

Appeal of James and Eileen R. McDonald

Eileen R. McDonald is included as an appellant only because she filed income tax returns jointly with her husband for the years in issue. "Appellant" herein shall refer to James McDonald.

The issue to be decided is whether certain cash distributions made to appellant by a corporation in 1973 and 1974 were taxable dividends.

Appellants filed timely joint California personal income tax returns for 1973 and 1974. Respondent examined these returns in connection with an audit of West Coast Oil Company (West Coast), a California corporation in which appellant owned a 13 percent interest (80.7 shares). In examining appellants' returns, respondent discovered that they had failed to include in their gross income for 1973 and 1974 cash distributions by West Coast of \$153,191.46 and \$6,398.45, respectively. Respondent issued notices of proposed assessments based on these findings and, for 1974, made other adjustments which are not in issue here. Appellants protested, respondent affirmed its proposed assessments and this timely appeal followed.

Appellant apparently argues that the distributions from West Coast were not taxable dividends since he was not a shareholder during 1973 and 1974 when the distributions were made. He asserts that his shares were sold back to the corporation late in 1973 and the amounts received from West Coast were in payment for his shares. Respondent contends that the shares were not sold back to the corporation until July, 1974, that appellant was a shareholder during the years in issue, and the distributions were taxable dividends.

Any distribution of money to a shareholder out of a corporation's current or accumulated earnings and profits is a dividend and includible in the gross income of the shareholder: (Rev. & Tax. Code, §§ 17071, 17321, 17323, subd. (a), 17381, 17383, subd. (a).) If the earnings and profits during the taxable year are sufficient to cover all distributions made during that year, then each distribution made is considered a taxable dividend (Cal. Admin. Code, tit. 18, reg. 17381(b), subd. (2)), unless the appellant can affirmatively show that the distributions were made for another purpose. (See, e.g., Appeal of Gordon A. and Zelda Rogers, Cal. St. Bd. of Equal., May 7, 1968, and Appeal of Jack A. and Norma E. Dole, Cal. St. Bd. of Equal., Nov. 6, 1970.) When stock is sold, a dividend declared and

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paid before the sale is includible in the gross income of the seller. (Cal. Admin. Code, tit. 18, reg. 17071(h), subd. (3).)

Appellant asserts vigorously that his West Coast shares were sold before the years in issue but has presented no evidence of such a sale. Unsupported assertions are inadequate to sustain appellant's burden of showing that respondent's determination is incorrect. (Appeal of Clyde L. and Josephine Chadwick, Cal. St. Bd. of Equal., Feb. 15, 1972.) The evidence supports respondent's position that the sale took place in July, 1974. By a letter dated June 27, 1974, appellant offered to sell his 80.7 shares for \$3,000.00 each. West Coast's board of directors passed a resolution on July 1, 1974, agreeing to buy all of appellant's shares at a total price of \$231,050.00 and a cashier's check dated July 2, 1974 was issued in that amount, payable to appellant. Appellant also reported the sale of his shares for \$231,050.00 on his 1974 California income tax return. On these facts, we find that appellant owned 80.7 shares in West Coast until July, 1974.

Appellant does not contest his receipt of \$153,191.46 in 1973 and \$6,398.45 in 1974 from West Coast. These amounts were reported as cash distributions on the corporation's forms 599 for those years. Since earnings and profits in 1973 and 1974 were sufficient to cover those distributions, they are considered dividends. Appellant has presented no objective evidence showing the distributions should be considered otherwise. Since the dividends were declared and paid before appellant sold his shares, they must be included in his gross income.

Based on the foregoing, we sustain respondent's action.

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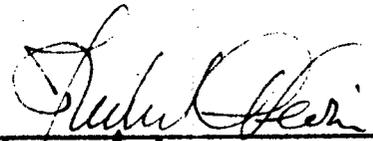
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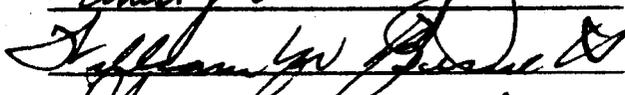
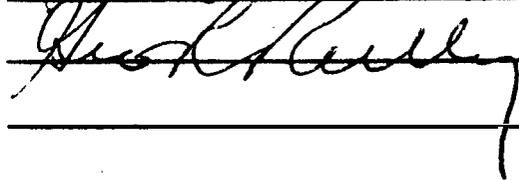
ORDER

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 Taxation Code, that the action of the Franchise Tax Board on the protest of James and Eileen R. McDonald against proposed assessments of additional personal income tax in the amounts of \$12,940.20 and \$366.70 for the years 1973 and 1974, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of September, 1980, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member

_____, Member