BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JOSEPH C. and ALMA N. ORENGO)

Appearances:

For Appellant: Carlo S. Morbio, Attorney at Law

For Respondent : Burl D. Lack, Franchise Tax Counsel; Crawford H. Thomas, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner on the protests of Joseph C. and Alma N. Orengo to proposed assessments of additional personal income tax in the amounts of $15.00, $1.43, $8.37 and $10.42 for the years 1942, 1943, 1944 and 1945, respectively.

During the years in question Joseph C. Orengo, a resident of California, was employed as a truck driver in San Francisco by H. Moffat Co., a wholesale butcher. He aiso directed the activities of a baseball team maintained by this employer. Each year H. Moffat Co. granted him a leave of absence to play professional baseball outside California. He was so engaged for more than one-half of each year pursuant to contracts with baseball clubs which in each instance provided for his hire during the baseball season and gave the club the right to terminate the contract at any time and to assign and annually renew it. His compensation under the contracts was several times greater than that which he received from H. Moffat Co. Moreover, each club paid his costs of transportation from his place of residence to the club's Spring training camp, together with his board, lodging and necessary traveiing expenses during Spring training and similar expenses during the regular ball season incurred while away from the city in which the club had its playing field. He received nothing, however, from any club either for his living or other expenses in the city where the club had its playing field or for his transportation back to his place of residence at the conclusion of the season. He claims that under Section 8(a) of the Personal Income Tax Act and Section 17301 of the Revenue and Taxation Code these expenses are deductible as ordinary and necessary traveling expenses while away from home incurred in pursuit of a trade or business, particularly in that his employment as a professional baseball player was merely temporary and was of benefit to H. Moffat Co., allegedly his principal employer, in the training, experience and prestige resulting therefrom which he could bring to its ball team.

Section 17301 of the Revenue and Taxation Code, which is merely a codification of Section 8(a) of the Act, reads in part as follows:

> "In computing net income there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including .. . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;. ..."

This Section is to be considered along with Section 17351 of the Revenue and Taxation Code, which is a codification of Section 9(a) (1) of the Act, stating in part:

> "In computing net income no deduction shall in any case be allowed in respect of:
>
> (a) Personal, living, or family expenses . . ."

A leading case construing comparable provisions of the Federal Internal Revenue Code is Commissioner of Internal Revenue v. Flowers, 326 U.S. 463, in which the Court says that the following conditions must be satisfied before traveling expenses are deductible:

> "(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> "(2) The expenses must be incurred 'while away from home,'
>
> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade." (At page 470.)

It was held in the Flowers case that a taxpayer who maintained his home in one city when his principal post of duty (his employer's headquarters) was in another city could deduct neither his traveling expenses in going from one city to the other nor his hotel expenses at the place of duty, even though he was allowed to do some of his work in his home city. The reason given for this decision was that the third condition set forth above was not present.

It appears that the reasoning of the Flowers case is

equally applicable to a situation where the taxpayer engages in different businesses in two towns, at least if neither business is of a temporary nature (see S. M. R. O'Hara, 6 T.C. 331, especially the concurring opinion on page 846) for the Court in the Flowers opinion makes it clear that deductible travel expenses in the case of an employee can only arise if the employer's business forces the taxpayer to travel and be temporarily at some place other than his principal place of duty in order to advance the business interests of his employer.

The expenses incurred in returning to one's residence from employment engaged in on other than a temporary basis is the personal problem of the worker and, therefore, such expenses are not ordinarily deductible. This has heretofore been applied in a case involving a baseball player employed under contract provisions similar to those under consideration. Walter Schmidt, 11 B.T.A. 1199.

In the case at hand, Mr. Orengo's employment in professional baseball was not merely temporary. The right of renewal in the baseball contracts to which he was a party indicates that his employment thereunder was for an indeterminate length of time from season to season. For purposes of the deductibility of traveling expenses indeterminate employment is treated in the same manner as permanent employment, and not as temporary employment. Neyv. United States, 171 Fed. 2d 449; Arnold P. Bark, 6 T.C. 851. Although the evidence that Mr. Orengo received by far the greater part of his compensation and spent over one-half his time playing professional baseball cannot be considered conclusive proof that such playing was not merely a temporary occupation (Coburn v. Commissioner of Internal Revenue, 138 Fed. 2d 763), it does tend to show that his principal occupation was that of a professional ballplayer, and that his employment as such was not merely temporary. Unlike the situation in the Coburn case, such employment does not appear to have been a mere temporary diversion from a life-long career.

Appellants maintain that the expenses should be allowed because they were connected with Mr. Orengo's work for H. Moffat Co. They do not, however, in our opinion, meet the requirement of the Flowers opinion that an expense have a direct connection with the carrying on of the trade or business of the employer. Not only did H. Moffat Co. not pay Orengo any compensation for his time on leave, but it appears that any value that his activities during such period had to the business of the company was at best extremely indirect. Furthermore, the expenses had no direct connection with the carrying on of the trade or business of the various baseball clubs by which he was employed while on leave, but were merely personal expenses incurred for personal living at his principal post of duty and for returning home after the completion of employment, and, therefore, were not expenses incurred in pursuit of the trade or business of the clubs.

Appeal of Joseph C. and Alma N. Orengo

ORDER

Pursuant to the views 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 Chns. J. McColgan, Franchise Tax Commissioner, on the protests of Joseph C. and Alma N. Orengo to proposed assessments of additional personal income tax in the amounts of $15.00, $1.43, $8.37 and $10.42 for the years 1942, 1943, 1944 and 1945, respectively, be and the same is hereby sustained.

Done at Sacramento, California this 17th day of August, 1949, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J. H. Quinn, Member
J. L. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary