BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT L. WEBBER)

For Appellant: Jay Julien
Attorney at Law

For Respondent: Bruce W. Walker
Chief Counsel

Paul J. Petrozzi
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 Robert L. Webber aqainst a proposed assessment of additional personal income tax in the amount of $560.83 for the year 1967, and against a proposed penalty assessment for failure to file a timely return in the amount of $216.87 for the year 1967.

Appeal of Robert L. Webber

Appellant, a professional actor, was a resident of New York prior to and during the year in issue. Respondent received information that appellant performed acting services and received compensation for such services in California. Accordingly, on February 11, 1969, respondent notified appellant of the possible requirement to file a California personal income tax return for 1967. A follow-up letter was sent to appellant in September 1969. In the absence of any response from appellant, respondent issued a notice of proposed assessment on January 9, 1970. Thereafter, the proposed assessment was revised in accordance with information available to respondent. The proposed assessment included a 25 percent penalty for failure to file a return upon notice and demand.

Appellant protested the proposed assessment. He stated that for 1967 his total gross income from California sources was $718. Therefore, appellant contended, he was not required to file a return. However, respondent asserted that certain information led it to believe that appellant performed services in California on behalf of Webber Productions, Inc. (Webber), his wholly owned New York corporation. Webber, in turn, received payment for appellant's services and paid appellant a substantial salary in 1967 for those services. Appellant admits receiving $46,000 in compensation from Webber during 1967, but maintains that none of that compensation was for services rendered in California. Respondent recomputed appellant's California source income and resulting tax liability, and issued its notice of action revising the proposed assessment. From this action appellant appealed.

The issue for determination is whether respondent correctly computed appellant's income from California sources.

For purposes of the California Personal Income Tax Law, in the case of a nonresident taxpayer, gross income includes only the gross income from sources within this state. (Rev. & Tax. Code, § 17951; see also Cal. Admin. Code, tit. 18, reg. 17951-17954(e), subd. (2).) The word "source" conveys the essential idea of origin. The critical factor which determines the source of income from personal services is not the residence of the taxpayer, or the place where the contract for service is entered into, or the place of payment. It is the place where the services are performed. If income is received for personal services

performed in California the income is from a California source and subject to the California Personal Income Tax Law. (Ingram v. Bowers, 47 F.2d 925, aff'd 57 F.2d 65; Irene Vavasour Elder Perkins, 40 T.C. 330, 341; Appeal of Charles W. and Mary D. Perelle, Cal. St. Bd. of Equal., Dec. 17, 1958; Appeal of Robert C. and Marian Thomas, Cal. St. Bd. of Equal., April 20, 1955; cf. Rev. Rul. 60-55, 1960-1 Cum. Bull. 270.) Thus, it is clear that if appellant received any compensation from his controlled corporation during the year in issue for services performed in this state they are includible in his California gross income.

It is respondent's position that it determined appellant's California source income and the resulting tax liability for the year in issue in accordance with current information from its files and records. (See Rev. & Tax. Code, § 18682 as it read in 1967.) Respondent maintains that it has constructed appellant's California source income on a reasonable basis from the information available to it.

It is axiomatic that respondent's determination is presumed correct and the taxpayer has the burden of proving the determination erroneous. (See, e.g., Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 4141; Appeal of Pearl R. Blattenberger, Cal. St. Bd. of Equal., March 27, 1952.) The presumption, however, is a rebuttable one, and will support a finding only in the absence of sufficient evidence to the contrary. (Caratan v. Commissioner, 442 F.2d 606; Robert Louis Stevenson Apartments, Inc. v. Commissioner, 337 F.2d 681; Cohen v. Commissioner, 266 F.2d 5, 11; Wiget v. Becker, 84 F.2d 706, 707; cf. Rockwell v. Commissioner, 512 F.2d 882; Rinieri v. Scanlon, 254 F. Supp. 469.) Respondent's determination is not evidence to be weighed against evidence produced by the taxpayer. The presumption of correctness disappears once evidence which would support a contrary finding has been submitted. (Herbert v. Commissioner, 377 F.2d 65, 69; Niederkrome v. Commissioner, 266 F.2d 238, 241; Cohen v. Commissioner, supra; cf. Rockwell v. Commissioner, supra.) In other words, the effect of respondent's presumption is little more than to cast upon the other party the burden of going forward with the evidence.

