



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
GEORGEANN M. BROWN)

Appearances:

For Appellant: Charles A. Pinney, Jr.,
Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel

RECEIVED
APPEALS DIVISION
FEB 24 1952

O P I N I O N

This appeal is made pursuant to section 18596 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests of Georgeann M. Brown against proposed assessments of additional personal income tax in the amounts of \$49.83 and \$13.59 for **the years 1954 and 1955, respectively.**

Appellant married Herb Nacio Brown in 1942 and thereafter two children Nacio Jan Brown and Candace Nacio Brown, were born to them. In 1946 appellant acquired two insurance policies on Mr. Brown's life. Appellant has continued to own these policies since that date, Beneficiary designations executed in 1951 named each of the two **children**, alternately, as primary beneficiary of each policy with the other as secondary beneficiary; appellant to take **only** if neither child were living at the time of death of the insured,

Prior to dissolution of their marriage in 1952, **appellant** entered into a preliminary agreement with her husband under which such matters as the division of property, support, and child custody were settled, On July 17, 1952, the parties executed two separate agreements which embodied and set forth in **more** detail the provisions of their original agreement. The first contract, titled "PROPERTY SETTLEMENT AGREEMENT," is divided into three parts. The first part deals with the division of property and the second relates mainly to support and custody of the children, The last portion contains general provisions, one of **which** gives to Mr. Brown all **right** to any dividends or rebates that may be paid in the future on appellant's life insurance policies. This agreement was approved and adopted by reference in an interlocutory divorce decree granted the same day.

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The second agreement, not included in the divorce decree, deals with appellant's support and maintenance. It provides, in part:

FIRST: First Party [Mr. Brown], agrees to pay to Second Party [appellant] as and for her support and maintenance, the sum of Three Hundred Eight and **50/100** Dollars (\$308.50) per month... .

SECOND: Second Party agrees that approximately One Hundred Thirty three and **50/100** Dollars (\$133.50) per month of this sum shall go toward the payment of premiums on presently existing insurance policies on [sic] the New York Life Insurance Company (**Nos. 20504963 and 20504964**), which policies are owned by Second Party on the life of First Party under terms of which policies the minor children of the parties hereto are the primary beneficiaries. To accomplish this purpose, Second Party agrees that she shall, upon receipt of ... (\$308.50) each month, immediately send ... (\$133.50) to FRANKLIN D. McDANIEL ... who **will** cause said sum to be paid monthly as received by him as premiums on the same policies the parties hereto agree that the beneficiaries under the said policies cannot be changed or modified in any way, **without the consent in writing of both parties** hereto. Second Party agrees that she shall not borrow on said policies without the written consent of the First Party, The New York Life Insurance Company shall be delivered a certified copy of this Agreement,

THIRD: The support payments herein provided for Second Party, shall continue up to and including the payment of August 1, 1966. Notwithstanding the foregoing, it is agreed and understood that the support payments herein provided for Second Party shall cease immediately upon the death of the First Party **or** the Second Party.

Until late 1955, Mr. Brown paid the \$133.50 per month directly to Mr., McDaniel, who paid the premiums and kept records of such payments, Some time in the last quarter of 1955 appellant moved to San Francisco and it was found to be more convenient for her to make the payments to the insurer. During the years under review, appellant did not report the insurance payments as income.

The Franchise Tax Board included the amounts used to pay insurance premiums in appellant's gross income on the ground that they constituted alimony within the meaning of section 17081 (formerly 17104) of the Revenue and Taxation Code, That section provides:

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If a wife is divorced ... from her husband under a decree of divorce ..., the wife's gross income includes periodic payments ... received after such decree in discharge of ... a legal obligation which, **because** of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a **written** instrument incident to such divorce....

This provision is substantially the same as section 22(k) of the Internal Revenue Code of 1939 (section **71(a)(1)** of the 1954 Code) which has frequently been construed by the federal courts. A review of those cases indicates that two lines of decision have been established. **Where** the former husband, pursuant to an agreement or divorce decree, pays life insurance premiums on policies owned absolutely by the wife and under which she is the primary beneficiary, such amounts are additional alimony, taxable to her regardless of whether she has the right to have such premiums paid directly to her or not. (Katharine T. Hyde, 36 T.C. 507, aff'd, 301 F.2d 279; Anita Quinby Stewart, 9 T.C. 195,) On the other hand, such payments are not taxable to the wife where she does not have substantial incidents of ownership in the policy even though she has a contingent interest as beneficiary. (Florence H. Griffith, 35 T.C. 882; Beulah Weil, 22 T.C. 612, aff'd on this issue, 240 F.2d 584, cert. denied, 353 U.S. 958 [1 L.Ed.2d 909]; James Parks Bradley, 30 T.C. 701; Ralph H. Pino, T.C. Memo., Dkt. Nos. 79112, 84237 and 84614, March 13, 1962.) The well-established principle of these cases is that a cash basis taxpayer must include in gross income amounts paid to third parties exclusively for the benefit of the taxpayer that are not intended to be gifts. (Hyde v. Commissioner, 301 F.2d 279, 282.)

The Franchise Tax Board argues that under the terms of appellant's agreement with her husband she retained an unrestricted right to cash in her policies. Since each premium payment increased their cash value, it is urged that appellant received a direct economic benefit.

It is true that appellant's **right** to cash in the insurance policies was not expressly prohibited in either of the two agreements. Such an express provision, however, was unnecessary. By agreeing to the restriction of her right to change beneficiaries, appellant effectively surrendered her sole control over the policies, including the right to unilaterally surrender them for cash. (Morrison v. Mutual Life Ins. of N. Y., 15 Cal. 2d 579 [103 P.2d 963].) As appellant had no right to borrow on the policies or to receive dividends or rebates payable thereon, her only remaining economic interest was as contingent beneficiary. The amounts appellant received for the purpose of paying the insurance premiums, accordingly, did not constitute income taxable to her, (Florence H. Griffith, supra; Smith's Estate v. Commissioner, 208 F.2d 349; Robert L. Montgomery, Jr., T.C. Memo., Dkt. No. 35891, June 25, 1954.)

