BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
CONRAD DONALD AND MARION DONALD)

Appearances:

For Appellants: William Drexler

For Respondent: James C. Stewart
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 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:

Appeals of Conrad Donald and Marion Donald

	Taxable Year	Proposed Tax	Assessments .Penaities
Conrad Donald	1974	$2,591.58	$1,425.38
	1975.	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	103.22
	1976	900.00	450.00
	1977	74.00	40.70

The sole issue for determination is whether the taxpayers have established any error in respondent's proposed assessments.

Appellants, who are husband and wife, filed a 1973 personal income tax return on which they reported a gross income of $27,992.75 from their chemical cleaning business and from Mr. Donald's contracting activities. They also reported $500.00 in interest income. In 1974 appellants jointly submitted a Form 540 on which they entered "Object: 5th Amendment" in the spaces provided for financial data and other information. The return contained no income information. Appellants did not file returns for 1975, 1976 or 1977.

Respondent informed appellants that the incomplete Form 540 for 1974 did not constitute a valid return and demanded that they file a valid return. Respondent also advised appellants that there was no record of them filing returns for 1975, 1976 or 1977, and demanded that such returns be filed. No returns for the appeal years were ever filed by appellants, either jointly or separately. After appellants' failure to file the requested returns, respondent issued separate notices of proposed assessment for each of the appeal years to each appellant. The proposed assessments were issued against each appellant separately for 1974 as well as the other three years even though a joint Form 540 was filed for 1974 since the benefits of joint return rates are predicated on the filing of a valid joint return. (See Joseph G. Yetman, ¶ 78,052 P-H Memo. T.C. (1978).)

The proposed assessments against Mrs. Donald were based on copies of her Form W-2, Wage and Tax Statement, for the appeal years which were obtained from her employer. Also included in the proposed assessments

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.)

To hold otherwise would establish skillful concealment as an invincible barrier to the determination of tax liability. (Joseph F. Giddio, supra.) When the taxpayer fails to supply adequate records, he is in no position to be hypercritical of respondent's labors. (Floyd Douglas, supra.) Since Mr. Donald has failed-to establish that respondent's determinations against him were excessive or without foundation, we must conclude that he has failed to carry his burden of proof. We reach the same conclusion with respect to Mrs. Donald since nothing whatsoever has been offered on her behalf to suggest that the assessments against her were excessive or without foundation.

Additionally', both appellants have voiced the tired litany of constitutional and other objections to the taxing system in general and its application to them in particular. Without exception, these contentions have been rejected as frivolous in previous decisions of this board and the federal judiciary. (See, e.g., United States v. Whitesel, 543 F.2d 1176 (6th Cir. 1976): United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den. 414 U.S. 1064 [38 L.Ed.2d 469] (1973); Appeal of Edwin Y. Webb III, Cal. St. Bd. of Equal., Jan. 6, 1981; Appeal of Arthur J. Porth, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of Armen B. Condo, Cal. St. Bd. of Equal., July 26, 1977.) We see no reason to depart from these decisions in this appeal.

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 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 Assessments Tax	Penalties
Conrad Donald	1974	$2,591.58	$1,425.38
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	1976	4,405.13	2,299.24
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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

BEFORE THE STATE BOARD OF EQUALIZATION

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In the Matter of the Appeals of)
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CONRAD DONALD AND MARION DONALD)

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition filed December 21, 1981, by Conrad and Marion Donald for rehearing of their appeals from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and the same is hereby denied and that our order of November 16, 1981, be and the same is hereby affirmed.

Done at Sacramento, California, this 5th day of January, 1932, by the State Board of Equalization. with Board Members Mr. Reilly, Mr. Dronenburg, and Mr. Nevins present.

_____, Chairman

George R. Reilly, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member