



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
AILEEN DOWSETT WHITE AND OSBORNE)
WHITE, EXECUTORS OF THE WILL OF)
F. LLEWELLYN DOWSETT, DECEASED)

Appearances:

For Appellants: Allen M. Singer
Attorney at Law

For Respondent: Israel Rogers
Associate Tax 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 Aileen Dowsett White and Osborne White, executors of the will of F. Llewellyn Dowsett, deceased, against proposed assessments of additional personal income tax in the amounts of \$943.88, \$1,540.34, \$1,553.75 and \$1,866.61 for the years 1958, 1959, 1960 and 1961, respectively.

In 1927, F. Llewellyn Dowsett (hereinafter referred to as "appellant") placed certain intangible personal property in an irrevocable trust. Appellant was then a resident of Hawaii. The original trustees resigned in 1932, and by order of a Hawaiian court, legal title to all of the trust property was vested in the Cooke Trust Company, Ltd., and George W. Sumner, both residents of Hawaii, as trustees. They served in this capacity until the trust terminated upon the death of appellant in 1962. The physical evidences of the trust property were at all times in the trustees' possession in Hawaii.

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The Dowsett trust, following the 1932 court order, provided that the net income thereof was to be paid to appellant during his life. The remainder of the trust estate was to be held for the benefit of appellant's children or his heirs at law. We retained a testamentary power to appoint the remainder among his children, but it was not exercised since appellant never married and had no children.

The trust also granted appellant the power during his lifetime to appoint all or any portion of the trust corpus to his wife, issue, or collateral relatives. This power required the consent of one of the trustees. The trustees were granted the power to sell the trust property and invest the proceeds in other securities, but no sale or investment could be made without appellant's written consent.

During the four years involved in this proceeding, the trustees actively performed their trust duties and exercised their powers of trust management. The trust annually received dividend and interest income averaging more than \$60,000. There were an average of nine sales, redemptions or exchanges of securities per year and an equal number of purchases. Substantial fees were disbursed for legal, tax, accounting and other services rendered to the trust. The trustees regularly sent appellant statements showing all receipts and disbursements and paid to him the net trust income.

Appellant, who was a California resident during the years on appeal, paid a net income tax to Hawaii on the income distributed to him from the trust and claimed credits for the Hawaiian tax, pursuant to section 18001 of the Revenue and Taxation Code, on his California personal income tax returns. The instant assessments arose from the Franchise Tax Board's disallowance of those credits.

Subject to certain conditions, section 13001 allows residents a credit against their California personal income tax for net income taxes paid to another state. This credit is allowed only for "taxes paid to the other state on income derived from sources within that state," (Rev. & Tax. Code, § 18001, subd. (a).) Thus, the credit is applicable here only if appellant's trust income had a source in Hawaii.

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Respondent's primary position is that the intangible personal property held under the Dowsett trust had its situs, and thus, the income from the property had its source, in California, not Hawaii.

The term "sources," as used in section 18001, is to be interpreted in light of the cases existing at the time of its original enactment. (Miller v. McColgan, 17 Cal. 2d 432 [110 P.2d 419].) Based upon the decisions existing at the time section 25, subdivision (a), of the Personal Income Tax Act of 1935 (the predecessor of section 18001) was enacted, we recently held that trust income from intangibles which were in the possession and control of trustees residing in Hawaii, under active trusts, was income derived from sources in Hawaii. (Appeal of Estate of Douglas C. Alexander, etc., Cal. St. Bd. of Equal., Jan. 4, 1966; Appeal of Kenneth S. and Margaret S. Lidgate, Cal. St. Bd. of Equal., Jan. 4, 1966; Appeal of Clifford and Violet P. Spitzer, Cal. St. Bd. of Equal., Jan. 4, 1966; Appeal of Samuel and Dorothy V. Pearson, Cal. St. Bd. of Equal., Jan. 4, 1966. See also, Appeal of C. H. Wilcox, Cal. St. Bd. of Equal., Nov. 15, 1939.)

It is respondent's alternative position, however, that the Dowsett trust differs materially from those in the other appeals. It contends that the trust appellant created was a passive or dry trust and that the issue is therefore controlled by the California Supreme Court's decision in Robinson v. McColgan, 17 Cal. 2d 423 [110 P.2d 426].

The term "dry trust" refers to a trust wherein the trustee has no actual responsibilities and no active duties to perform. (Estate of Shaw, 198 Cal. 352 [246 P. 48]; Gray v. Union Trust Co., 171 Cal. 637 [154 P. 306].) The beneficiary is entitled to actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyance of the legal estate as he directs. (Ringrose v. Gleadall, 17 Cal. App. 664 [121 P. 407].) These definitions closely parallel the trust described in Robinson v. McColgan, supra, wherein the court stated:

The stock certificates ... were simply held by the Bank of America in a living trust in San Francisco for the sole purpose of receiving the dividends thereon and forwarding the same

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to plaintiff. This trust had no fixed situs in California, but could be removed from the state at any time by the plaintiff, the trustor, without any previous consent of the trustee bank. The latter had no duties under this trust other than as custodian of these certificates of stock to send the income from the trust to the plaintiff, the trustor. The only asset of this trust was the aforementioned stock, and the trustee bank had no power to sell, invest or reinvest the trust corpus or property, nor had it any active duties of trust management.

Describing this as a "naked" trust, the court found that the situs of the stock held by the trustee bank, and thus the source of the dividends thereon, was at the residence of the plaintiff, who was both trustor and beneficiary.

While the power of the trustees in the present case to sell and invest the trust property was subject to appellant's consent, this was a limitation rather than an elimination of that power. Appellant retained a veto right but only the **trustees** were empowered to sell the trust property or make reinvestments. Moreover, the trustees were required to determine the amount of the trust's net income and allocate amounts received between corpus and income. In the performance of their duties they incurred substantial costs for the services of lawyers and accountants. It is true that the trust corpus was subject to appointment to certain limited classes of appointees under the powers appellant retained, but it cannot be said that he was entitled to actual possession and enjoyment of the property since he did not have the power to appoint to himself. We conclude that the Dowsett trust cannot be classified as a dry or passive trust.

Respondent has also suggested that, regardless of whether the trust was active or passive, appellant's trust income had a source in California and not in Hawaii because of the powers of appointment which he reserved. The proposition that the income had no source in Hawaii under these circumstances finds no support in the decisional law existing at the time of the enactment of the Personal Income Tax Act of 1935. In

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Bullen v. Wisconsin (1916) 240 U. S. 625 [60 L. Ed. 830], the Court found that intangibles held in trust were subject to inheritance tax at the residence of the trustor, who had reserved broad powers over the disposition of the trust corpus and income. At the same time, however, the Court recognized that the intangibles were taxable by the state in which the trustee and the physical evidence of the intangibles were located.

In our opinion, the income derived from the Dowsett trust had a source in Hawaii and appellant properly claimed credits for the Hawaiian taxes paid on that income.

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 Aileen Dowsett White and Osborne White, executors of the will of F. Llewellyn Dowsett, deceased, against proposed assessments of additional personal income tax in the amounts of \$943.88, \$1,540.34, \$1,553.75 and \$1,866.61 for the years 1958, 1959, 1960 and 1961, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 8th day
of February, 1966, by the State Board of Equalization.

Geo. H. Ferebee, Chairman
Daryl R. Leake, Member
John W. Linnich, Member
Richard C. Stein, Member
_____, Member

ATTEST: [Signature], Secretary