BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
J. ALBERT AND AUGUSTA F. HUTCHINSON)

For Appellant: J. Albert Hutchinson, In pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Jack E. Gordon
Counsel

OPINION

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 J. Albert Hutchinson, Individually, against proposed assessments of additional personal income tax in the amounts of $324.96, $181.02 and $359.23 for the years 1961, 1962 and 1963, respectively, and on the protest of J. Albert and Augusta F. Hutchinson, jointly, against a proposed assessment of additional personal income tax in the amount of $95.35 for the year 1964. Appellants were married in 1964. J. Albert Hutchinson will be referred to as "appellant" in this opinion.

The issues involved in this appeal are set out separately.

I. Head of Household

Appellant and his former wife, Maxine Dow Hutchinson, separated in April 1961. A support order was issued subsequently and an interlocutory decree of divorce was granted to Maxine on June 22, 1962, followed on February 28, 1964, by entry of a final divorce decree. On his state income tax returns for 1961, 1962 and 1963, appellant claimed a $3,000 head of household exemption which was disallowed by respondent.

Without a final decree of divorce or a decree of separate maintenance, a married taxpayer cannot qualify as a head of household, even though separated from his spouse. (Rev. & Tax, Code, §§ 17042, 17043; Appeal of LolitaW. Hamilton, Cal. St. Bd. of Equal,, Oct. 27, 1964; Wesemann v. Commissioner, 35 T.C.1164, aff'd, 298 F.2d 527.) Since the final divorce decree was not obtained until 1964 we must conclude that appellant did not qualify as a head of household during the years 1961 through 1963.

II. Exemptions for Claimed Dependents

Appellant and Maxine are parents of two children, Laurence and Diane, who were 15 and 12, respectively, in 1963. Pursuant to the interlocutory decree entered in June 1962, care and custody of the children were awarded to Maxine. Appellant was ordered to pay $150 monthly toward the support of each child and medical and dental expenses of each in excess of $20 per month. He was also ordered to pay $500 monthly for alimony and support of Maxine. The court awarded the family home to Maxine, In Hutchinson v. Hutchinson, 223 Cal. App. 2d 494 [36 Cal,, Rptr, 630,, (decided Dec 18, 1963), the appellate court upheld the lower court's finding that the home was community property which was properly awarded to Maxine. Occupied by Maxine and the two children, it has been described as a 10-room house located at 3659 Washington Street in San Francisco, with a $50,000 estimated value, and with monthly purchase payments of $112, plus taxes and Insurance payments of approximately $70 and $25, respectively.

In both 1963 and 1964 appellant paid approximately $4,200 for the support of his children ($2,100 for each child). The record does not indicate the total amount expended for their support irrespective of source, However, *in* Hutchinson v. Hutchinson, supra, the appellate court stated on page 507:

> The record shows that the sum of $1,250 per month is required in order for plaintiff to maintain the home for herself and the two children in accordance with the standard of living which had been established by defendant [appellant] before the separation.... [B]oth parties apparently desire that the children be given the "advantages" customarily provided for children of professional men.

On his returns for 1961 through 1963 appellant originally claimed only his son as a dependent but later requested that his daughter also be so considered. Both were claimed as dependents on the 1964 return. Respondent allowed dependency exemptions for both In 1961 and 1962 but did not allow an exemption for either In 1963 and 1964.

Appellant must prove that he contributed over *one*-half of the support of each claimed dependent. (Rev, & Tax. Code, § 17182.) To meet this burden appellant must establish the total amount contributed to the support of each child, as well as the amount provided by him. (Bernard C. Rivers, 33 T.C. 935; Appeal of John S. Brlntnall, Cal. St. Bd. of Equal., June 28, 1965; Appeal of Noumi and Audrey Fischer, Cal. St. Bd. of Equal., Dec 15 1954.) In support of his position, appellant contends that he should be regarded as contributing one-half of the lodging support. He malntalns that he was entitled to joint possession of the home and furnishings during the years in question, claiming Maxine's right to possession was not finally adjudicated until 1964 when he conveyed his half Interest In the home by deed, Lodging support is measured by fair rental value (Emil Blarek, 23 T.C. 1037; William C. Haymess 23 T.C. 1046; Rev. Rul. 58-302, 58-1 Cum. Bull 62) and is regarded as -provided by the party who has the right to possession and occupancy. (Delbert D. Bruner, 39 T.C. 534.) In view of the trial court's 1962 Interlocutory decree we must conclude that the fair rental value of the large and valuable home and furnishings was contributed solely by Maxine; rather than by appellant and Maxine jointly, In 1963 and 1964.

If $833 (two-thirds of $1,250, the monthly amount referred to in the record of the litigation) is used as the total support figure, appellant's support contribution clearly does not exceed one-half. In any event, appellant has failed to show the total amount contributed to the children 's support, and the burden is hls, irrespective of the difficulties Involved, (Bernard C. Rivers, supra; Frank E. McDevitt, T.C. Memo., Mar. 5 1954; Appeal of Nouml and Audrey Fischer, Cal. St. Bd. of Equal., Dec. 15 1954, supra.) Accordingly, appellant has not established'that the two children were his dependents In 1963 and 1964.

On his 1964 return, appellant also deducted certain medical expenses paid for his daughter. Inasmuch as appellant's daughter was not his dependent In 1964 the deduction was properly disallowed. (Rev; & Tax. Code,, § 1725%)

III. Dividend Income

Dividends of $28.93 and $150.45 were reported on the 1962 return. The $150.45 related to a $300.91 dividend

from Television Electronics Fund, Inc., treated by appellant as a "capital gain dividend" from a diversified management company eligible under federal law for a 50% long term capital gain deduction. (Int. Rev. Code of 1954 §§ 852(b)(3)(B), 1202.) California law contains no corn&able provision and, accordingly, the $300.91 dividend should have been Included in income In full. There is no basis for any adjustment since the amount determined by respondent as taxable is aotually less than the true taxable amount.

IV. Gain from Sale of Stock

Prior to February 29, 1960, by 'purchase and reinvestment appellant had acquired 446.374 shares of Television Electronics Fund, Inc. stock with a basis of $5,536.47. On that date the stock was split, giving appellant 892.748 shares. Subsequently, appellant's interest increased to 1213.841 shares with a total cost basis of $7,892.77. On February 3,1963, pursuant to the court order contained in the interlocutory decree, appellant transferred 561.460 shares to Maxine, and received a $2.78 check representing redemption of the .381 fractional share and a stock certificate evidencing ownership of the remaining 652 shares. Appellant sold the remaining 652 shares for $4,705.56 on February 13, 1963. Appellant reported a loss from this sale of $1,588.86 on his 1963 return, since he regarded the cost basis of the stock sold as $6,294.42.

In his method of determining the cost basis of the 652 shares, appellant attributed no cost basis to the stock received in the stock split. He also did not regard stock first acquired as first transferred.

Respondent originally determined that there was a gain on the sale of the 652 shares on February 13, 1963, of $466.56. Respondent now concedes that the gain is $297.32 calculated a8 follows:

Determination of Cost Basis

Total Coat of 1,213.841 shares	$7,892.77
Less: Coat allocated to 561.460 shams transferred to Maxine Dow Hutchinson:	

Earliest Acquisitions

	Shares	Cost
8/24/54-2/29/60	446.374	$5,536.47
2/29/60 stock split	446.374	-0-
	892.748	$5,536.47

Cost per share after split - $50536047 ÷ 892.748 = $ 6.2016

$6.2016 x 561.460 =	$3,481.75
Balance of cost allocable to remaining 652.381 shares	$4,411.02

Calculation of Gain

Sales proceeds for 652 shares	$4,705.56
Check received for .381 shares - not previously 'reported	2.78
	$4,708.34
Less: Basis as computed	4,411.02
Gain on sale	$ 297 .32

Section 17345 of the Revenue and Taxation Code provides:

> If a shareholder in a corporation receives Its stock ... (referred to in this section a8 "new stock") in a distribution to which Section 17335 [referring to non-taxable stock distributions] applies, then the basis of such new stock and of the stock with respect to which it is distributed (referred to in this section as "old stock"), respectively, shall, in the

> shareholder% hands, be determined by allocating between the old stock and the new stock the adjusted basis of the old stock,,,.

Respondent's regulations provide in part:

> If shares of stock in a corporation are sold or transferred by a taxpayer who purchased or acquired lots of stock on different dates or at different prices, and the lot from which the stock was sold or transferred cannot be adequately identified, the stock sold or transferred shall be charged against the earliest of such lots purchased or acquired in order to determine the cost or other basis of such stock..., (Cal. Admin. Code, tit.18, reg. 18042(a), subd. (2)(A).)

Respondent's slightly revised calculation conforms to the statute providing for the allocation of basis to "new stock" and to the regulation calling for the "first-in first-out" method. Accordingly, the proposed assessments will be revised to reflect the gain on the sale as $297.32.

V. Automobile Expense and Attorney's Fees

Prior to April 1961 appellant used his personal car for business as a *major* partner In a law firm. The car was taken by his former wife after their separation. Thereafter, appellant owned no personal car. He rented a car on a daily basis for the balance of 1961 and leased cars on a yearly basis in 1962,1963 and 1964.

Respondent disallowed $1,200 of automobile expense claimed in each year, This was only a partial disallowance of the total amount claimed by appellant. (Rev. & Tax. Code, § 17202; Cohan v. Commissioner, 39 F.2d 540.) No evidence has been presented which would establish the right to a larger deduction. Since deductions are a matter of legislative grace and the burden of showing the right to claimed deductions is Imposed upon the taxpayer there is no basis for any adjustment. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L. Ed. 1348]; Deputy v. du Pont, 308 U.S. 488 [84 L. Ed. 416].)

Appellant's 1961 return also contained a deduction of $819.95 for attorney's fees. Respondent disallowed the

deduction on the ground that the expenditure represented a personal expense. Appellant has *not* established that the fees were paid as a business expense or as an expense for the production of Income, (Rev. & Tax. Code, §§ 17202 and 17252.)

VI. Disallowed Medical Expense

Respondent properly disallowed the deduction of $432 expended in 1964 for sugar free substitutes in appellant's diet. Section 17253 of the Revenue and Taxation Code allows a deduction for medical care. An identical provision (Int. Rev. Code of 1954, § 213(a)) has been held not to apply to such food taken as a substitute for food normally consumed, where the substituted food satisfies nutritional requirements. (J. Willard Harris, *46* T.C. *672; Rev.* Rul.55-261, 1955-1 Cum. Bull. 307, 312.)

VII. Cigarette Tax

Respondent also properly disallowed a $9.25 cigarette tax deduction claimed by appellant on his 1961 return, *in view of* sections 30016 and 17204.5 of the Revenue and Taxation Code.

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,

Appeal of J. Albert and Augusta F. Hutchinson

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 J. Albert Hutchlnaon, individually, against proposed assessments of additional personal income tax in the amounts of $324.96, $181.02 and $359.23 for the years 1961, 1962 and 1963, respectively, and on the protest of J. Albert and Augusta F. Hutchinson, jointly, against a proposed assessment of additional personal income tax in the amount of $95.35 for the year 1964, be modified to reduce the gain from the sale of stock in 1963 In accordance with the concession of respondent. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 5th day of August, 1968, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary