

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
NEILL O. AND ALICE M. ROWE)

For Appellants: Neill O. Rowe,
in pro. per.

For Respondent: John R. Akin
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 Neill O. and Alice M. Rowe against a proposed assessment of additional personal income tax in the amount of \$165.00 for the year 1978.

Appeal of Neill O. and Alice M. Rowe

The sole issue presented by this appeal is whether respondent properly disallowed appellants' claimed deduction for a contribution to an individual retirement account ("IRA") for the year 1978.

Appellant-husband was employed by Van Waters & Rogers ("Waters"), a division of Univar Corporation, from July 1, 1976 to June 30, 1978. While employed by Waters, appellant-husband was covered by that company's qualified pension plan. In order to obtain vested rights under the pension plan, and to become entitled to any benefits thereunder, an employee is required to either: (i) be employed for ten years; or (ii) in the case of an employee who first participates in the plan while between the ages of 55 and 60, attain age 65. Appellant-husband was 58 at the time he began his employment with Waters.

Appellant-husband accrued benefits under his employer's qualified pension plan from July 1, 1976 until he terminated his employment on June 30, 1978. He was entitled to a reinstatement of previously accrued benefits if he was later re-employed by Waters, provided, however, that such re-employment took place within the time period provided by the break in service provision of the pension plan.^{1/}

On their joint California personal income tax return for 1978, appellants deducted \$1,500 for a contribution to an IRA. Upon review of their return, respondent disallowed the claimed deduction on the basis that *appellant-husband had been an active participant in Waters' qualified pension plan for a portion of the appeal year. Appellants' protest of respondent's action has resulted in this appeal.

Revenue and Taxation Code section 17.240, subdivision (b) (2) (A) (i), provides that no deduction for contributions to an IRA will be allowed for a taxable year to any individual who was an "active participant" in a qualified pension plan under Revenue and Taxation Code section 17501 for any part of such year. These sections are substantively identical to sections 219(b) (2) (A)(i) and 401(a), respectively, of the Internal Revenue Code of 1954.

^{1/} Pursuant to the provisions of the subject plan, upon re-employment, an employee is credited with the period of service prior to termination of employment, provided, however, that the period of absence does not exceed his prior period of service.

Appeal of Neill O. and Alice M. Rowe

Accordingly, federal case law is highly persuasive in interpreting the California statutes. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955).)

The question raised by this appeal has previously been addressed by the courts and this board. (See, e.g., Orzechowski v. Commissioner, 69 T.C. 750 (1978), affd., 592 F.2d 677 (2nd Cir. 1979); Frederick A. Chapman, ¶ 77 T.C. No. 33 (Aug. 24, 1981); Appeal of Ramakrishna and Saraswathi Narayanaswami, Cal. St. Bd. of Equal., July 29, 1981.) The cited authority stands for the proposition that an individual is considered an active participant if he is accruing benefits under a qualified pension plan, even though he has only forfeitable rights to plan benefits and such benefits are in fact forfeited by termination of employment before any rights become vested. The fact that appellant-husband forfeited his benefits under his employer's plan is of no consequence; the relevant factor is that he was an "active participant" in his employer's plan during 1978. (Frederick A. Chapman, supra; Appeal of Ramakrishna and Saraswathi Narayanaswami, supra.)

We have considered the recent opinion in Foulkes v. Commissioner, 638 F.2d 1105 (7th Cir. 1981), and believe it is clearly distinguishable from the instant appeal. In that case, the taxpayer terminated his employment in May 1975 and forfeited his rights to benefits under his employer's qualified pension plan. Moreover, it was conceded in that case that the break in service rules of section 411(a)(6) of the Internal Revenue Code did not apply to the taxpayer under the pension plan, i.e., he would receive no credit under the plan for past service were he to return to his former employment. Stressing that the congressional purpose in enacting the "active participant" limitation was to prevent the potential for a double tax benefit,^{2/} the Court of Appeals concluded under the facts of that case, that as of the end of the taxable year 1975, the taxpayer had no potential for a double tax benefit and therefore was not an "active participant" in a qualified plan in 1975 within the limitation of Internal Revenue Code section 219(b)(2)(A)(i).

^{2/} The double tax benefit which Congress sought to preclude was the potential for an individual to obtain the tax benefit provided by being a participant in a qualified plan, as well as the tax benefit provided to those making contributions to an IRA. (H.R. Rep. No. 93-807, 93d. Cong., 2d Sess. (1974) [1974 U.S. Code Cong. & Ad. News, pp. 4670, 47941.]

Appeal of Neill O. and Alice M. Rowe

As previously indicated, appellant-husband was entitled to a reinstatement of previously accrued benefits had he returned to his previous employment within the time period provided in the break in service provisions of his employer's pension plan. Therefore, contrary to the factual situation in Foulkes, supra, the potential for a double tax benefit did exist as of the end of 1978.

On the basis of the record of this appeal, we must conclude that appellant-husband was an "active participant" in a qualified plan in 1978 within the meaning of the statutory limitation of Revenue and Taxation Code, section 17240, subdivision (b) (2) (A) (i). Consequently, the appellants were not entitled to a deduction for a contribution to an IRA for that year.

Appellants have argued that appellant-husband accrued no benefits under Waters qualified pension plan because he terminated his employment before his rights to the plan benefits vested. For the reasons set forth above, appellants' argument is without merit. Appellants also contend that appellant-husband's rights under the plan could never have vested. Specifically, appellants assert that ten years of service were required to obtain vested rights under the plan. Since he was 58 years old when he first became covered by the plan, and **because** his employer allegedly had a mandatory retirement age of 65, appellants maintain that appellant-husband could not have worked the required ten-year **period**. **The record of this appeal fails to support the contention advanced by appellants.** The assertion that Waters had a mandatory retirement age of 65 is unsupported by any evidence. Moreover, as noted above, employees who first became participants under the plan between the ages of 55 and 60 would acquire vested rights thereunder at the age of 65, regardless of whether *or* not they had completed ten years of service.

For the reasons set forth above, respondent's action in this matter will be sustained.

Appeal of Neill O. and Alice M. Rowe

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 Will O. and Alice M. Rowe against a proposed assessment of additional personal income tax in the amount of \$165.00 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of August, 1982, by the State Board of Equalization, with Board Members Mr. Eennett, Mr; Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett , Chairman
Ernest J. Dronenburg, Jr. , Member
Richard Nevins I . . . , Member
_____, Member
_____, Member