

2. Love



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In, the Matter of **the Appeal** of)
'GLEN AND GENEVIEVE **GISH**)

For Appellants: Kenneth S. Carey
Attorney at Law

For Respondent: **Burl D. Lack**, Chief Counsel;
A. Ben Jacobson, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Glen and Genevieve Gish against a proposed **assessment** of additional personal income tax in the amount of \$367.59 for the year 1958.

Two questions are presented by this appeal: (1) Whether a sum of money paid to appellants by **George M. Kulash** in 1958 constituted compensation for personal services rendered, which was **includible** in appellants' gross income for that year, **or** whether the **money** was a gift; and (2) If the money constituted compensation for personal services, whether it was subject to the special provisions of section 18241 of the Revenue and Taxation Code, allowing the proration of compensation received in one year from a long-term employment.

Prior to 1956, appellants Gish had become well acquainted with their elderly neighbor, **George M. Kulash**, a retired railroad employee; On July 21, 1956, Mrs. Gish entered into a written agreement with **Kulash**, in which **Mrs. Gish** agreed to provide all necessary care and assistance to **Kulash** in the event of his **illness**, incompetency, **or** other inability to take care **of himself**; and **Kulash**, in consideration thereof, **promised**

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to devise to Mrs. Gish the home which he owned and in which he resided in Oakland, California.

Subsequently Mr. **Kulash's** health declined, and in April 1957 he sold his home and moved in with appellants., On April **30, 1958**, a new agreement was entered into between **appellants** and Kulash. The purpose of that agreement was stated as **follows**:

Kulash, age 76, desires **to arrange** for the security of his room and board, and medical and personal **care for** the remaining years of his life and to that end desires to make a present payment in full for future **services** to be rendered. Gishes are willing -to provide Kulash with room, board, medical and personal care for the remaining 'years of his life for the consideration of a present **lump sum payment** .

Kulash specifically agreed to transfer to appellants \$20,000 "to be paid in full forthwith," in complete payment for the care they promised **to furnish** him during the remainder of his lifetime.

The agreement further provided that if at any time during Kulash's lifetime appellants voluntarily failed to provide the prescribed services to him, they would return to Kulash a sum of money **to be** computed at **the time** of such breach by deducting from \$20,000 the amount of \$200 per month, 'plus any **additional amounts** spent for his care, for the period during which the contract was performed as agreed,

Pursuant to this agreement, Kulash transferred \$20,000 to appellants on April 30, 1958. He died on February 16, **1961**, and as of that date appellants **had fully** performed their part of the bargain,

Appellants file their income tax returns **on** a calendar year basis, **using** the cash **receipts** and **disbursements** method of accounting:" **The** \$20,000 which they received from Kulash was not reported by them in their personal income tax returns in any year; 'Respondent's audit resulted in a determination that the entire amount should have been included in appellants' gross **income** for the **year** 1958, the year in which **it was received**, and that they were then eligible for a

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deduction of \$100 per month for the expenses which they incurred in performing the contract, **The** proposed additional assessment for 1958 which resulted gives rise to this. appeal,

Appellants contend that **Mr. Kulash** intended to make **them** a tax-exempt gift of the \$20,000, such gift to be subject only to the necessary expenses of caring for him during the remainder of his life. They argue alternatively that if it is concluded that the \$20,000 was not a **gift, then** it constituted **compensation** from a **long-term** employment, the taxation of **which** comes within section 18241 of the Revenue **and Taxation** Code, and that they should accordingly be allowed to treat the amount received in 1958 as if **it** were received ratably over the years in which their services on Kulash's behalf **were** actually performed.

Respondent argues that the \$20,000 received by appellants was in no sense a gift, but rather constituted compensation for personal services to be rendered pursuant to the written agreement **entered** into by the parties. As such, respondent contends, the total sum was **includible** in appellants' gross income for 1958, the year in **which it** was received. Respondent urges further that appellants have failed to **sustain** their burden of proving facts that would make the tax-spreading benefits of section 18241 **of the** Revenue and Taxation Code applicable to this \$20,000 income item,

Section 17071, subdivision (a)(1), of the Revenue and Taxation Code defines gross income to include compensation for services. Section 17136 specifically excludes **from the** concept of gross income "the value **of** property acquired by gift...."

The intent of the **payor** is the most important factor to be considered in characterizing a payment as an exempt gift or as a taxable income item. (Commissioner v. Duberstein, 363 U.S. 278 [4 L. Ed, 2d 1218].) It is also fundamental to note that if consideration is involved in the transfer of property the transaction cannot be called a "gift" within the meaning of the taxation statutes. (Noel v. Parrott, 15 F.2d 669, cert. denied, 273 U.S. 754 [71 L. Ed. 875]; Botchford v. Commissioner, 81 F.2d 914.)

An inquiry into **Kulash's** intent in entering into the agreements involved here, and **in paying** \$20,000 to appellants,

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can lead to only one conclusion. His primary purpose in doing so, as expressly stated in the written agreements signed by him and by appellants, and as indicated by the surrounding circumstances, was to obtain assurance that he would be **adequately** taken care of in his old age. That payment did not proceed from "a detached and disinterested generosity," nor was it made solely "out of affection, respect, admiration, charity or like **impulses.**" (Commissioner v. Duberstein, supra, 363 U.S. 278 [4 L. Ed. 2d 1218].) Though the payment may have been, induced in some part by an appreciation and recognition of appellants' continued friendship towards him and may have reflected his confidence in them.; it **was primarily** made in anticipation of their future services on his behalf for an indefinite period of time, **i.e.**, for the remainder of his **life.**

Having determined that the \$20,000 transferred to appellants was not a "gift," in **whole or** in part, the next question is: Was **it** compensation from "an employment" which qualifies for special treatment under section 18241 of the Revenue and Taxation Code?

During the year in **question** section 18241 provided:

(a) **If** an individual or partnership'-

(1) Engages in an **employment as defined** in subsection (b); and

(2) The employment covers a period of 36 months or more (from the beginning to the completion of such **employment**); and

(3) The gross compensation from, the employment received or accrued in the taxable year of the individual **or** partnership is not less than 80 percent of the total compensation from such employment;

then the tax attributable to any part of the compensation **which is** included in the gross income of any individual shall not be greater than the aggregate of the **taxes attributable** to such part had it been included in the

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gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual,

(b) For purposes of this section, the term "an employment" means. an arrangement or series of arrangements for the performance of personal **services** by an individual or partnership to effect a particular result', regardless of the **number** of sources from which **compensation therefor is** obtained,'

* * *

According to authorities interpreting the federal counterpart of section 18241, the statute, being a precisely drawn provision for special tax relief, is to be given close scrutiny and is not to be liberally construed. (Ranz v. Commissioner, 273 F.2d 810; Breen v. Commissioner, 328 F.2d 58.) The burden is on the **taxpayer** to show that he **comes within** the favor of the statute: (Breen v. Commissioner, supra.)

Appellants' agreement of April 30, 1958, and the \$20,000 payment which was made to them at that time, related explicitly to future room, board and medical and personal care to be provided to **Mr. Kulash** for the remainder of his life. But section 18241, by its express terms, allows a payment to be spread back **only** over a period of "employment" preceding the receipt of the payment, Assuming that a 'lifetime care arrangement is one to "effect a particular result" and is thus an "employment" within the statutory definition, appellants **have** nevertheless failed to establish that any part of the \$20,000 should be attributed to services of the kind specified in their written agreement, actually rendered before April 30, 1958, under a lifetime care arrangement. Nor can it be determined, from the record before us, whether the sum of **\$20,000** represented 80 percent **of** the compensation for all of **the services** rendered under the "employment" either before or, after April 30, 1958.

Under the circumstances of this case, we cannot conclude that **the** amount in question constituted a **gift exempt** from taxation or that it **qualified** for the special treatment provided by section 18241 of the Revenue and Taxation Code.

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 Glen and Genevieve Gish against a proposed assessment of additional personal income **tax in** the amount of \$367.59 **for the** year 1958, be and the same **is hereby** sustained,

Done at Sacramento, California, this 18th day of December, 1964, by the State Board of Equalization;

Paul R. Lusk, Chairman
Earl Beecher, Member
John W. Lynch, Member
William C. Dean, Member
_____, Member

ATTEST:

William C. Dean, Secretary