



Appeal of Edward P. and Patricia Vivenzi

The sole issue presented by this appeal is whether appellants can retroactively elect to **report** the sale of cows and dairy equipment on an installment basis after reporting the entire gain from the **sale** on their original 1978 personal income tax return.

In September 1978, appellants sold milk cows and miscellaneous dairy equipment. On their 1978 return appellants reported their gain in its entirety which resulted in including \$64,803 in **taxable income**. In 1981, appellants filed an amended return reporting the sale as an installment sale which resulted in reducing their taxable income by \$46,912, to \$17,893, and claimed a refund of \$4,371. Respondent denied the claim for refund on the basis that the entire gain from the sale had been reported on appellants' original 1978 return. This timely appeal followed.

When addressing the issue of a taxpayer changing to an installment method in reporting a sale, this board has consistently followed the rule expressed by the United States Supreme Court in its decision in Pacific National Co. v. Welch, 304 U.S. 191 [82 L.Ed. 1282] (1938), wherein the Court held that when a taxpayer makes an election not to use the installment reporting method, that election is binding and may not be 'changed after the expiration of the time allowed for filing the original return. (Appeal of Glenn R. and Julia A. Stewart, Cal. St. Bd. of Equal., Oct. 18, 1977; Appeal of Carl H. and Ellen G. Bergman, Cal. St. Bd. of Equal., Feb. 19, 1974.) In so holding the Court stated:

Change from one method.[of reporting, income] to [another], as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns . . . to include the period allowed for recovering overpayments. . . . There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to [another] method. By reporting income from the **sales** in question according to [one] method, petitioner made an election that is binding upon it and the commissioner.

(304 U.S. at 194-195 [Footnote omitted].)

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In support of their position, appellants argue that their amended return did not seek to change the method of reporting the gain, **but to** correct the 'gross profit **pecentage** used. We find this argument to be without merit. We agree with respondent's finding that appellants reported the entire gain from the sale on their original return and did not file an amended return until after the expiration of the time allowed for making the original return. As such, appellants are precluded from changing their original reporting method and reporting the gain on an installment basis.

For the foregoing reasons, we must sustain respondent's **action** in this matter.

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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 19060 of the Revenue and Taxation Code, that the action of the **Franchise Tax Board** in denying the claim of Edward P. and **Patricia** Vivenzi for refund of personal income tax in the amount of \$4,371 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, **this 31st** day of **January**, '1984, by the State Board of Equalization, with Board Members Mr. **Nevins**, Mr. Dronenburg, Mr. **Collis**, Mr. Bennett and Mr. Harvey present.

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

*For Kenneth Cory, per Government Code section 7.9