



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RICHARD D. AND MARY JANE NILES)

For Appellants: Richard D. Niles, in pro. per.
For Respondent: Crawford H. Thomas
Chief Counsel
Paul J. Petrozzi
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 Richard D. and Mary Jane Niles against a proposed assessment of additional personal income tax in the amount of \$644.81 for the year 1969.

Richard D. and Mary Jane Nil-es, as husband and wife, filed a timely joint California personal income tax return for 1969, using the income averaging provisions contained in sections 18241-18246 of the Revenue and Taxation Code to compute their tax liability. Mary Jane had moved **to California** in April 1969, and she married

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Richard in June of that same year. It is conceded that Mary Jane was not a resident of California before April, 1969. Respondent disallowed the use of income averaging because Mary Jane did not meet the residency requirement of section 18243, subdivision (b), of the Revenue and Taxation Code. A Notice of Additional Tax Proposed to be Assessed was issued, and the taxpayers protested. Respondent denied their protest, and this appeal followed.

We do not reach the question of whether the use of income averaging **was proper** since there is a more fundamental problem involved. Section 18402 of the Revenue and Taxation Code provides that a joint return may not be filed by a husband and wife if one spouse was a resident for the entire year and the other spouse was a nonresident for all or any portion of the taxable year. The restriction does not apply if the nonresident or his or her spouse was an active member of the armed forces **or** any auxiliary branch thereof during the taxable year, but there is nothing in the record before us to indicate that either spouse was in military service. It follows that Richard D. and Mary Jane Niles **were not** entitled to file **a** joint return for 1969. Since the record is inadequate to allow us **to determine** the taxpayers' **correct** tax liabilities on the basis of separate returns, we must reverse the action of the Franchise Tax Board in order that it may take appropriate action with respect to the **individuals.**



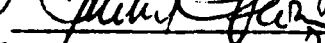
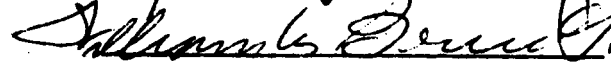
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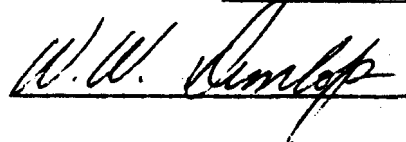
Pursuant to the views expressed in the opinion of the board, on file in this proceeding," and good cause appearing therefor,

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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 Richard D. and Mary Jane Niles against a proposed assessment of additional personal income tax in the amount of \$644.81 for the year 1969, be and the same is hereby reversed.

Done at Sacramento, California, this 26th day of March, 1974, **by the State Board of Equalization.**

 Chairman
 Member
 Member
 Member
_____, Member

ATTEST :  Secretary