BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HOWARD A. AND MARCIA SCHMIDT)

For Appellants: Martin I. Schneyer
Attorney at Law

For Respondent: Mark McEvilly
Counsel

OPINION

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 Howard A. and Marcia Schmidt against proposed assessments of additional personal income tax in the amounts of $1,115.61, $2,676.76, and $2,226.07 for the years 1976, 1977, and 1978, respectively.

The question for decision is whether certain monthiy pension benefits received by appellant Howard A. Schmidt were **excludible** from taxable income for purposes of the California personal income tax. The answer to that question depends on whether or not the pension **benefits had** accrued as income, within the meaning of section 17596 of the Revenue and Taxation Code, prior to the time appellant became a California resident.

Appellants, husband and wife, established residency in California in 1970. Prior to that time, they had resided in New Jersey where appellant-husband (hereinafter "appellant") worked for Great American Insurance Company (hereinafter "Great American"). **In** 1970, at the time **of** relocation, appellant was eligible to retire from Great American and receive a pension pursuant to the terms of the company pension plan. Instead, he continued to.work for Great American in California until 1976 when he, **in** fact, did retire. The Great American retirement plan permitted employeesto elect among several methods of **pension** payments, including a category entitled "options as may be approved by the Retirement Committee." At retirement, in 1976, the appellant chose to receive monthly pension payments for his and his spouse's lifetime. That option provided that retirement income shall be paid in monthly installments to the employee and his spouse, or the survivor thereof, "ceasing with the payment on the first of the month during which **the death** [of the **survivor] occurs.**" Appellant received pension payments of $19,645, $47,147, and $47,147 in 1976, 1977, and 1978, respectively. During 1976, the initial year of pension payments, appellant deducted $2,908 from the payment received which represented his contribution to the **pension plan.** In addition, based on the number of months of employment in each state (259 months in New **Jersey** and 243 months in California), appellant excluded 51.6 percent of the payments as being accruable in a state other than California. Therefore, for the years at issue, the appellant **reported 48.4 percent** of the pension received as being taxable in the State of California. On audit, respondent determined that appellant was not entitled to attribute any portion of the pension to another state and determined that the entire portion received (except the $2,908 return of his contribution **in** 1976) was taxable in the State of.California. This resulted in increasing income by $10,137, $24,328, and $24,328 in 1976, 1977, and 1978, respectively. Appellant protested the resulting proposed assessments,. Respondent denied the protest and affirmed the proposed assessments. This timely appeal followed.

Except as otherwise provided in the law, California personal income tax is imposed upon the entire taxable income of every resident of California and upon the income of nonresidents which is derived from sources within California. (Rev. & Tax. Code, § 17041.) In cases like the present one, where a taxpayer's residency status changes, section 17596 of the Revenue and Taxation Code. provides:

> When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise includible in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

Reading these statutes together, "sections 17041 and 17596 require that appellant pay California income tax on the retirement income he received while a resident of California, unless these funds accrued as income prior to the time appellant and his wife moved here." (Appeal of Kenneth Ellington and Estate of Harriet Ellington, Deceased, Cal. St. Bd. of Equal., Oct. 17, 1973. See also, Appeal of Henry D. and Rae Zlotnick, Cal. St. Bd. of Equal., May 6, 1971; Appeal of Lee J. and Charlotte Wojack, Cal. St. Bd. of Equal., March 22, 1971; Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6, 1969.) This accrual treatment of reporting retirement income applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. -"Generally, under an accrual method, income is to be included for the taxable year when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy." (Treas.. Reg. § 1.446-1(c) ii.)

Accordingly, we must now determine whether the monthly benefits received by appellant had accrued as income prior to the time appellant moved to California. We have consistently held that where the employee's right to his monthly retirement benefits was contingent upon his surviving through the month, there is no accrual of income within the meaning of section 17596 of the Revenue and Taxation Code until he actually receives each pension payment. (Appeal of Henry D. and Rae Zlotnick, supra; Appeal of Lee J. and Charlotte Wojack, supra; Appeal of

Edward B. and Marion R. Flaherty, supra.) As indicated above, appellant's right to monthly retirement benefits is contingent upon survival through the month. Again, the retirement plan provides that payments will cease with the payment on the first of the month during which the death of the survivor occurs. Therefore, under the well settled rule, the monthly benefits received by appellant in 1976; 1977 and 1978, at issue herein, accrued during those years while appellant was a resident of California.

Nevertheless, appellant argues that under the category of "options as may be approved by the Retirement Committee," he was entitled to a lump-sum settlement. Appellant argues that had he elected such a lump-sum settlement in 1970 while still a resident of New Jersey, no amount of such sum would have been taxable in California. Thus, appellant continues, the amount of the monthly payments taxable in California during the period at issue should be based on the services performed within and without California. There is nothing in the record that indicates that appellant was entitled to such a lump-sum settlement. However, even assuming that he was so entitled pursuant to the above-noted category, appellant's argument is without merit. In a substantially similar set of facts, we concluded that in spite of the existence of a lump-sum withdrawal option while the taxpayers were previously residents of another state, the monthly pension benefits they received while residents of California were subject to the substantial contingency of continued survival; Therefore, we determined that no part of the pension payments received by the taxpayers while they were residents of California was excludible from their California taxable income. (Appeal of Robert H. and Josephine Borchers, Cal. St. Bd. of Equal., April 6, 1977.) In the Borchers appeal, we stated:

> We do not deny that if appellant husband had taken the lump sum benefit, that amount of income would have accrued prior to his becoming a California resident. His right to that sum of money would have been nonforfeitable prior to his move to California. The fact is, however, that he did not choose that option, and we agree with respondent that the situation must be viewed in light of what he did do and not what he might have done.

Unlike the Appeal of Dr. F. W. C. Tydeman, Cal. St. Bd. of Equal., Jan. 5, 1950, there has been no proof that a

appellant had a vested right of immediate withdrawal before his move in 1970.

Again, as in the Borchers appeal, the "situation must be viewed in light of what he did do and not what he might have done." What appellant did do was to elect an option of pension payments that was subject to the substantial contingency of continual survival. Under Revenue and Taxation Code section 17596 and the cases decided thereunder, appellant's monthly retirement benefits at issue did not accrue as income until they were actually received, since his potential right to those payments was subject to the substantial contingency of his survival through each month. We must, therefore, conclude that respondent correctly determined that no portion of the pension payments at issue was excludible (except the $2,909 return of contribution) from taxable income in this state.

Appeal of Howard A. and Marcia Schmidt

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 Howard A. and Marcia Schmidt against proposed assessments of additional personal income tax in the amounts of $1,115.61, $2,676.76, and $2,226.07, for the years 1976, 1977, and 1978, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of January, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member

_____, Member