88-SBE-001

BEFORE TEE STATE BOARD OF **EQUALIZATION**

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 86R-0794-VN
EDWARD N. **DURAN**)
)

For Appellants: Edward **N. Duran**
in pro. per.

For Respondent: **Israel** Rogers
Supervising Counsel

'OPINION

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation code from the action of the Franchise Tax Board in denying the claim of Edward N. Duran for refund of personal income tax in the amount of $79.34 for the year 1982; pursuant to section 19058 of the Revenue and Taxation code from the deemed denial by the Franchise **Tax** Board of the claim of Edward N. Duran for the refund of personal income tax in the amount of $63.00 for year 1983 and $116 for the year 1984; and pursuant to section 19058 of the Revenue and **Taxation** code from the action of the Franchise **Tax** Board in denying the claim of Edward N. Duran for the refund of personal income tax in the amount of $56 plus interest in the amount of $14.25 for the year 1983.

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

Appeal of Edward N. Duran

Edward N. Duran (appellant) is an attorney. For 1982, appellant filed a joint return with his wife in which he claimed an adjustment to income or a deduction of $1,750 for payments to an individual retirement account (IRA). For 1983 and 1984, appellant filed joint returns which claimed IRA deductions of $1,750 and $3,000, respectively, for equal contributions to his and his wife's IRAs. Due in part to these deductions, appellant calculated that he was owed a tax refund for each year. The Franchise Tax Board refunded the tax overpayments indicated on these returns.

In 1985, respondent reviewed appellant's 1982 return and determined that he had been an active participant in a qualified pension plan offered by his employer. and not entitled to a deduction for IRA contributions. (See Appeal of Kathy S. Schell, Cal. St. Bd. of Equal., July 30, 1985.) Subsequently, on April 1, 1985, respondent issued a $158.68 deficiency assessment for 1982 which disallowed appellant's IRA deduction of $1,750. The assessment was comprised of $126 in additional tax and $32.68 in interest.

On April 14, 1985, appellant paid the deficiency assessment for 1982 but concurrently filed amended joint returns for 1983 and 1984 that omitted the $1,750 and $3,000 IRA deductions claimed on the Original returns. As a result of these changes, appellant indicated that he owed additional tax of $126 for 1983 and $232 for 1984. Appellant included payment of these additional tax amounts with his amended returns. However, respondent erroneously returned the $126 payment for 1983 with interest.

One week later, on April 21, 1985, appellant filed second amended joint returns for all three appeal years in which he now claimed IRA deductions in the following amounts equal to one-half of the deductions claimed on the original returns: $875 for 1982, $875 for 1983, and $1,500 for 1984. Appellant explained that his wife did not belong to any qualified retirement plan and that one-half of the original IRA deductions were attributable to contributions to her separate IRA. Appellant then requested a refund of one-half of the additional tax for 1982 paid as a result of respondent's disallowance of his IRA deduction as well as refunds of one-half of the additional tax for 1983 and 1984 voluntarily paid with his amended returns filed one week earlier in which he omitted the IRA deductions. Thus, for 1982, appellant requested a refund of one-half of the $158.68 deficiency assessment or $79.34. For 1983 and 1984, appellant requested refunds

of one-half of the $126 and $232, or $63 and $116, respectively, that he stated was "paid in error" with his amended returns.

In February 1986, the Franchise Tax Board denied the refund claim for 1983. Respondent, however, failed to act on the refund claims for 1982 and 1984. On April 14, 1986, almost one year after the filing of the three refund claims, appellant appealed the denial of his 1983 refund claim and filed appeals on his 1982 and 1984 refund claims, ostensibly electing to treat those two refund claims as disallowed under section 19058.2/

On April 21, 1986, after discovering that its earlier refunding of appellant's $126 tax payment for 1983 was erroneous, the Franchise Tax Board informed appellant that he still owed additional tax for 1983 but that the correct amount of tax due was $56, not $126, plus $14.25 in interest. On April 24, 1986, appellant paid this additional 1983 assessment of $70.25, but concurrently filed a protest, thereby converting the matter into a refund claim under section 19061.1.3/ On October 30, 1986, appellant again ostensibly elected under section 19058 to consider this fourth refund claim disallowed after respondent failed to mail a notice of action within six months and filed an appeal with this board.

First, with regard to the claim of refund of $70.25 for 1983, appellant simply argues that he should not be held liable for the interest assessment of $14.25 inasmuch as he had previously paid $126 with his amended return to cover his additional 1983 tax liability. Appellant contends that respondent caused interest to accrue by its mistaken return of the $126 payment to him.

2/ Section 19058 provides that, if respondent fails to mail a notice of action on any refund claim within six months after the filing of the claim, the taxpayer may prior to any mailing of a notice of action on the refund claim consider the claim disallowed and appeal to this board.

3/ Section 19061.1 provides, in part, that, if, with or after a filing of a protest, a taxpayer pays the tax protested before respondent acts upon the protest, the Franchise Tax Board shall treat the protest as a claim for refund.

Respondent agrees that its refunding of the $126 tax for 1983 was erroneous and apparently now concedes that appellant is not liable for said interest amount. Therefore, respondent's action with respect to the $14.25 in interest will be modified.

