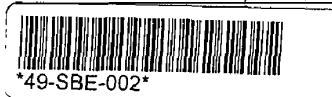


BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA



In the Matter of the Appeal of)
TRUST ESTATE OF HENRY M. ROBINSON,)
Deceased)
GEORGE E. FARRAND, Trustee)

Appearances:

For Appellant: Stephen M. Farrand, Attorney at Law
For Respondent: W. M. Walsh, Assistant Franchise Tax
Commissioner; Mark Scholtz and
Eebard Smith, Associate Tax Counsels

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code (formerly Section 20 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in denying the claims of the Trust Estate of Henry M. Robinson, Deceased, George E. Farrand, Trustee, for refunds of personal income tax in the amounts of \$1,444.81 and \$264.97, plus interest thereon, for the years 1941 and 1943, respectively.

Henry M. Robinson died on November 3, 1937, leaving a will which was admitted to probate in the Superior Court in and for the County of Los Angeles. The will established a trust and gave the decedent's widow a life interest in the corpus thereof, the remainder passing upon her death to the California Institute of Technology for use primarily in the maintenance and operation of a 200-inch telescope at the Rockefeller Observatory. On May 2, 1941, the trust property was distributed to the trustee under a general decree of distribution setting forth the several trust provisions. It was specifically provided that the net income should go to Mrs. Robinson during her lifetime "for her support; use, maintenance and benefit," and that

"D. If the trustee deem the net income payable hereunder not sufficient to provide for the proper support, maintenance and comfort of said beneficiary, he (the Trustee) may, as often as he deems necessary, pay to or apply for the use and benefit of such beneficiary such additional part, up to and including the whole thereof, of the corpus of the trust estate, as the trustee deems adequate in his absolute discretion..."

At the time of her husband's death Mrs. Robinson was approximately 75 years of age, She then and prior thereto had considerable separate property, the income from which during the

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taxable years here in question was between \$50,000 and \$75,000 per annum.. Her tastes were simple and modest and after Mr. Robinson's death she lived well-within this income. When she herself died in 1943, the appraised value of her estate, consisting almost entirely of the separate property she owned before Mr. Robinson's death, was over one and a half million dollars.

On April 7, 1942, the Superior Court approved the trustee's first account of his trust administration, at the same time finding that, as alleged in the trustee's petition for approval, it was not necessary to invade the trust corpus during 1941 for Mrs. Robinson's benefit inasmuch as she had substantial separate property and income of her own and was not in financial need or "support or maintenance or comfort." Similar approval was given by the Court on March 18, 1943, and April 27, 1944, to second and third accounts for the years 1942 and 1943, respectively, each such approval also containing a substantially similar finding as to non-necessity for a corpus invasion.

In 1941 and 1943, certain capital gains were realized on the sale of some assets of the trust. These the trustee reported in his trustee's returns for those years, at the same time claiming the taxable portion thereof as deductions in computing the net income of the trust pursuant to Section 12(d)(1) of the Personal Income Tax Act (now Section 18132 of the Revenue and Taxation Code), which provides for a deduction, in lieu of the usual deduction for charitable contributions available to individual taxpayers under Section 8(1) of the Personal Income Tax Act (now Section 17315 of the Revenue and Taxation Code), of such part of the gross income of a trust

"which pursuant to the term of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Subsection (1) of Section 8 or is to be used exclusively for religious, scientific, literary, or educational purposes.. "

The capital gains in question, which, being realized on the sale of some assets of the trust, were consequently regardable as part of the trust corpus (Estate of Gartenlaub, 193 Cal. 204; Estate of Davis, 75 Cal. App. 2d 528; Mertens, Law of Federal Income Taxation, Vol. 6, Sec. 36.71, p. 264), were, according to the trustee, "permanently set aside" by him for the use of the California Institute of Technology in maintaining and operating the telescope at the Rockefeller Observatory, such use evidently being one for an exclusively educational and scientific purpose within the meaning of Section 8(1). The Commissioner, however, refused to permit the deduction on the ground that an exercise of the trustee's power to invade the corpus for the "proper support, maintenance" and, particularly, "comfort" of Mrs. Robinson might have resulted in the distribution of the entire trust property, including the capital gains in question, to her, and none to the California Institute of Technology. The decision in Merchants National Bank of Boston v. Commissioner of Internal Revenue, 320

U. S. 256, is cited in justification of his action.

This case involved provisions of the Federal income and estate tax laws - the former almost identical with Section 8(1) of the Personal Income Tax Act and the latter permitting a gross estate deduction equivalent to the aggregate value of charitable gifts - in their application to a testamentary trust authorizing the trustee to invade the corpus

"at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife. . . my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." 320 U.S., at 257-258.

The net income of the trust was to go to the wife for life, and at her death all but a portion of the principal was to pass to designated charities. It was held that neither deduction was allowable for the reason that it was impossible to ascertain the value of the charitable remainder, or to determine whether it had any value at all, in view of the speculative element of the widow's happiness and the instruction to the trustee to exercise its discretion with liberality. The Court was of the opinion that the stated objects for which the corpus could be invaded - and particularly the widow's "happiness" - created a standard so uncertain and subjective as to permit a distribution for almost any purpose the trustee might see fit, with the consequence that there was no guarantee that the charities would ever receive anything on the widow's death.

