BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
PAUL G. AND PEARL M. PILGRIM, et al.)

Appearances:

For Appellants: Juan E. Arrache, Jr.
Attorney at Law

For Respondent: Jon Jensen
Counsel

O P I N I O N

These appeals are made 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 Paul G. and Pearl M. Pilgrim, Jack L. and Jean Gammon, and William L. and Bernice Gammon[1] for refund of personal income tax in the amounts of $45,390, $35,029, and $45,119, respectively, for the year 1976.

1/ Mrs. Pearl M. Pilgrim, Mrs. Jean Gammon, and Mrs. Bernice Gammon appear in these proceedings only because they filed joint personal income tax returns with their respective husbands.

The sole question for decision in these appeals is whether appellants can deduct certain casualty losses in the year immediately preceding the year of actual loss pursuant to the provisions of Revenue and Taxation Code section 17206.5. Because identical facts, issues, and legal principles are involved in each case, the three appeals are consolidated for purposes of this opinion.

The facts are undisputed. In 1977, appellants Paul Pilgrim, Jack Gammon and William Gammon were general partners in a partnership named G & P Farms. The partnership was engaged in farming a 726-acre almond orchard located in Kern County, California; The partners divided the profits and losses of the partnership equally. On December 21 and 22, 1977, a severe windstorm struck Kern County, uprooting and damaging the partnership's almond trees, rendering them all useless. Setting the total value of the loss at $1,341,000 and allocating one-third of that amount, $447,000, to each partner, appellants each filed amended 1976 personal income tax returns attributing their respective shares of the loss to 1976 and thereby requested refunds in the amounts at issue pursuant to Revenue and Taxation Code section' 17206.5. Respondent's denial of these claims led to these appeals.

There is no dispute as to appellants' entitlement to deductions for the loss of the almond trees in the amounts claimed in 1977, the year of actual loss. Instead, the dispute here centers upon appellants' ability to elect to deduct those losses in 1976, the year immediately preceding the year of actual loss, pursuant to section 17206.5 of the Revenue and Taxation Code.

Section 17206.5, as in effect during the year at issue, reads in relevant part as follows:

> [A]ny loss attributable to a disaster occurring in an area subsequently determined by the President of the United States to warrant assistance by the federal government under the Disaster Relief Act of [1974][2/] may, at the election of the taxpayer, be deducted for the taxable year immediately preceding the taxable year in which the disaster occurred. ...

2/ The statute actually reads "Disaster Relief Act of 1970." However, the United States Congress repealed the 1970 Act in 1974 by the passage of the Disaster Relief Act of 1974, and provided that any references to the 1970 Act were to be deemed references to corresponding sections of the 1974 Act. (42 U.S.C.A. § 5121, Historical Note.)

Respondent bases its denial of the deductions in the year at issue upon a careful reading of section 17206.5. Respondent. contends that only losses arising from disasters in which a presidential determination is made that federal assistance will be given under the Disaster Relief Act of 1974 qualify for deduction in the year preceding the year of actual loss. During the year at issue, Revenue and Taxation Code section 17206.5 was substantially similar to its federal counterpart. (Int. Rev. Code of 1954, § 165, subd. (h).) Revenue Ruling 77-490, 1977-2 Cum. Bull. 64, lists those disasters during 1977 which qualify for special tax treatment under section 165, subdivision (h), of the Internal Revenue Code. As the subject windstorm is not listed among those qualifying disasters, respondent concludes that section 17206.5 does not apply to allow appellants to deduct the losses in the year preceding the year of actual loss, i.e., 1976.

During these protracted proceedings, appellants have advanced several theories which they contend establish their right to section 17206.5 treatment. Appellants' central argument is that the legislative history of the Disaster Relief Acts of 1970 and of 1974 indicates a legislative intent to expand section 17206.5 qualifying disasters to include those in which declarations of assistance are made by the United States Department of Agriculture and/or the Small Business Administration. Next, appellants argue that to limit application of section 17206.5 to only those disasters declared by the President would be unconstitutional as a violation of the Fourteenth Amendment of the United States Constitution, as well as article I, section 21, of the California Constitution. Appellants further argue that since Kern County was, in fact, declared a disaster area qualifying for special tax treatment on February 8, 1978 (see Rev. Rul. 78-440, 1978-2 Cum. Bull. 115), the windstorm which caused the subject loss on December 21 and 22, 1977, was part of that qualifying disaster and, accordingly, a retroactive deduction to 1976 should be allowed. At the oral hearing on May 3, 1983, appellants presented one further basis for refund under section 17206.5.. Appellants there argued for the first time that they had incurred drought losses of $393,414.49 in early 1977 which were designated as qualifying for special tax treatment. (See Rev. Rul. 77-490, supra.) Accordingly, appellants argue that should we find that the subject windstorm-related loss of $1,341,000 does not qualify for section 17206.5 treatment, an alternative basis exists for allowing $393,414.49 based on drought losses.

It is well settled that respondent's determination to disallow a deduction is presumed correct, and the burden of proof is upon the taxpayer to establish his entitlement to it. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934); Appeal of Robert V. Erilane, Cal. St. Bd. of Equal., Nov. 12, 1974.)

