



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
ZINA VAN DYKE }

Appearances:

For Appellant: Dexter D. **Jones**, Attorney at Law

For **Respondent**: Burl D. Lack, Chief Counsel;
Mark **Scholtz**, Associate Tax
Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) *on the* protest of Zina Van Dyke to a proposed assessment of additional personal income tax in the amount of **\$2,117.40** for the year 1943.

Appellant and her former husband, W. S. Van Dyke, separated in 1935 and under the terms of a property settlement agreement, which was incorporated into a divorce decree, the husband agreed to pay Appellant 10 ~~per~~ cent of his future earnings for her support and maintenance; At the time of the husband's death in February, 1943, he was delinquent in payments due under the agreement in the amount of **\$97,329.36**. Appellant filed a claim against his estate for this amount which was ~~com-~~promised with the estate in 1943 for the sum of **\$59,258.64**, less attorney's fees of **\$5,400.00**, leaving a net amount of **\$53,858.64**. Appellant included only the sum of \$2,616 in her 1943 return, representing ten per cent of decedent's earnings for that year. The assessment here in quastion resulted from the action of the Commissioner in including the remaining **\$51,242.64** in Appellant's taxable income for 1943.

By Chapter 353 of the Statutes of 1943, the Legislature added Sections 7(k), **8(o)** and 12(j)(2) to the Personal Income Tax Act of 1935, operative with respect to taxable years beginning after December 31, 1942. These sections were similar in all respects to Sections 22(k), 23(u) and 171(b), respectively, of the Internal

Revenue Code,, which were added to the Internal Revenue Code by Section 120, Revenue Act of 1942.

Section 7(k) (now in Section 17104 of the Revenue and Taxation Code) provided in part as follows:

"(k) In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, **or** attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which because of the marital or family relationship, is imposed upon or incurred by such husband under such decree **or** under a written instrument incident to such divorce or separation shall be **includible** in the gross income of such wife ..."

Section 8(o) (now Section 17317.5 of the **Revenue** and Taxation Code) authorized a husband to deduct from his taxable-income the payments made taxable to the wife by Section 7(k).

Section 12(j)(2) (now in Section 18172.7 of the Revenue and Taxation Code) provided that for the purposes of computing the net income of an **estate** or trust **and the** net income of a wife described in Section 7(k) or Section 12(j)(1) the wife should be considered as a beneficiary of the estate **or** trust.

Section 12(d)(2) of the Personal Income Tax Act (now in Section 18133 of the Revenue and Taxation Code), which corresponds with Section 162(b) of the Internal Revenue Code, provided for allowance of a deduction in computing the net income of an estate or trust of the amount of the income of the estate or trust for its taxable year which is to be distributed currently to "legatees, heirs or **beneficiaries**" and for inclusion of that amount in computing the net income of the legatees, heirs or beneficiaries, whether distributed to them or not.

The **sole issue** for our decision is whether the amount of \$51,242.64 received by Appellant in the year 1943 in payment of **arrearages** of periodic alimony constituted taxable income to her in that year. The Appellant contends that the amount in question did not constitute taxable income because (1) the Legislature did not intend to tax to the wife alimony payments which were accrued but not received before the operative date of

Section 7(k) and (2) the payment of arrearages of alimony constituted the payment of a debt owed by decedent at the time of his death which was not deductible from estate income (John M. Brown, Executor, 11 B.T.A. 1203; Estate of Jacob S. Hoffman, 36 B.T.A. 972) and, accordingly, was not includible in Appellant's gross income.

The amount in question was received after the operative date of Section 7(k). That section provided, in part, that periodic payments "received" by the wife were includible in the gross income of the wife. In the face of the unequivocal language of Section 7(k) we cannot, by construction, exclude from the income of the wife any part of a periodic payment received by the wife after the operative date of that Section. That the amount in question was received as a periodic payment is clear. In Estate of Sarah L. Narischkine; 14 T.C. 1128, aff'd, 189 Fed. 2d 257; and Elsie B. Gale, 13 T.C. 661, aff'd, 191 Fed. 2d 79, the receipt of arrearages of alimony, accrued in part before the enactment of Section 22(k) of the Internal Revenue Code paid by the husband in a lump or aggregate amount, was held to constitute the receipt of a periodic payment includible in full in the gross income of the recipient in the year in which it was received.

Insofar as the inclusion of the periodic payment in the gross income of the wife is concerned the source of the payment is immaterial. As respects this question the Senate Finance Committee Report, No. 1631, 77th Congress, 2d Session, p. 84, concerning Section 22(k) of the Internal Revenue Code, states in part:

"Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment, or annuity contracts; or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital."

When made by the husband's estate periodic payments are taxable to the wife whether made out of estate income (Margaret Izrastzoff, 15 T.C. 573; aff'd, 193 Fed. 2d 625; Helen Scott Fairbanks, 15 T.C. 62, aff'd, 191 Fed. 2d 680) or out of the corpus of the estate (Trust Under Deed of Albert R. Gallatin Welsh; 16 T.C. 1398, aff'd, 194 Fed. 2d 708). Such payments, however, are deductible by the estate only if they are made out of estate income. Sections 12(d)(2) and 12(j)(2), supra. See also G.C.M. 25, 999, C.B. 1949-1 pp. 116-118. Hence, it does not follow that because the periodic payment received by Appellant was not deductible by the husband's estate it was not taxable to her.

In view ~~of~~ the above considerations it is our opinion that ~~the~~ position of the Commissioner must be sustained,

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,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Tazation Code, that the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) on the protest of Zina Van Dyke to a proposed assessment of additional personal income tax in the amount of \$2,117.40 for the year 1943 be and the same is hereby sustained.

Done at Los Angeles, California, this 7th day of October, 1952.

_____, Chairman
Wm. G. Bonelli, Member
J. H. Quinn, Member
Geo. R. Reilly, Member
Thomas H. Kuchel, Member

ATTEST: Dixwell L. Pierce, Secretary