



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
NICHOLAS H. OBRITSCH)

Appearances:

For Appellant: Norman A, Eisner and
Haskell Titchell, Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel;
Crawford H. Thomas, Associate Tax
Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Nicholas H. Obritsch to proposed assessments of additional personal income taxes in the amounts of \$1,593.80, \$199.40 and \$165.47 for the years 1945, 1946 and 1947, respectively, and to the imposition of a fraud penalty of \$796.90 for the year 1945.

Appellant married Alta (Anderson) Obritsch in 1943. At the time of their marriage Appellant and his wife orally agreed that their respective incomes would be separate rather than community property. Shortly thereafter he was inducted into the Army, leaving California in February, 1943, and not returning until November, 1945. At the time of the marriage his wife owned and thereafter continued to operate a business designated as a "colonic studio" for the administration of colonic irrigations and related services. While Appellant was in military service she also joined another person in a partnership which acquired and operated a tavern. Appellant and his wife executed a separation agreement and property settlement in March, 1945.

When Appellant returned from the Army in November, 1945, he was hired by the partnership as a bartender in the tavern. In February, 1946, his wife acquired sole ownership of the tavern and in July, 1946, Appellant bought the tavern from her for \$45,900.00. Early in 1946 Appellant's wife was indicted in Alameda County for performing illegal abortions and was on trial for about five months in that year. We have not been informed of the outcome of this trial. In 1947 she was indicted in San Francisco on a similar charge,

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was convicted and served one and one-half years in prison. In the trial, it was disclosed that Mrs. Obritsch's colonic studio was a front for her illegal operations.

For each of the years in question Appellant and his wife filed a joint return with the Franchise Tax Board and separate returns with the U. S. Bureau of Internal Revenue. The separate Federal returns each reported one-half of the income reported on the joint State returns for the same years.

A Federal audit based upon a comparison of net worth statements at the beginning and at the close of 1945 led the Federal agency to increase Appellant% and his wife's respective incomes approximately tenfold for that year. Federal deficiency assessments were made against both Appellant and his wife and a fraud penalty was assessed against his wife. In the course of proceedings prior to trial in the U. S. Tax Court Appellant's deficiency assessment for 1945, but not his wife's, was compromised and thus reduced by one half. In criminal proceedings against Appellant's wife she was charged with and pleaded guilty to evading Federal income tax for that year. It appears that no Federal deficiency assessments were made for 1946 and 1947.

On the basis of the Federal audit, the Franchise Tax Board determined that the combined net income of Appellant and his wife for 1945 should be increased from \$5,529.32 to \$47,901.42. The Franchise Tax Board also imposed a fraud penalty of 50% of the added tax liability with respect to the joint return for that year. The other joint returns in question disclosed net income of \$11,970.16 in 1946 and adjusted gross income of \$2,086.63 in 1947. Appellant% wife failed to answer Franchise Tax Board inquiries regarding her income during those years and Appellant asserted that he was without information concerning her income. The Franchise Tax Board thereupon determined that the combined net income for each of those years should be increased by the amount of \$10,000. The Franchise Tax Board also disallowed a deduction of \$5,686.81 for 1947 on the ground that this sum, claimed as attorneys' fees, had not been established as an ordinary and necessary business expense. Appellant, but not his wife, protested the proposed assessments and has appealed from the action of the Franchise Tax Board on the protest.

Appellant states that he has no personal knowledge of his wife's income and illegal activities and that he did not knowingly file a false return. His primary contention is that Respondent's determination of deficiency assessments for all years is erroneous. Prior to the hearing, he conceded on brief that the attorneys' fees are not deductible;

that in principle, but not in amount, the fraud penalty was properly imposed jointly and severally; and that any liability for deficiency assessments is joint and several. At the hearing, however, he raised the point that he was separated from his wife and argued that they were not entitled under the statute to file joint returns.

