BEFORE THE STATE BOARD OF EQUALIZATION

'OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
RONALD J. AND EILEEN BACHRACH)

For Appellants: Ronald J. Bachrach, in pro. per.

For Respondent: John A. Stilwell, Jr.
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Ronald J. and Eileen Bachrach against a proposed assessment of additional personal income tax in the amount of $219, plus interest, for the year 1976.

The primary issue presented is the propriety of respondent's partial disallowance of a claimed deduction which was based upon a federal audit adjustment.

On January 1, 1976, appellant Ronald J. Bachrach, who possesses a California real estate broker's license, started to work as a partner in a newly formed construction business,

Late in 1975 he had purchased a new Datsun automobile which was used throughout 1976 in connection with his work. On his 1976 federal return appellant reported that he had driven the Datsun 15,000 miles in that year with 12,750 miles or 85 percent being attributable to business. Appellant then allocated 85 percent of the cost of oil and gasoline, repair expense and depreciation to deductible business expense. He also allocated thereto the amount of $25 in parking fees and tolls. This resulted in appellants claiming a $3,577 deduction in automobile expenses. Upon audit, however, the Internal Revenue Service revised appellants' reported 1976 federal taxable income by disallowing $1,560 of the expenses claimed with respect to the business use of the new vehicle.

The IRS determined that appellant did not substantiate, all the claimed expenses and allowed appellant fifteencents per mile for the 12,750 miles driven for business purposes and a small amount of additional expenses in computing the $2,017 allowable deduction. In issuing its proposed assessment respondent applied the federal adjustments for state tax purposes.

In disagreeing with the partial disallowance, appellant asserts that the small Datsun was not purchased for family use (a family consisting of his wife, a teen-age son, and nine year old daughter); and that on weekends the family generally used the family sedan. Appellant alleges he traveled throughout San Diego county that first business year to acquire necessary business properties:

Appellant admits that for 1976 he did not keep records of his mileage and destinations, not having done this until advised by his certified public accountant in March of 1977 to do so. He explains that he offered to show the subsequent records to the federal auditor but that she refused to examine them on the ground that they were not relevant for 1976. He explains that after he appealed to the agent's supervisor concerning the partial disallowance, the

agent's action was upheld, and he claims that he did not have time to travel to Los Angeles to pursue the federal appeal process further. He also maintains, that because of the preliminary "negative attitude," he felt that a further appeal would be useless. Appellant claims that for these reasons he reluctantly consented to'the federal adjustment. Moreover; appellant maintains that respondent adjusted the tax liability in accordance with the federal audit without allowing a hearing.

In resolving this matter, we must recognize that respondent's proposed assessment based on a federal audit report is presumed correct and the burden is on the taxpayer to prove it erroneous. (Rev. & Tax. Code, §18451; Appeal of Robert J. and Evelyn A. Johnston, Cal. St. Bd. of Equal., April 22, 1975; Appeal of Henrietta Swimmer, Cal. St. Bd. of Equal., Dec. 10, 1963; see also Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414] (1949).) Moreover, deductions are a matter of legislative grace and the burden of proving the right thereto is upon the taxpayer.' (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L. Ed. 13481 (1934):)

After reviewing the record in this appeal, we conclude that respondent's position should be sustained. Appellant's statement concerning his reasons for acquiescence in the federal audit conceivably explains the motivation for his action. However, his reasons have little, if any, bearing on the issue of whether the federal action was correct. (Appeal of Robert J. and Evelyn A. Johnston, supra; Appeal of Donald D. and Virginia C. Smith, Cal. St. Bd. of Equal., Oct. 17, 1973; Appeal of Samuel and Ruth Reisman, Cal. St. Bd. of Equal., March 22, 1971.) Moreover, the amount of $2,017 of the $3,577 claimed deduction was allowed by the IRS notwithstanding the apparent absence of specific substantiation. (Cf. Appeal of Henrietta Swimmer, supra.) Furthermore, the appellant has only presented self-serving statements. The record before us simply does not establish that appellant has proved any basis for a further allowance. We note appellant's complaint that respondent did not give him a requested hearing on his protest and this makes it particularly disappointing that he did not avail himself of the opportunity to submit substantiating evidence in these appellate proceedings.

We note also that appellant objects to the accrual of interest for the period subsequent to his protest, explaining that respondent had advised him

the protest would receive the earliest consideration but it was nevertheless approximately five months before respondent affirmed its action. He maintains that he should not be penalized for this delay by respondent.

Section 18688 of the Revenue and Taxation Code mandates the imposition of interest upon a deficiency assessment "from the date prescribed for the payment of the tax until the date the tax is paid." Assuming, without deciding, that respondent's delay was unduly long, any such delay does not preclude interest being charged; a taxpayer can pay the tax at any time to stop the running of interest, without jeopardizing the right to a refund. (Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978; Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965.) Moreover, the imposition of interest is not a penalty but is compensation for the taxpayer's use of money. (Appeal of Patrick J. and Brenda L. Harrington, supra.)

For the reasons stated above, we conclude that respondent's actions of imposing the tax and interest must be sustained.

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,

Appeal of Ronald J. and Eileen Bachrach

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 Ronald J. and Eileen Bachrach against a proposed assessment of additional personal income tax in the amount of $219, plus interest, for the year 1976, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of February, 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member