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MEMORANDUM

Income Tax Determinations
A-2
Rapp, Edward J.

TO: State Tax Commission

FROM: Francis X. Boylan, Hearing Officer

SUBJECT: Edward J. Rapp, Determination After
Hearing, Personal Income Taxes,
Article 16, 1957.

The issue presented in this case was whether the Tax Commission properly disallowed the amount claimed by the taxpayer for separate maintenance of his wife. The taxpayer, at a conference held with his wife and a probation officer in connection with a supporting proceeding brought by the wife in the Domestic Relations Court of the Bronx, agreed to pay his wife \$35 a week for support. An informal notation was made of this stipulation, or agreement as it might be called, and the case was marked adjusted with no support order being entered then or later. The determination holds that in this situation there was not "a written separation agreement executed" within the meaning of those words in Tax Law section 359.8, a paragraph to which Tax Law section 360.17 makes reference.

A letter from the Office of Probation dated June 17, 1965 obtained by the taxpayer after the hearing states that the record did not contain a formal agreement with the taxpayer's signature on it, but that as a result of a conference the taxpayer agreed to give his wife \$35 weekly, and on that basis the case was marked "adjusted" with no further action taken. See Taxpayer's Exhibits #1 and #1(a).

Tax Law section 360.17 allows a deduction by the husband of those amounts paid to the wife, that under paragraph 8 of section 359 of the Tax Law constitute income of the wife, for the tax on which the wife herself is liable.

Tax Law section 359.8 provides that the wife's income includes periodic payments imposed under a decree of divorce or separation, or under a written instrument incident to such a decretal divorce or separation; these provisions have no application here. It then provides that if a wife is separated from her husband and "there is a written separation agreement executed," the wife's income includes payments received after such agreement that are made under the agreement and because of the marital or family relationship. This is the provision that is under consideration. There is also a further provision that the wife's income includes payments made under a decree for her support or maintenance; but no court order for support in the nature of a "decree" was entered in the Domestic Relations Court

proceeding here, or in any other proceeding. Tax Law section 339.8; cf. Internal Revenue Code section 71 (a)(2).

A valid separation agreement, it has been held, has the effect of being a bar to an action for a separation. *Druce v. Druce*, (1923) 207 App. Div. 217; *Borax v. Borax*, 4 N Y 2d 113. Consequently questions as to what constitutes a valid separation agreement commonly arise in cases where a writing claimed to amount to a separation agreement is set up as a bar to an action for a separation.

In *Weinert v. Weinert* the holding seems to indicate by implication that a simple written agreement made by the parties in a support proceeding, if no support order is entered, might well constitute such a separation agreement as would be a bar to an action for a separation. (Equivalently such an agreement would be a "written separation agreement" for the purpose under consideration here.) It was held in that case that the agreement or stipulation by the parties as to support did not constitute a separation agreement only because a decree of support was entered, with the consequence that the wife was receiving the support pursuant to the order of the court and so under a "fiat of compulsion" and not under a private agreement. A court order for support does not constitute a bar to an action for separation. *Weinert v. Weinert*, 23 NYS 2d 343.

But in the present matter no agreement however simple was entered into in writing by the parties or even by the husband. Considering the consequences that theoretically would follow from the rule of law that a separation agreement is a bar to an action for a separation, it seems to be quite clear that the stipulation here would not be held to constitute such a bar and cannot be considered a "separation agreement" within the meaning intended in Tax Law section 339.8, which is not different from its common law meaning.

Accordingly it is concluded that the husband's stipulation and the notation made thereof did not constitute executing "a written separation agreement".

It is therefore recommended that the determination be substantially in the form of the proposed determination submitted herewith.

/s/

FRANCIS X. BOYLAN

HEARING OFFICER

FEB:jmm
Enc.

March 11, 1968

3-11-68 Also see memo
dated 3/11/68
from Boylan to JH

BUREAU OF LAW
MEMORANDUM

124

TO: Saul Heckelman

FROM: Francis X. Boylan

SUBJECT: Edward J. Rapp; Art. 16, 1957,
Proposed Hearing Determination;
Rulings under Corresponding
Provisions of I.R.C.

The proposed determination in this case holds that an oral stipulation--in a domestic relations court of the Bronx--discontinuing the support proceeding and making provision for support of the wife and children did not constitute a "written separation agreement executed" under Tax Law sections 359.8 and 360.17 notwithstanding that an entry was made in the court's records of the oral stipulation.

This memorandum reports on the rulings and other materials cited to Internal Revenue Code sections 71(a)(2) and 215 which are the corresponding Federal provisions from which the provisions in our law were derived.

Internal Revenue Code, section 71(a)(2) provides that "if a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title" the wife's income includes such payment of alimony. (The date of the enactment is August 16, 1954.)

Internal Revenue Code, section 251 permits the husband to deduct payments made under section 71.