Whether Appellant and his wife had the right to file joint returns is governed by Section 18402 of the Revenue and Taxation Code. As amended in 1945, this section provides that if a "husband and wife" have certain income for the taxable year, each shall make a return or the income of each shall be included in a single joint return. Before 1945 this section specified "a husband and wife living together." The changed wording has been interpreted by regulation to mean, "A husband and-wife may elect to make a joint return ... even though the spouses are not living together at any time during the taxable year," (Title 18, Calif. Admin. Code, Reg. 18401-18404(a)(2)(a).) Under Section 51(b) of the Internal Revenue Code of 1939, which similarly provides that a husband and wife may file a single return jointly, a husband and wife who are separated under an interlocutory divorce decree may file a joint return. (Holcomb v. U. S., 137 Fed. Supp. 619, aff'd. 237 Fed. 2d 502; Joyce Primrose Lane, 26 T.C. 405; Rev. Rul. 57-368, C.B. 1957-2, 896.) Appellant and his wife were clearly entitled to file joint returns for the years in question,

Having filed such returns, their tax liability was joint and several (Section 18555, Revenue and Taxation Code). Under Section 51(b) of the Internal Revenue Code of 1939, which similarly provides for joint and several liability, an innocent spouse who is involved only because of jointly filed returns is nonetheless liable for any deficiencies and fraud penalties, (Myrna S. Howell, 10 T.C. 859, aff'd. 175 Fed. 2d 240; Emilie Furnish Funk, 29 T.C. _____, Nov. 20, 1957. Therefore, Appellant's liability in this case is clear unless, as he contends, the deficiency assessments and the fraud penalty are not supportable.

The Franchise Tax Board's determination of a deficiency for 1945 was based upon the Federal audit report. The determination is presumed to be correct and it is necessary for the taxpayer to show that it is erroneous (Todd v. McColgan, 89 Cal. App. 2d 509; Helvering v. Taylor, 293 U.S. 507; Harris v. Commissioner, 174 Fed. 2d 70). No material evidence whatever has been offered by the Appellant to show the actual income of his wife. He points out that the Federal authorities compromised the assessment against him at one-half of the original amount. That, however, sheds no light

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on the income of his wife as he filed a separate Federal return. The additional tax which he agreed to pay in compromise of his separate liability, in fact, indicates only that he may have failed to report all of his separate income in that year. Nor does the fact that Appellant may be unable to produce evidence as to his wife's income assist him (see Jack W. Jones, T.C. Memo., Dkt. No. 41143, April 30, 1953). We conclude that the deficiency assessment for 1945, and therefore the amount of the fraud penalty, must be upheld.

The determinations of additional income tax for 1946 and 1947 were issued by the Franchise Tax Board without any basis other than the unsupported assumption that Mrs. Obritsch continued to receive unreported income from performing abortions. The only investigation or audit of the income derived by Mrs. Obritsch from this source was made by the Federal Government, and it did not issue deficiency assessments for any year later than 1945. Upon this record, it seems clear that the proposed assessments for 1946 and 1947 are arbitrary and without foundation in fact. As has been stated by the Supreme Court of the United States, there is "... nothing in the statutes ... or our decisions that gives any support to the idea that the ... determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing . . ." (Helvering v. Taylor, 293 U.S. 507). Except for the deficiency occasioned by the disallowance of the deduction for 1947, which Appellant does not dispute, we conclude that the assessments for 1946 and 1947 cannot be sustained (James E. Caldwell & Co. v. Comm., 234 Fed. 2d 660; Ray Gasper, T.C. Memo., Dkt. No. 32352, March 30, 1956).

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 13595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Nicholas H. Obritsch to proposed assessments of additional personal income tax in the amounts of \$1,593.80, \$199.40 and \$165.47 for the years 1945, 1946 and 1947 respectively, and to the imposition of a fraud penalty of \$796.90 for the year 1945

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be and the same is hereby modified as follows: to the extent that the assessments for the years 1946 and 1947 are based upon estimated additional income of \$10,000 for each of those years, the action of the Franchise Tax Board is reversed; in all other respects the action of the Franchise Tax Board is sustained,

Done at Sacramento, California, this 17th day of February, 1959, by the State Board of Equalization.

Paul R. Leake, Chairman

Geo. R. Reilly, Member

John W. Lynch, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary