



Appeal of Desmond B. and Karen A. Griffin

The issues for determination are: (1) whether the purported transfer by appellants of their services to a family trust was effective to shift the incidence of taxation of such compensation from appellants to the trust; (2) alternatively, whether appellants are to be treated as owners of the family trust under sections 17781 through 17791 of the Revenue and Taxation Code; (3) whether appellants are entitled to deductions claimed; (4) whether any part of appellants' underpayment of tax was due to negligence within the meaning of Revenue and Taxation Code section 18684; and (5) whether respondent's proposed assessment violates any of appellants' constitutional rights.

On April 8, 1977, appellants, husband and wife, established the Des Griffin Trust (hereinafter "**Trust**"). While appellants have ignored respondent's requests for a copy of the Trust, it appears that said Trust is what is commonly known as a "family" or "equity" trust.

On their personal income tax return for 1979, appellants indicated all income from employee compensation as "nominee income," which they deducted from their gross income. The Trust filed a fiduciary income tax return for 1979 reporting said income and deducting what appear to be personal expenses of appellants, such as housing, automobile expenses and utilities.

Although, as indicated above, respondent requested additional information with respect to these transactions, none was provided. Instead, appellants now contend vaguely that respondent's imposition of tax here violates their constitutional rights. Nevertheless, a proposed assessment was issued which attributed employee compensation to appellants, disallowed the claimed deductions and imposed a penalty for negligence. Appellants protested, but respondent affirmed the assessment, and this appeal followed.

Respondent contends that the Trust was invalid to shift appellants' income for tax purposes, as it was merely a device to avoid taxation of the person earning the income, having no economic reality. Respondent alternatively alleges that appellants retained control of the Trust so as to be considered the owners of the Trust income pursuant to Revenue and Taxation Code section 17784. We have dealt with numerous similar situations. (See Appeal of Glen S. Hayden, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Robert R. and

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Marjorie M. Goodwin, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Kenneth L. and Lucile G. Young, Cal. St. Bd. of Equal., Feb. 2, 1981; Appeal of Hans F. and M. Milo, Cal. St. Bd. of Equal., July 29, 1981; Appeal of Edward B. and Betty G. Gillespie, Cal. St. Bd. of Equal., Oct. 27, 1981.)

In each of those appeals, we found similar trusts to be ineffective to shift the burden of taxation from the person who earned the income. As we have noted, it is a fundamental principle of income taxation that income must be taxed to the one who earns it. (Commissioner v. Culbertson, 337 U.S. 733, 739-740 [93 L.Ed. 1659] (1949).) One who earns income cannot avoid taxation by diverting it to another entity, since anticipatory assignment of income is ineffective as a means of avoiding tax liability. (Lucas v. Earl, 281 U.S. 111 [74 L.Ed. 731] (1930); Gregory v. H-ring, 293 U.S. 465 [79 L.Ed. 596] (1935); United States v. Basye, 410 U.S. 441 [35 L.Ed.2d 412] (1973); Richard L. Wesenberg, 69 T.C. 1005 (1978).) As appellants, who bear the burden of showing that respondent's determination is incorrect, have presented no evidence which would indicate that the Trust was other than a tax avoidance scheme, we have no alternative but to find the subject income is taxable to" appellants and not to the Trust, Moreover, we note that appellants have also produced no evidence that they did not have any of the several powers which result in the grantors being treated as the owners of all of the Trust. (Rev. & Tax. Code, §§ 17781-17790.) A grantor who retains any such power is taxable on the income. (Appeal of Hans F. and M. Milo, supra.) Accordingly, under either alternative, we would find that the subject income is taxable to appellants.

It is equally well settled that deductions are a matter of legislative grace, and the burden is upon the taxpayer to show that he is entitled to the deduction. (New Colonial Ice Co. v. Helverins, 292 U.S. 435 [78 L.Ed. 1348 - B. — Thornton, 47 T.C. 1 (1966); Appeal of Felix and Annabelle Chappellet, Cal. St. Bd. of Equal., June 2, 1969.) Again, appellants have introduced no evidence with respect to their entitlement to the deductions disallowed by respondent and, accordingly, we have no choice but to find that appellants are not entitled to the deductions claimed.

Next, we note that section 18684 of the Revenue and Taxation Code provides for the assessment of a five percent penalty when "any part of any deficiency is due

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to negligence." Again, the burden is on the taxpayer to prove that a negligence penalty **has** been improperly assessed. (Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Since appellants have failed to present any evidence or argument in opposition to the negligence penalty assessed, we must conclude that they have failed to sustain the burden of proving that respondent's action was improper. Accordingly, the penalty must be upheld.

Lastly, with respect to appellants' constitutional arguments, we believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution precludes our determining that the statutory provisions involved here are unconstitutional or unenforceable. In brief, said section 3.5 of article III provides that an administrative agency has no power to declare a statute unconstitutional or unenforceable unless an appellate court has made such a determination. In any event, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 9, 1975.) This policy is based upon the absence of **specific** statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse **decision in** a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal.

In summary, in such a case as this, we have no alternative but to sustain respondent's action.

