



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
BEVERLY BORTIN }

For Appellant: David N. Bortin, Attorney at Law

For Respondent: Crawford H. Thomas, Chief Counsel
Peter S. Pierson, Associate Tax
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 Beverly Bortin against a proposed assessment of additional personal income tax in the amount of \$33.65 for the year 1959.

Appellant married Murray B. Lawskey on March 28, 1946, and they resided thereafter in California. During 1959 they separated, and on November 9, 1959, Mr. Lawskey received an interlocutory decree of divorce from appellant. Appellant has since remarried.

Appellant filed a federal income tax return for 1959 in which she reported as her only income wages which she had earned during that year. She did not file a state income tax return with respondent for 1959, since her wages were less than the statutory minimum income requiring the filing of a return.

In his California personal income tax return for 1959, Mr. Lawskey reported his entire earnings during 1959. He paid the tax due on one-half of his income prior to November 9, 1959, the date of the interlocutory decree, and on all of the income he earned from that date until the end of the year.

Respondent issued the proposed additional assessment which gives rise to this appeal on the ground that one-half

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of Mr. Lawskey's income earned prior to November 9, 1959, was community property and was therefore taxable to appellant.

Section 163 of the Civil Code of California provides: "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is his separate property." In 1959 section 164 of that code provided: "All other property acquired after marriage by either husband or wife ... is community property" Under the terms of section 169.2 of the Civil Code, a husband's earnings derived after the parties are living apart under an interlocutory decree of divorce, are his separate property. Mr. Lawskey's earnings therefore constituted community property up to November 9, 1959, the date of the interlocutory decree of divorce,

Section 161a of the Civil Code of California defines the respective interests of husband and wife in community property, during continuance of the marriage, as "present, existing and equal interests." It is well settled that the wife's interest in community property under this provision is a vested property interest. (Ottinger v. Ottinger, 141 Cal. App. 2d 220, 225 [296 P.2d 347].) She is therefore considered the owner of one-half of the community income and is liable for income tax on that amount. (United States v. Malcolm, 282 U.S. 792 [75 L. Ed. 714]; Poe v. Seaborn, 282 U.S. 101 [75 L. Ed. 239]; Gilmore v. United States, 290 F.2d 942, rev'd and remanded on other grounds, 372 U.S. 39 [9 L. Ed. 2d 570].) Her liability is unchanged by the fact that she is living separately from her husband at the time the income is earned or that she is divorced at the end of the taxable year. (Jack Douglas, 27 T.C. 306; Ione C. Hubner, 28 T.C. 1150; Commissioner v. Cavanagh, 125 F.2d 366.) Under these authorities appellant is liable for tax on one-half of the earnings of her former husband up to the date on which the community character of those earnings was terminated by the interlocutory divorce decree.

Appellant contends that the additional assessment here protested was improperly based upon a tax return executed by her former husband without her knowledge and without her signature .

Section 18648, subdivision (a) of the Revenue and Taxation Code provides :

(a) If any taxpayer fails to file a return, ... for any taxable year, the Franchise Tax Board, at any time, ... may make an estimate of the net income, from any available information, and may

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propose to assess the amount of tax, interest, and penalties due under this law. (Emphasis added.)

Under this provision respondent was authorized to act upon the information revealed by Mr. Lawskey's 1959 tax return in proposing an additional assessment against appellant.

Appellant states that she has repeatedly asked respondent to furnish her with a copy of her former husband's 1959 personal income tax return. Respondent has refused on the ground that such disclosure would violate section 19282 of the Revenue and Taxation Code. That section provides that, with certain exceptions which do not apply here:

...it is a misdemeanor for the Franchise Tax Board, any deputy, agent, clerk, or other officer or employee, to disclose in any manner information as to the amount of income or any particulars set forth or disclosed in any report or return required under this part.

Appellant does not specifically state her reasons for wishing to see the tax return filed by her former husband. She does not contend that he did not earn this income. In any event, we cannot compel respondent to violate section 19282.

For the above reasons, we sustain respondent's action in this matter,

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,

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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 Beverly Bortin against a. proposed assessment of additional personal income tax in the amount of \$33.65 for the year 1959, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day
of August, 1966, by the State Board of Equalization.

Ray L. Price, Chairman
Alan C. Bortin, Member
John W. Lynch, Member
Sam R. LeVine, Member.
Richard L. Harris, Member

Attest: *[Signature]*, Secretary