

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of      )  
  )  
WILHELM S. AND GENEVA B. EVERETT    )

Appearances:

- For Appellants:   Robert L. Bacon  
  Attorney at Law
- For Respondent:   Jack E. Gordon  
  Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Wilhelm S. and Geneva B. Everett against a proposed assessment of additional personal income tax in the amount of \$141.33 for the year 1969.

Appellant, Wilhelm S. Everett, is employed as an executive for the Pulsation Controls Corporation. In 1957 he transferred substantially all patent rights which

Appeal of Wilhelm S. and Geneva B. Everett

he owned to that corporation, giving it the exclusive right to use them in the United States. He also **transferred** similar patent rights to Pulsco Great Britain, Ltd., and Pulsation Controls Japan, Ltd., in exchange for annual royalties.

In their 1969 joint California income tax return, appellants reported royalty payments from the Japanese corporation in the amount of \$15,185. Appellants also deducted \$1,518 for Japanese taxes imposed on and withheld from the royalty payments in 1969. This tax amounted to 10 percent of appellants' gross royalties for that year and was imposed pursuant to the provisions of the Income Tax Law of Japan. Respondent disallowed the deduction for Japanese tax on the basis that it was a tax "on or according to or measured by income," and not deductible under the terms of section 17204 of the Revenue **and Taxation** Code. Appellants protested but their protest was denied. This appeal followed.

The sole question for determination is whether respondent properly disallowed the deduction for the Japanese taxes.

Section.17204 of the Revenue and Taxation Code permits a deduction for taxes paid or accrued during the taxable year except as provided in subsection (c) which states, in relevant part:

(c) No deduction shall be allowed for the **following. taxes:-**

\* \* \*

(2) Taxes on or according to or measured by income or profits paid or accrued within the taxable year imposed by the authority of:

(A) The government of the United States or any foreign country;...

Appellants do not seriously contest the fact that the tax in question is a nondeductible tax "on or according to or measured by income." However, they do contend that respondent is estopped from disallowing the deduction for the year in question. Appellants **assert** that

Appeal of Wilhelm S. and Geneva B. Everett

they entered into the royalty agreement with the Japanese corporation in reliance on the state of the law as it existed at that time. (See, e.g., Appeal of Edward Meltzer and Frieda Liffman Meltzer, Cal. St. Bd. of Equal., April 1, 1953, overruled by Appeal of Charles T. and Mary R. Haubiel, Cal. St. Bd. of Equal., Jan. 16, 1973.) Specifically, they claim that they relied on respondent's Legal Ruling 191 which provided that Japanese income tax withheld on rental income owed to a California resident was deductible pursuant to section 1.7204 of the Revenue and Taxation Code. Appellants acknowledge that Legal Ruling 191 was reversed by Legal Ruling 336, issued May 5, 1970, providing that the Japanese withholding tax imposed on amounts paid nonresidents from domestic source income, such as royalties, was not deductible. However, they maintain that the **ruling** cannot be given retroactive effect and can only be applied prospectively.

Appellants' position is ill-founded\* Initially it is difficult to understand how appellants could have relied on Legal Ruling **191** in executing a contract in 1957 when that ruling wasn't published until December 5, 1958. However, even assuming that appellants relied on an interpretation of the law analogous to that contained in Legal Ruling 191, which was based on a decision of this board prior to 1957, their argument still must fail.

An administrative rule or regulation such as Legal Ruling 336, which is interpretive, necessarily relates to the statute it interprets as of the date of the statute's enactment. Revenue rules or regulations are automatically retroactive in the sense that they are an interpretation of the statute to which they refer. **and** are applicable as of the enactment **of that** statute.

(Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 **180** L. Ed. 5281, reh. denied 297 U.S. 728 180 L. Ed. 10101; see also Rev. & Tax. Code § 19253 which provides that respondent may prescribe **the extent** to which any ruling **or** regulation shall be applied without retroactive effect.)

Appeal of Wilhelm S. and Geneva B. Everett

The purpose of Legal Ruling 336 was to correct the mistaken interpretation of the law contained in Legal Ruling 191 and was issued in response to decisions of this board holding that a tax such as the one in issue was a nondeductible tax "on or according to or measured by income." (See Appeal of R. M. and Kathryn L. Blankenbeckler, Cal. St. Bd. of Equal., Jan. 6, 1969; Appeal of Don Baxter, Inc., Cal. St. Bd. of Equal., Oct. 21, 1963.) It has been **specifically** held in such a case that the doctrine of equitable estoppel is not a bar to the exercise of the power to make rulings or regulations retroactive since that doctrine does not prevent the correction of a **mistake of law.** (Automobile Club of Michigan v. Commissioner, 3 U.S. 180, 183 [1 L. Ed. 2d 7461; Twitchco, Inc. v. United States, 30 Am. Fed. Tax R.2d 5431.]) Therefore, that doctrine has no application in this matter.

Apparently, appellant also contends that the retroactive application of Legal Ruling 336 is unconstitutional as either an ex post facto law or a law which impairs contractual obligations, both of which are prohibited by article I, section 10, clause 1 of the federal Constitution. However, the constitutional prohibition against ex post facto laws is not applicable **here for this is neither a criminal proceeding nor one for a forfeiture.** (See Love v. Fitzharris, 460 F.2d 382, 384; McCune v. First Nat. Trust & Savings Bank of Santa Barbara, 109 F.2d 887, 889.) With respect to the prohibition against laws impairing the obligation of contracts, appellants point to no obligation which has been impaired nor are we able to ascertain any.

In any event it is a well-established policy of this board not to rule on a constitutional question raised in a deficiency assessment appeal. This policy is based upon the absence of any specific statutory authority **which** would allow the Franchise Tax Board to obtain judicial review of an unfavorable decision. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of Paul Peringer, Cal. St. Bd. of Equal., Dec. 12, 1972.)

Appeal of Wilhelm S. and Geneva B. Everett

Accordingly, it is concluded that respondent's action in this matter was proper and must be sustained.

Q 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 Wilhelm S. and Geneva B. Everett against a proposed assessment of additional personal income tax in the amount of \$141.33 for the year 1969, be and the same is hereby sustained.

Done at Sacramento, California, this 13th day of **November**, 1973, by the State Board of Equalization.

*William H. James*, Chairman  
*Scott Beece*, Member  
*John W. Lynch*, Member  
*Paul Allen*, Member  
\_\_\_\_\_, Member

ATTEST: *W.W. Sumlok*, Secretary