



72-SBE-010

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ESTATE OF HENRY B. JAMESON, DECEASED,)
ESTHER Me JAMESON, EXECUTRIX)

Appearances:

For Appellant: L. Morris Dennis
Attorney at Law

For Respondent: Benjamin F. Miller
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 Estate of Henry B. Jameson, Deceased, Esther M. Jameson, Executrix, against a proposed assessment of additional personal income tax in the amount of \$11,841.60 for the year 1968.

The issue presented is whether the gain realized upon final distribution in complete liquidation of a closely held corporation constituted income in respect of a decedent within the meaning of section 17831 of the California Revenue and Taxation Code.

The decedent, Henry B. Jameson, and his wife owned 50 percent of the stock of H. B. Jameson Co., Inc., a corporation engaged in the manufacture of automotive repair parts. In May of 1967 the decedent, together with the holder of the remaining 50 percent of the stock, adopted a plan to liquidate the corporation pursuant to section 337 of the Internal Revenue Code of 1954 and section 24512 of the California Revenue and Taxation Code. The sale of corporate assets took place shortly thereafter.

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In January of 1968 a certificate of intent to dissolve the H. B. Jameson Co., Inc., was filed with the California Secretary of State, and in February of that year the two stockholders filed an assumption of corporate liabilities with the Franchise Tax Board. Cash in the amount of \$6,000 was distributed to Henry B. Jameson on February 22, 1968. After his death on March 5, 1968, the remaining assets were distributed to the shareholders and the corporation was formally dissolved on May 15, 1968.

Recognition of gain or loss on a disposition of property is governed by sections 18031-18057 of the Revenue and Taxation Code. Subdivision (a) of section 18031 provides that the amount of gain shall be the excess of the amount realized over the adjusted basis of the property. Using the fair market value of the property at the time of its acquisition as its basis, as provided in section 18044, appellant determined that its gain was \$768, the amount by which decedent's one-quarter share of the distribution in liquidation exceeded the fair market value of his one-quarter interest in the stock at his death.

Respondent determined that the liquidating distributions made by the corporation constituted income in respect of a decedent as defined in sections 17831-17838 of the Revenue and Taxation Code, and that appellant, therefore, was not entitled to use the fair market value basis provided in section 18044. Respondent concluded, rather, that the decedent's investment cost of \$12,394 was appellant's proper basis and that decedent's one-quarter share of the liquidating distributions, amounting to \$256,099, resulted in a recognizable long-term capital gain of \$243,705. Pursuant to these findings, respondent issued a notice of proposed assessment for additional personal income tax. Respondent's denial of appellant's protest against that assessment gave rise to this appeal.

Section 18044 of the Revenue and Taxation Code provides:

Except as otherwise provided in this article, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the time of its acquisition,

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Under section 18045 property acquired by the decedent's estate from the decedent is considered to have been acquired from or to have passed from the decedent for purposes of applying section **18044**.

Respondent argues that section **1.8046** of the Revenue and Taxation Code precludes appellant from using the basis described in section 18044. Section 18046 states: "Sections **18044** and 18045 shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under Sections 17831 to 17837, inclusive ." Section 17831 provides:

The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period, ..shall be included in the gross income, for the taxable year when received, of:

(a) The estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;...

The statutory phrase "income in respect of a 'decedent'" is defined in respondent 's regulation as follows:

In general, the term "income in respect of a decedent" refers to those amounts to which a decedent was entitled as gross income, but which were not properly includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent.. .. (Cal. Admin. Code, tit, **18**, reg. 17831-17834(a), subd. (2).)

It is therefore necessary to determine whether at the time of his death the decedent was "entitled" to the liquidation proceeds .

Section 17831 of the Revenue and Taxation Code and the regulations adopted pursuant thereto are substantially identical to their federal counterparts. (Int. Rev.

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Code of 1954, § 691; Treas., Reg. § 1.691(a)-1 et seq.) It is well established that decisions of the federal courts are entitled to great weight in applying a state statute which is based upon a federal statute. (Meanley v. McColgan, 49 Cal. App. 2d 203 [121 P.2d 45].) Therefore, in interpreting section 17831 we will be considering federal case law. We will also keep in mind the intent of Congress in enacting section 691 of the Internal Revenue Code of 1954 and its predecessors, i.e., to avoid a loss of tax because of the death of a decedent who would have paid tax on such economic returns if he had lived to receive them. (See Commissioner v. Linde, (9 Cir. 1954) 213 F.2d 1, cert. denied, 348 U.S. 871 [99 L. Ed. 686]; Trust Company of Georgia v. Ross, 262 F. Supp. 900, aff'd per curiam, 392 F.2d 694.)

Appellant argues that the case of Keck v. Commissioner, 415 F.2d 531, compels a finding in its favor. The facts in that case, however, are readily distinguishable from 'those in the instant controversy. In Keck the sale of corporate assets took place nearly two years after decedent's demise. At the time of his death, approval of the sale by the Interstate Commerce Commission had not yet been obtained and the other shareholders 'had not yet agreed to sell. The Keck court found that "...at the date of his death, decedent...possessed neither the right nor the power to require the corporations to liquidate and did not, prior to his death, possess the right to receive any proceeds from the contemplated liquidation." (415 F.2d 531, 535.) In the instant case decedent and his wife, as holders of 50 percent of the stock, could have compelled dissolution of the corporation any time they chose; (Corp. Code, § 4600.) In addition, the sale of assets took place and a distribution of \$6,000 to decedent was made prior to his death, and the final distribution of the remainder of the corporate assets occurred only 26 days after decedent's demise.

Appellant argues that until the time of the final distribution of corporate assets on March 31, 1968, the shareholders could have reversed the liquidation proceedings by filing a certificate of revocation of the election to dissolve with the Secretary of State, and that when he died on March 5, 1968, the decedent therefore did not have a right to the liquidation proceeds within the meaning of section 17831 of the Revenue and Taxation Code. We cannot agree. By filing an election to dissolve we believe that the shareholders of H. B. Jameson Co., Inc., had allowed the liquidation to proceed to a point beyond the control of the decedent prior to his death. Section 4606 of the Corporations

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Code governing revocation of the election to dissolve provides for a reversal of the proceedings by "...written consent of the shareholders or members representing no less than a majority of the voting power,, ..." Decedent did not represent a majority of the voting power.

In summary, at the time of his death Henry B. Jameson had at least a contingent or conditional right to the income. The latter was primarily attributable to Mr. Jameson's lifetime activities. In addition, the liquidation proceedings giving rise to the income had progressed to a point where they were substantially irreversible. Accordingly, the gain realized by appellant upon liquidation of H. B. Jameson Co., Inc., did constitute income in respect of a decedent within the meaning of section 17831 of the Revenue and Taxation Code. (See 55 Cornell L. Rev. 211, 227; and 25 Tax L. Rev, 1, 73.)

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 Estate of Henry B. Jameson, 'Deceased, Esther M. Jameson, Executrix, against a proposed assessment of additional personal income tax in the amount of \$11,841.60 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of April, 1972, by the State Board of Equalization;

John W. Lynch, Chairman
Richard Davis, Member
Geoff Henry, Member
William A. Bennett, Member
_____ Member

ATTEST: W. W. Dunlop, Secretary