



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
G. M. SPICER)

Appearances@

For Appellant: Hugo W. Jones, Tax Counsellor
G. M. Spicer, Attorney at Law.

For Respondent: W.M. Walsh, Assistant Franchise
Tax Commissioner.

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code (formerly Section 19 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in overruling the protest of G. M. Spicer to a proposed assessment of additional tax in the amount of \$472.16 for the taxable year ended December 31, 1936.

In 1928, Appellant, an attorney at law, was retained by the Double A Oil Association to defend its interest in certain oil property against a quiet title action brought by the Dabney-Johnston Oil Corporation. Appellant accepted the matter on the basis that if he successfully defended his client's rights to the interest, he would receive as compensation for his legal services fifty percent of such interest and would thus be entitled to one-half of the Association's portion of all oil, gas and other hydrocarbon substances produced and saved from the lands involved, or the cash equivalent derived from the substances when produced, saved and sold. In June, 1931, judgment was rendered in favor of the Double A Oil Association by the Superior Court of Los Angeles County, and this judgment was affirmed by the Supreme Court of California on November 29, 1935, rehearing denied on December 26, 1935..

On January 15 1936, by virtue of his agreement with the Double A Oil Association, Appellant received \$44,166.39 from the Dabney-Johnston Oil Corporation as his share of the production of the oil lands from December, 1936, to December 31, 1930, with interest thereon. On March 3, 1936, after the deduction of the share of an associate counsel, Appellant received an additional amount of \$3, 584.99, representing his 'portion of the production from January 1, 1931, to November 30, 1935, with interest thereon. Expenses of \$3,000.00 were incurred in connection with the receipt of these payments, Appellant thus retaining a balance of \$44,751.38.

In reporting his income for the taxable year 1936, the return being prepared on a cash receipts and disbursements basis, Appellant

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estimated that seventy-five percent of his compensation of \$44,751.38, or \$33,563.53, had been earned prior to January 1, 1935, the effective date of the Personal Income Tax Act, and he regarded that portion as **excludible** from taxable income **under** Section 36 of the Act and Article 36-1 of the Regulations relating thereto. The Commissioner regarded the entire amount received by Appellant in 1936 as income for that year and levied his proposed assessment accordingly.

The Commissioner's proposed assessment also reflected the disallowance of a deduction from gross income in the amount of \$1,000.00 claimed by the Appellant as a loss resulting from his payment of that amount in 1936 to one J. V. Moore in satisfaction of Appellant's note for \$1,250.00 which had been given to Moore in 1931 to compensate him in part for a mining venture loss.

The arguments advanced by Appellant in opposing the action of the Commissioner present the following questions for determination:

1. Whether the payments received by Appellant from the Dabney-Johnston Oil Corporation in 1936 constituted taxable income in that year?
2. If such payments did constitute taxable income in 1936, whether Appellant is entitled to a deduction for depletion?
3. Whether the payment to J. V. Moore constituted a deductible loss in the taxable year 1936?
4. Whether the 1939 amendment to Section 19 of the Personal Income Tax Act, extending from three to four years the time within which deficiency assessments may be proposed is applicable to deficiencies proposed for taxable years ending on or prior to December 31, 1938?

The Appellant having reported on a cash receipts and disbursements basis, the payments received by him in 1936 are includible in their entirety in taxable income for that year, even though it be assumed that some portion thereof may have accrued prior to 1935. Dillman v. McColgan, 63 Cal. App. 2d 405; Cullinan v. McColgan, 80 A.C.A. 1104.

We are also unable to accept Appellant's contention that there was a constructive receipt of the payments in 1935. It does not appear that the payments were credited without restriction to the Appellant in 1935, nor were they made available to him to the extent that they could be drawn and brought immediately within his control and disposition. Richards' Estate v. Commissioner, 150 Fed. 2d 837; Van W. Peabody, 5 T.C. 426.

A taxpayer is entitled to a deduction for depletion only if he has an economic interest in the oil and gas in place. Helvering v. O'Donnell, 303 U.S. 370; Kirby Petroleum-Co. v. Commissioner, 326 U.S. 606. The Appellant had no such economic interest prior to December 26, 1935, at which time his interest in the property and

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his right to any accumulations from production from that interest became fixed. A deduction for depletion, therefore, could not properly be allowed to the Appellant with respect to the payments herein involved. Massey v. Commissioner, 143 Fed. 2d 429; Leland J. Allen, 5 T.C. 1232.

The Appellant's contention must also be rejected as to the deductibility of the \$1,000.00 payment to Moore. The Commissioner has denied the existence of any obligation on the part of Appellant to reimburse Moore for his loss, stating that Appellant neither sold anything to him nor solicited his participation in the venture. Appellant has not presented any evidence to indicate that he interested Moore in the venture and guaranteed to reimburse him for any loss sustained. Even assuming, accordingly, that payment was made in 1936, rather than in 1931 when the note was given, Appellant has failed to establish any obligation to Moore, the satisfaction of which could result in a deductible loss (see Goldsborough v. Burnet, 46 Fed. 2d 432) or to indicate any other basis for the deduction of the \$1,000.00 as a loss under Section 8(d) of the Personal Income Tax Act.

The Appellant also contends that the Commissioner's proposed deficiency assessment is uncollectible inasmuch as notice thereof was not mailed within the three year period provided by Section 19 of the Personal Income Tax Act as in effect during the taxable year in question. Prior to the termination of that period, however, the Section was amended (Stats. 1939, p. 2557) to provide a four year period for mailing of the notice and the notice of the assessment involved herein was mailed within that four year period. The California Supreme Court has rejected the Appellant's position in Mudd v. McColgan, 30 A.C. 463, and held the four year period prescribed by the 1935 amendment to be controlling in this situation. The Commissioner's notice of proposed assessment was, accordingly, mailed within the time required by the Act.

Ⓞ R D E R

Pursuant to the view 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 Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of G. M. Spicer to a proposed assessment of additional personal income tax in the amount of \$472.16 for the taxable year ended December 31, 1936, be and the same is hereby sustained.

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Done at Sacramento, California, this 21st day of August,
1947, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
Geo. R. Reilly, Member
J. H. Quinn, Member
Jerrold L. Seawell, Member
Thomas H. Kuchel, Member

ATTEST: Dixwell L. Pierce, Secretary