

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
 PAUL J. AND ROSEMARY HENNEBERRY)

Appearances:

For Appellants: Donn Kemble
 Attorney at Law

For Respondent: Claudia K. Land
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 Paul J. and Rosemary Henneberry against proposed assessments of additional personal income tax in the amounts of \$1,676.24 and \$1,658.25 for the years 1974 and 1975, respectively.

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The issue before us is whether respondent properly determined that appellant's swordfishing operations were not an activity engaged in for profit.

During 1974 and 1975, Paul J. Henneberry, herein-after referred to as appellant, held an executive position with Triple Quality Tool and Die, Inc., for which he received an annual salary of \$55,000 or more. He also owned a one-third interest in that company. In October 1973, appellant and his wife purchased a 42-foot **Bertram** boat, a top of the line model capable of being outfitted as a charter or game fish boat. Appellant **had the** boat outfitted for harpoon swordfishing and licensed for **commercial** fishing by the U.S. Coast Guard and the State of California. The purchase price of the boat was **\$108,152**.

Appellant's logbooks show that during the appeal years, he spent a total of 28 weekends and the major portion of one two-week period on the boat swordfishing. He operated the boat and fished either alone or with members of his family, catching and selling approximately 15 swordfish during the two years.

For 1974 and 1975, appellant characterized the fishing boat operation as a business and reported the following gross income, expenses and net losses:

<u>Year</u>	<u>Income</u>	<u>Expenses</u>	<u>Losses</u>
1974	\$3,002	\$28,006	\$ (25,004)
1975	\$1,050	\$27,256	\$ (26,206)

Respondent audited those returns, requested additional information, and ultimately concluded that appellant had failed to establish that he had engaged in swordfishing for a profit rather than as a hobby. Respondent allowed the deduction of taxes and interest for each year, however, concluding that those expenses would have been deductible whether or not the activity in which appellant had been engaged was for profit. The remaining expenses (\$15,788 in 1974 and \$15,677 for 1975) were disallowed. The result was an increase in taxable income for the years on appeal and **the** issuance of the proposed assessments here in issue. Appellant protested. After a hearing on the matter, respondent upheld the proposed assessments and denied the protest. Appellant then appealed.

Certain expenses are deductible without regard to whether or not an activity is engaged in for profit.

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(Rev. & Tax. Code, § 17233, subd. (b).) Appellant's expenses for interest and taxes fall under this category. Deduction of any other expenses, however, is permitted only if the activity is engaged in for profit. (Appeal of Clifford R. and Jean G. Barbee, Cal. St. Bd. of Equal., Dec. 15, 1976; Michael Lyon, ¶ 77,239 P-H Memo. T.C. (1977); Rev. & Tax. Code, § 17233, subd. (c).) Whether the activity at issue, swordfishing, was engaged in for profit is a question of fact.

. . . . The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. ... (Cal. Admin. Code, tit. 18, reg. 17233, subd. (b) (a).)

The burden of presenting the necessary facts rests with the appellant. (Appeal of Barbee, supra; Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414] (1949).)

Appellant has not carried this burden. This conclusion is based upon the following features of appellant's swordfishing activity: (1) appellant entered this endeavor with no expertise in the field; (2) he spent only a small portion of 1974 and 1975 swordfishing; (3) he continued on as a full-time executive of Triple Quality Tool and Die, Inc.; (4) he received substantial income, \$55,000 or more per annum, from sources other than swordfishing; (5) he did not obtain or make serious efforts to obtain employees to carry on the fishing activities in his absence; (6) his expenses far exceeded gross revenues; (7) he did **not utilize** the airspotting technique, which made swordfishing easier and more successful, as did commercial swordfishermen; and (8) the activity in which he engaged, swordfishing, is considered a sport by many. These factors indicate that the swordfishing activity was not engaged in for profit. (See Cal. Admin. Code, tit. 18, § 17233, subd. (b) (b).) Consequently, the expenses at issue were personal and, therefore, not deductible. Respondent's disallowance of the expense claims at issue therefore was proper.

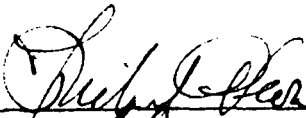
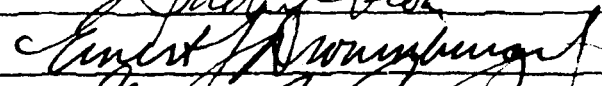
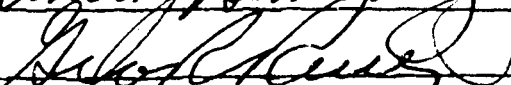

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O R D E R

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

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 Paul J. and Rosemary Henneberry against proposed assessments of additional personal income tax in the amounts of \$1,676.24 and \$1,658.25 for the years 1974 and 1975, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this **21st** day
of May , 1980, by the State Board of Equalization.

	, Chairman
	, Member
	, Member
	, Member
_____	, Member