



Appeal of Charles B. and Joyce A. Newberry

This appeal presents two issues: (1) whether appellants have established error in respondent's proposed assessment for 1974, which is based on a federal audit report; and (2) whether appellants are entitled to additional first year depreciation for 1977 in an amount greater than allowed by respondent.

Appellants filed a joint 1974 personal income tax return and also filed a 1974 franchise tax return for a business they operated known as **Newberry** Pet Centers. Subsequently, respondent received a copy of a federal audit report for 1974 which indicated that appellants had operated **Newberry** Pet Centers as a sole proprietorship rather than as a corporation, and therefore that the income reported on the federal corporate tax return had been attributed to appellants. On the basis of this report, respondent issued a proposed assessment which made the same adjustment to appellants' state income.

A deficiency assessment based on a federal audit is presumed to be correct, and the taxpayer bears the burden of proving that it is erroneous. (Appeal of Donald G. and Franceen Webb, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.) In the present appeal, appellants have offered no evidence tending to show any error in respondent's determination. We must conclude, therefore, that the 1974 proposed assessment is correct.

The 1977 proposed assessment resulted from an audit of appellants' return for that year conducted by respondent. Appellants claimed additional first year depreciation in the amount of \$22,539. Respondent determined that pursuant to section 17213 of the Revenue and Taxation Code, appellants were entitled to additional first year depreciation in the maximum amount of \$4,000. It issued a proposed assessment reflecting this determination.

Section 17213 of the Revenue and Taxation Code allows additional first year depreciation with respect to certain property of 20 percent of the property's cost. However, that section limits the amount of additional first year depreciation which can be claimed in one taxable year. In the case of a married couple filing a joint return, the amount is limited to \$4,000 per year. (Rev. & Tax. Code, § 17213.) Accordingly, we must conclude that respondent properly disallowed the claimed additional first year depreciation to the extent it exceeded \$4,000.

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Respondent concedes that it failed to adjust the basis of the property for which the additional first year depreciation was claimed to reflect the fact that the entire amount of claimed depreciation was not allowed. This results in the 1977 proposed assessment being reduced by \$61.86.

Appellants contend that they filed an amended return for 1977 and made a partial payment of the amount due. However, respondent has no record of this, and appellants have produced no evidence in support of this claim. Therefore, we must assume that appellants are mistaken.

For the foregoing reasons, respondent's actions, as modified by its concession regarding the 1977 proposed assessment, 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 these proceedings, 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 Charles B. and Joyce A. **Newberry** against proposed assessments of additional personal income tax in the amounts of **\$2,075.69** and **\$1,387.43** for the years 1974 and 1977, respectively, be and the same is hereby modified in accordance with respondent's concession regarding the 1977 proposed assessment. In all other respects, the action of the **Franchise Tax Board** is sustained.

Done at Sacramento, California, this 8th day of May, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

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

\*For Kenneth Cory, per Government Code section 7.9