



83-SBE-214

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
DEVRA G. RUTIGLIANO)

For Appellant: Devra G. Rutigliano,
in pro. per.

For Respondent: Elleene A. Kirkland
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 protest of Devra G. Rutigliano against a proposed assessment of additional personal income tax and penalty in the total amount of \$270.24 *for* the year 1978.

Appeal of Devra G. Rutigliano

The issues for determination are: (1) whether the purported transfer by appellant of her services to a family trust was effective to shift the incidence of taxation of such compensation from her to the trust; (2) alternatively, whether appellant is to be treated as owner of the family trust under sections 17781 through 17791 of the Revenue and Taxation Code; (3) whether any part of appellant's underpayment of tax was due to negligence within the meaning of Revenue and Taxation Code section 18684; and (4) whether respondent's proposed assessment violates any of appellant's constitutional rights.

On April 14, 1978, appellant established the Devra G. Rutigliano Trust (hereinafter "Trust"). While **appellant** has ignored respondent's requests for a copy of the trust instrument, it appears that this trust is what is commonly known as a "family" or "equity" trust. The Trust filed a fiduciary income tax return for 19'78 reporting income which had been paid to the Trust for **services** performed by appellant and deducting **what appear** to be personal expenses of appellant such as housing, automobile expenses, utilities, and telephone expenses.

Although, as indicated above, respondent requested additional information with respect to these transactions., none was provided. Instead, appellant contended vaguely that respondent's imposition of tax here violated her constitutional rights. Nevertheless, a proposed assessment was issued, which attributed the employee compensation to appellant, disallowed the personal deductions and imposed a penalty for negligence. (Rev. & Tax. Code, § 18684.) Appellant protested, but respondent affirmed the assessment, and this appeal followed.

Respondent contends that the Trust was invalid to shift appellant's income for tax purposes, as it was merely a device to avoid taxation of the person earning the income, having no economic reality. Respondent alternatively alleges that appellant retained control of the Trust so as to be considered the owner of the Trust income pursuant to Revenue and Taxation Code section 17784. We have dealt with numerous similar situations. (See Appeal of Glen S. Hayden, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Robert R. and Marjorie M. Goodwin, Cal. St. Bd. of Equal., March 3, 1982; Appeal of Kenneth L. and Lucile G. Young, Cal. St. Bd. of Equal., Feb. 2, 1981; Appeal of Hans F. and M. Milo, Cal. St. Bd. of Equal., July 29, 1981; Appeal of Edward B. and Betty G. Gillespie, Cal. St. Bd. of Equal., Oct. 27, 1981.)

Appeal of Devra G. Rutigliano

In each of those appeals, we found similar **trusts** to be ineffective to shift the burden of taxation from the person who earned the income. As we have noted, it is a fundamental principle of income taxation that income must be taxed to the one who earns it. (Commissioner v. Culbertson, 337 U.S. 733, 739-740 [93 L.Ed. 1659] (1949).) One who earns income cannot avoid taxation by diverting it to another entity, since anticipatory assignment of income is ineffective as a means of avoiding tax liability. (Lucas v. Earl, 281 U.S. 111 [74 L.Ed. 731] (1930); Gregory v. Helvering, 293 U.S. 465 [79 L.Ed. 596] (1935); United States v. Basye, 410 U.S. 441 [35 L.Ed.2d 412] (1973); Richard L. Wesenberg, 69 T.C. 1005 (1978).) Since appellant, who bears the burden of showing that respondent's determination is incorrect, has presented no evidence which would indicate that the Trust was other than a tax avoidance scheme, we have no alternative but to find the subject income taxable to appellant and not to the Trust. Moreover, we note that appellant has also produced no evidence that she did not have any of the several powers which result in the grantor being treated as the owner of all of a trust. (Rev. & Tax. Code, §§ 17781-17790.) A grantor who retains any such power is taxable on the income. (Appeal of Hans F. and M. Milo, supra.) Accordingly, under either alternative, we find that the subject income is taxable to appellant.

Next, we note that section 18684 of the Revenue and Taxation Code provides for the assessment of a five percent penalty when "any part of any deficiency is due to negligence." Again, the burden is on the taxpayer to prove that a negligence penalty has been improperly assessed. (Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Since appellant has **failed** to present any evidence or argument in opposition to the negligence penalty assessed, we must conclude that she has failed to sustain her burden of proving that respondent's action was improper, and, accordingly, that penalty must be upheld.

Lastly, with respect to appellant's constitutional arguments, we believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution precludes our determining that the statutory provisions involved here are unconstitutional or unenforceable. In brief, said section 3.5 of article III provides that an administrative agency has no power to declare a statute unconstitutional or unenforceable unless an appellate court has made such a determination. In any event, this

Appeal of Devra G. Rutigliano

board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal.

In summary, in such a case as this, we have no alternative but to sustain respondent's action.

Appeal of Devra G. Rutigliano

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 Devra G. Rutigliano against a proposed assessment of additional personal income tax and penalty in the total amount of \$270.24 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 15th day of September, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

<u>William M. Bennett</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, **per** Government Code section 7.9