

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
 )  
 ESTATE OF PHILIP ROSENBERG, )  
 DECEASED, ETHEL ROSENBERG, )  
 EXECUTRIX, AND ETHEL ROSENBERG )

Appearances:

For Appellants: Allan E. Biblin  
Attorney at Law

For Respondent: Richard Watson  
Counsel

David C. Dunlap, Attorney at Law, filed amicus briefs on  
behalf of the Estate of Florence N. Mel., urging reversal.

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 protests of the Estate of Philip Rosenberg, Deceased,

Appeal of Estate of Philip Rosenberg, etc.

Ethel Rosenberg, Executrix, and Ethel Rosenberg, individually, against proposed assessments of additional personal income tax for the following years and amounts:

<u>Appellant</u>	<u>Year</u>	<u>Amount</u>
Estate of Philip Rosenberg, Deceased, Ethel Rosenberg, Executrix, and Ethel Rosenberg	1966	\$ 2,439.77
Ethel Rosenberg	1967	24,152.46
Ethel Rosenberg	1968	672.03

We are asked to determine the basis of a surviving spouse's share of the community property for purposes of computing depreciation and gain on the disposition of certain capital assets.

Ethel Rosenberg's husband Philip died on March 5, 1966, leaving an estate composed entirely of the spouses' community property<sup>1/</sup>. He died testate, and his will provided for the creation of two trusts. The corpus of one trust was to be Ethel's one-half of the community property. She was given all the income from this trust, certain discretionary rights to invade the corpus, and a testamentary general power of appointment. The corpus of the second trust was to be Philip's one-half of the community property. Ethel was also the income beneficiary of this trust, with certain discretionary rights to invade the corpus.. She did not have a power of appointment over the second trust, however, and on her death the remainder would be payable to Philip's two children.

<sup>1/</sup> The estate included a relatively small joint tenancy bank account that the State Controller treated as community property for inheritance tax purposes. The parties before us have also treated this account as community property for purposes of this appeal.

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Ethel elected to take under her husband's will. California inheritance taxes were paid on the children's remainder interests in the second trust, and the so-called "pick-up" tax imposed by Revenue and Taxation Code section 13441 was also paid. Because of various exemptions in the Inheritance Tax Law, however, including those contained in chapter 3 of the law (Revenue and Taxation Code sections 13551 through 13560), no inheritance tax was due on the portion of the estate which passed to Ethel.

On their California income tax returns for the years in question, Philip's estate and his widow, appellants herein, used the fair market value on the date of Philip's death as the basis for both halves of the community property. They apparently also used this basis on their federal tax returns, without objection by the Internal Revenue Service. Respondent determined, however, that while the basis of Philip's one-half should be its fair market value on the date of his death, the basis of Ethel's share should be its adjusted cost. Respondent modified appellants' returns accordingly and issued the proposed assessments in question.

The pertinent statutory provisions are set out in Revenue and Taxation Code sections 18042 through 18045. Section 18042 states the general rule that the basis of property is its cost. Under section 18044, however, the basis of property acquired from a decedent is its fair market value as of the date of the decedent's death. For purposes of this rule, subdivision (e) of section 18045 (hereinafter referred to as "subdivision (e)") provides that a surviving spouse's share of the community property is deemed to have been acquired from a decedent, subject to the following proviso:

...if at least one-half of the whole of the community interest in such property was includable in determining the value of the decedent's gross estate under Chapter 3 of the California Inheritance Tax Law.

The predecessor of subdivision (e), the former Revenue and Taxation Code section 17746.3, was enacted in 1953. It was patterned after section 113(a)(5) of the Internal Revenue Code of 1939. The federal rule, now set out in section 1014(b)(6) of the

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1954 Code, provides that a surviving spouse's share of the community property will be deemed to have been acquired from a decedent, and thus receive a new basis, if:

... at least one-half of the whole of the community interest in such property was **includible** in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and **following**, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;. ..

The sections of estate tax law referred to in the federal statute define the conditions under which property will be includable in determining the value of a decedent's gross estate. In particular, section 2033 provides:

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Except for the effective date and the statutory **cross-reference**, the wording of subdivision (e) is identical to that of its federal counterpart. Unlike the provisions of the estate tax law **cited in the federal statute, however, chapter 3 of the** California Inheritance Tax Law, referred to in subdivision (e), contains no specific definition of when property is includable in determining the value of a decedent's gross estate. Its provisions instead describe various circumstances under which community property is or is not "subject to" the Inheritance Tax Law. Section 13551, for example, provides:

Upon the death of a spouse:

(a) None of the community property transferred to a spouse is subject to this part, except [certain powers of appointment].

