

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal)
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ELLA E. HARROLD)

Appearances:

For Appellant: David Livingston, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
 Hebard P. Smith, Associate 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 Board on the protest of Ella E. Harrold to a proposed assessment of additional personal income tax in the amount of \$335.22 for the year 1948.

Appellant and her former husband, Ellsworth Harrold, separated and entered into a property settlement agreement in June, 1945. However, they became reconciled the following September.

They filed separate income tax returns for the years 1946, 1947 and 1948. In the belief that the property settlement agreement allocated to the husband all of what would otherwise be community income he reported and paid the tax on all of his earnings and Appellant did not include any part thereof in her separate returns.

They again separated in March, 1948, and Appellant instituted a suit for divorce. In 1949 the court granted an interlocutory decree of divorce and determined that earnings of the husband after the reconciliation in 1945 were community property. Before dividing the community property between the parties the court deducted various expenses, including the Federal and State income taxes paid thereon by Ellsworth Harrold,

Ellsworth Harrold thereafter filed **claims for** refund of both Federal and State taxes paid for the years 1946, 1947 and 1948 on the ground that only half of his earnings for those years was **includible** in his separate returns. Both the Federal Bureau of Internal Revenue and the Fran-

Appeal of Ella E. Harrold.

chise Tax Board then proposed deficiency assessments against the Appellant for failure to pay taxes on her share of the community income in those years, Ellsworth Harrold authorized the Franchise Tax Board to apply any refunds due him for 1946 and 1947 against Appellant's deficiencies for those years but refused to do so for the year 1948.

The Appellant has cited Section 18555 of the Revenue and Taxation Code for the proposition that the Franchise Tax Board should properly collect the tax from Mr. Harrold. That section provides in part:

"The spouse who controls the disposition of or who receives or spends community income as well as the spouse who is taxable on such income is liable for the payment of the taxes imposed by this part on such income,"

While expressly agreeing with Appellant that under this section Mr. Harrold is liable for payment of the tax, the Franchise Tax Board nevertheless contends that the section does not relieve Appellant of her liability. We have difficulty in perceiving wherein this argument supports the position of the Franchise Tax Board. If Mr. Harrold is liable for payment of the tax he is not entitled to a refund. If he is not entitled to a refund there is no deficiency of tax to be assessed to Appellant. Even without the help of a Federal provision similar to Section 18555, however, the United States Court of Appeals, Ninth Circuit, has sustained the position of Appellant,

The question of Appellant's liability for Federal taxes was originally decided adversely to her by the Tax Court (Ella E. Harrold, 22 T.C. 625). The court stated in part:

"We recognize that there is a strong, equitable consideration here in petitioner's favor. In arriving at a division of community property, the Superior Court of California charged petitioner's share with the Federal income taxes previously paid by her former husband. But although he may now recover a refund of an amount previously credited to him in the divorce settlement, we cannot presume to adjust possible inequities therein."

The decision of the Tax Court was reversed by the Court of Appeals (Harrold v. Commissioner, 232 Fed. 2d 527). The

Appeal of Ella E. Harrold.

court stated:

"Both the Commissioner and the Tax Court, by some strange quirk, seem to have overlooked the fact, that on the stipulated record, the wife, and not the husband actually paid the taxes on her share of the community income. True, her check did not go to the Collector. But, pay it she did, by having it deducted from her share of the community distribution in the divorce court. And the husband received the benefit from it just as if the wife had turned her rightful share of the community property in dollars over to the Collector in payment. In law,, payment may just as effectively be made by offset or credit."

We are satisfied that there is no deficiency of tax owed by Appellant for the year in question,

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 Taxation Code, that the action of the Franchise Tax Board on the protest of Ella E. Harrold to a proposed assessment of additional personal income tax in the amount of \$335.22 for the year 1948 be and the same is hereby reversed.

Done at Sacramento, California, this 17th day of July, 1957, by the State Board of Equalization.

Robert E. McDavid, Chairman

Geo. R. Reilly, Member

Paul R. Leake, Member

J. H. Quinn, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary