BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CLAUDE E. ELLSWORTH)

Appearances:

For Appellant: Claude E. Ellsworth, in pro. per.

For Respondent: Terry L. Collins 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 Claude E. Ellsworth against proposed assessments of additional personal income tax and penalties in the total amounts of $1,877.05 and $930.82, both for the year 1979.

The issue for consideration is whether appellant may refuse to provide information concerning the amount of his taxable income for the year in question on the basis of his assertion of the Fifth Amendment privilege against self-incrimination.

On his 1979 California personal income tax form 540, appellant failed to disclose the required information regarding his income, deductions, or credits. In the spaces provided for this data he entered the words "object: self-incrimination." The only item he did report was $680.63 in withholding for state income tax. However, appellant did not include a copy of his form W-2 or any other information to confirm this,

Respondent subsequently demanded that appellant file a completed return: however, respondent's; sole reply was to cite his Fifth Amendment privilege against self-incrimination in support of his refusal to file a valid personal income tax return. A notice of proposed assessment was then issued on the basis of information from the California Employment Development Department (EDD) and certain financial institutions. When EDD later informed respondent of additional income attributed to appellant, a second assessment was issued. Both notices of proposed assessment included penalties fior failure to file,' failure to file after notice and demand, negligence, and failure to pay estimated tax. Only after the filing of this appeal was it discovered that the secondary information from EDD was completely erroneous. Accordingly, respondent agrees that its second proposed assessment, and the penalties associated therewith, should be withdrawn. Therefore, the following discussion will be limited to respondent's first proposed assessment.

It is well settled that respondent's determinations of tax and penalties are presumptively correct and that the taxpayer bears the burden of proving them erroneous. (Appeal of Ronald W. Matheson, Cal. St. Bd. of Equal., Feb. 6, 1980; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Appellant has not submitted any proof in this regard. Instead, he has taken the position that the assertion of his Fifth Amendment privilege against self-incrimination excuses his failure to file a return for the year in issue. Appellant is mistaken.

The stance taken by appellant is one that has been considered and uniformly rejected by the courts and this board. (See, e.g., United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); Appeal of Alfred H. Berger, Cal. St. Bd. of Equal., Nov. 17, 1982; Appeal of Gregory R. Cooper, Cal. St. Bd. of Equal., Nov. 17, 1982; Appeal of Robert A. Skower, Cal. St. Bd. of Equal., Feb. 1, 1982.) It is therefore well established that appellant's contention is meritless.

Having determined that appellant had no excuse for not filing a return, and noting that he submitted no evidence to contradict the first proposed assessment, we conclude that such assessment of tax was correctly computed. Furthermore, the imposition of the penalties associated therewith was also fully justified.

On the basis of the foregoing, respondent's action in regard to its first notice of proposed assessment will be upheld. The action as to the second notice, as noted above, is reversed.

Appeal of Claude E. Ellsworth

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 protest of Claude E. Ellsworth against proposed assessments of additional personal income tax and penalties in the total amounts of $1,877.05 and $930.82 for the year 1979, be and the same is hereby reversed with respect to the $930.82 assessment. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 4th day of May, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member