BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
JAN A. AND ALICE H. MICHALSKI)

For Appellants: Jan A. and Alice H. Michalski, in pro. per.

For Respondent: Allen R. Wildermuth
Counsel

O P I N I O N

These appeals are made pursuant to section **18593** of the Revenue and Taxation Code from the actions of the Franchise Tax Board on the protest of Jan A. Michalski against a proposed assessment of personal income tax and penalties in the total amount of $13.00 for the year 1978, and on the protest of Alice H. Michalski against proposed assessments of personal income tax and penalties in the total amounts of $105.30 and $144.30 for the years 1978 and 1979, respectively.

The questions presented by these appeals are (1) whether appellants filed valid California personal income tax returns for the years 1978 and 1979, and (2) whether respondent's determinations of tax and penalties were correct.

For both the years 1978 and 1979, appellants, who are husband and wife, filed forms 540 which listed their income, deductions, and credits, with their tax computed under the "married filing joint return" filing status. Appellants signed the forms, but crossed out the words "Under penalties of perjury" in the verification above their signatures. For each year the tax liability shown on the form 540 was zero because of exemption and low income credits. Refunds were made of the amounts which had been withheld from appellants' wages.

Upon later examination of the forms 540, respondent determined that they did not constitute valid returns because they had not been signed under penalties of perjury. Respondent then issued proposed assessments, using the wage amounts shown on appellants' W-2 forms and the interest amount shown on the form 540 which appellants had submitted for 1978. Respondent attributed to each appellant the income that each had earned and divided the interest income equally between them. The standard deduction was not allowed for either appellant for 1978, although each was allowed one personal exemption credit. For 1979, Jan Michalski did not earn enough income tc be required to pay tax, so no proposed assessment was issued to him for that year. For both years, appellants' tax liabilities were apparently computed using the rates for a married person filing a separate return.

Revenue and Taxation Code section 18431 requires that an income tax return "shall contain, or be verified by, a written declaration that it is made under the penalties of perjury." This part of section 18431 is substantially similar to Internal Revenue Code section 6065. Therefore, interpretations of the federal code section are highly persuasive of the proper interpretation and application of the corresponding state statute. (Meanley v. McColgan, 49 Cal.App.2d 203, 209 [121 P.2d 45] (1942).)

In Edward A. Cupp, 65 T.C. 68 (1975), affd. by unpublished order, 559 F.2d 1207 (3d Cir. 1977), the taxpayer submitted signed federal tax forms 1040 on which he had deleted the words "Under penalties of perjury." The tax court held that such documents could not constitute

valid returns. (Edward A. Cupp, supra, 65 T.C. at 79; see also, Lawrence Babcock, ¶ 79,285 P-H Memo. T.C. (1979).) We find, therefore, that the documents submitted by appellants, which were not signed under penalties of perjury, were not valid returns. Respondent, therefore, was justified in concluding that appellants had not filed returns for the years 1978 and 1979 and in determining their net income from any available evidence. (Rev. & Tax. Code, § 18648.)

Appellants have presented no evidence to show that respondent's determinations of tax and penalties were incorrect. Ordinarily, in this situation, we would simply sustain respondent's determinations. However, the notices of proposed assessment attached to respondent's brief show clearly that respondent's determinations were incorrect in several respects and we are compelled to require their correction.

First, we note that respondent attributed the income earned by each appellant solely to that individual. However, wages earned during a marriage are community property. (Civ. Code, § 5110; Phillipson v. Board of Administration, 3 Cal.3d 32, 40 [89 Cal.Rptr. 61] (1970).) Community income is divided equally between the spouses when separate returns are filed by a married couple. (Cal. Admin. Code, tit. 18, reg. 18402, subd. (c).) Because appellants did not file a valid joint return, respondent was entitled to treat each of them as married filing separate returns to determine their tax liability. However, we do not believe that respondent was entitled to ignore the community nature of their income. To the extent that we held otherwise in the Appeal of Christina Gee Davis, decided by this board on April 8, 1980, that holdings overruled. The total income of appellants must, therefore, be divided equally between them to determine their tax liability..

