BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
FRED R. DAUBERGER, et al.)

Appearances:

For Appellants: Emanuel Rose
Norman Youngs
Your Heritage Protection Assn.

For Respondent: Jon Jensen
John R. Akin
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 Fred R. Dauberger, et al., against proposed assessments of additional personal income tax and penalties in the total amounts and for the years as follows:

Appeals of Fred R. Dauberger, et al.

Appellant	Year	Proposed Assessment Including Penalties
Fred R. Dauberger	1978	$3,384.08
Anthony Degennaro	1978	4,371.00
Richard R. Goldworthy	1978	3,081.00
Thomas G. Greiss	1978	2,184.00
C. Hatfield	1978	3,133.50
Louis J. Logan	1978	618.00
Leroy Moore	1978	691.50
Norman Norton	1978	3,022.50
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John Spenst	1978	712.50
Arlie L. Brown, Jr.	1978	1,669.50
Thomas Chandler	1978	3,066.95
C. Bagley	1978	1,119.30
W. A. Barclay	1978	1,614.68
G. Courtois	1978	2,776.50
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Ronald D. Little	1978	838.55
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Frank A. Palminteri	1978	1,403.96
D. Sherr	1978	1,435.15
Gary Short	1978	1,843.50
Peter M. Stine	1978	2,594.60
Michael J. Moriarty	1978	1,159.21

The above appeals have been consolidated for hearing and disposition because of a substantial identity of facts and issues.

The appeals have come about as a result of respondent Franchise Tax Board's proposed assessment of income tax and penalties for each appellant's failure to file a return and comply with respondent's further requests and demands. In each instance, the proposed assessment was based upon income information received from the California Employment Development Department, employers or other reliable sources.

Appellants' presentation in this appeal consists of many complaints about the personal income tax and the monetary system of our country. They are the same sorts of complaints that other similarly situated individuals have raised and which have been consistently and repeatedly rejected by tax administrators and courts at state and federal levels. The more familiar contentions are that: wages do not constitute income; appellants are not "taxpayers;" Federal Reserve notes do not constitute income or legal tender; they are not obligated to file personal income tax returns; they have been denied various rights guaranteed by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution; the Franchise Tax Board and the Board of Equalization do not have jurisdiction: the burden of proof with respect to a deficiency assessment is on respondent; and the imposition of penalties for failure to file a return and for failure to file after notice and demand are improper.

It appears that many so-called "tax protestors" have been misled about, or at lehst do not understand, their legal obligations to report their income and pay their personal income tax liability under the California Personal Income Tax Law, as well'as under the Internal Revenue Code. If, indeed, they take issue with the constitutionality or the statutory application of California's system of income taxation, they are advised to take such complaints to the courts or to their legislators. However, as we will explain in more detail' below, based upon previous determinations of the United States Supreme Court, lower federal courts, California courts, and prior opinions of this board, we must conclude that appellants' arguments are without merit.

Appellants cite Eisner v. Macomber, 252 U.S. 189 [64 L.Ed. 521] (1920), as supporting their contention that wages do not constitute income. They read that case as defining income solely in terms of gain or profit for all purposes. They also believe that the exchange of labor for wages does not result in gain or profit. Rather, claim appellants, such exchange is the giving of a capital asset in which a person has a property right which may be exchanged for other property, e.g., money, without giving rise to any profit. This contention is meritless since compensation in whatever form, including wages for services, constitutes taxable income. (Lonsdale v. Commissioner; 661 F.2d 71 (5th Cir. 1981); William E Lopez, ¶ 82,007 P-H Memo. T.C. (1982); William Howell. ¶ 81,631 P-H Memo. T.C. (1981); Gerald C. Funk, ¶ 81,506 P-H Memo. T.C. (1981); Thomas H.

Hanson, ¶ 80,197 P-H Memo. T.C. (1980).) Moreover, the narrow interpretation that appellants attribute to Eisner v. Macomber is totally without basis. That case was not intended to provide "a touchstone to all future gross income questions." (Thomas H. Hanson, supra, citing Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430-431 [99 L.Ed. 483] (1955).)

