BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ARTHUR L. AND BERTHA HUBER)

For Appellants: Arthur L. and Bertha Huber, in pro. per.

For Respondent: Allen R. Wildermuth
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 Arthur L. and Bertha Huber against a proposed assessment of additional personal income tax in the amount of $745.00 for the year 1979.

Appeal of Arthur L. and Bertha Huber

The question for determination is whether appellants Arthur L. and Bertha Huber may exclude from their adjusted gross income any part of the retirement pay Mr. Huber received from the United States Army in 1979.

Bertha Huber is a party to this appeal solely because she filed a joint personal income tax return with Arthur L. Huber, her husband, for the year in issue. Accordingly, only the latter will be referred to as "appellant."

As of October 1968, appellant had spent twenty years in active service in the United States Army. On October 8, 1968, the Secretary of the Army issued a Special Order stating that appellant had requested, and was granted effective October 31, 1968, voluntary retirement at the grade of Major. Since retirement, appellant has received monthly military retirement pay computed on the basis of his length of service.

Subsequent to his retirement, appellant underwent a medical examination provided by the Veterans' Administration (VA). The VA, using its standard-rating schedule for physical disabilities, gave him a twenty percent disability rating for ongoing medical problems that had arisen while he had been on active duty, and awarded him disability compensation of $43 per month, effective June 1, 1969.

Federal law stipulates that, in order to avoid duplicating governmental payments of service benefits (see 38 U.S.C. § 3104(a)), a recipient of military retirement pay who is also eligible for VA compensation may receive the VA payments only after formally foregoing receipt of an equivalent amount of retirement pay. (38 U.S.C. § 3105.) In accordance with this rule, appellant filed a waiver of $43 per month of his Army retirement pay so that he could receive the veterans' disability payments.

On their income tax return for 1979, appellant and his wife reported $32,954 in total income, which included military retirement pay amounting to $11,277.20. The latter figure represented retirement pay based on years of service, diminished by the $516 ($43 per month for one year) in disability benefits received from the VA. They then subtracted $11,277.00 from income, as a "disability income exclusion," and did not report the $516 at all.

Respondent issued a proposed assessment restoring the $11,277.00 to income and reducing his medical expense deduction. In this timely appeal, appellant argues that

although retirement pay is generally taxable, his retirement pay is actually nontaxable disability compensation. He states:

> The retired pay received ... is granted in lieu of disability retirement for injuries sustained in combat in 1966. Normal retirement age for me (Major - U.S. Army) is sixty-two. I was administratively retired at age thirty-seven because ... twenty percent d'isabled. ...
>
> Based on the above facts, the exclusion of retired pay should be allowed until age sixty-two and no additional taxes are due.

California law follows the Internal Revenue Code in generally including government retirement pensions in gross income. (Rev. & Tax. Code, § 17071, subd. (a)(11); former Cal. Admin. Code, tit. 18, reg. 17071(j) (repealer filed 12-23-81; Register 81, No. 52); Int. Rev. Code of 1954, § 61(a)(11); Treas. Reg. § 1.61-11.) Revenue and Taxation Code section 17146.7 excludes from gross income up to $1,000 of a taxpayer's military retirement pay; however, this exclusion does not apply to taxpayers, such as appellant, whose adjusted gross income exceeds $17,000. (Appeal of Henry J. and Sheila D. Kelly, Cal. St, Bd. of Equal., Jan. 9, 1979.)

On the other hand, VA disability benefits are generally not included in income. Section 17138 of the Revenue and Taxation Code is patterned after federal law in excluding from gross income "[a]mounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces . ..." (Rev. & Tax. Code, § 17138, subd. (a)(4); Int. Rev. Code of 1954, § 104(a)(4).) It is well established that decisions of the federal courts are entitled to great weight in applying a state statute which is based upon a federal statute. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 453 (1942); Appeal of Glenn M. and Phyllis R. Pfau, Cal. St. Bd. of Equal., July 31, 1972.) Therefore, in construing section 17138, subd. (a)(4), we will be considering federal judicial interpretations of Internal Revenue Code section 104(a)(4).