(b) All of the decedent's half interest in the community property passing to anyone other than the surviving spouse is subject to this part.

It is this difference between the state and federal death tax provisions which gives rise to the problem on this appeal. We turn now to that problem.

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Appellants contend that subdivision (e) applies under the facts of this case to grant Ethel's share of the community property a stepped-up basis as of the date of Philip's death. Respondent determined that it does not apply, on the ground that the conditions of the proviso have not been satisfied. The issue thus presented is whether at least one-half of the spouses' community property was "includable in determining the value of the decedent's gross estate" within the meaning of the proviso to subdivision (e).

Respondent argues that this question must be answered by reference to chapter 3 of the Inheritance Tax Law, since the term "gross estate" in subdivision (e) is qualified by the words "under Chapter 3. ..." Specifically, its position is that only property made "subject to" the Inheritance Tax Law by the terms of chapter 3 can be considered includable in determining the value of the decedent's "gross estate under Chapter 3. " In this case, only the children's remainder interests in the second trust were "subject to" the Inheritance Tax Law. Since those interests amounted to less than one-half the value of the spouses' community property, respondent concludes that less than one-half of such **property was includable in Philip's gross estate for purposes of subdivision (e).**

Appellants and the amicus object to respondent's construction of subdivision (e). The term "gross estate, " they maintain, embraces the decedent's entire interest in property, not only property "subject to" the Inheritance Tax Law.<sup>2/</sup> While they

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<sup>2/</sup> The amicus also contends that even if respondent is correct, the question of whether one-half of the community property is "subject to" the Inheritance Tax Law should be considered on an item-by-item basis. That is, it argues that whether a specific item of property receives a new basis should depend on whether one-half the value of that specific item was subject to the tax, and not on whether one-half of the entire community property was so subject. **No showing has been made that** the property in question would qualify for a new basis under such a construction of subdivision (e), however, and we therefore reserve this issue for an appropriate case.

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raise several points in support of this position, their most significant contention is that the Legislature intended to adopt the federal rule when it enacted subdivision (e), and that respondent's construction does not carry out that intent.

Appellants are correct in their assertion that respondent's construction of subdivision (e) does not follow the federal rule. Under the federal estate tax law, a decedent spouse's one-half interest in community property is generally included in full in his gross estate. (Int. Rev. Code of 1954, § 2033, *supra*; Hurley v. Hartley, 379 F. 2d 205. ) There is an exception in cases where a decedent wife had a mere contingent interest in the community property under local property laws (Hernandez v. Becker, 54 F. 2d 542), and the proviso to the federal analogue of subdivision (e) was apparently designed solely to deny a new basis to the surviving husband's share of the community property in such exceptional situations. (See S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 28-29 [1948-1 Cum. Bull. 285, 351]. ) Regardless of the tax consequences where a wife predeceases her husband, however, there seems to be no question that when the husband dies first, his one-half of the community property will almost invariably be included in his gross estate for federal estate tax purposes, and that his surviving wife's share in such property will thus qualify for a new basis. (See Schwartz, Revocable Trusts and California Marital Property, U. So. Cal. 1968 Tax. Inst. 363, 413; Robinson, The Basis of a Surviving Spouse's Interest in Transmuted Community Property (1959) 32 So. Cal. L. Rev. 244; Ricks, Federal Income Tax and Community Property (Oct. 1968) 22 C. L. U. J. 38, 46. )

Respondent's construction of subdivision (e) produces different results for California tax purposes. In California, a surviving spouse's share of the community property is not subject to the Inheritance Tax Law. (Estate of Carson, 234 Cal. App. 2d 516 [ 44 Cal. Rptr. 360]. ) Furthermore, a decedent's half interest in such property is subject to the tax only to the extent it is transferred to someone other than the surviving spouse. (Rev. & Tax. Code, § 13551, subd. (b), *supra*. ) Therefore, at least one-half of the community property will be subject to the Inheritance Tax Law, and includable in the decedent's gross estate under respondent's construction, only in those cases where all of the decedent's one-half of the property is transferred to someone other than the surviving spouse. The consequences of such a

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construction are illustrated by the facts of this case. Philip's entire one-half of the community property was apparently included in his gross estate for federal tax purposes, and Ethel's share therefore received a stepped-up basis at the federal level. Since Philip bequeathed some of his portion of the community property to Ethel, however, less than one-half of that property was subject to the Inheritance Tax Law, and under respondent's view her share of the property does not qualify for a new basis under subdivision (e).

