

Appeal of John M. and Linda S. McCrary

The two issues for determination are: whether respondent's determination, which was based on corresponding federal action, was erroneous; and whether respondent's determination was barred by the statute of limitations.

During the appeal year Mrs. McCrary was an internship teacher for the Campbell Union High School District. The internship program was sponsored by the Secondary Intern Teaching Program of San Jose State University. The program consisted of full time teaching at a cooperating secondary school in addition to a program of instruction at the university. Mrs. **McCrary** was paid a salary by the school district and received most of the usual employee benefits. Mrs. McCrary was supervised by experienced instructors at the school as well as by members of the university faculty. After completion of the program, Mrs. McCrary was hired as a regular beginning teacher by the school district.

On their California and federal income tax returns for 1973, appellants excluded the amount received by Mrs. McCrary for her internship teaching duties from their gross income. The theory for the exclusion was that the income was an excludable scholarship or fellowship grant pursuant to section **17150** of the Revenue and Taxation Code and its federal counterpart, section **117** of the Internal Revenue Code of 1954.

On January 23, 1976 the Internal Revenue Service determined that the amount in question constituted compensation for services rendered and was not excludable from gross income as either a scholarship or fellowship under section 117 of the Internal Revenue Code of 1954. Thereafter, the federal action was affirmed, as reflected by a district conference report dated May 4, 1976. Appellants contend that they agreed to the final federal determination only to avoid the time and expense involved in a tax court proceeding. Appellants did not notify respondent of the federal change within 90 days after the final determination as required by section 18451 of the Revenue and Taxation Code.

Ultimately, respondent was advised of the federal determination, and, on April 23, **1979**, issued the proposed assessment in issue-which was in conformity with the final federal action. It is from respondent's determination **that** appellants appeal.

Appeal of John M. and Linda S. McCrary

Section 18451 of the Revenue and Taxation Code provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a determination by the Franchise Tax Board based upon corresponding federal action is presumed to be correct, and the burden is on the taxpayer to overcome that presumption. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Willard D. and Esther J. Schoellerman, Cal. St. Bd. of Equal., Sept. 17, 1973.) The Internal Revenue Service's action was in accordance with settled law. (See Elmer L. Reese, Jr., 45 T.C. 407 (1966) aff'd per curiam, 373 F.2d 742 (4th Cir. 1967); James M. Jaeger, 1173, 151 P-H Memo. T.C. (1973); Appeal of William M. and Barbara R. Clover, Cal. St. Bd. of Equal., May 10, 1977; Rev. Rul. 67-443, 1967-2 Cum. Bull. 75.)

Appellants have not presented any evidence or offered any explanation to show either that the federal action was erroneous or that respondent's action based thereon was incorrect. Appellants' contention that they agreed to the federal action only to avoid a tax court proceeding merely explains the motivation for their action: it does not tend to show that the federal action was erroneous in any respect. Accordingly, unless barred by the statute of limitations, we must conclude that respondent's proposed assessment of additional **personal** income tax for 1973 was correct.

Appellants contend that the deficiency assessment issued on April 23, 1979 was barred by the statute of limitations since it was not mailed within four years of the due date for their 1973 return, as required by section 18586 of the Revenue and Taxation Code. However, section 18586.2 of the Revenue and Taxation Code provides that if a taxpayer fails to report a federal change to respondent, a deficiency assessment may be made within four years after the final federal determination. In this appeal, the final federal determination was reflected in the district conference report dated May 4, 1976. Since appellants did not advise respondent of the final federal action, respondent's notice of proposed assessment dated April 23, 1979, was well within the four-year statutory period provided for in section 18586.2 of the Revenue and Taxation Code.

For the reasons set forth above, respondent's action in this matter must be sustained.

Appeal of John M. and Linda S. McCrary

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 John M. and Linda S. McCrary against a proposed assessment of additional personal **income** tax in the amount of **\$94.76** for the year 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of May , 1981, by the State Board of Equalization, with all **Board** members present.

Ernest J. Dronenburg, Jr., Chairman
George R. Reilly, Member
William M. Bennett, Member
Richard Nevins, Member
Kenneth Cory, Member