



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GEORGE L. AND LOUISE G. **CADWALADER**)

. Appearances:

For Appellants: George L. Cadwalader,
 in pro. per.

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 George L. and Louise G. Cadwalader against a proposed assessment of additional personal income tax in the amount of **\$3,847.81** for the year 1975.

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The issue presented is whether respondent properly computed appellants' preference income tax liability.

For 1975 appellants realized a capital gain of **\$172,430.00** from a one-year stock liquidation. They properly included one-half of such amount as income on their California personal income tax return for that year. Together with certain business losses totalling **\$26,070.78**, a partnership loss of **\$5,620.00**, and some wages, dividends and interest, appellants' adjusted gross income amounted to **\$59,920.19**. They did not, however, report the other one-half of the capital gain as a preference item as they were required to do. Consequently, respondent calculated the statutorily mandated tax on appellants' unreported preference income and issued a notice of proposed assessment which included such tax.^{1/} The portion of the assessment representing the preference income tax liability is conceded by respondent to be in error by \$1.00 in appellants' disfavor.

Appellants protested the proposed assessment, arguing that the amount of preference income subject to tax should have been reduced by **\$26,070.78**, which appellants state is the amount representing their "net business loss." Respondent disagreed and affirmed its proposed assessment. This appeal followed.

Section 17062 of the Revenue and Taxation Code provides, in pertinent part:

In addition to the other taxes imposed by this part, there is hereby imposed ... taxes in the following amounts and at the following rates on the amount (if any) of the sum of the items of the tax preference in excess of the the amount of net business loss for the taxable year. (Emphasis added.)^{2/}

^{1/} The proposed assessment also included additional tax as a result of certain federal adjustments not here in dispute.

^{2/} The amount of preference income in this case, given the total capital gain of **\$172,430.00** for 1975, is one-half of that amount, **\$86,215.00**. (See section 17062 and 18162.5 of the Revenue and Taxation Code.)

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If the amount of income in
excess of net business loss is: The tax 'is:

* * * * *

Over \$19,000 **\$412.50, plus**
 5-1/2% of the
 excess over
 \$19,000.

"Net business loss" is defined in section
17064.6 as follows:

For purposes of this chapter, the term
net business loss means adjusted gross income
(as defined in Section 17072) less the deduc-
tions allowed by section 17252 (relating to
expenses for production of income), only if
such net amount is a loss. 3/

Appellants' contention has been that their
preference income should have been reduced by the amount
of their claimed business losses (**\$26,078.78**). In their
view, since the term "net business loss" refers specifi-
cally to loss from "business," "adjusted gross income,"
as used in section **17064.6**, should be limited to
adjusted gross income from a trade or business. It
should not, they argue, include capital gains from a
corporate liquidation with regard to which the taxpayer
is merely one of many shareholders. Appellants contend
that respondent is incorrectly interpreting section
17064.6 when it asserts that "adjusted gross income," as
that term appears therein, includes capital gains. They
further contend that even if respondent's interpretation
is the one intended by the Legislature, it is one that
is constitutionally impermissible.

3/ Section 17064.6, as originally enacted in 1972, did
not contain the words "only if such net amount is a
loss." (Stats. 1972, ch. 1065, **§ 1.6**, p. 1980.) These
words were added by amendment in 1973 (Stats. 1973, ch.
655, **§ 1**, p. 1204) merely to clarify the current law
rather than to impose new or different requirements.
(See generally, Appeal of Richard C. and Emily A. Biagi,
Cal. St. Bd. of Equal., May 4, 1976.)

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This case is distinguishable from other appeals wherein the definition of "net business loss" has been challenged. (See, e.g., Appeal of Paul and Melba Abrams, Cal. St. Bd. of Equal., Jan. 11, 1978; Appeal of Richard C. and Emily A. Biagi, Cal. St. Bd. of Equal.: May 4, 1976,) In those cases, the central argument concerned the claim that under section 17064.6, business expenses deducted in the computation of adjusted gross income were also deductible as "Section 17252" expenses. Our conclusion in those cases was **that** the "Section 17252" expenses specified in section 17064.6 were different from those expenses deductible in the computation of **adjusted gross** income. We stated further that allowing the same expenses to be deducted in the computation of adjusted gross income and then again as "Section 17252" expenses would result in a double deduction not contemplated by the Legislature. Therefore, it was concluded that expenses entering into the computation of adjusted gross income are not deductible a second time in the **computation** of section 17064.6 "net business loss."

Appellants in this case have not asserted the "double deduction" argument. Rather, they have challenged respondent's interpretation of section 17064.6 as it relates to the term "adjusted gross income" appearing therein. Secondly, they have argued **that** if respondent's view is correct, the statute is unconstitutional.

As to appellants' first argument, it must be observed that the fundamental objective of statutory construction is to ascertain and give effect to the legislative intent and purpose behind a statute. (Helvering v. Hammett, 311 U.S. 504, 511 [85 L.Ed. 303] (1941); Stafford v. Reality Bond Service Corp., 39 Cal. 2d 797, 805 [249 P.2d 2411] (1952).) Moreover, it is an elementary rule of statutory construction **that** effect must be given, if possible, to every word, **clause** and sentence of a statute so that no **part** will be imperative or superfluous. (Select Base Materials, Inc. v. Board of Equalization, 51 Cal.2d 640, 645 [335 P.2d 672] (1959).) Applying the aforementioned principles, we note that section 17064.6 specifically states that "**adjusted gross** income," as used therein, is to be given the meaning that term is accorded by section 17072. It is our view that the term "adjusted gross income," so defined, includes capital gains. (See Rev. & Tax. Code, §§ 17071, 17072, 17073 & 18162.5.) Therefore, respondent has accorded the proper statutory

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construction to section 17064.6 and, consequently, we must decide in its favor as to this issue.

Appellants' second argument is that the provisions of section 17064.6 relating to "net business loss" are unconstitutional. 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 precludes our determining that the statutory limitations of section 17064.6 are unconstitutional or unenforceable. (Appeal of James W. Henderson, Cal. St. Bd. of Equal., Jan. **9, 1979**; 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. and Evelyn A. Johnston, Cal. St. Bd. of Equal., April 22, 1975; Appeal of Vortex 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 respondent to obtain judicial review of an adverse decision in a case of this **type**, and our considered view that **such judicial** review should be available for questions of constitutional importance. This policy clearly applies here.

Appellant's disagreement with the formula set forth in section 17064.6 should be directed **to the** Legislature, which is charged with the formulating the law, and not to those charged with its enforcement. (Appeal of Samuel R. and Eleanor H. Walker, Cal. St. Bd. of Equal., March 27, 1973.)

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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 George L. and Louise **G. Cadwalader** against a proposed assessment of additional personal income tax in the amount of **\$3,847.81** for the year 1975, is hereby modified to reflect the one-dollar error made by the Franchise Tax Board in computing the assessment. In all other respects, the action of the Franchise **Tax** Board is sustained.

Done at Sacramento, California, this **2nd** day
of February, **1981**, by the State Board of Equalization,
with Members Bennett, Nevins, Reilly and Drönenburg present.

<u>Ernest J. Dronenburg, Jr.</u>	- Chairman
<u>William M. Bennett</u>	, Member
<u>Richard Nevins</u>	, Member
<u>George R. Reilly</u>	Member
	Member