

BEFORE THE STATE BOARD OF EQUALIZATION
 OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
 JEROME J., JR. AND DIANE E. CURTIS)

For Appellants: Jerome J. Curtis, Jr.,
 in pro. per.

For Respondent: Bruce W. Walker
 Chief Counsel

Claudia K. Land
 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 Jerome J., Jr. and Diane E. Curtis** against a proposed assessment of additional personal income tax in the amount of \$94.21 for the year 1974.

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During 1974, appellants moved to Sacramento from Williamsburg, Virginia. On their 1974 California personal income tax return appellants claimed a deduction of \$2,215.17 for expenses incurred during their move to California. Their total moving expenses amounted to \$3,715.17, of which \$1,500.00 was reimbursed by Mr. Curtis' employer. The \$1,500.00 reimbursement was not included in appellants' gross income on their 1974 return. Respondent recalculated appellants' 1974 personal income tax liability by adding the \$1,500.00 reimbursement to gross income, allowing the moving expense deduction to the extent of the reimbursement, and disallowing the deduction for the unreimbursed portion of the moving expenses originally claimed by appellants. Respondent's action resulted in the \$94.21 proposed assessment which is the subject of this appeal.

Revenue and Taxation Code section 17266 allows a deduction for certain moving expenses of the taxpayer. The deduction is limited by subdivision (d) of that section, however, which provides in relevant part:

In the case of an individual whose former residence was outside this state and his new place of residence is located within this state . . . the deduction allowed by this section shall be allowed only if any amount received as payment for or reimbursement of expenses of moving from one residence to another residence is includable in gross income as provided by Section 17122.5 and the amount of deduction shall be limited only to the amount of such payment or reimbursement

In accordance with the statute, since appellants moved from their old residence in Virginia to a new residence in California, the allowable moving expense deduction is limited to the amount received as reimbursement for the move which is includable in their gross income. (See Appeal of Norman L. and Penelope Sakamoto, Cal. St. Bd. of Equal., May 10, 1977.) Apparently appellants do not challenge respondent's application of the statute. However, they maintain that section 17266 discriminates against those taxpayers whose interstate move begins or ends in California, and burdens the right of nonresidents to travel in interstate commerce, all in violation of the Constitutions of the United States and California. Appellants also contend that section 17266 abridges the privileges and immunities guaranteed by the California Constitution.

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We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution, ~~precludes~~ our determining that the statutory provision involved is unconstitutional or unenforceable. In any event, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Hubert D. Mattern, Cal. St. Bd. of Equal., June 29, 1978; Appeal of Harold and Sylvia Panken, Cal. St. Bd. of Equal., Sept. 13; 1971.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal and disposes of appellants' sole argument.

Accordingly, respondent's action in this matter must be sustained.

1/ Section 3.5 of article III provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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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 Jerome J., Jr. and Diane E. Curtis against a proposed assessment of additional personal income tax in the amount of \$94.21 for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of January, 1979, by the State Board of Equalization.

William A. Burnett, Chairman
W. H. King, Member
George Kelly, Member
_____, Member
_____, Member