BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LELAND M. AND)
JUNE N. WISCOMBE)

For Appellants: Leland M. Wiscombe, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

David M. Hinman
Counsel

OPINION

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 Leland M. and June N. Wiscombe against proposed assessments of additional personal income tax in the amounts of $212.15, $478.81, and $235.53 for the years 1968, 1969, and 1970, respectively.

The issue presented is whether appellants, who were California residents, are entitled to a tax credit for net income taxes paid to Alabama on income earned while performing personal services in California.

Mr. Wiscombe (hereafter appellant) is president and chief executive, and Mrs. Wiscombe is secretary-treasurer, of Wiscombe Southern Painting Company, an Alabama corporation (hereafter Company). Appellants own 86 percent of the Company's stock and are members of its board of directors. The Company issues salary checks in Alabama for appellants' services as corporate officers from which Alabama income tax is withheld. While they are now Alabama residents, during the years in question appellants were residents of this state and filed joint California resident returns, reporting $51,507.00 as adjusted gross income in 1968, $39,550.00 in 1969, and $30,743.00 in 1970. They also filed joint Alabama nonresident returns, paying income tax to that state on the following amounts of adjusted gross income: $25,560.00 in 1968, $25,360.00 in 1969, and $19,169.00 in 1970.

Appellant performed the following duties for the Company: budgeting; reviewing major job bid estimates;, securing financing; securing and guaranteeing bonding; analyzing financial statements; and making inspection trips to major jobs. Mrs. Wiscombe performed the usual duties of a secretary-treasurer. The Company's only place of business was in Alabama, and the books and records were kept there.

During the appeal years the Company carried out contracting work in numerous states but had no contracts or business interests in California. It employed a general manager, field superintendents and foremen to furnish direct services at job sites. Other than observing on inspection trips, appellant performed no services at the job sites. Appellant's longest field trip lasted approximately 10 days, in June of 1970.

Appellant spent approximately 40 percent of his working time on Company business and divided that time about evenly between California and Alabama. As already noted, his services for the Company elsewhere were negligible. During the years in question

he was also employed by California corporations. Mrs. Wiscombe likewise spent approximately half her time in the two states while performing services for the Company.

On their California returns appellants claimed a tax credit reflecting the entire amount of net income taxes paid to Alabama. Appellants relied on section 18001 of the Revenue and Taxation Code[1/] which permits a California resident who has paid a net income tax to a sister state on income derived from sources within that state, upon which he has also paid California personal income tax, to credit the Alabama tax paid against his California tax. The credit does not apply to income derived from a California source. Based on information originally received from appellants, respondent determined that only 40 percent of the salaries upon which tax was paid to Alabama was derived from an Alabama source . Consequently, respondent concluded that only 40 percent of those salaries could be included in computing the tax credit. After respondent's revision, appellants protested. Respondent denied their protest and this appeal followed.

Since this appeal was filed, respondent obtained further information from appellants, establishing the approximate equal division of time spent in both states performing services for the Company. Therefore, respondent now concedes that one-half of the salaries was derived from an Alabama source, and should.be used in computing the allowable tax credit.

1/ Rev. & Tax. Code, § 18001 provides, in pertinent part:

> Subject to the following conditions, residents shall be allowed a credit against the taxes imposed by this part for net income taxes imposed by and paid to another state on income taxable under this part:
>
> (a) 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 regulation interpreting section 18001 of the Revenue and Taxation Code, insofar as pertinent, allows resident taxpayers a credit only for taxes imposed by and paid to another state on income from personal services performed within such state and taxable under that state's laws irrespective of the taxpayers' residence or domicile. (Cal. Admin. Code, tit, 18, reg. 18001(b), subd. (1).) The effect of the regulation is to consider the source of the income as the place where the services are performed. A regulation interpreting a tax law adopted by an administrative agency charged with enforcing that law i-s entitled to great weight, and its language should be given full effect, unless clearly erroneous. (See Coca-Cola Co. v. State Board of Equalization, 25 Cal. 2d 918 [156 P. 2d 1].)

Appellants contend that all the salaries from the Company were derived from an Alabama source. They emphasize, as significant factors, that the Company's sole place of business was in Alabama and that it had no contracts or interests in California.

However, it is settled not only by the regulations but by decisions of this board that the source of income from personal services is the place where the services are performed. (Appeal of Robert C. Thomas and Marian Thomas. Cal. St. Bd. of Equal., April 20, 1955; accord, Appeal of Charles W. and Mary D. Perelle, Cal. St. Bd. of Equal., Dec. 17, 1958; see also Cal. Admin. Code, tit. 18, reg. 17951-17954(b).) The place where the taxpayer is located when performing personal services is still the source of the income, notwithstanding some relationship between the activities and another jurisdiction. (see Tipton & Kalmbach, Inc. v. United States, 480 F. 2d 1118; Karrer v. United States, 152 F. Supp. 66; Rev., Rul. 72-423, 1972-2 Cum. Bull. 446; Rev. Rul. 62-67, 1962-1 Cum. Bull. 128.)

It is noted that if nonresident salaried employees (including corporate officers) are employed in this state at intervals throughout any taxable' year, and are paid on a daily, weekly or monthly basis, the gross income from sources within this state includes that portion of the total compensation for personal services which the total number of working days employed

within the state bears to the total number of working days both within and without the state. (Cal. Admin. Code, tit. 18, reg. 17951-17%4(e), subd. (4).) This board approved the principle of the "working day ratio" as applied to salary received by a nonresident employee, the sole stockholder of his employer, working within and without this state. (Appeal of Louis and Betzi Akerstrom, Cal. St. Rd. of Equal. , May 17, 1960.) The same formula should logically be used in determining the source of income where a controlling stockholder and his wife are California residents dividing their working time for a corporation between California and another state.

In support of their view that all the salary received from the Company was derived from an Alabama source, appellants also maintain that it is the position of the Alabama taxing authorities that they are not entitled to any refund. However, under our interpretation of Alabama's code provisions and regulations, persons not regarded as Alabama residents or domiciliaries need not pay Alabama income tax with respect to compensation for per-sonal services performed as employees in another state. Even if our interpretation of the Alabama law is incorrect, there can be no tax credit resulting from compensation for personal services performed in this state. In other words, the income must be derived from sources within the sister state under California's interpretation of what constitutes income from sources within that state, before the taxpayer is entitled to a tax credit. (See Miller v. McColgan, 17 Cal. 2d 432 [110 P. 2d 419]; Appeal of Hallie L. Bills, Cal. St. B. of Equal., April 5, 1965.)

For the foregoing reasons, we conclude that inasmuch as appellants divided their time equally between California and Alabama while performing services as corporate officers for the Company, the tax credit should be computed in accordance with respondent's concession.

Appellant has also expressed concern whether he overpaid California taxes on his income from California employers since a portion of those services was performed outside of California. Appellant's concern is unfounded since a California resident is taxable on all of his personal service income regardless of its source. (Rev. &Tax. Code, § 17041.)

Appeal of Leland M. and June N. Wiscombe

ORDER

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 Leland M. and June N. Wiscombe against proposed assessments of additional personal income tax in the amounts of $212.15, $478.81, and $235.53 for the years 1968, 1969, and 1970, respectively, be and the same is hereby modified to reflect the concession made by respondent. In all other, respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 19 day of August 1975, by the State Board of Equalization.

John W. Lynch, Chairman

Member

George R. Reilly, Member

Member

Member

ATTEST: W. W. Dunlop Executive Secretary