



Appeal of Thomas M. and M. Snyder

In computing their state income tax liability for 1977, appellants used the income averaging method. On the income averaging schedule filed with their return, appellants stated that both of them had been California residents for the computation year (1977) and all four base period years (1973-1976). However, in reply to respondent Franchise Tax Board's inquiry regarding appellants' failure to file a 1973 return, Mr. Snyder stated that he had not been a permanent resident of California in 1973. Armed with **this** admission, respondent disallowed appellants' use of income averaging in 1977 and issued the proposed assessment in question,

Revenue and Taxation Code section 18243, subdivision (b), provides that an individual is not eligible to average his income "... for the computation year if, at any time during such year or the base period, such individual was a **nonresident**." Thus, in order to qualify for 'income averaging, a taxpayer must have been a California resident at all times **during** the five-year period composed of the computation year and the four preceding base period years. As we have indicated above, however, Mr. Snyder has admitted that he was not a California resident **during** 1973, one of the **base period** years. Under the clear terms of section 18243, therefore, appellants were not entitled to use income averaging on their 1977 **joint** return. (See also Appeal of Daniel H. H., Jr. and Jane S. Ingalls, Cal. St. Bd. of Equal., April 5, 1976.)

Appellants' only arguments in 'this case appear to be directed at the, constitutionality of the Personal Income Tax Law. Such arguments are unavailing, however, after the voters' adoption of Proposition 5 on June 6, 1978. That proposition added section 3.5 to article III of the California Constitution, and it prohibits an **administrative agency** from declaring, a statute unconstitutional or unenforceable unless an appellate **court** has already made such a determination with respect to that statute. In any event, we have a long-standing policy of **declining** to rule on constitutional questions in **appeals involving** unpaid deficiency assessments. (Appeal of Albert E. and S. Jean Hornsey, Cal. St. Bd. of Equal., June 2, 1971; Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal., Feb. 18, 1970.)

For the reasons expressed above, respondent's action in this matter will be sustained.

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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 Thomas M. and M. Snyder against a proposed assessment of additional personal income tax in the amount of \$101.52 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this **1st** day
of August , 1980, by the State Board of Equalization.

Richard Nevins, Chairman
Ernest Dronenburg, Jr., Member
George R. Reilly, Member
_____, Member
_____, Member