Second, with regard to the three refund claims for 1982, 1983, and 1984 in which he has claimed one-half of his original IRA deductions, appellant contends that his wife was self-employed and not an active participant in a qualified pension plan. Appellant takes the position that she was entitled to her own separate IRA deductions based on her own income. Respondent's determinations in the imposition of taxes are presumptively correct, however, and the taxpayer bears the burden of showing error in these determinations2 (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949).)

For 1982, section 17240 allowed a deduction from an individual's gross income for cash contributions made to an IRA. The amount of the deduction could not exceed the lesser of 15 percent of the taxpayer's compensation includible in gross income or $1,500. (Rev. & Tax. Code, S 17240, subd. (b)(l).) In the case of married individuals, the maximum deduction was to be computed separately for each individual. (Rev. & Tax. Code, S 17240, subd. (c)(2).) The term "compensation" as used in section 17240 included "earned income" as defined in section 17502.2, subdivision (b). (Rev. & Tax. code, S 17240, subd. (c)(l).) Section 17502.2, subdivision (b), stated that "[t]he term 'earned income' meant the net earnings from self-employment (as defined in section 1402(a) of the Internal Revenue code of 1954)." Under Internal Revenue code section 1402, subsection (a), the term "net earnings from self-employment" is defined as "the gross income derived by an individual from any trade or business carried on by such individual less the deductions allowed by this subtitle which are attributable to such trade or business."

Here, appellant has argued that his wife's retail art business had gross income of $350 in 1982. He, therefore, contends that she was entitled to a deduction equal to 15 percent of said gross income, or $52.50, for contributions to her IRA. Respondent has argued that Mrs. Duran had no compensation in 1982. In any case, we held in the Appeal of Eddie E. and Janice Reynolds, decided July 30, 1985, that it was clear under Internal Revenue code section 1402, subsection (a), that the amount includible in a self-employed individual's gross income for purposes of

determining an allowable IRA deduction was the net earnings or profit from the business and not gross receipts. Inasmuch as appellant has not provided any evidence of his wife's net earnings from her art business, we must reject his argument that she was entitled to her own IRA deduction in 1982 under section 17240.

Beginning January 1, 1983, section 17240 was repealed and reenacted as section 17272. (Stats. 1983, ch. 488, § 29, p. 1902.) For 1983 and 1984, section 17272, subdivision (a), provided:

> The maximum deduction allowable as provided by section 219(b) of the Internal Revenue code for an individual retirement account shall not exceed the lesser of the following:
>
> (1) One thousand five hundred dollars ($1,500).
>
> (2) An amount equal to 15 percent of the compensation includable in the individual's gross income for that taxable year.

Under Internal Revenue code, section 219(b), a federal taxpayer is allowed a deduction for any taxable year in an amount equal to his qualified retirement contributions but not to exceed the lesser of $2,000 or an amount equal to the compensation includible in the individual's gross income for the taxable year.

For purposes of Internal Revenue Code section 219, the term "compensation" includes earned income as defined in section 401(c)(2). (I.R.C. § 219(f), subd. (1).) Internal Revenue Code section 401(c), subdivision (2), states that "[t]he term 'earned income' means the net earnings from self employment (as defined in section 1402(a))." As indicated above, "net earnings from self-employment" is defined as "the gross income derived by an individual from any trade or business carried on by such individual less the deductions allowed by this subtitle which are attributable to such trade or business." (I.R.C. § 1402(a).)

For 1983 and 1984, appellant contends that section 17272 allowed an IRA deduction based on gross income. He argues that, because his spouse's art business realized gross income of $150 in 1983 and $6,787 in 1984, she was entitled to IRA deductions of $22.50 in 1983 and $1,019.65 in 1984. Again, appellant has apparently

confused gross receipts with net earnings from self-employment and failed to present evidence of the net earnings of his wife's business. In addition, while appellant has noted that the $6,787 gross income for 1984 was comprised of one-half of partnership income, there is no evidence that his wife was engaged in a partnership business or that she filed a partnership return for 1984. We must, therefore, reject appellant's argument that his wife was entitled to her own IRA deductions in 1983 and 1984 under section 17272.

Based on the foregoing, we find that appellant has not shown that he or his wife was entitled to IRA deductions for the three years at issue. Except for the denial of the refund claim for the $14.25 interest charged on the 1983 assessment, respondent's action will be sustained.

Appeal of Edward N. Duran

ORDER

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 Edward N. Duran for refund of personal income tax in the amounts of $79.34, $63.00, and $116.00 for the years 1982, 1983, and 1984, respectively, be and the same is hereby sustained; and that action of the Franchise Tax Board in denying the claim of Edward N. Duran for refund of personal income tax and interest in the amount of $70.25, be and the same is hereby modified by the refund to appellants of $14.25 in interest.. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 5th day of January, 1988, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Carpenter, Mr. Bennett, Mr. Collis, and Mr. Davies present.

Ernest J. Dronenburg, Jr., Chairman

Paul Carpenter, Member

William M. Bennett, Member

Conway Ii. Collis, Member

John Davies*, Member

*For Gray Davis, per Government Code section 7.9