BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 78A-487
JAMES E. AND SHARON L. JOYCE	)	

Appearances:

For Appellants: James E. Joyce, in pro. per.

For Respondent: Grace Lawson, Counsel

O P I N I O N

This appeal is made pursuant to section 18593[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of James E. and Sharon L. Joyce against a proposed assessment of additional personal income tax plus penalties in the total amount of $93.90 for the year 1976, and on the protest of James E. Joyce against a proposed assessment of additional personal income tax plus penalties in the total amount of $1,573.58 for the year 1977.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The issues for determination are: (1) whether respondent properly disallowed a deduction for a partnership loss claimed in 1976, and (2) whether appellant has established any error in respondent's proposed assessment for 1977.

On their personal income tax return for 1976, appellants claimed a $2,174.73 loss arising from their interest in Solar Air Company, a partnership. Upon audit, respondent noted that the partnership return contained only a negative figure of $2,174.33 in the line provided for "payments to partners - salary and interest" with the same figure in the space provided for "ordinary income (loss)." (Resp. Br., Ex. B.) Since appellants' partnership interest amounted to 50 percent, respondent concluded that appellants' distributive share of the partnership loss should be one-half of the total loss, or $1,087.16 rather than $2,174.33 as reported, and since any salary attributed to the partners should have been included in their incomes, respondent concluded that one-half of the amount shown as salary (i.e., again, one-half of $2,174.33 or $1,087.16) should be included in appellants' income. (Resp. Br. at 1 and 2.) On appeal, appellants appear to concede that only one-half of the total partnership loss (i.e., $1,087.16) should have been subtracted from their gross income. However, appellants contend that the negative amount of $2,174.33 entered as "payments to partners - salary and interest" should have, in fact, been entered in various expense categories. Accordingly, appellants argue that respondent's restoration of one-half of this amount as salary in their income was in error. (App. Reply Br., Ex. A at 2.) Respondent answers, however, that while appellants' entry of the $2,174.33 as salary may have been erroneous, appellants have not offered any evidence substantiating the amount of the alleged expenses. (Resp. Memo., Apr. 2, 1980.)[2/] Accordingly, respondent concludes that its assessment for 1976 must stand. In addition, respondent imposed a delinquent filing penalty of five percent. (Resp. Br., Ex. C.)

For taxable year 1977, appellant submitted a personal income tax form 540 which did not disclose any

2/ Nevertheless, respondent states that it was prepared to adjust the assessment if appellants would submit evidence of such expenses. To date, no such evidence has been submitted.

information with respect to his income or deductions.[3] (Resp. Br., Ex. E.) In the spaces provided for the required information, appellant entered symbols representing the following statement:

> I do not understand this return or the laws that may apply to me. This means that I take specific objection under the 4th and 5th Amendments of the U.S. Constitution to the specific question per U.S. v. Sullivan 273 U.S. 689; U.S. v. Garnes 424 U.S. 648; U.S. v. Merdock 209 U.S. 398; U.S. v. Bishop 93 S.Ct. (1973).

Appellant's return also contained the statement: "Note: I did not receive any constitutional dollars! (Containing 412.5 grains of silver.)" (Resp. Br., Ex. E.)

Upon audit, by letter dated June 16, 1978, respondent notified appellant that such a form 540 did not constitute a valid return and demanded that any required return be filed within 30 days. By letter dated July 10, 1978, appellant replied stating that a valid return had been filed. Thereupon, respondent proposed an assessment for 1977 based upon the information contained in his W-2 form, information received from the Employment Development Department, and savings account interest statements. Respondent also imposed a 5-percent negligence penalty and 25-percent penalties for delinquent filing and failure to file upon notice and demand. (Resp. Br., Ex. H.)

Based upon the record before us, we must hold that respondent's determination must be sustained[4] with respect to the issue raised for the taxable year 1976. It is well settled that the taxpayer bears the burden of proving that he is entitled to claimed deductions and credits. (Welch v. Helvering, 290 U.S. 111 [78 L.Ed. 212] (1933).) Appellants have made no attempt to substantiate or document the expense items claimed on the

3/ Appellant did, however, attach a W-2 form which indicated that he earned $19,086.99 in wages during 1977.

4/ At the oral hearing before this board, appellants apparently stated that they would file appropriate returns under the Amnesty Program in order to be relieved of the penalties. However, the record contains no indication that such returns have been filed.

partnership return for 1976. Accordingly, we conclude that respondent properly disallowed those items.

With respect to appellant's constitutional arguments for 1977, 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 provisions involved here are unconstitutional or unenforceable. In brief, section 3.5 of article III provides that an administrative agency has no power to declare a statute unconstitutional or unenforceable unless an appellate court has made such a determination. In any event, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., Mar. 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal. It is noteworthy, however, that in appropriate cases where these constitutional issues have been considered on the merits they have been rejected. (See, e.g., United States v. Sullivan, 274 U.S. 259 [71 L.Ed. 1037] (1927); United States v. Daly, 481 F.2d 28, 30 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973); Hartman v. Switzer, 376 F.Supp. 486 (W.D. Pa. 1974); Hatfield v. Commissioner, 68 T.C. 895 (1977); Appeal of Donald H. Lichtle, Cal. St. Bd. of Equal., Oct. 6, 1976.)

In addition, in cases of this type, the penalties assessed by respondent uniformly have been upheld. (See, e.g., Appeal of Ruben B. Salas, supra; Appeal of Arthur W. Keech, Cal. St. Bd. of Equal., July 26, 1977.) No reason has been presented to suggest that we should depart from those holdings in this appeal. Again, for the foregoing reasons, respondent's action must be sustained in its entirety.

Appeal of James E. and Sharon L. Joyce

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 James E. and Sharon L. Joyce against a proposed assessment of additional personal income tax plus penalties in the total amount of $93.90 for the year 1976, and on the protest of James E. Joyce against a proposed assessment of additional personal income tax plus penalties in the total amount of $1,573.58 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of October, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government code section 7.9