



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
ARTHUR E. AND HAZEL M. MORTIMER }

For Appellants: Arthur E. Mortimer, in pro, per,,
For Respondent: Burl D. Lack, Chief' Counsel
Donald H. Reinholdt, Junior 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 Arthur E. and Hazel M. Mortimer against a proposed assessment of additional personal income tax in the amount of \$48.21 for the year 1961.

The question presented is whether appellant Arthur E. Mortimer's services as administrator of an estate constituted two "employments" within the meaning of former section 18241 or the Revenue and Taxation Code, If so, he and his wife are entitled to treat compensation received in 1961 as if it were received ratably over a period of years,

Appellant was appointed by a probate court as a special administrator with general powers with respect to a decedent's estate on February 6, 1958, one day after the decedent's death, The appointment terminated in December 1961, when the estate was closed,, For six years prior to the death of the decedent a title insurance and trust company was guardian of her estate, inasmuch as she had been adjudged incompetent,

The appointment authorized and directed appellant, an experienced and licensed real estate broker, to operate and manage the estate properties. The property consisted of two commercial buildings, including a six-story bank building, and certain land with oil rights, These management duties included

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negotiating leases and month-to-month rentals with tenants, negotiating an agreement with the bank, negotiating with respect to a parking district, supervising repairs and re-conditioning, reviewing audits of percentage leases, **filing a complaint to recover an unpaid amount and obtaining a reduction** in the assessed value of the bank building, These duties consumed most of appellant's time, During the guardianship period, the guardian had employed a full-time manager for the bank building and another for the other properties,

In 1961 appellee received \$10,766, the statutory fee for the ordinary services of an administrator, (Prob. Code, § 901.) In 1958, 1960 and 1961 appellant also received, pursuant to court order, additional compensation totaling approximately \$56,000 for extraordinary services as an administrator, (Prob. Code, § 902.) Of this amount, \$12,500 was received in 1961.

Appellant regarded the \$10,766 statutory fee for ordinary services as received for a separate "employment" within the meaning of former section 18241 of the Revenue and Taxation Code, and therefore subject to the beneficial "spread-back" tax treatment provided by the section,

Respondent Franchise Tax Board regarded all of appellant's services as an administrator as but one "employment," Under this interpretation the requirements of **section 18241** were not satisfied, since the entire amount of fees **received** in 1961, \$23,266, was less than 80 percent of the total, compensation, \$66,266 .

Section 18241 provided, in material part, that if an "employment" **covers** 36 months or more and the compensation received in the taxable year from the "employment" is not **less** than 80 percent of the total compensation, then the tax is to be **no greater** than it would be if the compensation had been received ratably in each year of the "employment." An "employment" was defined as "an arrangement or series of arrangements for the performance of personal services ... to effect a particular result, regardless of the number of sources from which compensation therefor is obtained."

A number of federal cases applying similar "spread-back" provisions to administrators, executors and trustees have arisen under section 107 of the 1939 Internal Revenue Code, which was succeeded by section 1301 of the 1954 Internal Revenue Code, Section 1301, until recently amended, was the same as the California **statute** that concerns us here and section 107 was essentially the same **except** that it referred simply to "compensation for personal services" rather than to a **specifically** defined "employment." The purpose of adding the "employment" definition was to **clarify** and make more **definite** the

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meaning of the former phrase "compensation for personal services," (Ranz v. Commissioner, 273 F.2d 810.)

The federal courts have held that the following fees and commissions were not separable: (1) the ordinary and extraordinary fees of an **executor** who was an attorney and performed complicated tax work for the estate (Rosalynne H. Lesser, 17 T.C. 1479); (2) the ordinary and extraordinary fees of a trustee in a corporate reorganization who performed exceptional and *unforeseen* services in negotiations and litigation with the United States (R. O. Shaffer, 29 T.C. 187); and (3) "income" commissions and "principal" commissions received by a testamentary trustee, (Kingsford v. Manning, 109 F. Supp, 949.) The rationale of these decisions was that each taxpayer had performed services in one fiduciary capacity regardless of the fact that some of the services were unusually difficult and complicated,

Appellant cites as authority Chase v. Commissioner, 245 F.2d 288, Leon R. Jillson, 22 T.C. 1101 and E. A. Terrell, 14 T.C. 572. The Chase and Jillson cases both involved attorneys, Chase was decided on the ground that the attorney-executor there concerned was paid for legal services in the conduct of a lawsuit in his capacity as an attorney rather than as an executor. In Jillson, the taxpayer was specifically retained and paid as an attorney separately from his services as a trustee. The Terrell case involved a president and general manager of a corporation. There, the court found that extensive services in assisting attorneys in litigation over patent rights **were** distinct from the taxpayer's regular duties and that a special bonus for those services was separable from his regular salary.

We are aware of no rule whereby a **broker**, such as appellant, must be regarded as a broker and not an administrator in managing an estate. Appellant was appointed to serve only as an administrator and he was paid, pursuant to statute, for services as an administrator. The duties which he performed in protecting, preserving and managing the estate- may have been extraordinarily demanding but they were within the scope of an administrator's function, (Estate of Scherer, 58 Cal, App. 2d 133 [136 P.2d 103]; Estate of Reinhertz, 82 Cal, App. 2d 156 [185 P. 2d 858, 186 P--3=-----

We conclude that with the, possible exception of legal services under certain conditions, the ordinary and extraordinary duties performed by an administrator in behalf of a decedent's estate constitute **personal services performed** in a single capacity to effect a particular result, namely, the proper administration of the estate and, accordingly, constitute one "employment" within the meaning of former section 18241.

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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 Arthur E. and Hazel M. Mortimer against a proposed assessment of additional personal income tax in the amount of \$48.21 for the year 1961 be and the same is hereby sustained,

Done at Sacramento, California, this 4th day of January, 1966, by the State Board of Equalization.

Geoff Kelley, Chairman
John W. Lynch, Member
Robert J. ..., Member
Paul R. ..., Member
Richard ..., Member

Attest: W. J. ..., Secretary