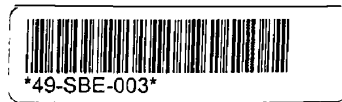


BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA



In the Matter of the Appeals of)
R. H. OSBRINK AND M. E. OSBRINK)

Appearances;

For Appellant: Frank M. Benedict, Attorney at Law

For Respondent: W.M. Walsh, Assistant Franchise
Tax Commissioner; Crawford Thomas,
Associate Tax Counsel; Milton A.
Huot, Assistant Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18593 of the Revenue and Taxation Code (formerly Section 19 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner on the protests of R. H. Osbrink and M. E. Osbrink, his wife, to a proposed assessment against each of additional personal income tax in the amount of \$2,252.62 for the year 1942.

The assessments result from the inclusion as the personal income of each Appellant of one-half' of the income from two irrevocable trusts created by them on October 1, 1942, one for the benefit of their son Raymond Hugh Osbrink, a minor, and the other in favor of their daughter Marion Adele Osbrink, also a minor. Each trust was expressly declared irrevocable and the trustee of each was Mrs. Osbrink's brother, Berton W. Beals, who was given no interest in the trust other than that of trustee. Each trust instrument authorized the trustee to distribute so much of the net income to or for the use of the beneficiary "as in the Trustee's sole discretion may be necessary for the comfort, maintenance and education" of the beneficiary. NO distribution, however, was actually made during the year 1942 pursuant to such authority. Throughout that year each beneficiary remained a minor and Mr. Osbrink had the custody and was liable and used his personal funds for the support of each.

As authority for his action the Commissioner cites the cases of Borroughs v. McColgan, 21 Cal. 2d 481, and Helvering v. Stuart, 317 U. S. 154, each holding that the income of a trust is taxable to the trustor if it may be devoted to the discharge of his legal obligation to support a minor child. In the Borroughs case the Court so held with respect to income from a trust which the trustor, as trustee, might have used in support of the beneficiaries, his minor children, although actually he failed to use it for any purpose. -The statutory basis for the decision was Section 12(h) of the Personal Income Tax Act (now Section 18172

Appeals of R. H. and M.E. Csbrink

of the Revenue and Taxation Code), which, as it read in 1942, provided that trust income is taxable to the **trustor** if it may be distributed to him either in his discretion or that of any person not having a substantial adverse interest in the disposition of the income. In the Stuart case the facts were substantially the same as in Borroughs v. McColgan, except that the **trustor** was not the sole trustee, 'his wife' and 'brother acting with him jointly in that capacity. The Stuart case involved the application of Section 167 of the Federal Internal Revenue Code, which as to substance was identical with Section 12(h) of the Personal Income Tax Act. It may be noted here that in 1943, the year following the decision in the Stuart case, Congress amended Section 167 to provide that trust **income** which may be used for the support of a beneficiary whom the **trustor** is legally obligated to support is not taxable to the **trustor** except to the extent that it is so used. The amendment was made effective as to taxable years commencing after December 31, 1942, with a provision making it retroactive to prior years on the filing of certain consents with the **Commissioner** of Internal Revenue. The California law was similarly amended in 1945, which was two years after the decision in the Borroughs case, by the addition of Section 18173.1 to the Revenue and Taxation Code. This latter amendment, however, unlike the Federal, was not retroactive, being expressly applicable only to taxable years commencing after December 31, 1944. Statutes 1945, Chapter 645, Section 123.

Considering the trusts, first, with regard to **Mr. Osbrink**, we are of the opinion that the facts here involved clearly bring him within the reach of the rule of the Stuart and Borroughs cases, and that, consequently, the trust **income for the calendar year** 1942 was properly assessed to him. The mere fact that the trustee is someone other than **Mr. Osbrink** is inconsequential under the Stuart case in view of the circumstance that the trustee has no **substantial** adverse interest. Georgia E. Lonsdale, 42 B.T.A. 847. Nor is the fact that none of the trust **income** was distributed by the trustee, since the rule of the Stuart and Borroughs cases turns primarily on the **possibility** of the use of trust **income** by the **trustor** in meeting his personal obligations.

Appellants argue that the 1945 amendment to the Revenue and Taxation Code was merely a clarification of the pre-existing law, and hence retroactive to 1942. In that, we are unable to agree. For one thing, the "very fact of amendment evidences a desire to change the-existing law." People v. Santa Fe Federal Savings and Loan Association, 28 Cal. 2d 675. For another, an amendment is not retroactive unless the Legislature so expresses its intent (Estate of Childs, 18 Cal. 2d 237), and, far from expressing any such intent, the Legislature here declared in Section 123 of the amending act (Statutes 1945, Chapter 645) that the provisions of that act affecting such matters as the method of calculating the tax should be applicable for taxable years beginning after December 31, 1944.

As for **Mrs. Osbrink**! it is to be observed that in California a wife's liability for the support of her minor children is secondary to that of her husband if the latter has

Appeals of R.H. and M. E. Osbrink

legal custody of the children and is able to provide for them: Section 196, Civil Code; Fox v. Industrial Accident Commission, 194 Cal. 1'73; Blair v. Williams, 86 Cal'. App. 676; Metson v. Metson, 56 Cal. App.2d 328. We believe that the facts of this case bring it within the impact of this principle, and that, accordingly, the obligation of Mrs. Osbrink to support the children, was merely of a secondary nature.

It has also been held that if an irrevocable trust is created by a wife whose liability for the support of her minor children is secondary to her husband's, the latter being the trustee, the income from the trust is not taxable to her under the Federal income tax law. Commissioner v. Yeiser, 75 Fed. 2d 956; Lillian R. Newman, 1 T.C. 921. The latter case is particularly significant inasmuch as the Commissioner of Internal Revenue, like the Franchise Tax Commissioner here, contended that the wife's secondary liability for support subjected her to income taxation on the trust income under the rule of the Stuart case. Under the holding therein, which was adverse to the position of the Commissioner, Mrs. Osbrink is free from income tax liability on the 1942 trust income.

O R D E R

Pursuant to the views 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 Chas. J. McColgan, Franchise Tax Commissioner, on the protest of R. H. Osbrink to a proposed assessment of additional personal income tax in the amount of \$2,252.62 for the year 1942 be and the same is hereby sustained, and the action of the Commissioner on the protest of M. E. Osbrink to a proposed assessment of additional personal income tax in said amount for said year 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. Boneili, Chairman
J. H. Quinn, Member
J. L. Seawell, Member
G. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary