

IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,

Petitioner,

vs.

CASE NO.: SC 04-1858

JOHN R. ZOLD,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

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INTRODUCTION

The following symbols are adopted for reference:

References to the Appendix will be indicated by the abbreviation "App." followed by the page number of that Appendix.

The parties will be identified as follows:

JOHN F. ZOLD - "Respondent" or "Husband"

SHERRY PALICTE ZOLD - "Petitioner" or "Wife"

STATEMENT OF THE CASE AND FACTS

This appeal concerns the treatment of retained earnings in a Subchapter S corporation for determining income for support and attorney's fee under Chapter 61, Florida Statutes.

The corporation involved is known as Tri Tech, Inc. and there are two shareholders: the Husband and one other shareholder, an attorney. (App. 2) The Husband is the chief executive officer of the corporation. (App. 1) The trial court found that the Former Husband owned 57.15428 % of the corporate stock and the other shareholder, thus, owned 42.84572 %. (App. 3)

For purposes of ability to pay support and attorney's fees, the trial court included the cash shown at year's end on the corporate balance sheet in the Husband's income. (App. 5) The District Court vacated that portion of the Final Judgment making findings of the Husband's income utilizing this retained earnings amount. (App. 5)

SUMMARY OF ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN IS NOT IN CONFLCIT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN DTERMINING WHETHER OR NOT UNDISTRIBUTED BUSINESS INCOME MUST BE INCLUDED IN A PARTY'S INCOME UNDER CHAPTER 61, FLORIDA STATUTES.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN IS NOT IN CONFLCIT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN DTERMINING WHETHER OR NOT UNDISTRIBUTED BUSINESS INCOME MUST BE INCLUDED IN A PARTY'S INCOME UNDER CHAPTER 61, FLORIDA STATUTES.

It is not the decision of the District Court in this case that all retained earnings of any Subchapter S corporation is not income attributable to the party who is a shareholder in that corporation. The decision of the District Court is limited to the facts of this particular case.

The District Court stated that a shareholder/director of a corporation with more than one shareholder has a fiduciary duty to the other shareholders and the corporation, and hence any retained earnings, is not the personal piggy bank of any shareholder merely because of ownership of a controlling interest in that corporation. Examining the trial testimony in the court below the District Court found that this corporation's other shareholder was an attorney and the tenor of his testimony was that the Former Husband was not free to treat corporate cash as his own or to accumulate cash in the corporation rather than distribute it; further, the corporate accountant testified that there was a legitimate business purpose in

retaining corporate earnings as working capital to maintain business operations and avoid bankruptcy.

The District Court went so far as to examine the voluminous records in this case to verify the Wife's assertion in her appellate brief that there was more than \$ 250,000 in corporate cash available for immediate distribution. They could find no statement in the record to substantiate that claim. Clearly this opinion was based on the specific facts of this case which the District Court went to great length to verify and articulate.

Finally, the District Court did not make a mandatory finding that retained earnings in a Subchapter S corporation cannot be used for determination of income of a shareholder because it remanded the case to the trial court for a redetermination of the Former Husband's income without consideration of the retained corporate earnings *unless* evidence shows that the delay of corporate cash distributions was not for corporate purposes.

The decisions cited by the Former Wife do not make mandatory findings that all retained earnings of Subchapter S corporations are income attributable to the shareholder of that corporation. *Zipperer v. Zipperer*, 567 So. 2d 916 (Fla. 1st DCA 1990) involved "business income", dividends and interest that the husband maintained was only reported for tax purposes. This decision does not involve corporate earnings or a business entity, corporate or otherwise, with other owners

to whom the husband owed a fiduciary duty. *Martinez v. Martinez*, 761 So. 2d 433 (Fla. 3rd DCA 2000) does involve a Subchapter S corporation, but the decision does not state whether there are other shareholders and does not hold that all retained earnings of all Subchapter S corporations must be included in the shareholder's income for support purposes: it merely found that the record in that case supports the award. Likewise *Sohacki v. Sohacki*, 657 So. 2d 41 (Fla. 1st DCA 1995) did not hold that retained earnings in a Subchapter S corporation must be considered as income attributable to the husband; it merely held that the trial court was not bound to accept the husband's testimony that his actual income was \$ 45,000 when the corporation earned \$ 100,000 and this amount was shown as income on his personal tax return. The clear implication is that if there was a business interest, as in the instant case, those retained earnings may not be included in his income for support purposes. In summary, all cases cited by the Wife do not require a finding that retained earnings of a Subchapter S must be totally included in the Husband's income under Chapter 61, Florida Statutes.

The decision most applicable in this case is the decision of *McHugh v. McHugh*, 702 So. 2d 639 (Fla. 4th DCA 1997). There Schedule K-1 income of a Subchapter S corporation was not attributed to the husband and the District Court found no error in its exclusion. Although not expressly stated, it is the clear implication that the K-1 income was not distributed to the husband for a legitimate

business reason: in a footnote, the Court stated that if the withholding of distribution of profits was to reduce the husband's income for purposes of the dissolution proceeding, then those profits could have been included. This is the decision reached by the District Court in the instant case under appeal and is in accord with the directions of the remand: exclude the retained earnings unless it is shown to be for the purpose of reducing the Husband's income for the dissolution proceeding. *McHugh* is a decision which is fact based and, as such, is not in conflict with the three decisions cited above and none of these decisions are in conflict with the present case under appeal.

CONCLUSION

For the reasons stated in this brief, the Husband contends that jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and the Appendix was furnished by U.S. Mail to NORMAN LEVIN, ESQ., 165 W. Jessup Road, Longwood, FL 32779 this _____ day of October, 2004.

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CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that the font in which this brief is Times New Roman 14 point font and was prepared in compliance with the Florida Rules of Appellate Procedure.

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