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Taxation--Employment Agency Fees Deductible as a Business Expense

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a possibility of reverter. In addition statutes in other jurisdictions similar to West Virginia's have been construed to render rights of re-entry and possibilities of reverter alienable.³³

The court left little doubt that a possibility of reverter is considered alienable. Such a conclusion is prompted by its adoption of the *Carney* case in addition to the reasons already enunciated. The court in *Carney* stated that a "possibility of resulting trust" was "somewhat in analogy to a possibility of reverter," and then held that a "possibility of resulting trust" was transferable under the statute of descent. It went on to say that such an interest is transferable by devise or bequest and also by alienation inter vivos.

The issue of the alienability of a right of re-entry would seem to be muddled by Judge Brannon's dissenting opinion in the *White* case, where he stated that our conveyance statute did not apply to a right of re-entry "because it requires some estate or actual interest for the foundation of a claim to come under this statute." However, as pointed out in *Zane*, Brannon reached such a conclusion by following the rule of the New York cases including *Upington v. Corrigan*.³⁴ By rejecting that rule the court in effect rejected Brannon's conclusions, since the basis of such a conclusion was destroyed.

In addition to maintaining that a possibility of reverter and a right of re-entry are both inheritable under our descent statute, *Zane* also lays important groundwork for a decision affirming the alienability of these interests under West Virginia's conveyance statute. Such a decision would be in accord with a growing tendency to reject all vestiges of the early common law regarding the transferability of these two future interests.

John R. Frazier

Taxation—Employment Agency Fees Deductible as a Business Expense

Petitioner-taxpayer was employed by a corporation as secretary-treasurer. In May 1966 petitioner sought new employment and for this purpose contacted an employment agency, paying their non-refundable fee which amounted to approximately \$3000. Through

³³ See *Fayette County v. Morton*, 282 Ky. 481, 138 S.W.2d 953 (1940); *Hamilton v. Jackson*, 157 Miss. 284, 127 So. 302 (1930); *Davis v. Skipper*, 125 Tex. 364, 83 S.W.2d 318 (1935). See also Annot., 53 A.L.R.2d 224 at §§ 3, 5 (1957).

³⁴ 151 N.Y. 143, 45 N.E. 359 (1896).

the agency's efforts, petitioner obtained employment with a second corporation as secretary-controller. Petitioner sought to deduct the \$3000 from his 1966 income tax return as an "Employment Agency Fee", but this deduction was disallowed by the Internal Revenue Service. The Service held that the \$3000 was not an allowable deduction under either section 162¹ or 212² of the Internal Revenue Code of 1954, but was a nondeductible personal expense. In the Tax Court, *held*, that the expenditure was incurred by petitioner in carrying on his trade or business of being a corporate executive. A fee paid to secure employment is deductible as an ordinary and necessary business expense. *David J. Primuth*, 54 T.C. 374 (1970).

Ambiguity and inconsistency persist in the area of the tax law under consideration in *Primuth*—the deductibility of expenses incurred in seeking and/or securing employment. There have been several contradictory rulings on whether such expenses are deductible as ordinary and necessary business expenses or as expenses incurred in the production of income. In a 1920 ruling, the Treasury Department held "fees paid to secure employment" to be allowable deductions.³ However, a 1922 ruling held that expenses incurred in *seeking* employment were personal expenses and therefore were not deductible from gross income.⁴ These rulings apparently played a significant part in forming the basis of the courts' past rulings which held that expenses incurred while *securing* employment were deductible while those incurred *seeking* employment were not.⁵ This distinction is clearly expressed in *Thomas W. Ryan*,⁶ where the court said that expenditures made while seeking employment were "clearly nondeductible, as established by judicial precedents and by the regulations." The courts have ruled on this subject (deductibility) on numerous occasions, their decisions being in

¹ INT. REV. CODE OF 1954, § 162: "Trade or Business Expenses. (a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business"

² INT. REV. CODE OF 1954, § 212: "Expenses for Production of Income. In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year— (1) for the production or collection of income"

³ O.D. 579, 3 CUM. BULL. 130 (1920) provides: "Fees paid to secure employment are considered allowable deductions for the purpose of computing net income subject to tax."

