L 9 (3-68)

Income Tax Determinations
A-Z

BUREAU OF LAW

MEMORANDUM Borax, Herman & Hermine

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: HERMAN & HERMINE BORAX

Application for Revision or Refund of Personal Income Taxes Under Article 16 of the Tax Law for the Years 1955, 1956 and 1959

A hearing on the above matter was held before me at 80 Centre Street, New York, New York on May 16, 1967.

The question at issue is whether payments of $6,550.00 for each of the years in question made to Ruth Borax, former wife of Herman Borax, were deductible as alimony payments for the years 1955, 1956 and 1959 or were not deductible as not having been made pursuant to a decree of divorce or legal separation.

A separation agreement was entered into between Herman and Ruth on March 14, 1945, which was reformed by the New York County Supreme Court on November 2, 1945 by requiring the husband to pay annual payments of $8,550.00 instead of the amount of $6,500.00 set forth in the agreement. Thereafter, the husband obtained a Mexican divorce in 1952 which was declared illegal by the New York Supreme Court (Borax v. Borax, 1953, 119 N.Y.S. 2d 819). The New York Court of Appeals held that the separation would be granted the wife who had sought the declaration of nullity, as long as the husband complied with the written separation agreement providing for alimony payments. (Borax v. Borax, 3 A D 2d 804, aff'd 4 N Y 2d 113)

Prior to the enactment of the 1954 Code, New York law was similar to Federal law in that both tax laws only recognized alimony agreements when made under a decree of divorce or separation or a written instrument incident to such decree. The 1954 Internal Revenue Code, however, in section 71 thereof provided two other grounds: (1) pursuant to a written separation agreement executed after the date of the enactment of the 1954 Code, and (2) under a decree of maintenance for support entered after March 1, 1954. Thus, under Federal law since the separation agreement was made prior to the date of the Code as was the November 22, 1945

decree for support and maintenance, relief could be afforded to the taxpayer only if there were a decree of divorce or separate maintenance or a written instrument incident thereto. The Federal Circuit Court (Estate of Henry V. Commissioner, 309 F. 2d 666, rev'g 40 T C 1001) did not find that there was any decree of separation. However, despite the New York decision holding that there was no divorce, the Court found in fact that there was a divorce for Federal tax purposes and that the separation agreement was incident to such divorce.

Section 359(8) of the New York Tax Law was amended, effective April 5, 1956, to conform to the liberalization of the 1954 Code which recognized alimony payments pursuant to a written separation agreement or a decree of maintenance or support. However, such amendment deliberately omitted from the act references to the dates on which separation agreements or decrees for support or maintenance were required to effectuate such provisions. Such interpretation that alimony payments would be taxable to the wife and not to the husband for years subsequent to 1955 despite the fact that there was a separation agreement providing for support and maintenance in 1955, was enunciated by the Commission in Matter of Bruce Steiner, a determination dated December 12, 1956. Therefore, in the instant case the alimony payments made by the husband are deductible by him under State law for the purposes of Article 16 (and not 22) for the years 1956 and 1957 since they were made pursuant to a written separation agreement.

However, for the year 1955 a question arises as to whether we are bound by the decision of the New York courts which held that there was no valid divorce or whether we are bound by the Circuit Court case holding that for Federal tax purposes there was a divorce decree in accordance with the provisions of the Internal Revenue Code. During such year, prior to the amendment of section 359(8) of the Tax Law, payments pursuant to written agreement for separation or decree for support were not recognized as alimony payments taxable to the wife and deductible to the husband. Only payments pursuant to or incident to a decree of divorce or separation were recognized. The Supreme Court order of November 2, 1955 reforming the contract was not a decree of divorce or separate maintenance. The Appellate Division and the Court of Appeals in the matter of Henry V. Henry, 3 A D 2d 404, aff'd 4 N Y 2d 113, refused the wife's prayer for a decree of separation. The sole question, therefore, remaining is whether Federal treatment as decided by the Circuit Court should be followed. The strong dissent of

Judge Friendly held that the decision of the New York court which had personal jurisdiction of all of the persons involved in the marital dispute and had declared the divorce a nullity was entitled to full faith and support within every court in the United States. The majority, however, in a decision announced by Judge Marshall held, that although the New York court had found the divorce a nullity, that it was the intention of Congress to enact sections 22(k) and 23(u) of the 1939 Code to eliminate the uncertain tax consequences resulting from the many variations in State law. The court further held that since many states are free to take different views as to validity of the divorce, the Federal courts are not in a position to attempt a resolution of the issue of divorce and that any divorce obtained in any jurisdiction would be recognized by the court regardless of whether the spouse invokes the power of another jurisdiction to declare the divorce invalid.

