

Appeal of Frank J. and Barbara D. Burgett

The issue to be decided is whether additional tax and penalties were properly assessed against appellants for the years 1978 and 1979.

Appellants filed a timely California joint income tax return for 1978. An audit of their federal income tax return for that same year by the Internal Revenue Service resulted in a determination that income which had been attributed to a trust should, in fact, be taxable to appellants. The Internal Revenue Service found that the subject trust was a grantor or family trust and, therefore, concluded that the trust income and deductions should be attributable to the grantor-appellants. (See Rev. Rul. 75-257, 1975-2 Cum. Bull. 251.) Pursuant to Internal Revenue Code section 6103 (d), the federal determination was disclosed to respondent. Thereafter, respondent audited appellants' 1979 income tax return and discovered similar transactions between appellants and the trust. Respondent concluded that the trust was invalid to shift appellants' income for tax purposes and, therefore, issued proposed assessments which attributed employee compensation to appellants and, apparently, disallowed deductions claimed for the years at issue. In addition, respondent imposed penalties for negligence. Appellants protested, but respondent affirmed the assessments, and this appeal followed.

Respondent contends that the subject trust is ineffective to shift appellants' income for tax purposes, as it is merely a device to avoid taxation of the person earning the income, and has no economic reality. Appellants have produced no evidence to indicate that the federal audit is incorrect or that respondent's determination of tax for 1979 is erroneous. Instead, appellants appear to argue that the trust is not a grantor trust but is a valid taxable entity based upon constitutional principles.

A determination by respondent which is based upon a federal audit is presumed correct. (Appeal of Arthur G. and Rogelia V. McCaw, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Herman D. and Russell Mae Jones, Cal. St. Bd. of Equal., April 10, 1979.) The taxpayer must either concede that the federal audit report is correct or bear the burden of proving that it is incorrect. (Hev. & Tax. Code, § 18451.) It is also well settled that respondent's determinations of tax and penalties (other than fraud) are presumed correct, and that the taxpayer has the burden of proving them erroneous,

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(Appeal of Ronald W. Matheson, Cal. St. Bd. of Equal., Feb. 6, 1980; see also, Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) As indicated above, appellants have produced no evidence. Instead, they merely make vague allegations that the subject trust is not a grantor trust. Since appellants have not met their burden of proof for either year, we have no choice but to sustain respondent's action.

Moreover, we note that where this issue has been considered on its merits in similar situations; we have found such trusts to be ineffective to shift the burden of taxation from the person who earned the income. (See Appeal of Glen S. Hayden, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Robert R. and 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.) ---

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

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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 protest of Frank J. and Barbara D. Burgett against proposed assessments of additional personal income tax and penalties in the total amounts of \$971.33 and \$1,195.95 for the years 1978 and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 21st day of June, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman
Conway H. Collis, Member
Ernest J. Dronenburg, Jr., Member
Richard Nevins, Member
_____, Member