

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RICHARD W. AND HAZEL R. HILL)

Appearances:

For Appellants: Richard W. Hill, in'pro. per.

For Respondent: Jack E. Gordon
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Richard W. and Hazel R. Hill for refund of personal income tax in the amount of \$1,089.15 for the year 1961.

The question presented is whether the Franchise Tax Board's adjustments, based upon a federal audit report, were proper.

Richard W. Hill (hereafter appellant) is an investment promoter. During 1961 he was associated with Conrad, Bruce and Company. In that year appellant was to receive a commission for services rendered in connection with a sales transaction which he had been working on since July 1957. One of his business associates filed a court action against appellant for a portion of that commission. As a result of the suit, in 1961 appellant actually received only \$24,000 of the total commission of \$40,000. The remaining \$16,000 was impounded and placed in escrow pending the outcome of the litigation. Appellant received the impounded funds in a subsequent year when he prevailed in the court action.

Appeal of Richard W. and Hazel R. Hill

In 1961, both federal and California law contained provisions setting forth precise circumstances under which a taxpayer receiving lump-sum compensation in one taxable year would be allowed to spread that income back to other taxable years. (Int. Rev. Code of 1954, § 1301; Rev. & Tax. Code, § 18241.) In his federal and state income tax returns for 1961, appellant used the above provisions and spread back the \$24,000 portion of the commission received in 1961. The Internal Revenue Service audited appellant's 1961 federal return and made several adjustments, the major one being the disallowance of appellant's use of the spread-back provisions. Other adjustments related to the disallowance of various other deductions, including a \$754.22 bad debt deduction.

Respondent issued its notice of proposed assessment for 1961 on the basis of the federal audit report. Thereafter the Internal Revenue Service allowed the \$754.22 bad debt deduction which appellant had claimed in 1961. Respondent accordingly concedes that of the above mentioned federal adjustments, the bad debt deduction should be allowed to appellant. At a meeting with respondent on January 29, 1970, appellant stated he would concede all of the remaining adjustments for 1961, with the exception of the one relating to his use of the spread-back provision in reporting the \$24,000 commission. Thus the propriety of that adjustment is the only matter remaining in issue.

Section 18451 of the Revenue and Taxation Code requires a taxpayer to report to respondent any changes or corrections made by the Internal Revenue Service in the taxpayer's reported taxable income. Under section 18451 the taxpayer must concede the accuracy of the final federal determination, or state wherein it is erroneous. Respondent's proposed assessment based upon the federal determination is presumed to be correct, and the burden is on the taxpayer to show that it is incorrect. (Todd v. McColgan 89 Cal. App. 2d 509 [201 P.2d 4143; Helvering v. Taylor, 293 U.S. 507 [79 L. Ed. 6235; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.)

In 1961 section 18241, subdivision (a), of the Revenue and Taxation Code and its federal counterpart, section 1301(a) of the Internal Revenue Code of 1954, allowed an individual to spread back income earned from an employment covering 36 months or more to the preceding taxable years in which it was being earned, provided that:

- (3) The gross compensation from the employment received or accrued in the taxable

Appeal of Richard W. and Hazel R. Hill

year of the individual **...is** not less than 80 percent of the total compensation from such employment;...

Appellant's total compensation from the employment in question was \$40,000. In 1961 he actually received only \$24,000, or 60 percent of the total compensation. Income which is impounded pending litigation is not considered to be received by a taxpayer until he has the right to demand payment to him of the impounded funds. (North American Oil Consolidated v. Burnet, 286 U.S. 417 [76 L. Ed. 11973.]) It has been held that income from a transaction could not be included to satisfy the percentage requirement for spreading back income where during the taxable year such funds were held in escrow and were not released until a following year. (Sloane v. Commissioner, 188 F.2d 254. See also Samuel Melnick, T.C. Memo., May 9, 1960.)

In the instant case appellant's right to the portion of the commission held in escrow was contingent upon the outcome of the litigation. That litigation was not completed until a year subsequent to 1961. During 1961 appellant received only 60 percent of the total sales commission and he was therefore not entitled to use the spread-back privilege set forth in section 18241 of the Revenue and Taxation Code. **We conclude that appellant** has failed to prove that respondent's adjustment in this regard, based upon the final federal determination, was improper.

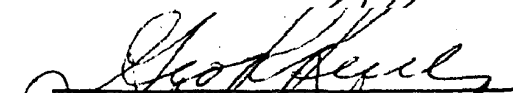


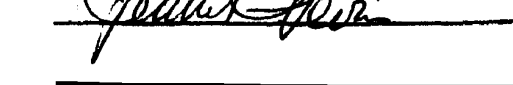
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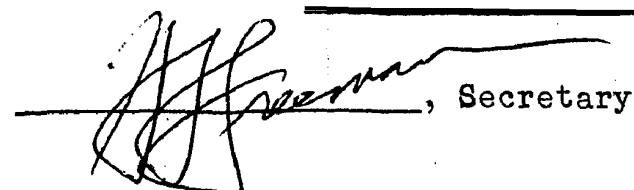
Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Anneal of Richard W. and Hazel R. Hill

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Richard W. and Hazel R. Hill for refund of personal income tax in the amount of \$1,089.15 for the year 1961 be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of November, 1970, by the State Board of Equalization.

 /Chairman
 , Member
 , Member
 , Member
_____ , Member

ATTEST:  , Secretary