BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JAMES M., SR., AND MARY V. FERGUSON)

For Appellants: James M. Ferguson, Sr., in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Brian W. **Toman**
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 James M., Sr., and Mary V. Ferguson against a proposed assessment of additional personal income tax in the amount of **$1,524.88** for the year 1968. Appellants have paid the assessment in full plus interest in the amount of $703.36. Pursuant to section 19061.1 of the Revenue and Taxation Code, the appeal will **therefore be** treated as an appeal from the denial of a claim for refund.

Appellants' 1968 federal income tax return was audited and certain adjustments were made by the Internal Revenue Service. In making these adjustments, the Service computed appellants' federal tax liability by the income averaging method. Subsequently respondent issued the proposed assessment in question. The assessment was based on the federal action except that respondent did not allow appellants to average their income. Respondent took this position because it had determined that appellants were not California residents throughout the entire base period, that is, the four taxable years immediately prior to the year in question.

Appellants protested the proposed assessment but the protest was denied. They subsequently paid the assessment in full plus interest. In accordance with Revenue and Taxation Code section 18688, a portion of the interest charges was computed at the rate of 12 percent per year. On appeal, appellants contend that the residency requirements for income averaging are arbitrary and discriminatory and that the 12 percent interest rate is usurious.

Section 18243 of the Revenue and Taxation Code defines the class of individuals who are eligible for the benefits of income averaging. In relevant part, subdivision (b) of that section provides that an individual shall not be eligible if, at any time during the base period, he or she was not a resident of California. In several prior decisions we have upheld this provision against charges that it is arbitrary and discriminates against nonresidents. (See, e.g., 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.) For the reasons expressed in those opinions, we conclude that the residency-requirement is neither arbitrary nor discriminatory.

Appellants.' usury argument is predicated on former article XX, section 22, now article XV, section 1, of the California Constitution (hereinafter referred to as section 1). In relevant part, that section provides that "interest upon the loan or forbearance of any money. .." shall, with certain exceptions, be 7 percent per year. Section 1 also prohibits any "person, association, co-partnership or corporation," again with certain exceptions, from receiving fees or other charges from a borrower in

excess of 10 percent per year. The last sentence of section 1 states that "this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith." Appellants contend that Revenue and Taxation Code section 18688, to the extent that it authorizes interest on unpaid taxes of 12 percent per year, is in conflict with and superseded by section 1.

We disagree with appellants' contention. Section 1 speaks in terms of "persons," "associations," "copartnerships" and "corporations," without explicitly referring to the state or its agencies. There is nothing in the language or history of that section to indicate that the state is subject to its restrictions. (See 53 ops. Cal. Atty. Gen. 4, Jan. 7, 1970.) Moreover, in Meilink v. Unemployment Reserves Commission, 314 U.S. 564 [86 L. Ed. 458] (1942), the United States Supreme Court indicated that section 1 did not invalidate a California statute which imposed 12 percent interest on 'delinquent unemployment insurance taxes. As the Court pointed out, "[a] rate of interest on tax delinquencies which is low in comparison to the taxpayer's borrowing rate ... is a temptation to use the state as a convenient, if involuntary, banker by the simple practice of deferring the payment of taxes." (314 U.S. at 567.) Accordingly, we conclude that Revenue and Taxation Code section 18688 is not in conflict with section 1.

For the above reasons, we sustain respondent's' action in this matter.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of James M., Sr., and Mary V. Ferguson for refund of personal income tax in the amount of $1,524.88 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of September, 1977, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member