BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MARTIN S. RYAN)

For Appellant: Martin S. Kyan, in pro. per.

For Respondent: Claudia K. Land
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the **Revenue** and Taxation Code from the action of the Franchise Tax Board on the protest of Martin S. Ryan against a proposed assessment of additional personal income tax in the amount of **$1,514.90** for the year 1975.

The issue presented is whether respondent properly computed appellant's preference income tax liability for the year 1975.

In 1975 appellant Martin S. Ryan realized a capital gain of $78,087.36 from the sale of stock. Pursuant to section 18162.5 of the Revenue and Taxation Code, appellant included one-half of the capital gains, $39,043.68, as income on his California personal income tax return for 1975. After reviewing the return, however, respondent determined that appellant had failed to report the remaining one-half of the capital gains as a tax preference item, Consequently, respondent calculated the statutorily mandated. tax on the unreported tax preference item and issued a notice of proposed assessment.

Appellant protested the proposed assessment, quoting from a discussion on the taxation of preference income in Russell S. Bock, 1974 Guidebook to California Taxes, at page 67, as follows:

> The intent is to impose some tax on taxpayers who benefit substantially from various forms of tax-free income or deductions that reduce their income tax under the regular rules.

Appellant interpreted this discussion to mean that the tax on tax preference items is to be imposed only on those who did not pay any tax at all. Since he had already paid $7,202.95 in state taxes and allegedly had not benefited from any tax-free income, appellant contends that the tax on preference income is inapplicable to him. After further consideration, respondent affirmed its proposed assessment and this appeal followed.

On appeal, appellant reiterates the above argument and further claims that the imposition of interest is inequitable and that the preference tax code section is unconstitutional.

Section 17062 of the Revenue and Taxation Code provides that additional tax be imposed on every taxpayer whose sum of tax preference items in excess of any net business loss is over $4,000. Section 17063 describes items of tax preference which are subject to the preference income tax. The portion of capital gains which are accorded preferential tax treatment is listed as an item of tax preference. (See Rev. & Tax. Code, § 17063, subd. (h).)

We feel that appellant has misconstrued the legislative intent of section 17062 based on his interpretation of Bock's discussion. Although the State of California is not bound by the guidebook, it appears that Bock's explanation confirms the legislative intent rather than appellant's understanding of the preference tax.

In the Appeal of Richard C. and Emily A. Biagi, decided May 4, 1976, we reviewed the legislative history of the federal and state taxes on items of tax preference and determined that the purpose of those legislative acts was to reduce the advantages derived from otherwise tax-free income and to insure that those receiving such preferences pay a share of the tax burden. We also noted that the legislation was intended to impose the preference income tax only with respect to those preference items which actually produce a tax benefit; to the extent that items of tax preference do not produce a tax benefit, they are not subject to the preference income tax. (See Appeal of Paul and Melba Abrams, Cal. St. Bd. of Equal., Jan. 11, 1978.)

The applicability of section 17062 does not depend on the amount of taxes a taxpayer pays, but rather on the tax benefit he derives through the usage of tax preference items. In the instant case, appellant has derived substantial tax savings by having $39,043.68 of capital gains excluded from his taxable income. The intent is to impose some tax on taxpayers who benefit substantially from various forms of income or deductions.

With respect to appellant's contention regarding the constitutionality of section 17062, we defer to our well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of William A. Hanks, Cal. St. Bd. Of Equal., April 6, 1977.) However, we do note that the power of the Legislature to levy personal income taxes is inherent and requires no special constitutional grant. (Tetreault v. Franchise Tax Board, 255 Cal. App. 2d 277, 280 [63 Cal. Rptr. 326] (1967).)

Appellant also objected to the imposition of interest upon the proposed assessment. We have repeatedly held that interest is mandatory and cannot be waived. (Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977.) The interest is not a penalty imposed on the taxpayer, it is merely compensation for the use of money, which accrues upon the deficiency regardless of the reason

for the assessment. (Appeal of Cecilia Andrew Butcher, Cal. St. Bd. of Equal., April 10, 1979; Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.)

Accordingly, we conclude that respondent properly computed appellant's 1975 preference income tax liability.

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 Martin S. Ryan against a proposed assessment of additional personal income tax in the amount of $1,514.90 for the year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 14th day of November, 1979, by the State Board of Equalization.

, Chairman

, Member

, Member

, Member

, Member