BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JOSEPH S. AND DORA B. HERBERT)

Appearances:

For Appellants: Burt Levitch
Attorney at Law

For Respondent: Karl F. Munz
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 Joseph S. and Dora B. Herbert against proposed assessments of additional personal income tax in the amounts of **$15,047.20, $16,936.93, $18,600.76,** and **$9,373.65** for-the years 1976, 7977, 1978, and 1979, respectively.

The issue to be resolved in this appeal is whether in each of the appeal years appellants are entitled to claim a charitable contribution carryover deduction in California for excess contributions made in a prior year while appellants were New York residents.

Appellants were California residents during the years in issue and timely filed California individual income tax returns with respect to each of these years. Prior to 1976, appellants were residents of the State of New York.-1/

During 1974, appellants made substantial charitable contributions, including a large donation to Pace University, a private educational institution located in the State of New York. The aggregate amount of the 1974 donations exceeded the percentage limitations imposed by section 170(b) of the Internal Revenue Code. As a result, appellants utilized the contribution carryover provisions of section 170(d) of the Internal Revenue Code, in deducting the "excess" contributions from their adjusted gross income in subsequent tax years. The carryovers, subject to the same percentage limitations to which the initial deduction was subject, were finally exhausted on appellants' 1979 federal return. Under New York state law, appellants were subject to contribution deduction and carryover limitations which paralleled the applicable federal law, and apparently appellants intended to similarly avail themselves of these provisions in the years following 1974.

Appellants became California residents in 1976, For that year, and the years following through 1979, they reported charitable contributions, including a contribution carryover from 1974, on their California individual income tax returns. After moving to California, appellants also filed New York nonresident returns with that state, and, to the extent applicable under New York law, appellants took charitable deductions which included the carryover amounts from previous years on their nonresident returns.

1/ Prior to moving to California in 1976, appellants had California-source income for many years and had filed appropriate nonresident returns for those years.

After audit, respondent determined that appellants were not entitled to deduct the claimed contribution carryovers and issued notices of proposed assessment. Appellants protested the proposed assessments, and an oral hearing was held. Respondent affirmed the audit action. This timely appeal followed.

Respondent disallowed the charitable deductions on the theory that appellants could not take charitable deductions on their California resident returns for a gift to a non-California educational institution which was made prior to appellants becoming California residents. Respondent contends that because appellants were nonresidents when they made the charitable contribution under the provisions of Revenue and Taxation Code sections 17301 and 17303,[2/] they must demonstrate that the contribution was: (1) connected with income arising within California at the time the gift was made, and (2) made to a California corporation or association. Respondent submits that the fact that appellants changed their residence to California in 1976 does not change the fact that the gift was nondeductible under California law when it was originally made.

Appellants contend that the applicable California statutory provision regarding contribution carryovers (Rev. & Tax. Code, § 17215.1) speaks only to the issue of contribution carryover deductions in the context of a current year and does not explicitly or implicitly differentiate on the basis of residence at the time of the initial contribution. Appellants maintain that Revenue and Taxation Code section 17215.1 is clear on its face and, in the absence of authority to the contrary, entitles appellants to have claimed the contribution carryover deductions. Appellants also contend that respondent's disallowance of the claimed contributions places an unconstitutional restriction on appellants' right to travel among the states.

2/ All references to sections 17301 and 17303 of the Revenue and Taxation Code, whether or not so stated, are to former sections 17301 and 17303 in effect during the appeal years. Section 17301 was amended and section 17303 was repealed as a result of the passage of Senate Bill 1326 (Stats. 1982, Ch. 327) operative for taxable years beginning on or after January 1, 1982.

Sections 17215[3/] and 17215.1 of the Revenue and Taxation Code provide the statutory basis for contribution carryover deductions under the California Personal Income Tax Law. Section 17215 specifically provides, in pertinent part, that "[t]he contributions or gifts shall be allowed as deductions only if verified under rules and regulations prescribed by the Franchise Tax Board."

Respondent relies on the fact that section 17301 of the Revenue and Taxation Code does not allow nonresident taxpayers charitable deductions-unless they are connected with the income arising from sources within this state and taxable under this part to a nonresident taxpayer. (Rev. & Tax. Code, §§ 17301-17303.) We agree with respondent's analysis in this regard. Section 17215.1 of the Revenue and Taxation Code permits a contribution carryover when "the amount of charitable contributions . .. payment of which is made within a taxable year ... exceeds 20 percent of the taxpayer's adjusted gross income ...." If appellants are to prevail in this appeal, it must be demonstrated that they qualified for this contribution carryover. For the reasons stated below, we must conclude that they did not.

Sections 17301 through 17302 of the Revenue and Taxation Code and the regulations promulgated in accordance with these sections (former Cal. Admin. Code, tit. 18, regs. 17301-17303, repealer filed Dec. 26, 1981 (Register 81, No. 52)), in effect during the appeal years, established the basic guidelines for determining whether a charitable contribution made by a nonresident is deductible on his California nonresident return. Former section 17303 provided that "[i]n the case of a nonresident taxpayer the deductions for contributions and gifts shall be allowed only as to contributions or gifts to corporations or associations incorporated by or organized under the laws of this State. . . ."

3/ All references to Revenue and Taxation Code section 17215 in this appeal, whether or not so stated, are to former section 17215, in effect prior to the enactment of Senate Bill 11 (Stats. 1982, Ch. 1604) operative January 1, 1984, which added subdivision (b) to section 17215.

The bulk of the charitable contributions made by appellants were to Pace University located in New York. When the charitable contributions were made in 1974, they did not qualify as charitable contributions in California because they did not satisfy the requirements of sections 17301 and 17303 in that they were not connected with income arising within California at the time the gift was made and were not made to a California corporation or association. As such, section 17215.1 is not applicable in the instant case because the gift was nondeductible under California law when it was originally made and, thus, there was no charitable contribution with which to utilize the carryover provisions found in section 17215.1.

Because of our conclusion that, for California income, tax purposes at least, appellants' charitable contributions were completed in 1974 and were not valid charitable contributions under California law when they were initially made, we find it unnecessary to address the contentions raised with regard to Revenue and Taxation Code section 17596.

Appellants also argue that respondent's position places unconstitutional restrictions on their right to travel. Consistent with our longstanding practice on constitutional issues, we must decline to consider appellants' position in this regard.. (Cal. Const., art. III, § 3.5; Appeal of Tide Water Associated Oil Company, Cal. St. Bd. of Equal., June 3, 1948.)

For the reasons stated above, respondent's action in this matter 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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Joseph S. and Dora B. Herbert against proposed assessments of additional personal income tax in the amounts of $15,047.20, $16,936.93, $18,600.76, and $9,373.65 for the years 1976, 1977, 1978, and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 27th day Of June , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis and Mr. Bennett present.

Richard Nevins , Chairman

Ernest J. Dronenburg, Jr. , Member

Conway H. Collis , Member

William M. Bennett , Member

, Member