

Appeal of Thomas L. and Wylma Gore

Appellants are a retired couple residing in San Diego, California. During the years immediately preceding his retirement, appellant husband was employed as a psychiatric consultant to the judges of the Superior Court of Los Angeles County. While serving in that capacity, it was his practice to submit his bill to the **county** at the end of each month. The bill was then forwarded to the judges for whom he had performed his services and, after their approval of the bill, Dr. Gore was paid. According to appellant, there was often a lag of some months between the time that he submitted his bill and the time that he received payment from the county.

In August of **1969**, a federal audit was performed on appellants' **1965**, 1966, and 1967 personal income tax returns. As a result of the audit, the federal taxing authorities added **\$3,785.00** and **\$6,445.00** to appellants' taxable income for the years 1965 and 1966, respectively. These additions apparently represented professional fees which had not been reported in those years. For the taxable year 1967, the federal audit adjustment added **\$1,238.00** to appellants' taxable income. This resulted from the disallowance of a business loss deduction on the sale of **an automobile**.

In April 1970, respondent issued notices of proposed assessment of additional personal income tax for the years 1965, 1966, and 1967 on the basis of **information** contained in the agreed federal audit report. Appellants protested, and respondent's denial of their protest gave rise **to this** appeal.

We have held many times that the Franchise Tax Board's determination of a deficiency, based **upon** a federal audit report, is presumed to be correct, and the burden is upon the taxpayer to establish that it is erroneous. (Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959; Appeal of Horace H. and Mildred E. Hubbard, Cal. St. Bd. of Equal., Dec. 13, 1961.) **Furthermore**, the taxpayer cannot merely assert the incorrectness of a tax and thereby shift the burden to respondent to justify the tax and the correctness thereof. (Todd v. McColgan, 89 Cal. App. 2d 509 (201 P.2d 414).)

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In the present case, appellants contend that the Franchise Tax Board has erroneously assessed additional taxes against them. It is apparently their position that the additions to income which gave rise to respondent's assessments actually represented income which was wrongly shifted to the years in question by the Internal Revenue Service. This shift was allegedly caused by the lag between the time that Dr. Gore submitted the bills for his psychiatric services and the time that he received payment from the county. Appellants have presented no evidence in support of this assertion. Furthermore, if the Internal Revenue **Service** had merely shifted income between years, we would expect the federal audit report to contain offsetting entries for earlier or later years. In the present case, no such adjustments appear.

Appellants maintain that records which would support their position were at one time available, but that due to circumstances beyond their control, they are unable to produce them now. Appellants' burden of proof is not lessened by their inability to produce supporting evidence. Speaking to this point in Burnet v. Houston, 283 U.S. 223 [75 L. Ed. 991], the United States Supreme Court stated:

The impossibility of proving a material fact upon which the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforceable claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof....
(283 U.S. at 228)

In view of the well established burden of proof in this area, and appellants' failure to meet that burden, we must sustain respondent's action in this matter.

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,

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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 Thomas L. and Wylma Gore against proposed assessments of additional personal income tax in the amounts of \$226.47, \$280.32, and \$16.96 for the years 1965, 1966, and 1967, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 11th day of December, 1973, by the State Board of Equalization.

J. M. Bennett, Chairman
W. W. Dwyer, Member
John W. Lynch, Member
Paul Reid, Member
_____, Member

ATTEST: *W. W. Dwyer*, Secretary