BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROLF AND JANICE C. URSIN-SMITH)

For Appellants: Rolf Ursin-Smith; in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Brian W. Toman
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 protest of Rolf and Janice C. Ursin-Smith against a proposed assessment of additional personal income tax in the amqunt of $2,160.00 for the year 1972.

The primary issue presented by this appeal is whether respondent properly limited to $2,500 a moving expense deduction in the amount of $37,942 claimed by appellants on their 1972 return.

In 1972 Mr. Ursin-Smith was requested by his employer to move from Los Angeles to San Francisco. The employer agreed to reimburse appellants for certain expenses and losses incurred in connection with the sale of their Los Angeles residence. The employer also agreed to compensate appellants for the increased federal income tax liability caused by the reimbursements.

Appellants sold their Los Angeles home at a price approximately $26,678 less than its fair market value. In connection with the sale, appellants incurred expenses totaling $4,446. Mr. Ursin-Smith's employer reimbursed appellants for the $26,678 "loss" on the sale of the home and for the $4,446 of expenses. The employer also paid appellants $6,818 for "relocation tax assistance." Thus, the employer paid appellants a total of $37,942 in connection with the employment related move.

Appellants included the $37,942 reimbursement in gross income on their 1972 return. However, appellants also claimed a deduction in that amount for "moving expenses." After conducting an audit of the return, respondent determined that the $37,942 was properly included in appellant's gross income, but that the moving expense deduction should have been limited to $2,500 pursuant to section 17266 of the Revenue and Taxation Code.

Section 17266 provides, in pertinent part:

> (a) There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee . . . at a new principal place of work.
>
> (b) (1) For purposes of this section, the term "moving expenses" means only the reasonable expenses--
>
> (A) Of moving household goods and personal effects from the former residence to the new residence,

> (B) Of traveling (including meals and lodging) from the former residence to the new place of residence,
>
> (C) Of traveling (including meals and lodging), after obtaining employment from the former residence . . . for the principal purpose of searching for a new residence,
>
> (D) Of meals and lodging while occupying temporary quarters in the general location of the new principal place of work . . . or
>
> (E) Constituting qualified residence sale . . . expenses.
>
> * * *
>
> (3)(A) The aggregate amount allowable as a deduction under subdivision (a) in connection with a commencement of work which is attributable to expenses described in subparagraph (C) or (D) of paragraph (1) shall not exceed one thousand dollars ($1,000). The aggregate amount allowable as a deduction under subdivision (a) which is attributable to qualified residence sale . .. expenses shall not exceed two thousand five hundred dollars ($2,500), reduced by the aggregate amount so allowable which is attributable to expenses described in subparagraph (C) or (D) of paragraph (1).

Thus, section 17266 authorizes the deduction in full of moving expenses attributable to the expenses described in subparagraph (A) or (B) of paragraph (1) of subdivision (b). However, section 17266 limits to $1,000 the deduction which may be taken for moving expenses attributable to the expenses described in subparagraphs (C) and (D), and it limits to $2,500 the deduction which may be taken for moving expenses attributable to "qualified residence sale .. . expenses" under subparagraph (E).

The record on appeal indicates that the entire $37,942 moving expense deduction relates, directly or Indirectly, to the "qualified residence sale . . . expenses" referred to in subparagraph (E). Consequently, pursuant to the statutory provisions set forth above, we must sustain respondent's action in disallowing all but $2,500 of the claimed deduction.

Appellants' position with respect to this appeal is not clear. Apparently, appellants contend that no limitation should be imposed on their moving expense deduction because none of the expenses or losses which constitute the deduction fall within subparagraph (E). However, appellants have presented no evidence that any portion of the deduction relates to the fully deductible expenses described in subparagraphs (A) or (B). Therefore, we must assume that appellants are now claiming the deduction under a different section of the Revenue and Taxation Code. In this connection, we note that the burden rests with appellants to specify an applicable statute and establish that the deduction comes within its terms. (Appeal of Ernest Z. and Shoshana R. Feld, Cal. St. Bd. of Equal., March 2, 1977; Appeal of Benjamin F. and Sue S. Kosdon, Cal. St. Bd. of Equal., May 4, 1976.) Appellants have failed to refer this board to any statute, other than section 17266, which might authorize the claimed deduction. 1/

Appellants also assert that if their moving expense deduction is subject to the statutory limits, the $37,942 reimbursement received from Mr. Ursin-Smith's employer was not includible in their gross income. In support of this assertion, appellants rely on a 1972 federal revenue ruling (Rev. Rul. 72-339, 1972-2 Cum. Bull. 31).

Section 17122.5 of the Revenue and Taxation Code expressly requires the inclusion in gross income, as compensation for services, of "any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another which is attributable to employment or self-employment." Moreover, the federal courts and this board have consistently held that indirect moving expense reimbursements such as those received by appellants must be included in gross income. (See, e.g., Bradley v. Commissioner, 324 F.2d 610, (4th Cir. 1963); William A. Kuffman, ¶74,108 P-H Memo. T.C. (1974); Appeal

1/ We note also that the Revenue and Taxation Code contains no provision authorizing the deduction of either a loss on the sale of a personal residence (see Cal. Admin. Code, tit. 18, reg. 17206(i); Appeal of Claude D. and Jessie V. Plum, Cal. St. Bd. of Equal., Nov. 19, 1958), or the payment of federal income taxes (Rev. & Tax. Code, § 17204; Appeal of Elsie Z. Bradberry, Cal. St. Bd. of Equal., April 5, 1976).

of William L. and Helen M. Hoffman, Cal. St. Bd. of Equal., Dec. 15, 1966.) In view of this statutory and judicial authority, we conclude that the $37,942 reimbursement was properly included in appellants' gross income.

With respect to the revenue ruling cited by appellants, we believe that appellants' reliance on the ruling is clearly misplaced. In the ruling the Internal Revenue Service was merely asked to determine the tax consequences of an employer's purchase, at fair market value, of a transferred employee's residence where no real estate sales commission was paid or incurred by any party to the transaction. The Service ruled that "the employee must account for the gain he realized on the sale of his residence, but no part of the transaction will give rise to income as compensation for the amount of a real estate commission that was neither paid nor incurred." (Rev. Rul. 72-339, 1972-2 Cum. Bull. 31.) (Emphasis supplied.) Thus, the ruling has no relevance whatsoever to the questions presented by this appeal.

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 Rolf and Janice C. Ursin-Smith against a proposed assessment of additional personal income tax in the amount of $2,160.00 for the year 1972, be and the same is hereby sustained.

-Done at Sacramento, California, this 5th day of December , 1978, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member