For the year 1978, respondent did not allow the standard deduction for either appellant when determining their taxable income. Taxable income means gross income minus either itemized deductions or the standard deduction. (Rev. & Tax. Code, § 17073.) Itemized deductions could not be used to determine appellants' taxable income because appellants did not file a return. Therefore, respondent must allow the standard deduction for each appellant to avoid computing their tax liability on their gross income.

For the year 1979, appellants' total gross income was $8,828.17, as shown by their W-2 forms, Dividing this income equally between them, $4,414.09 would be attributed to each as gross income. A married individual is required to file a return (either joint or separate) if the husband and wife have an aggregate adjusted gross income of over $10,000 or a gross income of over $12,000. (Rev. & Tax. Code, § 18401, subds. (b) and (c) and § 18402.) Clearly, appellants did not have sufficient income to be required to file a return,, Therefore, respondent's determination of tax and penalties for 1979 must be reversed.

Appeals of Jan A. and Alice H. Michalski

O R D E R

Pursuant to the views expressed in the opinion of the board on file in these proceedings, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the actions of the Franchise Tax Board on the protests of Jan A. and Alice H. Michalski against proposed assessments of personal income tax and penalties in the total amounts of **$13.00** and **$105.30**, respectively, for the year 1978, **be** and the same are hereby modified to reflect the community property nature of their earnings and the allowance of standard deductions, as provided in the foregoing opinion; and that the action of the Franchise Tax Board on the protest of Alice H. Michalski against a proposed assessment of personal income tax and penalties in the total amount of $144.30 for the year 1979 be and the same is hereby reversed. In all other respects, the actions of the Franchise Tax Board are hereby sustained.

Done at Sacramento, California, this 28th day of July , 1983, by the State Board of Equalization, with Board **Members** Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. **Nevins and** Mr. Harvey present.

William M. Bennett , Chairman

Conway H. Collis , Member

Ernest **J.** Dronenburg, Jr. , Member

Richard Nevins , Member

Walter Harvey* , Member

*FOE Kenneth Cory, per Government Code section 7.9

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JAN A. AND ALICE H. MICHALSKI)

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

Upon consideration of the petition filed August 26, 1983, by the Franchise Tax Board for rehearing of the appeal of Jan A. and Alice H. Michalski from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and the same is hereby. denied and that our order of July 28, 1983, be and the same is hereby affirmed.

Good cause appearing therefor, it is also hereby ordered that our opinion of July 28, 1983, be and the same is hereby modified as follows:

The second and third full paragraphs on the third page of the opinion are deleted and replaced with:

> First, we note that respondent attributed the income earned by each appellant solely to that individual.. However, wages earned during, a marriage are presumed to be community property. (Civ. Code, § 5110; Phillipson v. Board of Administration, 3 Cal.3d 32, 40 [89 Cal.Rptr. 61] (1970); Hicks v. Hicks, 211 Cal.App.2d 144 [27 Cal.Rptr. 307] (1962).) Respondent acknowledges that appellants were husband and wife before and during 1978 and 1979, (See, e.g., Resp. Br. at 1.) Respondent's regulations require that community income be divided equally between the spouses when separate returns are filed by a married couple. (Cal. Admin. Code, tit. 18, reg. 18402, subd. (c).) Because appellants did not file a valid joint return, respondent was entitled to treat each of them as married filing separate returns to compute their tax liability. However, under the particular facts of this case, we do not believe that respondent was entitled to ignore the presumed community nature of appellants' income when computing their tax liability. To the extent that the Appeal of Christina Gee Davis, decided by this board on April 8, 1980, held that Revenue and Taxation Code section 18555 allows the Franchise Tax Board to ignore the community nature of income when computing a taxpayer's liability, that holding is overruled. Appellants' total income, therefore, must be divided equally between them to determine their tax liability.

Done at Sacramento, California, this 8th day of May, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9