

CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 249

October 30, 1959

EMPLOYEE OF A FOREIGN GOVERNMENT – TAXABILITY WHEN WAIVER IS FILED UNDER SECTION 247(b) OF THE IMMIGRATION AND NATIONALITY ACT

Syllabus:

The salary of an employee of a foreign government is included in gross income if the employee has executed a waiver of exemption pursuant to Section 247(b) of the Immigration and Nationality Act.

The subject individual is a resident of California. She is a citizen of Country X but has been admitted into the United States for permanent residence. Her status is that of an "immigrant" alien. She is employed by the government of a foreign country in its Consulate in California.

As an employee of a foreign government, her status would be required to be changed to that of a "nonimmigrant" pursuant to the Immigration and Nationality Act (P.L. 414, 82d Cong., 1952), Section 247(a). A nonimmigrant alien cannot remain permanently in this country nor apply for citizenship. Section 247(b) of the act provides, however, that no change of status is required if an immigrant alien so requests, and executes and files with the Attorney General of the United States the prescribed written waiver. The subject individual executed such a waiver. The waiver provides that "I . . . hereby waive all rights, privileges, exemptions, and immunities which would otherwise accrue to me under any law or executive order by reason of such occupational status".

Section 17153 of the Personal Income Tax Law provides, insofar as relevant herein, that the salary of an employee of a foreign country is excluded from gross income if the employee is not a citizen of the United states. These provisions of the section are identical to Section 893 of the Internal Revenue Code.

Section 17153 of the Personal Income Tax Law (originally Section 7(b)(6) of the Personal Income Tax Act) was adopted in conformity with Section 893 of the Internal Revenue Code (formerly Section 116(h)). It should therefore be construed to apply coextensively with the Federal statute insofar as the two are identical.

The Attorney General of the United States stated that " . . . it is clear that Congress intended to deprive immigrant aliens employed in international organizations and foreign missions of the privileges and exemptions resulting from the occupational status which would not be equally available to American

citizens similarly situated". Opinion on the Attorney General of the United States, May 1, 1953, Vol. 41, Op. No. 2. See House Report No. 1365, 82d Cong., 2d Sess. February 14, 1952, U.S. Code Cong. and Adm. News 1952, p. 1653, 1721. The Attorney General thereupon reasoned that since the obligation of citizenship (to pay taxes) is imposed on American citizens in the specified occupations, the tax exemption under I.R.C. Section 116(h) (now, Section 893), which is not enjoyed by American citizens, is waived under Section 247.

The power to regulate aliens is vested in the Federal Government, alone, and not in the states, and Congress has clearly expressed its intention that aliens residing permanently in the United States as immigrants shall have no exemption because of their occupational status that is not equally available to American citizens. The Franchise Tax Board therefore adopts the position that the Federal statute requiring that immigrant aliens waive all exemptions resulting from occupational status supersedes the exemption granted by Section 17153 to such immigrant aliens, because of the supremacy of the Federal government in the field of alien regulation and control.

The compensation in question is not exempt from taxation under the tax agreement between the United States and the taxpayer's employer.