As illustrative of a defined and objective standard, the Court in Merchants National Bank of Boston v. Commissioner of Internal Revenue mentioned its prior decision in Ithaca Trust Co. v. United States, 273 U. S. 151, wherein it had upheld the allowance of a charitable deduction under the Federal estate tax law in the case of a testamentary trust by which the decedent gave his wife a life income in the corpus with gifts over to charities, the trustee being empowered to invade the principal for the wife's benefit as "may be necessary to suitably maintain her in as much comfort as she now enjoys." The Court held that, the gifts to the charities were not uncertain, since

"The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite term of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably

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"greater than the general uncertainty that attends human affairs." 279 U.S. at 154.

The case at hand seems on its facts to fall somewhere in between the Merchants National Bank of Boston and the Ithaca Trust Co. decisions, for the trust instrument involved 'does not include language of any such subjective nature as "happiness", which we find in the first case, nor does it spell out a standard as clearly specific and objective as that in the second. It is our opinion, however, that we do have here a sufficiently fixed, certain and objective standard which, considered together with the facts regarding Mrs. Robinson's financial situation, as of the time of her husband's death and during the years 1941 and 1943, gave the charitable remainder to the California Institute of Technology an ascertainable value, and rendered remote and unlikely the possibility that the trust corpus would ever be invaded for Mrs. Robinson's benefit.

In reaching this conclusion, we do not believe, for one thing, that the trustee's power to invade the corpus for Mrs. Robinson's "proper support, maintenance and comfort... as often as he deems necessary... in his absolute discretion..." was so untrammelled as to have permitted the trustee to distribute any portion of the principal to her for any purpose he might have seen fit. On the contrary, it seems to us that the decedent did not intend to give the trustee unlimited discretion in the matter (Estate of Marre, 18 Cal. 2d 184), but rather intended to confine the trustee's power to the making of such distributions from corpus as were necessary to enable her reasonably to support and maintain herself according to her needs, as determined by her mode of living and station in life, Canfield v. Security-First National Bank, 13 Cal. 2d 1.

Speaking with reference to the Federal law on deductions with respect to charitable bequests, the courts have frequently held that language in testamentary trusts similar to or substantially the same as that in the corpus invasion provision of the trust here involved, sets forth a fixed standard of the type under consideration.

In First National Bank of Birmingham v. Snead, 24 Fed. 2d 186, in which a 'trust-invasion was permitted if "at any time in the opinion of said trustees the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife" (page 137), the Court stated:

"...The authority of the trustees to make payments to the widow out of the corpus of the trust estate was dependent upon their forming the opinion that the net income from the trust estate is not sufficient for the proper comfort and support of the widow. The trustees are obligated to act in good faith in forming an opinion as to a matter with reference to which they act in their trust capacity. They are not empowered arbitrarily to invade the corpus of the trust estate in the

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"absence of the existence of a state of facts furnishing any support for a reasonable opinion or conclusion that the net income from such estate is 'insufficient for the proper support and comfort of the widow; and the exercise of the discretion vested in them is subject to judicial revision and control.'" 24 Fed. 2d at 188.

The Court also said that considering that the widow had a large separate estate of her own (around \$300,000), that she was of an advanced age (68), that she was a woman of simple and frugal tastes, and that her expenditures did not exceed her income, the possibility that the trustees would invade the trust corpus was so remote "that a finding that, by reason of the existence of that power, the vested interests of the charitable institutions had no substantial value when the will took effect, would be arbitrary and unwarranted." 24 Fed. 2d at 188.

In Hartford-Connecticut Trust Co. v. Eaton, 36 Fed. 2d 710, the Court had before it a testamentary trust providing for the payment of trust income to the decedent's widow for life and the remainder over to certain charities, with authority in the trustee to distribute to the wife in addition such part of the trust principal "as it may deem necessary or advisable for her comfortable maintenance and support.!" After noting the decision in Ithaca Trust Co. v. United States, supra, the Court said that although the provision for invasion in that case was more restricted than the one with which it was concerned, nevertheless "the trustee was limited to the support of the widow according to her 'station in life'; that is, according to her wont." 36 Fed. 2d at 711. The case arose under the Federal income tax law in connection with gain realized by the trustee on the sale of some securities, the issue being identical with that in the case at hand. Also, in mentioning and considering the Ithaca Trust Co. case, the Court said that it was of no significance that the latter dealt with the Federal estate tax.

See also Union Planters National Bank v. Henslee, 166 Fed. 2d 993; Berry v. Kuhl, 77 Fed. Supp. 581; Lucas v. Mercantile Trust Co., 43 Fed. 2d 39.

In view of these authorities, it is our opinion that the deduction claimed by the trustee in the case at hand should have been allowed,

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 19060 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in denying the claims of Trust Estate of Henry M. Robinson, Deceased, George E. Farrand, Trustee, for refunds of personal income tax in the amounts of \$1,444.81 and \$264.97, plus interest thereon, for the

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years 1941 and 1943, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 5th day of January, 1949, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J. H. Quinn, Member
J. L. Seawell, Member
Geo. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary