

Appeal of Robert P. and Carolyn R. Schalk

The issue in this appeal centers on the proper method of computing the special tax credit for 1973 allowed by section 17069 of the Revenue and Taxation Code.

Appellants' adjusted gross income for 1973 was \$33,500 and their taxable income was \$24,797. There is no dispute as to the accuracy of these figures. In calculating these amounts appellants declared that during 1973 they received capital gains of \$63,810 from property held for more than one year but not more than five years. Section 18162.5, subdivision (a)(2), of the Revenue and Taxation Code requires that 65 percent of such gains be taken into account in computing taxable income; therefore, \$41,476 of the total gain was included in the computation. However, appellants were entitled to offset the entire amount of those gains with a capital loss carryover. As a result of that offset, none of the capital gains were left to be included in appellants' adjusted gross income or taxable income. The only income included in appellants' adjusted gross income and taxable income was business income, dividend income and interest income.

Roth parties agree that section 17069 of the Revenue and Taxation Code allowed appellants a credit of 20 percent of their "net tax," as defined in section 17069.5 of that code. They disagree as to what treatment section 17069.5 requires of the above gains and carryover loss in the computation of "net tax."

In its explanation of how to compute the "net tax" on which the credit would be allowed, section 17069.5 provided in part:

(a) . . . However, for the sole purpose of determining the credits provided by this chapter, taxable income shall be computed without regard to the amount of net gains taken into account pursuant to paragraph (2) or (3) or subdivision (a) of Section 18162.5 (relating to capital gains).

Respondent maintains the above language should be construed to mean that taxable income should be reduced by the amount of capital gains taken into account pursuant to section 18162.5,

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subdivision (a)(2) or (a)(3). In other words, respondent contends that "taxable income shall be computed without regard to the amount of net gains. .." should be read as though it said "taxable income shall be reduced by the amount of net gains. ..".

Appellants contend the language from section 17069.5 quoted above means that for purposes of computing the special tax credit, taxable income is to be computed as if no gains had been taken into account pursuant to section 18162.5, subdivision (a)(2) or (a)(3), leaving such gains out of the computation entirely. We agree. The purpose of this portion of section 17069.5 was to prevent taxpayers, to the extent their taxable income included section 18162.5, subdivision (a)(2) or (a)(3) capital gains (only 65 percent or 50 percent of which are taxable), from getting a double tax benefit by also claiming a credit against the tax paid on those gains. To achieve this purpose, the statute directs that taxable income be recomputed without the gains, not that the gains be subtracted from taxable income.

Respondent maintains that appellants' interpretation fails to exclude their capital gains from their recomputation of taxable income, as required by section 17069.5. Without question, appellants realized large capital gains on the disposition of property during 1973. Also without question, though, this entire amount of capital gains was offset by an even larger capital loss carryover. Since, after the offset, none of the gains were left in taxable income, appellants paid no tax on those gains. Obviously, then, they could not have claimed a credit against tax paid on the gains.

Of the two interpretations of section 17069.5 presented in this appeal, we believe the interpretation proposed by the appellants is not only more in harmony with the statute's purpose, but it is also the more natural reading of the wording of the section. The interpretation respondent urges is a decidedly strained one, and requires an unnecessary distortion of the English language and of the section's purpose. It is not necessary, in order to prevent a double tax benefit, to require appellants to exclude the gains from their taxable income a second time. In requiring appellants to do just that, respondent would have us go beyond the purpose of the

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statute and penalize taxpayers with capital gains which are offset by loss carryovers, thereby denying them the credit against net tax to which they are otherwise entitled. It is well settled that an administrative agency has no authority to interpret a statute in such a manner as to vary or enlarge its command. (Dillman v. McColgan, 63 Cal. App. 2d 405, 410 [146 P. 2d 978]; Appeal of Melvin D. Collamore, Cal. St. Bd. of Equal. , Oct. 24, 1972.) We reject respondent's attempt to do so here.

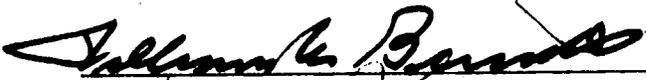
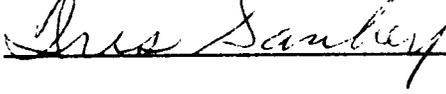
In view of the foregoing considerations, we must reverse respondent's action in this matter.

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 P. and Carolyn R. Schalk against a proposed assessment of additional personal income tax in the amount of \$197.76 for the year 1973, be and the same is hereby reversed.

Done at Sacramento, California, this 22nd day of June, 1976, by the State Board of Equalization.

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

ATTEST:  _____, Executive Secretary