

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOHN J. AND VIRGINIA BAUSTIAN)

For Appellants: W. L. Grigg
Tax Consultant

For Respondent: Bruce W. Walker
Chief Counsel

James C. Stewart
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 denying the claim of John J. and Virginia Baustian **for** refund of personal income tax in the amount of \$143.75 for the year 1976. Subsequent to the filing of this appeal, **respon-** dent conceded that appellants are entitled to a refund of \$75.74 for the year 1976. Therefore, the amount of tax in dispute is \$68.01.

The general question for decision is whether certain disability pension income received by Mr. Baustian during 1976 is subject to the California personal income tax.

Appellants have been residents of Idaho since their move to that state from Los Angeles, California in September, 1975. Mr. Baustian has been receiving monthly pension payments from the Los Angeles Fire and **Police** Pension System since 1972. Under the system, Mr. Baustian's right to receive the pension income is contingent upon his continued life.

Appellants filed a nonresident California personal income tax return for 1976 and included the pension income received during that year in their gross income.. Thereafter, appellants **filed an** amended return for the purpose of excluding the pension income from their gross income. It is appellants' position that the pension payments are not taxable by California because the right to receive the payments did not accrue until after appellants became residents of Idaho.

While we agree with appellants' contention that the right to receive the 1976 pension payments, 1/ did not **accrue while** appellants were residents of California, 1/ we must reject the conclusion that California is therefore precluded 'from taxing such-income. Section 17041 of the Revenue and Taxation Code provides that the California personal income tax "shall be imposed ... upon the entire taxable income of every nonresident which is derived from sources within this state." (Emphasis added.) Thus, the pension income received by appellants in 1976 is taxable by California if it is **determined** that such income was derived from sources within this state.

A retirement annuity or pension is in the nature of deferred compensation for personal services. (See W. F. Williams, 51 T.C. 346 (1968).) It is settled law that the source of income from personal services is the place where the services are actually **performed**, and not the residence of the taxpayer or the place of payment. . (Appeal of Janice Rule, Cal. St. Bd. of Equal., Oct. 6, 1976; Appeal of Charles W. and Mary D. Perelle, Cal. St. Bd. of Equal., Dec. 17, 1958; see Ingram v. Bowers, 47 F.2d 925 (S.D.N.Y. 1931), affd., 57

1/ The substantial **contingency** of appellant's continued life prevented accrual of each **payment** prior to its actual receipt. (See Appeal of Robert H. and Josephine Borchers, Cal. St. Bd. of Equal., April 6, 1977; Appeal of Kenneth Ellington and Estate of Harriet' Ellinston. Deceased., Cal. St. Bd. of Equal., Oct. 17, 1973; Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6, 1969.)

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F.2d 65 (2d Cir. 1932); Appeal of Estate of Marilyn Monroe, Cal. St. Bd. of Equal., April 22, 1975; Cal. Admin. Code, tit. 18, regs. 17951-17954(b), 17951-17954(e).)

The record on appeal indicates that the pension benefits paid to Mr. Baustian during 1976 were directly attributable to his employment by the City of Los Angeles. Accordingly, pursuant to section 17041, we conclude that the pension income is taxable by California as income derived from sources within this state.

Appellants rely on section 17596 of the Revenue and Taxation Code in support of their position that the pension income is not taxable by California. Section 17596 provides:

When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise includible in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

Apparently, it is appellants' position that any income "accrued" subsequent to a taxpayer's change of status from resident to nonresident must be treated as income derived from sources without this state pursuant to section 17596. We disagree.

The California personal income tax "shall be imposed upon the entire taxable income of every resident of this state and upon the ... taxable income of every nonresident which is derived from sources within this state." (Rev. & Tax. Code, § 17041.) (Emphasis added.) Under section 17596, income accrued prior to a change of residency status is "includible in respect of the period prior to such change" for purposes of determining whether the income is subject to tax under section 17041. Thus, in the case of a taxpayer's change of status from nonresident to resident, income accrued prior to such change is viewed as income of a nonresident; the income is taxable under section 17041 only if it is derived from sources within this state. (Appeal of Dr. F. W. L. Tydeman, Cal. St. Bd. of Equal., Jan. 5, 1950; cf. Appeal of Estate of Michael Karpen, Deceased, Cal. St. Bd. of Equal., Sept. 15, 1959.) Conversely, **income** accrued prior to a change of status from resident to nonresident is viewed as income of a resident; the income is taxable under section 17041 regardless of its **source**. (See Appeal of Jess D. and Marguerite M. Tush, Cal. St. Bd. of Equal., March 19, 1963.)

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Section 17596 expressly deals only with income accrued prior to a change of residency status. With respect to income accrued subsequent to a change of residency status, the taxability of such income is governed solely **by section 17041**. Thus, this board has consistently held that, regardless of its source, income accrued subsequent to a change of status from nonresident to resident is taxable under section 17041 as income of a resident. (See, e.g., Appeal of Kenneth Ellington and Estate of Harriet Ellington, Deceased, Cal. St. Bd. of Equal., Oct. 17, 1973; Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6, 1969.) Similarly, we see no reason for transgressing the plain language of section 17041 by holding that section 17596 requires treatment of income clearly attributable to sources within this state as income derived from sources without this state in cases where such income accrues subsequent to a taxpayer's change of status from resident to nonresident. Contrary to appellants' contention, such income is taxable under section 17041 as income of a nonresident derived from sources within this state.

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 section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of John J. and Virginia Baustian for refund of personal income tax in the amount of \$143.75 for the year 1976, be and the same is hereby modified in accordance with respondent's concession that the refund claim should have been allowed to the extent of \$75.74. In all other respects the action of the Franchise Tax Board is sustained.

March Done at Sacramento, California, this 7th day of
, 1979, by the State Board of Equalization.

William R. Burns Chairman
John K. Lee , Member
Charles G. Kelly , Member
_____, Member
_____, Member