BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MICHAEL AND ELIZABETH TAYLOR WILDING.)

For Appellants: Stanley H. Grainger

For Respondent: Burl D. Lack, Chief Counsel;
Israel Rogers, 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 Michael Wilding and Elizabeth Taylor Wilding to a proposed assessment of additional personal income tax in the amount of $464.10 for the year 1953. The term "appellant" hereafter refers only to Michael Wilding.

On October 8, 1951, Kathleen Tamar Wilding, then appellant's wife, petitioned for a divorce in an English court. With her petition, she applied for maintenance (i.e., payments in the nature of permanent alimony). On November 19, 1951, appellant and Kathleen agreed, and the court ordered, that appellant should pay Kathleen 2000 pounds per year temporarily. A final decree of divorce was entered on January 30, 1952. It is undisputed that this terminated appellant's obligation to pay the temporary alimony.

The English law provided that on any decree for divorce "the court may, if it thinks fit" order the husband to pay permanent maintenance and support. (14 & 15 Geo. VI, c.25 (Matrimonial Causes Act, 1950).) On January 19, 1954, the court entered an order that the petition for permanent maintenance was to be dismissed upon the execution of a deed of covenant by appellant to pay to Kathleen in monthly installments one-third of his annual income but not in excess of 2000 pounds per year. The payments were to commence from the date of the

-final decree, January 30, 1952. Appellant executed the deed of covenant on January 26, 1954.

During 1953, after the order for temporary support had terminated and before the deed of -covenant wasexecuted, appellant made payments to Kathleen equalling $6,066.71. The question presented is whether appellant may deduct this amount in computing his taxable income for 1953.

According to section 17317.5 (now 17263) of the Revenue and Taxation Code, appellant may deduct the amount in questionif it is includible in Kathleen's gross income under section 17104 (now 17081(a)) of the Code which provides:

> In the case of a wife who is divorced ... from her husband under a decree of divorce ... periodic payments (whether or not made at regular intervals) received subsequent to such decree 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 ... shall be includible in the gross income of such wife....

Sections 17317.5 and 17104 are substantially the same as sections 23(u) and 22(k), respectively, of the United States Internal Revenue Code of 1939 (now sections 215 and 71, respectively, of the United States Internal Revenue Code of 1954).

In support of his position, appellant cites Maurice: Fixler, 25 T.C. 1313, a case interpreting the federal-s.. There, the husband and wife entered into an oral support agreement prior to their divorce, Under the' law of the state in which the divorce was granted, the agreement survived the divorce even though it was not mentioned in the decree. 'Several years later the agreement was reduced to writing. The Tax Court held that. the written agreement was "incident" to the divorce. and allowed the husband to deduct alimony paid subsequent to the time the agreement was put into writing. We are here concerned, however, with a payment made after the provision for temporary alimony had terminated and before there was any written agreement or order to pay permanent alimony. Respondent has permitted the deduction of amounts paid after the order and deed of covenant of 1954.

Appellant also points to a statement which the Tax Court in the Fixler case quoted from Lerher v. Commissioner, 195 F.2d 296, as follows: "The term 'written instrument incident to such divorce' was designed, we think, only to insure adequate proof of the existence of the obligation when divorce has occurred, and not to deny relief to the 'husband when merely legal formalities have not been rendered their

full due." This statement must be considered in connection with the actual holdings on the facts in Fixler and Lerner. As we have pointed out, in Fixler the Tax Court only allowed the deduction of payments made after the support agreement was written. The Lerner case merely held that a written agreement made prior to a divorce and not incorporated in the decree was incident to the divorce.

Much closer to the issue before us is Van Vlaanderen v. Commissioner, 175 F.2d 389, which is cited by respondent. A divorce decree had been entered ordering the husband there involved to pay alimony of $30 weekly. Thereafter, he voluntarily increased the payments to $100 weekly and subsequently obtained an order modifying the decree to require such payments retroactively. The court in the Van Vlaanderen case refused to permit the husband to deduct the amount of the increase paid prior to the modification of the decree.

Respondent also cites the decision in Ben Myerson, 10 T.C. 729. In that case the husband paid alimony under an oral agreement made prior to his divorce. Both he and his wife were California residents. The court found that the oral agreement did not impose a legal obligation on the husband under California law and thus concluded that the payments were not deductible. The court added that "In any event, under Section 22 (k), the legal obligation must be incurred under a written instrument" and that "Petitioner was not making payments to his former wife in 1943 under a written instrument;..."

Appellant implies that, unlike the taxpayer in the Van Vlaanderen case, he was under some legal obligation to make the payment in question before the obligation was reduced to writing. Assuming that this would be a material consideration (cf. Ben Myerson, supra), appellant has nevertheless failed to establish that he was legally obligated in 1953 to make any payment. At that time, the order for temporary alimony had expired and there is no evidence that an enforceable oral agreement then existed. Neither the fact or amount of the obligation as to the permanent alimony was fixed prior to 1954. Whether permanent alimony would be granted at all after the final decree in 1952 was entirely discretionary with the English court. (Matrimonial Causes Act, supra,)

The order and deed of covenant in 1954 fixed the obligation of appellant to pay permanent alimony and, in accordance with the holding in Van Vlaanderen, the payment made in 1953 cannot be deducted even though the order and deed were made retroactive. (See also, Robert C. Richards, T.C. Memo., Dkt. No. 93542, Jan. 1, 1963.)

Appeal of-Michael and Elizabeth Taylor Wilding

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 Michael Wilding and Elizabeth Taylor Wilding to a proposed assessment of additional personal income tax in the amount of $464.10 for the year 1953 be and the same is hereby sustained;

-Done at Sacramento, California, this 18th day of February, 1964, by the State Board of Equalization.

Paul R. Leake, Chairman

John W. Lynch, Member

Robt. C. Kirkwood, Member

Geo. R. Reilly, Member

_____, Member

Attest: J. M. Kearney, Secretary