BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LESTER A. AND)
CATHERINE B. LUDLOW)

Appearances:

For Appellants: S. F. "Jack" Higgins

For Respondent: James C. Stewart
Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Lester A. and Catherine B. Ludlow against proposed assessments of additional personal income tax against them, individually, in the amounts of $80. 52 and $80.04, respectively, for the year 1971.

The questions presented for decision are: (1) Whether respondent properly denied one half of appellants' claimed capital loss carry-over deductions, and (2) Whether respondent properly disallowed appellants' claimed military pay exclusions.

Appellants, husband and wife, filed separate returns for the year 1971 on which they each claimed a deduction of $1,000 in capital losses carried over from 1970. In addition, since appellant husband was in the United States Naval Reserve, each appellant claimed a $500 military pay exclusion from gross income on his return. Respondent's disallowance of fifty percent of the claimed deductions and the entire amount of the military pay exclusions gave rise to this appeal.

The provisions of the California Revenue and Taxation Code imposing limitations on capital losses and capital loss carry-overs are contained in section 18152. A perusal of the history of this section reveals that changes have occurred in its provisions no less than four times since 1959, i. e., in 1964, 1967, 1971, and 1972. Respondent's denial of one half of appellants' claimed capital loss deductions was based on the change made in section 18152 by the California Legislature in December of 1971. Prior to 1971, any qualifying taxpayer could deduct up to $1,000 of capital losses incurred in the taxable year or carried over from prior years. (See former (1967) Rev. & Tax. Code, § 18152.) However, the 1971 change limited such capital loss deduction of a married taxpayer filing a separate return to $500. (Rev. & Tax. Code, § 18152, subd. (b).) Respondent applied the law as amended in 1971 to deny appellants one half of their claimed capital loss carry-over deductions.

Appellants make two arguments in support of their contention that they are entitled to the full amount of the capital loss deductions claimed. The first is based upon their interpretation of the so-called "transitional rule" contained in subdivision (f) of section 18152, as that section read in 197 1. This subdivision, which was, enacted in 197 1, provided:

> In the case of any amount which, under subdivision (d) and subdivision (a) (as in effect for taxable years beginning before January 1, 1971), is treated as a capital

> loss in the first taxable year beginning after December 31, 1970, subdivision (d) and subdivision (a) (as in effect for taxable years beginning before January 1, 1971) shall apply (and subdivision (d) and subdivision (a) as in effect for taxable years beginning after December 31, 1970, shall not apply) to the extent such amount exceeds the total of any net capital gains (determined without regard to subdivisions (d), (e), and (f)) of taxable years beginning after December 31, 1970.

Appellants interpret this provision to mean that 'where capital losses carried over from years prior to 1971 are claimed as deductions for 1971, the Legislature intended that they only be subject to the limitations imposed pursuant to former section 18152. Accordingly, appellants allege that section 18152, subdivision (b), of the current law was improperly applied against them.

We cannot agree with appellants' interpretation of subdivision (f) of section 18152. Nowhere in this provision is any allusion made to subdivision (b). Furthermore, we are unaware of any legislative intent, expressed or implied, that subdivision (b) be given other than immediate application. In fact, the preamble to the bill containing the change indicates just the opposite. (See Stats. 1971, 1st E. S., ch. 1, pp. 4873, 4874.) It follows that subdivision (b) became effective upon its enactment in December of 1971 and was properly applied by respondent herein. Concededly, the analogous 1969 changes in the Internal Revenue Code would permit federal taxpayers in appellants' situation the full amount of the deductions claimed for the year in which the law was changed. (See Int. Rev. Code of 1954, §§ 1211(b) and 1212(b)(3).) However, the California Legislature, for reasons unknown, chose not to follow the federal approach. If anything, the discrepancy between the federal and state provisions tends to indicate an intention on the part of the California Legislature that a result different from the federal was intended. (See People ex rel. Paganini v. Town of Corte Madera, 97 Cal. App. 2d 726 [218 P. 2d 810].)

Appellants' second argument is in the nature of an estoppel. They contend 'that they detrimentally relied on the erroneous instructions accompanying their 1971 returns in claiming $1,000 each of capital loss deductions: Therefore, they contend, respondent should not now be allowed to deny them any'part of the deductions claimed pursuant to those incorrect instructions.

In the past we have held that only under unusual circumstances will estoppel be invoked against the government in a tax case. The case must be clear and the injustice great. (Appeal of James R. and Jane R. Miller, Cal. St. Bd. of Equal., July 31, 1973; Appeal of Harlan R. and Esther 'A. Kessel, Cal. St. Bd. of Equal. , March 27, 1973.) This is not such a case. In reaching this result, we note that the 1971 change in the law occurred very late in the calendar year. Consequently, respondent was unable to make the necessary changes in its instructions prior to mailing out the 1971 returns early in 1972. Furthermore, although appellants might have been misled by respondent's erroneous instructions, whatever injustice might have resulted was not great in view of the fact that the denied portions of the deductions could still be carried over and used in subsequent years.

The second issue for our consideration is whether respondent properly disallowed appellants' claimed military pay exclusions. Appellants contend they are entitled to these exclusions under Revenue and Taxation Code section 17146, which provides:

> Gross income does not include the salary, wages, bonuses, allowances, and other compensation, except pensions and retirement pay, received by an individual for his services on extended active duty as a member of the armed forces of the United States, including any auxiliary branch thereof, up to and including one thousand dollars ($1,000) per annum in the aggregate. For the purposes of this section, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days 'or for an indefinite period.

Appellants disclosed that Dr. Ludlow was a senior medical officer attached to an active unit of the United States Naval Reserve. As a member of that unit, he was subject to twenty-four hour call-up to active duty and indefinite assignments for emergency duty. In addition, he was expected to actively participate in reserve activities for two or three days per month as well as a two-week cruise each summer. During the year in question, Dr. Ludlow's active participation was limited to the monthly meetings and the two-week summer cruise. Under these circumstances, he clearly did not meet the "extended active duty" test of section 17146 since, by his own admission, he was on active duty for no more than fifty days during 1971.

Based on the foregoing, we have no alternative but to sustain respondent's determination with respect to both of the issues on appeal.

O'R DE R

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

Appeal of Lester A. and Catherine B. Ludlow

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 protests of Lester, A. and Catherine B. Ludlow against proposed assessments of additional personal. income tax against them, individually, in the amounts of $80.52 and $80. 04, respectively', for the year 1971, be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of March, 1975, by the State Board' of Equalization.

John W. Lynch, Chairman

George R. Reilly, Member

Richard Nevins, Member

Paul Carpenter, Member

_____, Member

ATTEST: Gordon H. Ottesman, Acting Secretary