

Cite as 502 F.2d 963 (1974)

ily a nursing home, to taxpayer in exchange for a \$165,000 non-interest bearing demand note. Contemporaneously, taxpayer leased back to Restorium the acquired property for a monthly rental. This leaseback arrangement continued from 1962 to 1971.

[1] On appeal, taxpayer contends that the Tax Court erred in determining that taxpayer did not establish by a "clear preponderance of the evidence" that the securing of a corporate surtax exemption was not "a major purpose" of taxpayer's formation and the transfer by Restorium of property to taxpayer. Taxpayer asserts that the purposes of its formation were to limit liability, aid in securing insurance and assist in obtaining financing.

Upon full consideration of the record, the briefs and oral arguments, the court is of the view that the contentions of taxpayer are without merit and that the Tax Court's findings are not clearly erroneous. Rule 52(a), Fed.R.Civ.P. Although there may be some evidence in the record which supports taxpayer's asserted reasons for its creation, taxpayer has not carried its burden of demonstrating by a "clear preponderance of the evidence" that the securing of the surtax exemption was not "a major purpose" of the transfer of the nursing home in question. *Beacon Auto Radiator Repair Co. v. Commissioner*, 52 T.C. 155, 160-61 (1969); Note, Multiple Incorporation to Obtain Additional Accumulated Earnings Credits and Surtax Exemptions, 44 Minn.L.Rev. 485, 503 (1960).

[2] In rejecting taxpayer's contentions, we hold that the evidence supports the Commissioner for the reasons stated by the Tax Court. 42 P-H Tax Ct. Mem. at 1052. Further, there is evidence in the record that the separate incorporation of taxpayer and leaseback of the real estate used by Restorium in its nursing home business conformed to a pattern employed by Mr. Keller since 1957 in eleven nursing homes which he controlled. Mr. Keller testified that for

each of the eleven nursing homes there was a real estate and equipment holding company which leased a nursing home and its facilities to a separate operating company. This is additional evidence from which to infer intent on the part of Mr. Keller to evade the payment of federal income taxes by the creation of the taxpayer corporation.

Affirmed.



Larry P. et al., Plaintiffs-Appellees,

v.

Wilson RILES et al., Defendants-Appellants.

No. 72-2509.

United States Court of Appeals,
Ninth Circuit.

Aug. 16, 1974.

Civil rights suit wherein plaintiff sought a preliminary injunction restraining school district from administering IQ tests for purpose of determining whether to place black students in classes for educable mentally retarded. The United States District Court for the Northern District of California, Robert F. Peckham, J., 343 F.Supp. 1306, entered an order granting, in part, the motion for a preliminary injunction, and defendants appealed. The Court of Appeals held that the preliminary injunctive order, though changing the status quo to a limited extent, was well within the district judge's discretion.

Affirmed.

Civil Rights §13.2(4)

In civil rights suit wherein plaintiff sought a preliminary injunction restraining school district from adminis-

tering IQ tests for purpose of determining whether to place black students in classes for educable mentally retarded, to a limited extent, the preliminary injunctive order, though changing the status quo was well within the district judge's discretion. 28 U.S.C.A. § 1292(a)(1).

Daniel E. Collins, III (argued), Deputy City Atty., San Francisco, Cal., for defendants-appellants.

Michael S. Sorgen (argued), of San Francisco Neighborhood Legal Assistance Foundation, San Francisco, Cal., for plaintiffs-appellees.

Before KOELSCH and DUNIWAY, Circuit Judges, and ANDERSON,* District Judge.

OPINION

PER CURIAM:

This is an appeal from an order granting, in part, a motion for a preliminary injunction. 28 U.S.C. § 1292(a)(1) gives us jurisdiction. The district judge's Order and Memorandum, which embodies his findings of fact and conclusions of law, are reported in *P. v. Riles*, N.D.Cal., 1972, 343 F.Supp. 1306. We affirm.

As will be seen from that report, the district judge granted only a part of the requested relief, and narrowly limited what he granted. 343 F.Supp. at 1314-1315.

