

6. Pursuant to §692(b)(1) of the Internal Revenue Code and 37 U.S.C. §556, Paul O. Meder's date of death was not earlier than February 11, 1982.

7. Vietnam and certain waters adjacent thereto were designated as combat areas by the President of the United States as of January 1, 1964, by Executive Order 11216, 1965-1 C.B. 62.

8. The last induction period began with the Military Selective Service Act of 1967 and expired on June 30, 1973. From July 1, 1973 to date no person has been liable for induction in the Armed Forces of the United States.

9. The 1975 committee reports to P.L. 93-597 indicate that the induction period requirement of the prior law was removed effective July 1, 1973 to provide that no person otherwise eligible be denied benefits otherwise accorded by §112 of the Internal Revenue Code on account of the expiration of the 1967 Military Selective Service Act on June 30, 1973.

10. Paul O. Meder (deceased) and Jane Meder filed a joint Delaware return, pursuant to 30 Del. C. §1162(2), for tax year 1982 on or about July 25, 1983.

11. The joint tax return for 1982 showed a tax liability of \$996.56 which liability was claimed to be exempted or forgiven by the operation of 30 Del. C. §1204(a).

12. The Division of Revenue recomputed the tax liability of the Petitioners as if they filed separate returns, determined that the husband had no tax liability, pursuant to 30 Del. C. §1204(a) and determined that the tax liability of the wife was the percentage of Delaware income tax (as if it were computed on a joint filing basis) as computed upon her separate income under Treasury Regulation §1.692-1(b)(1).

Petitioners and Respondent agree that there are three issues presented: The first issue is whether the Petitioner, Paul O. Meder, died during an induction period as defined by 30 Del. C. §1204(b)(1). The second issue is whether Petitioner, Paul O. Meder's death occurred while serving in a "combat zone" as that term is defined by 30 Del. C. §1204(b)(2) and (3). The final issue is whether 30 Del. C. §1204(a)(1) forgives the tax liability of the deceased serviceperson and the serviceperson's spouse if they file a joint tax return.

"Induction Period" is defined by 30 Del. C. §1204 (b) as " ...any period during which, under laws heretofore or hereafter enacted relating to the induction of individuals for training and service in the armed forces of the United States, individuals ... are liable for induction for such training and service." Respondent contends that as the above legislation was enacted six days after the last induction period the only persons intended to be benefited by this legislation were the individuals who died between January 1, 1960 and June 30, 1973, ending six days prior to the effective date of the legislation.

While the Board finds this interpretation of the statute strained the contention must fall when the individual facts of this case are considered. Petitioner Paul O. Meder was declared Missing in Action (MIA) on December 21, 1972 (prior to the termination of the last induction period of June 30, 1973) as a result of his plane being shot down in support of combat operations. Had his body been found at that time there is no question that he died during an induction period. That his family has lived with his status of MIA for approximately ten years before the government officially declares him deceased

cannot be used to place him outside the ambit of this statute.

Petitioner must have also died in a "combat zone" in order to take advantage of the deduction provided by 30 Del. C. §1204. That term is defined by 30 Del. C. §1204(b)(3) as " ... any area which the President of the United States by Executive Order designates, for purposes of this section or corresponding provisions of prior income tax laws, as an area in which Armed Forces of the United States are or have (after January 1, 1960) engaged in combat."

Executive Order 11216 designated Vietnam and adjacent waters as a combat zone. It is argued by Petitioners that the amendment of 26 U.S.C. §112 should be read in conjunction with 30 Del. C. §1204 to include Laos, Cambodia, and Thailand in the definition of combat zone. Respondent contends that the failure of the President to amend Executive Order 1126 to include Laos must preclude the Petitioners from prevailing.

The Board need not determine which of the parties' contentions on this issue is correct as the parties have stipulated that the Respondent has already acquiesced to the use of 30 Del. C. §1204 in determining the tax liability of Petitioner Paul O. Meder. As Respondent has agreed that §1204 is applicable to Petitioner Paul O. Meder, the first two issues are moot.

