BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
HERBERT C. AND ISABELLE E. **FREELAND**)

For Appellants: Herbert C. Freeland, in pro. per.

For Respondent: John A. Stilwell, Jr. Counsel

O P I N I O N

These appeals are made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Herbert C. and Isabelle E. **Freeland** against proposed assessments of additional personal income tax in the amounts of $207.51 and $336.81 for the years 1975 and 1977, respectively, and against a proposed assessment of additional personal income tax and a penalty in the total amount of $322.62 for the year 1976.

The question presented is the propriety of respondent's determination, based on a federal audit report, that appellant Herbert C. Freeland received unreported taxable retirement income.

Isabelle E. Freeland is a party to this appeal solely because she filed joint personal income tax returns with Herbert C. Freeland, her husband, for the years in issue. Accordingly, only the latter will hereinafter be referred to as "appellant."

Appellant was a member of the Armed Forces for approximately twenty years, and for the past twelve years has been unemployed. On the Freelands' state and federal income tax returnsfor the years in issue, Isabelle Freeland's salary was reported as the source of virtually all of their income.

In 1978 the Internal Revenue Service completed an audit of appellant's 1975 and 1976 federal tax returns and concluded that he had received unreported retirement income in the amounts of $6,397 and $6,918 for 1975 and 1976, respectively. The I.R.S. also allowed appellant $70 in increased sales tax deductions for 1975, and added a 5 percent negligence penalty to its assessment for 1976.

Upon notification of the federal audit results, respondent examined appellant's state tax returns. For 1975, respondent added the $6,397 in retirement income, raising the Freelands' adjusted gross income to $17,943. After taking $70 in increased sales tax deductions, respondent produced a proposed assessment of $207.51 in additional tax. [1] For 1976, respondent followed the I.R.S. approach and added $6,918 in retirement income, increasing appellant's adjusted gross income to $19,998. Respondent also imposed a 5 percent ($15.36) negligence penalty, resulting in a proposed assessment of $322.62, including the penalty. After the filing of these appeals, respondent withdrew the 5 percent negligence penalty upon learning that the I.R.S. had also withdrawn the penalty.

T-Respondent reached the proposed additional tax of $207.51 after subtracting $34.40 in "previously assessed" tax. Since appellant had erroneously computed, on his original return, a tax liability of only $16.00 instead of the correct $34.40, it is not clear that the $34.40 was ever, in fact, assessed

In 1979 respondent obtained an Internal Revenue Service form W-2P(A) from the United States Civil Service Commission. The form stated that appellant's retirement income for the year 1978 amounted to $7,887. Respondent assumed that appellant had been receiving such income every year without reporting it. In order to determine the amount of annuity that appellant had received in 1977, respondent averaged appellant's retirement income for 1976 and 1978, Respondent thus obtained $7,402.60 in estimated unreported annuity income for 1977, increasing appellant's adjusted gross income to $21,291. On this basis it issued appellant a proposed assessment of $336.81 in additional tax for 1977.

Appellant contends on appeal that his retirement income should not be taxed. The arguments he presents in support of his contention are varied, rambling, and generally irrelevant. His first assertions are personal: he has been unemployed for over a decade, he has recently become disabled, and his and his wife's meager incomes provide barely enough money for them to pay for food, clothing and shelter, let alone taxes. As we stated in Appeal of Evelyn R. Marks, decided October 5, 1965, Personal grievances are not "... matters within our jurisdiction. We are not unsympathetic toward appellant's misfortunes, but our sympathy cannot justify a determination in [appellant's] favor." Similarly, appellant's complaints about what the federal government promised him before 1958, or political ruminations about what the United States president will or should do with taxpayers' money, are also outside our jurisdiction. (Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.)

Appellant's final set of arguments consists of constitutional attacks upon the United States' monetary system and federal and state tax laws. As to these arguments, we are barred by article III, section 3.5, of the California Constitution 2/ from ruling upon the

2/ Article III, section 3.5, adopted in 1978, provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

constitutionality or enforceability of the state and federal tax laws. (Appeal of Leon C. Harwood, Cal. St. Bd. of Equal., Dec. 5, 1978.)' Furthermore, it is a well established policy of this board to abstain from ruling on constitutional questions raised in appeals involving deficiency assessments. (Appeal of William F. and Dorothy M. Johnson, Cal. St. Bd. of Equal., Oct. 6, 1976; Appeal of Marvin W. and Iva G. Simmons, Cal. St. Bd. of Equal., July 26, 1976.) In any event, the federal courts uniformly have upheld the constitutionality of our taxation and monetary systems, and have rejected as frivolous constitutional challenges such as those raised by appellant. (United States v. Daly, 481 F.2d 28, 30 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); United States v. Porth, 426 F.2d 519, 523 (10th Cir.), cert. den., 400 U.S. 824 [27 L.Ed.2d 53] (1970).)

