BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DENNIS F. AND NANCY PARTEE)

Appearances:

For Appellants: James W. Braghetta, E.A.

For Respondent: Richard A. Watson
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in partially denying, to the extent of $93.48, the claim of Dennis F. and Nancy **Partee** for refund of personal income tax in the amount of $163.74 for the year 1968.

Appeal of Dennis F. and Nancy Partee

Two issues are presented: First, whether a nonresident professional football player was "away from home" while living in the city where his employer's franchise is located; and second, whether respondent properly apportioned the player's salary between California and other states on the basis of the number of "working days" which he spent in this state.

Appellants Dennis F. and Nancy Partee, husband and wife, were residents of the State of Texas throughout 1968. During the early part of the year they were both employed as teachers at schools in the Dallas area. On July 1, however, they came to California so that Dennis could try out for a position as a professional football player with the San Diego Chargers.

Since the Chargers had not picked Dennis until the eleventh round of the annual football draft, his chances of winning a place on the team appeared poor when he first reported to training camp. Dennis specializes in punting and kicking, and he had to compete for a position with nine other kicking specialists. By the end of August, however, according to articles in a local newspaper, Dennis was recognized as the finest punter that the Chargers had ever had. About that time the other nine kickers were traded or cut, and it became clear that Dennis had won a job with the Chargers for at least one season.

Sometime before the start of the 1968 season, Dennis signed a standard American Football League player's contract with the Chargers. The contract period began on the day the contract was executed and ended on May 1, 1969. Under section 2 of the contract Dennis agreed to play football for the Chargers and to report promptly for and participate in all practice sessions. In return, the Chargers promised in section 3 of the contract to pay Dennis a salary, of which 75 percent was to be paid in weekly installments during the football season with the balance to be paid in a lump sum at the end of the season. In section 6 the Chargers reserved the right to terminate the contract if Dennis did not keep himself in good physical condition or if he did not demonstrate sufficient skill to play professional football. Finally, section 7 provided

that if the contract were terminated, Dennis would receive a portion of his salary in the ratio of the number of regular season games already played by the Chargers at the time of termination to the number of the Chargers' scheduled regular season games.

The 1968 football season apparently lasted 98 days. During the season the Chargers played eight regular season games in California and six regular season games outside the state. Dennis was outside California a total of 24 days in connection with those latter six games. Throughout this period Nancy remained in the San Diego area and taught school in Imperial Beach, California. When the football season ended on December 15, 1968, appellants left California and returned to Texas.

Appellants filed a joint nonresident California personal income tax return for the year in question. On this return they reported Dennis' entire salary from the Chargers as income, and also claimed a traveling expense deduction for living expenses incurred while they were in California. Subsequently appellants filed a refund claim apportioning 24 percent of Dennis' salary from the Chargers to sources outside California. In acting on the claim respondent determined that 24.5 percent of Dennis' salary was properly apportionable to other states. Respondent also disallowed the claimed traveling expense deduction, however, creating a deficiency which it offset against the refund due appellants because of the revised income apportionment. On this appeal, appellants argue that the traveling expense deduction should have been allowed. They also contend that 42.9 percent of Dennis' salary should be apportioned to sources outside California.

I

We first discuss the traveling expense question. Subdivision (a)(2) of Revenue and Taxation Code section 17202 authorizes a deduction for ordinary and necessary traveling expenses, including meals and lodging, incurred while the taxpayer is "away from home in the pursuit of a trade or business...." This subdivision is identical to

section 162(a) (2) of the Internal Revenue Code of 1954. The deduction is allowed for meals and lodging for two reasons: (1) to offset the additional expense involved when a taxpayer maintains a permanent home in one locale but has to pay duplicate living expenses in another; and (2) to make allowance for the excessive cost of food and shelter while traveling. (James v. United States, 308 F.2d 204, 207; Henry C. Deneke, 42 T.C. 981, 982.) Therefore the deduction is limited to expenditures made while "away from home," and "home" for this purpose means a permanent residence where the taxpayer incurs substantial continuing living expenses. (James v. United States, supra, 308 F.2d at 207-208.)

The question presented here is whether appellants were "away from home" while they were living in California. Appellants contend that they were because Dennis' employment with the Chargers was temporary and insecure, and because it was therefore unreasonable to expect them to establish a permanent home in San Diego. Respondent, on the other hand, argues that Dennis' position with the Chargers was permanent or indefinite.

We find it unnecessary to determine whether Dennis' employment was "temporary," "permanent," or "indefinite." Such distinctions become material only when it appears that the taxpayer maintains a permanent home, but has to leave that home for a time for business reasons. (United States v. Mathews, 332 F.2d 91, 93.) Here appellants fail to allege that they had a permanent home outside California, or that they incurred substantial duplicate living expenses during their trip to this state. Indeed, insofar as we can ascertain from the record, appellants' only "home" during the period in question was in San Diego. Accordingly, since it does not appear that appellants had a "home" from which they were away while in California, we conclude that respondent properly disallowed the claimed traveling expense deduction. (James v. United States, supra; United States v. Mathews, supra.)

