BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ALAN J. AND ANNA P. ANTOS)

Appearances:

For Appellants: Anna P. Antos, in pro. per.

For Respondent: Kendall E. Kinyon
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 Alan J. and Anna P. Antos against a proposed assessment of additional personal income tax in the amount of $26.57 for the year 1973.

The issue presented is whether appellants were entitled to a tax credit in 1973 for tuition costs incurred in sending their son to a private nonsectarian school.

During 1973 appellants' son attended Sacramento Waldorf School, private nonsectarian school-located in Fair Oaks, California. In their joint California personal income tax return for that year, appellants claimed an "educational costs tax credit" in the amount of $27.00, thereby reducing their 1973 tax liability to zero. That credit was taken pursuant to former sections 17065 through 17067 of the Revenue and Taxation Code (Stats. 1972, ch. 1260, p. 2514), which allowed certain individuals a tax credit for the tuition costs of sending dependents to qualified nonpublic schools. Depending upon the amount of the taxpayer's adjusted gross income, a nonrefundable tax credit of up to $125.00 per dependent was authorized under those sections. The credit could not exceed the amount of the actual education cost paid to a nonpublic school, and no credit was allowable to taxpayers whose adjusted gross income exceeded $18,999.00.

On February 1, 1974, the United States District Court for the Northern District of California held California's education cost tax credit unconstitutional on the ground that it violated the religious establishment prohibition of the First Amendment to the United States Constitution. 1/ In its decision the federal district court also permanently enjoined respondent Franchise Tax Board from executing the provisions of sections 17065 through 17067 of the Revenue and Taxation Code. That decision was summarily affirmed by a majority of the United States Supreme Court on October 21, 1974. (Franchise Tax Board v. United Americans for Public Schools, et al., 419 U.S. 890 [42 L. Ed. 2d 1351.) In due course, former sections 17065 through 17067 of the Revenue and Taxation Code were repealed by the California Legislature. (Stats. 1976, ch. 892, p. 2050.)

On April 30, 1974, respondent informed appellants of the federal district court's decision and advised them that their tax computation on their 1973 return was being revised to eliminate the credit for tuition costs. Thereafter, on May 24, 1974, respondent sent appellants a notice of tax computation change, disallowing the $27.00 "education costs

1/ This decision, United Americans for Public Schools v. Franchise Tax Board, is not published in the Federal Supplement but appears in Commerce Clearing House California Tax Reports at paragraph 205-052 and in Prentice Hall California Taxes at paragraph 58,618.

tax credit" which they had claimed. At appellants' request, that notice subsequently was withdrawn and on September 11, 1975, a timely notice of proposed assessment was issued in the more precise amount of $26.57, reflecting respondent's disallowance of the credit. Appellants protested that deficiency assessment and, following a protest hearing, respondent affirmed its proposed assessment. Appellants then filed this timely appeal.

Appellants state that they relied on the availability of the education cost credit when they enrolled their son in the Sacramento Waldorf School. In support of their claim that they are entitled to the credit, appellants argue that the federal district court did not intend its finding of unconstitutionality to apply in the situation where the taxpayer's child was attending a nonsectarian private school, as opposed to a sectarian institution. Alternatively, appellants contend they were entitled to the credit on their 1973 return because the United States District Court's decision was rendered after the close of the taxable year 1973 and should not have been applied retroactively to 1973.

Before considering either of appellants' contentions, we believe it appropriate to make two observations. Because of the constitutional question presented by this case, we first will examine the effect of Proposition 5, which was adopted by the voters on June 6, 1978, adding section 3.5 to Article III of the California Constitution. That section 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.

Obviously, the above constitutional amendment presents no barrier to our decision in the instant case, since there has been an appeal to the United States Supreme Court and a

determination by that appellate court that the California statutes in question are unconstitutional.

Nor are we bound here to assert and follow our well established policy of abstaining from deciding constitutional questions in appeals involving deficiency assessments. That policy is based upon the absence of specific statutory authority which would allow respondent Franchise Tax Board to obtain judicial review of an adverse decision, and our belief that such review should be available for questions of constitutional importance. This appeal illustrates one recognized exception to that policy, i.e., the situation where it is respondent rather than the taxpayer who is asserting the unconstitutionality of the legislation. This exception is based on the same policy considerations as our general rule of abstention, however, since by upholding the position of respondent the taxpayer who has received an adverse decision from this board can still present the constitutional question to the courts. (Appeal of F. T. and Fumiko Mitsuuchi, Cal. St. Bd. of Equal., Jan. 5, 1949; see also Appeal of Leland J. Allen, Cal. St. Bd. of Equal., Jan. 27, 1949.)

We turn now to appellants' specific contentions on appeal. For the reasons hereafter stated, we must disagree with appellants' argument that the federal judicial determinations of unconstitutionality of former sections 17065 through 17067 of the Revenue and Taxation Code were not intended to apply to the situation in which the taxpayer's child was attending a nonreligious private school, as was appellants' son. In the course of its opinion, the district court observed that the majority of nonpublic school students in California attend schools where religious instruction is a part of the curriculum. The court then concluded as follows:

> The California tax credit benefits primarily those taxpayers who send their children to sectarian schools. Therefore, the Establishment Clause is violated whether or not the tax savings eventually find their way into sectarian institutions. Committee for Public Education and Religious Liberty v. Nyquist, supra, at 786 [413 U.S. 756, 37 L. Ed. 2d 948 (1973).] (United Americans for Public Schools v. Franchise Tax Board.) 2/

Finally, the district court ordered that respondent "is permanently enjoined from executing the provisions of sections 17065-17067 of the California Revenue and Taxation Code,,

2/ See footnote 1, ante.

Stats. 1972, c. 1260." By such order that court appears to have determined that there was no way of severing the unconstitutional aspects of those. sections from their possible valid applications.

The United States Supreme Court's affirmation of the district court's decision is in the form of a memorandum opinion, without discussion of the issues (419 U.S. 890) [42 L. Ed. 2d 135] (1974). If there be any doubt as to the views of the Supreme Court on this issue, however, we believe they are spelled out clearly in Sloan v. Lemon, 413 U.S. 825 [37 L. Ed. 2d 939] (1973). That case involved a constitutional challenge leveled against a Pennsylvania statute which provided funds to reimburse parents for tuition expenses incurred in sending their children to nonpublic schools. The federal district court had determined that the law violated the Establishment Clause of the United States Constitution. In reaching that conclusion it rejected the argument that the Pennsylvania law should be treated as containing a severable provision for aid to parents of children attending nonpublic schools that were not church-related. On appeal a majority of the United States Supreme Court affirmed that decision, noting with approval that

> [a]lthough the Act contained a severability clause, the [district] court reasoned that, in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools. (413 U.S. 825, 833-834, fns. omitted.)

The same reasoning is applicable in the instant case.

Our decision in Appeal of Bea E. Morris, decided on September 28, 1977, is dispositive of appellants' alternative argument. In that case, as here, the taxpayer protested respondent's disallowance of the education cost tax credit for the taxable year 1973, contending that the federal district court's decision of February 1, 1974, had improperly been given retroactive application to the prior taxable year. In response we reiterate the following from our opinion in Morris:

> Absent special circumstances, none of which appear to be present here, an unconstitutional statute is a complete nullity, as inoperative as though it had never been passed. (Brandenstein v. Hoke, 101 Cal. 131 [35 P. 562] (1894); Cummings v. Morez, 42 Cal. App. 3d 66 [116 Cal. Rptr. 586 (1974).)

Since there was never any valid authorization for the credit claimed by appellant, we have no choice but to sustain respondent's action.

Respondent's action must similarly be sustained here.

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 Alan J. and Anna P. Antos against a proposed assessment of additional personal income tax in the amount of $26.57 for the year 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of April, 1979, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member.