

BEFORE THE TAX APPEAL BOARD

STATE OF DELAWARE

PETER A. & MARIAN J. MARASCIO)
)
 Petitioners,)
)
 v.) No. 1343
)
 DIRECTOR OF REVENUE)
)
 Respondent.)

DECISION AND ORDER

The issues before the Board in this matter are: (i) whether payments made from employer to non-resident taxpayer for regular compensation and unused sick and vacation time constitute Delaware sourced income that is subject to tax under 30 Del. C. § 1124 ("Section 1124"); (ii) whether a non-resident taxpayer who receives \$42,620.95 in severance pay in 1999 and who performs no work in Delaware for his prior employer in 1999 has Delaware sourced income subject to taxation under Section 1124; and (iii) if the \$42,620.95 in severance pay is Delaware sourced income subject to taxation under Section 1124, what portion of the \$42,620.95 should be taxed.

As set forth below, we have determined that the regular compensation and unused vacation and sick time does constitute compensation for personal services and thus subject to taxation under Section 1124, the \$42,620.95 severance pay also is compensation for personal services and thus subject to taxation under Section 1124, and under the circumstances of this case the entire \$42,620.95 is subject to taxation under Section 1124.

FACTS

Petitioners are husband and wife and at all times they were non-residents of the State of Delaware. Mr. Marascio worked for CoreStates Financial Corp. ("CoreStates") from 1977

through January 1999. From October 1995 through January 1999, Mr. Marascio was assigned to work at a CoreStates facility located in Delaware.

In 1998 CoreStates agreed to merge operations with First Union Corporation ("First Union"). As a result of the merger, CoreStates determined it would restructure certain business operations, including its operations in Delaware where Mr. Marascio was employed. On November 12, 1998, CoreStates advised Mr. Marascio that as a result of the upcoming merger and restructuring it was anticipated that his employment would be terminated on January 13, 1999 or the date of the merger, whichever was later. On December 11, 1998, Mr. Marascio received a second letter confirming that his position had been eliminated and informing him that he was not required to be physically at work from the date of the letter to his termination date. This letter further stated that Mr. Marascio was considered an active employee and that to remain eligible for severance benefits he had to remain available to perform services for CoreStates.

Mr. Marascio's employment with CoreStates terminated on January 13, 1999. He received regular compensation for the period January 1 to January 13, 1999. In addition, upon termination Mr. Marascio received payments for unused sick and vacation time and a severance package pursuant to which First Union paid him \$42,620.95 in 1999. Mr. Marascio did not work a single day in Delaware in 1999 for any employer. Nevertheless, CoreStates/First Union withheld Delaware state income tax from the regular compensation, unused sick and vacation time and the severance payments.

Petitioners filed a 1999 Delaware non-resident personal income tax return on which they reported no Delaware source income and sought a refund of the amounts withheld from the regular compensation, unused sick and vacation time and the severance payments. In August 2000, the Delaware Division of Revenue issued a tax advisory notice which changed the

petitioners' Delaware source income from zero to \$44,625.00 and claiming a tax due in the amount of \$2,155.00. Petitioner timely protested the notice and once the protest was denied appealed the Division's determination to this Board.

ANALYSIS

Section 1124 defines the portion of a non-resident's income that is derived in Delaware and thus subject to taxation by the State. In particular, subsection (b) of Section 1124 provides that:

Items of income, gain, loss and deduction derived from, or connected with, sources of income in this State are those items attributable to: (1) Compensation, other than pensions, as an employee in the conduct of the business of an employer, for personal services, (i) rendered in this State, or (ii) attributable to employment in this State and not required to be performed elsewhere.

Petitioners must pay taxes on the regular compensation, unused vacation and sick time and the severance payments only if these payments fall within the terms of the foregoing language.

The 1999 Regular Compensation and Unused Sick and Vacation Time

Applying the language set forth in Section 1124(b) makes clear that petitioners must pay income taxes on the regular compensation and unused vacation and sick time Mr. Marascio earned in 1999.

