

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT P. AND **CAROL A. STRATHEARN**)

For Appellants: Theodore J. England
 Attorney at Law

For Respondent: James C. Stewart
 Counsel

O P I N I O N

This appeal is made pursuant to section 18553 of the Revenue and Taxation Code from the action of the Franchise Tax **Board**, on the protest of Robert P. and Carol A. **Strathearn**^{1/} against proposed assessments of additional personal income tax in the amounts of **\$2,323.47** and **\$4,096.57** for the years 1975 and 1976, respectively.

1/ Mrs. Carol A. Strathearn appears in this proceeding **only** because she filed joint personal income tax returns with Robert P. Strathearn.

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The question presented is whether certain payments made by appellant-husband (hereinafter "**appellant**") to his former wife pursuant to a **property settlement** agreement were periodic payments for her support so that they were deductible by him.

Appellant and Elaine Strathearn (hereinafter "**Elaine**") were married on October 19, 1946, and were divorced in 1969. Two children were born of this marriage, one in June 1955 and one in February 1958. Appellant had substantial assets at the time of marriage. Appellant and Elaine separated in 1968 and negotiations **aimed** at reaching a final separation and financial settlement commenced; In December of 1968, appellant and Elaine entered into an Integrated Property Settlement, Alimony, Child **Custody** Agreement (hereinafter "**Agreement**") as part of the action for divorce. That Agreement was intended to be a final disposition of all items of separate and community property, and additionally contemplated resolving all issues with respect to support.

The Agreement indicated that, at the time of the divorce, appellant possessed substantial separate property, including two promissory notes, one in the face amount of **\$2,350,600**, and the other in the face amount of \$286,160. The community property consisted primarily of the family residence and surrounding **acreage, various** cash in savings and commercial accounts, various stocks and an automobile. As part of the Agreement, all the community property owned by appellant and Elaine, in addition to her own separate property, was transferred to Elaine. The Agreement also provided that appellant would pay Elaine \$500 per month spousal support (hereinafter noted as "**support payments**") until her death or remarriage.

In addition to these payments, the Agreement provided for additional payments (hereinafter sometimes referred to as "**additional payments**") labeled "**periodic payments**" which were geared to the actual money received by appellant from the above-noted promissory notes. These additional payments were to be made once a year for **11** years and would not be terminable on either her death or remarriage. A maximum limitation of \$196,500 was placed upon the total amount of payments made under these two provisions. The Agreement unambiguously provided that all of these payments were to be **includible** in Elaine's income and deductible by appellant. In June of 1973, Elaine remarried.

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Under the above-noted support and additional payment provisions, appellant disbursed \$41,070.30 to Elaine in 1975 and \$20,698.47 to her^{2/} in 1976. Appellant deducted these payments as alimony.

Upon audit, respondent disallowed the deduction claimed by appellant for the additional payments on the basis that these payments were in settlement of property interests and not payments for support. That action gave rise to this appeal.

Section 17081 of the Revenue and Taxation Code provides that where a husband makes periodic payments for support to his spouse under a divorce decree, the wife must include the payments in her gross income. Section 17263 provides that the amounts so includible in the wife's gross income are deductible from the gross income of the husband. However, where the husband makes payments in satisfaction of the wife's property rights, the amounts received by the wife are capital in nature and are neither includible in her gross income under section 17081 nor deductible by the husband under section 17263. (See Fidler v. Commissioner, 231 F.2d 138 (9th Cir. 1956).) Furthermore, in order to be deductible, the payments must be "periodic," that is, the payments must be made at intervals, although not necessarily equal intervals, and extend for an indefinite period or be subject to contingencies. (Roland Keith Young, 10 T.C. 724 (1948); John H. Lee, 10 T.C. 834 (1948).) Although section 17083 of the Revenue and Taxation Code provides that payments which will or could be made for a period longer than ten years are to be considered periodic, the payments must still meet the qualifications that they are in satisfaction of marital support rights. Installment payments which are made in satisfaction of property rights cannot be considered alimony under any circumstances. (Appeal of Everett S. Shipp, Cal. St. Bd. of Equal., Oct. 7, 1952.) Where the husband is required to pay an ascertainable sum in installments and the duty to pay is absolute, regardless if either party dies or the wife remarries, the payments are presumed to be in lieu of property and not for support. (McCombs v. Commissioner, 397 F.2d 4 (10th Cir. 1968).) However, the presumption may be refuted by other facts (Riddell v. Guggenheim, 281 F.2d 836 (9th Cir. 1960)) or by express written agreement. (Civ. Code, § 4801, subd. (b).)

^{2/} There is no indication for the years at issue whether Elaine did or did not include these payments in her gross income as alimony.

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There appears to be no dispute that the payments at issue were periodic and that the obligation to make those payments was imposed under a written instrument incident to divorce. Accordingly, the single issue for our decision is whether the requirement that the payments be made in discharge of a legal obligation for support is satisfied.

The character of the subject payments is a factual question which **must be** resolved from the surrounding facts and circumstances. (Wright v. Commissioner, 543 F.2d 593 (7th Cir. 1976).) An important factor to be considered is the intent of the parties. (Porter v. Commissioner, 388 F.2d 670 (6th Cir. 1968).) Courts have also considered the respective property interests of the parties involved. (Walter H. Weiner, 61 T.C. 155 (1973).)

As indicated above, pursuant to the written Agreement, it was the expressed intent of the parties that the subject payments be **includible** in Elaine's income and deductible by appellant. Accordingly, the parties clearly expressed the intent that the subject payments be made for support. Moreover, it is well settled that where a wife has by other provisions of a marital agreement received property equal in value to her separate and marital property at the time of divorce, so that the wife has no further property rights that she could exchange for an interest in the husband's separate property, periodic payments over and above that amount are for support or alimony. (See-Joyce Schottenstein, 75 T.C. 451 (1980).) The Agreement **in** the instant matter clearly indicates that, at the **time** of divorce, Elaine was to receive all her separate property together with all community property. Clearly, she had no further property rights and the subject payments must therefore be found to be made for her support as alimony.

Respondent, citing United States v. Davis, 370 U.S. 65 [8 L.Ed.2d 3351 (1962)], nevertheless argues that a wife has a property right in her husband's separate property due to the possibility of her intestate succession to that property. However, the Davis case dealt with Delaware law, a common law jurisdiction, rather than with the law of a community property jurisdiction, such as this state. The property at issue in the Davis case was deemed to be the husband's property "subject to **cer-**tain statutory marital rights of the wife including a right of intestate succession." (United States v. Davis, supra, 370 U.S. at 66.) Under Delaware law, a married-person has the right to elect-the lesser of \$20,000 or

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one-third of her spouse's property. (12 Del. Code Ann. § 901.) Under California law, there is no such right to elect with respect to one's spouse's separate property. In California, a surviving spouse has a mere expectancy. (Prob. Code, § 221.) Accordingly, respondent's reliance upon Davis is misplaced.

In view of our determination, respondent's action must be reversed.

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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,

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 Robert P. and Carol A. Strathearn against proposed assessments of additional personal income tax in the amounts of **\$2,323.47** and **\$4,096.57** for the years 1975 and 1976, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 28th day of February , 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