



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
CHARLES C. GENSLER AND B. E. KRAGEN, )  
TRUSTEES FOR THE BENEFIT OF DON SCOTT GENSLER )

Appearances:

For Appellants: Horace E. Cecchettini  
Attorney at Law

For Respondent: Pete-r S. Pierson  
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 Charles C. Gensler and B. E. Kragen, as trustees for the benefit of Don Scott Gensler, against proposed assessments of additional personal income tax in the mounts of \$16.39 and \$43.55 for the years ended April 30, 1962, and 1963, respectively.

The question presented by this appeal is whether the terms of the will hereafter described created a single trust or two separate trusts.

Goody J. Gensler died in California in 1962. By the terms of his will certain property was distributed to Charles C. Gensler and B. E. Kragen in trust for the benefit of Steven Charles Gensler and Don Scott Gensler, the decedent's grandsons. The will provided that:

- (a) My trustees shall hold the property of the trust estate for the benefit of my grandchildren, Steven Charles Gensler and Don Scott Gensler. My trustees are authorized to accumulate the income from the trust estate for the benefit of said children and to hold the same until distribution as hereinafter provided.

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At the time and in the manner hereinafter set forth, the property of the trust estate, both corpus and accumulated income, shall be distributed as follows: -

Each of said children shall be entitled to receive one-half of the corpus and accumulated income of the trust estate when each child attains the age of 30 years, and the balance thereof when each child attains the age of 40 years.

if either of said children dies before the time fixed for the termination of this trust as to said child, then his share of the corpus and accumulated income of the trust shall be paid and distributed, share and share alike, to the issue, if any, of the deceased child by right of representation.

If either of said children of my son, Charles C. Gensler, dies prior to the time fixed for the termination of said trust without leaving issue, then his share of the trust property shall go to the surviving issue of my said son under all of the terms and conditions of said trust,

In the event both of the children of my son die prior to the termination of said trust, then the trust shall terminate and my trustees shall distribute the property of the trust estate to my son, Charles C. Gensler, or, if he dies prior to said time, then this trust shall terminate and the property shall be distributed to my then lawful heirs according to the laws of the State of California.

(b) It is my desire, and I hereby direct, that unless it is necessary to use any portion of this trust fund for the care, education, maintenance and support of the child or children of my said son, or for any expense incurred by reason of emergency, the property be accumulated and no portion of the trust estate be used until its distribution as hereinabove set forth. However, in the event conditions are such that it is necessary, in the sole discretion of my trustees, to use any of the property, either income or

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principal, for the benefit of either of my grandchildren, they are vested with authority to do so, and while it is my desire that any money be used equally for each of my grandchildren, nevertheless, if it becomes necessary or advisable in the sole discretion of my trustees to use any portion of this fund in a manner in which the proceeds are expended not proportionately for the benefit of said children, my trustees are nevertheless so to do, and they shall not be held liable for any of such expenditures.

I anticipate, however, that my son should be well able to care for and educate his children, and it is my desire that the trust property be held and the income accumulated until distribution.

For each year on appeal, the trustees filed two income tax returns on the theory that two trusts had been created. Half of the trust income was reported on each return. Respondent determined that a single trust had been created and that all of the income was reportable in a single return for each of the years. Additional tax liability resulted from this determination and tile notices of proposed assessment There in question were issued,

The question of whether a trustor has created one trust or more than one trust depends primarily upon the expressions of his intent in the trust instrument. (Wells Fargo Bank etc. Co. v. Superior Court, 32 Cal. 2d 1 [193 P.2d 721]; Huntington National Bank v. Commissioner, 90 F.2d 876.)

Where, as in this case, the trustor consistently refers to his creation as a single trust, there must be a clear showing to support a finding that he actually created more than one trust. (Hale v. Dominion National Bank, 186 F.2d 374; cert. denied, 342 U.S. 821 [96 L. Ed. 621]; Fort Worth National Bank v. United States, 137 F. Supp. 71; Edward M. and Fred C. Hiecke Trust, 6 T.C. 30.)

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....

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Conversely, a single trust is indicated if the shares are not completely isolated and independent.

Unlike the situation in the McHarg case, there was no complete isolation or independence of shares under the terms of the trust instrument before us. The trustees here were permitted to use any part of the entire trust fund for the benefit of either grandson. If one of the grandsons should die, moreover, the surviving grandson would receive the decedent's share, or part of the decedent's share, in trust. The possibility that a surviving beneficiary could receive in trust a part of the share of a deceased beneficiary served to distinguish the McHarg case in Fort Worth National Bank v. United States, supra, 137 F. Supp. 71. Although the grandsons were apparently not the same age and thus were to receive their shares at different times, that fact does not compel a conclusion that there were separate trusts. (Fort Worth National Bank v. United States, supra; Langford Investment Co. v. Commissioner, 77 F. 2d 468; Edward M. and Fred C. Hiecke Trust, supra, 6 T.C. 30.)

Considering the terms of the trust instrument as a whole, we conclude that a single trust was created, Respondent's action must therefore be sustained.

ORDER

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

