BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WILFORD E. AND REVA C. VIDLOCK)

For Appellants: Wilford E. Vidlock, in pro. per.

For Respondent: James C. Stewart 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 Wilford E. and Reva C. Vidlock against proposed assessments of additional personal income tax and penalty in the total amounts of $119.30 and $152.65 for the years 1966 and 1967, respectively, and on their protest against proposed assessments of additional personal income tax in the amounts of $86.29, $437.74 and $605.92 for the years 1969, 1976, and 1977, respectively.

The central issue for determination is whether respondent properly disallowed certain expenses claimed by appellants. In addition, we must decide whether a delinquency penalty was properly imposed for 1966. (Rev. & Tax. Code, § 18681.) Lastly, we must determine whether timely claims for refund were filed for the years 1973 through 1976, the threshhold requirement for this board's jurisdiction to consider the merits of the underlying assessments,

Respondent has no record of receiving a personal income tax return from appellants for 1966. Appellants did file personal income tax returns for 1967, 1968 and 1969 in February of 1970. An audit of their federal income tax returns for those years by the Internal Revenue Service resulted in a determination that adjustments should be made with respect to depreciation of rental property, expenses associated with the use of an airplane, deductions (especially property taxes) claimed with respect to real property in which appellant-husband (hereinafter "appellant") held a remainder interest and for certain medical expenses. The federal controversy was resolved by a stipulation of the parties filed with the United States Tax Court which adopted all of the federal audit adjustments. Thereafter, respondent audited appellants for those same years and concluded that the same adjustments should be made to their California returns. Accordingly, respondent issued proposed assessments reflecting the above-noted adjustments and imposed delinquency penalties for 1966 and 1967.

Appellants protested. The proposed assessment for 1968 was withdrawn, but respondent affirmed the assessments for 1966, 1967 and 1969. This appeal followed, However, respondent now concedes that the assessment for 1967 should be withdrawn and that the assessment for 1969 should, be reduced to $30.35.

Based upon further information from a separate federal audit for 1973 and based upon its own audit for 1974 through 1976, respondent issued proposed assessments reflecting adjustments similar to those it had previously made, specifically, expenses with respect to real property in which appellant held the remainder interest and losses from investment property. By a letter dated June 7, 1978, appellants protested the notice of proposed assessment for the years 1973, 1974, 1975 and 1976. When appellants failed to reply to an August 10, 1978, request for further information, proposed assessments were affirmed on November 20, 1978, and appellants were advised of their

right to appeal to this board within 30 days thereafter. (Rev. & Tax. Code, § 18593.) Appellants did not file an appeal, and on May 16, 1979, appellants were advised of their right to pay the subject assessments and to file claims for refund, the denial of which would be appealable to this board. (Rev. & Tax. Code, § 19057.) The record indicates that the subject assessments were paid in full as of August 2, 1979, but that no claims for refund were filed.

Based upon an additional audit of 1976 and an audit of 1977, respondent issued proposed assessments reflecting adjustments which disallowed deductions claimed for the operation of an airplane as not being used for business purposes, for expenses associated with rental property as being capital in nature, and for California State Disability Insurance payments. Appellants protested, apparently contending that the Internal Revenue Service had allowed the deductions for aircraft expenses in 1976 and 1977 and rehabilitation expenditures for rental property in 1977. Respondent's denial of that protest led to an appeal. The appeal for the years 1966, 1967 and 1969 and the appeal for 1976 and 1977 were consolidated in this action.

A determination by respondent which is based upon a federal audit is presumed correct. (Appeal of Arthur G. and Rogelia V. McCaw, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Herman D. and Russell Mae Jones, Cal. St. Bd. of Equal., April 10, 1979.) The taxpayer must either concede that the federal audit report is correct or bear the burden of proving that it is incorrect. (Rev. & Tax. Code, § 18451.) It is also well settled that respondent's determinations of tax and penalties (other than fraud) are presumed correct, and that the taxpayer has the burden of proving them erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.3d 414] (1949); see also, Appeal of Ronald W. Matheson, Cal. St. Bd. of Equal., Feb. 6, 1980; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Myron and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) The only evidence appellants produced has dealt with the adjustments involving the property taxes paid on real property in which appellant-husband held a remainder interest (1966 and 1969), and the business use of the airplane (1976 and 1977). Accordingly, we will here deal only with those issues together with the jurisdiction issue (1973, 1974, 1975 and 1976), finding that respondent's action on all other issues clearly must be sustained.

