



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
J. BRYANT AND MARYANN KASEY }

For Appellants: J. Bryant Kasey, in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

James W. Hamilton
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of J. Bryant and MaryAnn Kasey for refund of personal income tax in the amount of \$845.66 for the year 1966.

The question for decision is whether certain royalty payments were constructively received and thereby represented income when tendered to appellants in 1964 and 1965.

In 1950 J. Bryant Kasey discovered certain rare-earth deposits near Mountain Pass, San Bernardino County, California. In 1951, for \$15,000, appellants and Dr. J. A. Paskan, who then also had a one-third ownership interest, granted Molybdenum, Inc. an option to purchase these mineral claims. Later that year Molybdenum exercised the option by paying the vendors an additional \$135,000 and by agreeing to pay certain designated royalties from the anticipated net profits to be derived from the mineral rights. Dr. Paskan ultimately sold his royalty interest to Molybdenum and is no longer concerned with a controversy that developed concerning the contract.

Mining operations commenced in 1952, and that year royalty payments or advances were made by Molybdenum pursuant

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to the contract terms. Subsequently, however, a dispute arose between the contracting parties. In 1953 certain court actions were initiated and at the time this appeal was filed appellants and Molybdenum were still litigating the controversy.

Despite written demands by appellants for payment in 1953, Molybdenum refused to tender any further royalty payments until 1960. Appellants refused these 1960 payments on the basis that the corporation had previously committed a total breach of the contract.

More royalty payments were tendered to appellants through the mail in 1964 and 1965. Inasmuch as appellants were nonresidents, the state personal income tax was withheld by Molybdenum and forwarded to respondent pursuant to regulations 18805-18810 of title 18 of the California Administrative Code. Appellants again refused to accept the tendered checks, apparently believing that their position in the litigation might be jeopardized. In 1966 appellants accepted a portion or all of the previously refused payments, treating them as rent due because of Molybdenum's possession of the mining claims.

Respondent taxed the payments tendered to appellants by Molybdenum in 1964 and 1965 as income constructively received in those years. It applied the tax withheld and forwarded by that corporation as a credit against the taxes respondent imposed for the years 1964 and 1965. A refund was made to appellants to the extent the amounts withheld by Molybdenum for those years exceeded the tax found due by respondent for 1964 and 1965.

Appellants, cash basis taxpayers, reported a self-assessed tax of \$225.18 for 1966 and regarded the amounts withheld by Molybdenum for 1964 and 1965 as overpayments of their tax for 1966. Respondent, for the reasons indicated, refused to consider the amounts as taxes paid for 1966. Respondent also made certain other adjustments which were not contested. It concedes, however, that a penalty of \$111.06 for delinquent filing of the 1965 tax was inappropriately levied, and to that extent agrees that a refund should be made. Accordingly, except as modified by the uncontested adjustments, appellants seek a refund of the amounts withheld and forwarded by Molybdenum which have been treated as payments of 1964 and 1965 tax.

A cash basis taxpayer is ordinarily taxed on his income in the year in which it is received. (Rev. & Tax. Code, § 17571.) Both California and the federal government, however, follow the doctrine of constructive receipt with respect to cash basis taxpayers. This doctrine is explained in respondent's

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regulations (Cal. Admin. Code, tit. 18, reg. 17571(b), subd, (1)) as follows:

Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account or set apart for him so that he may draw upon it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions....

Appellants assert they had a right not to regard the payments tendered as income for 1964 and 1965 because they did not want to acknowledge that the 1951 contract was still in effect and thereby possibly jeopardize the final outcome of certain litigation. They maintain that this board's decision in the Appeals of W. L. and Ann Appleford, Cal. St. Bd. of Equal., Sept. 15, 1958, should resolve the present matter in their favor. However, while that case involved an oil and gas operating agreement in which the constructive receipt doctrine was held inapplicable, there the operator merely furnished monthly statements to the taxpayer and clearly manifested an intent to retain and not turn the royalties over to the taxpayer pending settlement of certain litigation.

With respect to this appeal, however, it is clear that the payments were placed at appellants' disposal without restriction or limitation. In William' Parris, 20 B.T.A. 320, a taxpayer refused to sign a particular written form called a "division order." Signing it would have enabled him to receive certain royalties to which he was presently entitled under an oil and gas lease. The taxpayer had brought an action to have the lease set aside, alleging misrepresentation and failure to pay rental. He refused to sign the order until the litigation was settled, an event which did not occur until after the taxable year. He maintained that if he had accepted the royalties earlier he might have prejudiced his position in the litigation. The court concluded the real issue was not whether he would have been prejudiced, but whether there were funds standing available and subject to the taxpayer's demand. The court concluded that the amount was constructively received and pointed out that even if he were unsuccessful in the litigation he still would have owned the royalty interest which produced the income, except a portion which he had subsequently assigned. The Parris case has frequently been cited and followed. (See,

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for example, Alexander Zolotof'f, 41 B.T.A. 991, and Nathan and Betty Ruth Fogle, T.C. Memo., June 27, 1966.) Under the above authority, we must conclude that the payments were constructively received in 1964 and 1965 either as royalties pursuant to the contract or as amounts due from Molybdenum for holding onto and benefiting from the mining claims.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the Claim of J. Bryant and MaryAnn Kasey for refund of personal income tax in the amount of \$845.66 for the year 1966 be modified to the extent of the concessions made by respondent concerning \$111.06. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 26th day of February, 1969, by the State Board of Equalization.

John W Lynch, Chairman
Paul R. Jacobs, Member
Paul Stein, Member
_____, Member
_____, Member

Attest: [Signature], Secretary