BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BENJAMIN AND CAROL LEVINE)

For Appellants: Benjamin Levine, in pro. per.

For Respondent: Lazaro L. Bobiles 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 Benjamin and Carol Levine against a proposed assessment of additional personal income tax in the amount of $135.20 for the year 1978.

The sole issue presented by this appeal is whether appellants were entitled to exclude from their gross income contributions made to an Individual Retirement Account (IRA) for the year 1978.

Appellant-husband was employed by International Telephone and Telegraph (ITT) until March 1978. For the remaining ten months of 1978 he was employed by Hughes Aircraft (Hughes) and did not participate in any pension plan. While employed at ITT,, appellant-husband was covered by a noncontributory pension plan. According to information obtained by respondent from ITT's benefits administrator, appellant-husband would have been entitled to reinstate previously accrued forfeitable benefits under the ITT plan if he were re-employed by ITT any time prior to March 1979.

On their joint California personal income tax return for 1978, appellants deducted $1,497 for a contribution to an IRA. Upon review'of their return, respondent disallowed the claimed deduction on the basis that appellant-husband's potential reinstatement to the ITT plan precluded deduction of contributions to an IRA during the same period. Appellants' protest of respondent's action has resulted in this appeal.

Under section 17240, subdivision (b)(2)(A)(i), of the Revenue and Taxation Code,, 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, subdivision (b)(2)(A)(i), and 401, subdivision (a), respectively, of the Internal Revenue Code of 1954. Accordingly, federal case law is highly persuasive in interpreting the California statutes. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356 [280 P.2d 893] (1955).)

The question raised by this appeal has been previously considered by the federal courts and this board. (See, e.g., Hildebrand v. Commissioner, 683 F.2d 57 (3d Cir. 1982); Appeal of Neill O. and Alice M. Rowe, Cal. St. Bd. of Equal., Aug. 17, 1982.) These cases have consistently held 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 a plan's benefits and such benefits are in fact forfeited by termination of employment before any rights become vested. The fact that the employee forfeits

his benefits under his employer's plan is of no consequence; the relevant factor is that the employee was an "active participant" in the employer's plan during the year in question. (Appeal of Neill O. and Alice M. Rowe, supra; Appeal of Ramakrishna and Saraswathi Narayanaswami, Cal. St. Bd. of Equal., July 29, 1981.)

We have considered the views expressed in two federal cases in this area: Foulkes v. Commissioner, 638 F.2d 1105 (7th Cir. 1981) and Hildebrand v. Commissioner, supra. Unlike the situation presented in Foulkes, wherein the taxpayer terminated his employment and was disqualified under the terms of his employer's pension plan from the possibility of receiving credit under the plan for past service were he to return to his former employment, in this case appellant-husband would have been entitled to reinstate previously accrued forfeitable benefits under the ITT plan if he were re-employed by ITT any time prior to March 1979. This appeal is a closer factual situation to that found in Hildebrand, where the court of appeals held that a taxpayer's two-month participation in a pension plan permitted a finding that he was an "active participant" in the qualified pension plan for the year and was thus precluded from taking an IRA deduction.

Appellant-husband argues that due to the circumstances of his departure from ITT, no possibility of re-employment existed. The test in each case, however, is whether there is a potential for a double tax benefit by allowing 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. (Foulkes v. Commissioner, supra; Appeal of Neill O. and Alice M. Rowe, supra.) Such a potential existed for appellant-husband.

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). As such, appellants were not entitled to a deduction for a contribution to an IRA for that year.

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

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 Benjamin and Carol Levine against a proposed assessment of additional personal income tax in the amount of **$135.20** for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of January , **1984**, by the State Board of Equalization, with Board **Members Mr.** Nevins, Mr. Dronenburg and **Mr.** Bennett present.

Richard Nevins , Chairman

Ernest J. Dronenburg, Jr. , Member

William M. Bennett , Member

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_____ Member