



OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MAY DEPARTMENT STORES COMPANY)

Appearances:

For Appellant: Raymond R. Hails, its Attorney; C. L. Richardson, Certified Public Accountant of Touche Nevin & Co.
For Respondent: Chas. J. McColgan, Franchise Tax Commission

O P I N I O N

This is an appeal pursuant to Section 25 of the California Bank and Corporation Franchise Tax Act from the action of the Franchise Tax Commissioner in overruling the protest of May Department Stores Company against a proposed assessment of additional tax in the amount of \$3,022.38.

The Appellant deducted from its gross income for the taxable year ended January 31, 1931, additional Federal income taxes for the years 1917 to 1928 in the amount of \$1,400,848.27, paid by it during the year. Liability for these taxes was vigorously contested by Appellant, and, as a result, Appellant's liability therefor was not finally fixed and determined until during the taxable year ended January 31, 1931, when the taxes were paid by Appellant. The disallowance by the Commissioner of the above item as a deduction resulted in the proposed assessment of additional tax in question.

The pertinent provisions of the Act are contained in Section 8c which provides, insofar as is relevant, that from gross income there shall be allowed as deductions,

"Taxes or licenses paid or accrued during the taxable year; * * * and provided, further, that the deduction allowed for Federal income taxes shall be the amount of such taxes accrued during the taxable year. * * *"

In view of the above provisions it appears that Federal income taxes are deductible from the gross income of a taxable year, only in the event they have "accrued" during that year. Hence, the problem for determination is whether additional Federal income taxes for the years 1917 to 1928, inclusive, are to be considered as having "accrued" during the taxable year ended January 31, 1931, when after litigation, liability for said taxes was finally fixed and determined and the taxes were paid.

It is clear, as conceded by Appellant, that the taxes in question cannot be considered as having accrued during the taxable

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'year ended January 31, 1931, simply because they were paid during that year. To hold otherwise would result in rendering meaningless and superfluous the term paid in the phrase "paid or accrued" which appears in various sections of the Act, including Section 8c above quoted in part.

Although the taxes in question are taxes for the years 1917 to 1928 and although these taxes cannot be considered as having accrued in the taxable year ended January 31, 1931 merely because they were paid during that year, Appellant nevertheless contends that these taxes should be considered as having accrued in said year inasmuch as Appellant's liability therefor due to litigation was not finally fixed and determined until during said year.

We are unable to concur in this view. The taxes involved in this appeal were assessed, apparently, prior to the taxable year ended January 31, 1931, and, unquestionably, would have accrued had there been no litigation prior thereto. No authority has been called to our attention, nor are we aware of any, which lends support to the proposition that a taxpayer, by contesting the liability to pay taxes, can postpone the accrual date thereof. In fact, the contrary view is supported by the Appeal of Bartles-Scott Oil Co., 2 B.T.A. 16, the only case we have found bearing directly on this point. In this appeal? it was held that **litigated taxes** are to be considered as having accrued at the time they would have accrued had there been no litigation.

Furthermore, it is our opinion, in view of the decision and opinion of the United States Supreme Court in the case of United States vs. Anderson, 269 U.S. 422, that a tax, except when otherwise provided by the laws or law imposing the tax, should be considered as accruing when all the events occur which give rise to the tax and on the basis of which the amount of the tax can be determined and the liability of the taxpayer therefor can be predicated.

It was held in United States vs. Anderson that the tax on munitions manufactured and sold in 1916 was deductible for Federal income tax purposes, by a taxpayer reporting on the **accrued** basis, in the year when the munitions were manufactured and sold, i.e., 1916, although the tax was not assessed and was not due and payable until 1917, when it was paid. In the opinion in this case, the Court said, at p. 440:

"Only a word need be said with reference to the contention that the tax upon munitions manufactured and sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the **munitions** tax here in question did

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"not stand on any different footing than other accrued expenses appearing on Appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued."

United States vs. Anderson, was followed in Aluminum Casing Co. vs. Routzahn, 222 U.S. 92. We are of the opinion that these cases are authority for the proposition that a tax may be considered as having accrued, at least for accounting purposes, when all the events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it, although the tax has not been assessed, has not become due and payable, and has not been paid.

Consistent with the opinion and decisions in the above cases, we find the following statement in the Appeal of H. H. Brown Co. vs. Commissioner of Internal Revenue, 8 B.T.A. 112, at 117,

"Under the accrual system, the word 'accrued' does not signify that the item is due in the sense of being then payable. On the contrary, the accrual system wholly disregards due dates. Neither is it necessary that the amount of an incurred liability be accurately ascertained in order to accrue it."

In view of the above, we are of the opinion that the taxes herein in question cannot be considered as having accrued for accounting purposes during the taxable year ended January 31, 1931, inasmuch as long prior thereto the events had occurred which fixed the amount of the taxes and determined Appellant's liability therefor. We are also of the opinion that the only federal income taxes which may be deducted under Section 8c of the Act are taxes which could be considered as having accrued on a taxpayer's books kept on the accrual basis, and, consequently, the taxes herein involved cannot be considered as having accrued during the taxable year ended January 31, 1931, within the meaning of Section 8c.

Section 11c provides that the phrase "'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed hereunder". It is true that only the term "accrued" and not the phrase "paid or accrued" is used in the provision in Section 8c relating to the deductibility of Federal income taxes. But if the phrase "paid or accrued" had been used, then, clearly in view of the above cited cases, and in view of the provision of Section 11c, a taxpayer keeping books on the accrual basis, could not have deducted the taxes under consideration during the year for which the Appellant claims a deduction. To reach a different result because only the term "accrued" is used, rather than the phrase "paid or accrued", would result in giving to the term "accrued" when used alone, a different construction than when used in the phrase "paid or accrued". This, we do not believe, was intended.

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Rather, we believe, that terms used in the Act should be given the same meaning wherever they appear unless a contrary intent is definitely expressed.

In this connection, it is to be noted that the Appellant has called our attention to the use of the term "accrue" in Section 4 of the ~~Act wherein~~ it is provided, that

"Taxes under this section and under sections 1 and 2 of this act shall accrue on the first day after the close of the 'taxable year' as defined in section 11 hereof."

Appellant contends that the term "accrued" in Section 8c of the Act relating to the deduction of Federal income taxes should be construed consistently with the term "accrue" in the above quoted portion of Section 4 of the Act, for "surely there is no reason to suppose that the Legislature used the word **in** one sense in one paragraph of the Act and in an entirely different sense in another paragraph."

With this view, we are in entire accord. But we are unable to perceive how Appellant **is** benefited thereby. At the time the taxes imposed by the Act "accrue" in accordance with Section 4, they are not assessed, are not **definitely ascertained** in amount, **and are** not due and payable. Furthermore, the liability of the taxpayer to pay the taxes is not finally determined in the sense that the liability to pay the taxes involved in this appeal became finally determined during the taxable year ended January 31, 1931. Hence, it is clear that the Appellant's claims in this appeal would in no way be furthered by giving to the term "accrued" as used in Section 8c the same meaning as should be given to the term "accrue" in Section 4. If our construction of the term "accrued" in Section 8c differs from the construction which should be placed on the term "accrue" in Section 4, Appellant, insofar as this appeal is concerned, has no cause to complain.

In support of the view that the taxes in question should be considered as accruing **in** the year claimed Appellant relies on the case of United States vs. Woodward, 256 U.S. 632. In this case, it was held that Federal estate taxes were deductible in computing Federal income taxes, and, under the particular facts of the case, were deductible in the year when due (1918) rather than in the year when paid (1919). In support of this holding, the Court stated at page 635:

"Here the estate tax not only 'accrued' which means became due, during the taxable year of 1918, but it was paid before the income for that year was returned or required to be returned."

We do not believe that this case is helpful in deciding the instant appeal, Here we are not concerned with the problem of deciding whether taxes should be deducted in the year when due and payable rather than in the year when paid. Furthermore, it is to be noted that United States vs. Woodward was carefully

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distinguished and held not applicable to the situation confronting the court in United States vs. Anderson, supra. We think the facts of the latter case are more nearly analogous to the facts of the instant appeal than those of United States vs. Woodward.

We conclude, then, that additional **Federal income** taxes for the years **1917** to **1928**, liability for which was not finally determined, and payment not made until during the taxable year ended January **31, 1931**, cannot be considered as having accrued under Section **8c** of the Act, during said taxable year, and, consequently, were properly disallowed as a deduction from **Appellant's** gross income for that year. We are unable to perceive **how this** conclusion results in any injustice or unfairness to the Appellant. Most of the taxes claimed as a deduction were for years prior to January 1, 1928. As indicated in the Appeal of the Institute of Musical Education, Ltd., decided by us on April 21, 1932, **income realized** and losses sustained during years prior to January 1, 1928, are not considered for the **purpose** of computing taxes composed by the Act. We do not believe it can be fairly claimed that different treatment should be accorded to Federal income taxes.

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, that the action of the Franchise Tax Commissioner, in overruling the protest of May Department Stores Company, a corporation, against a proposed assessment of an **additional tax** in the amount of **\$3,022.38**, based upon the return of said corporation for the period ended January **31, 1931**, under Chapter **13, Statutes** of 1929, be and the same is hereby sustained.

Done at Sacramento, California, this 11th day of May, 1932,
by the **State** Board of Equalization.

R. E. Collins, Chairman
Fred E. Stewart, Member
H. G. Cattell, Member
Jno. C. Corbett, Member

ATTEST: Dixwell L. Pierce, Secretary