72-SBE-031

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MELVIN D. COLLAMORE)

Appearances:

For Appellant: Melvin D. Collamore, in pro. per.

For Respondent: A. Ben Jacobson 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 Melvin D. Collamore against proposed assessments of additional personal income tax in the amounts of $127.81 and $205.23 for the years 1968 and 1969, respectively. All statutory references in this opinion are to the Revenue and Taxation Code.

The issues to be decided are: (1) whether under section 18001 appellant is entitled to a tax credit greater than the amount of taxes actually paid to another state; (2) whether respondent is precluded from issuing a new notice of proposed assessment after having previously withdrawn an earlier notice for the same year and based upon the same legal theory; and (3) whether a binding settlement has been entered into by respondent's negotiating a check which was explicitly tendered upon the condition that appellant's proposed terms of settlement be accepted.

Appellant is a resident of California. His occupation as a field engineer requires him to accept short-term work assignments at various job sites around the country for periods ranging from 30 days to one year. Consequently, in 1968 appellant spent four months working in New Mexico, and in 1969 another seven months were spent in that state. The remainder of the two years was spent in California. Appellant paid taxes on his net

income to the State of New Mexico in the amounts of $72.52 and $158.74 for the years 1968 and 1969, respectively.

On April 15, 1969, appellant filed a resident California personal income tax return for 1968. He reported a tax liability of $461.60 for that year, claiming a credit in the amount of $200.33 for taxes paid to another state, and attached his New Mexico non-resident return. The amount of the credit wasarrived at by applying the formula found in section 18001, subdivision (c).

On March 30, 1970, appellant filed'a part-year nonresident California personal income tax return, claiming nonresident status for the time spent in New Mexico. At the same time he filed an amended return for the year 1968, claiming nonresident status on the same basis. as the 1969 return. This amended return was treated by respondent as a claim for refund.

On September 25, 1970, respondent issued to appellant a notice' of additional personal income tax proposed to be assessed in the amount of $127.81 for the year 1968, this figure being the difference between the amount of the credit claimed on the original 1968 resident return and the amount actually paid in income taxes to the State of New Mexico in 1968. Appellant notified respondent of the amended return and made a claim for refund. The September 25, 1970, deficiency notice was thereupon withdrawn, and appellant was so notified on December 30, 1970.

However, on January 5, 1971; an erroneous billing for the September 25, 1970, deficiency notice was sent to appellant. Upon making inquiry, appellant was informed that the billing had been erroneous but that the with-drawn assessment would be reissued, as well as an assess-ment for the year 1969.

On February 4, 1971, notices of proposed assess-ments -for the years 1968 and 1969 were issued denying part-year nonresident status and allowing as a credit only those taxes actually paid to New Mexico in the. year 1968. Appellant's letter of protest, in addition to maintaining his claim of part-year nonresidency, asserted in the alternative a claim for a credit $260.45 for the year 1969 for taxes paid to another state, this figure again arrived at by application of the formula found in section 18001, subdivision (c). The letter also contained a check in the amount of $103.52 for the

self-assessed deficiency for the year 1969. This check was tendered upon the express condition that respondent accept the offered terms of settlement.

Respondent negotiated the check and applied the proceeds against appellant's deficiency. On May 28, 1971, notices of action were sent to appellant affirming the proposed assessment for 1968 and allowing as a credit for 1969 the amount actually paid to New Mexico in that year. On appeal, appellant has abandoned his claim for part-year, nonresident status.

Section 18001 provides:

> Subject to the following conditions, residents shall be allowed a credit against the taxes imposed by *this* part for net income taxes imposed by and paid to another state on income taxable under this part:
>
> (a) The credit shall be allowed only for taxes paid to the other state on income derived from sources within that state which is taxable under its laws irrespective of the residence or domicile of the recipient.
>
> (b) This credit shall *not* be allowed if the other state allows residents of this State a credit against the taxes imposed by that state for taxes paid or payable under this part.
>
> (c) The credit shall not exceed such proportion of the tax payable under this part as the income subject to tax in the other state and also taxable under this part bears to the taxpayer's entire income upon which the tax is imposed by this part. (Emphasis added.)

It is clear that the underlined words "and paid to" at the beginning of this section establish that the amount of taxes actually paid to another state determines the maximum allowable credit in all cases. The formula found in subdivision (c) provides a possible further limitation on the amount of the credit. Thus in applying the statute to the facts of this case respondent has correctly determined the amounts of the allowable credits. Moreover, appellant has not disputed this interpretation of the statute.

Appeal of Melvin D. Collamore

Appellant's argument, rather, is that he has correctly determined the amount of the allowable credit in accordance with the instructions accompanying Form 540, the resident California personal income tax return form. Those instructions, insofar as they are applicable here, read as follows:

> Credit for Income Taxes Paid Other States-- If you derived income from sources within and paid a NET INCOME tax to any of the following states on income which you report to California, you may claim a credit, subject to limitations explained below...
>
> [a list of states with tax systems which qualify is given]...
>
> You are not allowed a credit against your California tax for amounts paid to the following states...
>
> [a list of states with tax systems which do not qualify is given]...
>
> No credit may be allowed for income taxes paid to any city, the federal government, a foreign country, or for any payments of state unemployment or disability insurance.
>
> A credit is allowable against your California tax only if the tax you paid the. other state was based on net income...
>
> * * *
>
> Tax Credit Limitations--The credit allowable may not exceed that proportion of the California tax which the income taxable by both states bears to the entire income taxable by California.

While we agree with appellant that it is nowhere explicitly stated that the amount of taxes actually-paid to another state constitutes a limitation on the amount of the allowable credit, we do not agree that the formula given in the last paragraph of the above instructions is the only limitation on the amount of the credit available to appellant. The title given to the first paragraph. states that the credit is for "income taxes paid other states." The

second paragraph contains the words "amounts paid." The third paragraph contains the words "income taxes paid," and the fourth paragraph contains the words "tax you paid." We think all of these phrases indicate that the amount of taxes actually paid by appellant is determinative of the amount of the credit available to him. Even the paragraph upon which appellant relies, that containing the formula, has as its predicate the phrase "may not exceed;" this is a clear indication that the allowable credit may be less than the amount calculated by use of the formula. Therefore we reject appellant's contention that he has calculated the credit in the only way allowed by these instructions.

Moreover, even if appellant's claim that he correctly followed the instructions was well-founded, he has offered no reason as to why the instructions should take precedence over the statute. The statute is clear on its face, and an administrative agency has no power to interpret it in such manner as to alter-its command. (Dillman v. McColgan, 63 Cal. App. 2d 405, 409 [146 P.2d 978]; Appeals of James S. and Marian Forkner, et al., Cal. St. Bd. of Equal., Aug. 7, 1963.)

Furthermore, appellant has apparently misunderstood the purpose of this credit. it is not its purpose to exempt from tax income derived from sources in other states which impose a net income tax; California taxes its residents'on their income from whatever source derived (See section 17041). Its purpose, rather, is to shield California residents so far as possible from the inequities of double taxation. (See Appeal of John and Giivia A. Poole, Cal. St. Bd. of Equal.;Oct., 1, 1963) The purpose of the limitation found in section 18001, subdivision (c) is simply to impose the burden of another state's higher effective tax rate upon the taxpayer rather than upon the State of California. Thus, the spirit as well as the letter of section 18001 is served by allowing as a credit only the amount of taxes actually paid to another state, subject to the limitations found within the statute.

Appellant next argues that the second assessment for the year 1968 is invalid since a previous assessment for that year, based upon the same facts and

the same theory, had been withdrawn.[1] This precise issue has been previously decided by this Board, adversely to the taxpayer, in Appeal of Kung Wo Company, Inc., Cal, St. Bd. of Equal., decided May 5, 1953. In that case we construed section 25 of the Bank and Corporation Franchise Tax Act (Stats. 1943, p. 203) to allow reissuance of a previously withdrawn assessment. The language of section 18583, the controlling statute on the issue in this case, is substantially identidal to that construed in Kung Wo, and we see no reason to depart from our earlier construe-, tion. Therefore we reject appellant's argument on this issue.

Appellant lastly argues that a binding settle-., . ment between himself and respondent has been consummated which prevents any further assessment for the years in question. Appellant seeks to support his contention by showing his offer of settlement, his check which was tendered explicitly upon the condition that the settlement be accepted, and the negotiation of that check by respondent-

A settlement is effected between a taxpayer and the Franchise Tax Board by means of a closing agreement, The law with respect to closing agreements is found in section 19132 which provides that any such agreement must be in writing and approved by the State Board of Control. We have previously held that this is the only method whereby a settlement can be effected. (Appeal of Wesley G. Pope, Cal. St. Bd. of Equal., July 22, 1958; see also Botany Worsted Mills v. United States, 278 U.S. 282 [73 L. Ed. 379].) Since the requirements of the statute were not'met in this case we reject appellant's claim that a settlement has been effected.

For the above reasons we must sustain respondent's action in this matter.

---

[1] Appellant also claims that the withdrawal of the first 1968 assessment precludes the issuance of the 1969 assessment since the same issues are involved for each year., Our decision as to the validity of the second 1968 assessment makes unnecessary any discussion of this point. However, even if we were to conclude that the, second'1968 assessment was invalid, that would not affect the 1969 assessment. (See section 19452.)

Appeal of Melvin D. Collamore

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 Melvin D. Collamore against the proposed assessments of additional personal income tax in the amounts of $127.81 and $205.23 for the years 1968 and 1969, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 24th day of October, 1972, by the State Board of Equalization.

John W. Lynch, Chairman
Geo. R. Reilly, Member
William W. Bennett, Member
__________, Member
__________, Member

ATTEST: W. W. Dunlap, Secretary