75-SBE-077

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MICHAEL M. AND)
OLIVIA D. MaKIEVE)

Appearances:

For Appellants: Michael M. MaKieve, in pro. per.

For Respondent: David M. Hinman
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 Michael M. and Olivia D. MaKieve against proposed assessments of additional personal income tax in the amounts of $99.39 and $47.80 for the years 1970 and 1971, respectively.

Michael M. and Olivia D. MaKieve (hereinafter appellants) filed joint state returns for the years 1970 and 1971 using the income averaging method to compute their tax liability, as provided in sections 18241 through 18246 of the Revenue and Taxation Code. This method allows taxpayers to average certain income for the taxable year (computation year) with income for the four preceding years (base years) if the taxable income for the computation year exceeds the average taxable income for the base years by certain prescribed limits. The taxpayer who elects income averaging is required to report California taxable income for the computation year and the base years on the schedule provided. During the years on appeal the instructions attached to the schedule directed the taxpayer to enter on the schedule as taxable income for the base years amounts which represented "adjusted gross (total) income reported (or adjusted)" for those years. Appellants construed this to mean that no amount needed to be entered for any base year in which they were not required to pay tax or to file a return., Accordingly, in filling out the income averaging schedules appellants indicated that they had no taxable income in the years 1966 through 1968.

After reviewing appellants' returns, respondent requested that they complete income averaging questionnaires for the years 1970 and 1971. Based upon the information submitted thereon by appellants, respondent determined that they had realized taxable income in the amounts of $3,845.00, $1,964.00, and $3,076.00 for the years 1966, 1967, and 1968, respectively. Respondent recomputed appellants' tax liability for 1970 and 1971 on the basis of these revised taxable income figures for the base period years. Notices of proposed assessment of additional tax were issued. Appellants protested the assessments and have appealed from respondent's subsequent denial of their protests.

Appellants concede that respondent's revised income averaging computations conform to statutory requirements and that the additional tax is owed. Nevertheless, they contend that they should have some relief because respondent's instructions, and particularly the term "taxable income, " were misleading. Consequently, the question before us is whether there is any basis for abating all or any part of the proposed assessments.

The term "taxable income" is defined in section 17073 of the Revenue and Taxation Code as follows:

> (a) Except as provided in subdivision (b), for purposes of this part the term "taxable income" means gross income, minus the deductions allowed by this part,. other than the standard deduction allowed by Article 4 (Section 17171 and following).
>
> (b) In the case of an individual electing under Sections 17174 and 17175 to use the standard deduction provided in Article 4 (Section 17171 and following), for purposes of this part the term "taxable income" means adjusted gross income, minus such standard deduction.

It is clear that a taxpayer can have "taxable income" and yet not be required to pay any tax or to file a return, because he did not receive enough income. Furthermore, we do not find the instructions unclear or misleading. However, even assuming that the instructions were not entirely clear, the income averaging method is prescribed by statute and cannot be changed by any instructions. Certainly there was no detrimental reliance in this case which would warrant estoppel against the state. In a similar case dealing with income averaging we held that there had been no detrimental reliance where all of the facts relevant to the computation of the taxpayers' base period income had occurred prior to their alleged reliance on obsolete instructions. (Appeal of Arden K. and Dorothy S. Smith, Cal. St. Rd. of Equal., Oct. 7, 1974.) We believe that reasoning is equally applicable here.

Appellants also contend that they should be excused from paying interest on the additional tax due. Section 18688 of the Revenue and Taxation Code provides that interest on a deficiency shall be assessed, collected and paid at the rate of six percent (6%) per year from the date prescribed for payment of the tax until the date the tax is paid. We are aware of no authority which would permit us to override this clear and unambiguous statutory mandate under the circumstances presented here.

Appeal of Michael M. and Olivia D. MaKieve

For the above reasons we must sustain 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 Michael M. and Olivia D. MaKieve against proposed assessments of additional personal income tax in the amounts of $99.39 and $47.80 for the years 1970 and 1971, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of November 1975, by the State Board of Equalization.

John W. Lynch, Chairman

William M. Bennett, Member

Richard Nevins, Member

George R. Reilly, Member

_____, Member

ATTEST: W. W. Dunlop, Executive Secretary