BEFORE THE STATE BOARD OF EQUALIZATION

OF THE 'STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LEMBURG ENTERPRISES, INC.)

Appearances:

For Appellant: Stephen J. Schwartz
Attorney at Law

For Respondent: Peter S. Pierson
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Lemburg Enterprises, Inc., against proposed assessments of additional franchise tax in the amounts of $2,508.59, $2,508.59, and $842.35 for the taxable years ended November 30, 1962, 1963, and 1964, respectively.

The issues presented are whether payment, of certain advances Constituted income rather than loans and, if income, whether it was constructively received prior to actual receipt.

August Lemburg, a rice grower, signed a contract on March 27, 1952, with the Rice Growers Association of California designated as the buyer, providing that "the buyer purchases and the grower sells and agrees to deliver to the buyer upon harvesting all the rice produced by or for him" and "the buyer shall make advances to the grower upon delivery." The balance of the money due Lemburg was payable when RGA resold the rice; if RGA could not resell the rice, the advances would be paid back..

Notwithstanding the contractual provisions calling for progress payments or advances Lemburg regularly requested that the advance payments be deferred beyond the time of rice

delivery. Such deferrals were advantageous to RGA since it normally had to borrow money when making advances upon delivery of the rice. RGA therefore followed the established policy of temporarily deferring payment when requested to do so by a grower. Payment was never deferred beyond January 15 of the following year,

Appellant was incorporated on April 11, 1962, by 'Lemburg to pursue the farming operations previously conducted as a sole proprietorship, The corporation like its predecessor was a cash basis taxpayer and adopted a fiscal year ending November 30. .

On November 16, 1962, appellant delivered the bulk of its first rice crop to the Red Top Rice Drier, an authorized warehouse for RGA. A check for $4,576.61 was received by appellant on November 8, 1962, and it was returned immediately to RGA with the written instruction: "Please do not send us any more checks until we notify you to do so." Payment to appellant based upon $1.25 per 100 pounds of rice was not made until after the income year ended November 30, 1962. On January 31, 1963, appellant entered into a 15-year contract with RGA. This marketing agreement was substantially similar .to the 1952 contract between Lemburg and RGA.

Prior to the rice harvest in 1963 appellant again advised RGA that it wanted a deferral of the advance payments, As a result, payment to appellant based upon $1.75 per 100 pounds of rice was made on December 3, 1963.

Appellant reported the advances as income in the year payment was actually received. Respondent disallowed this method of reporting and included the advances received as income in the year rice-delivery was made.

Appellant contends that the advances were merely loans from RGA. It further contends that, even if there existed a relationship of buyer and seller, no income was received by appellant until the advances were actually paid by RGA.

Respondent contends that the relationship between appellant and RGA was one of seller and buyer. It also contends that the advances were constructively received on the basis they were unqualifiedly and without substantial limitation available to appellant when the rice was delivered.

Section 1 of the marketing agreement contemplates a sale of the rice by the grower to RGA when it provides that "the Buyer purchases and the Grower sells and agrees to deliver to the Buyer upon harvesting all the rice produced by or for

him . . ." (Olson v. Biola Coop. Raisin Growers Assn., 33 Cal. 2d 664 [204 P.2d 10].) This conclusion is based upo the express contractual provisions and the absence of any evidence to the contrary. Thus the advances constituted income from a sale,

The more difficult question to be decided is whether appellant constructively received the income during the fiscal year when the rice was delivered. The legal issue does not appear to be in dispute. In Oliver v. United States, 193 F. Supp. 930, a federal district court considered the same question and outlined the applicable law as follows:

> When the item of income in question consists of the proceeds of a sale by the taxpayer of merchandise or other property, including agricultural commodities, and where the sale is completed in a given year and the taxpayer at the time acquires an unconditioned vested right to receive the proceeds of the sale, and the buyer is ready, willing, and able to make payment, the taxpayer cannot avoid treating the proceeds as income for that year by voluntarily declining to accept payment during that year, or by requesting the purchaser not to pay him until a later year, or even by voluntarily putting himself under some legal disability or restriction with respect to payment. In such circumstances, he will be deemed in constructive receipt of the income notwithstanding his refusal to accept payment or his self-imposed restraints on payment. Williams v. United States, 5 Cir., 219 F.2d 523; Hineman v. Brodrick, D.C.Kan., 99 F. Supp. 582.
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> On the other hand, it must be recognized that a taxpayer has a perfect legal right to stipulate that he is not to be paid until some subsequent year, or that the payments are to be spread out over a number of years, Where such a stipulation is entered into between buyer and seller prior to the time when the seller has acquired an absolute and unconditional right to receive payment, and where the stipulation amounts to a binding contract between the parties so that the

> buyer has a legal right to refuse payment except in accordance with the terms of the agreement, then the doctrine of constructive receipt does not apply, and the taxpayer is not required to report the income until the same actually is received by him. Glenn v. Penn, 6 Cir., 250 F.2d 507; Kasper v. Banek, 8 Cir., 214 F.2d 125; J. D. Amend, 13 T.C. 178; Wilfred Weathers, 12 T.C.M. 314.

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What we have then is the factual question of whether appellant and RGA entered into binding agreements for deferring payment of the advances with respect to the 1962 and 1963 rice crops. The burden of proving that appellant and RGA entered into binding contracts which called for the deferral of advance payments was upon appellant. (Welch v. Helvering, 290 U.S. 111 [78 L. Ed. 2125; Kasper v. Banek, 214 F.2d 125; Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414].) ---

It would be nothing unusual for the parties to make such an agreement as it was mutually advantageous and it could have been done with little or no formality. The evidence presented, however, does not establish that appellant and RCA ever entered into a binding agreement which called for the deferral of payment.

RGA's practice of deferring payment upon the request of a member; Lemburg's regular requestfor such a deferral; appellant's continuation of this practice; and the fact that the parties were free to contract or to modify their contractual relationship, are all equally consistent with the conclusion that there was no binding modification of the basic marketing agreement with respect to the deferral of payment, and, instead, that RGA merely followed appellant's instructions in regard to the time for payment. //

Under the circumstances, we have no basis for disturbing respondent's action in this matter.

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,

Appeal of Lemburg Enterprises, Inc.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Lemburg Enterprises, Inc., against proposed assessments of additional franchise tax in the amounts of $2,508.59, $2,508.59, and $342.35 for the taxable years ended November 30, 1962, 1963, and 1964, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of January, 1968, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary