



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of

HORACE C. MATHERS, HELEN V. MATHERS,)
 NELLIE M. KEMPLEY, AND)
 DOROTHY M. LUSHER AND THE ESTATE)
 OF ERNEST E. LUSHER, DECEASED)

Appearances:

For Appellants: Herschel B. Green
 Attorney at Law
 W. J. Schraner
 Accountant

For Respondent: Joseph W. Kegler
 Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests against proposed assessments of additional personal income tax and interest for the year 1963 as follows:

Appellant	Amount
Horace C. Mathers	\$ 6,034.03
Helen V. Mathers	6,034.03
Nellie M. Kempley	2,180.97
Dorothy M. Lusher and the Estate of Ernest E. Lusher, Deceased	12,200.29

The sole issue raised by these appeals is whether appellants are entitled to the benefits of section 17402 of the Revenue and Taxation Code, relative to the recognition of gain on the liquidation of a corporation. Because of the identity of facts, issue, and legal principles involved in each case, the four appeals are consolidated for purposes of this opinion.

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Section 17402 provides for special tax treatment of liquidation gain under certain circumstances, and requires that a qualified shareholder file a written election in order, to receive the benefits of that section, Subdivision (d) of section 17402 provides:

The written elections referred to in subsection (c) must be made and filed in such manner as to be not in contravention of regulations prescribed by the Franchise Tax Board. The filing must be within 30 days after the date of the adoption of the plan of liquidation. ...

Respondent's regulations provide, "Under no circumstances shall Section 17402 be applicable to any shareholders who fail to file their elections within the 30-day period prescribed." (Cal. Admin. Code, tit. 18, reg. 17402(c).) These provisions are substantially the same as their federal counterparts. (Int. Rev. Code of 1954, § 333; Treas. Reg. § 1.333-3.)

Appellants are former shareholders of Keluma, Incorporated, a California corporation formed in 1949. On September 13, 1963, appellants' representative directed a letter to respondent which read:

We are desirous of dissolving KELUMA, INCORPORATED in the month of October, 1963, and would greatly appreciate your mailing us a tax clearance.

That letter was received at respondent's Sacramento offices on September 16, 1963, and respondent mailed the requested Tax Clearance Certificate to appellants' representative on September 18, 1963.

On October 3, 1963, appellants adopted a plan to completely liquidate Keluma, Incorporated, and that corporation was dissolved on October 28, 1963. Within 30 days from the date the plan of liquidation was adopted each appellant filed Treasury Department Form 964 with the Internal Revenue Service, thereby making timely federal elections to defer a portion of the gain which they realized upon the liquidation of Keluma, Incorporated. Nothing purporting to be an election under section 17402 of the Revenue and Taxation Code was filed with respondent at that time.

On or about February 25, 1964, appellants' representative completed a Form 596 (Annual Information Return) and a Form 599L (Information Return--Distributions in Liquidation for Calendar Year 1963) for each appellant as a stockholder of Keluma, Incorporated, and sent these forms to respondent. The Forms 599L

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showed that portion of the liquidation distribution which was being treated as a taxable dividend by each appellant-stockholder under section 333 of the Internal Revenue Code of 1954, but gave no indication that a similar election had been made under the provisions of section 17402 of the Revenue and Taxation Code.

On March 19, 1964, appellants' representative directed a letter to respondent in Sacramento and enclosed a completed copy of the federal election form, Form 964, for each appellant. In that letter appellants' representative stated that those forms were being filed in compliance with section 17402 of the Revenue and Taxation Code, since he had been informed by respondent's Los Angeles office that no specific state form was available for the section 17402 election and that the federal forms would be acceptable. Respondent's form inventory records in Sacramento and Los Angeles both indicate that a supply of Forms 564, the state election form similar to federal Form 964, was continuously available to the public at respondent's Los Angeles office from May 1963, until the end of that year.

In their California personal income tax returns for 1963, appellants computed their tax liability as if they were entitled to the special benefits of section 17402 of the Revenue and Taxation Code, with respect to the assets which they received upon liquidation of Keluma, Incorporated. Respondent's proposed additional assessments are based upon its determination that the entire liquidation gain was taxable to appellants, since they had failed to file timely written elections as required by section 17402 of the Revenue and Taxation Code.

Appellants argue that they substantially complied with the requirements of section 17402 by the following acts: (1) Their representative's letter of September 13, 1963, informing respondent of appellants' intention to dissolve Keluma, Incorporated, in October 1963, and requesting a tax clearance; (2) the filing of information returns with respondent on or about February 25, 1964; and (3) the filing with respondent of federal election forms for each appellant on March 19, 1964. Appellants contend further that their failure to file election forms with respondent during the 30-day period following their adoption of a plan of liquidation was due to mistake, inadvertence and neglect, and such failure should be excused under the authority of cases like Van Keppel v. United States, 206 F. Supp. 42, aff'd, 321 F.2d 717, Georgie S. Cary, 41 T.C. 214, and Pearce v. United States, 226 F. Supp. 702.

This board had occasion to consider the precise issue raised here in Appeal of Matthew Berman and the Estate of Sonia Berman, Cal. St. Bd. of Equal., June 28, 1965, and again

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in Appeals of John and Elvira C. Costa, et al., Cal. St. Bd. of Equal., March 7, 1967. In both of those cases we concluded that the 30-day requirement contained in section 17402 of the Revenue and Taxation Code is clear, explicit and mandatory, leaving no room for the exercise of discretion.

Federal decisions interpreting section 333 of the Internal Revenue Code of 1954, and its predecessor, section 112(b) (7) of the 1939 Internal Revenue Code, have also construed the 30-day filing requirement very strictly. (Ralph D. Lambert, T.C. Memo., Dkt. Nos. 2071-62, 2080-62, 2081-62, Oct. 29, 1963, aff'd per curiam, 338 F.2d 4; N. H. Kelley, T.C. Memo., Dkt. Nos. 22356, 22357, 22360, 22361, Feb. 13, 1951.) In the Kelley case, supra, election forms mailed by the taxpayers only one day after the expiration of the 30-day filing period were held to be untimely. None of the cases cited by appellants as authority for excusing their untimely filing were concerned with statutes which clearly required an election within a specified time, as is the case here.

In the instant case we do not think appellants have shown that they complied with the election requirement of section 17402 of the Revenue and Taxation Code. The plan to liquidate Keluna, Incorporated, was adopted on October 3, 1963. The end of the 30-day filing period was therefore November 2, 1963. During that period nothing purporting to be a 17402 election was filed by any of appellants. Assuming, as alleged by appellants and denied by respondent, that appellants received information in October 1963, that no special state election forms were available, appellants could still have made some other timely written communication to respondent of their desire to make the section 17402 elections. They did not do so. Consistently with our earlier decisions on this issue, since appellants failed to comply with the statutory election requirements we must sustain respondent's action.

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 protests against proposed assessments of additional personal income tax and interest for the year 1963 as follows, be and the same is hereby sustained:

Appellants	Amounts
Horace C. Mathers	\$ 6,034.03
Helen V. Mathers	6,034.03
Nellie M. Kempley	2,180.97
Dorothy M. Lusher and the Estate of Ernest E. Lusher, Deceased	12,200.29

Done at Sacramento , California, this 24th day
of April , 1967, by the State Board of Equalization.

Paul R. Leabo, Chairman
John W. Lynch, Member
_____, Member
_____, Member
Bob L. Smith, Member

ATTEST: [Signature], Secretary