Appellants' next contention concerns the term "taxpayer," as it appears in the statutory provisions under which respondent proposes the instant deficiencies and penalties. Appellants see that term as inapplicable to individuals generally. Alternatively, they contend that a separate and initial determination that the term "taxpayer" specifically applies to them is required. In regard to the latter claim, appellants argue that the "taxpayer" determination must itself be preceded by a notice and hearing before raising the subject of deficiencies and penalties, Both of appellants' claims are incorrect, First, section 17004 of the Revenue and Taxation Code defines "taxpayer" to include any individual subject, to the California personal income tax. Second, in order for the term "taxpayer" to be used in matters such as those at hand, it is not necessary that a person actually be liable for the tax; it is enough if such person is potentially liable for it, even if it is ultimately determined that he or she in fact owes no tax. (Morse v. United States, 494 F.2d 876 (9th Cir. 1974).)

The third contention made by appellants is that the Federal Reserve notes they have received do not constitute lawful money or legal tender. Such an argument has been summarily found to be without merit. (See e.g., United States v. Gardiner, 531 F.2d 953 (9th Cir.), cert. den., 429 U.S. 853 [50 L.Ed.2d 128] (1976); also see Milam v. United States, 524 F.2d 629 (9th Cir. 1974); Richard M. Baker, ¶ 78,060 P-H Memo. T.C. (1978), affd. without opinion, 639 F.2d 787 (9th Cir. 1980), cert. den., 69 L.Ed.2d 390 (1981).) Under section 392, title 31, United States Code, it is established that Federal Reserve notes, on an equal basis with other coins and currency of the United States, shall be legal tender for all debts, including taxes. (United States v. Wangrud, 533 F.2d 495 (9th Cir.), cert. den., 429 U.S. 818 [50 L.Ed.2d 79] (1976); United States v. Gardiner, supra; Milam v. United States, supra.) Under the circumstances, there is no merit to the claim that an individual incurs no tax liability for wages received in the form of Federal Reserve notes. (United States v. Gardiner, supra.) The argument that "lawful money" of the United States must be gold or silver was effectively put to rest

nearly a century ago in Julliard v. Greenman, 110 U.S. 421, 448 [28 L.Ed. 2041 (1884)], in which it was said:

> Under the power to borrow money on the credit of the United States, snd to issue circulating notes for the money borrowed, [Congress's] power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof, Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper and to make that currency lawful money for all purposes, as regards the National Government or private individuals. (Emphasis supplied.)

A related contention is often raised that Article 1, section 10, clause 1, of the United States Constitution prohibits states from treating anything but gold and silver as money. That constitutional provision, in providing that "(n)o State shall . . .make any Thing but gold and silver Coin a Tender in Payment of Debts....", only prohibits the states from creating either metal or paper money. It does not prohibit states from treating federal reserve notes as money nor from accepting those same notes in payment of taxes, Of course, no intention can be inferred from this constitutional provision to deny Congress the power to establish metal or paper money. (Julliard v. Greenman, supra.)

Appellants also contend that federal, as well as state law, exempts Federal Reserve notes from taxation, The first part of appellants' claim is that 31 U.S.C., section 742, which generally exempts Treasury obligations from taxation by state or local governments, applies also to Federal Reserve notes- This is not so.

31 U.S.C., section 425 -provides that United States legal tender notes circulating or intended to circulate as currency shall be subject to taxation as money on hand or on deposit under laws of any state or territory. Sections 425 and 742, together, are a clarification of congressional intent to immunize from state taxation only the interest bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government, which intent should not be expanded or modified in any degree by the judiciary. (Smith v. Davis, 323 U.S. 111 [89 L.Ed. 107] (1944).) More specifically, the exemption indicated in section 742 applies to U.S. credit instrumentalities characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States

to pay specified sums at specified dates, and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay. (Smith v. Davis, supra.) On the basis of the foregoing, it is clear that section 742 does not exempt Federal Reserve notes from taxation.

The second half of appellants' claim, exemption under state law, is also without basis. Appellants' contention is based on section 292 of the Revenue and Taxation Code, which exempts from taxation such property as notes, etc. Appellants' reliance on that section is misplaced since section 212 is a property tax provision, and since the California income tax is not a tax on property, but rather, a tax on income and merely uses dollars to measure the amount of income.

Turning to the next contention, the record before us indicates that each of the appellants was legally obligated to file a California personal income tax return and to self-assess his or her tax liability. Section 18401 of the Revenue and Taxation Code specifies who must file a return. In the absence of the filing of a return which provides the information necessary* to determine accurately the individual's tax liability, respondent has the statutory authority under section 18583 of the Revenue and Taxation Code to estimate the liability on the basis of whatever information is. available. (See also 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); Appeal of K. L. Durham, Cal. St, Bd. of Equal.,-March 4, 1980.) Obviously, a taxpayer is not in a good position to criticize respondent's estimate of his or her liability when he or she fails to file a required return. and, in addition, subsequently refuses to submit information'upon request,

Several constitutional arguments are implicit in the contentions made by appellant and others similarly situated. With respect to those constitutional arguments, we believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution, 1/ precludes

1/ 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:

([Continued on next page.)

our determining that the statutory provisions involved are unconstitutional or unenforceable. Furthermore, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal.,, March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow respondent to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. Finally, we note 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).) For the record, we are unaware of any decision which lends credence to the constitutional challenges which have been made..

One of the constitutional arguments that has been raised and rejected many times is that the Fifth Amendment of the United States Constitution excuses an individual from reporting his income and filing a return. This argument has no merit since it is well settled that the privilege against self-incrimination, does not constitute an excuse for a total failure to file a return. (United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); United.

1/ (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.

States v. Sullivan, 274 U.S. 259 [71L.Ed. 1037) (1927); Edward A. Cupp, 65 T.C. 68 (4975); Maurice M. Dillon, ¶ 81,583 P-H Memo. T.C. (1981).) Moreover, a blanket declaration of that privilege does not even constitute a valid assertion thereof. (United States v. Jordan, 508 F.2d 750 (7th Cir.), cert. den., 423 U.S. 842 [46 L.Ed. 2d 62], reh. den., 423 U.S. 991 [46 L.Ed.2d 311] (1975).) Even if it can be shown that specific questions in a return carry the threat of incrimination, the protection afforded by the Fifth Amendment will not be available when the self-incrimination privilege claimed is part of a scheme designed to frustrate the tax laws. (United States v. Carlson, 617 F.2d 518 (9th Cir. 1980); see also United States v. Neff, 615 F.2d 1235 (9th Cir.), cert. den., 447 U.S. 925 [65 L.Ed. 1117] (1980).) In such a case the need to preserve a self-assessment system for collecting revenue outweighs the Fifth Amendment's, privilege against self-incrimination. (United States v. Carlson, supra.)

Appellants also claim that their constitutional rights have been abridged because they have'been denied a jury trial. There simply is no provision for a "jury trial" in an administrative proceeding of this type; nor is the absence of one violative of any provision of the federal or state constitutions. (Wickwire v. Reinecke, 275 U.S. 101 [72 L.Ed. 184] (1927); Gloria Swanson,, 65 T.C. 1180 (1976); Sonleitner v. Superior Court, 158 Cal. App.2d 258 [322 P.2d 496] (1958).) In fact, appellants' claim is rather incongruous when one considers the fact that they have freely chosen to file an appeal and thereby asked for an administrative review of the proposed assessments of personal income tax. In view of the limitations which have been placed upon us by Proposition 5 with respect to considering constitutional arguments and the expressed desire for a jury trial, logic would dictate that such taxpayers bypass our board by paying the assessments, filing claims for refund, and then filing an action in the Superior Court if the claims were denied.

Another contention which is regularly made by many tax protestors is that respondent does not have the authority to propose assessments, and we do not have jurisdiction to hear and determine appeals involving deficiency assessments of personal income tax. Respondent's statutory authority derives from section 19251 of the Revenue and Taxation Code, which states that the Franchise Tax Board shall administer and enforce the California Personal Income Tax Law. Sections 18'593 and

18595 of the Revenue and Taxation Code give the taxpayers a right to appeal from the action of respondent on a protest against a proposed assessment of personal income tax, and places the responsibility on this board to hear and determine such appeals. Under the circumstances, our jurisdiction to consider a particular income tax matter arises when a taxpayer files an appeal and thereby asks us to consider a matter and determine his or her correct tax liability. However, the only power that this board has is to determine the correct amount of an appellant's California personal income tax liability for the appeal years. We have no power to remedy any other real or imagined wrongs that taxpayers believe they may have suffered at the hands of the Franchise Tax Board. An appeal can, of course, be dismissed at the written request of an appellant.

As to appellants' proposal that the burden of proof be shifted to respondent, it is very well established that the findings of the Franchise Tax Board in assessing taxes are prima facie correct, and that the taxpayer disputing an assessment has the burden of proving it incorrect. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); see also Welch v. Helvering, 290 U.S. 111 [78 L.Ed. 212] (1933); Greengard v. Commissioner, 29 F.2d 502 (7th Cir. 1928); Royal Packing Co. v. Commissioner, 22 F.2d 536 (9th Cir. 1927); Avery v. Commissioner, 22 F.2d 6 (5th Cir. 1927); Pennant Cafeteria Co., 5 B.T.A. 293 (1926); Louis Halle 7 T.C. 245 (1946), affd. 475 F.2d 500 (2d Cir. 1949), cert. den., 338 U.S. 949 [94 L.Ed. 586] (1950).) The regulations governing the hearing procedures of this board also place the burden of proof upon the appellant-taxpayer. (Cal. Admin. Code, tit. 18, § 5036.) The presumption of correctness attaching to respondent's determinations may be rebutted if an assessment is shown to be arbitrary and excessive or based on assumptions not supported by the evidence. (Helvering v. Taylor, 293 U.S. 507 (79 L.Ed. 623] (1935), affirming 70 F.2d 619 (2d Cir. 1934).) However, none of those defects apply to the instant assessments.

Another of appellants' contentions concerns the subject of giving credit for California personal income tax withheld from earnings. Appellants state that respondent should be obligated, in all cases, to produce information regarding such withholdings. In essence, appellants wish the burden of proof concerning credit for withholdings to be placed on respondent. Appellants are not entitled to such an accommodation.

A taxpayer having information that income taxes were withheld from wages has the opportunity to report that fact when he files a return. If a taxpayer fails to file, and a subsequent proposed assessment results, it is the responsibility of the taxpayer to show that withholding took place. This is just part of the well-established burden of the taxpayer, discussed above, to show error in regard to a proposed tax assessment.

Appellants contest, as well, respondent's imposition of various penalties. Appellants argue that such penalties violate the requirements of due process and constitute "bills of pains and penalties" prohibited under the United States Constitution. There is no merit to either of those claims since the validity of such penalties is well established. (Doll v. Evans, et al., 7 F. Cas. 855 [2 Am.Fed.Tax R. 2040] (1872); Gladwin C. Lamb, ¶ 73,071 P-B Memo. T.C. (1973); Norman E. McCoy, 76 T.C. 555 (1981).)

Appellants also protest respondent's application of the standard deduction when determining the respective tax liabilities. Appellants argue that the standard deduction can only be applied at the election of the taxpayer, and since in their cases no such elections have been made, respondent's use thereof results in erroneous and impermissible assessments. Appellants are clearly incorrect. Respondent's allowance of the standard deduction where there is no evidence that allowable itemized deductions would be greater is entirely proper and no defect results therefrom. (Appeal of Mildred C. Johnson, Cal. St. Bd. of Equal., Sept. 29, 1981; also see Matthew W. Glennon, Sr., ¶ 57,148 P-H Memo. T.C. (1957); Daniel Terribile, ¶ 81,351 P-B Memo. T.C. (1981).)

In a similar vein, appellants have contended that the proposed assessments are faulty because they were calculated on gross income rather than taxable income. Obviously, a taxpayer's correct taxable income would be known if the taxpayer presented accurate information about his or her allowable deductions. Where an individual refuses to provide such information, however, respondent is authorized to estimate income from available sources and apply the standard deduction. This results in an estimated taxable income, and respondent may properly use this as a basis for determining its proposed assessments.

Another contention raised in the past by similarly situated individuals is that California's personal income tax cannot be applied to individuals because it is an unapportioned direct tax in violation of the restriction placed on the Congress of the United States by article I, section 9, clause 4 of the Constitution of the United States.. This claim is ill-founded as the Sixteenth Amendment to the United States Constitution authorizes the imposition of an income tax without apportionment among the states,, (Boughton v. United States, 632 F.2d 706 (8th Cir. 1980), citing Brushaber v. Union P.R. Co., 240 U.S. 1 [60 L.Ed. 493] (1916); also see Appeal of David M. Albrecht, Cal. St. Bd. of Equal., Feb. 1, 1982.) Moreover, California's personal income tax is a state tax enacted by California's legislature and so is not prohibited by that portion of the Constitution of the United States cited above. (See Tetreault v. Franchise Tax Board, supra; Appeal of Orick Ratzlaff, Cal. St, Bd. of Equal., May 19, 1981.)