Property Tax

Appellant received a remainder interest in real property by gift deed frorn his father who retained a life estate. During 1966 and 1969, appellant paid the property taxes there due and deducted such payments on his respective tax returns. As indicated above, the Internal Revenue Service determined that such payments were not deductible by appellant since those taxes were not imposed upon him, but upon the life tenant, his father. Appellant's petition before the United States Tax Court involving 1966 and 1969 was settled by a stipulation in which appellant agreed to the disallowance of the subject property taxes. Based upon this stipulated settlement, respondent disallowed the deduction of the property taxes involved on the returns now before us.

Revenue and Taxation Code section 17204, subdivision (a)(1), permits the deduction of real property taxes paid from taxable income. However, such taxes are generally deductible by the person upon whom they are imposed. (See Appeal of Linn L. and Harriett E. Collins, Cal. St. Bd. of Equal., Nov. 18, 1980.) Respondent contends that the owner of the life estate is the person upon whom the tax is imposed and that, accordingly, appellant, the remainderman, cannot deduct the property taxes which he paid.

We have held that "one having an equitable interest in property who pays taxes on it may deduct such payments, notwithstanding the fact that legal title to the property is in the name of another." (Appeal of Robert J. and Margaret A. Wirsing, Cal. St. Bd. of Equal., Aug. 1, 1974.) A remainderman of real property has an interest in such property which equity will protect. Indeed, in the case of Huddleston v. Washington, 136 Cal. 514 [69 P. 146] (1902), it was held that a remainderman might invoke the aid of equity to compel a life tenant to pay delinquent taxes which endangered the remainderman's estate. (See also, Estate of Dare, 196 Cal. 29 [235 P. 725] (1925).) Accordingly: we find here that appellant had an equitable interest in the subject property as a remainderman and that his payment of property taxes entitled him to deduct such payments against his taxable income in 1966 and 1969, the years before us.

Business Use of Airplane

During the years at issue, the principal occupation of appellant was as an employee of Lockheed

Missile and Space Company. In addition, he received a pension from his military service. The record indicates that appellant earned a total of $31,154.64 in 1976 and $32,556.78 in 1977 from these sources. In 1968, appellant had purchased a four-place airplane with the stated intention of renting the airplane to other pilots in' order to earn a profit. Based upon the fact that the airplane was rented for approximately 138 out of 221 flying hours in 1969, the tax court settlement mentioned above allowed appellant to deduct 85 percent of the airplane expenses in 1969 as being incurred for business purposes. In later years, however, the airplane was used less for rental purposes, and by 1973, the airplane was rented for only 11 hours. In 1974, appellant started a charter service. Be flew the airplane for a total of approximately 36 flying hours in 1976 and 32 flying hours in 1977. Of those hours, appellant has only established that 28 flying hours in 1976 were used for charter flights. He has furnished no evidence establishing the number of hours of charter flights in 1977.

Appellant's tax returns for 1973 through 1977 indicate airplane income, expenses (including depreciation) and losses as follows:

Year	Income	Claimed Expenses	Losses
1973	$2,075.40	$7,099.19	$5,023.79
1974	1,256.85	6,519.09	5,262.24
1975	1,857.10	7,793.51	5,936.41
1976	975.45	6,339.37	5,363.92
1977	1,791.35	7,794.24	6,002.89

The record indicates, however, that the airplane was fully depreciated before 1976.

Upon audit, respondent determined that appellant had not established that he used the aircraft in a business operated for profit and, therefore, disallowed the claimed losses for 1976 and 1977 in accordance with the provisions of section 17233 of the Revenue and Taxation Code. Appellant has furnished a copy of the airplane's log for 1972 through February 10, 1979, but apparently relies, primarily, upon the tax court settlement which allowed 85 percent of the airplane losses incurred in 1969.

