BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ESTATE OF WORTH G. MURDOCK)

Appearances:

For Appellant: William S. Andrews, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18595 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of the Estate of Worth G. Murdock against a proposed assessment of additional personal income tax in the amount of $515.95 for the year 1951.

In 1951 the deceased taxpayer, Worth G. Murdock, sold a ranch for $98,750.00, receiving $29,500 at the time of the sale and the balance in notes payable in 1952, 1953 and 1954, In December, 1952, he filed a delinquent return for 1951 in which he reported a proportion of his gain using the installment method of reporting,

It is the position of the Franchise Tax Board that Mr. Murdock should have reported his entire gain as income in 1951 on the ground that the installment method of reporting gain may be elected only in a return filed before delinquency.

Appellant contends that the installment method of reporting may be elected so long as the election is made in the original return even though the return is filed after the date returns are due,

During the year in question Section 17532 of the Revenue and Taxation Code provided that in the case of a sale of real estate in which the initial payments do not exceed 30% of the selling price, "the income may ... be returned" on the installment basis, This section was substantially the same as Section 44(b) of the Internal Revenue Code of 1939.

The Franchise Tax Board relies primarily upon Sarah Briarly, 29 B.T.A. 256; Cedar Valley Distillery, Inc., 6 T.C. 870 and cites Rev. Rul 93, 1953-1 C B 82, all of which interpret the federal statute.

In Sarah Briarly (supra) the taxpayer had failed to file a return and the collector prepared a delinquent return for her under his statutory authority. The Board of Tax Appeals held that the taxpayer could not thereafter elect to report on the installment basis. It indicated that the return filed by the collector should be regarded as the return of the taxpayer, The Board also stated that even if that return should not be so regarded it was too late to make the election, The following language is pertinent:

> "The statute here involved provides that in the case of an installment sale of real estate 'the income may ... be returned' on the installment basis, This, in our opinion, requires both timely and affirmative action on the part of those seeking to take advantage of the benefits. conferred by the statute, As pointed out above, taxpayers voluntarily filing returns and making timely election are bound by their choice. To allow a *choice* where the taxpayer sits supinely by until by the diligence of the Government it is discovered that a tax is due would put a premium on inertia that oertainly is not within the spirit of our system of taxation,"

Cedar Valley Distillery, Inc. (supra) held that a partner could not use the installment method where the partnership in a delinquent return reported on the installment basis a capital gain from the sale of assets, and the taxpayer partner then reported his share of the gain for the first time in an amended return filed late,

Revenue Ruling 93, supra, provides:

> "An election to report a sale of property on the installment basis, under section 44 of the Internal Revenue Code must be exercised in a timely filed Federal income tax return for the taxable year in which such sale was made, otherwise the right of such an election is forfeited. (See Sarah Briarly et al v. Commissioner, 29 B.T.A. 256)."

The Appellant contends that all of the cases on this issue show that the use of the installment basis to report a capital gain is denied a taxpayer only when he seeks to change to that method after having chosen, or having had the Government choose for him, not to use it. Action by the Government in filing a collector% return or making an assessment prior to election by the taxpayer is considered crucial by the Appellant.

We do not believe that the decisions warrant the emphasis which Appellant places upon this aspect of the matter, In Cedar Valley Distillery, Inc. (supra) there was no action by the Government prior to the filing by the partnership of its first and delinquent return for the year. The court did not specify whether it regarded the return of the partnership or that of the partner as determinative but later the same court expressly held that the election by a partnership binds the partner (John G. Scherf, Jr., 20 T.C. 346). Even if the partner's election be considered determinative, he made no election in his first return since the sale was not reported therein (see W. T. Thrift, Sr., 15 T.C. 366, 373). Thus, his first election was made in a delinquent return prior to any action by the Government which could be construed as dictating an election,

The controlling principle is not confined to the particular statute before us. The courts have emphasized the necessity of making other elections on or before the due date for the return itself (J. E. Riley Investment Company v. Commissioner, 311 U.S. 55; Degnan v. Commissioner, 136 Fed. 2d 891; cert. den. 320 U.S. 778; Burford Oil Co. v. Commissioner, 153 Fed. 2d 745; Stewart v. U. S., 100 Fed. Supp. 221). The decision in Degnan v. Commissioner (supra) is especially pertinent here. The statute there involved allowed the percentage depletion method of computation by election in the "first return ... in respect of a property." The court held that an election could not be made in a late return even though it was chronologically the first return.

ORDER

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 Taxation Code that the action

of the Franchise Tax Board on the protest of the Estate of Worth G. Murdook to a proposed assessment of additional personal income tax in the amount of $515.95 for the year 1951 be and the same is hereby sustained,

Done at Los Angeles, California, this 22nd day of June, 1956, by the State Board of Equalization,

Paul R. Leake, Chairman

Geo. R. Reilly, Member

Robert E. McDavid, Member

J. H. Quinn, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary