BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HASKELL M. AND CECILE C. GOODMAN)

For Appellants: Haskell M. Goodman, in pro. per.

For Respondent; Crawford H. Thomae
Chief Counsel

Jack E. Gordon
Counsel

OPINION

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 Haskell M. and Cecile C. Goodman against proposed assessments of additional personal Income tax in the amounts of $87.50 and $87.35 for the years 1964 and 1965, respectively.

Appellants are husband and wife, Mr. Goodman practices law as a sole practitioner in San Jose, California. Appellants filed jolnt California personal income tax returns for the years 1964 and 1965. In each of those returns they claimed a deduction of $1,250, designated as "payment by self employed person to federally approved retirement plan." Respondent disallowed those deductions on the ground that there is no provision In the California Personal Income Tax Law which allows the deduction of such payments. That action by respondent gave rise to this appeal.

Appellants advance two arguments in support of the claimed deductions. Their first argument centers around a 1967 amendment to section 17501 of the Revenue and Taxation Code.

Section 17501 of the Revenue and Taxation Code is generally patterned after section 401(a) of the Internal

Revenue Code of 1954, which defines qualified pension, profit-sharing and stock bonus plans established by employers for the benefit of their employees. Section 17513 of the Revenue and Taxation Code is substantially similar to the first paragraph of section 404(a) of the 1954 Internal Revenue Code, allowing an employer a limited deduction of contributions which he makes to such a plan on behalf of his employees.

In 1962 section 401 of the federal law was amended to include retirement plans for self-employed Individuals within the framework of the qualified plan. (Int. Rev. Code of 1954, § 401(a)(10).) At the same time section 404 of that code was amended to allow a self-employed individual to deduot his own contributions to such a plan, within certain limits. The California law was not changed at that time.

In 1967 the Legislature added subdivision (g) to section 17501 of the Revenue and Taxation Code. That subsection expands the definition of the qualified plan to include:

> ... [a] trust or plan [which) meets the requirements of Public Law 87-792, 76 U.S. Stats. 809, approved October 10, 1962 (the Self-Employed Individuals Tax Retirement Act of 1962) but no deduction shall be allowed for contributions made to such plan or trust by the employer or employee, or both,

No change was made in section 17513 of the Revenue and Taxation Code at that time.

Appellants contend that when the above subdivision was added to section 17501, so as to specifically deny the deduction of contributions to a self-employed individual's retirement plan, the Legislature Intended to change the existing law. Appellants argue that since there was no prohibition against such a deduction prior to 1967, they are therefore entitled to the deductions claimed in 1964 and 1965. We cannot agree.

It is a well-established principle of income tax law that the allowance of deductions from gross Income is a matter of legislative grace, and the taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms. (New Colonial Ice Co. v. Helvering, 292 U.S.95 [78 L. Ed. 1348];; Deputy v. du Pont, 308 U.S. 488 [84 L. Ed. 416]; Appeal of Henrietta Swimmer, Cal. St. Bd. of Equal., Dec. 10, 1963.)

The amounts contributed by appellants to a self-employed individual's retirement plan were includible in the first instance in appellants@ gross income. (Rev. & Tax. Code, § 17071, subd. (a)(1).) The California law has never contained a provision allowing the deduction of such amounts. From the mere absence of such a statutory provision it cannot be concluded that the deduction was therefore available, for exemptions from taxation cannot rest upon mere implications. (United States v. Stewart, 311 U.S. 60 [85 L. Ed. 40].)

Nor is a contrary conclusion required by appellants' reference to the general rule of statutory construction that an amendment to a statute ordinarily indicates an Intent to change the pre-existing law. The California Supreme Court has recognized that a statutory amendment may Indicate merely an intention of the Legislature to clarify existing law. (Union League Club v. Johnson, 18 Cal, 2d 275 [115 P.2d 425].) IA our opinion that was clearly the case here. The express prohibition against any deductlon which is contained In section 17501, subdivision (g), of the Revenue and Taxation Code was undoubtedly intended to confirm the pre-existing unavailability of the deduction and also to distinguish the California law in this respect from the federal provisions, which do allow such a deduction,

Secondly, appellants argue that, at least IA years prior to 1967, section 28005 of the California Corporations Code supported their contention that their contributions to a self-employed individual's retirement plan were deductible under the California Personal Income Tax Law. That section provides:

> The property of a retirement system, the portion of wages or salary of an employee deducted or to be deducted, the right of an employee to a pension benefit, and all his rights in the funds of the system, shall be exempt from taxation and from the operation of any law relating to bankruptcy or insolvency.

IA Appeal of G. F. and Louise M. Anderegg, Cal. St. Bd. of Equal., Oct. 27, 1964, we had occasion to consider this precise question as it arose out of a slightly different factual situation. The issue in the Anderegg appeal was whether amounts withheld from Mr. Anderegg's salary by his employer, as contributions to a pension plan, were exempt from California personal income tax by virtue of section 28065 of the California Corporations Code. We there concluded the contributions constituted taxable income to the

taxpayer, and that no exemption from the Income tax was provided by section 28005 of the Corporations Code. That conclusion was based primarily upon the decision of the California Supreme Court in Estate of Simpson, 43 Cal. 2d 594 [275 P.2d 467], In which the court interpreted a clause of exemption almost Identical to the one before us and concluded that the words "exempt from taxation" applied only to property taxes. We see no reason to reach a different conclusion In the Instant case.

In the absence of any statutory provision allowing their deduction, the amounts set aside by appellants as retirement savings must be treated as nondeductible personal expenditures. Respondent's action in this matter must therefore be sustained.

ORDER

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 Haskell M. and Cecile C. Goodman against proposed assessments of additional personal income tax In the amounts of $87.50 and $87.35 for the years 1964 and 1965, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 5th day of August, 1968, by the State Board of Equalization.

, Chairman

, Member

, Member

, Member

, Member

ATTEST: Secretary