BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
PHILIP AND DIANE KRAKE, ET AL.)

For Appellants: Charles L. Abrahams
Attorney at Law

For Respondent: Bruce W. Walker
Chief Counsel

Marvin J. Halpern
Counsel

Richard A. Watson
Counsel

O P I N I O N

These appeals are made pursuant to sections 18594 and 19059 of the Revenue and Taxation Code from the actions of the Franchise Tax Board in denying a protest against a proposed assessment of additional personal income tax and

in denying claims for refund of personal income tax for the following taxpayers, years and amounts:

Appellants	Years	Claims For Refund	Proposed Assessment
Philip and Diane Krake	1968	$ 25.37	
Brent and Sandra Hughes	1968	52.96	
	1969	48.96	
William E. and Gail White	1968	111.62	
	1969	47.00	
Edward A. and Loretta Irvine	1968	64.77	
	1969	42.92	
Eddie **Joyal**	1967	105.41	
	1968	196.64	
	1969	455.65	
William M. and Doreen Flett	1968	80.65	
	1969	53.97	
Robert J. and Margaret Wall	1969	90.00	
Jerry F. and Michelle Desjardins	1969	50.26	
James Peters, Jr.	1968	11.00	
	1969	125.95	
Wayne A. and Sharyn Rutledge	1969	75.99	
Lawrence dnd Elaine Cahan	1969	113.99	
Matthew J. and Glory A. Ravlich	1970		$54.47

Appellant wives are involved in these appeals solely because joint returns were filed during the years at issue. Accordingly, the term "appellants" shall hereinafter refer only to the male appellants.

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The question presented is whether respondent properly apportioned appellants' incomes between California and other states.

During the years in question appellants played hockey for the Los Angeles Kings, a professional hockey team in the National Hockey League. The team played 42 of 76 regular season games in California during each of the 1968-1969 and 1969-1970 hockey seasons. Throughout these years none of the appellants were residents of California, and each allegedly spent the 144 days of the off-season outside this state.

The Kings' standard player's contract, which each of the appellants had apparently signed, was drafted for a one year period commencing October 1st of each year. Section 1 of the contract provided that the player would be paid in consecutive semi-monthly installments, provided that if the player were not employed through the entire regular season, he would receive only part of his salary in the ratio of the number of days of actual employment to the number of days in the regular season. Under section 2 each player agreed, inter alia, to play in all exhibition, regular season, and post-season games; to report to training camp in good physical condition; and to play hockey only for the Kings unless his contract was released or assigned. The player also agreed, in section 7 of the contract, not to engage in certain named sports during the contract period. Section 5 gave the Kings the right to suspend any player not in good physical condition at the start of the season, and under section 15 the Kings could deduct from the salary of a suspended player an amount equal to the proportion of his salary which the number of days of suspension bore to the number of days in the regular season. Finally, section 19 stated that the player's promise not to play hockey for other teams had been considered in determining his salary.

On their nonresident California personal income tax returns for the years in question, appellants each apportioned their salaries between California and other states and requested refunds of part of the taxes withheld by their employer.

Respondent determined, however, that appellants had apportioned their salaries incorrectly, and it therefore revised each return using the following apportionment formula:

$$\text{California source salary} = \text{total salary} \times \frac{\text{regular season games played in California}}{\text{total regular season games played}}$$

This determination resulted in the proposed assessment and the denials of the claims for refund at issue on these appeals.

Revenue and Taxation Code section 17951 states that the gross income of nonresidents "includes only the gross income from sources within this State." In addition, section 17954 provides in regard to nonresidents that "[g]ross income from sources within and without this State shall be allocated and apportioned under rules and regulations prescribed by the Franchise Tax Board." In relevant part, the implementing regulation reads as follows:

> If nonresident employees are employed in this State at intervals throughout the 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....If the employees are paid on some other basis, the total compensation for personal services must be apportioned between this State and other States and foreign countries in such a manner as to allocate to California that portion of the total compensation which is reasonably attributable to personal services performed in this State. (Cal. Admin. Code, tit. 18, reg. 17951-17954(e), subd. (4).)

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Appellants do not object to respondent's use of the "games-played" formula set out above.[1] They contend only that their total salaries should not be included in the computation. Their position is that the Kings' standard player's contract required them to perform "services" for the team during the off-season, such as keeping in good physical condition and refraining from playing hockey for other teams, and that a portion of their salaries represented compensation for such "services." Since appellants lived outside this state during the off-season, they contend that the compensation they received for such "services" had its source outside California. And since the off-season lasted 144 days, appellants conclude that 144/365 (about 39.5 percent) of their salaries should be allocated to other states before the "games-played" formula is applied to the remainder of their salaries. For the reasons expressed below, we disagree.

Sections 1 and 15 of the Kings' standard player's contract provided that, if the contract were terminated or the player suspended, the player's salary would be determined by reference to the number of days in the regular season. This indicates that appellants were hired by the Kings primarily for the services they would render during

1/ The previously quoted regulation arguably authorizes a formula for this case based on the number of "working days" spent in California. For professional athletes, respondent defines the term "working days" to include not only the days on which games are played, but also the days during the regular season on which the athlete practices or travels with the team. Respondent used the "games-played" formula rather than the "working-days" formula in this case, however, because it assumed those two formulas to be equivalent when applied to professional hockey players. We have described respondent's arguments on this point in the Appeal of Dennis F. and Nancy Partee, decided this day. In this case, since appellants do not raise the issue, we shall assume that the use of the "games-played" formula was appropriate.

the regular season, and that any "services" they were required to perform during the off-season were merely incidental. Therefore any portion of their salaries which represented compensation for off-season activities was de **minimis.** Appellants, however, seek to allocate almost 40 percent of their salaries to such off-season activities. Since this is clearly excessive,., we, must reject appellants' arguments.

Section 17954 of the Revenue and Taxation Code specifically authorizes respondent to adopt rules and regulations apportioning the gross income of nonresidents. "Regulations promulgated under such circumstances **carry** a strong presumption of validity." (Jack Winston Londen, 45 T.C. **106,** 110.) The apportionment formula urged by appellants does not yield the reasonable apportionment required by respondent's regulation. On the other hand, respondent's conclusion that appellants' entire salary may fairly be apportioned on the basis of services rendered during the regular season is reasonable, and it is also consistent with the position of the Internal Revenue Service with **regard** to professional hockey players. (See Rev. Rul. 766'7, 1976-1 Cum. Bull. ___.) We therefore sustain respondent's action.

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,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to sections 18595 and 19060 of the Revenue and Taxation Code, that the actions of the Franchise Tax Board in denying the protest against a proposed assessment of additional personal income tax and in denying the claims for refund of personal income tax of Philip and Diane Krake, et al., in the amounts and for the years specified in the opinion on file herein, be and the same are hereby sustained.

Done at Sacramento, California, this 6th day of October, 1976, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Executive Secretary