



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }  
JOHN R. AND BETTY J. BERARD )

For Appellants: John R. Berard, in pro. per.

For Respondent: Bruce W. Walker  
Chief Counsel

John A. Stilwell, Jr.  
Counsel

O P I N I O N

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 John R. and Betty J. Berard against a proposed assessment of additional personal income tax in the amount of \$528.53 for the year 1971.

Appeal of John R. and Betty J. Berard

The primary issue presented for resolution is whether respondent's action in assessing additional personal income tax for the year 1971 on the basis of corresponding federal action was proper.

During 1971 appellants realized a gain of approximately \$40,000 from the sale of their business. Appellants reported the gain as capital gain on their 1971 federal and California returns.

In January 1974 the Internal Revenue Service informed respondent of its determination that appellants' gain from the sale of their business should have been reported as ordinary income. The federal determination was based on appellants' failure to establish that the gain was not attributable to the sale of a covenant not to compete.<sup>1/</sup> Pursuant to its determination, the Service increased appellants' 1971 taxable income by approximately \$20,000 and assessed additional tax accordingly. Appellants filed a protest against the federal action.

On July 26, 1974, respondent issued a notice of proposed assessment adopting the federal adjustments to appellants' 1971 taxable income. Following appellants' protest against the proposed assessment, respondent deferred further action pending final resolution of appellants' protest at the federal level.

On April 7, 1975, appellants forwarded to respondent a revised audit report from the Internal Revenue Service which showed a substantial reduction of the initial federal assessment. Apparently, appellants and the purchasers of their business had entered into an agreement which allocated, for federal tax purposes, \$3500 of the sale price to a covenant not to compete. The Service accepted the allocation, and appellants paid the revised federal assessment.

On December 28, 1976, respondent issued a notice of action conforming its assessment to the final federal action. Subsequent to the filing of this appeal, respondent sent a letter to appellants requesting a copy of the original contract executed in connection with the

---

<sup>1/</sup> The portion of consideration received pursuant to the sale of a business which is attributable to a covenant not to compete is taxable as ordinary income. (See generally, 3B Mertens, Law of Federal Income Taxation, S22.33 (1973 Revision).)

Appeal of John R. and Betty J. Berard

sale of their business. Appellants have failed to provide a copy of the contract.

It is well established that a proposed assessment issued by respondent on the basis of corresponding federal action is presumed correct, and the burden is on the taxpayer to prove it erroneous. (Rev. & Tax. Code, § 18451; Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414] (1949); Appeal of I-rry and Jeannette Kohm, Cal. St. Bd. of Equal., 'Feb. 8, 1978.) In the instant case appellants have failed to sustain their burden. While appellants argue generally that the sale of their business during 1971 did not involve a covenant not to compete, they have not presented any independent evidence in support of the argument. Accordingly, we must sustain respondent's action in this matter.

Appellants also contend that respondent's action is barred by the statute of limitations. However, the record indicates that respondent issued its notice of proposed assessment on July 26, 1974, well within the statutory period set forth for such action. (Rev. & Tax. Code, § 18586.) In this connection, appellants assert that respondent's notice of proposed assessment did not adequately apprise them of the reasons for the assessment. Included in the notice was the statement: "Revised in accordance with the report of Federal adjustment ... to the extent applicable to your California return." It is our opinion that the statement provided adequate notice of the reasons for the assessment. (See Appeal of Avis J. Luer, Cal. St. Bd. of Equal., June 3, 1975.)

Appeal of John R. and Betty J. Berard

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 John R. and Betty J. Berard against a proposed assessment of additional personal income tax in the amount of \$528.53 for the year 1971, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of January, 1979, by the State Board of Equalization.

William H. Burnett, Chairman  
Paul H. [unclear], Member  
George P. Kelly, Member  
\_\_\_\_\_, Member  
\_\_\_\_\_, Member