



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
AMY C. McWHINNEY )

For Appellant: Robert Wanamaker, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;  
Wilbur F. Lavelle, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Amy C. McWhinney to a proposed assessment of additional personal income tax in the amount of \$119.72 for the year 1951.

Appellant's deceased husband, Curtis A. McWhinney, in 1930 created a trust which was amended in 1933 to give Appellant one-half of the income therefrom for life. The Chase National Bank of New York was trustee. Mr. McWhinney died in 1947 and Appellant became the sole beneficiary and executrix of his estate, which consisted entirely of community property valued at approximately \$30,000.

Upon the ground that the decedent's trust was a transfer of property taking effect at death, the Commissioner of Internal Revenue sought to impose an estate tax of approximately \$90,000, including interest, upon decedent's estate. It is undisputed that the corpus of the trust as well as the decedent's share of the community property would have been subject to payment of the tax if it had become final. The Appellant employed an actuary and attorneys who were successful in persuading the federal authorities to abandon their position. The fees of the actuary and attorneys aggregated \$10,000, which amount was paid in 1951.

Appellant, as executrix of the decedent's estate, filed a fiduciary tax return for the estate in 1951, reporting gross income of \$2,000 and claiming \$1,998.68 of the above fees as an expense of the estate. She treated the remainder of the fees, \$8,001.32, as an expense deduction on her personal income tax return for 1951. The Franchise Tax Board disallowed only this latter amount, upon the ground that it was not a proper deduction under Section 17302.5 of the Revenue and Taxation Code.

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Section 17302.5 (now 17252) of the Revenue and Taxation Code and Section 23(a)(2) of the Internal Revenue Code of 1939 (now Section 212 of the 1954 Code) read as follows:

In computing net income there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

The Franchise Tax Board argues that only the Estate of Curtis A. McWhinney is entitled to deduct the legal expense here in dispute under the above code provision and that Appellant, as legatee, may not deduct any part of that expense. However, since it is undisputed that the corpus of the trust would have been subject to payment of the proposed federal estate tax, it is our opinion that Appellant was entitled to deduct the fees paid by her as the income beneficiary of said trust.

In Stella Elkins Tyler, 6 T.C. 135, petitioner was one of the income beneficiaries of a testamentary trust. She claimed a one-sixth interest in the income, while others asserted she was limited to one-eighth. In permitting her a deduction under Section 23(a)(2) for \$50,000 in attorneys' fees incurred in a proceeding to obtain a construction of the trust provisions, the court said at page 136:

The question is whether it was an expense for the "collection" of income within the meaning of the statute. It was directly connected with income currently distributable to petitioner under the terms of the trust, and without such outlay it appears that she would have collected one-eighth of the trust income rather than the one-sixth interest to which she was entitled.

Appellant's position appears closely analogous to the above case. Here too, the amount of income that would be distributed to the income beneficiary was directly connected with the controversy for which the legal fees were expended. (See also, Mary deF. Harrison Geary, 9 T.C. 8; Rertha K. Goldberg, 31 T.J. 258; Frederick E. Rowe, 24 T.C. 382; Herman W. and Gay K. Fletcher, T.C. Memo., Dkt. No. 29870, Aug. 28, 1951.)

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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 Amy C. McWhinney to a proposed assessment of additional personal income tax in the amount of \$119.72 for the year 1951 be reversed.

Done at Sacramento, California, this 2nd day of May, 1961, by the State Board of Equalization.

John W. Lynch, Chairman

I--George R. Reilly - ) Member

Paul R. Leake, Member

Richard Nevins, Member

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ATTEST: Dixwell L. Pierce, Secretary