

STATE OF WISCONSIN
TAX APPEALS COMMISSION

CRIS E. AND KAREN D. DISHMAN
P.O. Box 975
Fresno, TX 77545-0975,

DOCKET NO. 04-I-24

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DIANE E. NORMAN, COMMISSIONER:

The above-entitled matter comes before the Commission on a Stipulation of Facts submitted by the parties. Attorney C. David Heisler represents petitioners, Cris E. and Karen D. Dishman (“petitioners”). Attorney Sheree Robertson represents respondent, Wisconsin Department of Revenue (“respondent”). Both parties filed briefs in this matter.

Having considered the entire record before it, the Commission finds, decides, concludes, and orders as follows:

FINDINGS OF FACT

For its Findings of Fact, the Commission adopts the parties’ stipulated facts, omitting extraneous, duplicative, and irrelevant material, and making format and nonsubstantive changes.

1. As a result of an audit of petitioners' 2000 Wisconsin income tax return, respondent issued to petitioners, under date of March 18, 2002, a Notice of Amount Due for additional income tax, adjusting petitioner Cris E. Dishman's ("Mr. Dishman") income that petitioners reported on their 2000 Wisconsin income tax return as follows:

Form W-2 wages, Kansas City Chiefs	\$1,017,637
Form W-2 wages, Minnesota Vikings	<u>4,552</u>
Wisconsin wages	<u>\$1,022,189</u>

Wisconsin taxes nonresident athletes based on the ratio of Wisconsin duty days to total duty days. The Kansas City Chiefs assigned the majority of Mr. Dishman's duty days to Wisconsin, since he was cut from its football team either during preseason training camp or shortly after preseason training camp. The Kansas City Chiefs held its preseason training camp in River Falls, Wisconsin, during 2000. Per the Office Audit Worksheet-Explanations attached to the Notice, respondent also revised the ratio used to reconcile petitioners' allowable itemized deduction credit as follows:

$$\frac{\$1,022,189 \quad \text{Wisconsin Income}}{\$2,629,037 \quad \text{Federal Income}} = .3888\%$$

2. On May 20, 2002, petitioners filed a petition for redetermination of respondent's assessment.

3. By Notice of Action letter dated December 16, 2003, respondent denied petitioners' petition for redetermination.

4. Petitioners filed a timely petition for review with the Commission

on January 20, 2004.

5. Petitioners were nonresidents of the state of Wisconsin during all of the year 2000. During all times pertinent to this proceeding, petitioners were residents of the state of Texas.

6. In 2000, Mr. Dishman was employed as a professional football player for the Kansas City Chiefs and the Minnesota Vikings.

7. On February 9, 2000, Mr. Dishman and the Kansas City Chiefs executed a standard NFL Player Contract ("contract") and a rider ("rider"). The rider, entitled "Signing, Reporting and Playing Bonus," provided for an additional payment of \$1,250,000 to Mr. Dishman for the execution of the contract, his passing the team's physical examination, and his adherence to all provisions of the contract.¹ Per the rider, the Kansas City Chiefs were to pay Mr. Dishman the \$1,250,000 as follows:

\$1,050,000	UPON EXECUTION OF THIS RIDER AND PASSING TEAM'S PHYSICAL EXAMINATION
\$ 50,000	ON September 01, 2000; AND
\$ 50,000	ON October 01, 2000; AND
\$ 50,000	ON November 01, 2000; AND
\$ 50,000	ON December 01, 2000.

The conditions placed on payment of the amounts set forth in the rider as described therein, state in part as follows:

IN THE EVENT PLAYER FAILS OR REFUSES TO REPORT TO CLUB, TO PRACTICE OR PLAY WITH CLUB, OR LEAVES CLUB IN ANY YEAR WITHOUT ITS CONSENT, DURING THE DURATION OF THE ABOVE CONTRACT YEARS, THEN, UPON DEMAND BY CLUB, PLAYER SHALL RETURN TO CLUB THE

¹ The exact language of the bonus rider states: "As additional consideration for the execution of NFL Player contract(s) for the year(s) 2000, 2001, 2002, 2003 and 2004 and for the player's adherence to all provisions of said contract(s), club agrees to pay player the sum of \$1,250,000.00."

UNEARNED PRORATED AMOUNT OF THE SIGNING BONUS.

8. On or about July 21, 2000, Mr. Dishman attended and participated in the Kansas City Chiefs' three-week preseason training camp in River Falls, Wisconsin, where he performed a majority of his services for that football team.

9. At the end of the three-week preseason training camp in August 2000, the Kansas City Chiefs cut Mr. Dishman from its football team.

10. In 2000, Mr. Dishman received from the Kansas City Chiefs \$1,050,000 of the signing bonus designated in the rider.

11. The remaining \$200,000 of the signing bonus was also paid to Mr. Dishman in 2000 after he was no longer with the Kansas City Chiefs.²

12. The W-2 issued by the Kansas City Chiefs for the year 2000 for Mr. Dishman stated Mr. Dishman's total wages, tips, and other compensation paid as \$1,780,865.50. The Kansas City Chiefs allocated \$1,017,637.43 of the total compensation paid as income earned in the state of Wisconsin. According to the W-2, the Kansas City Chiefs withheld taxes for the state of Wisconsin in the amount of \$31,197.92.

13. Shortly after Mr. Dishman was cut from the Kansas City Chiefs, he agreed to play professional football for the Minnesota Vikings for the 2000 football season. The Minnesota Vikings allocated a portion of Mr. Dishman's income as earned in Wisconsin, and this amount was correctly reported on petitioners' 2000 Wisconsin

² This fact was not stated explicitly in the Stipulation of Facts, but is argued in Petitioners' Brief, p. 3, and contained in the Signing, Reporting and Playing Bonus rider to the NFL Player Contract (Stipulated Exhibit 6).

income tax return.³

14. Petitioners reported Wisconsin wages, salaries, tips, etc., in the amount of \$8,152 on their 2000 Wisconsin income tax return. Petitioners' income tax return states that \$3,600.00 of the \$1,780,865.50 compensation paid by the Kansas City

³ The Minnesota Vikings paid Mr. Dishman \$701,495.94 for the year 2000. Of that amount, \$4,551.82 was correctly allocated as wages, tips, and other compensation earned in the state of Wisconsin.

Chiefs to Mr. Dishman is Wisconsin income. A statement attached to petitioners' return states that Mr. Dishman ". . . did attend football summer camp in Wisconsin for which he was paid \$3600.00."

APPLICABLE WISCONSIN LAW

Wisconsin Statutes

§ 71.02 Imposition of tax.

(1) For the purpose of raising revenue for the state and the counties, cities, villages and towns, there shall be assessed, levied, collected and paid a tax on all net incomes of individuals and fiduciaries . . . and also by every nonresident natural person upon such income as is derived from the performance of personal services within the state

* * *

§ 71.04 Situs of income; allocation and apportionment.

(1) SITUS.

(a) . . . Income from personal services of nonresident individuals, including income from professions, shall follow the situs of the services. . . .

* * *

Wisconsin Administrative Code

§ Tax 2.31 Compensation received by nonresident members of professional athletic teams.

* * *

(3) METHOD OF ALLOCATION.

(a) General. The allocation to Wisconsin of income earned by a nonresident employee as total compensation for services rendered as a member of a professional athletic team shall be made on the basis of a fraction, the numerator of which is the number of duty days spent within Wisconsin rendering services for the team in any manner during the taxable year and the denominator of which is the total number of duty days spent both within and outside Wisconsin during the taxable year.

* * *

(c) Bonuses. Bonuses which shall be included for purposes of the allocations described in par. (a) are:

* * *

2. Bonuses paid for signing a contract, unless all of the following conditions are met:

- a. The payment of the signing bonus is not conditional upon the signee playing any games for the team or performing any subsequent services for the team, or even making the team.
- b. The signing bonus is payable separately from the salary and any other compensation.
- c. The signing bonus is nonrefundable.

CONCLUSION OF LAW

Respondent correctly adjusted petitioners' 2000 Wisconsin taxable income to include Mr. Dishman's compensation received from the Kansas City Chiefs for the Signing, Reporting and Playing Bonus as services performed in the state of Wisconsin.

OPINION

Authority to determine allocation of income

Respondent argues that the Commission lacks the authority to determine the issue of the amount of Mr. Dishman's total compensation which should be allocated to the state of Wisconsin, since it was already determined by Mr. Dishman's employer and correctly reflected on his W-2 form. This assertion is made without any legal authority and is incorrect.

The Commission has been granted the authority for the hearing and determination of all questions of law and fact arising out of an appeal filed by a party aggrieved by the redetermination of the Wisconsin Department of Revenue. Wis. Stat. §§ 73.01(4) and (5). Moreover, the Commission has made determinations of allocation of income to the state of Wisconsin in previous cases that have been cited in respondent's brief. *Flynn v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-010 (WTAC 1993), *aff'd* Wis. Tax Rptr. (CCH) ¶ 400-045 (Dane Co. Circ. Ct. 1994); *Dorsey v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-038 (WTAC 1989).

Signing bonus is part of income to be allocated

The main issue in this case is whether or not any part of Mr. Dishman's signing bonus could be allocated to his Wisconsin taxable income. Mr. Dishman's contract with the Kansas City Chiefs included a Signing, Reporting and Playing Bonus rider. The bonus was paid to Mr. Dishman under the rider for his "adherence to all provisions of said contract." Petitioner was to be paid a total of \$1,250,000 over the course of 5 payments in 2000. The first payment of \$1,050,000 was paid after Mr. Dishman passed his physical examination. The remaining \$200,000 was paid in \$50,000 installments during 2000.

Petitioners argue that none of the income from the signing bonus should be included as Wisconsin taxable income. First of all, petitioners argue that none of the first payment of \$1,050,000 of the signing bonus is Wisconsin taxable income because it was paid solely for executing the signing bonus rider and for passing the team physical, as provided in the NFL Player Contract, and not for any services performed in the state of Wisconsin.

Signing the bonus rider and passing the team physical examination was not the only consideration for the first payment of the signing bonus. Passing the team's physical examination simply triggered the timing of the first payment of the signing bonus. Execution of the signing bonus rider was only one of the conditions for Mr. Dishman to receive and keep the signing bonus.

According to the rider, the entire amount of the signing bonus of \$1,250,000 was consideration for "**execution of the NFL Player contract(s) for the**

year(s) 2000, 2001, 2002, 2003 and 2004 and for [Mr. Dishman's] adherence to all provisions of said contract(s)" (emphasis added). The first payment was to be paid when he executed the contract rider and passed the team physical examination. The rest of the payments were to be paid in the year 2000 on dates specified in the signing bonus rider.

The Commission has previously found that a signing bonus with contract language almost identical to this case was compensation for personal service. See *Dorsey, supra*. In that case, Mr. Dorsey had signed a contract with the Green Bay Packers football club which contained language in the signing bonus rider that provided for compensation for execution of the contract, as well as Mr. Dorsey's agreement to perform various services in his capacity as a football player, just as in Mr. Dishman's contract rider. The Commission found that the signing of the contract rider was just one of several conditions that Mr. Dorsey was required to meet in order to collect and retain his bonus. The remainder of those conditions involved the performance of personal services. Taken as a whole, the bonus was construed as an advance payment for those services which Mr. Dorsey agreed to render under the terms of the rider. Since the signing bonus was for the performance of personal services, it was taxable in Wisconsin to the extent that it represented compensation for services which Mr. Dorsey rendered within the state.

This conclusion was affirmed with similar contract language by the Dane County Circuit Court in *Flynn v. Wis. Tax Appeals Commission*, Wis. Tax Rptr. (CCH) ¶ 400-045 (Dane Co. Circ. Ct. 1994) at p. 30,169:

. . . The rider clearly required petitioner to report and not to leave the team of his own unilateral accord. The allegedly ambiguous language of the rider, that the bonus is not salary under paragraph 5 of the main contract, simply indicates that the bonus is separate and additional compensation, not subject to any of the terms or conditions of the main contract. That the rider compensated petitioner for some of the same services as the main contract did not render either ambiguous. See 1 *Corbin on Contracts*, sec. 125 at 536 (1963) (Performance of service by employee is sufficient consideration for wages *and* bonus); *Restatement of Contracts, 2d*, sec. 80 at 204 (1981) (Single performance may furnish consideration for multiple promises).

Mr. Dishman's contract rider was almost identical to contract rider language in *Dorsey and Flynn*. If Mr. Dishman merely signed the contract and passed the physical examination without performing the other services specified in the contract, he would not have been entitled to the bonus. In fact, if Mr. Dishman had failed to perform the services as required in the signing bonus, the Kansas City Chiefs football club was allowed to demand back the unearned prorated amount of the signing bonus. If this bonus was paid strictly for signing the contract and passing the physical examination, Mr. Dishman's right to retain any part of the bonus would not depend upon whether he performed other services for the Kansas City Chiefs.