"It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judi-

cial discretion. *Meccano, Ltd. v. John Wanamaker*, 253 U.S. 136, 141 [40 S. Ct. 463, 64 L.Ed. 822]; *Love v. Atchison Railway*, supra [8 Cir., 185 F. 331] p. 331; and cases there cited. Especially will the granting of the temporary writ be upheld, when the balance of injury as between the parties favors its issue. *Amarillo v. Southwestern Telephone Co. (C.C.A.)*, 253 F. 638, 640."

Prendergast v. N. Y. Tel. Co., 1923, 262 U.S. 43, 50-51, 43 S.Ct. 466, 469, 67 L.Ed. 853. Accord: *Deckert v. Independence Shares Corp.*, 1940, 311 U.S. 282, 290, 61 S.Ct. 229, 85 L.Ed. 189. In *Washington Capitols Basketball Club, Inc. v. Barry*, 9 Cir., 1969, 419 F.2d 472, 475-476, we said: "On an appeal from such an order [granting a preliminary injunction] it is the responsibility of this court to decide only the question as to whether or not the granting of the order was an abuse of discretion. An abuse of discretion has been defined as a 'plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as they are found.' *Bowles v. Quon*, 154 F.2d 72, 73 (9th Cir. 1946)." *Id.* at 476.

In reviewing the district court's order, we also apply the principles stated by us in *Sierra Club v. Hickel*, 9 Cir., 1970, 433 F.2d 24, 33, *aff'd*, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636: "In order to obtain such relief [viz. a preliminary injunction], . . . the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing. [Citations]. . . ."

In addition, before such a writ should issue, the applicant must show that it will suffer irreparable injury. The court must balance the damage to both parties. [Citation.]" See also *Allison v. Froehke*, 5 Cir., 1972, 470 F.2d 1123, 1126. We also have in mind that, as we

* The Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

said in *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 9 Cir. 1963, 316 F.2d 804 at 808, 809.

"It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it.

* * * * *

We are not to be understood as stating that the foregoing principles are hard and fast rules to be rigidly applied to every case regardless of its peculiar facts. The infinite variety of situations in which a court of equity may be called upon for interlocutory injunctive relief requires that the court have considerable discretion in fashioning such relief."

Our review of the record convinces us that the district court's findings of fact are fully supported by the record thus far made. Those findings also convince us that the order appealed from was well within the district judge's discretion, and that it is in accord with the principles stated by us in *Sierra Club v. Hickel, supra*. Although the relief granted does to a limited extent change the status quo, the facts of the case, and the carefully limited relief granted, are justified by the "peculiar facts" of this case. *Tanner Motor Livery, Ltd. v. Avis, Inc., supra*, does not require reversal.

On the basis of the findings of fact, and substantially for the reasons stated by the district judge, the order appealed from should be affirmed. We express no opinion as to the ultimate merits of the case.

Affirmed.

Louis B. GINSBERG and Grace Ginsberg,
Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE, Appellee.

No. 74-1089.

United States Court of Appeals,
Sixth Circuit.

Aug. 29, 1974.

Taxpayers appealed from the decision of the Tax Court, Tannenwald, J., which upheld Commissioner's determination of federal income tax deficiencies. The Court of Appeals, Harry Phillips, Chief Judge, held that evidence that taxpayer had formed partnership with trust which he had created for the benefit of his daughter and as to which he was the only trustee, evidence that taxpayer did not actively represent the trust as an independent factor in the management of the business, and that trust could withdraw from the partnership but without allowance for good will, trade names, patents, or other tangible assets demonstrated that the trust was not a bona fide partner and that taxpayers were properly taxable on entire income of the partnership.

Affirmed.

Internal Revenue § 1525

Evidence that taxpayer attempted to transfer 15 percent of assets of his sole proprietorship to himself as sole trustee of trust for his daughter, that he entered into partnership agreement with the trust, that he never actively represented the trust in the management of the business, that the trust was not held out as a partner to customers or creditors, and that trust could withdraw from the partnership but without allowance for good will, trade names, patents or other tangible assets demonstrated that the trust was not a bona fide partner and taxpayer was taxable on the entire income of the partnership. 26 U.S.C.A. (I.R.C.1954) § 704(e).