In view of the great similarity in language of subdivision (e) and its federal counterpart, it is disquieting that respondent's interpretation of subdivision (e) leads to different results than are obtained under the federal statute. As a general rule, there is a strong public policy favorable to interpreting similar statutes dealing with the same subject matter in a similar fashion.

(Meanley v. McColgan, 49 Cal. App. 2d 203, 209 [121 P. 2d 45].) The Legislature's practice of following the federal provisions generally in the Personal Income Tax Law makes available to the state a ground work of relevant federal experience and judicial pronouncements (Holmes v. McColgan, 17 Cal. 2d 426, 430 [110 P. 2d 428], cert. denied, 314 U. S. 636 [86 L. Ed. 510]), and also allows the state to make substantial use of federal audits, which benefits the state and its taxpayers alike. (Richfield Oil Corp. v. Franchise Tax Board, 169 Cal. App. 2d 331 337 [337 P. 2d 237].) These policies are defeated, however, when the construction placed on a state statute leads to results that are inconsistent with those produced by its federal counterpart. Any such construction must therefore be viewed with some suspicion. Nevertheless, for the reasons enumerated below, we have concluded that respondent's action in this case should be sustained.

Respondent's construction of subdivision (e) was apparently adopted in 1956, and was formalized in 1958 with the publication of Franchise Tax Board Legal Ruling 182. It has been discussed without adverse comment by some of the leading writers on California tax law. (See, e.g., Marshall, State and Local Taxation, 12 Cal. Practice, § 585~~9~~(9).) While not controlling, the contemporaneous administrative construction of a statute is entitled to great weight, and generally will not be overturned unless clearly erroneous or unauthorized. (Coca-Cola Co. v. State Board of Equalization, 25 Cal. 2d 918, 921 [156 P. 2d 1];

*Note These  
were struck  
& substituted  
at p. 522*

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Great Western Financial Corp v. Franchise Tax Board, 4 Cal. 3d 1 [92 Cal. Rptr. 489; 479 P.2d 993].) We note, furthermore, that since this appeal arises from respondent's action on a proposed assessment, there is no specific statutory authority which would allow respondent to obtain judicial review of an adverse decision. (See Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970.) Under these circumstances, we do not believe it would be appropriate for this board to reject respondent's interpretation of subdivision (e) without a showing that it is clearly erroneous.

While considerable doubt has been cast on respondent's construction of the statute, we are not persuaded that its construction is clearly erroneous. Appellants' position, in effect, is that community property should be considered as includable in a decedent's gross estate for purposes of subdivision (e) whenever it is so includable under the federal estate tax law. When the Legislature 'borrowed the federal rule, however, it deleted the reference to the estate tax law, and replaced it with the reference to chapter 3 of the Inheritance Tax Law. Despite the substantial policy reasons for conforming California tax law to the federal, therefore, we cannot say that the Legislature intended to incorporate into subdivision (e) the concept of "gross estate" as that term is defined in the federal law. Moreover, since the Inheritance Tax Law taxes community property differently than does the federal estate tax law,<sup>3/</sup> we cannot assume that the Legislature intended the change in subdivision (e)'s cross-reference to be merely a clerical as opposed to a substantive change. For these reasons, we sustain respondent's action.

<sup>3/</sup> See the discussion at pp. 6-7, supra.



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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 protests of the Estate of Philip Rosenberg, Deceased, Ethel Rosenberg, Executrix, and Ethel Rosenberg, individually, against proposed assessments of additional personal income tax for the following years and amounts:

<u>Appellant</u>	<u>Year</u>	<u>Amount</u>
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Ethel Rosenberg	1967	24, 152. 46
Ethel Rosenberg	1968	672.03

be and the same is hereby sustained.

Done at Sacramento, California, this 19 day of August 1975, by the State Board of Equalization.

John W. Lynch, Chairman  
William H. Bennett, Member  
George H. Kelly, Member  
Philip C. Davis, Member  
\_\_\_\_\_, Member

ATTEST: W. W. Amlop, Executive Secretary