



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
J. F. BARRETT, ELISE C. BARRETT,)
H. H. HILP and ADELAIDE W. HILP)

Appearances:

For Appellants: Lawrence Livingston, Attorney
at Law

For Respondent: 'Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax
Counsel

O P I N I O N

These appeals are made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of J. F. Barrett, Elise C. Barrett, H. H. Hilp and Adelaide W. Hilp to proposed assessments of additional personal income tax against them in the amounts of \$15,027.61, \$11,892.32, \$15,548.01 and \$11,433.97, respectively, for the year 1941.

Elise C. Barrett is the wife of Appellant J. F. Barrett and Adelaide W. Hilp is the wife of Appellant H. H. Hilp. The two husbands have been partners since 1931 in a firm engaged in heavy construction work, Until 1941 they were the only partners and each held an equal interest in the firm, The partnership interest of each was community property.

In the year 1941 each partner discussed with his wife a plan to give to their children in trust a 20% interest in the partnership, with the trustees to become limited partners. Each of the wives orally approved the plan and told their respective husbands to go ahead with it in the manner they thought best. In the latter part of July, 1941, at a meeting with their attorney, Lawrence Livingston, and their accountant, Edwin C. Nelson, each of the partners orally declared for his children a trust consisting of a 20% interest in the partnership, Mr. Livingston was to be trustee for Mr. Hilp and Mr. Barrett was to be his own trustee until another was decided upon. The trusts were stated to be irrevocable. The trustees were to be limited partners and Appellants Barrett and Hilp were to remain as general partners, each with a 30% interest and an annual salary of \$30,000. Mr. Nelson was instructed to set up new partnership books as of

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August 1, 1941, with the trustees as limited partners. As Mr. Livingston was in ill health at the time of this meeting, the preparation of written agreements covering the several transactions was deferred pending his recovery. After the meeting, each partner told his wife of the arrangement and both wives orally approved of it,

On August 1, 1941, new books of original entry, comprising records of cash receipts and disbursements, vendors' invoices and payrolls were set up for the limited partnership. Early in August a general ledger was opened which included capital accounts for the Barrett and Hilp trusts. Actual balances for the assets, liabilities and partner's capital accounts as of August 1, 1941, were not, however, inserted in the new general ledger until about November 30, 1941, when the balances were established by audit. In October, 1941, a payroll tax return was filed for the old partnership for July, 1941, and for the new partnership for the months of August and September.

According to the Appellants' best recollection as to dates, the following series of transactions occurred between the middle of November and the end of December, 1941. On or about November 26 the partners executed, and their wives ratified and approved, a written agreement of dissolution of partnership. This agreement was dated August 1, 1941. On November 28 the partners signed, and the wives ratified and approved, a letter of instruction addressed to their bank which stated in part: "On August 1, 1941, we entered into an agreement of limited partnership and we now notify you accordingly."

J. F. Barrett and H. H. Hilp executed, and their wives ratified and approved, a written agreement of limited partnership with Edmond J. Barrett, brother of J. F. Barrett, and Lawrence Livingston, trustees. At some time subsequent to December 10, J. F. Barrett made a written assignment of a 20% interest in the partnership to his brother as trustee for the Barrett children and H. H. Hilp made a similar assignment to Mr. Livingston as trustee for the Hilp children. On each assignment the donor's wife endorsed a statement that she joined in and approved the gift. Declarations of trust, expressly stated to be irrevocable,, were executed by the respective trustees and were consented to and approved in writing by the husbands and wives. The agreement of partnership, the assignments and the declarations of trust were all dated August 1, 1941. A certificate of limited partnership was filed on December 31, 1941.

The issue for determination is whether the income of the trusts, for the period August 1 to December 31, 1941, is taxable to the Appellants. For the period in question, Section

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12(g) of the Personal Income Tax Act provided in part as follows:

"Where the title to any part of the corpus of the trust may at any time revert in the grantor without the consent of any person having a substantial Adverse interest in any part of the corpus or the income therefrom, and the reversioning is not contingent upon the death of all the beneficiaries, then the income of such part of the trust shall be included in computing the net income of the grantor...++

Section 2280 of the Civil Code provided in part:

"Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee...,,++
(Emphasis added,)

Appellants contend that these were not "voluntary" trusts within the meaning of Section 2280 because they were supported by consideration. They allege that the trusts were parts of a plan to create a limited partnership and that there were mutual benefits and detriments to the two families. There is nothing in the affidavits of the Appellants, upon which we have relied primarily for the facts in this matter, to indicate that the trusts were supported by consideration. On the contrary, the trust documents designate the transfer as gifts and state that they were made without consideration except love and affection for the children.

Even if there were consideration of some kind, it does not follow that these were not voluntary trusts. Appellants rely upon Touli v. Santa Cruz County Title Co., 20 Cal. App. 2d 495. There, in holding that a deed of trust is merely an instrument of security and is not governed by sections of the Civil Code relating to trusts, the court said that the expression "voluntary trust++ was used in Section 2280 in "the restricted sense of a trust created freely and without a valuable consideration or legal obligation.++ But the later cases of Fernald v. Lawsten, 26 Cal. App. 2d 552 and Title Insurance and Trust Co. v. McGraw, 72 Cal. App. 2d 390, hold that the word "voluntary++ in Section 2280 has the same meaning as in Section 2216 and other sections of the Civil Code. We conclude, accordingly, that the trusts created by the Appellants are voluntary trusts and subject to Section 2280.

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There remains the question whether under Section 2280 a trust must be in writing to be irrevocable. This turns upon the meaning of the word "instrument" as used therein. The decisions in this State seem to establish beyond question that "**instrument**" as used in our statutes in any sense approaching its use in Section 2280 imports a written document,

As early as 1880 the Supreme Court of California in Hoag v. Howard, 55 Cal. 564, made this observation:

"If we look into the provisions of the (Civil) Code in which the word 'instrument' is used, it will be invariably found to indicate some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty."

Again in Foorman v. Wallace, 75 Cal. 552, the court stated:

"An instrument is a writing which contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances, leases, mortgages, bills, bonds, promissory notes, wills, **etc.**" (Emphasis by the court.)

See also Cardenas v. Miller, 108 Cal. 250 and Jennings v. American President Lines, Ltd., 61 Cal. App. 2d 417.

In support of their contention that the "**instrument**" creating the trust does not have to be in writing the Appellants cite the case of Loch v. Mayer, 100 N.Y.S. 837. This case was concerned with the disposition of a remaining balance of public contributions made for the victims of a certain disaster. A statute permitted the court to direct the administration of charitable gifts where conditions had so changed as to render impracticable a literal compliance with the terms of the "**instrument**" containing the gift. The court stated that "'An instrument' in the ordinary accepted sense is a document or **writing.**" Under the circumstances there present, however, it deviated from that definition to hold that the statute applied to the public contributions. Presumably, the funds otherwise would have been retained in perpetuity for disaster victims who no longer existed, since the doctrine of cy-pres was not recognized by New York except as to trusts subject to the statute in question.

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The constraining influence upon the court to give a broad interpretation to the statute in that case is obvious. Generally; however, words in a statute are to be given their ordinary meaning unless otherwise clearly intended or indicated (Estate of Richartz, 45 Cal. 2d 292, holding that an insurance policy means a written instrument). There is no clear intent here that "instrument" should be given an extraordinary meaning. On the contrary, it is apparent that the Legislature meant to place strictures upon the creation of an irrevocable trust to protect unwary trustors (see 28 Calif. Law Review, 202, 208). That a trust must be in writing in order to be irrevocable is entirely consonant with that purpose.

Appellants have also cited Fleishman v. Blechman, 148 Cal. App. 2d 88, Newman v. Commissioner, 222 Fed. 2d 131, and Gaylord v. Commissioner, 153 Fed. 2d 408, urging that these cases impliedly recognized that voluntary oral trusts may be irrevocable. The first two of these cases held that the trusts were revocable because they were not made expressly irrevocable and the court in the third case found that there was no trust whatever. These cases did not reach the question here presented.

It is also suggested that if "instrument" means a writing, then Section 2280 does not apply to oral trusts and such trusts are governed by the common law, under which a trust is irrevocable unless stated to be revocable. This does not follow. Under Section 2280 "every voluntary trust" is revocable unless it is a written trust which is expressly made irrevocable.

Since the Appellants have been unable to fix the exact date on which the trust instruments were finally executed, we have no alternative but to accept the statement of the Franchise Tax Board that it was on December 31, 1941. We conclude, therefore, that the trusts in question were voluntary oral trusts during the period from August 1, 1941, to December 31, 1941, that as such the trusts were revocable until December 31, 1941, and that, accordingly, the income therefrom was taxable to the trustors.

O R D E R

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

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of J. F. Barrett, Elise C. Barrett, H. H. Hilp and Adelaide W. Hilp to proposed assessments of additional personal income tax for the year 1941 in the amounts of \$15,027.61, \$11,892.32, \$15,548.01 and \$11,433.97 against them, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of February, 1958, by the State Board of Equalization.

George R. Reilly, Chairman

J. H. Quinn, Member

Paul R. Leake, Member

Robert E. McDavid, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary