



Appeal of Herman and Sandra J. Barnathan

On March 3, 1983, respondent filed a timely petition for rehearing pursuant to section 19061 of the Revenue and Taxation Code. Respondent contends that we misinterpreted the State Teachers Retirement **System** (STRS) memorandum of December 21, . **1981**, and did not consider the impact of sections 23202 and 22901 of the **Education Code**. Following its petition for rehearing, respondent wrote STRS for a clarification of its memorandum, asking STRS if **Mr.** Barnathan had continued teaching at a public school in 1978 but had not been a member of STRS during that **year**, whether he could in any possible way have received service credit towards retirement for that 1978 service and whether such an option to receive service credit could have been available to him at the end of 1978. STRS replied that if Mr. Barnathan should again **become** a member of STRS, he could elect to receive credit for the time he was employed **by a** public school but was not a member of **STRS** (citing section 22903 of the Education Code), and, additionally, that Mr. Barnathan also could have made an election at the end of 1978 (citing section 22603.1 of the Education Code) to become a member, and that had he done so, he could have received credit for the time he worked as a teacher after his requested termination of his STRS membership in **1977**.

Since we now understand that Mr. Barnathan did, in fact, continue teaching in the Los Angeles Community College in 1978, and it now appears **that** STRS would have allowed him the opportunity to receive membership benefits for **1978** even **though** he had not been an STRS member at any time during 1978, respondent appears correct that the potentiality of a double tax benefit for 1978 still existed for Mr. Barnathan at the end of that year. As we noted in our original opinion, the potentiality of a double tax benefit for 1978 would be sufficient to require a conclusion that appellant was an "active participant" in a governmental pension plan during that year and that no deduction would be allowable for an individual retirement account contribution in that year. Since respondent now has demonstrated that the potentiality existed, we have no alternative but to sustain respondent's action.

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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 19060 of the Revenue and Taxation Code, that the petition of the Franchise Tax Board for rehearing of the appeal of Herman and Sandra J. Barnathan from the action of the Franchise Tax Board in denying their claim for refund of personal income tax in the amount of **\$208.35** for the year **1978**, be and the same is hereby granted, and that our order of February 1, 1983, be and the same is hereby reversed.

Done at Sacramento, California, this 8th day of May, 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