BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
LEONARD S. AND ERLENE G. COHEN)
ESTELLE GROSSMAN)

Appearances:

For Appellants: Morton J. Bloom
Attorney at Law

For Respondent: Michael E. Brownell
Counsel

O P I N I O N

These appeals are made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Leonard S. and Erlene G. Cohen and of Estelle Grossman against proposed assessments of additional personal income tax and penalty in the amounts listed below for the year 1976:

Appeals of Leonard S. and Erlene G. Cohen and Estelle Grossman

Appellant	Amount
Leonard S. and Erlene G. Cohen	$6,288.47
Estelle Grossman	$6,144.78
Penalty (Rev. & Tax. Code, § 18681)	$1,536.19

The sole issue raised by these appeals is whether appellants are entitled to the benefits of section 17402 of the Revenue and Taxation Code[1/] involving nonrecognition of gain in certain corporate liquidations. Because of the identity of facts, issue, and legal principles involved in each case, the two appeals are consolidated for purposes of this opinion.

Section 17402 provides that under certain circumstances, a shareholder's gain on the complete liquidation of a corporation may go unrecognized, if he and enough other shareholders so elect. Among the requirements for section 17402 treatment is the timely filing of the proper forms electing such treatment. Section 17402, subdivision (d), provides, in relevant part, as follows:

> The written elections . . . must be made and filed in such manner as to be not in contravention of regulations prescribed by the Franchise Tax Board. The filing must be within 30 days after the date of the adoptionof the plan of liquidation ... and may be made by the liquidating corporation or by its stockholders.

The basic question presented here is whether appellants made such a timely "written election" as required.

As section 17402 conforms to Internal Revenue Code section 333 and since there are now no regulations of the Franchise Tax Board in this area, the regulations under section 333 of the Internal Revenue Code govern the interpretation of the above section 17402. (Cal. Admin. Code, tit. 18, reg. 19253.) Treasury Regulation section 1.333-3 provides, in relevant part, as follows:

1/ Unless otherwise indicated, all statutory references herein are to the Revenue and Taxation Code.

> An election to be governed by section 333 shall be made on Form 964 (revised) in accordance with the instructions printed theron and with this section. Th.e original and one copy shall be filed by the shareholder with the district director with whom the final income tax return of the corporation will be filed. The elections must be filed within 30 days after the adoption of the plan of liquidation. Under no circumstances shall section 333 be applicable to any shareholders who fail to file their elections within the 30-day period prescribed.

Accordingly, the basic question in the instant case can be restated as whether the appellants made a timely election on Franchise Tax Board Form 3512 (which is comparable to the above-noted Internal Revenue Form 964 (revised)) in accordance with the instructions printed thereon.

Appellants Estelle Grossman, a resident of Illinois, and Leonard S. Cohen, a resident of California, were each 50 percent shareholders of B. W. Holding Corporation, a California corporation. On September 1, 1976, appellants made an election to dissolve B. W. Holding Corporation which qualified' as an adoption of a plan of liquidation within the meaning of Revenue and Taxation Code section 17402. On September 2, 1976, appellants' attorney wrote the following letter to the Franchise Tax Board:

> Enclosed please find the Request for Tax Clearance Certificate and Supplemental Information and Individual Assumption of Tax Liability forms for Leonard S. Cohen and Estelle Grossman.
>
> * * *
>
> will you then please issue your tax clearance for the above-named corporation at once because we are seeking a one-month dissolution of the corporation.

While a timely, formal Election of Shareholder, Form 964, was thereafter filed with the Internal Revenue Service securing the benefits of Internal Revenue Code section 333, no formal election was filed with the

Franchise Tax Board on the comparable California form FTB 3512 within the statutory 30-day period. Upon examination of appellants' returns for 1976, respondent determined that appellants were ineligible for nonrecognition treatment under section 17402,'because of their failure to file requisite timely, written elections. Respondent issued. assessments reflecting these adjustments, and appellants protested. Respondent subsequently affirmed its assessments, and appellants then filed these timely appeals,.

Appellants -apparently admit to the oversight with respect to the Franchise Tax Board. Appellants' counsel states that he assumed the public, accountant "would prepare and file all returns, and documents required by the taxing authority. [The accountant] did prepare the papers required by the IRS and they. were filed, bu.t a copy thereof or a comparable State of California form was not filed with the Franchise Tax Board,.." However,. the a-ppellants now argue' t-hat t-he September 2, 1976, letter to the Franchise Tax Board, quoted. above, particularly the' last paragraph, "substantially complies" with the timely notice requirement of section 17402, subdivision (d), and that, in any case, the 30-day limitation period is not reasonable or necessary.