Payments Mr. Marascio received as regular compensation constitute compensation he received as an employee. 30 Del. C. § 1124(b). Mr. Marascio was an active employee and was required to be available in the event CoreStates needed his services and thus provided a personal service for his regular compensation. The regular compensation also was attributable to his employment in Delaware, e.g., he earned the compensation because he was employed by CoreStates and was assigned to work in Delaware. 30 Del. C. § 1124(b)(1)(ii). Finally, while Mr. Marascio was under no obligation to come to work in Delaware in 1999, the record contains

no facts indicating CoreStates/First Union required Mr. Marascio to perform services outside of Delaware. Consequently, the fact Mr. Marascio performed no activities in Delaware in 1999 does not relieve him of his obligation to pay tax on his regular compensation.

The payments Mr. Marascio received for unused vacation and sick time also are taxable under Section 1124. The payments are compensation. He received these payments as a result of his employment with CoreStates in Delaware. The payments are in exchange for past personal services. Gow v. Director of Revenue, 556 A.2d 190, 197 n.5 (1989) (holding non-residents must perform some personal service for the employer in order for state to tax compensation and recognizing that the payment of unused vacation pay is compensation for personal services rendered in the past).¹ As all of the conditions of Section 1124 are satisfied, Mr. Marascio must pay taxes on the payments he received for unused sick and vacation time.

The Severance Payment

The \$42,620.95 severance payment Mr. Marascio received is also subject to taxation under Section 1124. The severance payment is compensation received by an employee which is attributable to employment in Delaware. Mr. Marascio was not required to perform services outside of Delaware in order to receive this compensation. Although the record does not contain the exact manner in which Core States calculated Mr. Marascio's severance, it does reflect that Mr. Marascio received the severance pay because of the years he had devoted to CoreStates and the position he had attained within the corporation. Hence, the severance payment was

¹ We recognize that in Gow the Delaware Supreme Court was addressing 30 Del. C. § 1122 and that this case involves the application of Section 1124. This distinction is meaningless as the Section 1122 language at issue in Gow is identical to the language currently found in Section 1124 and it appears old Section 1122 has been re-codified in Section 1124.

compensation Mr. Marascio received for personal services he had rendered in the past. Gow makes clear that such compensation is taxable. Gow, 556 A.2d at 197, n.5.

Mr. Marascio argues that he should not have to pay taxes on the severance payment because nowhere in the instructions accompanying the 1999 Delaware non-resident personal income tax return does it state that the severance payments of this nature are taxable by Delaware and because the Division of Revenue has not adopted a regulation to that affect. While the instructions and regulations may not be as clear as Mr. Marascio would prefer, this fact does not change the clear language set forth in Section 1124 - the application of which shows Mr. Marascio must pay income tax on his severance payment.

Tax Is Due On The Entire Severance Payment

Mr. Marascio also argues that even if he owes tax on the severance payment he should not have to pay Delaware tax on the entire amount, but, rather, based on the number of years he worked in Delaware (3) compared to the number of years he worked for CoreStates (21), he should only have to pay tax on three/twenty-firsts of the severance payment. This argument has some appeal; however, Mr., Marascio has failed to introduce sufficient evidence to support this application.

The record does not contain any specific facts showing exactly how CoreStates calculated Mr. Marascio's severance payment. We believe this specific information is crucial because only with this information can we determine how much, if any, of the severance payment was in exchange for past services which were "rendered in this State" or "attributable to employment in this State" 30 Del. C. § 1124(b)(1). Fairness may weigh in favor of a different result, but Mr. Marascio bears the burden of proving the Division of Revenue has taxed him incorrectly. To meet this burden he must introduce facts from which the Board can make an appropriate

determination. He has failed to introduce such facts. Accordingly, his request to limit the taxable portion of the severance payment to 3/21 of the total must be denied.

Donald E. Fry

Regina C. Durling

Agatha L. Hughes

Jan M. Winter

Judith E. Self

Dated :

1-10-03