BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
KATHY J. SCHELL)

For Appellant: Kathy J. Scholl,
in pro. per,

For Respondent: **Lazaro L. Bobiles**
Counsel

O P I N ION

This appeal is made pursuant to section 19057, subdivision (a),1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Kathy J. **Schell** for refund of personal income tax in the amount of $122 for the year 1983.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The sole issue presented for our decision is whether appellant is entitled to exclude from gross income her contributions to an individual retirement account (IRA) for the year 1983.

For the first seven months of the appeal year, appellant was employed by Toy World. During this period, she contributed to a profit-sharing or retirement plan through payroll deductions. Upon the sale of the company and the termination of her employment in July 1983, appellant received a refund of her contributions. Appellant then worked for Kay Bee Toy & Hobby for the remaining five months of the year.

Appellant filed a timely California personal income tax return for 1983. Prior to the 1983 filing deadline, however, appellant filed an amended return, claiming a tax refund based upon an adjustment to income or deduction for a payment to a newly established IRA. Upon the receipt of information that appellant had received a lump-sum distribution from the profit-sharing or retirement plan in 1983, respondent determined that appellant had been an "active participant" in a qualified pension plan. Consequently, respondent disallowed the claimed deduction and denied the claim for refund. Appellant filed this appeal from the denial of her claim.

Section 17272 allows a deduction from gross income for cash contributions made to an IRA. No deduction is allowable, however, for an individual who, at any time during the taxable year, was an "active participant" in a qualif'ied pension plan, which is described in section 401(a) of the Internal Revenue Code and includes a trust exempt from tax under section 501(a) of the Internal Revenue Code. (Rev. & Tax. Code, § 17272, subd. (d)(l)(A).) Section 17240 is substantially similar to former section 219(b)(2) of the Internal Revenue Code of 1954.[2/] Therefore, case law interpretations of the federal statute are highly persuasive in construing the California section. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356 [280 P.2d 8931 (1955).)

2/ Internal Revenue Code section 219(b) was amended by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 311(a), to allow employees who are covered by a qualified employer pension plan to deduct contributions to an IRA for taxable years beginning after 1981. California has not adopted a comparable amendment to its IRA statute.

Like section 17272, the federal statute does not define the term "active participant." By looking at the legislative history of the federal statute, however, the federal courts have determined that the purpose of the active participant limitation is to prevent the occurrence of situations in which taxpayers would obtain double tax benefits by setting. aside in an IRA the maximum portion of their income allowed and deferring tax on that income while for the same year deferring tax on employer contributions to a qualified retirement plan. (Johnson v. Commissioner, 620 F.2d i53 (7th Cir. 1980).) Thus, an individual is considered an active participant if he is accruing benefits under a qualified plan even though that person 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); Guest v. Commissioner, 72 T.C. 768 (1979).)

It is well settled that respondent's determinations in regard to the imposition of taxes are presumptively correct, and the taxpayer has the burden of showing error in these determinations. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) In the instant appeal, the meager record discloses that appellant contributed to a company profit-sharing or retirement plan during the year under review. Appellant has stated that, while she was employed by Toy World, payments to fund the pension plan were deducted from her payroll checks. When she was terminated, appellant's contributions were distributed to her in a lump sum. Thus, it appears that appellant accrued benefits under her employer's profit-sharing or retirement plan in 1983. Because appellant has not shown otherwise, we must conclude on the basis of the record before us that appellant was an active participant in a qualified plan.

Appellant argues that she was not an active participant because the company profit-sharing or retirement plan ceased when the company itself was sold. However, active participation requires only that there be an accrual of benefits on behalf of the employee or contributions made to the plan. (Orvis v. Commissioner, ¶ 84,533 T.C.M. (P-H) (1984); Anthes v. Commissioner, 81 T.C. 1 (1983).) The fact that appellant lost her benefits under he employer's plan is of no consequence; the significant fact is that appellant was an "active

participant" in the plan during the taxable year. (Hildebrand v. Commissioner, 683 F.2d 57 (3d Cir. 1982); Chapman v. Commissioner, 77 T.C. 477 (1981); Appeal of Neill O. and Alice M. Rowe, Cal. St. Bd. of Equal., Aug. 17, 1982.)

On a final note, we observe that appellant has made mention of a profit-sharing plan offered by her succeeding employer which required a five-year period of employment before the vesting of benefits. While we have no reason to believe that appellant was not an active participant in the profit-sharing or retirement plan of her prior employer, appellant's enrollment in the plan of her next employer would similarly preclude a deduction for the subsequent IRA contribution. (See Johnson v. Commissioner, supra.)

For the foregoing reasons, we find that appellant was an active participant in a qualified plan during 1983 within the meaning of section 172.72, subdivision (d)(1)(A). Therefore, appellant is not entitled to deduct contributions to an IRA for that year. Accordingly, respondent's action in this matter will be sustained.

Appeal of Kathy J. Schell

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 action of the Franchise Tax Board in denying the claim of Kathy J. Schell for refund of personal income tax in the amount of $122 for the year 1983, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of July, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

_____, Chairman

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9