BEFORE THE STATE BOARD OF WUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LEONARD J. AND LORRAINE K. MEYBERG)

Appearances:

For Appellants: Phillip Singer
Attorney at Law

For Respondent: Richard A. Watson
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 Leonard J. and Lorraine K. Meyberg against proposed assessments of additional personal income tax in the amounts of $286.41 and $1,129.04 for the years 1964 and 1965, respectively.

This matter was consolidated, for purposes of hearing and decision, with the Appeal of Penn Co., Ltd., decided this day. Since the resolution of t the primary issue in this appeal is controlled by our determination in Penn Co., Ltd., we adopt the findings and conclusions set forth therein. They are summarized below.

Penn Co.,Ltd., was incorporated in 1931. However, no stock was ever issued, The original three incorporators were employed by appellant Leonard J. Meyberg. The corporation acquired the Highland Property in 1935 for a recited consideration of $10.00. A 50-cent revenue stamp was affixed to the deed indicating that the net value of, or the net consideration paid for, the realty conveyed was $500.00 or less. In 1964, by corporation grant deed, Penn Co.,Ltd. conveyed the property for a recited consideration of $42,500.00. In that year the purchaser paid the corporation $12,000.00 in cash and gave Its note to Penn Co.,Ltd.,for $30,500.00. The note was paid in full in 1965. From these proceeds Penn Co.,Ltd.,distributed $11,535.44 and $30,500.00 to appellants in 1964 and 1965, respectively.

Appellants treated the sale of the Highland Property as though it had been owned and sold by them individually, reporting It on the installment basis in their 1964 Joint personal income tax return, In calculating their purported capital gain, appellants maintained that they paid $8,000.00 for the property Initially and Incurred selling expenses of $290.25. Appellants reported that they received $12,000.00 from the alleged sale in 1964. However, appellants did not report the $30,500.00 which they received from Penn Co., Ltd., In 1965.

After an audit respondent determined that the gain on the sale of the Highland Property was properly attributable to Penn Co.,Ltd., and that the property had a basis of $500.00. Respondent then computed the gain as $41,709.75 ($42,500.00 selling price less $500.00 cost basis and $290.25 selling expense) and determined that the proceeds distributed to appellants were dividends taxable to them as ordinary income. Although appellants reported the receipt of $12,000.00 in 1964, respondent conceded that they actually received only $11,535.44 from Penn Co.,Ltd., in 1964.

The primary question for determination is whether respondent properly determined that the distributions to appellants from Penn Co.,Ltd., in 1964 and 1965 constituted dividends taxable as ordinary income. We find that respondent's determination was correct.

In Appeal of Penn Co.,Ltd., decided this day, we held that the appellant was a taxable entity and that the gain from the sale of the Highland Property was taxable to it. Upon receipt, the proceeds from the sale were distributed to appellants pursuant to a resolution of the corporation's board of directors. It follows that the distribution constitutes a dividend taxable to appellants as ordinary income.&/

Appellants contend that the distribution cannot constitute a dividend since the corporation had no earnings and profits. However, in view of our holding in Appeal of Penn Co.,Ltd., supra, the corporation had earnings and profits in 1964 from the Highland Property transaction alone of $41,709.75. This accounts for all of the distribution chargeable to appellants as ordinary income for both 1964 and 1965 except approximately $300.00. Presumably, this amount constitutes earnings and profits from prior years. In any event, in matters involving distributions such as this, the burden is upon the taxpayer to prove that the corporation did not have earnings and profits equal to the amount distributed. (DiZenzo v. Commissioner, 348 F.2d 122, 127.) This appellants failed to do.

Furthermore, the fact that a corporation has failed to issue stock, as Penn Co.,Ltd., failed to do, has not caused the courts any concern in analogous situations when taxing corporate distributions to the party or parties who exercised dominion and control over the distributing corporation or its property. (Taylor v. Commissioner, 445 F.2d 455; Carver v. United States, 412 F.2d 233; Estate of Lichstein, T.C. Memo., Oct. 29, 1962.)

1/ Section 17381 of the Revenue and Taxation Code provides, in pertinent part:

> [T]he term "dividend" means any distribution of property made by a corporation to its shareholders--
>
> (a) Cut of its earnings and profits accumulated after February 28, 1913; or
>
> (b) Out of its earnings and profits of the taxable year...without regard to the amount of earnings and profits when the distribution was made.

There is another issue which must be resolved in this matter. Mr. Meyberg made numerous business trips during 1965. Generally, his wife accompanied him, and on one extensive trip to the East Coast they were accompanied by their son,, The total cost of these trips was $9,073.08. In their 1965 Joint personal income tax return, appellants deducted $5,443.85 or 60 percent of the total travel expense incurred as a business travel deduction. After auditing these expenses, respondent determined that only $3,629.23 or 40 percent of the total travel expense was attributable to business related travel.

It is well established that amounts expended by a taxpayer for the purpose of having his wife accompany him on a business trip where the wife's presence does not serve a bona fide business purpose constitute a nondeductible personal expense. (Patterson v. Thomas, 289 F.2d 108, 114; Wm. E. Reisner, 34 T.C. 1122, 1131.) The same principle applies with equal vigor to appellants' son. Respondent determined that the proper allocation was 60 percent to personal expense and 40 percent to business expense. Respondent% determination is presumed to be correct. (Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414].) Appellants have failed to offer any evidence to substantiate their arbitrary allocation of 60 percent of these combined travel expenses to business purposes. Accordingly, respondent's determination must be upheld.

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, Appeal of Leonard J. and Lorraine K. Mevberq

IT ISHEREBYORDERED, ADJUDCEDANDDECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Leonard J. and Lorraine K. Meyberg against proposed assessments of additional personal income tax in the amounts of $286.41 and $1,129.04 for the years 1964 and 1965, respectively, be and the same is hereby modified in accordance with respondent's concession. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 19th day of February , 19'74, by the State Board of Equalization.

Geo. R. Reilly, Chairman

John W. Lynch, Member

Richard Nevins, Member

__________, Member

William M. Bennett, Member

ATTEST: W.W. Dunlop, Secretary