BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DENNIS AND DIANNE KIMBROUGH)

For Appellants: Michael J. Regan
Certified Public Accountant

For Respondent: Carl G. Knopke
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 Dennis and Dianne Kimbrough against a proposed assessment of additional personal income tax in the amount of **$2,656.41** for the year **1977.**

Appellants were Kansas residents until the end of May 1977, when they moved to California and became California residents. Throughout 1977, Mr. Kimbrough (hereinafter referred to as "appellant") was a partner in three partnerships: B-irmingham Management Associates, of Birmingham, Alabama; Tidewater Management Associates, of Norfolk, Virginia: and Peninsula Management Associates, of Hampton, Virginia. Each was a calendar year partnership which derived its income as a manager of retail stores located outside of both Kansas and California. Appellants filed a Kansas part-year resident return for the period January through May 1977, which included partnership income which appellant attributed to that period. Appellants also filed a California part-year resident return for the period July through December 1977, which included partnership income which appellant attributed to that period.

Section 17041 of the Revenue and Taxation Code imposes a tax upon the entire taxable income of every resident of California. Respondent determined that all of appellant's partnership income for 1977 was part of his California taxable income for that year, and issued a proposed assessment based on the amount of the partnership income appellant reported on the Kansas return but not on the California return. Appellants protested. After consideration, respondent affirmed its proposed assessment. This appeal followed.

A partner is taxed on his distributive share of the partnership's income or losses. (Rev. & Tax. Code, § 17853, subd. (b).) A partner's distributive share of the partnership's income is taxable to him whether or not any of the income was actually distributed to him by the partnership. Conversely, actual distribution of money or property, including advances against the partner's distributive share, are not taxable so long as the partner's basis in his partnership interest is not exceeded. (Rev. & Tax. Code, § 17891, subd. (a)(1); see Treas. Reg. 1.731-1 (a)(1)(ii).) According to California tax law, which is similar to federal law, a partner's distributive share of partnership income is not ascertainable or identifiable until the close of the partnership's taxable year. (Rev. & Tax. Code, § 17861; former Cal. Admin. Code, tit. 18, reg. 17861-17863, repealer filed Aug. 6, 1981 (Register 81, No. 32); see also Appeal of Jerald L. and Joan Katleman, Cal. St. Bd. of Equal., Dec. 15, 1976.) A partner is required to include in his income any partnership income for the taxable year of the partnership which ends within or with his own taxable year. (Rev. &

Tax Code, § 17861.) In this appeal, appellant and all the partnerships were on calendar tax years. Accordingly, appellant's distributive shares of each of the partnerships.' income for the 1977 tax year did not become ascertainable until December 31, 1977, after he had become a California resident. Therefore, all three distributive shares were includible in appellant's California income for the 1977 taxable year, which also ended on December 31, 1977.

Appellant states that the receipts of each partnership were a direct percentage of the gross cash receipts of stores which each partnership managed. Each partnership's income and expenses were accurately determinable monthly. Appellants provided schedules of partnership income on a monthly basis as well as appellant's drawings from the partnerships throughout 1977. Appellants argue that the income which appellants reported on their Kansas return had accrued within the meaning of section 17596 of the Revenue and Taxation Code, which 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.

Appellants conclude that the income reported on the Kansas return was not taxable by California.

Our decision in the Appeal of Virgil M. and Jeanne P. Money, decided December 13, 1983, discusses the Appeal of Bertram D. and Glorian B. Thomas, decided November 16, 1981 (cited in respondent's brief) and concludes that section 17596 of the Revenue and Taxation Code was designed to apply only when two conditions are satisfied: (1) when California's sole basis for taxation is the taxpayer's residency, and (2) when that taxation would differ depending on whether the taxpayer used the accrual or the cash method of accounting.

Applying our two-pronged standard to appellants' partnership income, we find that the first condition is satisfied; California's only basis for taxing the income is the taxpayers' residency in this state. However, we

find that the second condition is not satisfied because California's taxation of appellants' partnership income would not differ between cash and accrual basis taxpayers. Revenue and Taxation Code section 17861, referred to above, makes no distinction between cash and accrual basis taxpayers but simply determines that the computation of the taxable income of a partner is based on the income, gain, loss, deduction, or credit of the partnership for the taxable year of the partnership ending within or with the taxable year of the partner. Effectively, this provision puts all partners on the same method of accounting, so making unnecessary the general provisions of section 17596 to achieve the same result. Appellants' partnership income is, therefore, taxable by California.

At issue also in this appeal is whether appellants are entitled to a credit for taxes paid to Kansas. Section 18001 of the Revenue and Taxation Code provides that subject to certain conditions, residents shall be allowed a credit on income taxable by California for net income taxes imposed by and paid to another state,, But one of those conditions imposed by part of that section is that:

> The credit shall be allowed only for taxes paid to the other state on income derived from sources within that state which is taxable under its laws irrespective of the residence or domicile of the recipient.

The income of the partnerships was derived from their management of retail stores. It is settled that the source of income from personal services is the place where the services are performed. (Appeal of Leland M. and June N. Wiscombe, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Vernell H. Petersen, Cal. St. Bd. of Equal., June 28, 1979; see also Cal. Admin. Code, tit. 18, req. 17951-17954(b) in effect for the year here on appeal, since amended and renumbered Cal. Admin. Code, tit. 18, reg. 17951-2.) Since all the partnerships and the stores they managed were outside Kansas, and no evidence has appeared to indicate any partnership services were performed in Kansas, we can only conclude that the partnership income, and appellant's distributive share of that income, had a source outside of Kansas. Accordingly, the provisions of section 18001 prevent appellant from receiving any credit for Kansas income tax if any was imposed.

For the reasons stated above, we must sustain respondent's action.

Appeal of Dennis and Dianne Kimbrough

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 Dennis and Dianne Kimbrough against a proposed assessment of additional personal income tax in the amount of $2,656.41 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 27th day of June, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis and Mr. Bennett present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

William M. Bennett, Member

_____, Member

_____, Member