Certain expenses (e.g., taxes, interest) are deductible without regard to whether or not an activity is engaged in for profit. (See Rev. & Tax. Code,

§ 17233, subd. (b).) However, deduction of any other expenses is permitted only if the activity is engaged in for profit. (Rev. & Tax. Code, § 17233, subd. (a.); Appeal of Clifford R. and Jean G. Barbee, Cal. St. Bd. of Equal., Dec. 15, 1976.) The disposition of this issue, then, turns upon whether appellant's operation of the airplane during the years at issue was an activity engaged. in for profit. In order to prevail, appellant must establish that he held the airplane during the years at issue primarily for profit-seeking purposes and not primarily for personal or recreational purposes. (Appeal of Paul J. and Rosemary Henneberry, Cal. St. Bd. of Equal., May 21, 1980; Appeal of F. Seth and Lee J. Brown, Cal. St. Bd. of Equal., Aug. 16, 1979.) Of course, whether property is held primarily for profit seeking motives is a question of fact upon which the taxpayer has the burden of proof. (Appeal of Guy E. and Dorothy Hatfield, Cal. St. Bd. of Equal., Aug. 1, 1980; Appeal of Clifford R. and Jean G. Barbee, supra.) Based upon the record before us, we must conclude that appellant has failed to carry his burden of proving that the airplane activity was engaged in primarily for profit. This conclusion is based upon the following facts: (1) appellant spent only a small portion of 1976 and 1977 operating his charter service; (2) he continued his work as a full time employee of Lockheed; (3) appellant received substantial income from his other sources, approximately $32,000 a year: (4) appellant's expenses far exceeded his gross revenues; (5) appellant did not obtain employees to carry on his charter activities in his absence; and (6) flying is considered a sport by many. Appellant does not appear to contest the accuracy of any of these facts, but instead appears to contend that the tax court settlement involving the same issue in 1969 is determinative of this issue before us now. We must disagree. The record clearly indicates that the circumstances have changed between 1969 and the years in issue, 1976 and 1977. In 1969, the airplane was rented for 138 flying hours, while in 1973, it was rented for only 11 flying hours. Changing to a charter approach, appellant has established only 28 flying hours were used for chartering in the years in issue. We must conclude, therefore, that appellant has not established that his operation of the airplane during the years in issue was engaged in primarily for profit.

Claim for Refund

As indicated above, respondent issued proposed assessments for the years 1973 through 1976. Appellants protested the proposed assessments which were later

affirmed by respondent, and appellants paid the assessments in full by August 2, 1979. The record indicates that no claims for refund have been filed. The question then is whether, under these circumstances, this board has jurisdiction to consider the merits involved in those assessments.

In order to file a valid appeal to this board to recover taxes paid, a taxpayer, first, must file a claim for refund. (Rev. & Tax. Code, § 19057, subd. (a).) Section 19053 of the Revenue and Taxation Code provides that a claim for refund must be filed within four years from the last day prescribed for filing a return or one year from the date of payment, whichever period expires later. The record indicates that appellants have not filed formal refund claims within the statutory period. Moreover, there was nothing stated in any of the letters sent to respondent by appellants to indicate that the writer considered them as informal claims for refund nor were any such letters so regarded by respondent. (Appeal of Clarence L. and A. Lois Morey, Cal. St. Bd. of Equal., Aug. 3, 1965.)

Under these circumstances, we have no choice but to find that we do not have jurisdiction to consider the merits of the assessments for those years.

Appeal of Wilford E. and Reva C. Vidlock

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 Wilford E. and Reva C. Vidlock against proposed assessments of additional personal income tax and penalty in the total amounts of $119.30 and $152.65 for the years 1966 and 1967, respectively, and on their protest against proposed assessments of additional personal income tax in the amounts of $86.29, $437.74 and $605.92 for the years 1969, 1976, and 1977, respectively, be and the same is hereby modified in accordance with respondent's concession and with the views expressed in this opinion. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 13th day of December, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member