



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
PAUL GREENING TRUST, JACK W. AND)
ROBERT GREENING, CO-TRUSTEES)

Appearances:

For Appellant: Donald E. Maroney
Attorney at Law

For Respondent: John D. Schell
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 the Paul Greening Trust, Jack W. and Robert Greening, co-trustees, against a proposed assessment of additional personal income tax in the amount of \$27,399.82 for the year 1964.

Paul Greening, a resident of San Bernardino County, California, died testate on November 29, 1960. In his will decedent declared that all of his property was community property and that he intended to dispose of his one-half interest in the community property in the following manner: to his widow, Estella Greening, he devised his interest in the family home, its furnishings, his personal effects, and the family passenger cars; to his sons, Jack and Robert Greening (hereinafter referred to as Jack and Robert), he devised the residue of his estate in trust, primarily for the benefit of his widow. The will also named the two sons as co-executors.

On December 23, 1960, decedent's will was admitted to probate in the Superior Court of San

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Bernardino County, and the two sons were appointed co-executors and issued letters testamentary. Since Robert resided in Mexico, Jack carried on the active administration of the estate.

During 1963 Jack decided to sell some real property forming a substantial part of the estate, and he reached an agreement for the sale with Amberwood Construction Corporation. In his capacity as co-executor, Jack petitioned the probate court on December 13, 1963, for confirmation of the sale to Amberwood. Filed in support of the petition was a "Waiver and Consent to Sale" signed by Robert and the widow. After a hearing on the matter, the court issued an "Order Confirming Sale of Real Property" on February 21, 1964. The order stated that the sale was for a total price of \$2,836,812.00 composed of the following: (1) a cash down payment of \$625,000.00, and (2) \$2,211,812.00 to be paid in annual installments of \$42,417.00, or more, plus interest from the close of escrow. The \$2,211,812.00 balance was to be evidenced by a note secured by a first deed of trust "in favor of the heirs and devisees of Paul Greening, deceased, subject to the administration of the estate of Paul Greening as to an undivided one-half interest and Estella Greening, a widow, as to an undivided one-half interest." The order further directed the co-executors to execute a deed of conveyance upon payment of the purchase price. Pursuant to the order, but one day before the judge issued it, the co-executors signed an Executor's Deed which recited that it was intended to convey the estate's undivided one-half interest in the property to Amberwood. Contemporaneously, the widow executed a grant deed conveying to Amberwood her undivided one-half interest in the property.

On April 30, 1964, the co-executors sold to H.T. and F. Wood other real property being administered in the estate. This property was sold for \$8 000, the co-executors receiving an initial payment of 61,200 and \$6,800 in purchase money installment obligations.

In the final fiduciary income tax return of the estate for the period ended June 30, 1964, the co-executors elected to use the installment method for reporting the gain from both sales. On August 7, 1964, the co-executors submitted their final accounting for the estate and petitioned the probate court for a decree of distribution of the assets of the estate. The court issued an "Order Approving First and Final Account and Decree of Distribution" on August 25, 1964. In pertinent

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part the order provided that one-half of the residue of the estate be distributed to Jack and Robert as co-trustees of the testamentary trust. Part of the property thus distributed to the trustees consisted of an undivided one-half interest in the installment obligations received from Amberwood and the Woods pursuant to the sales described above.

After auditing the fiduciary income tax returns for the estate and the trust for 1964, respondent determined that the distribution by the co-executors to themselves as co-trustees was a distribution or other disposition of installment obligations within the meaning of section 17580 of the Revenue and Taxation Code, requiring immediate reporting of all the gain which would otherwise have been returnable on the installment basis. Pursuant to the provisions of Revenue and Taxation Code section 17761, respondent allowed the estate a deduction in the amount of the unreported gain and, pursuant to section 17762, included that gain in the gross income of the distributee, the Paul Greening Trust.

On appeal the trustees challenge respondent's determination that there was a distribution or other disposition of installment obligations within the meaning of section 17580. No issue was raised with respect to respondent's computation of the tax due under its theory that section 17580 applies to these facts. Consequently, if any tax is due under that section, it is in the amount determined by respondent.

Section 17580 provides, in pertinent part, as follows:

(a) If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of; gain or loss shall result to the extent of the difference between the basis of the obligation and --

* * *

(2) The fair market value of the obligation at the time of distribution, transmission, or disposition, in the case of the distribution, transmission, or disposition otherwise than by sale or exchange.

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Any gain or loss so resulting shall be considered **as** resulting **from the** sale or exchange **of the** property in respect to which the installment obligation was received.

(b) The basis of an installment obligation shall be the excess of the face value of the obligation over an amount equal to the income **which would** be returnable were the obligation satisfied in full.