Also, the Wisconsin Administrative Code specifically includes bonus income when calculating the allocation of Wisconsin income earned by a nonresident employee as total compensation for services rendered as a member of a professional athletic team. § Tax 2.31(3).

Bonus income would only be excluded if the following conditions are all met:

- a. The payment of the signing bonus is not conditional upon the signee playing any games for the team or performing any subsequent services for the team, or even making the team.
- b. The signing bonus is payable separately from the salary and any other compensation.
- c. The signing bonus is nonrefundable.

Wis. Admin Code, § Tax 2.31(3)(c)2.

While Mr. Dishman's signing bonus was paid separately from his salary, it was also conditional upon his playing for the team and adherence to all provisions of the NFL Player Contract. Finally, the signing bonus was refundable if Mr. Dishman failed to perform these services. Therefore, the income is includable as Wisconsin taxable income.

Petitioners argue that the signing bonus was not income from personal services by citing the case of *Testaverdes v. Calif. Franchise Tax Board*, CA-Tax Rptr. (CCH) ¶ 20000327052 (2000). The California Franchise Tax Board ("Tax Board") found that the signing bonus in *Testaverdes* was a "true signing bonus" and not a playing bonus. A true signing bonus is not compensation for services, but is consideration for signing of the contract and for the player's promise not to play for any other team. The Tax Board reached a different conclusion two years later in the case of *In the Matter of the Appeals of Hearst and Langham*, CA-Tax Rptr. (CCH) ¶ 403-367 (2002). In that case, the Tax Board found that the signing bonus represented additional compensation for services. The reasoning for this finding was that if the language of the signing bonus rider obligates the player to repay a proportionate share of the bonus for any period of time in which he fails or refuses to practice or play with the football team, the signing

bonus represents compensation for services and not just consideration for signing the contract.

Income Follows Situs of Services

Petitioners also argue that none of the payments to Mr. Dishman under the signing bonus were taxable Wisconsin income because none of it was paid while Mr. Dishman was physically present in the state of Wisconsin. However, there is no requirement that the compensation for services must be paid to a nonresident while still performing services in the state of Wisconsin. Under this logic, any nonresident who performed services in the state of Wisconsin could avoid tax liability on income earned for those services by leaving the state before payment was received.

The correct rule is that the income of nonresident individuals follows the situs of the services. Wis. Stat. § 71.04(1)(a). Therefore, since Mr. Dishman was a nonresident who earned income for services performed within the state of Wisconsin, the income for those services was taxable in Wisconsin.

Since Mr. Dishman's services for the Kansas City Chiefs were performed in other states as well as Wisconsin, his income is allocated for income tax purposes based upon a duty days formula. "Duty days" means all days during the taxable year from the beginning of a professional athletic team's official preseason training period through the last game in which the team competes or the day the person leaves the team, if the person leaves before the last scheduled game. Wis. Admin. Code § Tax 2.31(2)(a); *Kern, et al. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-253 (1991), *aff'd* Wis. Tax Rptr (CCH) ¶ 203-316 (Dane Co. Circ. Ct. 1992). Since Mr. Dishman was cut

from the Kansas City Chiefs almost immediately after completing preseason training camp in Wisconsin, then most of his income from the Kansas City Chiefs must be allocated to the state of Wisconsin under this formula.

Mr. Dishman's income is not severance pay

Petitioners argue that the remaining payments of \$200,000 under the signing bonus are not compensation for personal services, but are in the nature of severance or termination pay. There is nothing in Mr. Dishman's contract with the Kansas City Chief's that identifies any part of his compensation as severance pay. Also, the remaining signing bonus payments of \$200,000 would have been paid to Mr. Dishman if he had not been cut from the Kansas City Chiefs and he had continued to perform his services as required under the contract. Therefore, these payments could not be severance or termination pay.

Nonresident athletes are not treated differently from other nonresidents

Petitioner asserts that nonresident athletes are treated differently than other nonresidents for income tax purposes. This is not true, because the income of all nonresident individuals follows the situs of the services to determine if that income is Wisconsin taxable income. Wis. Stat. § 71.04(1)(a). This applies to all nonresidents, not just nonresident athletes. Mr. Dishman is a nonresident individual who earned taxable income in the state of Wisconsin. Respondent, therefore, correctly applied the law in adjusting petitioners' Wisconsin income to include the compensation Mr. Dishman received from the Kansas City Chiefs for performing services in the state of Wisconsin.

Therefore,

IT IS ORDERED

That respondent's action on petitioners' petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 24th day of May, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"