

Appeal of Janice Rule

Appellant is an actress by profession. During the appeal years she was a resident of New York. As an actress appellant appeared in several motion pictures filmed in California.

As a result of the review of appellant's 1963 and 1964 California personal income tax returns respondent requested that appellant file returns for 1965, 1966 and 1967. The requested returns were not filed and, ultimately, respondent issued notices of proposed assessment reflecting California income in the amounts of \$40,000, \$40,000 and \$50,000 for the years 1965, 1966 and 1967, respectively. Thereafter, appellant's representative filed unsigned California personal income tax returns on appellant's behalf for 1965 and 1967. Accompanying the returns were schedules setting out **appellant's** total income and California income. Appellant's representative also indicated that no 1966 return was submitted since the personal exemption and dependency exemption reduced California taxable income to zero.

In computing income from California sources appellant did not include any compensation received from **Zazz Productions, Inc.** (hereinafter referred to as **Zazz**). **Zazz** is a New York corporation. Its principal business activity is theatrical and motion picture production. The corporation's principal source of income is compensation for the personal services of appellant who **is the** corporation's sole shareholder and principal **employee**.

Respondent determined that **Zazz's** major source of income during the years in issue was from appellant's appearances in productions filmed in California. Since, in **respondent's** opinion, the income received by **Zazz** was almost exclusively for **appellant's** acting services in California, respondent concluded that the salary paid to appellant by **Zazz** was for the performance of her services in California. Respondent revised its notices of action to include only the California income reflected in appellant's schedules plus the compensation paid to appellant from **Zazz**. The parties agree that the payments to appellant from **Zazz** in 1965 and 1966 were \$12,000 and \$3,500, respectively. For 1967, it is respondent's position that appellant received compensation **in** the amount of \$39,710, while appellant maintains that she received only \$27,000.

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The primary issue for determination is whether compensation received from appellant's wholly owned corporation was for services performed in California and **includible** in appellant's gross income. If it is determined that the compensation is California income, then we must ascertain the amount of compensation appellant received in 1967.

For purposes of the California Personal Income Tax Law, in the case of a nonresident taxpayer, gross income includes only the gross income from sources within this state. (Rev. & Tax. Code, § 17951; see also Cal. Admin. Code, tit. 18, reg. 17951-17954(e), subd. (2).) The word "source" conveys the essential *idea* of origin. The critical factor which determines the source of income from personal services is not the residence of the taxpayer, or the place where the contract for services is entered into, or the place of payment. **It** is the place where the services are actually performed. (Ingram v. Bowers, 47 F.2d 925, **aff'd**, 57 F.2d 65; Irene Vavasour Elder Perkins, 40 T.C. 330, 341; Appeal of Charles W. and Mary D. Perelle, Cal. St. Bd. of Equal., Dec. 17, 1958; Appeal of Robert C. and Marian Thomas, Cal. St. Bd. of Equal., April 20, 1955; cf. Rev. Rul. 60-55, 1960-1 Cum. Bull. 270.)

The case of Ingram v. Bowers, *supra*, illustrates this principle. Ingram concerned the source of income received by Enrico Caruso, a nonresident alien, from the sale of phonograph records outside the United States. The singing by Caruso used for the production of the records occurred within the United States. Caruso performed these services for the Victor Company and received a percentage of the sales price for each record sold by Victor. The amounts received from Victor were included in Caruso's gross income on the theory that the income was from sources within the United States. In upholding the taxing agency's position the court held that the place where the services are performed, and not where payment is determined, is the source of the income.

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Based on the foregoing authority we must conclude that appellant's California gross income includes compensation received from Zazz to the extent that such compensation was for **services** performed in California.

In support of her position that the compensation was not for services performed in California, appellant relies most heavily on a letter from her accountants dated July 7, 1975. The letter indicates that, in 1967, appellant performed some services for Zazz of an administrative and professional nature in New York. However, that letter concerns only 1967 and states that appellant did, in fact, perform some services in California during 1967. Although specifically requested to do so by respondent, appellant did not attempt to establish the extent of appellant's services in either California or New York.

On the other hand, respondent relies, in part, on the statement contained in a letter from the same accounting firm dated January 8, 1969, to the effect that the corporation received the bulk of its income from appellant's services performed in California. The record also indicates that, at least in 1965, taxes were withheld from income arising from appellant's performances in California.

While the record is far from satisfactory, based on the information contained therein, and cognizant of the fact that appellant's failure or refusal to produce any records or to render assistance on this issue must bear heavily against her, we conclude that the compensation received by appellant during the years in issue from Zazz was for services rendered in California. (See Halle v. Commissioner, 175 F.2d 500, cert. denied, 338 U.S. 949 [94 L. Ed. 586].)

The next question is the amount of compensation paid to appellant by Zazz during 1967. As previously indicated, respondent maintains that appellant received compensation from Zazz in the amount of \$39,710 while appellant contends that she received only \$27,000.

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We recognize the well established rule that respondent's determination is presumed to be correct and the burden is on the taxpayer to prove that it is erroneous. (See, e.g., Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414]; Appeal of Robert R. Ramlose, Cal. St. Bd. of Equal., Dec. 7, 1970.) However, the presumption is a rebuttable one and will only support a finding in the absence of sufficient evidence to the contrary. (Caratan v. Commissioner, 442 F.2d 606; Robert Louis Stevenson Apartments, Inc. v. Commissioner, 337 F.2d 681; Cohen v. Commissioner, 266 F.2d 5, 11; Wiget v. Becker, 84 F.2d 706, 707; cf. Rockwell v. Commissioner, 512 F.2d 882.) Respondent's determination is not evidence to be weighed against evidence produced by the taxpayer. The presumption of correctness disappears once evidence which would support a contrary finding has been submitted. (Herbert v. Commissioner, 377 F.2d 65, 69; Niederkrone v. Commissioner, 266 F.2d 238, 241; Cohen v. Commissioner, supra; cf. Rockwell v. Commissioner, supra.)

In the instant case appellant has submitted income schedules and statements from her accounting firm to the effect that she received only \$27,000 in compensation for personal services from Zazz in 1967. While the evidence submitted by appellant on this issue is not overwhelming, respondent has offered none. In support of its contention that appellant received \$39,710 from Zazz, respondent has merely denied that appellant received compensation in the amount of \$27,000. The law imposes much less of a burden upon a taxpayer who is called upon to prove a negative - that she did not receive the income which the taxing agency claims - than it imposes upon a taxpayer who is attempting to sustain a deduction. (Weir v. Commissioner, 283 F.2d 675; see also Mac Levine, 31 T.C. 1121, 1124; Clara O. Beers, 34 B.T.A. 754, 758.)

We believe appellant has satisfied her burden of establishing that respondent's determination concerning the amount of compensation appellant received from Zazz in 1967 was erroneous. Accordingly, we find that the amount of compensation actually received by appellant from **Zazz** in 1967 was \$27,000.

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Appellant has **not** contested the delinquency penalties or the expense adjustments. Therefore, respondent's determination in these matters must be sustained to the extent applicable.

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 Janice Rule against proposed assessments of additional personal income tax in the amounts of \$451.88, \$14.57 and **\$2,970.51** for the years 1965, 1966 and 1967, respectively; and against proposed penalty assessments for failure to file timely returns in the amounts of \$112.97, \$3.64 and \$742.63 for the years 1965, 1966 and 1967, respectively, be and the same is hereby modified, in accordance with the opinion of the board, and in all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 6th day of October, 1976, by the State Board of Equalization.

William W. Bennett, Chairman
John J. [unclear], Member
Robert [unclear], Member
_____, Member
_____, Member

ATTEST: W. W. [unclear], Executive Secretary