

Appeal of Fred E. and Betty N. Donner

The question presented by this appeal is whether respondent properly included in appellants' California income pension annuity payments received by them while residents of California. "Appellant" herein refers to Fred E. Donner.

Appellant retired from the Air Force on December 1, 1966, and sometime during the month of December he moved to California where he has apparently continued to reside to the present time. He had been a resident of Washington until he moved to California, although he had served in several other states and overseas during his military career.

When appellant retired, he became entitled to receive monthly military life pension benefits. He received his first retirement annuity payment in December 1966. Appellant made no contributions to this retirement plan and had no right to a lump-sum payment on retirement or to any fixed sum. Each monthly payment was contingent on his continued survival. The plan has no provision for a survivor annuity, a lump-sum payment to his estate, or any other death benefits.

Appellant, a cash-basis taxpayer, did not report the \$6,067.62 of annuity income he received during 1978 on his California personal income tax return for that year. Respondent determined that the annuity income should have been included in appellants' California income, and, after denial of appellants' protest, this appeal was filed.

Appellant contends that his military retirement pay was earned and accrued as income while he was a resident of another state and, therefore, may not be taxed by California. He also argues that his retirement pay is not community property and mentions a recent Supreme Court decision holding that "federal law governing military pay takes precedence over state laws: ..." (App. Br. at 1.)

Section 17041 of the Revenue and Taxation Code, as it read during 1978, stated that the personal income tax is to be imposed on the entire taxable income of every resident of this state, regardless of the source of the income, and upon the income of nonresidents which is derived from sources within California. Pensions and annuities are specifically included in income. (Rev. & Tax. Code, §§ 17071, 17101.) Military pensions and retirement pay are entitled to a limited exclusion which is not applicable here because appellants' income exceeded the maximum allowed for the exclusion. (Rev. & Tax. Code, § 17146.7.)

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Appellant's first argument is apparently in reference to Revenue and Taxation Code section **17596**, which states:

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.

In the Appeal of Virgil M. and Jeanne P. Money, decided this day, **we held that section 17596** does not apply in the case of an annuity, but the specific annuity provisions of Revenue and Taxation Code, section 17101 through 17112.7 control. Appellant's annuity payments, therefore, are not exempt from California taxation.

Appellant's second argument, that his military pay is not community property, is irrelevant, since the income of a California resident is taxable by California, regardless of whether it is community or separate income.

Respondent's action, therefore, must be sustained.

