

Appeal of Robert P. and Marie L. Maltinsky

The question presented by this appeal is whether appellants were entitled to their claimed deductions for contributions to Individual Retirement Accounts (IRA's) for 1980.

Robert Maltinsky terminated his employment with American Edwards Laboratories (AEL) in September 1980. Up until that termination, he had been accruing forfeitable, nonvested benefits under **AEL's** pension plan. These benefits were forfeited when he terminated his employment, but could be reinstated if he were re-employed by AEL within three years of his termination. After he left AEL, he contributed to an IRA for 1980 and deducted his contributions on his 1980 California joint income tax return.

Marie Maltinsky was continuously employed during 1980 by the Manhattan Beach School District, and was automatically a participant in the district's pension plan. She also contributed to an IRA during 1980 and deducted her contribution on the couple's California joint return.

Respondent disallowed the deductions for both IRA's because both Robert and Marie were "active **participants**" in pension plans during 1980. A notice of proposed assessment was issued, which appellants protested. They now appeal from respondent's action affirming the proposed assessment.

Revenue and Taxation Code section 17240, subdivision (b)(2), disallows deductions for contributions to IRA's if, for any part of the taxable year, the taxpayer was an active participant in his employer's pension plan, including plans maintained "for its employees by the United States, by a state or political subdivision thereof, **or** by an agency or instrumentality of any of the foregoing" This section is substantially the same as section 219(b)(2) of the Internal Revenue Code of 1954. Therefore, interpretations of the federal section are **highly persuasive in construing the** comparable state statute. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955).)

Appellants admit that Marie was an active participant for all of 1980 in the school district's pension plan, but argue that this will provide her with very little income after retirement and that her IRA is really the only retirement she has. While we are sympathetic to appellants' situation, the statute is clear in denying deductibility for IRA contributions made by an active

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participant in a pension plan such as that provided by the school district. We have no choice but to sustain respondent's action as to Marie Maltinsky's contribution.

Robert Maltinsky's situation is substantially similar to that of the taxpayer in Frederick A. Chapman, 77 T.C. 477 (1981). In that case, the United States Tax Court stated that:

[a]n individual is considered an active participant if he is accruing benefits under a qualified plan even though he has only forfeitable rights to plan benefits and such benefits are in fact forfeited by termination of employment before any rights become vested. Orzechowski v. Commissioner, 69 T.C. 750 (1978), *affd.* 592 F.2d 677 (2d Cir. 1979).

(Frederick A. Chapman, *supra*, 77 T.C. at 479-480.)

Therefore, Robert was an active participant in his employer's pension plan for part of 1980 and falls squarely within the prohibition of section 17240, subdivision (b)(2).

Appellants argue that Robert's deduction is denied on the basis of a mere potential double tax benefit--he could have his pension plan benefits reinstated if he were re-employed by AEL within the time allowed under the plan's break-in-service rules and then would receive the tax benefits of both the pension plan contributions and his IRA contribution for the same year. This "mere potential" for a double tax benefit, however, is what the "active participant" limitation was designed to prevent. (Foulkes v. Commissioner, 638 F.2d 1105, 1109 (7th Cir. 1981); Frederick A. Chapman, *supra*, 77 T.C. at 480-481.) Therefore, both the strict language of the statute and the purpose for its enactment require that we find that Robert was not entitled to a deduction for his 1980 IRA contribution.

For the reasons stated above, respondent's action must be sustained.

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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 Robert P. and Marie L. **Maltinsky against** a proposed assessment of additional personal income tax in the amount of \$234 for the year 1980, be and the same is hereby sustained.

Done at Sacramento, California, this **28th day** of February , 1984, by the State Board of Equalization, with Board **Members Mr. Nevins, Mr. Dronenburg, Mr.. Collis, Mr. Bennett and Mr. Harvey** present.

Richard Nevins - _____, Chairman
Ernest J. Dronenburg, Jr. _____, Member
Conway H. Collis - _____, Member
William M. Bennett _____, **Member**
Walter Harvey* _____, Member-

*For Kenneth Cory, per Government Code section 7.9