

In the Matter of the Appeals of)
GEORGE S. GAYLORD and GERTRUDE H. GAYLORD)

Appearances :

For Appellants : Thomas A. J. Dockweiler,
Attorney at Law

For Respondent: W.M. Walsh, Assistant Franchise Tax
Commissioner; James J. Arditto,
Franchise Tax Counsel; and Hebard P.
Smith, Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18593 of the Revenue and Taxation Code (formerly Section 19 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner on the protests of George S. Gaylord and Gertrude H. Gaylord, his wife, to proposed assessments of additional tax in the amounts of \$2,608.04 and \$193.18, respectively, for the taxable year ended December 31, 1936.

The Appellants, on November 7, 1935, executed a trust instrument whereby they declared themselves trustees of 7,000 shares of the common stock of Marathon Paper Mills Company, Mr. Gaylord contributing 5,000, or 5/7 of the total, from his Separate property and Mrs. Gaylord 2,000, or 2/7, out of her separate property. The primary beneficiaries were the Appellants' daughter: Margaret Gaylord Ruppel and Gertrude Gaylord, who on the date the trust was executed were 31 and 19 years of age, respectively. The trust was to continue for a maximum period terminating with Gertrude's 30th birthday, i.e., for approximately 11 years. Each beneficiary was to share equally in the entire net income of the trust and upon the termination thereof, if each survived, an equal share of the corpus was to vest in each. Provision was made also for the disposition of the corpus in the event of the death of either daughter or both. This included a possible vesting of the corpus in Mrs. Gaylord if she survived both.

The trust instrument did not state that the trust was irrevocable. It appears, however, that the Appellants intended to make it such and, upon the advice of the attorney who prepared the instrument, thought that it was. On this assumption they filed Federal gift tax returns for the year 1935 in which they reported the transfers of the Marathon stock to an irrevocable trust. Subsequently, in 1940, they recorded an instrument wherein they expressly declared their intention to make the trust irrevocable as of and from the date of its creation. In addition,

Appeals of George S. and Gertrude H. Gaylord

fiduciary income tax returns for the trust were filed for the years following 1935, in each of which the beneficiaries were shown as entitled to the trust income. Each beneficiary, in turn, filed an income tax return in which she reported the distribution of the trust income to her.

The trust instrument contained provisions under which Appellants, as trustees, were given virtually absolute and uncontrolled discretion over the management and disposition of the trust property. They were expressly vested with "the same and all the powers and discretions that an absolute owner of property has or may have." Included specifically were the power to sell, mortgage, lease or otherwise dispose of the trust corpus; to lend, invest or reinvest any trust property or income; to compromise and settle all claims against the trust; and to exercise the voting rights incidental to any shares of stock owned by the trust. The trustees were also authorized, "in their sole judgment and discretion," to apply any beneficiary's share of the trust income for the care, maintenance, support and education of the beneficiary, rather than pay her the income directly. In making any distribution of corpus to the person or persons entitled, the decision of the trustees as to the property allotted to any beneficiary, and its relative value, was to be conclusive on all persons interested. Indeed, so also was to be any decision of the trustees as to any matter within their discretion.

The Commissioner determined that the 1936 income of the trust was taxable to the Appellants in shares proportionate to their contributions to the trust corpus. In so doing he was primarily of the mind that the trust was revocable under Section 2280 of the Civil Code since it did not expressly provide for its irrevocability, and accordingly, that the income therefrom fell within subsection (g) of Section 12 of the Personal Income Tax Act, as enacted in 1935, under which the income from a trust is to be deemed that of the trustor if he has retained power to re-vest in himself the title to the trust corpus. The Commissioner also felt that, aside from revocability, the trust income was properly to be regarded as the Appellants' own income because they had never really relinquished control over the trust property.

The Appellants have expressed their dissatisfaction with the Commissioner's action on several grounds, but principally by reason of their intent to make the trust irrevocable and, consistent therewith, their course of conduct ever since the inception of the trust. They claim, too, that the trust was not a "voluntary" one and therefore not within the purview of Section 2280 of the Civil Code. Finally, they urge that it was intended that the trust be operative under laws of jurisdictions other than California, since it named a Chicago trust company as a possible successor trustee if the Gaylords resigned and no other trustee was appointed, and because some of the trust property had been invested in Texas in 1938 and the trust instrument had

"

Appeals of George S. and Gertrude H. Gaylord

been recorded in several of the counties of that State in implementation of such investment, They state in this regard that the law in Texas and elsewhere outside of California is that a trust is irrevocable unless the trust agreement expressly provides otherwise.

It is unnecessary, however, for us to enter into an extended discussion of the merits of the Appellants' position. The Commissioner of Internal Revenue determined deficiencies to be due from Appellants under the federal income tax law, the pertinent portions of which are similar to the California law, for the year here in question upon the same theory relied upon by the Franchise Tax Commissioner, i.e., that the income from the trust should be treated as that of the Appellants. The same objections offered here were urged in judicial proceedings against the federal liability, but those objections were held to be unsound. Gaylord v. Commissioner of Internal Revenue, 153 Fed. 2d 408, affirming 3 T.C. 281. Upon the basis of the decision in that case and the authorities cited therein, the action of the Franchise Tax Commissioner must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the Board in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, on the protests of George S. Gaylord and Gertrude H. Gaylord to proposed assessments of additional tax in the amounts of \$2,608.04 and \$193.18, respectively, for the taxable year ended December 31, 1936; be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of November, 1948.

Wm. C. Bonelli, Chairman
G. R. Reilly, Member
J. H. Quinn, Member
J. L. Seawell, Member

ATTEST: D. L. Pierce, Secretary