BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CURTIS W. AND)
BISERKA V. LIVESAY)

Appearances:

For Appellants: Curtis W. Livesay, in pro. per.

For Respondent: Paul J. Petrozzi
Counsel

OPINION

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Curtis W. and Biserka V. Livesay for refund of personal income tax in the amounts of $61.76 and $73.50 for the years 1968 and 1969, respectively.

The issue presented is whether the portion of a civil service employee's compensation automatically withheld from his pay and credited to an employee retirement fund is includible in his gross income for the year such portion is withheld.

During the years at issue Mr. Livesay (hereafter appellant) was employed by the County of Los Angeles as a deputy district attorney. As a condition of his employment, appellant was required by law to participate in the retirement system established by the county. (County Employees Retirement Law of 1937, Gov. Code, § 31450 et seq.) As a result, certain amounts were withheld each month from appellant's gross wages as mandatory employee contributions to the retirement fund. The accumulated contributions are recoverable by appellant only upon his retirement or separation from county employment, or by appellant's survivor or designated beneficiary upon his death.

Appellant filed joint California personal income tax returns for 1968 and 1969 wherein he included as gross income the respective retirement fund contributions withheld from his compensation for those years. Subsequently, appellant filed claims for refund of the income tax paid on such amounts based on the theory that they were erroneously included in his gross income. Respondent denied the claims on the basis of its determination that the amounts were includible in appellant's -gross income.

Section 17071 of the Revenue and Taxation Code provides, in pertinent part, that '-'gross income means all income from whatever source derived, including ... [c]ompensation for services, including fees, commissions, and similar items. " The federal definition of gross income is identical. (Int. Rev. Code of 1954, § 61.) Federal court decisions construing the federal statute are thus entitled to great weight in applying the corresponding state law. (Meanley v. McColgan, 49 Cal. App. 2d 203, 209 [121 P. 2d 45]; Appeal of Glenn M. and Phyllis R. Pfau, Cal. St. Bd. of Equal.., July 31, 1972.)

The federal authorities have uniformly and consistently held that the portion of an employee's compensation automatically withheld as a contribution to a retirement fund is includible in the

employee's gross income for the year of the contribution. (Hogan v. United States, 513 F. 2d 170, cert. denied ___ u. s. ___ [46 L. Ed. 2d 55]; Megibow v. Commissioner, 218 F. 2d 687; Miller v. Commissioner, 114 F. 2d 287; Lawrence J. Cohen, 63 T.C. 267, a-docketed, No. 75-1578, 9th Cir., Feb. 25, 1975.) Although these decisions involve employees who were subject to the federal Civil Service Retirement Act, the rationale supporting the decisions is equally applicable with respect to an employee subject to the retirement system of Los Angeles County. (Eugene G. Feistman, 63 T. C. 129.)

Appellant contends that since he neither actually nor constructively received the amounts withheld from his compensation as retirement fund contributions, the funds were not income to him in the year they were withheld. Rather, appellant argues, the accumulated contributions should be deemed income to their recipient upon the ultimate distribution of the funds. Appellant fails to recognize, however, that the monthly contributions purchase for him a pension and other benefits accorded under the retirement system. "These benefits take the place of the part of the taxpayer's salary which was withheld, and, in any event, had an equal or greater value than the sum withheld and constitute income just as if the taxpayer had received his entire salary in cash. " (Miller v. Commissioner, supra, 144 F. 2d at 289.) Accordingly, the income is taxable to appellant as the party who earned it, irrespective of whether that income is actually distributed to him. (Lucas v. Earl, 281 U. S. 111 [74 L. Ed. 731]; see also United States v. Bayse, 410 U. S. 441, 447 [35 L. Ed. 2d 412], rev'g 450 F. 2d 109.)

Appellant attempts to distinguish the federal cases on the ground that an employee subject to the federal retirement system is "deemed to consent and agree to" the retirement fund contributions, (5 U.S.C. 3 8334), while the County Employees Retirement Law contains no similar implied consent provision. We do not believe that the distinction is significant. As an employee of Los Angeles County, appellant's membership and participation in its retirement system was automatic and mandatory. (See Gov. Code, § 31552.) Thus, appellant's consent to the retirement fund contributions may be implicitly derived from his employment contract with the county. (See Hogan v. United States, supra, 513 F. 2d at 175; Eugene G. Feistman, supra.)

We conclude that appellant's contributions to the county retirement fund are includible in his gross income for the year such contributions were withheld from his compensation. Accordingly, respondent's action in this matter must be sustained.

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Curtis W. and Biserka V. Livesay for refund of personal income tax in the amounts of $61.76 and $73.50 for the years 1968 and 1969, be and the same is hereby sustained.

Done at Sacramento, California, this 2nd day of February, 1976, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Executive Secretary