



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
SAI ULL GREENBERG, TRUSTEE)

Appearances:

For Appellant: Emanuel Rothman, Attorney at Law
For Respondent: Burl D. Lack, Chief Counsel

O P I N I O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Samuel Greenberg, Trustee, against proposed assessments of additional personal income tax in the amounts of \$781.03 and \$824.30 for the years 1955 and 1956, respectively.

Appellant is the trustee under the will of Louie Greenberg, who created testamentary trusts which he designated as "Trust Estate A" and "Trust Estate B." Appellant has regularly maintained separate records for each of seven beneficiaries under "Trust Estate A" and has filed seven separate returns of the income from "Trust Estate A." The additional tax involved resulted from Respondent's treatment of "Trust Estate A" as but one trust with several beneficiaries. For reasons that do not appear in the record, there is no issue before us as to "Trust Estate B."

After this appeal was filed a superior court, upon the uncontested petition of Appellant, issued an order pursuant to Section 1120 of the Probate Code settling the first account of the Appellant as trustee. The order stated that the decedent intended to establish separate trusts under "Trust Estate A" and that the administration of the trustee on that basis was approved.

A decree rendered under Section 1120 of the Probate Code is, as provided by Section 1123 of that code "conclusive upon all persons in interest, ..." As a general rule, limitations thus placed on the rights of "persons" are not binding upon the state; the state is bound only if the intent to so restrict it is clearly and necessarily implied. (Berton v. All Persons, 176 Cal. 610 [170 Pac. 1513; Bayshore Sanitary District v. County of San Mateo, 48 Cal. App. 2d 337 [119 P. 2d 752]; Philbrick v. State Personnel Board, 53 Cal. App. 2d 222 [127 P. 2d 634].)

Appeal of Samuel Greenberg, Trustee

In considering this matter we have examined the case of Estate of Radovich, 4% Cal. 2d 116 [308 P. 2d 14]. There the court found that the State Controller was bound for inheritance tax purposes by a contested order of a probate court in heirship proceedings under Section 1080 et seq. of the Probate Code. The court pointed out that the inheritance tax depended on the probate court's findings as to heirship, that death is the "generating source" of the tax and that, accordingly, "a cardinal purpose of the inheritance tax law would be to coordinate its assessment as closely as possible with the substantive probate law regulating the distribution of the decedent's estate." The court's conclusion, obviously, was reached because of the intimate relationship between the inheritance tax law and the probate proceedings. That relationship is unique; there is no parallel to it in the matter before us',

Far from finding a clear implication of an intent to bind the state here, it appears to us that it would be a mockery to hold the state bound for income tax purposes by language in an uncontested order obtained in ex parte proceedings, after the income tax issue had arisen and while it was in the course of determination under prescribed procedures, and where the only apparent aim in petitioning to include the pertinent language was to affect the income tax proceedings. Our conclusion is that the state is not bound. This conclusion is consistent with the views of the majority of Federal Courts which, although indicating that they would normally follow a State Court determination of property rights touching upon the application of Federal taxes, have refused to do so under circumstances such as those here involved. (James S. Reid Trust, 6 T. C. 438; Estate of Arthur Sweet, 24 T. C. 488, aff'd 234 F. 2d 401, cert. denied 352 U. S. 878 [1 L. Ed. 2d 79]; Faulkerson's Estate v. United States, 301 F. 2d 231, cert. denied 371 U. S. 887 [9 L. Ed. 2d 121]; Colowick, The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case (1957) 12 Tax L. Rev. 213.)

We will therefore proceed to consider the matter before us on its merits,

Under the terms of the trust instrument, there were established a "Trust Estate A," consisting primarily of a partnership interest in a business known as Sam's-U-Drive, and a "Trust Estate B," comprising the rest of the trustor's estate. Each "Trust Estate" was to be divided, without the necessity of physical separation, into three equal shares, one for the trustor's daughter, Rachel, one for the children of the trustor's son, Samuel, and one for the children of the trustor's other son, Jacob. Each "Trust Estate" was to continue until the death of Paula, the trustor's wife, after which "Trust Estate B" was to be distributed immediately and "Trust Estate A" was to be distributed as soon as the partnership interest of which it consisted was sold by the trustee.

Appeal of Samuel Greenberg, Trustee

If Rachel were to die before the termination of both "Trust Estate A" and "Trust Estate B," then 25 percent of the income from her share was to be paid as appointed by her to her surviving spouse and the rest, or all in the absence of such an appointment, to her children in equal shares. The share of income attributable to a deceased child was to go to his issue, subject to the exercise of a power to appoint 25 percent of it to his surviving spouse, and if he had no issue his share was to be added to the income of other children of Rachel and of the issue of any deceased child of Rachel. If there were no such children or issue surviving him, the income of a deceased child was to go as appointed by Rachel and in the absence of such an appointment the income was to be added to the income from the shares set aside for the children of Samuel and of Jacob.

The income from the "shares" (using the language of the trust instrument) set aside for the children of Samuel was to be added to the principal of the respective trust estates until all of his children were 25 years old. Thereafter, they were to receive the income. The share of income attributable to a deceased child was to go to his issue, to other children of Samuel or to their issue according to provisions similar to the above provisions regarding Rachel. If none of Samuel's children or their issue survived, then Samuel was to receive the income and if he also was deceased, the income was to be paid as previously appointed by him. In the absence of such an appointment the income was to be added to that of Rachel and of Jacob's children.

The provisions with respect to the income from the "shares" for Jacob's children were parallel to those regarding Samuel's children, with parallel possibilities of distribution to Rachel and to Samuel's children.

In the event of Rachel's death before the complete distribution of both "Trust Estate A" and "Trust Estate B" the distribution of her share of the principal was to be made in the manner provided in connection with the income from her share,

The shares of the principal held for the children of Samuel were not to be distributed to them in any event until they were all 25 years old and so also as to Jacob's children. The share attributable to a deceased child of Jacob or Samuel was to be distributed in the same way that the income was to be paid, as previously described.

Stating that "In connection with decedent's Trust Estate (which has been divided into separate and independent trusts designated 'Trust Estate A' and 'Trust Estate B')", the trust provisions permitted Paula, the trustor's wife, to receive as needed for her support up to 10 percent of the principal of the respective trusts, annually. A "beneficiary under either of the trusts" was allowed to receive as needed for his support up to

Appeal of Samuel Greenberg, Trustee

10 percent of his share of the principal each year. It was provided that "Advances shall first be paid from the principal of Trust Estate B until said Trust Estate B is completely exhausted; thereafter, advances may be made from the principal of Trust Estate A." The trustee was permitted to pay the expenses of administration from either income or principal according to the best interests of the "Trust Estates" or for the benefit of any beneficiary.

Appellant's position is that under "Trust Estate A," seven trusts were created, one for the trustor's daughter Rachel, two for the two children of the trustor's son, Jacob, and four for the four children of Samuel, the trustor's other son.

The trust instrument here involved, which covers 14 pages and is in great detail, refers throughout to "Trust Estate A" as a single trust. This indication of the trustor's intent should be followed unless it is established clearly that he actually intended to create several trusts. (Hale v. Dominion National Bank, 186 F. 2d 374, cert. denied 342 U. S. 821, 96 L. Ed. 621]; Huntington National Bank v. Commissioner, 90 F. 2d 876; Langford Investment Co. v. Commissioner, 77 F. 2d 468; Fort Worth National Bank v. United States, 137 F. Supp. 71; William L. Mellon Trusts, 11 T. C. 135, aff'd 174 F. 2d 828.)

Although not conclusive (United States Trust Co. v. Commissioner, 296 U. S. 481 [50 L. Ed. 340]), a description in the trust instrument of each beneficiary's interest as a "share," as was the case here, tends to show one trust with several beneficiaries. (James S. Reid Trust, 6 T. C. 438.) In McHarg v. Fitzpatrick, 210 F. 2d 792, it was held that separate trusts were created where "Each 'share,' during the whole period of its existence in trust, was as completely isolated from all other 'shares' in composition, in beneficiary, and in duration, as though they had all been set up by separate deeds" Unlike the situation in McHarg, the whole of "Trust Estate A" was designed to terminate at one time. Pursuant to the terms of the trust instrument, moreover, each beneficiary was given a contingent right to receive in trust the share of income or principal of every other beneficiary. Regardless of the number of conditions which must be met before the right matures, the existence of the right indicates the existence of a single trust. "The proper test is whether there is a possibility that a beneficiary may receive in trust a portion of the 'share' of a deceased beneficiary, not that such must be an absolute certainty." (Fort Worth National Bank v. United States, 137 F. Supp. 71, 75.)

Appellant argues that the trustor must have intended that "Trust Estate A" comprise separate trusts because of provisions in the trust instrument (1) that the beneficiaries in case of need could draw from the principal of "Trust Estate A" *only* after

Appeal of Samuel Greenberg, Trustee

"Trust Estate B" was exhausted and (2) that the trustee could pay trust expenses from either principal or income according to the best interests of the trust estates or for the benefit of any beneficiary. Appellant assumes that provision (1) means that a beneficiary may draw from his portion of "Trust Estate A" as soon as his portion, rather than all, of "Trust Estate B" is exhausted. Whether or not this interpretation is correct, both provision (1) and provision (2) could be administered by looking to the share of each beneficiary as well as by treating each share as a separate trust.

The fact that the trustee has consistently filed separate returns of the income from "Trust Estate A" is a factor to be considered but is not controlling. (Huntington National Bank v. Commissioner, 90 F. 2d 876.) Because of the tax benefits to be derived, a trustee would naturally be inclined to treat each share as a separate trust.

In our opinion, the language and tone of the trust instrument clearly demonstrate the intent of the trustor that "Trust Estate A" was to be a single trust and we see no compelling reason to find that he intended otherwise.

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,

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 Samuel Greenberg, Trustee, against proposed assessments of additional personal income tax in the amounts of 5781.03 and \$824.30 for the years 1955 and 1956, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of August, 1963, by the State Board of Equalization.

John W. Lynch , Chairman
Paul R. Leake , Member
Geo. R. Reilly , Member
_____, Member
_____, Member

ATTEST: H. F. Freeman -Secretary