



Appeal of Robert Harold and Darlene B. Sousa

The issue before us is whether respondent properly determined that appellants' fishing operations were not an activity engaged in for profit.,

During the 'year at issue', Robert worked primarily as a plumber while Darlene worked primarily as a clerk. Their California joint personal income tax return for 1978 indicated that **Robert** and Darlene earned **\$20,924.05** and **\$10,349.76** from these respective occupations. That return further indicated that appellant-husband (hereinafter "appellant") operated a commercial fishing operation with gross receipts of \$133.40 and total expenses of **\$6,503.74** for a net: loss of **\$6,370.34**.

The record indicates that appellant held a commercial fishing license. However, no information is provided regarding appellant's expertise or training in commercial fishing. While appellant's boat was rigged for offshore fishing, it appears to have been primarily a pleasure craft in standard trim. The boat's log indicated that the boat was used only **eleven** days during 1978 or about three percent of the available days during that year. Appellant states that he did not use the boat for fishing more frequently because of the **demands** of his job as a plumber and because of bad weather during 1978. Moreover, we note that appellant did not hire any outside help. While it is not determinative of the year at issue, it is interesting to note that the boat's log indicated that appellant used the boat only eight days in '1979.

On audit, respondent concluded that appellant failed to establish that he had engaged in fishing for a profit rather than as a hobby. Accordingly, **respondent** allowed the deduction of taxes and vehicle license fees, which would have been deductible whether or not the fishing operations were engaged in for profit, but disallowed the remaining expenses associated with the fishing operations. Appellant protested, but respondent affirmed the proposed assessment, and this appeal followed.

Certain expenses are deductible without regard to whether or not an activity is engaged in for profit. (Rev. & Tax. Code, § 17233, subd. (b).) As indicated above, appellant's expenses for taxes and vehicle license fees fall into this category. However, deduction of other expenses claimed here is permitted only if the activity is engaged in for profit. (Rev. & Tax. Code, § 17233, subd. (c); Appeal of Clifford R. and Jean G. Barbee, Cal. St. Bd. of Equal., Dec. 15, 1976.) The

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disposition of this appeal, then, turns on whether appellant's operation of the boat was an activity engaged in for profit. In order to prevail, appellant must establish that he held the boat primarily for profit-seeking purposes and not primarily for personal or recreational purposes. (Appeal of Paul J. and Rosemary Henneberry, Cal. St. Bd. of Equal., May 21, 1980; Appeal of F. Seth and Lee J. Brown, Cal. St. Bd. of Equal., Aug. 16, 1979.) **Of course, whether** the property is held primarily for profit-seeking motives is a question of fact upon which the taxpayer has the burden of proof. (Appeal of Guy E. and Dorothy Hatfield, Cal. St. Bd. of Equal., Aug. 1, 1980; Appeal of Clifford R. and Jean G. Barbee, supra.)

Based upon the record before us, we conclude that appellant has failed to carry his burden of proving **that** the fishing activity was engaged in for profit. This conclusion is based upon the following facts: (1) appellant spent only a small portion of 1978 fishing; (2) he continued his work as a full-time plumber; (3) appellants received substantial income, a total of \$31,273.81 per year, from sources other than fishing; (4) appellant did not obtain employees to carry on the fishing activities in his absence; (5) his expenses far exceeded **gross income**; and (6) the activity in which he engaged is considered a sport by many. Appellant does not appear to contest the accuracy of any of these facts, but instead argues that the presumption of Revenue and Taxation Code section 17233, subdivision (d), would apply to establish that his fishing activities were engaged in **for** profit. Subdivision (d) provides that an activity will be presumed to be engaged in for profit if the gross income derived from an activity exceeds the deductions attributable to such activity for two or more of the five taxable years ending with the taxable year in question. However, determination as to whether this presumption applies cannot be made before the close of the fourth taxable year in which the taxpayer first engages in the activity. (Rev. & Tax. Code, § 17233, subd. (e)(1).) As the year at issue was the first year in which appellant engaged in the fishing operations, the presumption provided for by subdivision (d) of section 17233 is inapplicable. Accordingly, respondent's action in this matter must be sustained.

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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,

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 Harold and Darlene B. Sousa against a proposed assessment of additional personal income tax in the amount of **\$377.89** for the year 1978, be and **the** same is hereby sustained.

Done **at Sacramento**, California, this **15th** day of **September**, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

\*For Kenneth Cory, per Government Code section 7.9