

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
HENRY D. AND RAE ZLOTNICK )

Appearances:

For Appellants: Henry D. Zlotnick, in pro. per.  
For Respondent: Benjamin F. Miller  
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 Henry D. and Rae Zlotnick against a proposed assessment of additional personal income tax in the amount of \$188.33 for the year 1966.

The question for decision is whether certain monthly retirement benefits received by appellant Henry D. Zlotnick were subject to the California personal income tax.

Appellants became residents of California on March 6, 1964. Prior to that time they had lived in the State of New York. Appellant Henry D. Zlotnick was employed by the United States Government from September, 1917, to December 20, 1963, at which time he retired from federal service after some 43 years with the Internal Revenue Service.

Upon retirement appellant became eligible for benefits under the United States Civil Service Retirement Act. During his years of employment with the federal government, he had made contributions to the Civil Service Retirement Fund totalling \$14,683.88. At the time of his

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retirement appellant had the following options under the Civil Service Retirement Act: (1) he could withdraw his contributions of \$14,683.88, plus interest, thereby terminating all of his annuity rights under the act; (2) he could take a lifetime annuity for himself, with a survivor annuity to his wife; or (3) he could accept a reduced lifetime annuity for himself with an increased survivor annuity to his wife. Appellant chose the third option, with his annuity payments being set at \$840.00 per month for his life, and a survivor annuity for his wife, Rae, of \$497.00, the latter payments to commence on the death of appellant and to continue until Mrs. Zlotnick's death. The annuity payments were payable the first day of each month, for the preceding month.

Appellant was notified on January 28, 1964, that his first annuity check in the amount of \$1,103.19 would be mailed no later than February 10, 1964, representing benefits payable for the period from December 21, 1963 through January 31, 1964. Regular monthly payments followed that initial check, and by the end of 1965 appellant had recovered the entire amount of his contributions to the Civil Service Retirement Fund.

During 1966 appellant received twelve monthly annuity payments of \$840.00, plus a \$600 cost-of-living adjustment, or total benefits of \$10,680.00. In the joint California personal income tax return which they filed for 1966, appellants included only the \$600.00 cost-of-living adjustment in their gross income. On appeal appellants argue that no part of the \$10,680.00 received from the federal government during 1966 is taxable for California income tax purposes.

Except as otherwise provided in the law, the California personal income tax is imposed upon the entire taxable income of every resident of California and upon the income of nonresidents which is derived from sources within California. (Rev. & Tax. Code, § 17041.) Where a change in residency occurs, 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 includible in respect of the period prior to such change, but the taxation or deduction of items accrued

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prior to the change of status shall not be affected by the change.

This accrual method of allocating income and deductions applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. (Cal. Admin. Code, tit. 18, reg. 17596.) If sections 17041 and 17596 are read together, it appears that Mr. Zlotnick's retirement income is subject to California's Personal Income Tax Law unless it accrued as income prior to the time appellants moved to 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. 1613 [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.)

In the instant case appellant argues that his retirement benefits were in the nature of deferred compensation for past services rendered entirely outside the State of California, which were therefore not subject to tax in California. He contends that upon his retirement his rights to future annuity payments for himself and for his wife, Rae, became vested, with no contingencies or events left to occur before he was entitled to his retirement benefits.

Under the Civil Service Retirement Act, an annuity does not become payable until "the first business day of the month after the month or other period for which it has accrued." (5 U.S.C.A. § 8345(a).) This language indicates that a retiring federal employee has no vested right in any monthly annuity benefit until its payment becomes due. Respondent concedes that those monthly checks received by appellant prior to the date he and his wife moved to California were not subject to tax in

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California. Respondent also concedes that any unrefunded contributions made by appellant to the Civil Service Retirement Fund would constitute income which had "accrued," within the meaning of section 17596 of the Revenue and Taxation Code, prior to the time appellants became California residents. (Appeal of Dr. F. W. L. Tydeman, Cal. St. Bd. of Equal., Jan. 5, 1950.) In the event that appellants had both died prior to the recovery of the entire \$14,683.88, plus interest, all unrefunded contributions would have been paid to the estate of one of them, depending on who was the last decedent (5 U.S.C.A. 3 8342). Thus, appellants had vested rights in the annuity to the extent of \$14,683.88, plus interest, and that amount of benefits was not subject to tax in California.

By 1966, however, all of Mr. Zlotnick's contributions had been recovered. At that point in time appellants' position was substantially similar to that of the taxpayers in Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., decided Jan. 6, 1969, and Appeal of Lee J. and Charlotte Wojack, Cal. St. Bd. of Equal., decided March 22, 1971. In each of those cases we held that the retired employee's right to his monthly retirement benefits was contingent upon his surviving through the month and, therefore, until he actually received each pension payment there was no accrual of income within the meaning of section 17596 of the Revenue and Taxation Code.

In the instant case, if appellant had predeceased his wife, Rae, after January 1, 1966, it is true that Mrs. Zlotnick would have been entitled to a survivor annuity for the remainder of her life. Although no such survivor benefits existed in the Flaherty and Wojack appeals mentioned above, we must nevertheless reach the same conclusion here as we did in those appeals. Had Mrs. Zlotnick predeceased her husband, the right to any survivor benefits would have been terminated. As of 1966, after Mr. Zlotnick's contributions to the Civil Service Retirement Fund had been recovered, the rights of both appellants to the monthly annuity benefits payable under the Civil Service Retirement Act were subject to the substantial contingency of their continued lives. Respondent therefore properly determined that the retirement income which Mr. Zlotnick received in 1966 was subject to tax in California.

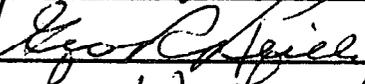
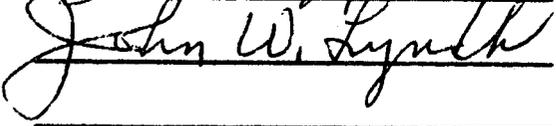
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**O R D E R**

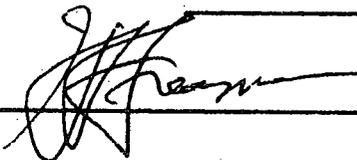
Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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 **Henry D. and Rae Zlotnick** against a proposed assessment of additional personal income tax in the amount of **\$188.33** for the year 1966 be and the same is hereby **sustained.**

Done at Sacramento, California, this 6th day of May, 1971, by the State Board of Equalization.

  
\_\_\_\_\_, Chairman  
  
\_\_\_\_\_, Member  
  
\_\_\_\_\_, Member  
\_\_\_\_\_, Member  
\_\_\_\_\_, Member

ATTEST:

  
\_\_\_\_\_, Secretary