BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
AARON F. VANCE)

For Appellant: Aaron F. Vance, in pro. per.

For Respondent: Burl D. back, Chief Counsel;
Wilbur F. Lavelle, Associate
Tax Counsel

OPINION

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Aaron F. Vance against proposed assessments of additional personal income tax in the amounts of $32.29, $27.95 and $20.01 for the years 1955, 1956 and 1957, respectively.

These appeals involve questions which were adjudicated, with respect to appellant's federal income tax liability, by the Tax Court of the United States in Aaron F. Vance, 36 T.C. 547. The record before us is barren of original allegations of facts. In place of such allegations respondent adopts, by reference, the Tax Court's findings of fact. While appellant takes issue with some of these findings, apparently he too relies upon them to supply at least the basic. uncontested facts. Therefore, we find the following:

> Petitioner (appellant) and Beverly J. Vance were married in 1948. Two children, Paul and Debra, were born to them. Petitioner's (appellant's) marriage to Beverly was annulled in April 1954 by a California court and petitioner (appellant) was ordered to pay Beverly $25 per week for the support and maintenance of the children. The court amended these payments in November 1957 to $20 per week for Paul and $15 per week for Debra. Pursuant to the court orders, petitioner (appellant) paid Beverly $1,250 in 1955, $1,175 in 1956, and $1,340 in 1957. (Note: These amounts were stipulated and no explanation appears for the apparent deviation from the amount ordered by the California court.)
>
> Petitioner (appellant) and Beverly were both employed ... during the years in question. Petitioner's (appellant's) net salary, after deductions for FICA and Federal withholding taxes, was $8,522.66 in 1955, $9,662.49 in 1956, and $9,284.44 in 1957. Beverly's net salary, after the same deductions, was $3,957.02 in 1955, $4,403.66 in 1956, and $4,810.25 in 1957 ....

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Due ing 1955, 1956 and 1957 Beverly had custody of the two children. ... Pet it ioner (appel l ant) had visitation r'ghts with the children,... It is stipulated he had the children in h's care as follows:

		Hours
1955	(Paul	1,876
	(Debra	1,299
1956	(Paul	2,536
	(Debra	2,536
'957	(Paul	2,724
	(Debra	2,724

***

Pet it ioner (appel l ant) cl aimed dependency deduct i ons for both children on his income tax returns for the years 1955, 1956, and 1957....

In 1953 pet it loner (appel lant) borrowed $884.37 from a loan company secured by a chattel mortgage on furniture. On January 8, 1955, the furniture was repossessed by the finance company due to a default on the loan, Petitioner (appell ant) deducted $1 ,022 as a casual ty loss on his 1955 tax return for the repossessed furniture....

In 1955 Beverly moved from the house which she and petitioner (appellant) had occupied prior to the annul'ment of their marriage. On l eav ing she removed a laundry tray with its attendant plumbing, a metal cabinet, special chimes, mercury switches, and a television aerial . Some of the items were later returned, On h's income tax return for '956 petitioner (appellant) deducted $998 and described the deduction as "Theft of house&old f ixtures *** and legal expenses in connection with theft & title to property." ... (Aaron F. Vance, supra, 36 T.C. 547, 548, 549.)

St was stipulated in the Tax Court proceeding that in addition to h is support payments, appel lawt spent the do' lowing amounts for the support of Paul and Debra: $140 in 1955 for pictures and miscellaneous; $416.83 in 1956 for a phonograph, medical care, hospital, clothing, music lessons, bicycles, watches, records, and miscellaneous; and $616.90 in 1957 for medical care, a water cooler, clothing, toys, music lessons, pictures, miscellaneous, and a portion of the price of a television set. Appellant testified at the Tax Court hearing that the house from which his dormer wife removed certain fixtures was owned in joint tenancy by them. Beverly Vance testified at the Tax Court hearing that the net amount of her contribution to the children's support, exclusive of appellant's payments , was $2,205.63 in 1955, $2,301.16 in 1956, and $2,947.11 in 1957.

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The Tax Court held that appellant did not contribute more than half of his children's support and he was, therefore, not entitled to claim dependency deductions for them. It also disallowed amounts claimed as casualty losses of repossessed furniture in 1955 and for theft of household fixtures, etc., in 1956.

The Franchise Tax Board issued proposed assessments based upon the disallowance of these same deductions. In addition, it disallowed a deduction for "legal expenses in connection with theft & title to property" in the amount of $800, claimed by appellant for the year 1957.

Section 17181 of the Revenue and Taxation Code allows a deduction for each dependent. Section 17182 defines dependent so as to include a taxpayer's son or daughter, over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer. Thus, in order for appellant to be entitled to claim his children as dependents, he has the burden of proving not only how much he contributed to their support each year but also that it exceeded one-half of their total support. A necessary step in this process is showing the amount of the children's total support received from all sources each year.

