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Income Tax--Alimony--Payment for Months Prior to Divorce Decree Not Deductible

Arthur Mark Recht
West Virginia University College of Law

Virginia court has had a little less trouble with this principle than with its apparent double. *State v. Legg, supra,* which deals directly with this point holds: "The testimony of a witness upon a preliminary examination of one accused of a crime may be used by the witness upon trial of such accused person for the purpose of refreshing his memory." Usage of the concept of present recollection revived is further bolstered in West Virginia by a succession of cases dealing with books of original entry. *State v. Larue,* 98 W. Va. 667, 691, 128 S.E. 116 (1925); *Architects & Builders v. Stewart,* 68 W. Va. 506, 70 S.E. 113 (1911). Similarly, a case allowing the testimony of a nurse, who had refreshed her memory as to the number of persons visiting the plaintiff's room by use of the bed chart, was held proper. *Browning v. Hoffman,* 90 W. Va. 568, 589, 111 S.E. 492 (1922).

The use of notes by a witness to refresh his memory immediately raises the danger of a witness being given a script from which to testify. The threat of such sharp practice has given rise to inspection of the notes so used either by opposing counsel or by the trial judge. 3 WIGMORE, EVIDENCE § 111 (3d ed. 1940). Even so, the process of refreshing the memory by notes is comparatively unrestricted save by the use of common sense.

From the cases it would appear that the doctrines of past recollection recorded and present recollection revived are established in this state in varying degrees. Concerning the latter, there is little doubt, but some confusion does exist among the cases as to past recollection recorded. As stated before, this doctrine is extremely useful and instances of its applicability should come readily to mind. Perhaps a clear affirmation of it by the West Virginia court would be appropriate some time in the future.

John George Van Meter

Income Tax—Alimony—Payment for Months Prior to Divorce Decree Not Deductible

In May 1953 while a divorce action was pending, the respondent and his wife entered into an agreement by which the respondent agreed to pay his wife $30,000 annually in advance beginning in February of that year. In June an interlocutory divorce decree was entered, and in September this divorce decree became final. On the day that the final divorce decree was issued, the respondent paid his wife $20,000 for the months of February through September, commensurate to the terms of their agreement. The respondent subsequently used this amount paid as a deduction from his gross income. The Tax Court held that all payments made to the respondent's wife were properly deducted from the respondent's gross income. *Held,* in reversing the Tax Court, that the paying of an aggregate sum after the issuance of the divorce decree, does not in itself satisfy the requirement of the code provision which provides that periodic payments made to a wife subsequent to a divorce decree, which is in discharge of a legal obligation under the decree, shall be includible in the wife's gross income and deductible by the husband. The post-decree payments received by the wife allocable to months prior to the decree were all normal items of maintenance and support, which were the respondent's responsibility as in all other pre-decree months. The agreement of May did not effect a change in this situation. An installment which would not have been deductible if paid at the time when it was due, is not made deductible merely because it was paid at a time when it would have been deductible if then due. *Commissioner v. DeWitt,* 277 F.2d 720 (2d Cir. 1960).

The alimony tax problem has been a most prolific source of litigation in recent years. The principle case represents one facet of the controversy which springs out of the court's interpretation of INT. REV. CODE of 1939, § 22(k), 23(u). The part of § 22(k) which is pertinent to this discussion provides that when a wife receives payment made *"subsequent to the decree,"* the payments are to be includible in the wife's gross income and deductible by the husband. In § 23(u), it is provided that the husband may deduct any payments made to his wife within the taxable year which are includible in the gross income of the wife under § 22(k).

The interesting element worthy of comment in the principle case is the fact that the payments *were* made subsequent to the divorce decree, but by relating to months prior to the decree, they were not deductible. This seems to present an anomalous situation; where, upon first glance, it would appear that the statute had been complied with, but yet the respondent did not come within the scope of the statute.

This precise question was passed on in *Warley v. McMahon,* 148 F. Supp. 388 (S.D. N.Y. 1957). This case involves substantially the same facts as those of the principle case. The petitioner, pursuant to a separation agreement, made payments to his wife, subsequent to the decree, but they referred to months prior to the decree. In holding the payments not deductible the court said that when the code speaks of payments received subsequent to the decree it is referring to only those months following the decree.

There appears to be a paucity of cases dealing directly with this question. There are, however, analogous cases which seem to be in accord with the mood of the principal case. These cases deal with the situation where payments were made for months prior to the decree but not subsequent to it. These were held not deductible because the allowance of a deduction under this statute is completely predicated upon the existence of a decree of divorce or of separate maintenance. *Smith v. Commissioner*, 168 F.2d 446 (2d Cir. 1948); *George Wick*, 7 T.C. 723 (1946).

To follow this reasoning, the payments in the principal case for the months of February through September could not be dependent on any decree because the decree was not entered until September. Where no decree of divorce or of separate maintenance has been entered but payments are made to a wife commensurate to some agreement between the parties, they will not constitute income to her. *Smith v. Commissioner, supra; Daine v. Commissioner*, 168 F.2d 449 (2d Cir. 1948).

Thus it may be concluded that when the respondent made the payments for the months of February through September, they could not have been deducted from his gross income. A non-deductible payment should not be transformed into a deductible payment merely because it is received in a lump sum subsequent to the decree. *Warley v. McMahon*, 148 F. Supp. 388 (S.D. N.Y. 1957).

To allow a deduction for payments relating to months prior to a divorce decree, would in effect be an attempt to make the decree retroactive to the month the payments began. The decree would be similar to a decree rendered *nunc pro tunc* reverting to February. If this is true it would be in accord with the rationale of the preceeding authorities, and a deduction may be allowed. Unfortunately, retroactive judgments do not determine the rights of the federal government under its tax laws. *Daine v. Commissioner, supra.*

On the basis of the preceeding authorities, it would appear that the court reached a practical and realistic conclusion which carried out the intention of Congress. Judge Waterman, however in his dissenting opinion resolves the question of the meaning of the phrase "subsequent to the decree" by stating that it means any payment made after there has been adequate proof of a duty to pay arising out of a divorce decree.

Arthur Mark Recht

Perpetuities—Interests Subject to the Rule—Equitable Interests

The grantor, conveying land fronting on a highway, covenanted that in the event of the highway being relocated, additional land would be conveyed to the grantee without further cost so that the land presently conveyed would continue to front on the highway. The deed was recorded. By action of the State Road Commissioner the highway was relocated. In an action for specific performance of the covenant, the trial court granted the relief prayed for and the covenantor appealed. *Held,* upon delivery of the deed containing the covenant, the grantee therein became immediately vested with equitable rights or interests in the parcels of land to which the covenant related and that the rule against perpetuities has no application to such vested interests. The interest in or claim acquired by the grantee was held to be "conveyable," "vendable," and "alienable," within the meaning of a statute authorizing the conveyance of any interest in or claim to real estate, and hence not in violation of the rule against perpetuities. *Greco v. Meadow River Coal & Land Co.,* 113 S.E. 2d 79 (W. Va. 1960).

The significant point of this case, apparently unique in regard to its particular facts, is the presentation at the outset of the validity of a covenant to convey realty. The decision, it seems, fails to dispel the confusion that permeates the case in regard to the application of the rule against perpetuities to contracts which create "rights" or "interests" in property.

The rule against perpetuities is stated by Professor Gray as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). If by any possibility, even a remote one, an interest might vest beyond the prescribed period, the interest is void. It is not necessary that the interest will actually vest but it is necessary to show