Appellant's personal and political grievances are not the types of complaints to be resolved by this board, nor are they sufficient justification for nonpayment of a tax assessment. We therefore turn to the substantive issue in this case: whether respondent's proposed assessments upon appellant's retirement income were erroneous.

The first question to be answered in resolving this issue is whether respondent acted properly in determining appellant's retirement income from a federal audit and federal documents.

2/ (Continued)

(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.

Revenue and Taxation Code section 18451 provides, in part, that if a federal adjustment or correction is made in a taxpayer's tax liability, then he "shall concede the accuracy of such determination or state wherein it is erroneous." It is well settled that a proposed deficiency assessment by the Franchise Tax Board based upon federal action is presumed to be correct, and the burden is upon the taxpayer to overcome that presumption. (Todd v. McColgan, 89 Cal.App.2d 509, 514 1201 P.2d 4141 (1949); Appeal of Robert J. and Evelyn A. Johnston, Cal. St. Bd. of Equal., April 22, 1975; Appeal of Edwin R. and Joyce E. Breitman, Cal. St. Bd. of Equal., March 18, 1975.) Other than stating that his retirement pay should not be taxed, appellant has not proffered any explanation to show that either the federal audit reports regarding his 1975 and 1976 income, or respondent's use of those reports, was improper.

Similarly, appellant has not presented any coherent objection to respondent's action in estimating his retirement income for 1977. Respondent determined this income by averaging his 1976 and 1978 retirement pay as reported by federal authorities. It is settled that respondent is permitted to estimate income in this manner, and that its determination is presumptively correct. (Todd v. McColgan, supra; Appeal of Richard A. and Virginia R. Ewert, Cal. St. Bd. of Equal., April 7, 1964; see also Appeal of Myrtle T. Peterson, Cal. St. Bd. of Equal., April 6, 1978.)

We therefore conclude that the manner by which respondent computed the amount of appellant's retirement income for the years in issue was proper. The question remaining is whether respondent acted correctly in assessing a tax upon that income.

The record is unclear as to whether the retirement income is derived from military service or non-military employment. In either case; we believe that the income is taxable.

Revenue and Taxation Code section 17071, subdivision (a), includes pensions and annuities in gross income. If appellant's retirement income was a non-military annuity, then its taxability and possible exclusions thereto are governed by sections 17101 through 17107.5. The record presents no evidence to show that appellant was entitled to any of the exclusions in these sections, if in fact his income was such a non-military annuity.

If the income in question was retirement pay from appellant's military service, then its taxability is governed by Revenue and Taxation Code section 17146.7. Section 17146.7, enacted in 1972, excludes from income the first $1,000 of military pensions and retirement pay where the recipient's adjusted gross income does not exceed $15,000. The exclusion is reduced by 50 cents for each dollar of adjusted gross income over $15,000. In computing the exclusion, one must include the full amount of retirement pay in the adjusted gross income. If the military retiree is married, then the combined adjusted gross income of husband and wife is taken into account.

Applying the above formula, we see that if the adjusted gross income is $17,000 or more, then the amount of the exclusion is reduced to zero. In the instant case, the combined adjusted gross income of appellant and his wife, including appellant's retirement pay, exceeded $17,000 for each of the years in question. The exclusion is therefore inapplicable, and the full amount of appellant's retirement pay must be included in his taxable income. (Appeal of Henry J. and Sheila D. Kelly, Cal. St. Bd. of Equal., Jan. 9, 1979.)

We therefore hold that respondent's proposed assessment of tax upon appellant's retirement pay was proper. With the exception of the imposition of the penalty for 1976, we will affirm respondent's action.

Appeals of Herbert C. and Isabelle E. Freeland

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 Herbert C. and Isabelle E. Freeland against proposed assessments of additional personal income tax in the amounts of $207.51 and $336.81 for the years 1975 and 1977, respectively, and against a proposed assessment of additional personal income tax and a penalty in the total amount of $322.62 for the year 1976, be and the same is hereby modified to reflect the cancellation, of the penalty in the amount of $15.36 for the year 1976. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 1st day of February, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Reilly, Mr. Dronenburg, and Mr. Nevins present.

William M. Bennett, Chairman

George R. Reilly, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

, Member