85-SBE-022

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
RONALD P. AND GERTRUDE B. FOLTZ)

For Appellants: Ronald P. Foltz,
in pro. per.

For Respondent: Donald C. McKenzie
Counsel

OPINION

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Ronald P. and Gertrude B. Foltz against a proposed assessment of additional personal income tax in the amount of $4,345.30 for the year 1979.

The central issue presented is whether respondent properly included in appellants' California income payments received by appellants as partnership income and a separation allowance where appellants terminated their California residency during the year at issue.

Appellant-husband (appellant) is a certified public accountant who was a partner in the San Francisco office-of Deloitte, Haskins, and Sells until June 2, 1979, when he resigned. On that date, which was the end of the firm's fiscal year, appellant-.was entitled to his partnership share of the firm's income together with a separation allowance. A letter dated March 16, 1979, from his employer outlining the financial arrangements surrounding his resignation indicated that the partnership income for 1979 would likely be paid to him in June, September, December of 1979 and the following April, and that the separation allowance would be paid at any time he designated after June 2, 1979. Appellant remained a California resident until July 10, 1979, when he moved to Montana where he became a resident. As indicated above, -appellant received payments from Deloitte, Haskins and Sells both before and after becoming a resident of Montana.

On his 1979 California income tax return, appellant allocated that income to California based upon the number of days he was a California resident during 1979. Upon audit, respondent determined that appellant's entire income from Deloitte, Haskins and Sells noted above was taxable in California because that income was derived from sources within California and also because appellant was a California resident when he became entitled to the income. (Rev. & Tax. Code, § 17596.) Appellant's protest and respondent's denial led to this appeal.

Gross income includes income from sources within this state for both residents (Rev. & Tax. Code, § 17041) and nonresidents (Rev. & Tax. Code, § 17951). It is well settled that the source of income from personal services is the place where the services are performed. (Appeal of Verne11 H. Petersen, Cal. St. Bd. of Equal., June 28, 1979; see also Cal. Admin. Code, tit. 18, reg. 17951-5(a)(3), dealing with accountants.) There is nothing in the record that would indicate that the subject compensation paid to appellant by the San Francisco office of Deloitte, Haskins and Sells was generated from sources other than from within this state. Indeed, appellant has made no such claim. Based upon the

record before us, we must therefore find that the subject payments are income from sources within this state which are taxable by California and respondent's determination must be sustained.[1/]

Appellant also argues that delays by respondent have violated his constitutional rights to due process. We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution precludes our determining that the statutory provisions involved here are unconstitutional or unenforceable. In brief,- section 3.5 of article III provides that an administrative agency has no power to declare a statute unconstitutional or unenforceable unless an appellate court has made such a determination. In any event, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this decision.

Again, we have no choice but to sustain respondent's action here.

1/ Since taxation is imposed here on a source basis, section 17596 noted above is irrelevant since that section deals only with taxation affected by a change in residency. (Appeal of Virgil M. and Jeanne P. Money, Cal. St. Bd. of Equal., Dec. 13, 1983.) Accordingly, there is no reason for us to address respondent's second basis for taxation or appellant's reliance upon Appeal of Jerald L. and Joan Katleman, decided on December 15, 1976, both of which deal with change-of-residency situations.

Appeal of Ronald P. and Gertrude B. Foltz

ORDER

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 Ronald P. and Gertrude B. Foltz against a proposed assessment of additional personal income tax in the amount of $4,345.30 for the year 1979, be and the same is hereby sustained.

Done at Sacramento, 'California, this 9th day of April, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9