BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ESTATE OF DOUGLAS C. ALEXANDER, DECEASED)
ROBERT D. ALEXANDER, EXECUTOR, AND)
PHOEBE C. ALEXANDER)

Appearances:

For Appellants: Roger W. Findley
Attorney at Law

For Respondent: Israel Rogers
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 protests of the Estate of Douglas C. Alexander, Deceased, Robert D. Alexander, Executor, and Phoebe C. Alexander against proposed assessments of additional personal income tax in the amounts of $1,325.00, $1,465.72, $1,501.60 and $1,323.81 for the years 1958, 1959, 1960 and 1961, respectively, After the filing of this appeal appellants paid the contested deficiencies together with interest--thereon to September 15, 1965, Accordingly, the appeal will be treated as an appeal from the denial of claims for refund of the amounts so paid, pursuant to section 19061.1 of the Revenue and Taxation Code,.

Phoebe C. Alexander (now deceased) was the widow of Douglas C. Alexander, who died on June 11, 1961. Joint California personal income tax returns were filed for the years 1958, 1959, 1960 and 1961.

Phoebe was the daughter of George Robert Carter, a resident of Hawaii, who died in 1933. Under the terms of his

will, one-third of the residue of his estate was left to his son, George Kohert Carter, Jr,, andthe Hawaiian Trust Company, Limited, a Hawaiian, corporation having its principal office in Honolulu, as co-trustees, in trust, for the benefit of Phoebe (then known 'as Phoebe Dyer), her children, and any issue thereof, Under the terms of the trust, the trustees were directed and empowered:

> (a) To pay the net income derived from said trust estate to my daughter, PHOEBE DYER, during her life;
>
> (b) Qn the death of my said daughter, Phoebe Dyer, to transfer, ... the principal of said trust estate to those who shall be surviving of the children of my said daughter and of the issue of any deceased children of my said daughter ...
>
> (c) My said Trustees shah% have the power to sell at public or private sale, lease for such terms as shall seem advisable ..., convert, mortgage, hypothecate and otherwise deal in any manner with all real estate and personal property forming the principal of said trust estate, with full powers with reference to the management thereof, and to invest the proceeds thereof, with like power of sale, disposition and investment from time to time in the discretion of said Trustees ...

The Hawaiian Trust Company, Limited , and George Robert Carter, Jr,, a resident of Hawaii, acted as trustees-at all times material hereto, During the period under review, the trust estate consisted of approximately fifty different securities having a total market, value of somewhat over $1,000,000. Certificates evidencing the securities were maintained by the trust company at its office in Honolulu.

The management and control of the trust estate was conducted by the trustees in Hawaii, During the four years in question, the trustees received, approximately $416,000 from eleven sales, ten redemptions and three other capital transactions, and reinvested some $396,000 by making twenty-two separate purchases of securities,

During 1960, Phoebe unsuccessfully attempted to substitute a California banking corporation in place of the Hawaiian Trust Company. It appears that neither of the two banks approached were willing to undertake trusteeship of the Carter trust since they would have been required to qualify to do business in Hawaii,

During the years 31958, 1959, 1960 and 1961, Phoebe received distributions of trust income in the respective amounts of $26,974.19, $28,307.69, $32,379.10 and $29,373.98. The trust income was reported in Hawaiian nonresident income tax returns and Hawaiian income tax was paid in the respective amounts of $1,378.40, $1,465.72, $1,501.60 and $1,323.82. The same trust income was reported on joint California resident personal income tax returns, and credits for the income tax paid to Hawaii were claimed,

The instant appeal arises from the Franchise Tax Board's disallowance of those credits on the theory that the trust income was derived from sources in California rather than in Hawaii,

Section 18001 of the Revenue and Taxation Code provides, in part:

> Subject to the following conditions, residents shall be allowed a credit against taxes imposed by this part for net income taxes imposed by and paid to another state on *income* taxable under this part:
>
> (a) The credit shall be allowed only for taxes paid to the other state on income derived from sources within that state which is taxable under its law irrespective of the residence or domicile of the recipient, (Emphasis added,)

The question presented' is whether the income Phoebe *received from* the Carter trust was derived from "sources" (as that term is used 'in section 18001, subdivision (a)) in Hawaii, Essentially this same question was decided by us in the Appeal of C. H. Wilcox, Cal. *St,* Bd. *of* Equal,, Nov. 15, 1939, *under section 25,* subdivision (a), of the Personal Income Tax Act of 1935, the predecessor of the present credit provision. Wilcox,

a California resident; was the beneficiary of certain testamentary trusts. The trustors and trustees were all residents of the Territory of Hawaii, and the trust property consisted of intangible personal property, the physical evidences of which were in the possession and control of the trustees in Hawaii. We held that the income Wilcox received as a beneficiary had a source in Hawaii,

Respondent argues that our decision in Wilcox can no longer be considered valid in view of two subsequent decisions by.the California Supreme Court, Miller v. McColgan (1941) 17 Cal, 2d 432 [110 P.2d 419], and Robinson v. McColgan (1941) 17 Cal, 2d 423 [110 P.2d 426].A careful and exhaustive consideration of those opinions has not revealed, however, wherein they are inconsistent with Wilcox, On the contrary, we find that the Miller case, in particular, which contains a lengthy discussion of the rules of law applicable to the taxation of intangibles, lends support to the theory on which Wilcox was decided,

Miller v.McColgan, supra, dealt with the question of whether a California resident, owner of certain stock in a Philippine mining corporation, was entitled to a credit for income tax paid to the Philippines on dividends and gains derived from the stock, Under the applicable credit provision, section 25, subdivision (a), of the Personal. Income Tax Act of 1935, the court found that the source of the income in question was in California, applying the rule mobilia sequunter personam, which places the situs of intangible personal property at the residence of its owner. The court's decision was based upon the principle 'that legislation should be construed in light of court decisions existing at the time of its enactment, A number of cases were cited for the proposition that when the Persona% Income Tax Act was enacted in 1935, the courts had declared that the taxation of intangibles was subject to the mobilia rule,

Among the many cases cited by the court was Safe Deposit & Trust Co, v. Virginia (1929) 280 U.S.83 [74 L. Ed. 180]. In the latter case the United States Supreme Court recognized that intangible personal property was ordinarily subject to the mobilia rule, but refused to apply it to intangibles held in trust by a trustee who had legal title, possession and control of the securities in question, It found that the situs of the securities was at the residence of

the trustee, not the residence of the beneficiaries. This decision, which was specifically recognized in Miller v. McColgan, supra, (1941) 17 Cal. 2d 432 [110 P.2d 419], was also a cornerstone in our opinion in the Wilcox appeal, Moreover, the court in Miller expressly recognized an exception to the maxim of mobilia sequunter personam but found it not applicable to the case before it, saying that the taxpayer "did not set his property aside in a Philippine trust or engage in business in the Philippines," (Miller v. McColgan, supra at 444,)

While in Robinson v. McColgan, supra, 17 Cal, 2d 423 [110 P.2d 426], it was found that the situs of stock held in trust by a California bank was at the residence of the beneficiary, the case cannot be considered controlling of the issue presented here, The court explained that the stock certificates were held by the trustee bank for the sole purpose of receiving dividends and forwarding them to the taxpayer, Robinson,, The trust had no fixed situs in California, but could be removed at wild. by Robinson, who was also the trustor. The trustee bank had no active duties of trust management and it had no power to sell, invest or reinvest the trust property, The arrangement, described by the court as a "naked" trust, was a trust in *name* only and the court was fully justified in ignoring it for the purpose of taxation, We are aware of no applicable authority which would justify similarly treating the trust in the instant appeal. This trust granted the trustee broad powers of trust management, imposed active duties and was clearly not removable from Hawaii at the will of the beneficiary,

Since the California Supreme Court has held that the meaning of the word "sources" in section 18001 was fixed by the cases existing at the time of its first enactment in 1935, the meaning can be changed only through further review by the California Supreme Court or through amendment by the Legislature,, Although the Legislature has, since 1935, amended the predecessor of section 17953, which deals with the problem of source of income for the purpose of taxing nonresidents, it has made no change in section 18001 or its predecessor insofar as the meaning of the word "'sources" is concerned.

Prior to 1943 the predecessor of section 17953 stated that the income of nonresident beneficiaries of trusts was income from sources within California only if distributed out of income of

the trust derived from sources within this state. an 1943, the Legislature added the following language to that provision;

> For the purposes of this subparagraph, the nonresident beneficiary shall be deemed to be the owner of intangible personal. property from which the income of the estate or trust is derived . (Stats, 1943, pp. 1475, 1476.)

The same language is now contained in section 17953, except that the word "subparagraph" has been changed to "section."

As is conceded by respondent, section 17953 *is* not directly pertinent here because it deals with the taxation of nonresidents. We *need not decide* what interpretation should be placed upon that section for it does not control 'the meaning of the word "sources" in section 18001. Had the Legislature intended to change, the established meaning of the credit provision in 1943, when it amended the predecessor of section *17953, we* believe it would have directly amended the predecessor of section 18001. In *the* absence of such amendment, we see no 'reason *to* depart from our holding in the Appeal of C. H. Wilcox, supra.

We conclude that the income here in question had *"sources'" in* Hawaii within the-meaning of section 18001 and that appellants are *entitled to* the tax credits which they seek.

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,

Appeal of Estate of Douglas C. Alexander, Deceased, Robert D. Alexander, Executor, and Phoebe C. Alexander

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims for refund of persona% income tax of the Estate of Douglas C. Alexander, Deceased, Robert D. Alexander, Executor, and Phoebe C. Alexander-in the amounts of $1,325.00, $1,465.72, $1,501.60 and $1,323.81, and interest paid thereon, for the years 1958, 1959, 1960 and 1961, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 4th day of January, 1966, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member,

ATTEST: _____, Secretary