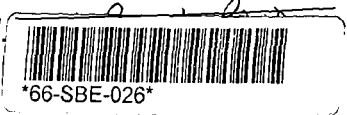


EMPLOYEE PEN
BY EMPLOYER
BENEFICIARY



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
VERA H. SILVER)

Appearances:

For Appellant: Rudolph A. Phillips
Certified Public Accountant

For Respondent: Burl D. Lack
Chief 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 Vera H. Silver against proposed assessments of additional personal income tax in the amounts of \$254.75, \$175.70, \$136.61 and \$324.97 for the years 1957, 1958, 1959 and 1960, respectively.

The questions raised by this appeal concern the availability of an exclusion from gross income of amounts received by appellant as beneficiary under an employees' pension plan.

Appellant is the widow of George E. Silver. Immediately before his death, Mr. Silver was employed by a company which provided a retirement plan for its employees and made all of the contributions required to fund it. This plan constituted a "qualified" pension trust within the meaning of sections 17501 et sequitur of the Revenue and Taxation Code which, in general, provide for the deduction of contributions by an employer and for the taxation of pension payments to an employee.

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In addition to a provision for lifetime monthly payments to the employee commencing at the normal retirement age of 65, the plan provided that if the employee died within five years before his normal retirement date, monthly payments would be made to his beneficiary for 10 years. In either case, the annual amounts were to be 1 percent of the employee's average annual compensation in excess of \$1,200 during the 10 years immediately preceding the termination of his employment, multiplied by the total years of service.

After an employee completed 20 years of service and reached the age of 45, he could terminate his service with a "vested right" to retirement payments commencing at age 65, in annual amounts equal to 1 percent of his average annual compensation in excess of \$1,200 during the five years immediately preceding termination of his employment, multiplied by the total years of service.

Mr. Silver died in 1956, at the age of 62, having completed 27 years of employment with the company. No part of the value of the retirement plan was required to be included in his estate for purposes of the California Inheritance Tax Law. Beginning in November 1956, appellant received monthly payments of \$434.50 as Mr. Silver's designated beneficiary under the death benefit provisions of the retirement plan.

Appellant contends that for income tax purposes she is entitled to exclude from gross income that portion of the payments equivalent to the fair market value of the annuity at the date of her husband's death.

Except where the total distribution is made in one year, the amounts distributed by a pension trust of the type under consideration are taxable to the distributee (Rev. & Tax. Code, § 17503), with appropriate exclusion of amounts contributed by the employee. (Rev. & Tax. Code, §§ 17101 to 17108.) Exclusions based on the value of property acquired from a decedent are permitted pursuant to section 18045 of the Revenue and Taxation Code, but the only provisions therein which could possibly apply to the property here involved have, by express terms, no application unless the value of the property was required to be included in the decedent's estate for inheritance tax purposes.

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Since Mr. Silver made no contributions toward the retirement plan, and since none of the property was required to be included in his estate for inheritance tax purposes, no exclusions may be founded upon the statutes thus far considered.

Section 17132 of the Revenue and Taxation Code provides for: an exclusion from gross income of up to \$5,000 of amounts received by an employee's beneficiary, if the amounts are paid by or on behalf of an employer by reason of the death of the employee. The exclusion, however, does not apply to "amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living." Under respondent's regulations, an employee is considered to have had a nonforfeitable right with respect to the date of death value of an annuity which would have been paid to him if he had terminated his employment and continued to live, or with respect to amounts paid in lieu thereof. (Cal. Admin. Code, tit. 18, reg. 17131-17132(b) subd. (4).) See also, Cal. Admin. Code, tit. 18, reg. 17504 subd. (a) (2); Hess v. Commissioner, 271 F.2d 104; Rev. Ru1.55-74, 1955-1 Cum. Bu11. 230.)

Because Mr. Silver had completed 20 years of service and was over 45 years old, he had, immediately before his death, a right to retirement income commencing at age 65, in accordance with the provisions of the retirement plan. If he had terminated his employment and continued to live, he would have received the amounts. Within the terms of the above Statute and regulation, we conclude that Mr. Silver had a nonforfeitable right in lieu of which an annuity was paid to appellant. (See Cal. Admin. Code, tit. 18, reg. 17131-17132(b), subd. (5)(B), ex. 1.)

Under respondent's regulations, the exclusion provided by section 17132 may be allowed to the extent that the value of the beneficiary's annuity exceeds the value of the employee's nonforfeitable right. (Cal. Admin. Code, tit. 18, reg. 17131-17132(b), subd. (5).) Since there is no contention or evidence that the value of appellant's annuity exceeded the value of the nonforfeitable right, no exclusion may be allowed under section 17132.

Appellant has not cited nor have we discovered any other statutes which would permit her to exclude from gross

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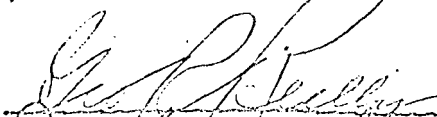
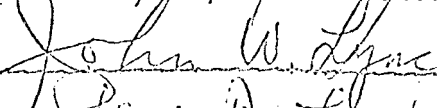
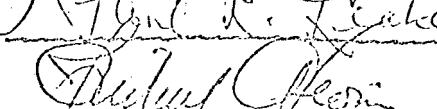
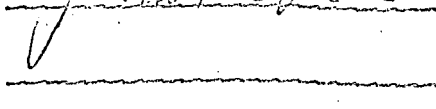
income any portion of her annuity payments. Accordingly, respondent's action must be sustained.

O R D E R

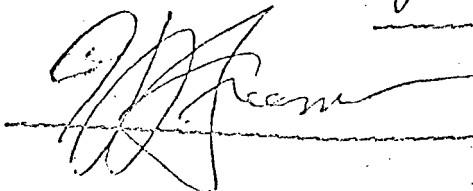
Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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 Vera H. Silver against proposed assessments of additional personal income tax in the amounts of \$254.75, \$175.70, \$136.61 and \$324.97 for the years 1957, 1958, 1959 and 1960, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of March, 1966, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member

_____, Member
_____, Member

ATTEST:


_____, Secretary