Thus the remaining issue is whether the income attributed to Petitioner Jane M. Meder is exempt from taxation pursuant to 30 Del. C. §1204 when she files a joint return with her deceased husband.

Petitioners contend that 30 Del. C. §1105 provides that the federal adjusted gross income (AGI) is the beginning point

in calculating the State Taxable Income. Further, 30 Del. C. §1162(2) provides that a husband and wife filing a joint federal tax return may file separate or joint returns in Delaware; as they elect. Thus when filing a joint return for Delaware, 30 Del. C. §1204(a)(1) provides the tax shall not apply to the year in which a qualifying serviceman dies in a combat zone during an induction period. As the taxpayer is the "marital unit" the income of the deceased serviceman and the spouse is forgiven by this section.

30 Del. C. §1204(a) provides, in pertinent part, "[i]n the case of any individual who dies ... any tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone after January 1, 1960 ..." [Emphasis added.] The statute refers to an individual not a marital tax unit. The exemption applies to a deceased individual who died while in the service of the armed forces; which does not apply to Jane M. Meder and therefore not to the marital unit.

That this conclusion is intended by the legislature is further shown by the manner in which the federal statute (which §1204 is patterned after) is interpreted. The federal return required a proration of the income such that Jane M. Meder was required to pay federal taxes on her income (despite filing a joint federal return). An opposite result is not intended for a Delaware return and the statute makes this intention clear by using the terms "individual", "his death", and "he so served." Only Paul O. Meder meets the prerequisites of the statutory exemption. Jane M. Meder may not benefit from

the statute without meeting its requirements, and filing a joint return does not assist in meeting the statute's requirements.

Petitioners attempt to bolster their contentions by citing Burpulis v. Director of Revenue, Del. Supr., No. 106, 1984, Hermann, C.J. (June 26, 1985). They argue that Respondent is attempting to force Petitioners to file separate returns in Delaware in opposition to the ruling of Burpulis.

Petitioners misunderstand Burpulis. Burpulis holds that:

Allocating aggregate adjusted gross income between separate taxpayers represents a concept foreign to tax law because aggregate adjusted gross income applies only to joint returns.

In the instant case, allocating aggregate adjusted gross income between separate husband and wife taxpayers is clearly unjustified because some deductions, including the two-earner married couple deduction, are components only of aggregate adjusted gross income, but not of separate gross income. Id. at page '9.

In the present case, as discussed above, the taxable unit whose tax is forgiven is the "individual who dies during an induction period ... while serving in a combat zone." §1204(a). That taxable unit is the person Paul O. Meder. As the exemption from taxation is for the separate gross income only, it may not be used in determining the aggregate adjusted gross income in filing a joint Delaware return.

To state it another way, this case is the mirror of Burpulis. In Burpulis, the deduction was a component of the joint (federal) return's aggregate adjusted gross income but not permitted to be used in calculating a separate adjusted gross income. In the case at bar, the exemption is a component of the separate adjusted gross income, therefore it may not be used to calculate the aggregate adjusted gross income.

The Notice of Assessment dated September 6, 1983 is hereby affirmed.

IT IS SO ORDERED.

Joseph S. Gusk

John W. Cordrey

Nettie C. Feilley

Walter B. Ralston

Charles G.

Dated: August 9, 1985

SYNOPSIS

DOCKET NO. 829

TAX SEGMENT: PERSONAL INCOME TAX

ISSUE: Whether or not the exemption provided by 30 Del. C., §1204 in determining the aggregate adjusted gross income applies to Petitioner when filing a Delaware joint return with her deceased husband.

TAB DECISION: The Tax Appeal Board held that the exemption provided by statute (30 Del. C., §1204 (a)) applies to the "individual" and not to the marital unit. Therefore, as the exemption from taxation applies to the individual who dies during the induction period it does not extend to the income of the surviving spouse.

DECISION: For Respondent

DECISION DATE: August 9, 1985