

Appeals of Conrad Donald and Marion Donald

were penalties for failure to file a return, failure to file after notice and demand, negligence, and underpayment of estimated tax. Since Mrs. Donald's **W-2's** indicated that California income tax was withheld for the appeal years, respondent 'concedes that appropriate credits shall be allowed against any tax found due. On the same basis, respondent concedes that the penalties for failure to file a timely return and for **underpayments** of estimated tax, if upheld, must be modified.

The proposed assessments against Mr. Donald were based on a projection of his income reported on the 1973 return adjusted for inflation. Respondent also assessed penalties for failure to file a return, **failure** to file after notice and demand, negligence, and failure to pay estimated tax. These penalties were assessed for each year in issue except for the failure to pay estimated tax, which was imposed for each year except 1974. Respondent acknowledges that the appropriate amount of appellant's interest income for 1976 should have been \$665.50 instead of **\$6,655.00**, and concedes that an appropriate adjustment to the proposed assessment of tax and penalties for that year is appropriate if its position is upheld.

It is well settled that respondent's determinations of tax and penalties are presumptively correct, and that the burden of proving them erroneous is upon the taxpayer. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, **1980**; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) In an attempt to sustain his burden of proving that the assessments were excessive, Mr. Donald has simply claimed that he did not work during the appeal years. However, during this period Mr. Donald had a valid contractor's license and a current seller's permit with an active account.

Where the taxpayer files no return and refuses to cooperate in the ascertainment of his income, respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1980); Floyd Douglas, ¶ 80,066 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Memo. T.C. (1979).) In reaching these conclusions the courts have invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.)

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ORDER

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 protests of Conrad Donald and Marion Donald against proposed assessments of additional personal income tax and penalties in the amounts and for the years as follows:

	Taxable Year	Proposed Tax	Assessments Penalties
Conrad Donald	1974	\$2,591.58	\$1,425.38
	1 9 7 5	3,128.79	1,862.92
	1976	4,405.13	2,299.24
	1977	4,456.06	2,734.87
Marion Donald	1974	\$ 155.00	\$ 90.50
	1975	170.22	101.22
	1976	900.00	450.00
	1977	74.00	40.70

be and the same is hereby modified in accordance with this opinion. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 16th day
of November , 1981, by the State Board of Equalization,
with Board Members Mr. Dronenburg, Mr. Reilly, Mr. Bennett,
and Mr. Nevins present.

Ernest J. Dronenburg, Jr. , Chairman

George R. Reilly, Member

William M. Bennett , Member

Richard Nevins, Member

_____, Member