II

We now turn to the apportionment question. Section 17951 of the Revenue and Taxation Code provides that the gross income of nonresidents "includes only the gross income from sources within this State." Section 17954 further provides that, in regard to nonresidents, "[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, as would be the case if employed in operating trains, boats, planes, motor buses, trucks, etc., between this State and other states and foreign countries, 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).)

Respondent uses the working-day formula of this regulation to apportion the salaries of nonresident professional football players. It defines the term "working day" to include all days on which the player's team practices, travels, or plays, beginning with the first practice day for the first regular season game and extending through the team's last post-season game. In this case, respondent

determined that each of the 98 days of the 1968 season was a working day.[1/] Since Dennis was outside California for 24 of those days, respondent apportioned 24/98 (or 24.5 percent) of his salary to sources outside this state.

Appellants maintain that the working-day formula, as defined by respondent, is inappropriate for professional football players. They argue that football players are paid only for playing in football games, not for practicing or traveling, and that their salaries should therefore be apportioned on the basis of the number of games played during the football season. Since the Chargers played fourteen games during the 1968 season, of which six were played outside California, appellants conclude that 6/14 (or 42.9 percent) of Dennis' salary should be apportioned to sources outside this state.

In support of their position, appellants contend that the standard football player's contract provides that players are paid only for playing in games. It is true that, under section 7 of the contract, the salary of a terminated player is determined by reference to the number of games played by the team, an indication that players are paid on a game-by-game basis. Section 2 of the contract, however, requires each player to participate in practice sessions, and by implication the contract also requires the player to travel to and from games and practices. Furthermore, it does not appear that practicing and traveling are

1/ It seems unlikely that Dennis had no days off during the entire season. Appellants do not object to respondent's determination on this point, however, and we therefore assume that that determination is correct. Appellants also do not contest the exclusion of some preseason practice days from the definition of "working days," and we accordingly do not reach that issue.

insignificant or incidental parts of the player's duties. It is therefore quite plausible to assume that a portion of the player's salary represents compensation for such activities. Under these circumstances, respondent's determination that professional football players are paid for practices and necessary travel, as well as for playing in games, is not unreasonable.

Appellants also allege that the other states which have professional football teams use the games-played formula to apportion the players' salaries. They argue that respondent's working-day formula must be wrong because it is out of step with the practice in those other states. We disagree. 'The fact that other states may have found the games-played method to be preferable does not necessarily render respondent's method unreasonable or incorrect.

Finally, appellants point out that respondent uses the games-played formula to apportion the salaries of non-resident professional baseball, basketball and hockey players. (See the Appeals of Philip and Diane Krake, et al., decided this day.) Appellants contend that it is therefore unreasonable and discriminatory to apply the working-day method to nonresident professional football players.

Respondent offers two reasons to explain the apparent discrimination. First, use of the games-played formula is administratively convenient since it requires no information beyond that readily available in published team schedules. The second reason involves scheduling differences between football and other sports. Baseball, basketball and hockey teams play a relatively large number of games during their respective playing seasons, and the number of working days approximates the number of games played. Moreover, baseball, basketball and hockey teams often play series of games without returning to their home state. Any discrepancies between the number of games and working days therefore appear in both the numerator and the denominator of the apportionment formula and cancel each other out. Respondent therefore concludes that the working-day and games-played methods are equivalent when applied to baseball, basketball and hockey players. In essence,

respondent's position is that the working-day method is preferable for all nonresident athletes, but that the games-played method is appropriate in some cases because it is more convenient and produces approximately the same result.

We need not decide whether it is proper for respondent to use the games-played formula for nonresident baseball, basketball or hockey players. It is sufficient to note that the principal reason for using the games-played method in those cases does not apply here. Unlike baseball, basketball or hockey teams, football teams play only one game per week during the regular season, and they typically return to their home state after each game to practice for the next. Therefore the games-played method, if applied to football players, would produce substantially different results than the working-day method. Accordingly, it is not unreasonable for respondent to use the one method for some athletes while using the other method for football players..

In conclusion, we recall that section 17954 of the Revenue and Taxation Code provides that the gross income of nonresidents is to be allocated and apportioned according to respondent% rules and regulations. "Regulations promulgated under such circumstances carry a strong presumption of validity." (Jack Winston Londen, 45 T.C. 106, 110.) No error has been shown in the regulation involved here, or in the definition of "working days" which respondent uses for nonresident professional football players. We therefore conclude that respondent correctly apportioned the salary Dennis received from the Chargers.

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,

Appeal of Dennis F. and Nancy **Partee**

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 partially denying, to the extent of $93.48, the claim of Dennis F. and Nancy **Partee** for refund of personal income tax in the amount of $163.74 for the year 1968, be and the same is 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