



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
ARTHUR C. OPPENHEIMER }

Appearances:

For Appellant: Scott H. Dunham, Certified Public Accountant
For Respondent: Harrison Harkins, Assistant Franchise Tax
Counsel

O P I N I O N

This appeal is made pursuant to Section 19 of the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended), from the action of the Franchise Tax Commissioner in overruling the protest of Arthur C. Oppenheimer to a proposed assessment of additional tax for the year ended December 31, 1935, in the amount of \$1,967.92.

During the years 1934 and 1935 the Appellant was employed as Vice-President and General Manager of Rosenberg Bros. & Co. under an agreement whereby he received, in addition to a monthly salary, a bonus equal to 8% of the company's net profits. Although the terms of the agreement with respect to the manner of computing and paying the bonus have not been established in any detail? it does appear that the company kept its accounts on the basis of a fiscal year ending May 31, and that the ~~bonuass~~ due its officers and employees were customarily paid annually, shortly after the close of each fiscal year. For the fiscal year of the company ending on May 31, 1935, the Appellant received as a bonus the sum of \$42,344.64, and the extent, if any, to which this sum represents income accrued prior to January 1, 1935, is the sole question presented by this appeal.

On the ground that at least 7/12 of this amount had accrued prior to January 1, 1935, and therefore, under Section 36 of the Personal Income Tax Act and Article 36 of the Regulations Relating to the Act, was not subject to the tax, the Appellant and his wife, in reporting their income for the year 1935, included in their respective gross incomes only 5/12 of their community property shares of the bonus. The Commissioner took the position that no portion of the bonus accrued prior to January 1, 1935, and on the basis thereof levied his proposed assessment of additional tax. He justifies his action on the ground that under the agreement between the company and Appellant the bonus was computed on the basis of the company's profits for the fiscal year, and, therefore, no portion of the annual bonus accrued until the close of the fiscal year.

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Without presenting any evidence as to the specific terms of the bonus agreement, except that it was computed at the rate of 8% of the company's net profits, the Appellant contends that the bonus liability of the company "accrued from day to day", so that on December 31, 1934, a bonus was **actually due** him on account of his services from June 1 to December 31, based upon the company's profits for that period. In this connection he states that the company's accounting records reflect its net income as at the close of each month, and he has presented evidence that substantially more than 7/12 of the company's net profit for the fiscal year in question was earned prior to January 1, 1935. He has also submitted the opinion of R. S. Geen the Secretary of the company, to the effect that he "was legally entitled to not less than \$24,701.04 (7/12 of \$42,344.64) as his share of the bonus liability for the year ended May 31, 1935, as at December 31, 1934." In support of this position the Appellant cites a number of decisions of the United States Supreme Court which hold that an item of income or expense accrues when all the events that create the right or liability have occurred, even though the exact amount is not known. (See *United States v. Anderson*, 269 U. S. 422; *Continental Tie & Lumber Co. v. United States*, 286 U. S. 290.) In our opinion, however, he has failed to submit evidence sufficient to bring himself within this proposition.

In view of the fact that his salary was paid to him monthly and that the company's records disclosed its net income at the close of each month, so that the bonus could likewise have been paid monthly if it did accrue from day to day as alleged, we think the circumstance that no portion of the bonus was paid until the close of the fiscal year is not satisfactorily explained by Appellant's statement that this method of payment was followed "as a matter of convenience," or that it is overcome by the mere opinion or conclusion of the company's Secretary and of Appellant that a legal liability existed at December 31, 1934, but that it indicates that the bonus was on an annual basis. In other words, it indicates that no bonus was due if the company's operations for the entire fiscal year failed to result in a net profit, even though the operations of the first seven months of the year, considered by themselves, resulted in a profit. Under such circumstances there could be no fixation of the rights of the parties, and therefore no accrual of income, prior to the close of the fiscal year, (*Commissioner v. R. J. Darnell, Inc.*, 60 F. (2d) 82, *United States v. Wood*, 79 F. (2d) 286).

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 that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Arthur C. Oppenheimer to a proposed assessment of additional tax in the amount of \$1,967.92 for the year ended December 31, 1935, be and the same is hereby sustained.

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Done at Sacramento, California, this 7th day of July,
1942, by the State Board of Equalization.

R. E. Collins, Chairman
Wm. G. Boralli, Member
George R. Reilly, Member
Harry B. Riley, Member

ATTEST: Dixwell L. Pierce, Secretary