



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Platter of the Appeal of)
EDNA ELIZABETH TROESCHER ELAM)

For Appellant: Edna Elizabeth Troescher Elan
in pro. per.

For Respondent: Crawford H. Thomas, Chief Counsel
Tom Muraki, 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 Edna Elizabeth Troescher Elam against a proposed assessment of additional personal income tax in the amount of \$113.04 for the year 1962.

The sole question presented is whether certain premium payments made by appellant's former husband on a life insurance policy are includible in appellant's gross income.

On April 19, 1957, appellant acquired an insurance policy on the life of her then husband, Daniel Wesley Elam (hereinafter referred to as Daniel). Appellant was designated as the owner and primary beneficiary of the policy and the children of the marriage were named secondary beneficiaries.

On June 28, 1961, appellant and Daniel entered into a Property Settlement and Separation Agreement (hereinafter termed the Agreement) which, with respect to the insurance policy in question, provided as follows:

That all remaining community property shall be divided equally between the parties in the following manner:

Appeal of Edna Elizabeth Troescher Elam

* * *

It is agreed that Northwestern Mutual Life Insurance Company Policy No. 4-926-395 shall be maintained by Mr. Elam by paying premiums from his separate property for the benefit of Mrs. Elam until **his** death or the remarriage of Mrs. Elam shall first occur. Upon the remarriage of Mrs. Elam Mr. Elam shall have the option of surrendering such policy for its cash value at the date of **the** remarriage of Mrs. Elam and divide the proceeds of such surrender equally **between** the parties or to pay to **Mrs. Elam** an amount equivalent to one-half the cash value of the said policy at the date of remarriage, in which event Mrs. Elam shall relinquish all right, title and interest in and to said **policy** and Mr. Elam shall have the privilege of changing the beneficiary of said policy in his sole discretion.

On June 30, 1961, appellant was granted an interlocutory decree of divorce and the Agreement was incorporated by reference in the decree.

Pursuant to the Agreement, Daniel paid premiums on **the policy** in the amount of \$2,473.28 during the year 1962. One half of the total premiums thus paid were included by respondent in appellant's income for the year 1962 as alimony payments taxable to a divorced wife under section 17081 of the Revenue and Taxation Code. The pertinent part of section, 17081 reads as follows:

If a wife is 'divorced .. from'her husband under a decree of divorce ... the wife's gross income includes periodic payments . . . received after such decree in discharge of ... a legal obligation which, because of the marital or 'family relationship, is imposed on or incurred by the husband under the decree *or* under a written instrument incident to such divorce

Appeal of Edna Elizabeth Troescher Elam

It is agreed that the premium payments were made in discharge of a legal obligation incurred by Daniel under a written instrument incident to the divorce decree. Nevertheless, **appellant contends** that the Agreement divested her of ownership of the policy and that as a mere beneficiary she cannot be considered to have received the payments.

Appellant has provided a copy of a letter from the insurer dated April 12, 1966, which defines her rights in the **policy** as follows:

As we see the property agreement, we consider **your** rights in the policy. to be:

1. Beneficiary of the death benefits, provided you outlive the insured.
2. One half value of the policy, provided you remarry.
3. **Policy** dealings as owner, but with the consent of the insured.

Testamentary disposition now by you may be questionable, The conditions regarding your remarriage or your early death before the insured poses problems in this regard.

Section 17081 is substantially the same as section 22(k) of the Internal Revenue Code of 1939 (section 71(a)(1) of the 1954 Code) and considerable weight is to be given to prior judicial construction of the federal provision in interpreting section 17081. (Appeal of Georgeann M. Brown, Cal; St. Bd. of Equal., Nov. 13, 1962,)

. We have researched the applicable authorities and considered all of the information contained in the record. We agree with appellant's contention that the premium payments did not constitute income received by her, actually or constructively.

Where the divorced wife completely owns the insurance policy, the premium payments made by the former husband are **includible** in her gross income. (Hyde v. Commissioner, 301 F.2d 279; Anita Quinby Stewart, 9 T.C. 195.) Where,

Appeal of Edna Elizabeth Troescher Elam

however, her interest in the policy is contingent and she does not have the right to exercise the normal incidents of policy ownership, the premium payments are not includible in her income because she does not receive measurable economic benefits from the payments. (Kiesling v. United States, 349 F.2d 110, cert. denied, 382 U.S. 939 [15 L. Ed. 2d 350]; Piel v. Commissioner, 340 F.2d 887; Florence T. Griffith, 35 T.C. 882; James Parks Bradley, 30 T.C. 701.)

By the terms of the Agreement, Daniel was required to pay the annual premiums "for the benefit of Mrs. Elam until his death or the remarriage of Mrs. Elam." In the event appellant should predecease Daniel, the right to the proceeds of the policy would shift to the children as secondary beneficiaries, and appellant's estate would acquire no interest. Although appellant could acquire one half of the policy's cash surrender value or its equivalent upon her remarriage, this was an event not within her exclusive control and was not certain to occur. Thus far, it appears that appellant's right to receive the policy's proceeds, or any portion thereof, was contingent upon uncertain events. Therefore, unless she had an unrestricted right to exercise the incidents of ownership of the policy, the premiums were not taxable to her.

While appellant was designated in the policy as the owner, the Agreement recognized that the policy was owned by appellant and Daniel as community property and fixed their future rights. The Agreement provided that in the event of appellant's remarriage, Mr. Elam had the option of surrendering the policy and taking half of its cash value or of paying the equivalent of half of the cash value to appellant and acquiring all rights in the policy. In view of this interest of Mr. Elam in the policy, appellant was unable to change the beneficiaries, borrow on the policy, or obtain its cash surrender value without the consent of her former husband. In the absence of an unrestricted right to exercise these incidents of policy ownership, a beneficiary does not receive the full benefit generated by the premium payments. (Florence T. Griffith, supra.)

Inasmuch as appellant's right to receive the proceeds of the policy was contingent and her right to exercise the incidents of policy ownership depended upon the consent of her former husband, it was not certain that she would derive

Appeal of Edna Elizabeth Torescher Elam

any benefit from the premium payments. Under the circumstances, appellant did not receive economic gain or benefit capable of ascertainment.

ORD ER

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 Edna Elizabeth Torescher Elam against a proposed assessment of additional personal income tax in the amount of \$113.04 for the year 1962, be and the same is hereby reversed.

Done at Sacramento, California, this 23rd day of November, 1966, by the State Board of Equalization.

Geo. P. Kelly, Chairman
John W. Lynch, Member
Paul R. Leake, Member
Paul R. Leake, Member
_____, Member

ATTEST: [Signature], Secretary