

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOHN M. AND MARIAN B. JOHNSTON }

For Appellants: John M. Johnston

For Respondent: Burl D. Lack, Chief Counsel;
A. Ben Jacobson, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of John M. Johnston and Marian B. Johnston to a proposed assessment of additional personal income tax in the amount of \$17.90 for the year 1957.

In 1957 John M. Johnston (hereafter referred to as Appellant), a member of an army reserve component, was involuntarily released from active duty as an officer because of reduction in force. Appellant received a lump-sum readjustment payment of 83,678, computed at the rate of one-half month's pay for each of his fifteen years of service. (50 App. U.S.C.A. § 1016.) Appellant immediately reenlisted for six years as an enlisted man, thereby also receiving a lump-sum reenlistment bonus of \$360. (37 U.S.C.A. § 238.)

Appellant filed a joint personal income tax return with his wife for the year 1957 in which he regarded the readjustment payment for fifteen years' service as a capital gain, treating 30 percent thereof, or \$1,103.40, as taxable income, relying on the language of Section 18151 of the Revenue and Taxation Code as it read in 1957.

Appellant also regarded the reenlistment bonus as a capital gain from the sale or exchange of a capital asset held for more than five years but not for more than ten years which under Section 18151, as it then read, would result in 40 percent, or \$144, of the gain being recognized in computing taxable income.

Respondent disallowed the treatment of the readjustment payment and reenlistment bonus as capital gains, contending that they constituted ordinary income, that there was neither any property that could be classified as a capital asset, nor any

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transaction that could conceivably come within the meaning of a sale or exchange, Respondent concluded the payments were merely compensation for personal services rendered in the past and for services to be rendered in the future.

Appellant contended the receipts should be considered as capital gains because they represent "a good many years ... spent in the service of the U. S. Army."

Section 18151 permitted capital gain treatment of 'gain "upon the sale or exchange of a capital asset." A capital asset is defined in Section 18161 as property (with certain exclusions not relevant here) held by a taxpayer. It is clear that Appellant received the consideration for personal services, not for property exchanged, and therefore the income constituted ordinary income and not capital gains.

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 John M. Johnston and Marian B. Johnston to a proposed assessment of additional personal income tax in the amount of \$17.90 for the year 1957, be and the same is hereby sustained,

Done at Sacramento, California, this 9th day of October, 1962, by the State Board of Equalization.

Geo. R. Reilly, Chairman

John W. Lynch, Member

Paul R. Leake, Member

Richard Nevins, Member

 , Member

ATTEST: Dixwell L. Pierce, Secretary