⁴ I.T. 1397, I-2 CUM. BULL. 145 (1922).

⁵ See, e.g., *Morris v. Commissioner*, 423 F.2d 611 (9th Cir. 1970), *aff'g* 26 CCH TAX CT. MEM. 1296 (1967); *Eugene A. Carter*, 51 T.C. 932 (1969).

⁶ 18 CCH TAX CT. MEM. 580 (1959).

⁷ *Id.* at 583.

accord with *Ryan*.⁸ Furthermore, the Treasury Regulations also provide that such expenses are not deductible.⁹

In 1960 a series of rulings was handed down which confused the issue further. The Treasury Department, revoking a previous ruling¹⁰ which allowed deductions of expenses incurred in securing employment, held that employment agency fees were not deductible.¹¹ This ruling stated that section 262 of the Code¹² prohibited the deduction of personal, living, or family expenses, and further noted a long standing position of the Service that expenses incurred in seeking employment were personal in nature, and therefore not deductible. Moreover, the ruling held that there was no distinction between money expended in *seeking* employment and that expended in *securing* employment. This ruling was revoked approximately two months later by Revenue Ruling 223 which stated that "the Internal Revenue Service will continue to allow deductions for fees paid to employment agencies for *securing* employment,"¹³ (but not for *seeking*).

The reasons given by the courts for holding employment agency fees nondeductible appear to be two-fold. First, a job-seeker is not engaged in any trade or business, and therefore the agency fee is not an expense incurred pursuant to a trade or business, as required by statute;¹⁴ second, a distinction drawn between expenses incurred in *seeking* employment and those incurred in *securing* employment.¹⁵

These grounds for denial of the deduction are not persuasive.

⁸ See Paul C. Sequin, 26 CCH TAX CT. MEM. 950 (1967); Francois Louis, 25 CCH TAX CT. MEM. 1047 (1966); William Galindos, 14 CCH TAX CT. MEM. 303 (1955); Leon Chooluck, 13 CCH TAX CT. MEM. 864 (1954); Raymond L. Collier, 13 CCH TAX CT. MEM. 857 (1954).

⁹ Treas. Reg. § 1.212(f) (1957), in pertinent part provides:

"(f) Among expenditures not allowable as deductions under section 212 are the following: . . . expenses such as those paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal services for compensation. . . ."

¹⁰ O.D. 579, 3 CUM. BULL. 130 (1920).

¹¹ Rev. Rul. 158, 1960-1 CUM. BULL. 140.

¹² INT. REV. CODE OF 1954 § 262.

¹³ Rev. Rul. 223, 1960-1 CUM. BULL. 57. (emphasis added).

¹⁴ *E.g.*, Morton Frank, 20 T.C. 511 (1953) where it was held that expenses incurred in investigating and looking for a new business were not deductible as ordinary and necessary business expenses in carrying on a trade or business. See also, Harold Haft, 40 T.C. 2 (1963) where the court held that a salesman who had worked 25 years did not cease to be in the jewelry business simply because he was temporarily unemployed.

¹⁵ See *Morris v. Commissioner* 423 F.2d. 611 (9th Cir. 1970), *aff'g*, 26 CCH TAX CT. MEM. 1296 (1967); Eugene A. Carter, 51 T.C. 932 (1969).

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It was held in *Peoples-Pittsburgh Trust Co.*¹⁶ that a taxpayer's business could be that of being an employee and that expenses incurred in that relation are ordinary and necessary expenses of such business. Thus the job-seeking expenses in *Primuth* were held to have been incurred pursuant to a trade or business, that of being a corporate executive.¹⁷ This leaves the distinction between expenses incurred in *seeking* employment and actually *securing* employment as the main cause of confusion in cases preceding *Primuth*. This distinction is clearly illustrated by the court in its decision in *Eugene A. Carter*¹⁸ where, discussing the language of Revenue Ruling 223,¹⁹ it said:

[T]his language was not intended to permit the deduction of a fee where the employment agency merely seeks to locate a position for the taxpayer . . . but was intended to allow a deduction only where the agency actually obtains a position for the taxpayer.²⁰

This language was upheld by the ninth circuit in the case of *Morris v. Commissioner*²¹ where the court held that "the distinction recognized . . . is between expenses incurred in *seeking* and *preparing* for new work, which are not deductible, and expenses incurred in *seeking* and *performing* such work, which . . . are deductible."²²

In *Primuth* the taxpayer obtained employment through an agency, but the Tax Court confronted the distinction between expenses incurred in *seeking* employment and those incurred in *securing* employment, and found that there was no basis for such a differentiation.²³ Judge Tannenwald summarized the court's reasoning in his concurring opinion:

[T]he drawing of distinctions based upon the difference between "seeking" and "securing" employment, upon whether the fee . . . is contingent or payable in any event, or upon whether the agency's efforts are successful or un-

¹⁶ 21 B.T.A. 588 (1930); see Ralph C. Holmes, 37 B.T.A. 865 (1938); Harold A. Christensen, 17 T.C. 1456 (1952).

¹⁷ David J. Primuth, 54 T.C. 374, 379 (1970).

¹⁸ 51 T.C. 932 (1969).

¹⁹ Rev. Rul. 223, 1960-1 CUM. BULL. 57, which states that the Internal Revenue Service will allow as deductions fees paid to employment agencies to secure employment.

²⁰ 51 T.C. at 935.

²¹ 423 F.2d 611 (9th Cir. 1970).

²² *Id.* at 612.

²³ 54 T.C. at 380.

successful simply adds unnecessary confusion and complexity to a tax law which already defies understanding even by sophisticated taxpayers. . . .²⁴

Likewise, Judge Simpson in his concurring opinion reasoned that there was no legal basis for such a result and that to "allow deductions for *securing* employment and deny deductions for *seeking* employment seems unreasonable and arbitrary."²⁵

Since its decision in *Primuth*, the Tax Court has been faced with a similar situation on two occasions and has adhered to its holding in *Primuth*. In *Guy R. Motto*,²⁶ on facts similar to those in *Primuth*,²⁷ the Tax Court cited *Primuth* as controlling and for this reason relieved the taxpayer. Again *Primuth* was controlling in the recent case of *Kenneth R. Kenfield*,²⁸ even though the facts were somewhat different.²⁹

In conclusion, the decision in *Primuth* and subsequent cases appears to be bringing some degree of uniformity into an area of the tax law which has been in confusion for quite some time. It would appear that in the future one will be able to deduct expenses incurred in *seeking*, though not actually *securing* employment.

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²⁴ *Id.* at 381. The Internal Revenue Service contended that Rev. Rul. 60-158 only applied in situations where the employment agency fee was contingent upon the securing of a position and not where the fee was payable in any event. The court held that this was a "distinction without a difference", and that the purpose of payment and the results obtained are identical.

²⁵ *Id.* at 383-84. (emphasis added).

²⁶ 54 T.C. 558 (1970).

²⁷ *Id.* at 559 where the court held that the only difference between this case and *Primuth* was the type of employment, an engineer in *Motto* and a corporate executive in *Primuth*.

²⁸ P-H TAX CT. REP. & MEM. DEC. ¶ 54,113 (1970).

²⁹ *Id.* Petitioner was allowed the deduction of the fee paid to the employment agency even though he did not actually go to work at the new employment obtained by the agency. Petitioner did accept the employment but later decided to remain with his then present employer who apparently offered him a comparable position to induce him to remain.