Appellant argues that in addition to the amounts it is conceded that he spent for the support of Paul and Debra, he is also entitled to credit for (a) a part of the rental value of his home ($810 in 1955, $680 in 1956, and $740 in 1957), (b) life insurance premiums on policies insuring the children ($55.64 in 1957, (c) part of the cost of two organs bought and installed in appellant's home ($355.40 in 1957), and (d) automobile expenses for transporting the children ($175 for each year).

We agree with the Tax Court's conclusion that life insurance premiums cannot be considered part of the children's support. We need not decide whether, as a matter of law, the other items constitute support. While appellant may be entitled to credit for the board, lodging and other normal support items furnished to his children while they visited him (see Fearing v. Commissioner, 315 F.2d 495, 499; E. R. Cobb, Sr., 28 B.C. 595; Clifford P. O'Shea, T.C. Memo., Dkt. No. 88773, March 11, 1963; Leo H. Robers, T.C. Memo., Dkt. No. 85747, July 26, 1962), we have no information from which we can conclude that his claims are reasonable in amount. Appellant has not shown the basis on which he has arrived at these amounts or allocated them to his children. Even though appellant may have contributed more for support than respondent has conceded (1955 - $1,390; 1956 - $1,591.83; 1957 - $1,956.90) we cannot justifiably conclude that he spent more than his former wife claims to have spent from her own funds (1955 - $2,205.63; 1956 - $2,301.16; 1957 - $2,947.11).

In an effort to contradict the testimony by his former wife as to the amounts she contributed to Paul's and Debra's support, appellant offered evidence regarding certain custody proceedings which, he contends, shows that Beverly was derelict in her duty and did not properly provide for the children. He argues that we should not give her full credit for the amounts she claimed to have contributed to their support. If we reject Beverly's testimony then appellant must show by other means what her contributions were. This he has not done. Thus, appellant has failed to prove what the children's total support was and he is no better off than if we give full credit to Beverly's testimony. In either case, appellant has failed to show that he contributed more than one-half of the children's total support.

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We are impressed by the earnestness of the arguments offered by appellant on his own behalf. However, as was pointed out in the Tax Court's opinion, "Argument is no substitute for evidence in a case of this nature." (Aaron F. Vance, supra, 36 T.C. at p. 551.) In view of the manifest lack of evidence regarding the crucial points at issue, we are forced to conclude that appellant was not entitled to claim his children, Paul and Debra, as his dependents.

We are also of the opinion that appellant's deduction on his 1955 return of $1,022 as a casualty loss was properly disallowed. This loss resulted from the repossession of household furniture by a finance company. Appellant contends that Beverly had possession of the furniture and that she wilfully failed to make the required payments. We argues that this amounts to a "theft" of the furniture.

A very similar contention was rejected in Johnson v. United States, 291 F.2d 908, wherein it was held that a loss which resulted from the lawful taking of possession of certain property by a bank under the terms of a chattel mortgage, was not deductible as a theft loss. On so holding, the court said, " 'losses .... from theft' consist only of takings and deprivations in which the element of criminal intent has been involved," (Johnson United States, supra at p. 909.) Since appellant's loss was through the lawful process of a creditor enforcing his legal remedies, no criminal intent was involved, Beverly's state of mind is not material to this issue. Clearly, no "theft" occurred.

Appellant deducted $998 on his 1956 income tax return as "Theft of household fixtures... and legal expenses in connection with theft & title to property." The record shows that the removal of these items occurred and was discovered in the year the taxpayer discovers his loss, (Rev. & Tax. Code, Sec. 17206, subsection (e).) Since the loss occurred and was discovered in 1955, that is the only year for which appellant could claim this loss. Furthermore, we conclude that Beverly's removal of the fixtures did not amount to a "theft" since she and appellant owned the property as joint tenants. The taking of property by a person who has title to such property in common with another is not larceny or embezzlement. (People v. Cravens) 79 Cal. App. 2d 658 (180 P.2d 453).) The loss from the taking of such property is therefore not deductible, and we know of no provision which would authorize the deduction of legal fees incurred in securing the return of such property.

The disallowance of an $800 deduction for "legal expenses in connection with theft & title to property" which was taken on appellant's 1957 return is also affirmed. Appellant has offered no evidence in support of this item nor has he argued the point.

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 protests of Aaron F. Vance against proposed assessments of additional personal income tax in the amounts of $32.29, $27.95 and $20.01 for the years 1955, 1956 and 1957, respectively, be and the same is hereby sustained.

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Done at Sacramento, California, this 11th day of December, 1963, by the State Boarct of Equalization.

John W. Lynch, Chairman

Paul R. Leake, Member

Geo. R. Reilly, Member

_____, Member

_____, Member

ATTEST: H. 6. Freeman, Secretary