



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MAE M. OURY)

Appearances:

For Appellant: Charles R, Lees, Certified Public
Accountant

For Respondent: Burl D. Lack, Chief Counsel;
Cleo M. Gray, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Mae M. Oury to proposed assessments of additional personal income tax in the amounts of \$344.73 and \$315.07 for the years 1949, and 1950, respectively.

Eldon Willardson died testate March 4, 1945, leaving various properties in trust for the benefit of his widow and children, The principal asset of the trust was a plumbing and heating contracting business which had been operated by the decedent prior to his death. Frank E. Hess and Appellant, who had been long-term employees of the decedent, and the Bank of America were named trustees. Under the terms of the will the trustees were to receive a fair and just compensation for their services,

In fixing their compensation the trustees determined that Mr. Hess should receive \$25,000.00 per year plus 20% of the net income from the business exceeding \$100,000.00 and that Appellant should receive \$11,700.00 per year plus 10% of the net profits exceeding \$100,000.00. Appellant was paid \$31,714.26 for services rendered during the period March 1, 1947, to April 30, 1948, and \$19,248.34 for the period April 30, 1948, to November 30, 1948, Appellant reported these sums in full on her income tax returns.

On December 28, 1949, the Superior Court reviewed the trustees' accounts, found Appellant's salary excessive and reduced it to \$8,400.00 for the period ended April 30, 1948, and to \$4,900.00 for the period ended November 30, 1948, and ordered the excess returned to the trust. The court also

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disallowed the excessive salaries paid to Mr. Hess, This order was affirmed on appeal (Estate of Willardson, 101 Cal. App. 2d 777) in 1951. Appellant thereafter repaid the sum of **\$37,662.61**, plus interest, and deducted that amount in computing her 1951 gross income.

The trustees state that they met on November 23, 1949, and November 30, 1950, and orally agreed that Appellant was to be paid a basic salary of \$8,400 for each of the fiscal years ending November 30, 1949, and 1950, respectively. They also agreed that for each of those years she was to be paid an additional sum based on a percentage of net profits before taxes, with the understanding that the additional sum was to be held subject to return if it was not approved by the Superior Court as proper compensation.

Appellant received compensation from the business in the aggregate amounts of **\$22,128.21** and **\$20,345.19** for the calendar years 1949 and 1950, respectively. Of these sums she reported \$8,400 as income in each year. In 1951 the Superior Court reviewed the trustees' account for the years 1949 and 1950 and again disallowed salaries it deemed excessive. Appellant was allowed total compensation of only **\$9,000.00** per year and was ordered to repay all excess amounts to the trust, with interest at 7% per annum. Appellant in 1951 repaid the excess and in that year reported as income the difference between the yearly amounts of **\$9,000** approved by the Court and the \$8,400 previously reported by her.

Amounts not reported by Appellant as income when received aggregated **\$13,728.21** in 1949 and **\$11,945.19** in 1950. These amounts she invested in government bonds. Interest received thereon was retained by her. The business in each year deducted as wages and salaries the entire amounts paid to Appellant.

The Franchise Tax Board has determined that all of the monies received by Appellant in 1949 and 1950 were income to her in those years because she received them under a claim of right and without restriction as to their disposition.

In North American Oil Consolidated v. Burnet, 286 U.S. 417, the "claim of right" doctrine was enunciated by the United States Supreme Court as follows:

"If a taxpayer receives earnings under a claim of right and without restriction as to their disposition, he has received income which he is required to return,

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even though it may still be claimed that he is not entitled to the money, and even though he may still be adjudged liable to restore its **equivalent.**" (The Court added that the taxpayer is entitled to a deduction in the year of repayment,)

The principle thus stated has since been consistently applied by the courts where monies are in-dispute (Vol 2, Mertens, Law of Federal Income Taxation, §12.103). Its basis lies in the annual **accounting** concept (U. S. v. Lewis, 340 U.S. 590). In National City Bank v. Helvering, 98 F. 2d 93, the court indicated the impracticability of the **State being** compelled to take sides in private controversies and delaying the collection of taxes until the claimants adjusted their rights, The court concluded that if the claimant **"holds** with claim of right, he should be taxable as an owner, regardless of any infirmity of his title; no other doctrine is practically possible, ..."

In the instant situation Appellant unquestionably asserted a right to the entire amount paid to her as compensation in each of the years in question. There is no other basis or explanation for the payments to her, or for their deduction in full as wages and salaries by the business managed by Appellant and her fellow trustees. Nor does it appear that the oral agreement between Appellant and the other two trustees constituted a renunciation of her claim of right to the payments, or imposed any restrictions on their disposition. That **agreement** did no more than require her to be prepared to repay any portion of the payments not approved by the Superior Court. This, as a trustee, she would have been required to do in the absence of any such agreement (Estate of Willardson, supra). The known possibility that Appellant might subsequently be adjudged liable to restore the payments does not prevent their taxation to her (North American Oil Consolidated v. Burnet, supra).

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