In the instant matter respondent has alluded to "information", "current information from (its) files and records," and "information available to this office," in support of its assessment. However, the record is devoid of any such information. Respondent has failed to submit a single shred of evidence to support the deficiency it assessed against appellant.

On the other hand, appellant has submitted signed statements concerning the amounts of income received by Webber and by him during 1967. Appellant stated that he received $906 1/ in income as a result of residual payments made to him in connection with work performed for various companies in California prior to 1967. The statement also asserts that appellant performed services for Webber in Italy and France during 1967. The performance of those services resulted in the only income to Webber in 1967 according to appellant's statement. The services rendered included appellant's performance in a film entitled

1/ In his protest appellant stated that his income from California sources for 1967 was $718. In the signed statement he indicated that California source income for 1967 was $906. The difference between the two figures is $188. Although the difference is not explained, a review of the income schedule submitted to respondent by appellant indicates that apparent California source income totals $907. Included in this amount is a $189 item of income attributable to a California source. Presumably, this item accounts for the difference ($906 - $718 = $188) with a $1 mathematical error.

"Every Man My Enemy" produced by a firm called Tiki Film Company on location in Rome. The gross income received by Webber for this performance was $40,000. Appellant also maintains that he performed services in Paris, France, in a picture named "Mannon 70" produced by Robert Dorfmann. The gross income received by Webber as a result of this performance was $9,144. In the statement referred to above appellant stated specifically that, in 1967, he performed no services for any company, including Webber, in California. In another signed statement appellant stated: that in 1967 he received $46,000 from Webber; that the payment was made for the aforementioned acting services performed in Italy and France, and for administrative services performed in New York.

When a taxpayer has introduced sufficient evidence to establish a prima facie case, the burden then shifts to respondent to present contrary evidence. If it fails to do so, it cannot prevail. (Paul J. Byrum, 58 T.C. 731.) In the instant appeal respondent has offered no evidence to contradict the statements of appellant. Nor has it offered any evidence which would challenge the credibility of appellant's statements. Where appellant's statements are competent, relevant, credible and uncontradicted, we may not arbitrarily discredit or disregard them. (See Banks v. Commissioner, 322 F.2d 530, 537 and the cases cited therein; see also Estate of Albert-Rand, 28 T.C. 1002, 1006; cf. Mac Levine, 31 T.C. 1121, 1124; Clara O. Beers, 34 B.T.A. 754, 758.)

Respondent has offered no evidence; it has relied entirely on the presumption. Appellant, on the other hand, has offered some evidence, albeit weak, of the fact that he had no, or minimal, California source income. The law imposes much less of a burden upon a taxpayer who is called upon to prove a negative - that he did not receive the income which the taxing agency claims - than it imposes upon a taxpayer who is attempting to sustain a deduction. (Weir v. Commissioner, 283 F.2d 675; see also Mac Levine, supra; Clara O. Beers, supra.)

We believe appellant has satisfied his burden of establishing that respondent's determination concerning the amount of compensation he received from a California source in 1967 was erroneous. When respondent's determination has been shown to be erroneous and the presumption of correctness disappears, respondent, and not the taxpayer, has the burden of proving whether any deficiency exists and, i'f so, the amount. (Cohen v. Commissioner, supra; see also Nelvering v. Taylor, 293 U.S. 507, 514 [79 L. Ed. 623]; cf. Compton v. United States, 33.4 F.2d 212, 216.) Since respondent has not satisfied the burden of establishing a deficiency, its action in this matter must 'be reversed.

Appellant also points out that $306.65 was withheld for Webber's account in 1967 and none of it was returned. Appellant contends that the amount should be refunded with interest. Initially, we note that Webber is not a party to this appeal. Also we are unaware of any claim for refund being filed on behalf of Webber, or any -other party, with regard to this amount. Even if we were to determine that appellant's appeal constituted an informal claim for refund, a question we do not reach, it was not timely filed. (See Rev. & Tax. Code, §§ 19053, 26073.)

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,

Anneal of Robert L. Webber

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 Robert L. Webber against a proposed assessment of additional personal income tax in the amount of $560.83 for the year 1967, and against a proposed penalty assessment for failure to file a timely return in the amount of $216.87 for the year 1967, be and the same is hereby reversed.

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

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST _____ Executive Secretary