63-SBE-147

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WALTER L. AND EMILY SCHOTT)

Appearances:

For Appellants: Edward Sumner, Attorney at Law

For Respondent: Crawford H. Thomas, Associate Tax Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Walter L. and Emily Schott to proposed assessments of additional personal income tax in the amounts of $281.34 and $2,048.40 for the years 1955 and 1956, respectively.

In 1953 appellant Walter L. Schott established a trust for each of his four children. The four trust agreements were identical in wording except for the identification of the particular child as beneficiary. During, the years on appeal the trusts received income from the trust property and it is respondent's contention that such income is taxable income of the grantor of the 'trusts, Walter L. Schott.

Section 17789 of the Revenue and Taxation Code provides that the grantor of a trust "shall be treated as the owner of any portion of a trust ... where at any time the power to revest in the grantor title to such portion is exercisable by the grantor,..." and section 17781 provides that where the grantor is thus treated as the owner of any portion of the trust the income of such portion of the trust shall be taxable to the grantor. Section 2280 of the Civil Code provides, 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. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate ...

Appellants. argue that the trusts were intended to be irrevocable and that the following provision of the trust agreements constitutes sufficient compliance with section 2280 of the Civil Code to accomplish the intention:

> The Trustees shall be vested with full and complete title to al 1 the personal property above set forth' and such 'other property as may be added under the terms of this agreement ... and neither the Grantor nor any Donor shall have any interest therein.

Although the above quoted language makes it clear that the grantor has transferred all of his title and interest in the trust property to'the trustees, as is characteristic of most trusts, it is not at all conclusive from the language that the grantor has abandoned his right to revoke the trust and regain his title and interest. Pursuant to section 2280, a trust is revocabl e unless expressl y made i rrevocabl e. "Express1 y" means cl early , distinctly or in direct terms, not inferentially or impl iedly (Newman v. Commissioner, 222 F.2d 131.) On Fernald v. Lawsten, 26 Cal . App. 2d 552 (79' P.2d 742), a trust was held revocable by the grantor alone even though the instrument provided that the trustee was to hold the property during the life of the grantor "unless otherwise agreed upon in writing by the parties hereto." Despite the implication that the trust could be terminated during the grantor's life only by written agreement between the trustee and the grantor the court said that "Since the document is not expressly made irrevocable, it may be revoked in the manner provided by section 2280 of the Civil Code."

The case of Ball v. Mann, 88 Cal. App. 2d 695 (199 P.2d 706), which is cited by appellants, is not in point, The question there was whether the trust property was to revert to the grantors under the terms of the trust agreement. The matter of revocation and the impact of section 2280 were not discussed.

Appellants also rely upon amendments to the trust agreements whereby in 1961, after the tax question was raised by respondent, the trusts were expressly made irrevocable. Such amendments, however, cannot retroact ivel y change the income tax consequences for the years on appeal, 1955 and 1956. (Gavl ord . Commissioner, 153 F.2d 408.)

In our view, the trusts here involved were revocable by the grantor in 1955 and 1956. Therefore, respondent ' s act ion w i 11 be upheld.

ORDER

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 Taxat ion Code, that the action of the Franch ise fax Board, on the protest of Walter L. and 'Emily Schott to proposed as'sessments of additonal personal income tax in the amounts of $281 .34 and $2,048.40 for the years 1955 and 1956, respect ively , be and the same is hereby sustained .

Appeal of Walter L. and Emily Schott

Done at Sacraniehto, Cal ifdrnia, this 11th day of December, 1963, by the State Board of Equalization.

John W. -Lynch, Chairman

Paul R. Leake, Member

Geo. R. Reilly, Hember

Richard Nevins, Hember

_____, Member

Attest: H.F. Freeman, Secretary