As indicated above, appellants' central argument is that it was the intent of the Legislature to allow appellants to utilize section 17206.5 to deduct the windstorm loss in 1976. Briefly, appellants argue that section 17206.5 does not require the President to declare a federal disaster, but only that federal assistance be warranted under the Disaster Relief Act of 1974. The Disaster Relief Act of 1974 authorizes the Department of Agriculture and the Small Business Administration to provide disaster assistance, and actions by the head of a federal department can be ascribed to the President. Since these departments designated Kern County as a disaster area entitled to loss assistance due to the windstorm damage, appellants conclude that the subject loss comes within the provision of section 17206.5.

The fundamental rule of statutory construction is that the intent of the Legislature should be ascertained as to effectuate the purpose of the law. (Select Base Materials v. Board of Equalization, 51 Cal.2d 640 [335 P.2d 672] (1959).) In ascertaining such legislative intent, we must first turn to the statutory language for an answer. (People v. Knowles, 35 Cal.2d 175 [217 P.2d 1], cert. den., 340 U.S.87995 L.Ed. 639] (1950).) Where no uncertainty or doubt about the meaning of the language appears, the provision will be applied according to its terms without further construction. (Anderson v. I. M. Jameson Corp., 7 Cal.2d 60 [59 P.2d 962] (1936).)

Looking to section 17206.5 we conclude that its language is free from ambiguity and uncertainty. The Legislature clearly required that for section 17206.5 treatment, a disaster area must be "determined by the President of the United States to warrant assistance. ..." On its face, no delegation or further enlargement of the statute was intended. Accordingly, appellants' argument concerning legislative intent is untenable. The Internal Revenue Service annually publishes a complete list of disaster areas qualifying as "presidential determinations." For 1977, the subject Kern County windstorm was not listed. (Rev. Rul. 77-490, supra.) Accordingly, we conclude that within the clear meaning of section 17206.5, appellants are not entitled to deduct the subject windstorm losses in 1976.

As indicated above, appellants' next argument is that respondent's action is unconstitutional. We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution precludes our determining that the statutory provision involved here is unconstitutional or unenforceable.

Appellants' next argument, that Revenue Ruling 78-440, supra, would apply to allow them to deduct the subject windstorm loss in 1976 is also untenable. Revenue Ruling 78-440 lists those disaster areas which the President determined qualified for special tax treatment in 1978. Among those areas listed was Kern County, California, for windstorm losses incurred or declared on February 5, 1978. Appellants argue that the windstorm loss at issue in the instant case--occurring on December 21 and 22, 1977--was part of the disaster referred to above in Revenue Ruling 78-440. Alternatively, appellants note that section 17206.5 requires that an area be "subsequently determined by the President" to qualify for assistance, and they argue that the 1978 determination (Rev. Rul. 78-440, supra) should then apply to the 1977 losses so that they could be deducted in 1976. However, on its face, Revenue Ruling 78-440 applies only to disasters "of sufficient severity occurring during 1978" which qualify for retroactive treatment to 1977. No provision is made in Revenue Ruling 78-440, nor can be made under the statute, for retroactive treatment beyond 1977. Therefore, appellants' third argument for allowance is also without merit.

At the May 3, 1983, oral hearing on this matter, appellants presented an additional argument for refund under section 17206.5'. Appellants there argued that should we find that they were not entitled to a section 17206.5 retroactive'deduction to 1976 for the windstorm losses of $1,341,000, they were nevertheless entitled to retroactively deduct drought losses of $393,414.49 which they incurred in early 1977. Appellants point out that Revenue Ruling 77-490 provides for retroactive allocation of drought losses occurring in 1977 in California to 1976. Respondent, on the other hand, contends that a claim'based on this new basis is now untimely. If the claim based on the drought loss is viewed alone, respondent is clearly correct. (Appeal of James R. and Jane R. Miller, Cal. St. Bd. of Equal., July 31, 1973) To be timely, an election under section 17206.5 must be made on or before the later of the due date for filing the income tax return for the taxable year in which the disaster actually occurred

(1977) or the due date for filing the income tax return (determined with regard to any extension of time granted to the taxpayer for filing such returns) for the taxable year immediately preceding the year in which the disaster actually occurred (1976).

Appellant also argues that the new claim should be considered merely as an amendment to a timely claim. However, in order to be allowed as timely, the second claim must not be premised upon a different theory than that urged in the original claim; the claimant may not raise a new factual basis or advance a new legal theory for his claim after the statute of limitations has run. (Appeal of Chromalloy American Corporation, Cal. St. Bd. of Equal., Feb. 3, 1977.) Here, although appellants' legal theory is the same, the factual basis for the claim is new. Under the circumstances, we must conclude that appellants' second claim based on drought losses incurred in 1977 is untimely.

For the reasons listed above, respondent's action must be sustained.

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 claims of Paul G. and Pearl M. Pilgrim, Jack L. and Jean Gammon, and William L. and **Bernice** Gammon for refund of personal income tax in the amounts of $45,390, $35,029, and $45,119, respectively, for the year 1976, be and the same is hereby sustained.

Done at **Sacramento,California,** this 28th day of **February,** 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