The remainder of appellants' contentions are either direct constitutional challenges to the proposed assessments, which we cannot consider, or are subarguments of contentions discussed above, all of which we have rejected. It is quite clear, therefore, that appellants have presented no reason for the overturning or variance of any of the proposed assessments under consideration. Consequently, the proposed deficiencies and penalties must be upheld.

Overall, appellants' contentions have broken no new ground in the area of tax protest. As we have indicated in this opinion, the arguments raised by appellant& have been soundly repudiated in previous court decisions. Any arguments raised by appellants but not specifically addressed in this opinion have been considered and found to be utterly without merit. In this regard, it is indeed fitting to quote language from the Tax Court decision of Norman E. McCoy, supra:

> It may be appropriate to note further that this Court has been. flooded with a large number of so-called tax protestor cases in which thoroughly meritless issues have been raised in at best misguided reliance upon lofty principles. Such cases tend to disrupt the orderly conduct of serious litigation in this Court, and **the issues raised therein are of the type that have been consistently decided against** such protestors and their contentions

> often characterized as frivolous. The time has arrived when the Court should deal summarily and decisively with such cases without engaging in scholarly discussion of the issues or attempting to soothe the feelings of the petitioners by referring to the supposed "sincerity" of their wildly espoused positions,

In addition to noting this call for more decisive treatment of tax protestor cases, we observe that several tax protestor cases at the federal level have resulted in the imposition of an additional penalty, a penalty for delay, pursuant to section 66.73 of the Internal Revenue Code of 1954.. (See, e.g., Roger D. Wilkinson, 71 T.C. 633 (1979); Gordon B. Leitch, Jr., ¶ 81,504 P-H Memo. T.C. (1981); James S. Babcock, q 81,090 P-H Memo. T.C. (1983); Eugene J. May, ¶ 81,919 B-M Memo. T.C. (1981); Ephraim J. Swann, ¶ 81,236 P-H Memo. T.C. (1981); Princess E. L. Lingham, ¶ 81,042 P-H Memo. T.C. (1981).)

Appellants and others similarly situated should be aware that California Revenue and Taxation Code section 19414 is patterned after the federal delay penalty. Section 19434 states:

> Whenever it appears to the State Board of Equalization or any court of record of this state that proceedings before it under this part have been instituted by the taxpayer merely for delay, a penalty in an amount not in excess of five hundred dollars ($500) shall be imposed, Any penalty so imposed shall be paid upon notice and demand from the Franchise Tax Board and shall be collected as a tax,

We take this opportunity to advise all individuals who proceed with frivolous cases that serious consideration will be given to the imposition of damages, under section 19414. The cost of processing an appeal is significant, and we will not condone repeated appeals where the arguments have been considered and rejected previously.

We would like to conclude by quoting the following passage from Roger D. Wilkinson, supra:

> Many citizens may dislike paying their fair share of taxes; everyone feels that he or she needs the money more than the Government,

On the other hand, as Justice Oliver Wendell Holmes so eloquently stated: "Taxes are what we pay for civilized society." Compania de Tabacos v. Collector, 275 U.S. 87,100 (1927). The greatness of our nation is in no small part due to the willingness of our citizens to honestly and fairly participate in our tax collection system which depends upon self-assessment. Any citizen may resort to the courts whenever he or she in good faith and with a colorable claim desires to challenge the Commissioner's determination; but that does not mean that a citizen may resort to the courts merely to vent his or her anger and attempt symbolically to throw a wrench at the system.

* * *

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 actions of the Franchise Tax Board on the protests of Fred R. Dauberger, et al., against proposed assessments of additional personal income tax and penalties in the total amounts and for the years as follows:

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Peter M. Stine	1978	2,594.60
Michael J. Moriarty	1978	1,159.21

be and the same are hereby sustained.

Done at Sacramento, California, this 31st day Of March , 1982, 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