It may be possible to hold with respect to the year 1955, in which the issue of whether or not there was a valid decree of divorce is squarely presented, that the decision of the New York court holding the Mexican divorce to be invalid to be binding upon the courts and agencies of this State despite the Federal case. If this were done, the sustaining of the assessment for the year 1955 disallowing the alimony deduction would present certain administrative difficulties. The action of the Income Tax Bureau disallowing the deduction and issuing the assessment against Herman and Hermine Horn jointly, is in effect a recognition of the validity of the second marriage and the validity of the Mexican divorce decree as found by the Circuit Court but implies a finding that the payments of alimony were not made under such decree. This is inconsistent with the Federal court treatment. If the Mexican divorce decree were recognized as a valid decree, the payments made pursuant to the separation agreement entered prior to that date should be recognized as imposed or incurred under such Mexican divorce decree from the date of such decree. Such conclusion was reached by the Federal court under section 22(k) of the 1939 Code which is almost word for word identical with section 3797(a) of the Tax Law. Therefore, a conformity with the Federal finding of a valid divorce would require the cancellation of the assessment on the ground that the payments were made pursuant thereto. If, however, the Mexican divorce were to be held invalid as contended by the New York courts and Herman was not to be deemed the husband of Hermine, then joint returns could not have been filed and an assessment could not have been issued jointly. Furthermore, in that case the taxpayer, Herman, would only have been allowed exemptions and dependency credits in the amount of $3,300 as

head of the household instead of the $3,700 which he reported. Hermine, therefore, would have been required to file separate returns on a separate income and would have been allowed a $1,000 personal exemption.

The better line of reasoning is to hold that despite the New York court holding the Mexican divorce illegal, the divorce should be allowed as a valid divorce for New York State tax purposes. Although the year involved is a preconformity year, section 359(8) parallels and is similar to the provisions of the Internal Revenue acts and the provisions of the 1939 Code. In the case of Marx v. Bragalini, 6 N Y 2d 322, the court cited:

> "It has long been the policy of our courts to adopt, whenever reasonable and practical, the Federal construction of substantially similar tax provisions. * * * The doctrine is in furtherance of the legislative policy of maintaining uniformity in the administration of the two tax laws. As this court observed in Matter of Gregan's Estate, 275 N.Y. 337, 341, 9 N.E. 2d 993, 994, 112 A.L.R. 260, we give great weight to the Federal decisions '"for the purpose of maintaining uniformity of administration of the Tax Law which the Legislature has sought to achieve"'".

Since the decision affected the same parties, the Federal decision should apply for New York State tax purposes. I have, therefore, prepared a determination cancelling the assessments for all of the years.

/s/ VINCENT P. MOLINEAUX
Hearing Officer

VPM:kcm
Enc.

June 18, 1968

6-27-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

HERMAN AND HERMINE ROSAX

FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEARS 1955, 1956 AND 1959

Herman and Hermine Rosax having filed applications for revision or refund of personal income taxes assessed under Article 16 of the Tax Law and a hearing having been held at the office of the State Tax Commission, 80 Centre Street, New York, New York on the eighteenth day of May 1967 before Vincent P. Molinaeus, Hearing Officer of the Department of Taxation and Finance, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Herman Rosax, was married to Ruth Rosax and on March 14, 1946 they separated by mutual consent and executed a separation agreement which gave Ruth custody of their son and obligated Herman to pay $575 a month for the support of Ruth and child. These payments amounting to $6,900 a year were increased to $8,550 a year by a consent decree which reformed the separation agreement and was entered by the New York Supreme Court on November 22, 1946. Herman faithfully discharged this obligation throughout his lifetime. He died in 1961.

(2) That the taxpayer, Herman Rosax, obtained a Mexican divorce in 1952 which was declared invalid by the New York Supreme Court (Rosax v. Rosax, 1953, 119 N.Y.S. 2d 819).

(3) That the Appellate Division and the New York Court of Appeals held that no decree of separation would be granted the wife, Ruth Borax, who has sought the declaration of nullity since there was an outstanding written separation agreement providing for alimony payments. (Borax v. Borax, 3 A D 2d 404, aff'd 4 N Y 2d 113)

(4) That the Federal Circuit Court (Estate of Borax v. Commissioner, 349 F. 2d 666, rev'g 40 T C 1001) did not find that there was any decree of separation, but found that the Mexican divorce decree was a divorce decree for Federal tax purposes and that the written separation agreement was incident to such divorce.

(5) That the taxpayer, Herman Borax, filed a joint return with the taxpayer, Hermine Borax, for the years 1955, 1956 and 1959 deducting thereon the amount of $8,550 annually as and for alimony payments to Ruth Borax, who was declared the lawful wife of Herman Borax (Finding of Fact # 2).

(6) That on September 8, 1958, Assessments B-466837 and B-466838 were issued for the years 1955 and 1956 and on February 28, 1963, Assessment A3-0480A8 was issued for the year 1959. All of the assessments were based upon disallowance of deductions claimed for alimony in the amount of $8,550 for each year.

Based upon the foregoing findings, the State Tax Commission hereby,

DETERMINES:

(A) That payments of $8,550 for the years 1956 and 1959 were payments pursuant to the written separation agreement in accordance with the provisions of section 399(B) of the

Tax Law then in effect and were deductible by the taxpayer, Herman Borax, pursuant to the provisions of section 360(17) of the Tax Law.

(3) That in accordance with the decision of the Federal Circuit Court and Finding of Fact # 4, the payment of $8,550 for the year 1955 was for New York State tax purposes imposed or incurred under a court decree of divorce within the intent and meaning of section 359(8) of the Tax Law then in effect and was deductible in accordance with the provisions of section 360, subdivision (17) of the Tax Law.

(6) That accordingly, the assessments for all of the above years, 1955, 1956 and 1959, are cancelled.

DATED: Albany, New York this 19th day of July 1965.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

/s/ SAMUEL E. LEPLER
COMMISSIONER