

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
WILLIAM C. AND JUNE R. VANDEVENTER)

For Appellants: **Mihran Krikorian ,**
Certified Public Accountant

For Respondent: **Burl D. Lack, Chief Counsel**
Peter S. Pierson, Assistant 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 William C. and June R. Van Deventer against a 'proposed assessment of additional personal income tax in the amount of \$377.04 for the year 1960.

William C. Van Deventer, a doctor, was employed by the County of Stanislaus as Medical Director of the Stanislaus Hospital. His contract was renewed for one year on April 1, 1955. On September 28, 1955, he was **summarily** discharged by the County Board of Supervisors and thereupon brought suit for breach of contract. In 1960, after trial, Dr. Van Deventer was awarded **\$12,017.68**, which included an amount of **\$9,253.04 designated** as salary for calendar years 1955 and 1956. **Appell-**ants computed their income tax on this amount as though it had been earned in those two years. Respondent disallowed this method of computation on the ground that the **\$9,253.04** was not "**back pay.** "

Section 18243 of the Revenue and Taxation Code provides that if the amount of back pay received by an individual during a taxable year exceeds 15 percent of the individual's

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gross income for that year, then **the** amount of tax attributed to that back pay shall not be greater than the total of the increases in taxes which would have resulted if the back pay had been received in the years **to** which it is attributed. Section 18244 defines back pay as remuneration, including wages, salaries, retirement pay, and other similar compensation, which is "... received or accrued during the taxable year by an employee for services performed **before** the taxable year..." and which would have been paid but for the intervention of certain specified circumstances.

Section 18244 is substantially the same as section 1303(b) of the Internal Revenue Code which defines back pay for purposes of federal taxation.

In Estate of Lester O. Stearns, 14 T.C. 420, aff'd, 189 F.2d 259, the United States Tax Court interpreted section 107(d) of the Internal Revenue Code, the predecessor of section **1303(b)**. There, the decedent was discharged from his employment as sales manager of a manufacturing corporation. In compromise of a suit for breach of contract the decedent received a lump sum payment. The Tax Court upheld the contention of the Commissioner of Internal Revenue that this payment was not for "services performed" and therefore was not back pay within the definition of section 107(d). The payment was for the period of time covered by the contract when decedent was no longer performing the duties specified by the contract.

The Internal Revenue Service more recently issued a revenue ruling on the point raised in this appeal. Using the **Stearns** case as authority the Internal Revenue Service ruled that: "A lump-sum payment received by a dismissed employee of a **city** as a settlement for waiving his right to reinstatement in his **position** and his salary rights **for** the period of dismissal does not **constitute** back pay within the meaning of section 1303 of the Internal Revenue Code of 1954, but constitutes **income includible** in the recipient's gross **income** in the **year** received." (*Rev. Rul.* 60-188, 1960-L Cum. Bull. **28**.) Once again, the deciding factor was the lack of an actual rendering of services to the employer.

That section 18244 does not include the situation at hand, and was not intended by the Legislature to do so, is indicated by the addition of section **18246** to the Revenue and Taxation Code. This section, which went into effect on **June 23**,

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1961, provides that damages awarded for breach of contract shall be taxed in the same manner as back pay. It sets forth the same method of computation as is allowed by section 18243.

Therefore, we find that the award received by appellant does not constitute back pay within the meaning of section 18244 of the Revenue and **Taxation** Code.

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 William C. and June R. Van Deventer to a proposed assessment of additional personal income tax in the amount of \$377.04 for the year 1960 be and the same is hereby sustained.

Done at San Francisco , California, this 17th day of March , 1964, by the State Board of Equalization. .

Paul R. Leake, Chairman
John W. Lynch, Member
Leo R. Feirly, Member
Richard C. Smith, Member
_____, Member

ATTEST: J. H. [Signature], Secretary