

Appeal of Munson E. and Dorothy Moser

The question for decision is **whether** certain monthly pension payments received by Munson E. Moser during 1975 and 1976 were subject to the California personal income tax.

Dorothy is included as an appellant solely because she and Mr. Moser filed a joint return. Appellant shall refer to Mr. Moser. Appellants moved their residence from California to **Nevada** on October 15, 1974, and have lived there continuously since that time; Appellant had been an employee of the Los Angeles **Police Department** but retired on June 20, 1974, and since then has been receiving monthly pension payments. Appellant and the City of Los Angeles had both contributed to the pension fund. Prior to 1975 he had recovered his contributions. Pursuant to this pension plan, the only option of a former employee is to receive monthly payments for as long as he lives, with a reduced monthly amount **payable to** a surviving spouse upon the member's death as long as the spouse thereafter lives. Thus, the right to receive the monthly pension as a consequence of the prior employment is contingent upon the continued life of the member and the subsequent continued life of the spouse.

Appellants filed nonresident tax returns for the years 1975 and 1976, and included the pension payments received during those years as taxable income. In 1977, appellants filed claims for refund, maintaining that the pension payments were not taxable. Denial of the claims resulted in this appeal.

Section 17041 provides that the California personal income tax "shall be imposed ... upon the entire taxable income of every nonresident which is derived from sources within this state. ..." (Emphasis added.) (See also § 17951.) Thus, the pension income received by appellants in 1975 and 1976 is taxable for California income tax purposes if it is determined that such income was derived from sources within this state.

Appellants first contend that the pension payments had an out-of-state source, and were **consequently** nontaxable because the right to receive them did not accrue until after appellants became residents of Nevada. While we agree with appellants' assertion that the right to receive the **1975** and 1976 pension payments did not accrue while appellants were residents

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of California,^{2/} we must reject the contention that the income was thereby derived from an out-of-state source.

A retirement annuity or pension is regarded as in the nature of deferred compensation for personal services. (Appeal of John J. and Virginia Baustian, Cal. St. Bd. of Equal., March 7 1979; see W. F. Williams, 51 T.C. 346 (1968).) It is settled that the source of income from personal services is the place where the services are actually performed, and not the residence of the taxpayer or the place of payment. (Appeal of Janice Rule, Cal. St. Bd. of Equal., Oct. 6, 1976; Ingram v. Bowers, 47 F.2d 925 (S.D. N.Y. 1931), affd., 57 F.2d 65 (2d Cir. 1932); Appeal of Estate of Marilyn Monroe, Dec'd, Cal. St. Bd. of Equal., April 22, 1975.) The fact that the compensation is contingent does not alter this rule. (Ingram v. Bowers, supra; Appeal of Estate of Marilyn Monroe, Dec'd, supra.) The record in this appeal indicates that the pension payments made to appellant during 1975 and 1976 were attributable to the performance of services by appellant as an employee of the City of Los Angeles.

Appellants rely on section 17596 in support of their position that the pension income is derived from an out-of-state source. Section 17596 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 prior to the change of status shall not be affected by the change.

^{2/} The substantial contingencies of the continued lives prevented accrual of each payment prior to its actual receipt. (Appeal of Henry D. and Rae Zlotnick, Cal. St. Bd. of Equal., May 6, 1971; Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6, 1969.)

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It is appellants' claim that any income accrued subsequent to a taxpayer's change of status from resident to nonresident must be treated as income derived from sources without this state pursuant to the language of section 17596. We disagree.

We conclude that, under that provision, where income accrues prior to a change in residency, the taxpayer is treated as an accrual basis taxpayer, even though he normally would report on a cash basis. Pursuant to the statutory language, the time of liability, if liability is incurred, is not changed. The effect of this provision is to treat the taxpayer as if a residency change had not occurred in those instances where income accrues prior to the change;

Therefore, in accordance with this statute, where a nonresident taxpayer accrues income out-of-state and thereafter becomes a California resident and receives the income subsequent to the change of status, the income is nontaxable even though the taxpayer is on a cash basis. (Appeal of Dr. F. W. L. Tydeman, Cal St. Bd. of Equal., Jan. 5, 1950.) In the absence of section 17596, the income, notwithstanding its out-of-state source, would be taxable to a cash basis taxpayer because of its receipt while the taxpayer is a **resident** of this state. The drafters of the statute no doubt felt that it would be inequitable to tax the income where all the events required to accrue the income had been performed outside this state, before the taxpayer became a California resident. Consequently, where the income of such taxpayer accrues prior to the change, the taxpayer is put on an accrual basis, and the subsequent residence change is disregarded.

