BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
R. H. SCANLON AND MARY M. SCANLON)

Appearances :

For Appellant: A, Wallace Helvern, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel
John S. Warren, Associate Tax Counsel

OPINION

These appeals are made pursuant to Section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of R. H. Scanlon and Mary M. Scanlon for refund of personal income tax for the year 1949 in the amounts of $8,301.39 for R. H. Scanlon and $494.55 for Mary M. Scanlon.

Appellants, husband and wife, were residents of California throughout the year 1949, In that year they received dividends upon stock which they held *in* corporations located and operating in Canada. A Canadian income tax of 15 percent was withheld from the dividends. It is the contention of Appellants that they *are* entitled to a credit for that tax against the tax imposed by this State.

Section 17976 of the Revenue and Taxation Code provides in part:

> "Subject to the following conditions, residents shall be allowed a credit against the taxes imposed by this part for net income taxes imposed by and paid to another state or country on income taxable under this part:
>
> "(a) The credit shall be allowed only for taxes paid to the other state or country on income derived from sources within that state or country which is taxable under its laws irrespective of the residence or domicile of the recipient,"

The narrow question presented is whether the source of the dividends was in Canada. If not, no credit may be allowed, There are two California cases which appear to be directly in point.

In Miller v. McColgan, 17 Cal, 2d 432 (1941), the question before the Supreme Court of California was whether a credit was allowable for a Phillippine tax on dividends received by a California resident from his stock in a corporation in the Phi lippines. The case arose under former Section 25(a) of the Personal Income Tax Act, the predecessor of the Section here involved, The court decided that the source of the dividends was the corporate stock and that the situs of the stock was the residence of the owner. It was therefore concluded that a credit was not allowable.

Subsequently a District Court of Appeal of this State has reached a different conclusion in Henley v, Franchise Tax Board, 122 Cal. App. 2d 1 (1953). The question there involved was whether a credit was allowable under Section 17976 (supra) for a Canadian tax upon dividends received by a California resident from stock in a Canadian corporation, It was concluded that a credit was proper. The court indicated its belief that the Miller decision was no longer the law since it was -based upon First National Bank v. Maine (1932), 284 U.S. 312, which was overruled in State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942).

It is, of course, fundamental that a ruling on the law of California pronounced by the Supreme Court of this State is controlling over a conflicting decision of a District Court of Appeal of this State (In re Halcomb, 21 Cal. 2d 126; Estate of Fleishman, 62 Cal. App. 2d 588). We are unable to find a material distinction in the facts involved in Miller v. McColgan (supra), Henley v. Franchise Tax Board (supra) and the appeal before us.

Appellants, however, emphasize the statement in the Henley decision that Miller v. McColgan is not the law today in view of tne reliance by the Court on First National Bank v. Maine (supra) which was overruled by State Tax Commissioner of Utah v. Aldrich (supra). The question in each of the latter cases was one of due process under the United States Constitution. In the Maine decision it was held that the state in which a corporation was located could not impose a tax on the transfer of stock in the corporation by a resident of another state upon his death. The court said that onlv the state of residence could impose such a tax. In the Aldrich case it was held to the contrary, that the state in which the corporation-was located could tax in such. circumstances and the court said that the state of residence of the stockholder could also tax, In Miller v. McColgan the earlier decision was cited, among others decided prior to the adoption of the Personal Income Tax Act, in connection with the proposition

that the legislative intent as to the word "source" should be construed in the light of court decisions existing at the time of the enactment. No federal question was involved. While the court indicated that the rule of the Maine case was currently the rule in the federal courts, it is apparent that the opinion was a matter of interpretation of a state statute as to which the state and not the federal courts are the final arbiters (Ware v. Heller, 63 Cal. App, 2d 817).

Appellants have urged that these dividends must have had their source in Canada since Canada imposed the tax. The following statement in Miller v. McColgan is applicable here:

> "That the Philippines may impose, such a tax does not mean that under our theories and our act such income is derived from the Philippines. Rather it simply, indicates that the Philippines have adopted a theory and philosophy of taxation different from that adopted by California, which has uniformly applied. the well-recognized principal of mobilia sequunter personam in determining the situs of intangibles for purposes of taxation."

The Franchise Tax Board has submitted a memorandum by the Attorney General of this State which thoroughly analyzes and compares the Miller and Henley decisions and states that the Miller decision is still the law. With that conclusion we are in accord. If the rule in the Miller case is to be changed, we believe the change must be made, in the absence of legislation; by the Supreme Court of this State,

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, pursuant to Section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of R, H, Scanlon and Mary M. Scanlon for refund of personal income tax in the amounts of $8,301.39 for R. H. Scanlon and $494.55 for Mary M. Scanlon, be and the same is hereby sustained.

Done at Sacramento, California, this 20th day of April, 1955, by the State Board of Equalization.

J. H. Quinn, Chairman

Paul R. Leake, Member

Robert E. McDavid, Member

Geo. R. Reilly, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. *Pierce*, Secretary