

Appeal of Richard P. and Mary E. Herget

The issue for consideration is whether the base period residency requirement of California's income averaging provisions violates either the privileges and immunities clause or the equal protection clause of the United States Constitution. We conclude that it violates neither.

Appellants became residents of California during 1968. For 1969, they filed a joint resident California personal income tax return without the benefit of income averaging. Included with appellants' 1969 return was a claim for refund of the tax they would have saved had California law permitted them the use of income averaging for that year. Respondent denied appellants' claim which gave rise to this timely appeal.

California's income averaging provisions are contained in sections 18241 through 18246 of the Revenue and Taxation Code. The residency requirements are found in section 18243, which provides in pertinent part:

(a) Except as otherwise provided in this section, for purposes of this article the term "eligible individual" means any individual who is a resident of this state throughout the computation year .

(b) For purposes of this article, an individual shall not be an eligible individual for the computation year if, at any time during such year or the base period, such individual was a nonresident.

The term "computation year" means the taxable year for which the taxpayer chooses the benefits of income averaging and the term "base period" is defined as the four taxable years immediately preceding the computation year. (Rev. & Tax. Code, § 18242, subd. (d).)

By not residing in California throughout the entire base period (1965-1968), appellants were clearly ineligible to average their income for the computation year. 1969. (See Appeal of

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Leo Horowitz, Cal. St. Bd. of Equal., Aug. 7, 1967; Appeal of Herbert H. and Darlene B. Hooper, Cal. St. Bd. of Equal., Feb. 26, 1969; Appeal of Donald G. and Ilene M. Hagman, Cal. St. Bd. of Equal., Dec. 11, 1973.) Nonetheless, appellants assert income averaging eligibility for 1969 on the ground that California's base period residency requirement is unconstitutional and, therefore, inapplicable. The constitutional provisions allegedly infringed by this requirement are the Privileges and Immunities Clause and the Equal Protection Clause. (See U. S. Const., art. IV, § 2, cl. 1; U. S. Const., Amend. XIV, § 1.)

The residency requirements of California's income averaging law have previously been challenged before this board on identical constitutional grounds. In Appeal of John P. and Nina J. Davis, decided March 8, 1976, we found that these requirements did not infringe upon appellants' privileges and immunities. Likewise, in Appeal of Laurence E. Broniwitz, decided September 10, 1969, no infringement of appellant's equal protection rights were found. In both cases we determined that residency for the requisite five-year period was an equitable exchange for the benefit of income averaging. Nothing in the record before us indicates that a contrary result should be reached herein. Accordingly, we find the Davis and Broniwitz appeals dispositive of the matter before us and must deny appellants' claim for refund.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Richard P. and Mary E. Herget for refund of personal income tax in the amount of \$208.65 for the year 1969, be and the same is hereby sustained.

Done at Sacramento, California,, this 5th day of April, 1976, by the State Board of Equalization.

William G. Bennett, Chairman

George R. Jensen, Member

Robert G. ..., Member

_____, Member

_____, Member

ATTEST: *W. W. ...*, Executive Secretary