



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARION F. TOMS)

Appearances:

For Appellant: Brobeck, Phleger & Harrison,
Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel;
Milton A. Huot, Mark Scholtz
and Paul L. Ross, Associate
Tax Counsels

OP IN I ON

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) on the protest of Marion F. Toms to a proposed assessment of additional personal income tax in the amount of \$217.51 for the year 1939.

The proposed deficiency assessment resulted in part from the disallowance of a business expense deduction taken by Appellant for expenses incurred by her for investment counsel and related items in the handling of her personal investments, and in part from attributing to Appellant for tax purposes the income from five irrevocable trusts which she had established in 1936. Each trust instrument named Appellant and her husband, G. Parker Toms, as trustees and directed payment of the trust net income to Mr. Toms until his death, whereupon the trust was to terminate and the trust property vest in a named child of the Appellant. If, however, on the death of Mr. Toms the named child "shall not have attained the age of twenty-five (25) years, then said trust shall continue and the net income shall be accumulated until he attains the age of twenty-five (25) years." The trustees were also specifically directed to "accumulate all capital gains until the termination of this trust." The foregoing instructions for the accumulation of income were qualified as follows:

"Fourth: Notwithstanding anything else herein contained, in the event the Trustees shall at any time, or from time to time,

determine that the proper maintenance, education, care, comfort or support of any beneficiary of this trust so requires, the Trustees may pay to or apply for the benefit of each one so requiring it such of the trust property or net income as the trustees shall deem necessary or proper, and the judgment and determination of the Trustees as to the necessity and amount of such payment or payments shall be **conclusive.**"

Mr. Tomsdied in 1937 and was succeeded as co-trustee by a person who had no adverse interest in the disposition of the trust income. During the taxable year in question the five children mentioned in the trust instruments were minors for whose support Appellant was legally responsible. She was able to and did support the children with her personal funds and none of the income from the trusts was used or distributed for that purpose.

The Commissioner disallowed Appellant's claimed deduction for the expenses incurred in the handling of her personal investments on the ground that such activities did not constitute a trade or business within the meaning of Section 8(a) of the Personal Income Tax Act (now Section 17301 of the Revenue and Taxation Code). Although the law was amended in 1943 to allow as a deduction all the ordinary and necessary expenses paid or incurred for the production of income, the change was not retroactive. Stats. 1943, p. 1467. The expenses, accordingly, are allowable as a deduction only if the management of Appellant's personal investments constituted a trade or business. Upon the authority of the decisions in Higgins v. Commissioner of Internal Revenue, 312 U. S. 212 and Meanley v. McColgan, 49 Cal. App. 2d 203, the Commissioner's action, as respects this issue, must be upheld.

The trust income was taxed to Appellant by the Commissioner under Section 12(h) of the Personal Income Tax Act (now Section 18172 of the Revenue and Taxation Code) on the basis of the decisions in Borroughs v. McColgan, 21 Cal. 2d 481, and Heilvering v. Stuart, 317 U. S. 154, because of the possibility of the use of that income for the support of her minor children. As in the Appeal of S. F. Pellas, decided this day, we believe that the trusts here involved are distinguishable from those considered in the Borroughs and Stuart cases. For the reasons set forth in our opinion in that matter, we are of the view that the Commissioner acted incorrectly in taxing the trust income to Appellant.

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 Commissioner (now succeeded by the Franchise Tax Board) on the protest of Marion F. Toms to a proposed assessment of personal income tax in the amount of **\$217.51** for the year **1939**, be and the same is hereby modified **as follows**: the amount of income derived from the five trusts created by Marion F. Toms on December 28, **1936**, shall be excluded from her net income and the amount of the assessment adjusted accordingly; in all other respects the action of the Commissioner is sustained.

Done at Sacramento, California, this 22d day of July, 1952, by the State Board of Equalization.

J. L. Seawell, Chairman

_____, Member

J. H. Quinn, Member

Geo. R. Reilly, Member

Thomas H. Kuchel, Member

ATTEST: Dixwell L. Pierce, Secretary