BEFORE THE STATE BOARD OF **EQUALIZATION**

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
EDWARD AND CAROL **McANEELEY**)

For Appellants: Ray Saintonge

For Respondent: Bruce W. Walker
Chief Counsel

Jacqueline W. Martins
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 Edward and Carol **McAneeley** against a proposed assessment of additional personal income tax in the amount of **$3,773.14** for the year 1975.

The sole issue for determination is whether appellants received any income from a California source during 1975.

Appellant Edward McAneeley, a professional hockey player, filed a joint California nonresident personal income tax return with his wife for the appeal year. On that return appellant reported, as California source income, **$35,066.76** in wages from the California Golden Seals in Oakland and a **$17,500.00** contract settlement from the same employer. Appellant also claimed **$9,288.60** in credits for taxes paid to the State of Utah and the Dominion of Canada which more than offset the computed California income tax liability. By this return appellants claimed, and were originally granted, a total refund of the **$3,223.93** in taxes withheld by California. Thereafter, respondent audited appellants' return, denied the credits claimed for taxes paid to Utah and Canada, and proposed the assessment in controversy.

Although appellants do not challenge the disallowance of the tax credits, they do contend that they had no California source income in 1975. It is appellant's position that they were Canadian residents and did not live in California at any time during 1975. Appellants further maintain that Mr. McAneeley performed no services in California **during** the 1975 portion of the 1974-75 season since during that period he played for a Utah hockey team which was in a league that had no California members. It is also asserted that during the 1975 portion of the 1975-76 season, Mr. McAneeley played for the Edmonton, Alberta, team which made only two appearances in California during the appeal year.

Respondent's position rests solely upon the wages and contract settlement proceeds originally reported by appellants as California source income. (See Rev. & Tax. Code, § 17041, which imposes the personal income tax on all California source income of nonresidents.) While acknowledging that the proposed assessment requires a possible modification, respondent steadfastly maintains that appellants have failed to furnish sufficient information to justify any adjustment and recites the hoary shibboleth that its determination is presumed correct and the burden to overcome that presumption is upon the taxpayer. Although appellants did not respond completely to respondent's host of questions, we believe that they have submitted enough relevant information to vindicate their position, at least in part.

Based upon information submitted by appellants we find the following facts to be true. Appellant was employed as a hockey player by the Oakland (California) Hockey Club during the appeal year under the terms of a two-year contract commencing October 1, 1974. The regular hockey season extended from October through the following May. Thus, the 1974-75 season extended from October 1974 through May 1975. During the 1974-75 season, appellant played with the Oakland parent club only through November 14, 1974. He spent the remainder of that season playing for a subsidiary in Salt Lake City, Utah. The Salt Lake City team was in the Central Hockey League which had no members in California. Appellant received $35,066.76 from the Oakland club for his services during 1975.

After the completion of the 1974-75 regular season apellant's two-year contract with the Oakland club was terminated with one year remaining. Appellant received $17,500.00 compensation from the Oakland club in consideration for the termination.

During 1975 appellant also received $5,100.00 from the Edmonton hockey team for his services during the 1975 portion of the 1975-76 hockey season. There was no relationship between the Edmonton team and the Oakland and Salt Lake City teams, which were in different leagues. During the 1975 portion of the 1975-76 season two of Edmonton's 41 games were played in California.

Appellants were residents of Canada during the entire year of 1975. Appellants owned and maintained a home in Canada during 1975. Mr. McAneeley resided in rented premises while employed in the United States.

