

BEFORE THE STATE BOARD OF EQUALIZATION
 OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
 ELMER H. AND JOAN C. THOMASSEN)

Appearances:

For Appellants: Byron Foote
 For Respondent: Richard A. Watson
 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 Elmer H. and Joan C. Thomassen against proposed assessments of additional personal income tax in the amounts of \$153.37 and \$583.09 for the years 1959 and 1961, respectively, plus a penalty in the amount of \$29.15 for the year 1961.

Appellants are residents of Newport Beach, California. Elmer H. Thomassen is a practicing orthopedic surgeon with offices located in Newport Beach and Garden Grove.

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In October 1963 respondent's auditors reviewed appellants' joint personal income tax returns for the years 1959 and 1961. The audit resulted in the following adjustments which form the basis of this appeal. For both 1959 and 1961 respondent reduced certain business expenses, or deductions, increased income, and disallowed a loss in accordance with a federal audit report. Medical expenses were reduced **\$3,800.72** and **\$7,083.35** for the years 1959 and 1961, respectively, as being in excess of the allowable statutory limit. Automobile expenses were reduced 25 percent for 1959 because appellants failed to establish that such expenses were business related. For the year 1961 respondent also assessed a negligence penalty in the amount of 5 percent of the total **proposed** deficiency assessment.

It is well established that deficiency assessments which are based upon a federal audit are presumed to be correct and that the taxpayer has the burden of proving error. (Appeal of William B. and Sally Spivak, Cal. St. Bd. of Equal., Feb. 26, 1969; Appeal of Herbert Tuchinsky, Cal. St. Bd. of Equal., July 1, 1970.) Appellants **maintain** that the federal audit report relied on by respondent does not reflect the final basis upon which they settled their federal tax liability for the years on appeal. However, respondent has indicated that the final federal adjustments were considered in revising its proposed assessments. In any event, appellants, although requested to do so, have failed to offer any evidence which even suggests that the federal audit adjustments relied upon by respondent were erroneous. Accordingly, we find that respondent's action in relying upon the federal determination was proper.

Appellants claimed medical expense deductions in the amounts of **\$6,300.72** and **\$9,583.35** for the years 1959 and 1961, respectively. Section 17255 of the Revenue and Taxation Code (section 17254 prior to 1961) specifically limited the maximum medical deduction to **\$2,500.00** where the taxpayer filed a joint return with his spouse. Respondent disallowed these deductions to the extent they exceeded

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the statutory maximum. We find that respondent's action in disallowing the excess portion of these deductions was correct as a matter of law.

In the year 1959 appellants deducted **\$3,947.48** as a business expense for the leasing and maintenance of various automobiles. Respondent determined that during 1959 appellants neither owned nor leased any other automobiles for their personal use and disallowed 25 percent of the amount claimed as a nondeductible personal, living or family expense. (Rev. & Tax. Code, § 17282.)

Deductions from gross income are a matter of legislative grace and are allowable only where the conditions established by the Legislature have been met. (New Colonial Ice Co. v. Helvering 292 U.S. 435 [78 L. Ed. 13481.]) Although appellants have failed to produce any records or other evidence showing how the claimed expense should be apportioned between personal and business use, respondent has allowed a portion of **the expense claimed under the rule of Cohan v. Commissioner, 39 F.2d 540.** In view of appellants' failure to offer any evidence on this issue we find that respondent's action in disallowing a portion of the claimed automobile expense for 1959 was correct.

Finally, for the year 1961, respondent assessed the 5 percent penalty for negligence under section 18684 of the Revenue and Taxation Code. The Internal Revenue Service imposed an identical penalty pursuant to section 6653(a) of the 1954 Internal Revenue Code for the year 1961. Respondent's determination that a penalty should be assessed is prima facie correct and **appellant** has the burden of proving that the action is **erroneous.** (David Courtney, 28 T.C. 658; Ralph Romine, 25 T.C. 859.) Appellants have submitted no evidence which would suggest that respondent's action in assessing the penalty was erroneous. Accordingly, we find that respondent's action must be sustained.

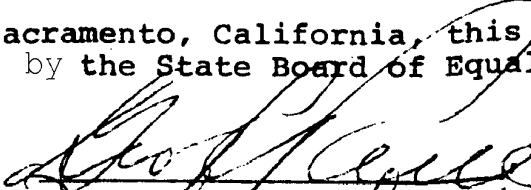
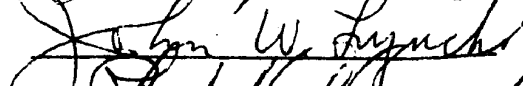
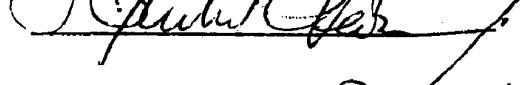
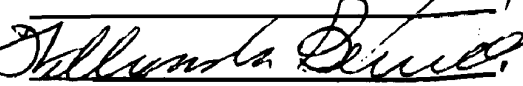
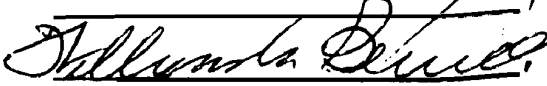
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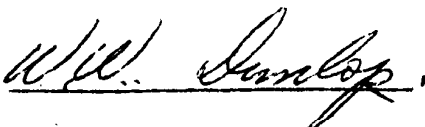
O R D E R

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Elmer H. and Joan C. Thomassen against proposed assessments of additional personal income tax in the amounts of \$153.37 and \$583.09 for the years 1959 and 1961, respectively, plus a penalty in the amount of \$29.15 for the year 1961, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of February, 1974, by the State Board of Equalization.

 Chairman
 Member
 Member
 Member
 Member

ATTEST:  Secretary