



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
GOGI GRANT RIFKIND)

Appearances:

For Appellant: Robert G. Rifkind,
Attorney at Law

For Respondent: Tom Muraki,
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 13594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Gogi Grant Rifkind against a proposed assessment of additional personal income tax in the amount of \$287.23 for the year 1961.

Appellant is a singer known professionally as Gogi Grant. On August 11, 1959, she entered into an exclusive two-year recording contract with Liberty Records, Inc. (hereafter, "Liberty"). Under the terms of that contract Liberty was to record appellant in a minimum of three albums and four single records in each year of the contract. Liberty also agreed to pay her nonreturnable advance royalties of \$12,500 for each year of the contract, payable in monthly installments, and a percentage of any sales in excess of those which would yield the advance royalties. The contract further provided:

During the term of this agreement you [appellant] shall be considered by us to be one of our leading artists and as such you shall be treated accordingly. During the term hereof, we agree to accord to you and to each of your record releases promotion and exploitation equal to that given our other leading vocalists and their record releases.

Appeal of Gogi Grant Rifkind

Over the two-year period of the contract Liberty paid appellant advance royalties totaling \$25,000, as agreed, but it failed to release the minimum number of records specified in the contract. On June 6, 1961, the contract was amended in several particulars, and appellant agreed to release Liberty from all liability for not recording the minimum number of selections. Liberty agreed to the following:

In addition to all of the moneys which we are obligated to pay you pursuant to the terms of said contract, we shall pay to you, concurrently with the execution of this amendment, the sum of \$7,500.00.

In an information return which Liberty filed with respondent for 1961, it reported this \$7,500 as royalties paid to appellant. Appellant did not include the \$7,500 in her taxable income for that year. The proposed deficiency assessment here on appeal is based upon appellant's receipt of that amount.

Appellant contends that this \$7,500 which she received from Liberty in 1961 was nontaxable because it constituted an amount paid to compensate her for damages to her reputation. She alleges that that payment was made by Liberty in response to her threat to sue to recover damages for the injury to her reputation which Liberty had caused by failing to record and promote the agreed number of records, and by failing to exploit and publicize appellant, as one of its leading artists. She states that because of Liberty's breach of their contract, and the resultant denial of valuable public exposure which she suffered, she has been unable to get another full-time recording contract since the expiration of her contract with Liberty.

After the issuance of the proposed additional assessment here on appeal Liberty wrote to respondent, stating that the \$7,500 payment had been made to appellant in 1961 in settlement of a claim by her that Liberty had damaged her reputation. In this letter Liberty said that its bookkeeping department had been in error when it entered that payment as a royalty payment.

Respondent argues that the \$7,500 payment received by appellant in 1961 constituted either damages paid in lieu of royalties which would have accrued to appellant if Liberty had promoted her records as agreed, or damages constituting an award for loss of further profits due to Liberty's failure to adequately publicize appellant. Either of these characterizations, respondent contends, would result in treatment of the payment as taxable income.

Appeal of Gogi Grant Kiskind

Section 17071 of the Revenue and Taxation Code defines gross income generally for tax purposes as "all income from whatever source derived." Section 17138 specifically excludes from that definition "The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Statutes substantially identical with these are contained in the United States Internal Revenue Code and have been construed by the federal courts.

The federal courts have held that the taxability of the proceeds of a lawsuit, or of a sum received in settlement thereof, depends upon the nature of the claim and the actual basis of recovery. (Nicholas E. Mathev, 10 T.C. 1099, 1104, aff'd, 177 F.2d 259, cert. denied, 339 U.S. 943 [94 L. Ed. 1359].) The crucial question is: In lieu of what were the damages awarded? (Raytheon Production Corp. v. Commissioner, 144 F.2d 110, 113, cert. denied, 323 U.S. 779 [39 L. Ed. 622].) It has been held that compensation for injury to an individual's personal rights is not taxable. (C. A. Hawkins, 6 B.T.A. 1023; Mrs. Lyde McDonald, 9 B.T.A. 1340.) If the recovery represents damages for loss of profits, however, it is taxable in the same manner that the profits would have been taxable if they had been realized. (Sager Glove Corp., 36 T.C. 1173, aff'd, 311 F.2d 210, cert. denied, 373 U.S. 910 [10 L. Ed. 2d 411].)

Respondent's determination that the amount in controversy is taxable as ordinary income is presumptively correct, and the burden of proof is on appellant to show that the receipt constituted nontaxable income. (Cal. Admin. Code, tit. 18, § 5036; Sager Glove Corp., supra.)

It is not at all clear that the \$7,500 payment to appellant was in fact made in settlement of a claim for damage to her reputation. The threat to sue was not in writing and the settlement negotiations were apparently conducted orally. No complaint was ever filed, since settlement was reached prior to the commencement of any action. The release dated June 6, 1961, signed by appellant, does not state the purpose of the payment. In addition, though it stated three years later that such treatment was erroneous, Liberty in the first instance did treat the \$7,500 payment as a royalty payment to appellant, both on its own books and on the 1961 information return filed with respondent.

The injury to reputation which has been held to be compensable without tax, moreover, is injury to one's personal reputation, e.g., to one's character and integrity, rather than to one's reputation in his business or professional

Appeal of Gogi Grant Rifkind

capacity. (Nathan Agar, T.C. Memo., Dkt. No. 69090, February 18, 1960, aff'd per curiam on other grounds, 290 F.2d 283; Mason K. Knuckles, T.C. Memo., Dkt. No. 4139-62, February 12, 1964, aff'd, 349 F.2d 610.)

There is no evidence that appellant's personal reputation suffered in any way as a result of Liberty's breach of their recording contract. If there was damage to her reputation, it consisted of injury to her business reputation, her marketability as a professional singer, as reflected in a loss of profits. That her claimed injury was at most of a business nature is demonstrated by her allegation that because of Liberty's breach of their contract she has been unable to get another full-time recording contract. Since the lost profits would have been taxable as ordinary income, any payment made in lieu of those profits would also be taxable. (Nathan Agar, supra.)

After a careful review of the entire record we conclude that the lump-sum payment received by appellant in 1961 from Liberty constituted taxable income, and we therefore affirm respondent's proposed assessment,

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 Gogi Grant Rifkind against a proposed assessment of additional personal income tax in the amount of \$287.23 for the year 1961, be and the same is hereby affirmed.

Done at Sacramento, California, this 10th day of May, 1966, by the State Board of Equalization.

_____, Chairman
John W. Lynch, Member
Paul R. Drake, Member
Paul H. Martin, Member
_____, Member

ATTEST: W. J. Fran, Secretary