74-SBE-031

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GENE A. AND DOTTIE D. FARBER)

For Appellants: Gene A. Farber, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Jack E. Gordon
Supervising Counsel

OPINION

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 Gene A. and Dottie D. Farber against a proposed assessment of additional personal income tax in the amount of $178.22 for the year 1970.

Appellants used the income averaging method to compute their California income tax liability for 1970. Included with their tax return for that year was a statement made by appellants

admitting they were nonresidents of California during 1966, 1967, and 1968. Respondent denied appellants the use of income averaging on the ground that they failed to satisfy the residency requirements necessary to income average in California.

Whether respondent properly denied appellants the use of income averaging for 1970 is the sole issue for our determination.

Sections 18241 through 18246 of the Revenue and Taxation Code allow qualified individuals to income average if they meet certain prerequisites, one of which is California residency over a designated period of time. In this regard, subdivision (b) of section 18243 provides:

> (b) For purposes of this article, an individual shall not be an eligible individual for the computation year if, at any time during such year or the base period, such individual was a nonresident.

The term "computation year" means the taxable year for which the taxpayer chooses to income average (Rev. & Tax. Code, § 18242, subd. (d)(l)); "base period" is defined to mean the four taxable years immediately preceding the computation year (Rev. & Tax. Code, § 18242, subd. (d)(2)); and "base period year" is any of the four taxable years immediately preceding the computation year (Rev. & Tax. Code, § 18242, subd. (d)(3)). By admitting their nonresidency for three of the four base period years, appellants cannot be considered eligible individuals for income averaging purposes within the meaning of section 18243, subdivision (b). (See Appeal of Leo Horowitz, Cal. St. Bd. of Equal., Aug. 7, 1967.) Appellants, nevertheless, contend that respondent wrongfully denied them the use of income averaging for 1970.

Appellants argue, without citing any authority, that the residency requirements of the income averaging provisions violate their constitutional rights under the privileges and immunities, equal protection, and due process clauses of the United States Constitution. Appellants also allege that even had

they been California residents during 1966, 1967, and 1968, no tax would have been payable, nor would it have been necessary for them to file California income tax returns, since during those years they received very little income. These factors allegedly distinguish the instant case from Appeal of Herbert H. and Darlene B. Hooper, decided by this board on February 26, 1969.

With. respect to the constitutional argument, this board has a well established policy of abstention from deciding questions of a constitutional nature where the appeal involves proposed assessments of additional tax. This policy is based on the lack of any specific statutory authority allowing the Franchise Tax Board to obtain judicial review of our decisions, and our belief that in constitutional matters such review should be available. (See Appeal of C. Pardee Erdman, Cal. St. Bd. of Equal., Feb. 18, 1970.)

With respect to appellants' attempt to distinguish their case from Appeal of Herbert H. and Darlene B. Hooper, supra, suffice it to say that the alleged distinctions between the two cases are not determinative of the issue before us. In Hooper, we denied the taxpayers the use of income averaging because they were found to have been nonresidents during a portion of the base period in question. Here appellants, likewise, were nonresidents during part of the base period.

In view of the clear terms of section 18243, subdivision (b), restricting the use of income averaging to those who are residents throughout the entire computation year and base period, and in keeping with our prior decisions in this area, we are compelled to conclude that respondent's determination was proper.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Gene A. and Dottie D. Farber

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 Gene A. and Dottie D. Farber against a proposed assessment of additional personal income tax in the amount of $178.22 for the year 1970; be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of August, 1974, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____ Secretary