83-SBE-102

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)
	)
ESTATE OF JOSEPH DIPPOLITO, DECEASED,	)
FRANCES DIPPOLITO, EXECUTRIX, AND	)
FRANCES DIPPOLITO	)

For Appellants: Earl C. Crouter
Attorney at Law

For Respondent: Allen R. Wildermuth
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of the Estate of Joseph Dippolito (Deceased), Frances Dippolito, Executrix, and Frances Dippolito against proposed assessments of additional personal income tax in the amounts of $907.65, $2,161.50, $1,946.00, $2,105.60, and $1,602.50, for the years 1966, 1967, 1968, 1969, and 1970, respectively.

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The issues presented by this appeal are whether appellants have proven respondent's determination to be incorrect, whether the state is estopped from assessing additional personal income tax, and whether respondent's action has resulted in impermissable double taxation.

Frances Dippolito (Frances) and her husband, Joseph Dippolito (Joseph), now deceased, filed joint California and federal income tax returns for 1966-1970. Respondent was notified that the Internal Revenue Service had audited these returns and adjusted the taxable income reported on them. After determining these adjustments to be applicable to appellants' state returns, respondent issued proposed assessments based on the'federal audit reports. Respondent took no action on the assessments while appellant protested the federal assessments. When the federal assessments were finally determined, respondent revised its proposed assessments to conform to the final federal determination. It reaffirmed the proposed assessments after appellants' protest, and this timely appeal followed.

The federal adjustments involved a business, Charley's Market, which originally belonged to Charles Dippolito (Charles), Joseph's father. In 1961, following Charles' death, the Superior Court of San Bernardino County authorized Grace Mineo, Charles' daughter, to operate the market in her capacity as executrix of his estate, From 1961 until 1971, the estate reported the income from Charley's Market on its federal and state income tax returns. During the same period, the estate was licensed by the California Department of Alcoholic Beverage Control and paid both local property taxes and state sales taxes. In 1966, the estate paid California income tax in the amount of $274.00. Respondent has determined that this tax was paid on income which respondent now seeks to have attributed to appellants. Therefore, respondent has agreed to allow appellants a credit of $274.00 against their tax liability if respondent's position on appeal is upheld. The estate paid no state income tax for the other years on appeal.

The Internal Revenue Service determined that Joseph actually operated Charley's Market from 1966 until 1971 and that he received the income from the business. Therefore, it concluded that this income was taxable to appellants rather than to Charles' estate. The Service also determined that the income from the business as reported by Charles' estate was understated.

Appellants present two estoppel arguments, one concerning estoppel of respondent, and the other, estoppel of this board. Appellants first contend that respondent is estopped from taxing appellants on the income from Charley's Market since the Superior Court authorized the executrix to operate the market, the county collected property tax from the estate, the Department of Alcoholic Beverage Control issued a license to the executrix, and this board collected sales taxes from her. Apparently, appellants interpret the actions of these agencies as indicating that the agencies determined the executrix, rather than Joseph, to be the operator of the market and contend that respondent should be required to accept this determination. While these factors indicate that the executrix was authorized to operate the market and may ever. suggest that she was the nominal operator of the business, they do not establish that it was the executrix and not Joseph who, in fact, operated the market and received the income therefrom. Therefore, the argument that respondent is estopped must be rejected.

Appellants' second estoppel argument is that this board is estopped from sustaining respondent's action because this board accepted sales tax payments relating to Charley's Market from Charles' estate. This argument is also without merit. The acceptance of sales tax payments was done in this board's capacity as the agency responsible for the administration and enforcement of the Sales and Use Tax Law. (Rev. & Tax. Code, § 7051.) This board did not, by that action, make any representation regarding who was actually operating the market. Nor did this board, in assessing sales tax, make any legal determination regarding who was obligated to pay personal income tax on the income from the market. The authority to make that determination, in the first instance, rests with the Franchise Tax Board, not with this board. (Rev. & Tax. Code, § 19251.)

Appellants next argue that, by taxing appellants on the income from Charley's Market, respondent is subjecting appellants to impermissable double taxation. The possibility of double taxation may have existed in that appellants owned the building in which the market was located and included, in their taxable income, rental payments they received from the estate. However, in calculating the adjustment for 1966, the Internal Revenue Service removed the rent from appellants' income, thereby removing the possibility of taxing appellants twice on

the same income. Although our record does not reveal that this was done for the other years in issue, we must presume that it was since appellants have offered no evidence to the contrary. Nor can appellants argue that respondent seeks to tax both Charles' estate and appellants upon the same income since respondent has agreed to allow appellants a credit in the amount of the California income tax paid by Charles' estate if respondent's action is sustained by this board. Apparently, appellants argue that impermissable double taxation results from the payment of property and sales taxes and the payment of income tax. This argument is clearly without merit since these taxes are imposed upon different taxable events by different taxing authorities. (Associated Home Builders Etc., Inc. v. City of Walnut Creek, 4 Cal.3d 633 [94 Cal.Rptr. 630 (1971); Fox Etc. Corp. v. City of Bakersfield, 36 Cal.2d 136 [222 P.2d 879] (1950).)

Finally, appellants claim that their tax liability was less than the amount shown on the federal audit reports but have produced no evidence to support this claim. Respondent's deficiency assessment based upon a federal audit report is presumed correct. (Appeal of Herman D. and Russell Mae Jones, Cal. St. Bd. of Equal., April 10, 1979.) The taxpayer must either concede that the federal audit report is correct or bear the burden of proving that it is incorrect. (Rev. & Tax. Code, § 18451; Appeal of James M. Denny, Cal. St. Bd. of Equal., May 17, 1962.) Since appellants have produced no evidence to prove that the federal audit reports were inaccurate, we must conclude that they were correct.

For the foregoing reasons, the action of respondent must be sustained.

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O R D E R

Pursuant to the views expressed in tne 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 the Estate of Joseph Dippolito (Deceased), Frances Dippolito, Executrix, and Frances Dippolito against proposed assessments of additional personal income tax in the amounts of $907.65, $2,161.50, $1,946.00, $2,105.60, and $1,602.50, for the years 1966, 1967, 1968, 1969, and 1970, respectively, is hereby modified to reflect the allowance of a credit in the amount of $274.00 for 1966. In all other respects, the action of the Franchise Tax Board is hereby sustained.

Done at Sacramento, California, this 4th day of May , 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett , Chairman

Conway H. Collis , Member

Ernest J. Dronenburg, Jr. , Member

Richard Nevins , Member

, Member