



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RAYMOND AND JUANITA M. CARIGNANI)

Appearances:

For Appellants: James J. Uhle
Public Accountant

For Respondent: Peter S. Pierson
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Raymond and Juanita M. Carignani against proposed assessments of additional personal income tax in the amounts of \$327.45, \$73.24, and \$49.55 for the years 1961, 1962, and 1963, respectively.

The issue presented is whether the inclusion of **noncash** patronage allocations in gross income upon receipt in 1957 constituted an election binding on appellants to regard similar allocations in 1961, 1962, and 1963 as gross income when received.

In 1957 appellants received certain **noncash** patronage allocations from the Merced Tomato Growers' Association. Appellants wanted their income tax liability deferred with respect to the allocations until the year they were redeemed or realized upon. Through an error by the office staff of appellants' accountant, however, the face amount of the allocations was included in gross income on appellants' 1957 personal income tax return.

No more **noncash** allocations were received by appellants until after 1960, They did not report the face

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amount of allocations received in 1961, 1962, and 1963, their intention being to defer inclusion of these allocations in gross income until the year they were redeemed or realized upon,

Concluding that an election had been made in 1957, respondent Franchise Tax Board revised appellants' gross income for the three years under appeal and included in taxable income the face value of the noncash allocations when received. Appellants contend that they should not be bound by the mistake.

Section 17117.5 of the Revenue and Taxation Code provides in part:

(a) Noncash patronage allocations from farmers' cooperative and mutual associations . . . may, at the election of the taxpayer, be considered as income and included in gross income for the taxable year in which received.

(b) If a taxpayer exercises the election provided for in subdivision (a), the amount included in gross income shall be the face amount of such allocations.

(c) If a taxpayer elects to exclude non-cash patronage allocations from gross income for the taxable year in which received, such allocations shall be included in gross income in the year that they are redeemed or realized upon.

(d) If a taxpayer exercises the election provided for in subdivision (c), the face amount of such noncash patronage allocations shall be disclosed in the return made for the taxable year in which such noncash patronage allocations were received.

(e) If a taxpayer exercises the election provided for in subdivision (a) or (c) for any taxable year, then the method of computing income so adopted shall be adhered to with respect to all subsequent taxable years unless with the approval of the Franchise Tax Board a change to a different method is authorized.

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Respondent's regulations provide in part:

If a taxpayer includes in his gross income for his first taxable year beginning after December 31, 1956, any amount attributable to **noncash** patronage allocations, he shall be deemed to have elected to include the face amount of such allocations in gross income for such year and all subsequent taxable years.

* * *

Once an election has been made, it may be changed only with the consent of the Franchise Tax Board. Application for permission to change an election shall be filed within 93 days after the beginning of the taxable year to be covered by the return. (Cal. Admin. Code, tit. 18, reg. 17117.5, subdivision (c).)

Once an election has been made as to the method of reporting and paying tax on a certain transaction pursuant to a statutory provision, the choice made is generally regarded as binding. (Pacific National Co. v. Welch, 304 U.S. 191 [82 L. Ed. 1282].) An election is afforded as a matter of legislative grace and therefore must be made in the manner and time prescribed by the Legislature. This rule also applies with respect to methods of reporting which bind taxpayers for subsequent years. Otherwise, taxpayers with the benefit of hindsight, in many instances, could shift from one method to another in light of developments subsequent to their original choice. (J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 [85 L. Ed. 36].)

The provisions of section 17117.5 are clear and unequivocal. Such provisions neither require nor permit consideration of the absence of wilfulness or negligence of the taxpayer and an oversight of an accounting firm resulting in an election contrary to wishes is still binding. (See N. H. Kelley, T.C. Memo., Feb. 13, 1951.) Accordingly, a binding election was made by appellants in 1957.

An election under section 17117.5 is binding with respect to all subsequent years unless a change to a different method is authorized. In accordance with respondent's regulations, consent to a change in the reporting method may only be given if application for permission to change the method is

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filed with respondent within .93 days after the beginning of the year to be covered by the return. (Cal. Admin. Code, tit. 18, reg. 17117.5, subdivision (c), supra.) In the present case, a change from the 1957 reporting method was neither requested nor authorized.

It is true that appellants* situation is not one where they seek to change an intentional election and benefit from hindsight. They explain that the mistake did not come to their attention until the proposed assessments were initiated and consequently no attempt was made before then to change this unintended election in the manner prescribed. Nevertheless, this circumstance does not form a legal basis for excusing failure to conform to the statutory and regulatory requirements. (See N. H. Kelley, supra, T.C. Memo., Feb. 13, 1951.)

We conclude, accordingly, that an election was made in the 1957 return to include noncash patronage dividends in gross income for the taxable year in which they were received and that this election was binding with respect to allocations received during the years under appeal.

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 Raymond and Juanita M. Carignani against proposed assessments of additional personal income tax in the amounts of \$327.45, \$73.24, and \$19.55 for the years 1961, 1962, and 1963, respectively, be and the same is hereby sustained..

Done at Sacramento, California, this 8th day of January, 1968, by the State Board of Equalization.

Richard L. Davis, Chairman
William J. ..., Member
John W. Linnick, Member
John ..., Member
..., Member

ATTEST: John ..., Secretary