



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
LESLIE A. SPIVAK)

Appearances:

For Appellant: Leslie A. Spivak, in pro. per.

For Respondent: Wilbur F. Lavelle, Associate Tax
Counsel

O P I N I O N

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 **Leslie A.** Spivak to a proposed **assessment** of additional personal income tax in the amount of **\$15.00** for the year 1957.

Appellant Leslie A. Spivak and Helen L. Spivak were married in 1938, and four children were subsequently born to them. On April 16, 1957, appellant and Mrs. Spivak separated. There is **no** evidence of any separation agreement.

On May 10, 1957, a superior court awarded Mrs. Spivak the custody of the four minor children, and ordered appellant to **pay the sum** of \$375.00 per month for the support of his wife and their children.

Appellant filed a **separate** tax return for the year 1957. Attached thereto was a **statement** to the effect that Mrs. Spivak would claim the four children as dependents, and that appellant and Mrs. Spivak would each claim one-half of the married couple's personal exemption of \$3,500. The tax return was filed in accordance with this statement.

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In his 1957 tax return, **appellant also** claimed a deduction of \$4,500 ($\375×12) **for** the support of **his wife** and **four** children during '1957. Respondent **allowed appellant a deduction**, for alimony paid in 1957 of only \$3,000 ($\375×8). This deduction represented payments made **after issuance of** the court's support order.

It is from respondent's disallowance of \$1,500 of appellant's claimed deduction of \$4,500 for the year 1957 that this appeal has been filed.

Section 17263 of the Revenue and Taxation Code allows a husband to deduct alimony **paid to** his wife during the taxable year if such payments constitute taxable income to the wife.', Section 17081 sets forth the circumstances under which such payments are **includible** in the wife's gross income.

In general, alimony is taxable to the wife under section 17081, and therefore deductible by the husband, if a wife is separated from her husband and:

(a) **the payments** result from a decree of divorce or separate maintenance or written instrument **incident** thereto; or

(b) the payments are received by the wife-under a written separation agreement; or

(c) the **payments** are received -by **the** wife, from her husband **under a** decree requiring the **husband** to make payments for her support or maintenance.

None of the specified conditions was met until May 10, 1957, when a superior court issued a decree requiring appellant to pay for Mrs. Spivak's support. This decree rendered section **17081, subdivision** (c) applicable, but only as to alimony payments made by appellant to his wife after the date of the support decree. Thus, respondent was correct on this point.

In the alternative appellant argues that he is entitled to an additional portion of the married couple's personal exemption and a portion of the exemptions for dependents for the first three months of 1957, during which time the appellant and his family were still united.

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In order to determine whether or not appellant and his wife are entitled to the married couple's personal exemption of \$3,500 (Rev. & Tax. Code, § 17181, subd. (b)), **itis** necessary to determine their marital status at the close of the taxable year. (Rev. and Tax. Code, § 17186, subd, (a).)

Appellant and Mrs. Spivak, though separated, were still married on December 31, 1957, and were therefore entitled to the full personal exemption for married couples. Section 17181, subdivision (b) also provides, however, that if a husband and wife file separate returns, the personal exemption may be taken by either or divided between them. Appellant filed a separate return and correctly claimed one-half of the married couple's personal exemption, in accordance with the agreement with his wife. We see no possible basis for allowing an additional amount to him.

With respect to **the** exemption for **dependents**, there is no provision allowing part of an exemption based on supporting a person for part of a year. No exemption is allowed unless the taxpayer furnishes over one-half the support of the claimed dependent for the entire taxable year. (Rev. and Tax. Code, § 17182.) The burden is on the taxpayer to prove that he provided the support requisite to legal dependency, (Appeal of H. R. Lichtman, Cal. St. Bd. of Equal., July 19, 1961, CCH Cal; Tax Cas. Par. 201-824, P-H State & Local Tax Serv. Cal. Par. 58200; Victor A. Pietrowski, T.C. Memo., ' Dkt. No. 37801, April 23, 1953.) And it must be assumed, in the absence of **evidence** to the contrary, that the support provided by appellant was **for** all of the children and not for one or more to the exclusion of the others. (Ollie J. Kotlowski, 10 T.C. 533.)

Support payments made by **a husband to a wife which** are **includible in the** wife's gross **income are** not, to be treated as payments **for** the support of **any dependent**. (Rev. & Tax Code, § 17183; subd. (d).) The payments **made to** Mrs. Spivak after May 10, 1957, the date of the support order, **were includible** in her **gross** income in their entirety, because there was no amount specifically designated in the decree for child support. (Commissioner v. Lester, 366 U.S. 299 [6 L. Ed. 2d 306].) It was for this reason that appellant was allowed to deduct all of those payments as alimony.

In order to establish his right to 'the dependency exemptions, therefore, the appellant would have to prove that