Morris Kraskow v. Commissioner, 23 TCM 1414, Dec. 26, 955(M) TC Memo 1964-234. In an action for a separation in the Supreme Court, Bronx, the attorneys stipulated for a discontinuance and read into the record a provision for support for the wife and children. "Such a stipulation of terms for what amounts to a continuance would not amount to a 'written separation agreement' within the terms of said section 71(a)(2)", the Tax Court held, citing Harry L. Clark, sub. Reference is made in the opinion to the doctrine of cases cited by petitioner to the effect that an open court stipulation "amounts to a contract" between the litigants, but it was pointed out that the stipulation was earlier than August 16, 1954 in any case.

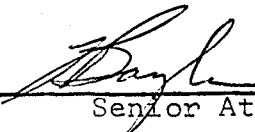
H. L. Clark, 40 T.C. 57, Dec. 26, 1969. It was held here that there was no written separation agreement that would qualify under section 71(a)(2). Payments made by petitioner (separated from his wife by mutual consent and with the sanction of the marriage tribunal of the Roman Catholic Archdiocese of Boston in a decree in 1952) which were made to the wife pursuant to an oral but not a written agreement between them, were held not includible under any of the provisions of section 71.

Revenue Ruling, 59-397 (1959-2 CB 32). This revenue ruling held that correspondence by the attorneys for the parties which referred to an oral agreement of support did not amount to a written separation agreement within the meaning of section 71(a)(2).

Regulation, section 1.71-1(b)(2)(i). The salient part of this regulation is the statement: "The periodic payments must be made under the terms of the written separation agreement . . . Such payments are includible in the wife's gross income whether or not the agreement is a legally enforceable instrument."

(In this context 'enforceable' would not seem to effect the requirement that there be a written separation agreement which is adequate and valid.)

Mertens, volume 5, section 31A-02c. Mertens collates much of the material above. The latest citation (Berniece Morris, TC Memo, 1967-83 is not in point on the question we have here.



Senior Attorney

FXB:pg

March 11, 1968

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF

EDWARD J. RAPP

**FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF TAX LAW FOR THE
YEAR 1957**

Edward J. Rapp, the taxpayer, having filed an application for revision or refund of additional personal income taxes assessed for the year 1957, and such application having been denied, and a hearing having been held at the offices of the State Tax Commission at 80 Centre Street, New York, New York, on June 10, 1963, before Francis X. Boylan, Hearing Officer, and the taxpayer having been present in person and the record having been duly examined and considered,

The State Tax Commission hereby finds that:

(1) By notice of additional assessment No. 2-846781 dated April 5, 1961 the State Tax Commission recomputed the personal income taxes of the taxpayer for the year 1957 by disallowing in effect the amount of \$2,080 claimed by taxpayer on his return as a deduction for separate maintenance of his wife. Of the further amount of \$3,300 claimed by the taxpayer for personal exemption and dependency credit, the amount of \$2,300 was disallowed, and a personal exemption of \$1,000 only allowed to the taxpayer. The additional normal tax found to be due on the recomputation was the amount of \$165.94.

Thereafter, however, by letter dated May 10, 1962 the taxpayer was allowed the personal exemption credit in the amount of \$3,300 as the head of a family with two dependents; and the

related portion of the additional assessment in the amount of \$99.07 was cancelled on April 23, 1962, so that the additional tax due under the said notice of additional assessment, as modified by the letter of May 10, 1962, was the amount of \$66.87.

(2) In his return the taxpayer had claimed personal exemption in the amount of \$2,500 as the head of a family, and also credit for dependents in the amount of \$800 for the support of two of his daughters. He had three children; the third, also a daughter, made her home with him.

His other deductions included an item of separate maintenance of his wife in the amount of \$2,080. The disallowance of this item presented the only issue under his application for revision or refund when his claim for a personal exemption and credit in the amount of \$2,300 had been allowed finally as above stated.

(3) In connection with a proceeding for support brought by his estranged wife, Margaret, in the Domestic Relations Court of the Bronx, the taxpayer had been asked to attend a conference with a probation officer at the Office of Probation for the Courts of New York City, where his wife also was present, and at the conference on November 12, 1953, he informally agreed to pay \$35 weekly to his wife, and the support proceeding was thereupon marked "adjusted" with no further action taken.

Upon the foregoing facts and findings and all the evidence herein, the State Tax Commission hereby

DETERMINES:

(A) That the State Tax Commission's original determination that the amounts paid to his wife during the year under consideration were not deductible from his income pursuant to

Tax Law section 360.17 was correct and is affirmed. Such payments were not paid "under a written separation agreement", or "under a decree requiring the husband to make the payments for her support" within the meaning of such terms as used in paragraph 8 of the Tax Law section 359 to which the said section 360.17 of the Tax Law makes reference; nor were they deductible under other provisions of Tax Law section 360, which provides for deductions, or otherwise deductible.

(B) That, accordingly, the aforesaid assessment B-846781 dated April 5, 1961 as modified April 25, 1962 is affirmed; the adjusted normal tax due is the amount of \$66.47 as of the date of the said assessment April 5, 1961, subject to interest until payment is made.

And it is So Ordered.

DATED: Albany, New York this 3rd day of April 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

A. BRUCE MANLEY

Commissioner

/s/

SAMUEL E. LEPLER

Commissioner