BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
AVIS J. LUER)

Appearances:

For Appellant: Avis J. Luer, in pro. per.

For Respondent: James C. Stewart
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 Avis J. Luer against proposed assessments of additional personal income tax in the amounts of $56. 44, plus interest, and $91.31, plus interest, for the years 1964 and 1965, respectively . During the course of these proceedings appellant paid the proposed assessment for 1965; therefore, pursuant to section 19061.1 of the Revenue and Taxation Code, the appeal for that year is treated as from the denial of a claim for refund.

The issue presented is the propriety of respondent's proposed assessments which are based upon similar federal adjustments.

Respondent received federal audit reports concerning appellant's income tax liability for 1964 and 1965, and issued notices of proposed assessment for both years on December 29, 1967. The proposed assessments reflected the federal audit adjustments to the extent applicable under California law. Included in the notice for 1964 was the statement: "Revised in accordance with the report of Federal adjustments to the extent applicable to your California return. " Similar language was not included in the notice for the year 1965.

On February 7, 1968, appellant protested respondent's action. In her protest she acknowledged that the proposed assessments for both years were made in accordance with federal adjustments. Appellant also noted that her objections to respondent's adjustments were the same as the objections she was making to the federal adjustments, and that no final determination had been reached at the federal level.

The protest was followed by correspondence between respondent and appellant and appellant's counsel relating to progress of the federal matters. On February 25, 1974, respondent inquired concerning the present 'status of the federal proceedings for 1964 and 1965. Respondent explained that it had been withholding action on appellant's protest pending the outcome of those proceedings, and requested a copy of any final federal determination. On March 24, 1974, appellant returned the letter, indicating thereon that she was taking no further action on the federal matter. Respondent then affirmed its proposed assessments on April 17, 1,974, and this appeal followed.

In seeking reversal of respondent's action,. appellant contends that: (1) the statute of limitations barred respondent's adjustments; (2) respondent failed to provide her with a breakdown as to how it arrived at the proposed assessments and the reasons for them, thereby wrongfully depriving her of any opportunity to file an effective protest; and; (3) all state income tax owing was paid with timely filed returns.

After analyzing each of appellant's contentions, we conclude that respondent's action should be sustained. With respect to her first contention, there is no bar by the statute of limitations where notice of a proposed assessment for a particular year is mailed to a taxpayer within four years after the final due date of the return for that year. (Rev. & Tax. Code, §§ 18586, 18588.) Both notices were mailed on December 29, 1967, well within such period.

In considering her second argument, we recognize that pursuant to section 18584 of the Revenue and Taxation Code, a notice of proposed assessment "shall set forth the reasons for the proposed additional assessment and the computation thereof. " As shown in the following comments, however, we conclude that if there was any failure to conform with those requirements here, it was not sufficient to void respondent's action.

The purpose of section 18584 is to inform the taxpayer of the basis of the assessment, thereby enabling the taxpayer to protest intelligently, if he or she desires to do so. (See Appeal of The First National Bank of Chicago, Trustee; Cal. St. Bd. of Equal. , June 23, 1964.) Assuming, without deciding, that the notice for the year 1965 was technically defective by not mentioning that the revisions were in accordance with applicable federal adjustments in a federal audit report, this did not prevent the filing of an intelligent protest. This is evident because appellant's protest clearly showed her awareness that respondent's adjustments for both years were based on the federal audit reports. The reasons for the adjustments to income for state tax purposes for 1965 (as well as for 1964) could be determined by reviewing the explanations of the identical adjustments in the federal reports possessed by appellant or her counsel. Moreover, the computation of the increased state tax liability, as a result of the income adjustments, was shown in the state notices.

It is true that at the board hearing appellant said she did not understand the federal matters. However, the federal reports explain the corresponding adjustments in detail. They

point out adjustments caused by the Internal Revenue Service's interpretation of the effect of California's community property laws. They also explain why the Service concluded that there was not a deductible loss, and loss carry-over, from what that federal agency considered was a sale of rental property. Respondent simply followed these adjustments.

For the foregoing reasons, if any technical defect existed in the notice of proposed assessment for 1965, it did not deprive appellant of the opportunity to file an effective protest. In the absence of a showing that she was deprived of this opportunity, any alleged defect did not invalidate the notice. (Appeal of The First National Bank of Chicago, Trustee, supra Appeal of Robert E. Campbell, Executor, Cal. St. Bd. of Equal., June 20, 1950.) Furthermore, since the notice for 1964 refers to the federal audit report for that year, there is no reason for regarding it as even technically defective.

Appellant also urged that all state tax owing was paid with timely filed returns. We first note that section 18451 of the Revenue and Taxation Code provides that a taxpayer shall either concede the accuracy of a final federal determination or state wherein it is erroneous. Consequently, it is settled that respondent's determination of deficiencies based upon a federal audit report is presumed correct, and the burden is on the taxpayer to show that it is in error. (Appeal of Sidney and De Daun Buegeleisen, Cal. St. Bd. of Equal., April 9, 1973; Appeal of Henrietta Swimmer, Cal. St. Bd. of Equal., Dec. 10, 1963.)

At the hearing appellant did explain that she neither knew the amount of her former husband's earnings nor had any use of such income after the parties separated in October of 1964. She, therefore, questioned the correctness of being taxed on one-half of her husband's earnings as community income after their separation.

It is well settled that the wife's interest in community property under California law is a vested property interest. (Ottinger v. Ottinger, 141 Cal. App. 2d 220, 225. [296 P. 2d 347].) She is therefore considered owner of one-half of the community income and is liable for income tax on that amount. (United States v. Malcolm, 282 U. S. 792 [75 L. Ed. 714]; Poe v. Seaborn, 282 U. S. 101 [75 L. Ed. 239].) During the years on appeal, the character of the husband's

earnings as community property and the wife's federal and state income tax liability on her share thereof was not changed although she lived separate and apart from him, and received none of his earnings. (Appeal of Ann Schifano, Cal. St. Bd. of Equal., Oct. 27, 1971.) While the law has since been changed, during those years the community character of the husband's earnings was not terminated until an interlocutory divorce decree was obtained. (Appeal of Neil D. and Carole C. Elzey., Cal. St. Bd. of Equal., Aug. 1, 1974.) Thus, the Internal Revenue Service and respondent correctly treated the husband's earnings as community income until the interlocutory decree was acquired in August of 1965, and his earnings thereafter as his separate property.

At the hearing appellant also questioned the disallowance of the claimed loss and loss carry-over. She maintained that she had to relinquish her interest in Florida rental property in 1964 because of her inability to continue making mortgage payments. The Service found that appellant had sold the property, that the basis of the property did not exceed the selling price, and, consequently, that there was no deductible loss. Respondent also disallowed the deductions. Appellant simply has not established that the method whereby her interest was conveyed to another did not constitute a sale; nor has she shown that her basis in the property exceeded the selling price.

Finally, appellant urges that respondent unduly delayed its final action until 1974, and asserts that this caused the improper accrual of interest. However, the nature of appellant's protest in 1968 made deferral of any final action appropriate, and it was not until March 24, 1974, that appellant advised respondent that the federal action was no longer being challenged. Moreover, appellant could have paid the tax at any time to stop the accrual of interest, and still be entitled to a refund of the tax, if a refund was warranted. In any event, the accrual of interest is mandatory. Section 18688 of the Revenue and Taxation Code provides without any qualification that interest upon the amount assessed as a deficiency shall be assessed, collected and paid at the rate of six percent per year from the date prescribed for the payment of the tax until the date the tax is paid.

For the foregoing reasons, we sustain respondent's action in making adjustments in conformity with the federal action, and in imposing interest until the date of payment.

ORDER

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 Avis J. Luer against a proposed assessment of additional personal income tax in the amount of $56.44, plus interest, for the year 1964, be and the same is hereby sustained; and, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Avis J. Luer for refund of personal income tax in the amount of $91.31, plus interest paid, for the year 1965, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of June, 1975, by the State Board of Equalization.

John W. Lynch, Chairman

William M. Bennett, Member

George R. Reilly, Member

Paul Carpenter, Member

_____, Member

ATTEST: W. W. Armstrong, Executive Secretary