

87-SBE-009

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of) No. **81A-1331-SW**
CHARLES AND VIRGINIA H. WIESE) **81A-1332**
JACK D. AND MARJORIE KAHLO) **81A-1333**
JACK M. NICHOLS)

For Appellants: Cecil G. Toftness
Attorney at **Law**

For Respondent: Terry Collins
Counsel

O P I N I O N

These appeals are made pursuant to section **18593^{1/}** of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Charles and Virginia H. Wiese, Jack D. and Marjorie Kahlo, and Jack M. Nichols against proposed assessments of additional personal income tax in the amounts of **\$27,882.24, \$27,310.46, and \$27,669.40**, respectively, for the year 1978.

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

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The issue presented in these appeals is whether appellants are entitled to the benefits of section 17402 relative to the recognition of gain from the liquidation of a corporation. Because of the identity of facts, issue, and legal principles involved in each case, the three appeals are consolidated for purposes of this opinion.

Appellants were the sole shareholders of Harbor Village, Inc., a corporation which on December 1, 1978, adopted a plan of liquidation. The corporation timely filed the necessary certificates and elections to dissolve with the Secretary of State and with the Internal Revenue Service. Appellants did not, however, file Form 3512, "Election of Shareholder under Section 17402" with the Franchise Tax Hoard during the statutory **30-day** election period. A copy of the federal election under section 333 of the Internal Revenue Code was attached to the Wieses' 1978 income tax return filed with the Franchise Tax Hoard on June 14, 1979. The record does not reveal whether similar copies were attached to the returns of the other appellants.

Respondent noted that the elections under section 17402 had not been filed during the statutory period and each appellant was individually sent a notice of additional tax being assessed. Appellants, in contesting the assessments, contend that their filing an election with the Internal Revenue Service meets the filing requirements of section 17402, subdivision **(d)**.

Section 17402 provides that under certain circumstances shareholders may elect to not recognize their gain on the complete liquidation of their corporation. The election, however, must be timely. Subdivision **(d)** of this section requires that a written election must be made in conformance with the regulations of the Franchise Tax Hoard and must be filed within 30 days after the date of the adoption of the plan of liquidation. Appellant contends that when the necessary forms were filed with the Internal Revenue Service, the requirements of section 17402 were met. We cannot agree.

Respondent's regulation, which was in effect **during** December of 1978, when the election was to have been made, provided, in part, that:

An election to be governed by Section 17402 shall be made on the form

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prescribed by the 'Franchise Tax Board and in accordance with this regulation. The original and one copy shall be filed by the shareholder or by the liquidating corporation with the Franchise Tax Board within 30 days after the adoption of the plan of liquidation or **by May 13, 1954**, whichever is the later. Under no circumstances shall Section 17402 be applicable to any shareholders who fail to file their elections within the 30-day period prescribed. ...

This regulation was repealed effective June **13, 1981**. (**Cal. Admin. Code**, tit. 18, reg. 17402(c), repealer filed May 14, **1981** (Register 81, No. **20**.) More specifically, therefore, the basic question presented by these appeals, is whether, in view of the fact that regulation 17402 has been repealed, the appellants made a timely election to have their gain go unrecognized.

In the Appeals of Leonard S. and Erlene G. Cohen and Estelle Grossman, decided by this board on **April 5, 1983**, the taxpayers liquidated their corporation in September of 1976. They filed the necessary forms with the Internal Revenue Service but failed to file timely elections with the Franchise Tax Board. This board held that the taxpayers had not shown that they complied with the election requirement of section 17402, subdivision (d). In support of this finding we stated:

This board has also had occasion to consider the precise issue raised here. (Appeals of Horace C. Mathers, et al., Cal. St. Bd. of Equal., April 24, 1967; Appeals of John and Elvira C. Costa, et al., Cal. St. Bd. of Equal., March 7, 1967; and Appeal of Mathew Berman and the Estate of Sonia Berman, Cal. St. Bd. of Equal., June 28, 1965.) In each of these cases, we have concluded that the 30-day election requirement imposed by section 17402, subdivision (d), is clear, explicit, and mandatory, leaving no room for the exercise of discretion. In Appeals of Horace C. Mathers, et al., 'supra', as in the instant case, the taxpayers'- representative directed a letter to the Franchise Tax Board requesting a tax clearance certificate within 30 days of adopting a plan of liquidation. That letter read, in part, as follows: "We are desirous

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of **dissolving** [the corporation] in the month of October, 1963, and would greatly appreciate your mailing us a tax clearance." As in the instant case, within 30 days from the adoption of the plan of liquidation, each shareholder filed a Form **964** with the Internal Revenue Service. However, nothing purporting to be an election under section 17402 was filed with the Franchise Tax Board within those 30 days.

(Appeals of Leonard S. and Erlene G. Cohen and Estelle Grossman, Cal. St. Bd. of Equal., Apr. 5, 1983.)

Although the specific issue raised in this appeal was not raised in the Grossman appeal, we must conclude that for several reasons our holding in Grossman is consistent with our findings in this case.

The primary rule of statutory construction is that the intention of the legislature must be ascertained. (Marina Village v. California Coastal Zone Conservation Commission, 61 Cal.App.3d 388 [132 Cal.Rptr. 120] (1976).) Section 17402, subdivision (d), provided that the written election had to be filed in such a manner as not to be in contravention of regulations of the Franchise Tax Board. Clearly, the California Legislature did not intend the Franchise Tax Board to pass regulations depicting the procedure used to file an election with the Internal Revenue Service.²⁹ The only reasonable interpretation of their intent is that the regulations would define a procedure for filing the election with the Franchise Tax Board.

2/ Section 17024.5, subdivision (d), provides:

(d) Whenever this part allows a taxpayer to make an election, the following rules shall apply:

(1) A proper election filed in accordance with the Internal Revenue Code or regulations issued by "the secretary" shall be deemed to be a proper election for purposes of this part, unless otherwise provided in this part or in regulations issued by the Franchise Tax Board.

(2) A copy of that election shall be furnished to the Franchise Tax Board upon request.

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The facts show that at the time appellants were to have acted in making their election, there was no question as to the procedure to be followed. The regulation directed that the notice be filed with the Franchise Tax Board and yet appellants failed to do so. Appellants now seek to estop respondent from considering the repealed regulation. The doctrine of estoppel was created to insure fairness to those who relied on the old rule or law. [4 Davis, Administrative Law Treatise § 20.7 (2d Ed. 1983)1.1 In this case, there is no possibility that appellants relied to their detriment on the 1981 repeal of respondent's regulation as their failure to act occurred in 1978. We cannot conclude that appellants have been treated unfairly. Consequently, the doctrine of estoppel will not apply. (See California Employment Commission v. Black-Foxe Military Institute, 43 **Cal.App.2d** 868, 876 (110 **P.2d** 729] (1941).)

We note that appellants make numerous arguments concerning the constitutionality of section 17402. In conformance with article III, section 3.5 of the California Constitution, we must conclude that this board has no authority to declare a state statute unconstitutional. (Appeals of Fred R. Dauberger, et al., Cal. St. **Bd. of Equal.**, Mar. 31, 1982.)

For the above-stated reasons, the action of respondent will be affirmed.

2/ (continued)

This section became effective on January 1, 1983. The intent of the Legislature from this date on is the position taken by appellants. An election filed with the Internal Revenue Service will be effective notice for the Franchise Tax Board. However, the Legislature specifically made this intention applicable only to taxable years beginning on or after January 1, 1983. Had the Legislature intended this procedure to be applicable to earlier taxable years, presumably it would have so provided.

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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 BEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Charles and Virginia H. Wiese, Jack D. and Marjorie Kahlo, and Jack M. Nichols against proposed assessments of additional personal income tax in the amounts of **\$27,882.24, \$27,310.46, and \$27,669.40** respectively for the year, 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of **January**, 1987, by the State Board of Equalization, with **Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter** and Ms. Baker present.

Conway H. Collis, Chairman
Ernest J. Dronenburg, Jr., Member
William M. Bennett, Member
Paul Carpenter, Member
Anne Baker*, Member

*For Gray Davis, per Government Code section 7.9