96-SBE-015

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal of | ) | |
| | ) | No. 95A-0208 |
| JERRY MICHALLA | ) | |

Representing the Parties:

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| For Appellant: | Jerry Michalla |
| For Respondent: | Mark McEvilly, Counsel |
| Counsel for Board of Equalization: | Jefferson D. Vest, Tax Counsel |

## O P I N I O N

This appeal is made pursuant to section 19045[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jerry Michalla against proposed assessments of additional personal income tax in the amounts of $654 and $755 for the income years ended 1990 and 1991, respectively.[2]

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

The issue in the present case is whether the appellant is entitled to claimed alimony deductions.

Apparently, following the dissolution of their marriage, appellant and his former spouse were unable to sell their home. Additionally, appellant was unable to afford supporting two households. Therefore, appellant and his former spouse decided to live in the same house subsequent to their divorce. A "Notice of Entry of Judgment," dated October 11, 1990, provided that, commencing February 1, 1990, appellant was to pay monthly child support of $500 and monthly spousal support of $700. The judgment also provided that while both appellant and his former spouse continued to reside in the house, appellant was allowed a credit against the child and spousal support obligations for any payments he made towards mortgages, utilities and telephone bills. A "Stipulation on Ex Parte Order to Show Cause Hearing; and Order Thereon," dated October 24, 1991, provided the restrictions and enjoinments of both parties while living together. Under the order of October 24, among other things, appellant and his former spouse were to stay six feet away from each other, use the kitchen and shower at separate times, and restrain from making disparaging or derogatory remarks about each other in front of their child. Appellant and his former spouse remained in the same house during the appeal years.

Appellant claimed alimony deductions on his income tax returns for 1990 and 1991 in the amount of $7,700 and $8,400, respectively. Respondent denied the alimony deductions claimed, which increased appellant's taxable income, resulting in an additional assessment of tax for both years. Appellant paid the additional tax and this appeal followed.

Appellant argues that because he complied with a court decree which allowed him to live separate from, but in the same house as his former spouse, he was living separate from his former spouse during the appeal years; and therefore, they were not members of the same household.

California Revenue and Taxation Code section 17201 incorporates by reference Internal Revenue Code (IRC) section 215, which provides for a deduction of "alimony" payments if the payments are includable in the recipient spouse's gross income pursuant to IRC section 71. Section 71, subsection (b)(1), states:

> **(b)Alimony or separate maintenance payments defined.**
> For purposes of this section -

(..continued)

[2] Subsequent to the filing of this appeal, appellant paid the proposed assessments. Therefore, this matter is now treated as an appeal from the denial of a claim for refund. (Rev. & Tax. Code, § 19335.)

> **(1) In general.** The term "alimony or separate maintenance payment" means any payment in cash if-
> (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
> (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,
> (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
> (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

In the present case the more specific issue is whether appellant and his former spouse were "members of the same household" during the appeal years. Internal Revenue Service Treasury Regulation 1.71-1T (A-9) provides the following:

> Generally, a payment made at the time when the payor and payee spouses are members of the same household cannot qualify as an alimony or separate maintenance payment if the spouses are legally separated under a decree of divorce or of separate maintenance. For purposes of the preceding sentence, a dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the dwelling unit. The spouses will not be treated as members of the same household if one spouse is preparing to depart from the household of the other spouse, and does depart not more than one month after the date the payment is made.

There is no evidence in the record that would show that either party was in the process of "preparing to depart" from the household.

Additionally, in Lyddan v. U.S (2d Cir. 1983) 721 F.2d 873, the court held that as a matter of law, "before an alimony deduction can be allowed under IRC § 215, the husband and wife must have lived in separate residences during the relevant period." (Lyddan v. U.S., 721 F.2d, supra, at 876; see also (Coltman v. Commissioner (1991) ¶ 91,127 T.C.M. (RIA).)

Appellant has failed to provide any statutory or case law authority that would allow alimony deductions for appellant during the tax years that he lived in the same residence with his former spouse. Appellant maintains that, because he complied with a court order, he was not a member of the same household as his former spouse even though they lived in the same home. However, a judge in rendering a divorce decree generally does not determine the income tax consequences of the divorce judgment rendered. (See Imel v. U.S. (10th Cir. 1975) 523 F.2d 853.) Therefore, under the circumstances, we support respondent's action in this matter.

Appellant also contends that if he does not prevail in this matter, he is entitled to a reduction of interest charges because of delays by respondent in dealing with this matter. However, we have consistently held that the imposition of interest is mandatory under section 18688 (renumbered to section 19104, operative January 1, 1994), of the Revenue and Taxation Code. (Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977.) This board has also held in the Appeal of Philip C. and Ellen Boesner Snell (92-SBE-023), decided on July 30, 1992, that this board has no right to review respondent's decision not to abate interest charges, which accrued because of alleged delays by respondent, under former Revenue and Taxation Code section 18688, subdivision (c) (renumbered as section 19104, subdivision (c), operative January 1, 1994). Additionally, no adequate basis for its abatement appears in the records of this appeal.

In view of the above, we must sustain respondent's action in this matter.

## 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 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Jerry Michalla against proposed assessments of additional personal income tax in the amounts of $654 and $755 for the years 1990 and 1991, respectfully, be and the same is hereby sustained.

Done at Sacramento, California, this 25th day of July, 1996, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Dronenburg, Mr Andal, Mr. Sherman and Mr. Halverson present.

Johan Klehs, Chairman

Ernest J. Dronenburg, Jr., Member

Dean F. Andal, Member

Brad J. Sherman, Member

Rex Halverson*, Member

*For Kathleen Connell, per Government Code section 7.9.