



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of
I. R. SMITH and AGNES G. SMITH

Appearances:

For Appellants: John Leekley, Attorney at Law
For Respondent: W. M. Walsh, Assistant Franchise
Tax Commissioner; Hebard P. Smith,
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code (formerly Section 20 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in denying, to the extent of \$147.19, the claim of I. R. Smith and Agnes G. Smith for a refund of personal income tax in the amount of \$405.50 for the year 1936.

Two issues were originally raised by Appellants. One relates to the Commissioner's inclusion of the additional amount of \$1,123.71 in Appellants' income -for the year in question and the other involves the propriety of the Commissioner's action in disallowing the deduction of investment counsel fees in the amount of \$1,300.00 as a business expense. The first issue, however, is no longer before us inasmuch as the Commissioner has conceded that the inclusion of the additional \$1,123.71 in Appellants' income was erroneous.

As respects the investment counsel fees, it is the Commissioner's position that they were paid by Appellants in connection with the handling of their personal investments and that inasmuch as the handling of personal investments, no matter how extensive, does not constitute the carrying on of a trade or business under the decision in Meanley v. McColgan, 49 Cal. App. 2d 203, the fees cannot be deducted under Section 8(a) of the Personal Income Tax Act of 1935 as an expense "paid or incurred during the taxable year in carrying on a trade or business. .." The Appellants contend on the other hand, that the fees were paid in connection with carrying on a trade or business by virtue of the fact that Mr. Smith was engaged, as president and director, in the active management of two corporations in which Appellants had invested in excess of ninety percent of the value of all their investments, and that the investment counsel fees related to a large extent to the affairs and management of those corporations.

Appeal of L. R. Smith and Agnes G. Smith

It is to be noted, however, that regardless of the validity of Appellants' contention that a stockholder actively engaged in managing and directing the affairs of a corporation whose stock he holds is engaged in carrying on a business, Appellants do not deny that they were also engaged in handling investments other than those in the corporations of which Mr. Smith was an officer and they do not claim that the handling of these other investments constituted the carrying on of a trade or business. Furthermore, beyond general allegations to the effect that "in excess of 90% of the total value" of their investments were represented by their interests in the two corporations and that the investment counsel fees related "to a large extent" to the affairs and management of those corporations, Appellants have made no showing whatsoever as to the portion of the total investment counsel expense which might properly and equitably be allocated to the activities which Appellants contend constitute carrying on business.

It must be concluded, accordingly, that Appellants have failed to overcome the presumption of correctness attaching to the Commissioner's determination that the investment counsel fees were paid in connection with Appellants' handling of their personal investments. Inasmuch as expenses occurred in the handling of personal investments are not deductible as business expenses under the Act as enacted in 1935 (Meanley v. McColgan, 49 Cal. App. 2d 203) the action of the Commissioner must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the Board in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in denying to the extent of \$147.19, the claim of L. R. Smith and Agnes G. Smith for a refund of personal income tax in the amount of 9405.50 for the year 1936 be and same is hereby modified as follows: The Commissioner's action in denying refund of the amount of tax attributable to the inclusion of the sum of \$1,123.71 in Appellants income for the said year is hereby reversed, in all other respects the action of the Commissioner is hereby sustained.

Done at Sacramento, California, this 1st day of April, 1948, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
George R. Reilly, Member
J. H. Quinn, Member
Jerrold I. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary