*80-SBE-078

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DONALD MORRIS)

For Appellant: Jon P. Chester
Attorney at Law

For Respondent: John A. Stilwell, Jr.
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 protest of Donald Morris against a proposed assessment of additional personal income tax in the amount of $701.57 for the year 1972.

The issue in this case is whether appellant may be relieved' of liability for the subject deficiency assessment under the "innocent spouse" provisions of Revenue and Taxation Code section 18402.9.

Appellant and his former wife Dorothy were married in July of 1972 and divorced in July of 1973. For the year 1972, they filed a joint California personal income tax return which reported gross income from, among other sources, a real estate brokerage business conducted by Dorothy as her separate property. Subsequently, the Franchise Tax Board received an audit report from the Internal Revenue Service detailing a number of changes in the taxable income reported on the Morrises' 1972 joint federal return. The most significant change was an increase of $6,301.55 in the reported gross income of $60,987.13 from Dorothy's real estate business, but the addition of several other adjustments resulted in a total increase of $15,540.92 in the Morrises' federal taxable income. Since all of these adjustments were equally applicable to the Morrises' state return, respondent increased their reported income by a like amount and issued the deficiency assessment in question.

On appeal, appellant contests the portion of the assessment arising from the understatement of the gross income of Dorothy's real estate business. He says that he knew nothing about this business because Dorothy ran it entirely on her own and because he was away from home in the Navy during most of 1972. He argues, therefore, that any tax arising from the real estate operation should be Dorothy's separate liability, and that he is an "innocent spouse" entitled to relief from the tax by virtue of Revenue and Taxation Code section 18402.9.

Where a husband and wife file a joint return, the liability for the tax on the aggregate income is joint and several. (Rev. & Tax. Code, § 18555, subd. (b).) It is therefore within respondent's discretion to assert the tax against either spouse. (Appeal of Arthur A. and Dorothy L. Reynolds, Cal. St. Bd. of Equal., March 18, 1975; Appeal of Hilde H. Anders, formerly Hilde H. Lewin, Cal. St. Bd. of Equal., Feb. 26, 1969) Since appellant's liability is clear under this general rule, he seeks' to avoid it by invoking section 18402.9. That statute provides, in substance, that a spouse who files a joint return may be relieved of liability for the tax arising from a failure to report an amount of gross income if: (1) the omitted amount is attributable to the other spouse and constitutes more than 25 percent of the amount of gross income stated in the return; (2) the innocent spouse didn't know, and had no reason to know, of the omission when he signed the

return; and (3) it is inequitable to hold the innocent spouse liable for the tax, taking into account all of the facts and circumstances, including whether or not he benefitted significantly from the omitted income.

It is immediately apparent, as appellant seems to admit, that the omission of gross income from Dorothy's business was not in excess of 25 percent of the reported gross income. In fact, the omission of some $6,300 was barely more than 10 percent of the $60,987 in income Dorothy reported from her business. Appellant argues, however, that relief is nevertheless available, even when the specific conditions of the statute aren't met, if it is inequitable to hold the taxpayer liable. In support of this proposition, appellant cites Busse v. United States, 542 F. 2d 421 (7th Cir. 1976), which holds, in reference to the federal counterpart of section 18402.9, that even if the "innocent spouse" enjoyed a significant benefit from the omitted income, relief would still be available if it would be inequitable to hold the spouse liable for the tax. Obviously, this holding relates to the third part of the statutory test rather than to the first, or 25 percent test, which was not in issue in Busse. Thus, we must conclude that Busse is not authority for ignoring the plain statutory language which requires that the omission be in excess of 25 percent of the income stated in the return.

For the above reasons, respondent's action in this matter will be sustained.

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,

Appeal of Donald Morris

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 protest of Donald Morris against a proposed assessment of additional personal income tax in the amount of $701.57 for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of June, 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member