BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
WALLACE W. AND RISE B. BERRY )

Appearances:

For Appellants: Wallace W. Berry, in pro. per.

For Respondent: Richard C. Creeggan
Counsel

## O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Wallace W. and Rise B. Berry against a proposed assessment of additional personal income tax in the amount of $164.68 for the year 1967.

The questions presented are:

(1) Whether appellants are eligible to use the income averaging provisions in computing their joint 1967 California income tax liability, and

(2) Whether, in the alternative, a 1967 separate return submitted by appellant Wallace W. Berry may be considered in determining his eligibility to separately average income when he had previously filed a joint return with his spouse for the same taxable year.

During the appeal year, appellant was employed as a professor at San Jose State College and his wife was a teacher. They filed a joint i967 California personal income tax return in which they computed their tax liability through use of the income averaging method. Subsequently, in response to a request from the respondent? Franchise Tax Board, appellant completed and returned an income averaging questionnaire. On that form, appellant indicated that neither he nor his wife were California residents for the years 1965 and 1966. Appellant also stated therein that both he and his wife were single in the years 1963-1965 and married in 1966. Although appellant reported that he furnished over fifty percent of his support for the years 1963-1966, he stated that his wife did not supply over fifty percent of her support all during that period. Specifically, his wife reportedly had no earnings in either. 1963 or 1964.

In view of these facts, respondent concluded that the appellants were not eligible for income averaging. A notice of proposed assessment of additional tax based on this finding was issued against the appellants on March 31, 1970. Appellant immediately filed a protest to the proposed assessment and informed respondent that both he and his wife had retained their California residency throughout the years 1963-1967. Nonetheless, respondent determined that appellant and his spouse would still not be entitled to average income in their 1967 joint return because his wife had not provided more than one-half of her support for all of the four years immediately preceding 1967 as required by section 18243, subdivision (c), of the Revenue and Taxation Code. Since it did not appear that any of the exceptions to the support requirements of subdivision (c) of section 18243 applied, respondent disallowed the protest and affirmed its proposed assessment. That action gave rise to this appeal which was filed on October 30, 1970: Subsequently, on April 10, 1971, appellant and his wife filed separate returns for the year 1967.

Income averaging.is governed by sections 18241-18246 of the Revenue and Taxation Code. Those sections contain a number of specific requirements for eligibility. Subdivision (c) of section 18243 provided:

(c)(1) For purposes of this article, an individual shall not be an eligible individual for the computation year if, for any base period year, such individual (and his spouse) furnished less than one-half of his support.

(2) Paragraph (1) shall not apply to any computation year if --

(A) Such year ends after the individual attained age 25 and, during at least four of his taxable years beginning after he attained age 21 and ending with his computation year, he was not a full-time student.

(B) More than one-half of the individual's adjusted taxable income for the computation year is attributable to work performed by him in substantial part during two or more. of the base period years, or

(C) The individual makes a joint return for the computation year and not more than 25 percent of the aggregate adjusted gross income of such individual and his spouse for the computation year is attributable to such individual.

* * *

The term "computation year" means the taxable year for which the taxpayer chooses to average income, and the "base period" means the four taxable years immediately preceding the computation year. (Rev. & Tax. Code, § 18242, former subd.(e), now subd.(d).)

In the instant case, appellant has stated that his wife had no earnings in 1963 and 1964 and therefore she contributed nothing to her own support during those years. In addition, at the hearing appellant conceded that none of the exceptions to subdivision (c) of section 1.8243 were applicable. Under the circumstances, appellants are not eligible for income averaging in computing their joint 1967 California income tax liability.

With respect to whether a 1967 separate return submitted by appellant may be considered in determining his eligibility to separately average income, *we* conclude that it may not be. In our opinion the law in effect at the time appellant filed his separate return did not allow the filing of the same subsequent to the submission of a joint return, where the separate return was not filed before the due date of the required return for the particular tax year involved.

Former sections 18409-18409.9 of the Revenue and Taxation Code (in effect beginning April 18, 1952) did permit taxpayers, who had previously filed a joint return, to file separate returns for the same year as late as 4 years after the due date of the return for that year. The enactment of these sections changed the law, which previously had clearly provided that separate returns could not be filed after a joint return unless they were filed before the due date of the taxpayer's return-for the year in question. (Appeal of Max and Lily Feterman, Cal. St. Bd. of Equal., June 12, 1957.) But these sections were repealed effective November 10, 1969, by chapter 980 of the 1969 Statutes, and the Legislature specified in section 22 of chapter 980 that the -repealer was to be applied on and after the effective date of that chapter. Consequently, on November 19,1969, the law which existed prior to the enactment of sections 18409-18409.9 was reinstated.

Based upon the aforementioned consideration, we must sustain respondent's action.

## 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,

Appeal of Wallace W. and Rise B. Berry

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 Wallace W. and Rise B. Berry against a proposed assessment of additional personal income tax in the amount of $164.68 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of February, 1973, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary