

Appeal of James A. and Phyllis A. Tindell

James A. **Tindell** (hereinafter referred to as "appellant") became disabled in 1974 and began receiving temporary disability payments the subsequent year. In 1977, a medical determination was made that appellant was permanently and totally disabled and would be unable to return to his former employment with the University of California. As a consequence of his disability, appellant **became** eligible for a disability pension of \$459.91 a month. Appellant received **\$11,123.00** in disability payments from his employer in 1977; that amount-included retroactive payments for 1976 in the sum of **\$5,064.00**.

On their joint California personal income tax return for the year in issue, appellants excluded the retroactive disability payments for **1976** from their gross income. They contend that since those payments should have been received in 1976, they did not constitute gross income in 1977. Appellants also excluded \$948.00 in "**sick pay**" from their gross income for 1977.

Upon review of their return, respondent determined that appellants' exclusion of the retroactively paid disability payments was improper in that, as cash basis taxpayers, all income received by them **during** the **year** in issue was to be included in their gross income for that year. After revision of their-adjusted gross income to include the disability payments **for 1976**, appellants' adjusted gross income for 1977 totaled **\$24,856.00**. Respondent also concluded that, pursuant to Revenue and Taxation Code section 17139, appellants were not entitled to exclude \$948.00 in "**sick pay**" from their gross income. Appellants' protest of respondent's determinations has resulted in this appeal.

The issues presented by this appeal are the following: (i) whether the 1976 disability payments, retroactively paid in 1977, should be included in appellants' gross income in the year in which they were received; and (ii) whether appellants are entitled to exclude \$948.00 in "**sick pay**" from their gross income for the year in issue.

Revenue and Taxation Code section 17571, subdivision (a), the California counterpart to Internal Revenue Code section **451(a)**, provides as follows:

Appeal of James A. and Phyllis A. Tindell

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(a) The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period. (Emphasis added.)

It is well established that, as a general rule, the gains, profits, and income of a cash basis taxpayer shall be included in gross income for the taxable year in which they are received. (Hugh N. Mills, ¶ 67,067 P-H Memo. T.C. (1967), affd., Mills v. Commissioner, 399 F.2d 744 (4th Cir. 1968); John H. Gooch, ¶ 55,326 P-H Memo. T.C. (1955), affd., Gooch v. Commissioner, 240 F.2d 324 (7th Cir. 1957); Appeal of J. Bryant and MaryAnn Kasey, Cal. St. Bd. of Equal., Feb. 26, 1969; Appeal of W. L. and Ann Appleford, Cal. St. Bd. of Equal., Sept. 15, 1958; see also Treas. Reg. § 1.451-1 (a), T.D. 6282, 1958-1 Cum. Bull. 215.) Appellants contend that it is unfair to include the 1976 disability payments in their gross income for 1977, the year of their receipt, because appellant's employer was allegedly slow in processing the disability claim. As noted above, however, the courts and this board have repeatedly held that cash basis taxpayers are required to include in their gross income all income actually received in the taxable year. There is no reason to deviate from that rule in this appeal.

Insofar as pertinent here, section 17139 of the Revenue and Taxation Code provides that amounts received by an employee through accident or health insurance for personal injuries or sickness (where the amounts are attributable to nontaxable contributions by the employer, or are paid by the employer) are not included in the gross income of a taxpayer who is under 65 years of age and retired on disability if such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of permanent and total disability.. However, when a taxpayer's adjusted gross income, determined before the above described exclusion, exceeds \$15,000, the amount which would have been excluded for the taxable year must be reduced by an amount equal to the excess of the taxpayer's adjusted gross income over \$15,000. (Rev. & Tax. Code, § 17139, subd. (d)(3).) Consequently, as the maximum allowable exclusion, is \$5,200 a year (Rev. & Tax. Code, § 17139, subd. (d)(2)),

Appeal of James A. and Phyllis, A. Tindell

the exclusion is completely phased out when the taxpayer's adjusted gross income reaches \$20,200; on a joint return where each spouse is entitled to the maximum allowable exclusion of \$5,200, the exclusion is eliminated when joint adjusted gross income reaches \$25,400.

Appellants' joint adjusted gross income for 1977, as determined before the exclusion provided by section 17139, totaled \$24,856; appellant's wife was not eligible for a section 17139 exclusion: Accordingly, as their joint adjusted gross income exceeded \$20,200, appellants were not entitled to exclude the \$948.00 in "sick pay" from their gross income.