Revenue and Taxation Code section 17951 states that the gross income of nonresidents "includes only the gross income from sources within this State." In addition, section 17954 provides in regard to nonresidents that "[g]ross income from sources within and without this State shall be allocated and apportioned under rules and regulations prescribed by the Franchise Tax Board." The implementing regulation reads, in relevant part, as follows:

> If nonresident employees are employed in this State at intervals throughout the year . . . and are paid on a daily, weekly or monthly basis, the gross income from sources

> within this State includes that portion of the total compensation for personal services which the total number of working days employed within the State bears to the total number of working days both within and without the State. ... If the employees are paid [on some basis other than a mileage basis] the total compensation for personal services must be apportioned between this State and other States and foreign countries in such a manner as to allocate to California that portion of the total compensation which is reasonably attributable to personal services performed in this State. (Cal. Admin. Code, tit. 18, reg. 17951-17954(e), subd. (4).)

In the Appeals of Philip and Diane Krake and the Appeal of Dennis F. and Nancy Partee, both decided October 6, 1976, we upheld respondent's application of the working-day or games-played formula to apportion the salaries of nonresident professional athletes. (See also Rev. Rul. 76-66, 1976-1 Cum. Bull. 189.) It was respondent's position that, while the working-day method is preferable for all nonresident athletes, the games-played method is appropriate in some cases because it is more convenient and produces approximately the same result. The applicable formula may be summarized as follows:

$$\frac{\text{Working days or games played in California}}{\text{Working days or games played-everywhere}} \times \text{Total salary} = \text{California source income}$$

When applying the holding of those appeals to the $35,066.76 appellant received from the Oakland organization during 1975, we note that during the 1974-75 season, appellant spent 1.5 months (October 1 through November 14) with the Oakland team and the remaining 6.5 months of the season (November 15 through May 31) with Salt Lake City. Thus, assuming appellant elected to receive his wages over a 12 month period, part of his 1975 wages were for services performed while playing in Oakland. (Cf. Rev. Rul. 76-66, 1976-1 Cum. Bull. 189.) Since appellant has not seen fit to inform us of the amount of time spent within and without California while assigned to the Oakland team, we must assume that all of it was spent in California. Therefore, the formula is:

$$\frac{1.5 \text{ months}}{8.0 \text{ months}} \times \$35,066.76 = \$6,575.02$$

Accordingly, the portion of appellant's wages received from the Oakland organization representing California source income subject to taxation by this state is $6,575.02.

Next, we must apply the formula to the $5,100.00 appellant received from the Edmonton hockey club for services performed during 1975. The record indicates that 2 of 41 games were played in California during the 1975 portion of the 1975-76 season. Therefore, the formula is:

$$\frac{\text{2 games played in California}}{\text{41 games played everywhere}} \times \$5,100.00 = \$248.78$$

Thus, the portion of appellant's wages received from the Edmonton team representing California source income subject to taxation by this state is $248.78.

Finally, we consider the $17,500.00 received by appellant for the early termination of his contract with the Oakland organization. Respondent's regulations provide that income from the sale of intangible personal property such as a contract right is taxable as income from sources within this state only if the intangible has a situs in this state. (Cal. Admin. Code, tit. 18, reg. 17951-17954(f), subd. (2).) Under the doctrine of mobilia sequuntur personam, intangible property has its situs in the state or country where the owner resides unless it has acquired a business situs elsewhere. (Miller v. McColgan, 17 Cal.2d 432, 439 [110 P.2d 419] (1941).) Since appellant's presence in this state during 1975 was approximately two days, it is readily apparent that the intangible in question did not have a California situs. Furthermore, there has been no suggestion that the intangible acquired a California business'situs. Therefore, California may not tax the proceeds from the contract settlement.

For the reasons set out above, respondent's determination must be modified.

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 Edward and Carol McAneeley against a proposed assessment of additional personal income tax in the amount of $3,773.14 for the year 1975, be and the same is hereby modified in accordance with the opinion of the board.

Done at Sacramento, California, this 28th day of October, 1980 by the State Board of Equalization, with Members Nevins, Reilly, Dronenburg and Bennett present.

Richard Nevins, Chairman

George R. Reilly, Member

Ernest J. Dronenburg, Jr., Member

William M. Bennett, Member

_____, Member