In the contrasting situation, where a California resident accrues income with a source outside this state and after such accrual becomes a resident of **another** state, receiving the income subsequent to the change, the income is taxable, in view of this provision. In the absence of the statute, the **subsequently** received income by a cash basis taxpayer would not be taxable. Thus, this specific legislation again achieves a consistent and apparently equitable result by imposing the tax on the income accrued prior to the change of residence since all the events required to accrue **the** income are performed while the taxpayer is a California resident.

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Section 17596 expressly deals only with income accrued prior to a change of residency status. With respect to income accrued subsequent to a change of residency status, section **17596** is not operative. Consequently, this board has consistently held that, regardless of its out-of-state source, pension income constituting compensation for personal services performed out-of-state accrued and paid subsequent to a change of status from nonresident to resident, **is** taxable under section 17041, as income of a resident. (See, e.g., Appeal of Henry D. and Rae Zlotnick, supra (footnote 2); Appeal of Edward B. and Marion R. Flaherty, supra (footnote 2).)

Similarly, we have held that where pension income, constituting compensation for personal services performed in this state, accrues subsequent to a change of status from residency to **nonresidency**, as in the appeal before us, the income is still derived from a source within this state and is taxable, pursuant to section 17041, notwithstanding that it is received after the taxpayer has become a nonresident. (Appeal of John J. and Virginia Baustian, supra.)

Appellants next urge that the source of the income is out-of-state based on their premise that the income was not "earned" in California, nor has a "business **situs**" in this state. Specifically, they maintain that each monthly amount of income was not "earned" until it accrued, upon survival to date of payment, which event occurred after appellant became a nonresident. Based upon the assumption that it was not "earned" in this state, they claim that it is incorrect to treat this income as compensation derived from personal services performed in California. In asserting this view, they rely upon the decision in Charles R. Wilkerson, 44 T.C. 718 (1965), affd. per curiam, 368 **F.2d** 552 (9th Cir. 1966). Appellants claim that the monthly pension more realistically constituted income from "other intangible **personal** property," which, pursuant to section 17952, would not constitute income derived from a source **withi**n this state. 3/

3/ Section 17952 provides:

Income of nonresidents from stocks, bonds, notes, or other intangible personal property is not income from sources within this State unless the property has acquired a business **situs** in this State, except that if
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We also disagree with this position of appellants. The decisive feature is that the services were rendered in this state. We recognize that receipt of the payments was contingent upon survival while out-of-state. But this cannot obscure the fact that the source, i.e., the origin of the income, was the service as an employee, performed in California. (See Ingram v. Bowers, supra.)

Moreover, appellants' reliance upon Wilkerson is misplaced. In that case, the court merely held that the monthly army retirement benefits were not acquired, for purposes of determining whether they constituted community or separate property income, until thirty years of service were completed. The court indicated that the taxpayer might still be said to have earned the income over the period of service, and the court said that retirement pay of military personnel is predicated on the performance of past services.

Furthermore, we are unable to conclude that the income was derived from an intangible, whose situs and thus source, was in the state of appellant's residence when received under the doctrine of mobilia sequuntur personam. Neither decisions cited by appellants, nor any others of which we are aware, suggest that a contract right to receive additional payments for personal services even though the payments are contingent upon subsequent events, is an intangible subject to the mobilia doctrine. (See Appeal of Estate of Marilyn Monroe, Dec'd, supra.)

For the foregoing reasons, we must sustain respondent's action.

3/ (Continued from page 5.)

a nonresident buys or sell such property in this State or places orders with brokers in this State to buy or sell such property so regularly, systematically, and continuously as to constitute doing business in this State, the profit or gain derived from such activity is income from sources within this State irrespective of the situs of the property.

