



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
THOMAS GARRIS)

Appearances:

For Appellant: **A. J.** Porth

For Respondent: Jean Harrison Ogrod
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 Thomas Garriss against a proposed assessment of additional personal income tax and penalties in the total amount of **\$4,800.64** for the year 1977.

Appeal of Thomas Garris

The sole issue for determination is whether appellant has established any **error** in respondent's proposed assessment.

On the basis of certain information which it received, respondent determined that appellant was required to file a California income tax return for 1977. However, respondent had no record of appellant having filed a return for that year. Therefore, respondent issued appellant a notice and demand that he file any required return.

Appellant did not comply, and respondent, therefore, issued a notice of proposed assessment. The assessment was based upon information available through the State Employment Development Department which indicated that during 1977 appellant had received wages in the amount of **\$37,311.00**. The proposed assessment also included two 25 percent penalties for **failure to** file a return and failure to file after notice and demand, as well as a five percent penalty for negligence. Appellant protested the assessment, and respondent's denial of that protest led to this appeal.

It is well settled that respondent's determinations of tax, and penalties for failure to file a return are presumptively correct, and that the taxpayer bears the burden of proving them erroneous. (Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977; Appeal of Sarkis N. Shmavonian, Cal. St. Bd. Of Equal., April 6, 1977; Appeal of Myron E. and Alice Z. Gire, Sept. 10, 1969.)

Appellant's entire case consists of his argument that the California Personal Income Tax Law is unconstitutional. However, it is our well established policy to abstain from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of William A. Hanks, Cal. St. Bd. of Equal., April 6, 1977; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8 1976, 1/). Accordingly, we must sustain respondent's action with respect to the proposed assessment.

1/ We do note, however, that the power of the State Legislature to levy personal income taxes is inherent and requires no special constitutional grant. (Tetreault v. Franchise Tax Board, 255 Cal.App.2d 277, 280 [63 Cal.Rptr. 326] (1967); Hetzel v. Franchise Tax Board, 161 Cal.App.2d 224, 228 [326 P.2d 611] (1958).)

The penalty determinations must also be upheld. Appellant has not submitted any significant evidence or arguments in refutation of the penalties. Therefore, he has failed to carry his burden of **proving** those penalties erroneous. (Appeal of Myron E. and Alice Z. Gire, supra.)

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Done at Sacramento, California, this 18th day
of November, 1980, by the State Board of Equalization,
with Members Nevins, Reilly, Dronenburg and Bennett present.

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