*81-SBE-048*

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
DANIEL W. FESSLER )

Appearances:

For Appellant: Daniel W. Fessler, in pro. per.

For Respondent: John R. Akin
Counsel

## O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Daniel W. Fessler against a proposed assessment of additional personal income tax in the amount of $256.17 for the year 1977.

The issue for decision is whether respondent properly disallowed a portion of appellant's claimed credit for taxes paid to another state.

Appellant, a resident of the State of California, filed a personal income tax return as a single individual for taxable year 1977. Appellant is a law professor at University of California at Davis. During the summer of 1977, appellant was employed in the State of New York as a visiting professor by Syracuse University. From this employmen?, he received wages in the amount of $6,500.00 from which $726.24 was withheld by the State of New York for state income tax purposes.

In his California return for the year in question, appellant claimed a credit for New York income tax in the amount of $386.00. This credit was based upon a "tax paid" to the State of New York in the amount of $726.24, the amount withheld from appellant's New York wages. In May of 1979, appellant complied with respondent's request to provide a copy of his New York tax return. The return disclosed a calculation by appellant of his tax liability in the amount of $130.00 and an overpayment by appellant of $596.00. Appellant also indicated that he had not received the claimed refund of $596.00 from the State of New York. Respondent thereupon amended the claimed credit amount to the extent of appellant's calculated New York tax liability of $130.00 and issued a notice of additional tax proposed to be assessed accordingly.

In his letter of protest, appellant argued that under the credit provisions of Revenue and Taxation Code Section 18001, the "tax paid" to the State of New York, is the amount withheld of $726.24 and that this amount should be the foundation for his credit. On the other hand, respondent determined that $130.00 was the amount of tax "imposed and paid" to the State of New York and, consequently, the proper basis for the credit allowed under Section 18001. Employing this rationale, respondent affirmed its proposed assessment. This appeal followed.

Section 18001 provides in pertinent portion:

> Subject to the following conditions, residents shall be allowed a credit against taxes imposed by this part for net incometaxes imposed-by and paid to another state on income taxable under this part:
>
> (a) The credit shall be allowed only for taxes paid to the other state on income derived from sources within that state which is taxable under its laws irrespective of the residence or domicile of the recipient. (Emphasis added. )

Appellant contends that the fact that he has not received his claimed refund of $596.00 from the State of New York conclusively proves his assertion that the tax "paid" to that state, as specified by the provisions of Revenue and Taxation Code Section 18001, is the $726.24 withheld. Moreover, he states that'a contrary conclusion would nullify the effect of sections 18007 and 18008 of the Revenue and Taxation Code. We disagree with appellant's contentions.

First, the amount of tax withheld from the wages of a taxpayer is not the tax imposed on that taxpayer but merely represents the amount of tax anticipated to be due the taxing agency. Section 671 of the New York Income Tax Law states in part:

> (a)(l) Every employer ... shall deduct and withhold from such wages ...so far as practicable ... an 'amount substantially equivalent to the tax reasonably estimated to be due under this article ....

This provision illustrates that the withholding of taxes concerns only an estimate of tax liability; it does not concern the actual tax imposed. The "imposed" tax is calculated on the basis of net income and net income is determined only after applicable deduction and exemption factors are taken into account. Appellant applied these factors when he calculated his New York tax liability on his New York return.

Secondly, the purpose of Section 18001 is to shield California residents, so far as possible, from the inequities of double taxation. (Appeal of Melvin D. Collamore, Cal. St. Bd.

of Equal. , Oct. 24, 1972; Appeal of John H. and Olivia A. Poole, Cal. St. Bd. of Equal. , Oct. 1, 1963. ) Since appellant's tax liability to New York for his New York derived income is $130.00, double taxation would be avoided if California did not impose an additional tax on that same income. This is precisely the situation here; the State of California satisfied its requirement of shielding appellant from the inequities of double taxation by allowing him a credit towards his California income tax liability with respect to the $130.00 which was imposed by and paid to the State of New York,. Therefore, the purpose of Section 18001 has not been violated.

Furthermore, there is no merit in appellant's contention that respondent's interpretation of Section 18001 would serve to nullify the intended effect of Sections 18007 and 18008 of the Revenue and Taxation Code,

Section 18007 provides:

> If any taxes paid to another state for'which a taxpayer has been allowed a credit under this chapter are at any time credited or refunded to the taxpayer, the taxpayer shall immediately report that fact to the Franchise Tax Board.

Section 18008 provides:

> A tax equal to the credit allowed for the taxes credited or refunded by the other state is due and payable from the taxpayer upon notice and demand from the Franchise Tax Board.

These sections are concerned only with taxes paid to another state upon which a credit has been allowed. Under the facts of the instant appeal, the sections would be, and are intended to become, functional, only if New York refunded a portion of the $130.00 paid to that State.

Appellant's remedies in regard to the $596.00 overpayment to the State of New York do not lie with this board or with the State of California. Instead, appellant's recourse remains with the State of New York. (Inexplicably, appellant does not appear to have pursued this remedy, to date, with due diligence. ) In the alternative, we suggest he direct his disagreement with the present credit provisions to the California Legislature which is charged with formulating the law, and not to those charged with its enforcement.

(Appeal of Samuel R. and Eleanor H. Walker, Cal. St. Bd. of Equal. , March 27, 1973. )

With respect to appellant's alternative claim that he be allowed a theft loss for the $596.00 amount not yet refunded to him by the State of New York, appellant simply has not presented evidence to establish the elements of theft. Where a theft loss is alleged, it must be shown that the loss was a product of circumstances which clearly and convincingly indicate theft. (Michele Monteleone, 34 T.C. 688 (1960). )

Based upon the foregoing,. we sustain respondent's action in denying a portion of appellant's claimed credit for taxes paid to another state.

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,

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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 Daniel W. Fessler against a proposed assessment of additional personal income tax in the amount of $256.17 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of May 1981, by the State Board of Equalization, with all Board members present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

Kenneth Cory, Member