The parties agree that the $516 that appellant received in veterans' disability benefits is not subject to tax. The issue remaining is whether the payments he received from the Army are also nontaxable disability benefits or are taxable retirement payments.

Under 10 United States Code section 1201(3)(A), the Secretary of a branch of the armed forces may grant disability retirement to a regular member of the branch who has served at least twenty years, and who, while in the service, incurs a permanent physical disability that is not caused by the member's intentional misconduct. Appellant argues that when he left the Army, he could have retired for disability under the above criteria. Therefore, he maintains, he should now be considered to have retired for disability and his Army payments should be treated as disability payments, However, the premise to this argument is faulty, for appellant has not shown that he was in fact entitled to retire for disability.

Appellant submitted to this board three federal documents to support his contention. Two of the documents, a Special Order from the Secretary of the Army and an Army personnel report on appellant's military history and retirement, state that his retirement arises pursuant to 10 United States Code section 3911. Section 3911 provides in relevant part:

> The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service ..., at least 10 years of which have been active service as a commissioned officer.

It does not mention retirement for disability. The third document appellant submitted was issued by the VA,, announcing his disability rating and the amount of his disability award. It cited no statutes.

The three documents discuss neither disability retirement nor any of the various federal statutes pertaining to disability retirement. Rather, they indicate that the Secretary of the Army retired appellant, at the latter's request, for longevity. Furthermore, nothing in the record indicates that the Secretary or any of his agents at any time found appellant disabled or entitled to retire for disability, (William H. Lambert, 49 T.C. 57 (1967).)

Appellant argues that his subsequent VA disability rating of 20 percent proves that he was entitled to retire for disability. However, it has long been held that VA disability ratings are not binding upon the Army. Disability compensation for the VA is provided under separate statutes (38 U.S.C. § 331 et seq.), for different

purposes, and according to different criteria, than that provided for the armed forces (10 U.S.C. § 1201 et seq.). (Finn v. U.S., 548 F.2d 340 (Ct.Cl. 1977); Storey v. U.S., 531 F.2d 985 (Ct.Cl. 1976); Williams v. U.S., 405 F.2d 890 (Ct.Cl. 1969), cert. den., 396 U.S. 966 [24 L.Ed.2d 432] (1969), reh. den., 396 U.S. 1047 [24 L.Ed.2d 694] (1970).) Thus, the fact that the VA found appellant disabled does not prove that the Army found him physically unfit for duty and eligible for disability retirement. (Douglas k e Guernsey, ¶ 79,444 P-H Memo. T.C. (1979).) During the past fourteen years, appellant presumably has had the opportunity to obtain a review of his retirement status by petitioning the Army Board for Correction of Military Records. (10 U.S.C. § 1552.) There is.no evidence before us that he did so, or that the Board did change his records,

Appellant has the burden of establishing his entitlement to exclude his income as disability compensation. (United States v. Stewart, 311 U.S. 60, 70-71 [85 L.Ed. 40, 49] (1940).) We believe he has not carried this burden. Appellant may not exclude his retirement pay from income simply because of a subsequent VA disability rating. Since he was not retired for disability, his retirement pay - after subtracting the $516 in veterans' benefits - is taxable. (Douglas Drake Guernsey, supra; William H. Lambert, supra.)

We agree with respondent that, since the above determination effectively increases appellant's adjusted gross income for 1979, his medical expense deduction must correspondingly be reduced by approximately three percent of the increase in income, in accordance with Revenue and Taxation Code sections 17253 and 17254. (See Appeal of Nelson and Doris DeAmicis, Cal. St. Bd. of Equal., June 29, 1982.)

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

Appeal of Arthur L. and Bertha Huber

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 Arthur L. and Bertha Huber against a proposed assessment of additional personal income tax in the amount of $745.00 for the year 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 21st day of September, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____ Member