

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
 }
PAUL D. AND MILDRED W. NEWBY }

Appearances:

For Appellants: Charles R. Newby, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, 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 Board on the protest of Paul D. and Mildred W. Newby to a proposed assessment of additional personal income tax in the amount of \$1,528.45 for the year 1951.

Appellants, husband and wife, are residents of California. Appellant Mildred W. Newby is the income beneficiary of a trust created and administered in Canada. During the year in question the trustee withheld a 15 percent tax from Mrs. Newby's distributive share of the trust income and remitted the amount thereof directly to the Canadian authorities. Appellants reported the income from the trust on their joint personal income tax return filed with the Franchise Tax Board for the year 1951 and under Section 17976 (now Section 18001) of the Revenue and Taxation Code claimed a credit against their California tax for the tax paid to Canada,

Subject to certain limitations not in issue here-, Section 17976 allowed to a resident of California a credit against the personal income tax for "net income taxes imposed by and paid to another state or country" on income also taxable under the California statute. The Franchise Tax Board determined that the Canadian tax was not a net income tax and disallowed the credit, but under Section 17305 (now Section 17204) of the Code it allowed the amount of the tax as a deduction from gross income when it re-computed Appellant's California tax.

The tax paid to the Dominion of Canada was imposed under Part II of the Canadian Income Tax Act of 1948. The portions thereof pertinent to the question at issue in this

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appeal are as follows:

"96. (1) Every non-resident person shall pay an income tax of 15% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to him as, on account or in lieu of payment of, or in satisfaction of,

...

(c) income of or from an estate or trust,

...

97. (1) The tax payable under section 96 is payable on the amounts described therein without any deduction from those amounts whatsoever." (Emphasis added.)

Appellants rely upon Burgess v. State of California, 71 Cal. App. 2d 412, as support for their contention that the Canadian tax was a net income tax. That case involved a claim for credit on account of taxes paid to Canada under the Canadian War Income Tax Act of 1917 for the years 1935, 1936, 1937 and 1938. A substantial change, however, was made in the Canadian statute in 1942, when subsection (5) was added to Section 9B to provide:

"(5) No exemptions, deductions or tax credits provided by any other section of this Act shall apply in the cases of the taxes imposed by this section...."

The Canadian War Income Tax Act of 1917 was subsequently superseded by the Income Tax Act of 1948, the Canadian statute here in question, which similarly precluded any deductions in computing the tax on amounts paid to nonresidents.

In Keyes v. Chambers, 307 Pac. 2d 498, the Supreme Court of Oregon held that the tax imposed on nonresidents under Section 96(1) of the Canadian statute of 1948 was not a net income tax and that a resident of Oregon was not entitled to a credit for the Canadian tax under a credit provision apparently adopted from, and substantially similar to, the California provision, stating:

"We hold, as contended by the Commission, that to constitute a 'net income tax,' the statutes imposing such a tax must grant certain

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deductions or exemptions from the taxpayer's gross income. Without 'deductions' of a kind there cannot be a 'net' income." (Citation of authorities,)

...

"We also note that the facts in the Henley and Burgess cases disclose that all Canadian taxes were under the Act of 1917 and prior to its amendment in 1942, which added subsection 5 to Section 9B, previously referred to. This was a substantial change of distinguishing importance so far as non-resident Canadian taxpayers were concerned. The California cases, i.e., Burgess and Henley, are only interested in taxes imposed under the act of 1917 and have no reference to the Act of 1948..."

In the light of the reasoning of the Oregon Supreme Court, we conclude that the Burgess case is not controlling here and that the Canadian tax in question was not a net income tax. The action of the Franchise Tax Board, accordingly, must be sustained,

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Paul D. and Mildred W. Newby to a proposed assessment of additional personal income tax in the amount of \$1,528.45 for the year 1951 be and the same is hereby sustained.

Done at Sacramento California, this 18th day of September, 1957, by the State Board of Equalization.

Robert E. McDavid, Chairman

Paul R. Leake, Member

J. H. Quinn, Member

Geo. R. Reilly, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary