

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JAMES W. AND MARGARET R. HENDERSON)

Appearances:

For Appellants: James W. Henderson, in pro. per.

For Respondent: John R. Akin
Counsel

O B 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 James W. and Margaret R. Henderson against a proposed assessment of additional personal income tax in the amount of \$120.40, plus interest, for the year 1977.

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The primary issue for determination is whether, under the circumstances described below, this board should regard appellants as entitled to a child care expense tax credit.

Appellants reported **\$40,372.00** in adjusted gross income on their 1977 California personal income tax return. From their computed state income tax liability they deducted a claimed tax credit for child care expenses **in** the amount **of** \$120.00.

While section 17052.6 of the Revenue and Taxation Code does provide a tax credit for the expenses of child care in **an** amount not to exceed \$120.00, **respondent disallowed** the entire claimed credit because of the limitation contained in subdivision **(a) (3) thereof, 1/** and **consequently proposed** the assessment which *is* the subject of this appeal.

This statutory limitation was applied by respondent to appellants' circumstance because their adjusted gross income exceeded **\$19,999.00**. The statutory limitation is unquestionably clear; under its provisions, we must conclude that appellants' claimed credit was properly disallowed. (See Appeal of James W. Henderson, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of Terry A. and Jeanne-M; Burdyshaw, Cal. St. Bd. of Equal., Feb. 8, 1979.)

Appellant James W. Henderson has not challenged respondent's computation of the proposed assessment. However, he contends that the statutory limitation is unconstitutional and unfair. He argues that it results in a repressive tax against the working middle class taxpayer, and therefore is an unconstitutional provision denying the equal protection of law guaranteed by the federal and state Constitutions. He strenuously urges that consequently this board should hold that the statutory limitation in question is unconstitutional. He also relies on the fact that there is not a similar limitation in the federal income tax law.

1/ Subdivision **(a) (3)** thereof provides., in pertinent part:

The credit **shall be** reduced by 2 percent for each one hundred dollars of adjusted gross income in excess of fifteen thousand dollars.

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We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution 2/ precludes our determining that this statutory limitation is unconstitutional or unenforceable. (Appeal of James W. Henderson, supra; see also Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978.)

Moreover, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of James W. Henderson, supra; Appeal of Robert J. Johnston and Evelyn A. Johnston, Cal. St. Bd. of Equal., April 22, 1975; Vortox Manufacturing Company, Cal. St. Bd. of Equal., Aug. 4, 1930.) This policy is based upon the absence of any specific statutory authority which would allow the respondent to obtain judicial review of an adverse decision in a case of this type, and our considered view that such judicial review should

2/ Section 3.5 of article III provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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be available for questions of constitutional importance.
This policy clearly applies here./

With respect to the allegation of unfairness, we recognize the relatively greater burden that this statutory limitation may impose on individuals in appellants' position, but we are bound to enforce this provision as it is plainly written; where the statute is clear and unambiguous there is no room for the exercise of discretion, (See Appeal of Terry A. and Jeanne M. Burdyshaw, supra; Appeal of James W. Henderson, supra; Appeal of Seymour and Arlene Grubman, Cal. St. Bd. of Equal., April 22, 1975.)

Moreover, the applicable provision in the matter before us is the state and not the federal statute providing for a child care expense tax credit. (Cf. Int. Rev. Code of 1954, § 44(A).)

Finally, appellant argues that interest should not be imposed on the deficiency. Section 18688 of the Revenue and Taxation Code specifically provides, however, that interest upon the amount assessed as a deficiency shall be assessed, collected and paid in the same manner as the tax from the date prescribed for the payment of the tax until the date the tax is paid. In the absence of circumstances of grave injustice, this board has no authority to waive mandated statutory interest. (Appeal of Arthur H. and Betty R. Muller, Cal. St. Bd. of Equal., May 9, 1979; Appeal of James W. Henderson, supra.) Such grave circumstances are clearly absent here.

For the foregoing reasons, we conclude that respondent's action in this matter must be sustained.

3/ Thus, in a prior appeal by appellant concerning the year 1975, he unsuccessfully made the same constitutional objections to a similar statutory limitation; in that case he was denied a deduction for child care expenses under former section 17262 of the Revenue and Taxation Code.

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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 James W. and Margaret R. **Henderson against** a proposed assessment of additional personal income tax in the amount of \$120.40, plus interest, for the year 1977, be and the same is hereby sustained.

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

Fritz Herz, Chairman
 Ernst Brongberg, Member
 Karl Herz, Member
 Hermann Berber, Member
 , Member