BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
EDWARD AND ANNE J. RITTENHOUSE)

For Appellants: Bernard J. Kurtin
Certified Public Accountant

For Respondent: Bruce W. Walker
Chief Counsel

Paul J. Petrozzi
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 Edward and Anne J. Rittenhouse against a proposed assessment of additional personal income tax in the amount of $203.19 for the year 1973.

Appeal of Edward and Anne J. Rittenhouse

The issue is whether appellants are entitled to capital gains treatment for a second lump sum distribution from a qualified profit-sharing retirement trust.

Until 1969, appellant was a corporate officer and shareholder of Dockside Machine and Ship Repair. On September 30, 1969, appellant sold all of his shares in the corporation and terminated his employment. During the course of his employment, commencing in 1963, appellant was covered by the corporation's profit-sharing retirement plan. The profit-sharing plan was a qualified employees' trust as described in section 17501 of the Revenue and Taxation Code, which is exempt from tax under section 17631 of that code.

In 1971 appellant elected to take a lump sum distribution of his interest in the qualified plan. On January 4, 1972, he received $11,277.45. Appellant immediately objected to the committee administering the fund, asserting that the amount paid was insufficient. After negotiation and the threat of a lawsuit, the matter was settled. On April 13, 1973, appellant received an additional distribution of $6,092.00. For the most part, the discrepancy resulted from the failure of the plan administrators to properly calculate contributions and allocate forfeitures of prior terminating employees.

On their 1972 return, appellants correctly treated the initial lump sum distribution received in 1972 as a gain from the sale of a capital asset held for more than five years. On their 1973 return, appellants also treated the second distribution which was received in 1973 as a long-term capital gain. Respondent denied capital gains treatment to the second distribution and required that appellants treat the distribution as ordinary income. Appellants' protest against the resulting proposed assessment was denied and this appeal followed.

Section 17503 of the Revenue and Taxation Code provides that, in the case of an exempt employees' trust, if the totai distributions payable with respect to any employee are paid to the distributee within one taxable year of the distributee on account of the employee's separation from the service, the amount of such distribution, to the extent exceeding the net amounts contributed by the employee, shall be considered a gain from the sale or exchange of a capital asset held for more than five years. In order to qualify for long-term capital gain treatment, the statutory requirement concerning time Of distribution is explicit. The entire amount of the distributable funds must be paid to the taxpayer within a single taxable year of the taxpayer. (See Cal. Admin. Code, tit. 18, reg. 17503(a) (6).)

The California law concerning distributions from qualified employees' trusts is similar to the corresponding federal law. (See Int. Rev. Code of 1954, § 402(a) (2).) Accordingly, federal interpretations are highly persuasive of the result to be reached under the California law. (Meanley v. McColgan, 49 Cal. APP. 2d 203 [121 P.2d 45] (1942).)

The Internal Revenue Service has ruled adversely to the taxpayer in a situation factually quite similar to the one Presented by this appeal. (Rev. Rul. 190, 1969-l Cum. Bull. 131.) In that ruling, an employee received a lump sum distribution in the same year he was separated from his employment. The employee properly treated this amount as a long-term capital gain in his return for that year. During the employee's next taxable year the plan actuary determined that the employee was entitled to an additional amount which was -distributed to the employee. Notwithstanding the fact that the employee was free from fault, the Service ruled that the second distribution was not entitled to capital gains treatment since it was paid in another taxable year. (See also Rev. Rul. 292, 1960-2 Cum. Bull. 153; Rev. Rul. 164, 1967-1 Cum. Bull. 88; Beecher v. United States, 226 F. supp. 547, 550 (D.C.N.D. Ill. 1963).)

In the absence of contrary authority, we believe this ruling controls the instant appeal. Consequently, we conclude that the payment in 1973 was not part of the total distributions paid in one taxable year on account of appellant's separation from employment. The second distribution, therefore, is not entitled to long-term capital gain treatment, but is taxable as ordinary income.

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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 Edward and Anne J. Rittenhouse against a proposed assessment of additionalpersonal income tax in the amount of $203.19 for the year 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of May, 1978, by the State Board of Equalization.

__________________, Chairman

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