



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
EDWARD B. AND MARION R. FLAHERTY)

Appearances:

For Appellants: Hiram N. Bishop, Jr.
Certified Public Accountant

For Respondent: Peter S. Pierson
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 Edward B. and Marion R. Flaherty against a proposed assessment of additional personal income tax in the amount of \$158.05 for the year 1964.

The question for decision concerns whether certain monthly pension payments received by appellants were subject to tax in California.

Prior to May 1, 1958, appellants were residents of Boston, Massachusetts, where Mr. Flaherty had been employed as a teacher for some thirty years. On January 27, 1958, Mr. Flaherty's retirement was approved by the School Committee of the City of Boston, and he began receiving an annual pension of \$4,687.80. That pension was payable monthly, by checks mailed from the office of the City Treasurer in Boston.

On March 1, 1958, Mr. Flaherty's request to be retired from the Naval Reserve was approved by the Department of the Navy. He retired with the rank of captain? and as a result of his past military service he was eligible for retirement pay.

Anneal of Edward B. and Marion R. Flaherty

Mr. Flaherty had never made contributions towards either of the above pension plans. Under both plans monthly payments were to terminate at Mr. Flaherty's death. Neither retirement plan made provision for any survivor's benefits or any lump sum payment, either to Mr. Flaherty while he was still living or to his estate upon his death.

On May 1, 1958, appellants moved to California and established residence in Redondo Beach. Prior to their arrival in California Mr. Flaherty had applied for admission to a special graduate program for retired military officers which was offered by the University of California at Los Angeles. Appellants' California residence has continued to date, and Mr. Flaherty has received regular checks under both of the above mentioned pension plans.

In their California personal income tax return for 1964, appellants excluded the \$4,687.80 received from the City of Boston pursuant to the pension plan and \$2,484.36 paid by the Navy Disbursing Office as retired pay, on the ground that said amounts constituted income which had accrued prior to the time appellants became residents of California. Upon audit respondent determined that the total monthly payments received from the City of Boston during 1964, as well as \$1,484.36 of the military retired pay received during that year (total retired pay less a \$1,000 military pay exclusion) constituted additional taxable income to appellants in 1964. Appellants protested the resulting proposed assessment, and respondent's denial of that assessment gave rise to this appeal.

The California personal income tax is imposed upon the entire taxable income of residents of California and upon the income of nonresidents which is derived from sources within California. (Rev. & Tax. Code, § 17041.) Where a taxpayer's residency status changes, section 17596 of the Revenue and Taxation Code provides:

When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise included in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

Appeal of Edward B. and Marion R. Flaherty

This accrual treatment applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. (Cal. Admin. Code, tit. 18, reg. 17596.)

The crucial inquiry in the instant appeal therefore is: Had the pension payments received by appellants from the City of Boston and the United States Navy "accrued" as income prior to the time they became residents of California?

Respondent's regulations provide, as do the federal income tax regulations and the case law, that under an accrual method of accounting income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. (Cal. Admin. Code, tit. 18, reg. 17571(a); Treas. Reg. § 1.446-1(c)(1)(ii); Spring City Foundry Co. v. Commissioner, 292 U.S. 182 [78 L. Ed. 1200], reh. denied, 292 U.S. 613 [78 L. Ed. 1472].) If there are substantial contingencies as to the taxpayer's right to receive, or uncertainty as to the amount he is to receive, an item of income does not accrue until the contingency or events have occurred and fixed the fact and amount of the sum involved. (Midwest Motor Express, Inc., 27 T. C. 167, aff'd, 251 F.2d 405; San Francisco Stevedoring Co., 8 T. C. 222.)

Appellants contend that prior to their moving to California all events had occurred to fix Mr. Flaherty's right to receive his pension payments, i.e., he had completed the years of service required to entitle him to the pensions, he had made proper applications for retirement on completion of such service, and those applications had been approved by the City of Boston and the Department of the Navy. With respect to the requirement that the amount of income to be accrued be determinable with reasonable accuracy, appellants contend that at the time they came to California the value of Mr. Flaherty's pensions could be reasonably determined by means of actuarial tables. Appellants conclude that for these reasons the income which they received in 1964 from the two pension plans had accrued prior to their becoming residents of California.

Respondent argues, conversely, that until appellants received each pension payment there was no accrual of income. More explicitly, respondent urges that appellants' right to receive the pension payments in question was contingent upon Mr. Flaherty's survival? and unless he lived, the respective payors had no obligation to pay. We must agree with respondent's position.

This is not a case where a retired employee, or his estate, was guaranteed receipt of a fixed amount in

Appeal of Edward B; and Marion R. Flaherty

pension benefits. (Cf., Appeal of Dr. F. W. L. Tydeman, Cal. St. Bd. of Equal., Jan., 5, 1950.) If Mr. Flaherty had died one month after payment under either pension plan had begun, his estate would have been entitled to no future payments nor would his wife or any other named beneficiary have had a right to any death benefit. Mr. Flaherty's right to each monthly check was contingent upon his surviving through the month. Similarly the obligations of the City of Boston and the Department of the Navy to issue each check were contingent upon Mr. Flaherty's continued survival.

In our opinion such a substantial contingency as continued life prevented the accrual of any pension income, within the meaning of section 17596 of the Revenue and Taxation Code, prior to its actual receipt by appellants, We must therefore sustain respondent's action in this matter.

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 Edward B. and Marion R. Flaherty against a proposed assessment of additional personal income tax in the amount of \$158.05 for the year 1964 be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of January , 1969, by the State Board of Equalization.

John W. Lynch, Chairman
[Signature], Member
[Signature], Member
[Signature], Member
[Signature], Member

ATTEST: Ronald B. Stelch, ^{Acting} Secretary