25 July 1946.

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ARIZONA ATTORNEY GENERAL

Mr. Elwood W. Driggs, Director,
Income Tax Division,
State Tax Commission,
Capitol Building,
Phoenix, Arizona.

Re: Community Property Contracts

Dear Mr. Driggs:

We have examined the records which you submitted to us in connection with the following question:

> "Can a husband and wife by agreement provide that their respective incomes shall be the separate property of the spouse acquiring the same so that it is taxable for income tax purposes on a separate rather than a community basis?"

This specific question has never been considered by the Supreme Court of Arizona, so it becomes necessary to refer to decisions handed down in other jurisdictions having community property laws.

An agreement of this nature has long been sustained in California, one of the earliest cases being Wren v. Wren, 100 Cal. 272, 34 Pac. 775, wherein it was held that a husband and wife could agree that all of the wife's future earnings would be her separate property. In Perkins v. Sunset Tel. & Tel. Company, 155 Cal. 712, 103 Pac. 190, it was said;

> "Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby one may release to the other all interests, both present and in expectancy."

There are numerous other decisions in California to the same effect but we deem it unnecessary to cite them here.

The above principle was applied in a situation involving federal income taxes by the Circuit Court of Appeals of the Ninth Circuit in Helvering v. Hickman, 70 Fed. (2d) 985, wherein a husband and wife domiciled in California entered into an oral agreement whereby the earnings of the respective spouses were to be the property of the one acquiring the same. The court held that the earnings of the husband could not be taxed as community income and that the income of each spouse should be reported on a separate basis. The federal court thus adopted the decisions of the state court as to the validity of such agreements.

A second jurisdiction which has determined such an agreement to be valid is the state of Washington. In Gage v. Gage, 78 Wash. 262, 138 Pac. 886, it was held that a husband and wife may agree that the earnings of the wife shall be her separate property.

And, an agreement similar to the one in question here was sustained in Union Securities Co. v. Smith, 93 Wash. 115, 160 Pac. 304.

The Supreme Court of Arizona would no doubt follow the decisions in the Washington cases in view of the opinion in Cooper v. The Valley Bank, 28 Ariz. 373, 237 Pac. 175, where it was sied:

> "It will readily be seen that we have placed ourselves squarely in accord with the view prevailing in the state of Washington, and this is but natural, for our statutes on this subject are more analogous to those of that state than to any other."

And, in Kothman v. Kumbeck, 54 Ariz. 443, 96 Pac. (2d) 250, the court said:

> "Under the Washington cases, whose decisions as to community property we have generally followed, * * * * * * * * * * *."

In view of these decisions, our Supreme Court would undoubtedly sustain the validity of the agreement in question.

Furthermore, under our law the spouses have a wide latitude in dealing with the community property. In Baldwin v. Baldwin, 50 Ariz. 265, 71 Pac. (2d) 791, a conveyance creating a joint tenancy between husband and wife, rather than a community relationship, was upheld.

In Lincoln Fire Ins. Co. v. Hamed, 53 Ariz. 264, 83 Pac. (2d) 533, the general rule was stated to be that, "All property acquired by either spouse during coverture, except through gift, devise or descent, is presumed to be the community property of the two * * * *."

The court went further and held:

> "This presumption may be overcome by proof that it was the intention of the spouses at the time of acquisition that the property should be the separate property of one or the other."

Surely an agreement such as the one under discussion here would be proof of the intention of the spouses that the income of each should be his or her separate property at the time of acquisition.

This question was passed upon by the Board of Tax Appeals, the decisions of which carry considerable weight even though it is not a court of general juridication. In Shoenhair v. Commissioner of Internal Revenue, 45 B.T.A. 576, it was held that a husband and wife, residents of Arizona, could orally agree that the income of each would be his or her separate property and that federal income tax returns should be made on that basis under such an agreement.

For the above reasons it is the opinion of this office that such an agreement is valid in Arizona for income tax purposes, and this is true whether the agreement is oral or written. In reaching this conclusion we are aware of the former opinions of this office which are to the contrary.

Very Truly yours,

JOHN L. SULLIVAN
Attorney General

ROBERT SUTTON
Assistant Attorney General

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