Where "material provisions of the federal statute and state act are substantially identical, decisions, interpreting the federal law furnish a guide in construction of the state act," (Douglas v. State of California., 4'8 Cal.App.2d 835, 838 [120 P.2d 927] (1942).)As the material provisions'of Internal Revenue Code section 333(d) and Revenue and: Taxation Code section 17402, subdivision (d), are substantially identical, decisions interpreting section 333(d) furnish a guide 'in construction of'section 17'402,. subdivision (d). Federal decisions interpreting the requirement of a timely, written election'have been uniform'in demanding strict' compliance'.. In N. H. Kelley, ¶ 51,043 P-H Memo. T.C. (1951), the written federal election forms were filed 31 days after the adoption of the plan of liquidation rather than the.30 days as required'by the federal statute'. In denying nonrecognition treatment, the tax court skated that tne language of the statute "is pla-in and unequivocal and neither requires nor permits consideration of the absence of willfulness or negligence." Strict and not substantial compliance was required. (See also, Virginia E-. Ragen, 33 T.C. 706 (1960); Ralph D. Lambert,

¶ 63,296 P-H Memo. T.C. (1963), affd. per curiam, 338 F.2d 4 (2d Cir. 1964).) Also, in Lee R. Dunavant, 63 T.C. 316, 320 (1974), the tax court stated that the essence of section 333(d)'s requirement of a timely, written election "is to demand specific, contemporaneous, and incontrovertible evidence of a binding election to. accept the tax consequences imposed by the section."

Moreover, it has been held that the Internal Revenue Code's requirement of a timely, binding election by the shareholders in order to receive nonrecognition treatment is reasonable and consistent with the statute. (Posey v. United States,, 449 F.2d 228 (5th Cir. 1971).) Since other liquidation provisions in the Internal Revenue Code result in other tax treatment, the requirement of Treasury Regulation section 1.333-3 of a specific manner of making and filing elections prevents confusion as to whether an election has or has not been made. (See also, Bachman v. United States, 34 Am.Fed.Tax R.2d 6031 (1974).)

This board has also had occasion to consider the precise issue raised here. (Appeals of Horace C. Mathers, et al., Cal, St. Bd. of Equal., April 24, 1967; Appeals of John and Elvira C. Costa, et al., Cal. St. Bd. of Equal., March 7, 1967; and Appeal of Mathew Berman and 'the Estate of Sonia Berman, Cal. St. Bd. of Equal., June 28, 1965.) In each of these cases, we have concluded that the 30-day election requirement imposed by section 17402, subdivision (d), is clear, explicit, and mandatory, leaving no room for the exercise of discretion. In Appeals of Horace C. Mathers, et al., supra, as in the instant case, the taxpayers' representative directed a letter to the Franchise Tax Board requesting a tax clearance certificate within 30 days of adopting a plan of liquidation. That letter read, in part, as follows: "We are desirous of dissolving [the corporation.] in the month of October, 1963, and would greatly appreciate your mailing us a tax clearance." As in the instant case, within 30 days from the adoption of the plan of liquidation, each shareholder filed a Form 964 with the Internal Revenue Service. However, nothing purporting to be an election under section 17402 was filed with the Franchise Tax Board within those 30 days. We rejected the taxpayers' argument there that their representative's letter requesting a tax clearance had substantially complied with the election requirement of section 17402, subdivision (d).

Similarly, in the instant case, we do not think that appellants have shown that they have complied with the election requirement of section 17402, subdivision (d). The statement referring to a one-month dissolution in the September 2, 1976, letter is not clear, "specific, contemporaneous, and incontrovertible evidence of a binding election to accept the tax consequences imposed by the section." (Lee R. Dunavant, supra.) That letter is no more specific or incontrovertible evidence of a binding election than the representative's letter in Appeals of Horace C. Mathers, et al., supra, where we denied nonrecognition treatment. Moreover, as discussed in Posey v. United States, supra, we hold the 30-day limitation is reasonable and necessary, and must be upheld.

In keeping with our earlier decisions on this issue, we must sustain respondent's action since appellants failed to comply with the statutory election requirements. However, since appellant Estelle Grossman was not a resident of California in the year at issue, her gain from the liquidation would be considered Illinois-source income and not be taxable here. (Miller v. McColgan, 17 Cal.2d. 432 [110 P.2d 419] (1941).)

Appeals of Leonard S. and
Erlene G. Cohen and Estelle Grossman

O R D E R

Pursuant to the views expressed in the opinion of the board on file in these proceedings, and good cause appearing therefor,,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation C o d e ,

1) that the action of the Franchise Tax Board on the protest of Leonard S. and Erlene G. Cohen against a proposed assessment of additional personal income tax in the amount of $6,288.47 for the year 1976, be and the same is hereby sustained; and

2) that the action of the Franchise Tax Board on the protest of Estelle Grossman against a proposed assessment of additional personal income tax in the amount of $6,144.78 and penalty in the amount of' $1,536.19 for the year 1976, be and the same is hereby modified to reflect her status as a resident of Illinois.

Done at Sacramento, California, this 5th day of April , 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. 'Harvey present.

William M. Bennett , Chairman

C o n w a y H. C o l l i s , Member

Ernest J. Dronenburg, Jr. , Member

Richard Nevins , Member

W a l t e r Harvey* , Member

*For Kenneth Cory, per Government Code Section 7.9