



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
B. CARL TREMAINE)

Appearances:

For Appellant: John T. Riley

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner; James J. Arditto, Assistant Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 19 of the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended) from the action of the Franchise Tax Commissioner, overruling the protest of B. Carl Tremaine, to his proposed assessment of additional tax of \$1,255.75 for the taxable year 1936.

In 1922 Appellant was divorced from his wife, Marguerite Tremaine, and executed a property settlement agreement providing for payments of \$2,000.00 per annum for her support and a like sum for the support and education of each of his minor daughters, Nancy and Sally. Under date of July 26, 1929, this agreement was cancelled and Appellant then conveyed certain securities to Cleveland Trust Company of Cleveland, Ohio, under three separate, irrevocable trust agreements. The income from one trust was to be paid to Marguerite Tremaine with a guarantee by Appellant that she should receive at least \$2,000.00 per year. Nancy and Sally were to receive the income of their respective trusts for life.

Under date of September 10, 1936, Appellant entered into a property settlement agreement with his second wife, Adelaide Tremaine later divorced, providing for the payment of \$25,000.00 in cash. In lieu of the cash payment certain securities having a "cost base" of \$10,829.25 and a market value of \$25,025.00 were transferred to her. The Commissioner, after applying the capital gain percentage based on the length of time the securities were held, determined that Appellant realized a taxable gain of \$7,453.14 in connection with this transfer.

Appellant submits that no portion of the income of the trust for the benefit of Marguerite Tremaine should be taxed to him within the purview of Helvering v. Fuller, 310 U. S. 69, but that in any event he should not be taxed on more than \$2,000.00 per year from any of the trusts, as there was no continuing obligation to pay his wife any amount in excess of \$2,000.00, and the Ohio court, which granted the divorce decree, was satisfied that \$2,000.00 per year

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for each of the children was ample for their education and support, and that the transfer of securities in satisfaction of the contractual obligation of Adelaide Tremaine did not constitute a sale or exchange taxable under the capital gains provisions of the Personal Income Tax Act.

In passing upon the tax consequences of a trust set up under divorce and separation agreements, it has been held that the taxpayer must establish by "clear and convincing" proof that the local law and the agreement have given the divorced husband a full discharge, with no continuing obligation, however contingent.

Helvering v. Fitch 309 U. S. 149.

In the case of Helvering v. Fuller, 310 U. S. 69, cited by both the Appellant and the Commissioner, the husband made no commitments in respect to the trust beyond its creation, and was completely discharged of his obligation to his former wife under the law of the state in which the separation agreement was executed. Appellant herein, having underwritten the income to the extent of \$2,000.00 per year, was under a contingent continuing obligation. The divorce decree of the Court of Common Pleas for the County of Cuyahoga, State of Ohio, dated June 13, 1922, reserved the right to enforce the provisions of the separation agreement, and retained jurisdiction of the cause for the purpose of enforcement.

We have heretofore held the validity of the deficiency assessment is not impaired by the fact that the intangibles constituting the trust res were located outside of California.

Appeal of C. H. Wilcox, November 15, 1939.

We must reach the inescapable conclusion that entire income of all three trusts is taxable to Appellant. While his obligations to his former wife and minor children were satisfied by the creation of the trusts before he became a resident of California he has a continuing, contingent liability under the terms of the settlement agreement, issued later than the divorce decree, and referred to therein. The trusts created in 1929 merely modified the means of meeting the obligation, and inherited the responsibilities outlined in the divorce decree.

The transfer of securities of Adelaide Tremaine in 1936 is subject to tax under the capital gains provisions of the Personal Income Tax Act. We cannot differentiate between the transfer to securities with a "cost base" of \$10,829.25 and a market value of \$25,025.00, and an actual sale. The securities could have been sold readily for \$25,025.00, and that amount paid in cash to Adelaide Tremaine. An account payable was extinguished through the relinquishment of the securities, and to declare the transaction non-taxable would provide an avenue for escape from tax on realized increment.

O R D E R

Pursuant to the views expressed in the opinion of the Board

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on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Chas. J. **McColgan**, Franchise Tax Commissioner, in overruling the protests of B. Carl Tremaine to the proposed additional assessment of \$1,255.75 for the taxable year 1936 be, and the same is hereby sustained.

Done at Sacramento, California, this 15th day of July, 1943,
by the State Board of Equalization.

R. E. Collins, Chairman
J. H. Quinn, Member
Geo. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary

