

Appeal of Hans F. and M. Wilo

In August 1977, appellants executed a Declaration of Trust to create the Hans F. Milo Trust, which appellants were to administer as the trustees. Appellants transferred a house in Tampa, Florida, and an array of household items and furniture from themselves to the trust. Appellants state that the trust also possessed the lifetime services of Hans F. Milo. On their joint personal income tax return for the year 1977, appellants reported \$28,496 total income before adjustments. From this amount appellants deducted \$17,493 as "nominee **Inc[ome]** to Hans F. Milo Trust." Respondent requested additional information about the trust, and appellants responded with a copy of the Declaration of Trust.

A principle of taxation is that income must be taxed to the person who earns that income. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 451 (1942).]) The earner of income is the person who has the actual control over the earnings rather than the person who has only apparent control over the income. (American Savings Bank, 56 T.C. 828 (1971).) A person who earns income cannot avoid tax liability for that income by assigning the earnings before they are earned but in anticipation of their receipt, (United States v. Basye, 410 U.S. 441 [35 L.Ed.2d 412] (1973).) Respondent concluded that appellants were personally taxable on the income "assigned" to the trust because the assignment was an anticipatory assignment of income, which was ineffective for income tax purposes. Also, respondent concluded that the trust itself was a "grantor's trust" of the type contemplated by sections 17781-17790 of the Revenue and Taxation Code, which required that any income the grantor's trust received be included in the computation of the grantor's own income tax liability. Respondent determined that there was no basis for appellants' adjustment of \$17,493 and issued a notice of proposed assessment of \$803.20 in additional tax, plus \$40.16 penalty for negligence (5%), plus applicable interest. This appeal followed.

Trusts with provisions and circumstances similar to the Hans F. Milo Trust have been the subject of several court decisions concerned with the application of federal income tax to both anticipatory assignments of income and to grantor's trusts. (George T. Horvat, 177,104 P-H Memo. T.C. (1977), affd. (7th Cir. 1978) in an unpublished opinion, cert. den., 440 U.S. 959 [59 L.Ed.2d 7721 (1979)]; Wallace J. Vnuk, ¶ 79,164 P-H Memo. T.C. (1979); Richard L. Wesenberg, 69 T.C. 1005 (1978);

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Ronald E. Morgan, ¶ 78,401 P-H Memo. T.C. (1978.) The **application** of California's **income** tax to anticipatory assignments of income **corresponds** to the application of federal income tax (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942)), and the California "grantor's trust" provisions (Rev. & Tax., Code, §§ 17781-17790) are modeled on the federal "grantor's trust" provisions (Int. Rev. Code of 1954, §§ 671-678). So the federal tax court opinions parenthetically noted above are applicable to the questions presented here. As the opinions in those cases fully explain, in order to overcome the presumption of correctness which adheres to the tax administering agency's determination of taxes due, appellants must first produce evidence which proves that the income received by the trust was not anticipatorily assigned to it **by a** grantor who retained the control of the wage earning process. When such an anticipatory assignment occurs, the assignor is taxable on the income received by the assignee-trust. Appellants must also produce evidence that the grantor of the trust did not have any of the several powers which result in the grantor's being treated for income tax purposes as the owner of portions or all of the trust over **which** the **powers** extend. A grantor who retains any such power is taxable on the income received by those portions or all of the trust.

The present appellants have not produced evidence which proves that no anticipatory assignment occurred and that no grantor's trust existed. Taxpayers' unsupported statements are not evidence that the respondent is in error. (Appeal of Clyde L. and Josephine Chadwick, Cal. St. Bd of Equal., Feb. 15, 1972.) So respondent's proposed assessment must be sustained.

