

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ROBERT J. AND MARGARET A. WIRSING)

Appearances :

For Appellants: Robert J. Wirsing, in pro. per.
For Respondent : Marvin J. Halpern
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 Robert J. and Margaret A. Wirsing against proposed assessments of additional personal income tax in the amounts of \$149.65 and \$250.38 for the years 1967 and 1968, respectively;

In 1967 and 1968, appellants filed timely California personal income tax returns. On those returns, they claimed deductions for business expenses of \$3,022.07 and \$4,306.13 for 1967 and 1968, respectively. They also claimed deductions for

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mortgage interest and real property tax payments for those years in the total amount of \$3,925.51. Respondent audited appellants' 1967 and 1968 returns and disallowed seventy-five percent of the claimed business expense deductions and all of the claimed deductions for mortgage interest and real property taxes.

Whether respondent properly disallowed these deductions is the question presented for our determination.

Respondent disallowed the major portion of the business expense deductions claimed on the ground that, although given ample opportunity to do so, appellants failed to substantiate them. In this regard, the record is in total agreement with respondent. **It is settled that deductions are a matter of legislative grace, and the burden of proving the right to them is upon the taxpayer.** (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L. Ed. 1348]; Deputy v. du Pont, 308 U.S. 488 [84 L. Ed. 416]; Appeal of James M. Denny, Cal. St. Bd. of Equal., May 17, 1962.) By **not** substantiating their business expense deductions, appellants failed to carry their burden of proof and, consequently, were properly denied the benefit of those deductions.

With respect to the mortgage interest and real property **tax deductions, the facts disclose that appellants paid the amounts** in question while living on the property pursuant to a purchase agreement dated November 24, 1964, and entitled "Agreement for Sale of Real Estate." The agreement, in which appellants were listed as buyers and appellant wife's mother as seller, provided that appellants were responsible for the existing mortgage payments on the property, repayment of a personal loan made by the seller to the buyers, payment of all taxes, and keeping the property in good condition. During the period in issue, the seller remained the legal owner of record.

Respondent disallowed the mortgage interest and property tax deductions because appellants were not the legal owners during the years in question. To support its position, that only legal owners of real property are entitled to mortgage interest and real property tax- deductions, respondent cites three cases: Kathleen Marie Emmons, T. C. Memo. , October 23, 1961; Walter Shemerdiak, T. C. Memo., August 29, 1963; and John Patrick Feeney, M e m o . , January 12, 1966. While both the Emmons and

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Feeney cases disallowed deductions for mortgage interest claimed by nonlegal owners of real property, and all three cases disallowed deductions for real property taxes to claimants other than the legal owners, the rationale for so doing in each case was not the lack of legal ownership of the real property in question, but rather the fact that the amounts paid were not owed by the claimants. In the instant case, the mortgage and real property tax payments were owed by appellants under the "Agreement for Sale of Real Estate." Accordingly, we do not find these cases persuasive of respondent's position.

With respect to the mortgage interest payments, respondent's regulations provide in pertinent part:

* * *

Interest paid by the taxpayer on a mortgage upon real estate of which he is the legal or equitable owner, even though the taxpayer is not directly liable upon the bond or note secured by such mortgage, may be deducted as interest on his indebtedness. ... (Emphasis added.) (Cal. Admin. Code, tit. 18, reg. 17203.)

Under California law, an equitable owner is one who enjoys a beneficial interest in property while the legal title to it is held by another. (Title Ins. & Trust Co. v. Duffill, 191 Cal. 629 [218 P. 14].) By being in possession of the property in question under the purchase agreement, appellants had the requisite beneficial interest in the land and were, therefore, equitable owners and entitled to the mortgage interest deductions allowed by regulation 17203.

The real property taxes made pursuant to the agreement were, likewise, deductible. Indeed, the rule seems to be clear that one having an equitable interest in property who pays taxes on it may deduct such payments, notwithstanding the fact that legal title to the property is in the name of another. (See Comelia C. F. Horsford, 2 T. C. 826; Martin Thomas O'Brien, 47 B.T. A. 561; Estate of John Edgerly Morrell, 43 B.T.A. 651; Hord v. Commissioner, 95 F.2d 179.)

Based upon the foregoing, we sustain respondent's determination regarding the business expense deductions in question,

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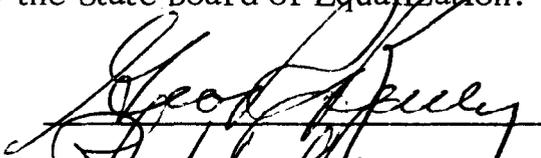
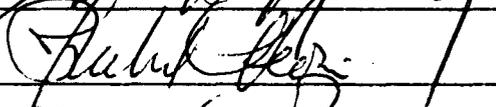
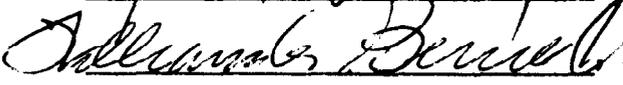
but we are compelled to reverse respondent's disallowance of the deductions for mortgage interest and real property taxes.

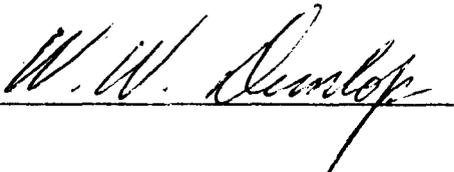
ORDER

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert J. and Margaret A. Wirsing against proposed assessments of additional personal income tax in the amounts of \$149.65 and \$250.38 for the years 1967 and 1968, respectively, be and the same is hereby reversed to the extent that appellants were denied deductions for mortgage interest and real property taxes. In all other respects the action of the Franchise Tax Board is sustained.

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

 , Chairman
 , Member
 , Member
_____, Member
_____, Member

ATTEST:  , Secretary