

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FREDDIE L. SIMMONS)

Appearances:

For Appellants: Freddie L. Simmons,
in pro. per.

For Respondent: Carl G. Knopke
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Freddie L. Simmons for refund of personal income tax in the amount of \$631.00 for the year 1977.

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The principal issue in this matter is whether appellant properly excluded his military retirement pay from his gross income.

On appellant's original California resident income tax return for 1977, he reported adjusted gross income of **\$17,596.00**. A portion of that amount consisted of **\$6,135.00** in military retirement pay. Appellant subsequently filed an amended return for 1977, whereby he reduced his adjusted gross income by **\$6,135.00** and claimed a refund of \$631.00. He also claimed entitlement to a military exclusion. His respective claims were denied and this appeal followed.

Appellant first argues that his military retirement pay is excludable from his gross income because "that money was never earned in California." **Presumably**, this means that although appellant was a resident of California in 1977, he was a nonresident of same when he performed the military duty from which the retirement pay derives. For the reasons stated **below**, we disagree that such circumstance **is** a basis for excluding appellant's military retirement pay from his **gross** income.

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.) 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.

This accrual treatment of reporting retirement income applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. (Cal. Admin. Code, tit. 18, reg. 17596.)

The effect of the above provisions is that a taxpayer must pay California income tax on retirement

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income he received while a resident of California unless those funds accrued as income prior to the time the taxpayer moved here. (Appeal of Howard A. and Marcia Schmidt, Cal. St. Bd. of Equal., Jan. 3, 1983.) We have consistently held that where an 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 such pension payment. (Appeal of Howard A. and Marcia Schmidt, supra; 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.)

Since military retired pay terminates with the retired service member's death, and does not pass to the member's heirs (10 U.S.C.A. § 2771; McCarty v. McCarty, 453 U.S. 210, 215 [69 L.Ed.2d 589, 595 (1981)]), appellant's right to each monthly retirement check at issue was contingent upon his surviving through the month. Therefore, such payments did not accrue within the meaning of section 17596 until they were actually received. Since appellant was a resident of California at that time, he was not entitled to exclude those payments from his 1977 gross income.

With respect to the military exclusion claimed, section 17146.7 of the Revenue and Taxation Code provides, in relevant part, that gross income does not include military retirement pay up to and including one thousand dollars. However, that section also provides that such exclusion is to be reduced by fifty cents for each one dollar of adjusted gross income in excess of fifteen thousand dollars. Since appellant's adjusted gross income is \$17,596.00, the amount of the exclusion is effectively reduced to \$0.00. Consequently, no military exclusion was applicable in his case.

On the basis of the foregoing, we conclude that respondent acted properly in denying appellant's respective claims. Its action to that effect must therefore be upheld.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in these proceedings, 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 in denying the claim of Freddie L. Simmons for refund of personal income tax in the amount of \$631.00 for the year 1977, be and the same is hereby sustained.

Done at **Sacramento**, California, this 15th day **of September**, 1983, by the State Board of Equalization, with Board Members **Mr. Bennett**, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H; Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9