



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
STEVEN R. LUCIDO)

Appearances:

For Appellant: Steven R. **Lucido**,
in pro. per.

For Respondent: Terry Collins
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 Steven R. **Lucido** against proposed assessments of personal income tax and penalties in the total amounts of **\$1,552.38** and **\$6,420.28**, both for the year 1979.

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Appellant filed a 1979 California personal income tax return which disclosed no information about his income. Except for the space provided for the amount of income withheld, the spaces provided for financial **information** were either left blank or filled in **with** the words "none" or "object--self incriminating." Respondent demanded **that appellant** file a valid return, **but he** failed to do this. Respondent issued a proposed assessment based on wage and interest information received from the California Employment Development Department and certain financial institutions. Penalties for **failure** to file a return, failure to file a return after notice and demand, and negligence were also imposed.

Respondent **later** received information indicating that appellant and a co-owner had sold their principal residence **for \$85,900.00** and replaced it with a residence purchased for **\$14,000.00**. Since respondent had no evidence of what, if any, financial interest the co-owner had in the two properties, it issued a proposed assessment against appellant alone, which assessed tax on the difference between the adjusted sales price of the old house and the **cost of** the new one in accordance with section **18091** of the Revenue and Taxation Code. Penalties were also imposed with respect to this proposed assessment.

After considering appellant's protests, respondent affirmed both proposed assessments. Appellant filed timely appeals which were consolidated for decision by this board. Appellant has established that in 1979, \$957.70 was withheld for state income tax. Therefore, respondent has agreed to allow a credit in this amount.

Respondent's determinations of tax and penalties are presumed correct, and **it is** the taxpayer's burden to prove that they are incorrect. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980.) Appellant does not attempt to prove that the proposed assessments are incorrect. Rather, he contends that respondent's actions violate his Fifth Amendment privilege against **self-incrimination**. **We believe** that section 3.5 of article III of the California Constitution precludes us from deciding that the statutory provisions involved are unconstitutional or **unenforceable**. Furthermore, this board has a well established policy of abstention from deciding constitutional questions in cases **involving** deficiency assessments. (Appeals of Fred R. Dauberger, et al., Cal, St. Bd. of Equal., March 31, 1982.) Were we not so constrained, however, we would have to conclude that the Fifth Amendment privilege does not excuse the

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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).)

Since'appellant has failed to establish any error in respondent's determinations, we must sustain respondent's actions as modified by its agreement to allow a credit of \$957.70.

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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 Steven R. **Lucido** against proposed assessments of personal income tax and penalties in the total amounts of **\$1,552.38** and **\$6,420.28**, both for the year 1979, be and the same is hereby modified to allow a credit of \$957.70 for taxes withheld. In all other respects, the action of the Franchise **Tax** Board is hereby sustained.

Done at Sacramento, California, this 15th day Of September, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9