

Appeal of Gerald G. Marans

The issue to be decided is whether appellant was entitled to a deduction for a contribution made to an individual retirement account in 1978.

Appellant and his wife filed a joint California personal income tax return for the year 1978. They claimed a \$3,000 deduction for a **contribution** made to an individual retirement account (hereafter referred to as "IRA"). One-half of this contribution was made on behalf of each spouse. Respondent allowed the deduction made on behalf of Mrs. **Marans**, and she is not a party to this action.

Although appellant was employed by California Alumni Association during the appeal year and was **covered** by its pension plan, he had no vested benefits in the plan. In 1979 he was terminated from his employment and forfeited his right to the benefits accumulated in his name.

Respondent determined that appellant was not entitled to a deduction for an IRA contribution because he was included in his employer's pension plan, and disallowed the \$1,500 deduction. Respondent's denial of appellant's protest led to this appeal. Subsequent to filing this appeal, appellant paid the assessment in full. Therefore, this appeal is being treated as a denial of a claim for refund.

Section 17240 of the Revenue and Taxation Code allows a deduction from gross income for cash contributions made to an IRA. No deduction is allowed an individual who, at **any** time during the taxable year, is an "active participant" in an employer pension or profit sharing plan if such plan is qualified under section 17501 and includes a trust exempt from tax under section 17631. (Rev. & Tax. Code, § 17240(b), subd. **(2)(A)(i).**)

This dispute concerns the definition of the term "active participant." Respondent's position is that **appellant** was an active participant in his employer's qualified plan, and as such, was not entitled to a deduction for his contribution to an IRA. Appellant's position is that he was not an active participant because he received no benefits from the plan. Appellant has argued that he needed the protection of an IRA because his lack of tenure **and job security made it highly unlikely that he would remain in his position long enough to receive any benefits.**

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The term active participant is not defined in Revenue and Taxation Code section 17240. However, federal courts have defined the term as it is used in Internal Revenue Code section 219, which is the federal counterpart of section 17240. It is well established that when a state law is similar to a federal statute, interpretations of the statute by federal courts, although not binding on the state, are entitled to great weight. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).)

Federal courts have determined that an individual is an active participant in his employer's plan if he is accruing benefits under the plan even though he has no vested interest in the plan. (John L. Pizor, ¶ 79,487 P-H Memo. T.C. (1979).) He remains an active participant even if, at some later date, he is terminated from employment and forfeits all benefits. (Orzechowski v. Commissioner, 592 F.2d 677 (2d Cir. 1979).) The definition of the term active participant developed by the courts has been adopted by the Treasury Department in regulations which became effective after the tax year in question. (Treas. Reg. § 1.219-2)

Appellant is clearly within this definition of active participant since his employer did accrue benefits on his behalf during the year 1978. The fact that appellant had no vested interest in these benefits and forfeited his interest when his employment was terminated in 1979 does not alter his 1978 status as an active participant.

Appellant also argues what section 17240 of the Revenue and Taxation Code is unconstitutional in that it gives an advantage to employees who are not included in their employer's pension plan and to those who are vested under their employer's plan. We are of the opinion that section 3.5 to article III of the California Constitution precludes this board from determining the constitutionality of statutes. However, we note that the federal statute which corresponds to section 17240 has been found to be reasonable and, therefore, constitutional. (Orzechowski v. Commissioner, supra.)

For the reasons set forth above, we must sustain respondent's actions.

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O K 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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the claim of Gerald G. Marans for refund of additional personal income tax in the amount of \$152.62 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, **this 10th** day of December, 1981, by the State Board of Equalization, with Board Members **Mr. Dronenburg, Mr. Reilly, Mr. Bennett, Mr. Nevins** and **Mr. Cory** present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

Kenneth Cory, Member