

Anneal of Robert B. and Joanna C. Radnitz

corporation would lend appellant such sums as he might specify from time to time, up to a maximum aggregate amount of \$50,000. The loans would be repayable upon demand and were to bear interest at 4 percent per annum. In addition the corporation was authorized to reduce the outstanding loan balance by withholding any salary or other amounts payable to appellant.

Beginning in January of 1964 and continuing throughout the years in question, appellant withdrew funds from the corporation in varying amounts. These withdrawals were treated as loans in both the corporation's account books and appellant's personal records. Although appellant's withdrawals were offset periodically by cash repayments, by credits to his loan account for salary he did not draw, and by his payment of certain corporate debts, the balance due the corporation showed an increase at the end of each appeal year. The loan account transactions may be summarized as follows:

<u>Year</u>	<u>Withdrawals</u>	<u>Repayments</u>	<u>Balance</u>
1964	\$28,781.72	\$16,442.83	\$12,338.89
1965	24,746.28	17,479.60	19,605.57
1966	21,284.03	15,148.80	25,740.80

Appellant gave the corporation no security for his net withdrawals, but it appears that he was at all times solvent and able to repay the outstanding balance. Despite the fact that the loan agreement called for interest on the withdrawals, no interest was ever paid by appellant or accrued on the corporation's books.

Respondent determined that, to the extent of the corporation's earnings and profits, the difference between appellant's withdrawals and repayments in each year constituted dividends. Respondent's computation for each year was as follows:

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	1964	<u>1965</u>	1966
Accumulated earnings and profits, January 1	-0-	\$ 1,764.03	\$5,960.35
Plus: Income; or minus (loss)	<u>\$14402.42</u>	<u>11,463.00</u>	(740.83)
E & P available for dividends	14,102.42	13,227.03	5,219.52
Less: Dividend (net withdrawals)	<u>12,338.39</u>	<u>7,266.68</u>	<u>5,219.52*</u>
Undistributed E & P	<u>1,764.03</u>	<u>5,960.35</u>	-0-

* Limited by earnings and profits available for declaring a dividend.

Appellants protested the determination on the grounds that the withdrawals were loans, and they appeal from respondent's denial of that protest.

Whether a stockholder's withdrawals from a corporation are loans rather than taxable distributions of earnings is a question of fact to be determined from all the circumstances present in a particular case, and the controlling factor is whether at the time of each withdrawal the parties intended that it should be repaid. (Harry E. Wiese, 35 B.T.A. 701, aff'd, 93 F.2d 921, cert. denied, 1304 U.S. 562 [82 L. Ed. 1529]; Clark v. Commissioner, 266 F.2d 698; Chism's Estate v. Commissioner, 322 F.2d 956; Berthold v. Commissioner, 404 F.2d 119.) Withdrawals are deemed to be dividend distributions, as determined by respondent, unless the taxpayer can affirmatively establish that they were loans, and when the corporation is wholly owned by the person making the withdrawals, his control invites special scrutiny. (Ben R. Meyer, 45 B.T.A. 228; W. T. Wilson, 10 T.C. 251, aff'd, 170 F.2d 423; Appeal of Goodwin D. and Bessie M. Key, Cal. St. Bd. of Equal., Dec. 15, 1966.)

After considering all of the facts in this case, we cannot say that appellant has proved his intention to repay the net amount of the withdrawals. A particularly damaging factor is appellant's total disregard of the "loan agreement" provision requiring the payment of interest. His failure to pay, and the corporation's failure even to accrue, any interest strongly suggests that appellant never intended to be bound by the agreement. Appellant's argument that he had the right to waive any interest he owed the corporation is not supported by either of the cases cited. In Peter Theodore, 38 T.C. 1011, the taxpayer-shareholder waived the interest payments on a debt owed to

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him by his corporation. In John Hamilton Perkins, T.C. Memo., July 12, 1957, the court said that the taxpayer-shareholder's failure to pay interest on his note to the corporation indicated a withdrawal of funds rather than a loan, but for other reasons the court found the withdrawal there to be a loan.

As factors tending to show that the withdrawals were really loans, appellant places particular emphasis on his repayments and on the fact that his outstanding balance declined in each of the three years following the appeal years. The favorable significance of appellant's repayments, however, is considerably lessened by the fact that in each appeal year his repayments were offset by larger withdrawals. With respect to the declining balance in later years, it is not clear that the decline began before respondent questioned the withdrawals, and in any event the decline was insignificant. At the end of 1969, appellant still had possession of more than \$22,000.00 in withdrawn funds.

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 Robert G. and Joanna C. Radnitz against proposed assessments of additional personal income tax in the amounts of \$686.99, \$145.52, and \$174.30 for the years 1964, 1965, and 1966, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of May, 1971, by the State Board of Equalization=

[Signature], Chairman
[Signature], Member
John W. Lynch, Member
_____, Member
_____, Member

ATTEST: [Signature], Secretary