BEFORE THE STATE BOARD OF **EQUALIZATION**

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. **83A-752**
JOHN K. **ERICSON**)

For Appellant: Anthony J. Bradisse
Attorney at Law

For Respondent: **Vicki McNair**
Counsel

O P I N I O N

This appeal is made pursuant to section **18593**[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of John K. **Ericson** against proposed assessments of additional personal income tax in the amounts of $748.64 and $923.00 for the years 1978 and 1979, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The issue presented is whether appellant remained taxable on his entire income, despite a Superior Court order awarding one-half of his assets to the woman with whom he lived during the years at issue.

Appellant lived with one Helodie **Ericson** in a nonmarital relationship for 15 years from 1965 to 1980. When they parted in 1980, Ms. **Ericson** brought a "palimony" suit against the appellant, claiming that she was entitled to one-half of the assets they accumulated while living together. Ms. **Ericson** prevailed in that action, and the court ordered that all assets accumulated by Ms. **Ericson** and appellant while living together be equally divided.

Although they were not married, appellant and Ms. **Ericson** filed California personal income tax returns for 1978 and 1979 as "married filing jointly." Respondent determined that they were not entitled to file joint returns and recomputed appellant's taxable income by subtracting Ms. Ericson's income from the amounts reported on the joint returns and allowing him one-half of the deductions claimed on the joint return. It then calculated appellant's tax liability using the single rates and issued proposed assessments of tax, After considering appellant's protest, respondent affirmed the proposed assessments, and this timely appeal followed,

Section 18402 specifies that if certain conditions are met, a husband and wife may file a joint return and compute their tax liability on their combined income as provided in section 17045. Section 17045 provides that the tax "shall be twice the tax which would be imposed if the taxable income were cut in half." Appellant concedes that he and Ms. **Ericson** were not entitled to file a joint return, since they were not husband and wife. However, he contends that their tax liability should nevertheless be- computed as provided in section 17045, since the court determined that their assets were jointly owned.

The Superior Court order dividing appellant's property was based upon the case of Marvin v. Marvin, 18 **Cal.3d** 660 **[134 Cal.Rptr. 815]** (1976). The Marvin case held that where adults engaged in a nonmarital relationship have entered into either an express or an implied contract to divide assets acquired during their relationship, the contract is valid and enforceable. The court specified that it was not holding that the parties were married and that it did "not seek to resurrect the doctrine of common law marriage, which was abolished in

California by statute in 1895." (Marvin v. Marvin, supra, 18 Cal.3d at 684 n. 24.)

Since the Superior Court which decided the Ericson lawsuit based its decision on the Marvin case, the court must have found that Ms. Ericson and appellant had entered into an implied contract to pool their income. Thus, the issue facing this board is whether this agreement shifted the incidence of taxation for one-half of appellant's income to Ms. Ericson. Appellant claims that he is properly taxable only on one-half of his income because he only beneficially received that portion of his income. We cannot agree. It is a well-established principle of tax law that income is taxed to the one who earns it, and that the tax cannot be avoided by an anticipatory assignment. (Lucas v. Earl, 281 U.S. 111 [74 L.Ed. 731] (1930).) Appellant earned his entire income and remained taxable on it despite the implied contract with Ms. Ericson.

Appellant argues that Lucas v. Earl is outdated and factually distinguishable from the instant appeal. We cannot agree. The principle announced in Lucas v. Earl has been repeatedly reaffirmed and remains a fundamental principle of our system of taxation. (See, e.g., United States v. Basye, 410 U.S. 441 [35 L.Ed.2d 412] rehg. den., 411 U.S. 940 [36 L.Ed.2d 402] (1973); Johnson v. United States, 698 F.2d 372 (9th Cir. 1982).) The factual differences between Lucas v. Earl and this appeal are not significant. In both situations, the taxpayer entered into a contract to share whatever income he subsequently earned. Appellant places much emphasis on the fact that he was ordered by a court to divide his assets while the taxpayers in Lucas v. Earl entered into an express contract. However, the court which ordered that appellant's assets be divided was merely enforcing an implied contract between appellant and Ms. Ericson.

Finally, appellant raises constitutional objections to respondent's action. This board has a well-established policy of abstaining from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., Mar. 8, 1976.) Furthermore, we believe that section 3.5 of article III of the California Constitution precludes our determining that the statutory provisions involved are unconstitutional or unenforceable.

For the reasons stated above, respondent's action must be sustained.

. Appeal of John K. Ericson

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 John K. Ericson against proposed assessments of additional personal income tax in the amounts of $748.64 and $923.00 for the years 1978 and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of November, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9