

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ERIC G. AND LYNETTE Y. VESELY)

For Appellants: Eric G. Vesely,
in pro. per.

For Respondent: Allen R. Wildermuth
Counsel

OP 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 Eric G. and Lynette Y. Vesely against proposed assessments of additional personal income tax in the amounts of \$4,542.66 and \$9,788.70 for the years 1972 and 1973, respectively.

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The following issues are presented by this appeal: (i) whether appellants have established error in respondent's proposed assessments of additional personal income tax for the years in issue; and (ii) whether appellants have established their eligibility to income average.

Shortly after issuing deficiency assessments to appellants for the years 1972 and 1973, **respondent** received information that the Internal Revenue **Service** had made certain adjustments to appellants' federal returns for the same years. Respondent thereafter withdrew its deficiency assessments and issued notices of proposed assessment based upon the federal adjustments. In issuing its proposed assessment for 1972, respondent compounded an error committed by appellants on their **joint California** return for that year, thereby **overstat-**ing appellants' 1972 gross income by \$2,000; respondent has acknowledged this error and has stated that an appropriate adjustment will be made upon final **disposi-**tion of this matter.

Appellants protested respondent's proposed assessments, and requested a deferral pending a final determination as to the propriety of the federal audit adjustments. The United States Tax Court **issued** its decision as to appellants' federal tax liability on January 26, 1979. The record of this **appeal indicates** that appellants filed a motion for reconsideration of that decision. Respondent subsequently received a revised audit **statement** allowing appellants a casualty loss for 1973 which had been disallowed by the **tax court's** original decision; no changes were made to the 1972 adjustments. Based upon the final federal audit report, respondent affirmed its previously issued proposed assessment **for 1972**; the 1973 assessment, as revised by the final federal audit statement, was also affirmed. Appellants' protest of respondent's action has resulted in this appeal.

A deficiency assessment based on a federal audit report is presumptively correct (see Rev. & Tax. Code, **§ 18451**), and the taxpayer bears the burden of proving that respondent's determination is erroneous. (Appeal of Donald G. and Franceen Webb, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.) While appellants have set forth several arguments challenging respondent's determination, they have offered no evidence to indicate that the federal audit report was

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erroneous. Consequently, we must conclude that appellants have failed to carry their burden of proof.

With respect to their claimed entitlement to income average, appellants submitted a copy of a federal Form 4857 (~~the~~ federal counterpart to respondent's Schedule G) which they claim was used for federal purposes. The information contained therein merely reflected the federal taxable income figures for 1972 and the base period years; appellants did not provide any details of the computation of their state taxable income figures for the base period years. Since this information was unavailable to respondent, respondent was unable to determine if appellants were entitled to income average for state purposes for the appeal years. Therefore, appellants were denied the benefits of income averaging.

The burden of establishing the right to income average is upon appellants. (Appeal of Dare and Patricia Miller, Cal. St. Bd. of Equal., March 18, 1975; Appeal of Joseph J. and Julia A. Battle, Cal. St. Bd. of Equal., April 5, 1971.) Since appellants have failed to submit the evidence necessary to establish their right to income average, we must conclude that respondent's action in this regard was correct.

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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 Eric G. and Lynette Y. Vesely against proposed assessments of additional personal income tax in the amounts of **\$4,542.66** and \$978.70 for the years 1972 and 1973, respectively, be and the same is **hereby** modified in **accordance with** respondent's concession regarding the overstatement of appellants' gross income for the year 1972. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this **1st** day of March 1983, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

_____, Chairman
Ernest J. Dronenburg, Jr. _____, Member
Conway H. Collis _____, Member
Richard Nevins _____, Member
Walter Harvey* _____, Member

*For Kenneth Cory, per Government Code Section 7.9