82-SBE-133

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
NICHOLAS PHILLIPS)

For Appellant: Nicholas Phillips, in pro. per.

For Respondent: Mark McEvilly 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 Nicholas Phillips against a proposed assessment of additional personal income tax in the amount of $215.02 for the year 1977.

Appeal of Nicholas Phillips

The principal issue for determination is whether appellant is entitled to a deduction for moving expenses.

On his part-year resident personal income tax return for 1977, appellant Nicholas Phillips claimed a $4,380 moving expense deduction. This amount represented the cost of moving from the United Kingdom to California to seek employment here. He did not report as gross income any payment for or reimbursement of this expense. Respondent reviewed his return and found that his taxable income after the deduction was low enough to entitle him to a special tax credit, which he had failed to take. (Rev. & Tax. Code, § 17069.) Respondent computed the credit and notified him that he was eligible for a refund.

Subsequently, respondent audited appellant's return and decided that he was entitled to neither the moving expense deduction nor the special tax credit. Respondent consequently issued a proposed deficiency assessment in October 1979. The reason given by respondent for disallowing his moving expense deduction was, "[m]oving expenses incurred in a move in which the ending point is not in California are personal expenses and are not deductible."

After appellant's protest, respondent conceded that its rationale for disallowing the moving expense deduction had been in error. In April 1930, respondent changed the rationale and asserted that it disallowed the deduction because appellant had not been reimbursed.

In this timely appeal, appellant acknowledges that his moving expenses were not reimbursed. Nevertheless, he argues that his -deduction is valid, primarily because the Internal Revenue Service had accepted it on his federal income tax return, and because his state tax return had irreversibly "passed audit" when respondent reviewed it in 1978 and issued him a refund.

Subject to certain conditions, section 17266 of the Revenue and Taxation Code allows a deduction for expenses incurred by a taxpayer in moving to a new principal place of work. Subdivision (b) of this section enumerates the types of moving expenses deductible. Subdivision (d), however, limits the deduction where such expenses are incurred in connection with an interstate move by providing, in relevant part:

> In the case of an individual whose former residence was outside this state and his new place of residence is located within this state ..., the deduction allowed by this section shall be allowed only if any amount received as payment for or reimbursement of expenses of moving from one residence to another residence is includable in gross income . . . and the amount of deduction shall be limited only to the amount of such payment or reimbursement or the amounts specified in subdivision (b), whichever amount is the lesser.

Therefore, taxpayers who move into California from out of state may not deduct any of their moving expenses unless they receive some payment for those expenses, Since appellant admittedly was not reimbursed for his move here from the United Kingdom, he is not entitled to a deduction under section 17266. (Appeal of Richard K. and Roberta C. Myers, Cal. St. Bd. of Equal., June 28, 1979; Appeal of Pierce Barker and Carol Frost, Cal. St. Bd. of Equal., Feb. 8, 1979.)

Appellant points out that most of his claimed deduction had been allowed by the Internal Revenue Service. However, although section 17266 is patterned after section 217 of the Internal Revenue Code of 1954, the limitation contained in subdivision (d) has no counterpart in the federal statute. (Appeal of Norman L. and Penelope A. Sakamoto, Cal. St. Bd. of Equal., May 10, 1977.)

Appellant urges that his tax return "passed audit" when respondent reviewed it in 1978 and found him eligible for the special tax credit. He asserts that respondent should be bound by that action, and should not be permitted to change its decision after such a review.

In cases similar to this, we have found that respondent's initial review of a taxpayer's return was not an audit, and that the conclusions drawn from that review were not irreversible. In the Appeal of Bruce H. and Norah E. Planck, decided by this board on August 16, 1977, we held that respondent is permitted to recover credits erroneously allowed to a taxpayer. Furthermore, respondent's tentative refund of a credit, made after a preliminary computation of a taxpayer's return, does not preclude respondent from proceeding in the ordinary

manner to audit that return. (Appeal of Thomas A. and Jo Merlyn Curdie, Cal. St. Rd. of Equal., June 29, 1978.) Thus, respondent is not bound by its initial review, and may issue a subsequent timely assessment for the same taxable year. In this case, the assessment was timely, since it was issued well within the statutory four-year period for such actions. (Rev. & Tax. Code, § 18586; Appeal of Robert F. and Clara B. Pyle, Cal. St. Bd. of Equal., Sept. 25, 1979.)

Appellant's final contention is that he should not be required to pay interest on the deficiency, especially where the interest rate is higher than that receivable from certain savings accounts, and "where delay. [causing interest to accrue] is from the failure of the Tax Board to proceed correctly and on a reasonable time scale." He observes that, after he filed his tax return, it took respondent a year and a half to issue a proposed assessment.

Section 18688 of the Revenue and Taxation Code mandates that interest be imposed on a deficiency assessment from the date the tax is due until the date it is paid. (Appeal of Ronald J. and Luella R. Goodnight, Cal. St. Bd. of Equal., June 28, 1979; Appeal of Samuel C. and Lois B. Ross, Cal. St. Bd. of Equal., May 4, 1978.) This requirement is not overcome by respondent's delays in determining a proposed assessment, so long as it is issued within the statutory four-year period of limitation. (Rev. & Tax. Code, § 18586; Appeal of Arthur H. and Betty R. Muller, Cal. St. Bd. of Equal., May 9, 1979; Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978.) A taxpayer can pay the tax at any time to stop the running of interest thereon, without jeopardizing the right to a refund (Appeal of Ronald J. and Eileen Bachrach, Cal. St. Bd. of Equal., Feb. 6, 1980; Appeal of Patrick J. and Brenda L. Harrington, supra); furthermore, the imposition of interest is not a penalty, but is compensation for the taxpayer's use of money. (Appeal of Ronald J. and Eileen Bachrach, supra; Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.) In view of our determination that the additional tax was properly assessed, appellant's arguments are no defense against the imposition of statutory interest. (Appeal of Robert A. and Dorothy L. Craft, Cal. St. Bd. of Equal., Sept. 30, 1980.)

For the reasons above, we must sustain respondent's action.

Appeal of Nicholas Phillips

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 Nicholas Phillips against a proposed assessment of additional personal income tax in the amount of $215.02 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of June, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg, and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

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