for 1977 was also unavailable, respondent estimated appellant's income by adding

13 percent for growth and inflation to appellant's calculated income for 1976, and by the same process used for the previous year, determined a tax liability of $205.00.

For 1976, respondent also determined that penalties in the total amount of $93.90 were due, consisting of a 25 percent penalty for failure to file a return (§ 18681), a 25 percent penalty for failure to file after notice and demand (§ 18683), a 5 percent negligence penalty (§ 18684), and the 12 percent penalty for failure to pay estimated tax (§ 18685.05). For 1977, respondent also determined penalties totalling $125.82, consisting of the same ones as found applicable for 1976.

At the hearing on this appeal, appellant withdrew his objections to the proposed tax assessments, except to the absence of any allowance for a renter's credit. Consequently, the proposed assessment of penalties is the principal dispute.

With respect to the penalty for failure to file a timely return (§ 18681), the initial question is whether the tax forms appellant filed consituted valid returns. In this connection section 18401 provides, in relevant part:

> Every individual taxable under this part shall make a return to the Franchise Tax Board, stating specifically the items of his gross income and the deductions and credits allowed by this part, ... (Emphasis added.)

Respondent's regulations specify that the return of a California resident shall be on Form 540 (Cal. Admin. Code, tit. 18, reg. 18401-18404(e)), and they further state that:

> Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the law. ... (Cal. Admin. Code, tit. 18, reg. 18401-18404(f).)

In light of the language of the statute and regulations, it is clear that the forms submitted by appellant did not constitute valid returns within the meaning thereof. (See United States v.

Porth, 426 F. 2d 519 (10th Cir. 1970) cert. den., 400 U.S. 824 [27 L. Ed. 2d 53] (1970); Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978.)

Pursuant to section 18681, the assessment of a penalty for failure to file a timely valid return must be sustained unless the taxpayer establishes that the failure was due to reasonable cause and not due to willful neglect. (See Appeal of Ruben B. Salas, supra.) Appellant. has offered no explanation of his opinion that he actually did file a valid return, or that the failure to do so was due to reasonable cause and not willful neglect, other than on essentially constitutional grounds.

With respect to these constitutional arguments, we conclude that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution[2] precludes our determining that the provisions of section 18681 are unconstitutional or unenforceable. For the same reason, we must conclude that the penalty for failure to file returns upon notice and demand was properly imposed.

2/ Section 3.5 of article III provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In addition, since appellant has, in essence, based his objections to all of the penalties on constitutional grounds which we do not consider, we also conclude that the five percent penalty for intentional disregard of respondent's rules and regulations (i.e. -- the negligence penalty) and the penalty for failure to pay estimated tax should not be overturned by this board.

We conclude, however, based upon the information appellant submitted with each Form 540 and his statements at the hearing, that he is entitled to the $37.00 renter's credit for each year.

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 Donald W. Cook against proposed assessments of additional personal income tax and penalties in the amounts of $248.90 and $330.82 for the years 1976 and 1977, respectively, be and the same is hereby modified to allow the $37.00 renter's credit for each year, with appropriate adjustments to the amount of tax liability and penalties. In all other respects, the action of the Franchise Tax Board is affirmed.

Done at Sacramento, California, this 21st day of May, 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member