86-SBE-142

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 83R-558-SW
LOUIE H. AND)
MURIEL B. SHERRIFFE)

Appearances:

For Appellants: Louie H. Sherriffe, in pro. per.

For Respondent: Alison M. Clark Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a),[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Louie H. and Muriel B. Sherriffe for refund of personal income tax in the amounts of $1,281.10 and $1,527.00 for the years 1978 and 1979, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The issue presented in this appeal is whether appellants have shown that the Franchise Tax Board incorrectly based its assessments upon federal audit information.

Respondent, upon receiving copies of Internal Revenue Service (IRS) proposed changes in appellants' 1978 and 1979 personal income.tax liabilities, issued notices of proposed assessment which were based upon the federal adjustments. These notices reflected all the adjustments made by the IRS with the exception that no loss carrybacks were allowed because California law makes no provision for net operating loss carryovers or carrybacks, Appellants paid the assessments for both years and then filed timely claims for refund.

Appellants contend that because the IRS made tnem change their accounting method and because respondent usually follows IRS rules, respondent's adjustments should follow the same pattern as the IRS adjustments, including spreading the tax effect of the adjustments over time.

Respondent asserts that the reductions in appellants' federal tax liability were the direct result of net operating loss carrybacks. Respondent also contends that appellants are not eligible to use the special averaging rules of section 17612 which allow a taxpayer to spread the tax effects of a change in accounting method over several years. In a letter to appellants in August of 1985, however, respondent advised appellants that relief was available under section 17612 for 1978 and that a full refund would be made to them for that. year. This offer was expressly conditioned, however, on appellants' agreeing to forego any refund for 1979. Appellants did not agree, and respondent subsequently informed them that it had erred in concluding that section 17612 authorized relief for 1978. Respondent's explanation was as follows:

> The method of limiting tax under Revenue and Taxation Code Section 17612(a) which provides for three-year spread back is allowed only if: (1) the old method of accounting was used in the two preceding taxable years, and (2) the net amount of the adjustments increased taxable income for the change-over year by more than $3,000. The Internal Revenue Service changed the Sherriffe's methods of accounting for taxable years 1977, 1978, and 1979, Inasmuch

> as the old method of accounting was not used for the two years preceding 1978 and 1979, the taxpayer does not qualify for this method of limitation for either 1978 and 1979.
>
> Mr. Sherriffe contends the federal adjustments to income for taxable years 1977 and 1978 should be considered allocations back to preceding years under the new method of accounting as defined by Revenue and Taxation Code Section 17612(b). However, it cannot be ascertained that the 1977 and 1978 adjustments made by the Internal Revenue Service are adjustments which have been allocated back to those years under the new method of accounting.

It is well established that a deficiency assessment issued by respondent on the basis of a federal audit report is presumed to be correct, and the burden is on the taxpayer to show otherwise. (Appeal of Edwin R. and Joyce E. Breitman, Cal. St. Bd. of Equal., Mar. 18, 1975.) This presumption of correctness is not altered-by the fact that the proposed federal deficiency was eliminated through the application of the federal net operating loss carryback provisions. (Appeal of J. Douglas White, Cal. St. Bd. of Equal., Apr. 5, 1976.) We do not believe that appellants have sustained their burden of proving that respondent's action is improper. The federal audit papers indicate that federal loss carryback provisions were applied (Resp. Br., Ex. D) and that after the carryback the federal liability was reduced. Appellants have not shown that the reduction in these federal liabilities warrants a reduction in the state liability for which there are no carryback provisions. (See Appeal of Donald G. and Franceen-Webb/Cal. St. Bd. of Equal., Aug. 19, 1975.) In the absence of such evidence, the action of respondent must be sustained.

We note that respondent sent appellants a letter indicating that they were due a full refund for 1978. The issue arises as to whether this action somehow estops respondent from later changing its position and finding continued liability for 1978. We have consistently held that taxpayers must show that they relied to their detriment on respondent's statements before the doctrine of equitable estoppel will apply. (Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978.) In this case, the facts fatal to appellants' claimed status had taken place long

before they received respondent's letter.' As appellants cannot show that they relied to their detriment on respondent's letter, we cannot apply an estoppel against respondent. (See Appeal of Henry C. H. Hsiung, Cal. St. Bd. of Equal., Dec. 17, 1974.) Furthermore, respondent's letter is perhaps best characterized as a settlement offer, which appellants expressly declined to accept because of their unwillingness. to concede that a refund was not due for 1979. Respondent had every right to withdraw the offer prior to its acceptance by appellants. (Adelberg v. Commissioner ¶ 85,597 T.C.M. (P-H) (1985); see Appeal of State Mutual Savings and Loan Association, Cal. St. Bd, of Equal., June 29, 1978.)

For the above reasons, respondent's action in this matter will be sustained.

Appeal of Louie H. and Muriel B. Sherriffe

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 claims of Louie H. and Muriel B. Sherriffe for refund of personal income tax in the amounts of $1,281.10 and $1,527.00 for the years 1978 and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of July , 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

Richard Nevins, Chairman

William M. Bennett, Member

Ernest J. Dronenburg, Jr., Member

Walter Harvey*, Member

__________, Member

*For Kenneth Cory, per Government Code section 7.9