This section is based on section 453(d) of the Internal Revenue Code of 1954 and is identical to it in all respects material to this appeal. That being so, judicial decisions interpreting the federal statute are highly persuasive on the proper construction of the state law. (Rihn v. Franchise Tax Board, 131 Cal. App. 2d 356, 360 [280 P.2d 893]; Appeal of Clayton B. and Dorothy M. Neill, Cal. St. Bd. of Equal., April 24, 1967.)

The federal case most nearly in point on the issue presented by this appeal is Estate of Henry H. Ropers, 1 T.C. 629, aff'd, 143 F.2d 695, cert. denied, 323 U.S. 780 [89 L. 'Ed. 623]. There, as here, executors sold property held by the estate and received installment obligations as part of the consideration for the sale. The executors elected on the estate's federal income tax return to report the gain from the sale on the installment basis. Subsequently, the executors distributed the installment obligations to themselves as trustees of testamentary trusts. The Tax Court held that the installment obligations had been "**distributed**, transmitted, sold, or otherwise disposed of" within the meaning of section 44(d), Internal Revenue Code of 1939, the predecessor of section 453(d) of the Internal Revenue Code of 1954. A subsequent case, Harry F. Shannon, 29 T.C. 702, confirmed this interpretation of section 44(d) and went on to hold that an undivided interest in installment obligations may be "**distributed**" within the meaning of that section. Taken together, these two cases indicate that the distribution involved in this appeal is a section 17580 distribution.

Counsel for the trustees has cited no authority contrary to Rogers and Shannon and has offered no reason why the construction placed on the federal statute by those cases should not apply equally to section 17580. Counsel has cited Probate Code **section 28**, relating to the time of vesting of testamentary dispositions, but

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- the relevance of that section to the proper interpretation of section 17580 is not apparent and has not been explained by counsel.

It has been argued on behalf of the trustees. that Jack and Robert intended to make the sale to Amberwood in their capacity as trustees, but the record belies this assertion. All of the documents relating to the sale clearly show that it was made by the estate, not by the trust.

As an alternative ground for their theory that the sale was made -- and the installment obligations received -- by the trustees in the first instance, the trustees assert that the estate terminated for income tax purposes prior to the sale. The basis for this assertion is regulation 17731(g) of title 18, California Administrative Code, which provides in substance that an estate will be considered terminated for income tax purposes if its administration is prolonged beyond a reasonable period for performance by the executor of all the duties of administration. The regulation further provides that the income of an estate thus considered to be terminated becomes the income of the persons succeeding to the property of the estate. In this case, those persons would be the co-trustees. However, although the argument is imaginative, it is of no avail because the trustees have presented no objective evidence which would justify a finding that they, as co-executors, unreasonably prolonged the administration of the estate.

Finally, the trustees make much of the Internal Revenue Service's failure to assert federal income tax liability under section 453(d) of the Internal Revenue Code even though the trust was audited by the Internal Revenue Service for the year here involved. Although the record is not entirely clear on this matter, there is a substantial possibility that the federal audit was never completed. In any event, we are satisfied that the Service could properly have applied section 453(d) to this case, and we are equally satisfied that respondent did properly apply section 17580.

Accordingly, respondent's determination will be sustained.

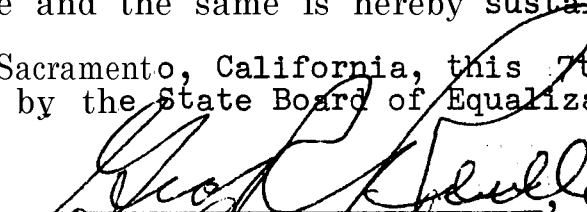
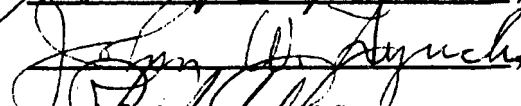
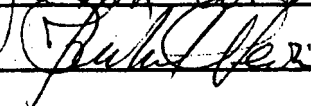
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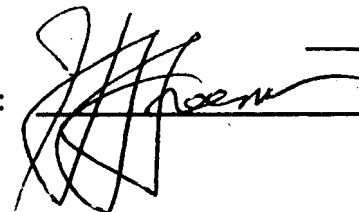
O R D E R

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 the Paul Greening Trust, Jack W. and Robert Greening, co-trustees, against a proposed assessment of additional personal income tax in the amount of **\$27,399.82** for the year **1964** be and the same is hereby **sustained**.

Done at Sacramento, California, this 7th day of December, 1970, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member
_____, Member
_____, Member

ATTEST:  _____, Secretary