



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
 DAN J. AND GLADYS D. WHITESIDE)

For Appellants: **Dan J. Whiteside, in pro. per.**

For Respondent: Bruce W. Walker
 Chief Counsel

 John A. Stilwell, Jr.
 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 Dan J. and Gladys D. Whiteside against a proposed assessment of additional personal income tax in the amount of \$193.05 for the year 1971.

Appellants resided in Nebraska during the years 1967 through 1970 and in California throughout 1971. They filed a joint California tax return for 1971 using the income averaging method to compute their tax liability. Appellants

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thereby reduced their **reported** tax liability, although they were **fully** aware **that** **section** 18243 of the Revenue and Taxation Code restricts **the** use of **income** averaging to taxpayers who were California residents during the **computation** year and the **four** preceding base period years. Appellants took **this** action in the belief that the residency requirement **in** section 18243 is unconstitutional.

Respondent denied appellants the use -of the income averaging provisions because appellants were not **California** residents during the four **base period** years (1967-1970), as required by section 18243. Respondent also disallowed the 1971 **special** tax credit under the **provisions** of section 17069 of the Revenue and Taxation Code (as it then read), 'which required a taxpayer to pay the **entire amount** of the tax due on or before the due date of the return in order to qualify' for the credit, unless the failure to pay was due to reasonable cause.

Appellants protested respondent's -action, **alleging** (1) that the residency requirement in section 18.243 is unconstitutional, and (2) that the special tax credit was improperly denied. Respondent denied the protest and this appeal followed.

Appellants contend that by **requiring** five consecutive years of residency (the computation year and the four base period years), **section** 18243 violates the privileges and immunities clause and the equal protection clause of the Constitution of the United States. This board has a well established policy of abstention from deciding constitutional questions in appeals involving proposed assessments of additional tax. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of Paul Peringer, Cal. St. Bd. of Equal., 'Dec. 12, 1972.) This policy is based upon our belief that such questions **are** entitled to judicial scrutiny, and the absence of any specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of **an** adverse decision. 'Although this abstention policy applies in the instant case, we nevertheless note that the constitutionality of this **residency** requirement has **been** upheld in appeals involving denials of claims for refund. (Appeal of Laurence E. Broniwitz, Cal. St. Bd. of Equal., Sept. 10, 1969; Appeal of John P. and Nina J. Davis, Cal. St. Bd. of Equal., March 8, 1976.)

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Appellants also contend that' respondent has improperly denied them the **1971** special tax credit; The credit was granted by section 17069 of the Revenue and Taxation Code, which then provided in part:

(b) . . .In order to claim the tax credit allowed in subdivision (a), the taxpayer must first pay the entire amount of the [tax imposed by the code], . . .on or before the **due** date of the return...unless the taxpayer's failure to pay or file a timely return was due to reasonable cause and not due to willful neglect.

Appellants feel this section was meant to apply only to those taxpayers who failed to pay the full amount of tax admittedly due. They believe it should not be applied to taxpayers who, like themselves, dispute in **good** faith the amount of tax due. **However**, section 17069 conditions the credit upon payment of the full amount of tax imposed by law, not upon payment of the full amount of tax a taxpayer admits is due. Further, section 17069 provides an exception for failure to pay due to reasonable cause, not for failure to pay due to good faith beliefs.

In the instant case, appellants failed to pay the full amount of tax required by law. Therefore, the issue is whether appellants acted reasonably in deliberately ignoring the residency requirement in section 18243 because they believe **that** requirement to be unconstitutional.

In construing similar "reasonable cause" language in section 18681 of the Revenue and Taxation Code, we stated:

"Reasonable cause . . . [means] such cause as would prompt an ordinarily intelligent and **prudent** businessman to have so acted under the circumstances." (Appeals of Joseph W. and Elsie M. Cummings, Cal. St. Bd. of Equal., Dec. 13, 1960. (Emphasis added.)

We do not find reasonable cause in this case. Appellants knew that section 18243 prohibited the action they took. Further, this board had ruled in 1969 that the residency

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requirement in section 18243 is constitutional. (Appeal of Laurence E. Broniwitz, supra.) Under these circumstances, respondent's action in denying the special tax credit was correct.

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 Dan J. and Gladys D. Whiteside against a proposed **assessment of** additional personal income tax in the amount Of **\$193.05** for the year **1971**, be and the same is hereby sustained.

Done at Sacramento,, California, this 6th day of October., 1976, by the State **Board of Equalization.**

J. L. ... Chairman
... Member
... Member
_____, Member
_____, Member

ATTEST: *Will ...*, 'Executive Secretary

In the Matter of the Appeal of)
)
DENNIS G. DAVIS)

Upon consideration of the petition filed October 26, 1976, by Dennis G. Davis for rehearing of his appeal from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and the same is hereby denied and that our order of October 6, 1976, be and the same is hereby affirmed.

William B. Smith, Chairman
 Richard H. ... Member
 Mrs. Sanby ... Member
 George ... Member
 ... Member

W. W. Smithe, Executive Secretary