BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
GEORGE L. O'CONNELL and ELIZABETH K. LEWICKI)

For Appellants: Elizabeth K. Lewicki,
in pro. per.

For Respondent: Kathleen M. Morris
Counsel

OPINION

These appeals are 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. O'Connell and Elizabeth K. Lewicki against a proposed assessment of additional personal income tax in the amount of $733.24 for the year 1978, and pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of George L. O'Connell for refund of personal income tax in the amounts of $536.73 and $42.99 for the years 1977 and 1979, respectively.

Appellants were married in 1976; appellant-husband became a California resident the same year. On their joint California return for the year 1978, appellants used the income averaging method to compute their income tax liability; appellant-husband also utilized the income averaging method on his 1977 and 1979 separate returns. upon review of these returns, respondent disallowed appellants' use of income averaging on the basis that appellant-husband had not been a California resident for the entire base periods applicable to the appeal years. The issues presented by these appeals are: (i) whether respondent properly disallowed appellants' use of the income averaging method on the aforementioned returns; and (ii) if so, whether appellants are now entitled to file separate returns for the year 1978.

Revenue and Taxation1 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 base period.1/ Appellant-husband readily acknowledges that he was not a California resident for the entire base periods applicable to each of the appeal years. Under the clear provisions of section '18243, therefore, appellants were not entitled to use income averaging on their 1978 joint California return; for the same reason appellant-husband was precluded from utilizing the income averaging method on his 1977 and 1979 separate returns. (See also Appeal of Thomas M. and M. Snyder, Cal. St. Bd. of Equal., Aug. 1, 1980.)

1/ Revenue and Taxation Code section 18242, subdivision (d), defines the terms "computation year" and "base period" as follows:

(1) The term "computation year" means the taxable year for which the taxpayer chooses the benefits of this "article.

(2) The term "base period" means the four taxable years immediately preceding the computation year.

Appellants' only arguments against respondent's disallowance of their use of income averaging are directed at the constitutionality of the Personal Income Tax Law. We believe that with respect to such arguments, the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution, 2/ precludes our determining that the relevant provisions involved are unconstitutional or unenforceable. Furthermore, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., Mar. 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow respondent to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance.

2/ Section 3.5 of article III provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
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> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Appellants' alternative position in the instant appeal is that they should be permitted to file separate returns for the year 1978, thereby enabling appellant-wife, a California resident since 1956, to obtain the benefits derived from the use of income- averaging. In the Appeal of Wallace W. and Rise B. Berry, decided by this board on February 6, 1973, we rejected the identical contention. The analysis used in that decision is equally applicable here:

> Former sections 18409-18409.9 of the Revenue and Taxation Code (in effect beginning April 18, 1952) did permit taxpayers, who had previously filed a joint return, to file separate returns for the same year as late as 4 years after the due date of the return for that year. The enactment of these sections changed the law, which previously had clearly provided that separate returns could not be filed after a joint' return unless they were filed before the due date of the taxpayer's return for the year in question. [Citation.] But these sections were repealed effective November 10, 1969, by Chapter 980 of the 1969 Statutes, and the Legislature specified in section 22 of Chapter 980 that the repealer was to be applied on and after the effective date of that chapter. Consequently, on November 19, 1969, the law which existed prior to the enactment of sections 18409-18409.9 was reinstated.

We must conclude, accordingly, that appellants are not entitled to file separate returns for the year 1978. (See also Cal. Admin. Code, tit. 18, reg. 18401-18404(a), subd. (4)(a)(ii).)

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

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. O'Connell and Elizabeth K. Lewicki against a proposed assessment of additional personal income tax in the amount of $733.24 for the year 1978, and pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of George L. O'Connell for refund of personal income tax in the amounts of $536.73 and $42.99 for the years 1977 and 1979, respectively, be and the same are hereby sustained.

Done at Sacramento, California, this 21st day of September, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member