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Taxation--Exchange of Principal Residence; Exchange of Property Held for Productive Use

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hysteria, a picture inconsistent with alcoholic amnesia, and a clinical examination negative for psychosis.” *Davidson, Forensic Psychiatry* 161 (1952).

In view of the thoroughness and stringency of these requirements, it is felt that in dealing with this phantasm, no marked differences should apply in establishing the validity of a plea of amnesia in civil cases. This would seem particularly necessary considering the frequent incidence of an attitude of an “open season” against insurance companies, even on the part of the insured against his own insurer. It is quite generally acknowledged that herein, many people believe that any means are justified in effecting recoveries from insurance companies. Many persons do not realize that insurance policies are contracts defining not only the rights of both parties, but also demanding certain duties from both.

In this case as reported, there was no indication that such testing methods, or any part thereof, were applied to the defendant’s plea of amnesia. While the decision on the facts in this case may still have been rendered in all due justice, it is submitted that in view of the considerations presented herein, the courts should approach with the greatest of caution those cases where a defendant claims so spurious a reason as amnesia as the basis for his refusal to testify. It not only appears to be perhaps the most difficult ground to prove, but the possibilities of its abuse, are, for this very reason, the more unpropitious to the insurer.

L. B. S.

**Taxation—Exchange of Principal Residence; Exchange of Property Held for Productive Use.**—Taxpayer’s principal place of residence, with a market value of $9,000, was located on his farm which he held for productive use, their combined market value being $90,200, and having a taxable basis of $45,000. He exchanged both for another farm having a market value of $75,000, and received $15,200 as “boot” from the exchange. Within twelve months, taxpayer invested in excess of the market value of his old residence in a new principal residence, and allocated $9,000 of the “boot” received on the exchange of productive property to the exchange of residences. As a result of this allocation, taxpayer contends that his taxable gain on the entire transaction was $6,200. *Held*, in an action to recover taxes paid, that since the government had provided no regulation applicable to this type of exchange, it could not com-
The jury held that the exchange of farms was an exchange of like property held for productive use, and where such property is exchanged solely for like property, no taxable gain or loss in the transaction is recognized. Int. Rev. Code of 1939, ch. 1, § 112(b) (1), 53 Stat. 37 (now Int. Rev. Code of 1954, § 1031(a)). However, where an exchange would fall within this provision except for the fact that money is received as a partial consideration for the exchange, a gain is recognized to the extent of such money received. Int. Rev. Code of 1939, ch. 1, § 112(c) (1), 53 Stat. 39 (now Int. Rev. Code of 1954, § 1031(b)). In the principal case, if the whole transaction was completed at the culmination of the exchange of farms, the taxable gain to the taxpayer would have been recognized to the extent of the "boot" received, in this case $15,200. See Coleman v. Commissioner, 180 F.2d 758 (8th Cir. 1950); Trenton Cotton Oil Co. v. Commissioner, 147 F.2d 33 (6th Cir. 1945).

The taxpayer complicated the transaction by investing in excess of the market value of his old residence ($9,000.00) in a new principal residence within twelve months after the exchange of the residence for other property. Int. Rev. Code of 1939, § 112, added by ch. 521, § 318(n)(1), 65 Stat. 494 (1951) (now Int. Rev. Code of 1954, § 1034(a)), states that gain in the exchange of principal residences is recognized only to the extent that the taxpayer's selling price of the old residence exceeds his cost of purchase of the new residence. Exchange of the residence for other property is considered as a sale of such residence. Int. Rev. Code of 1939, § 112, added by ch. 521, § 318(n) (2) (A), 65 Stat. 494 (1951) (now Int. Rev. Code of 1954, § 1034(c) (1)). Taxpayer, by applying these statutes to his exchange, contends that he should be allowed to deduct the $9,000 he reinvested from the $15,200 "boot" received in the exchange, thus making his taxable gain from the entire transaction $6,200.

The government's contention is that of the "boot" received in the exchange of property, only that fractional part apportionable to the old residence should be applied to the later exchange of residences. This would allocate 90/902 of the $15,200 "boot" or $1,516.63, as being paid to taxpayer for the exchange of his principal residence. The government further averred that taxpayer received
this same fractional share of the $75,000 farm obtained in the exchange, as payment for his old principal residence. They arrive at the taxable gain on the exchange of farms by totaling the entire "boot" received on this exchange, $15,200, plus the amount received as payment for the old residence, $7,483.37, less $9,000 reinvested in the new residence, and contend the taxable gain on the entire transaction to be $13,683.37.

This contention was rejected. The court said that at the end of the entire transaction, taxpayer had substantially the same property as before, and the only economic gain to him was $6,200 of the "boot" he had received, thus upholding the contention advanced by taxpayer.

If the transaction be considered as an exchange of principal residences, it is submitted that the contention advanced by the government was correct, but that the allocation was carried to an illogical extreme. The taxpayer, after exchanging his residence and farm for another farm, did not receive 90/902 of a residence in exchange, and it is contended that the allocation by the government of $7,483.37 as received for his residence is not correct. However, the same net result will be reached by omitting this allocation entirely.

It is also submitted that the fact situation of the principal case is covered by applicable regulations. Int. Rev. Code of 1939, § 112, added by ch. 521, § 818(n) (1), 65 Stat. 494 (1951) (now Int. Rev. Code of 1954, § 1034(a)), provides that no gain on the sale of a principal residence shall be recognized for taxation purposes, if within one year after such sale, taxpayer reinvested in excess of the selling price in a new principal residence. Where property is used by a taxpayer partially as a principal residence and partially for other purposes, only that amount allocable to the selling price of the residential portion need be reinvested for taxpayer to come within the above provision relating to nonrecognition of such gain. Treas. Reg. 118, § 39.112(n)-1(b)(1)(ii)(1953). Where taxpayer does so use his residence partially for other purposes, as in the case of an apartment over a store, or a home on a farm, the provision relating to nonrecognition of gain applies only to that portion of the property used as a residence. Joint Committee Staff Summary of Provisions of the Revenue Act of 1951, 1951-2 Cum. Bull. 287, 310. In determining the gain on an exchange of principal residences,
there must be an actual allocation of the selling price to the respective portions of the property as if there were two separate transactions. Rev. Rul. 286, 1953-2 Cum. Bull. 20.

It is submitted that by application of these regulations the transaction in the principal case can be construed as a sale of a principal residence, with an apportionment of the “boot” received in the exchange between the residence and the other property. This would allocate 90/902 of the “boot” received, or $1,516.63, to the residence, and the remainder allocable to the farm exchanged, making the taxable gain to the taxpayer as a result of the exchange of like property held for productive use $13,683.37, the amount which the government contended was correct.

It is contended that the government has provided, in the regulations herein discussed, applicable regulations for this exchange, and that a consideration of them would lend support to the contention made by the government in this novel fact situation.

M. D. W., Jr.

TORTS—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE AS SEPARATE DEFENSES.—D and P, residents of Florida, were planning a trip to D’s cabin at a lake resort in North Carolina. Upon arrival at the resort but prior to going to D’s cabin, P and D went to the lakeside in D’s truck, towing the latter’s motorboat on a trailer which was attached to the truck by an old and worn cable. D was familiar with the launching procedure but P was not. When they attempted to launch the boat, the truck bogged down, and after several unsuccessful attempts to free the boat and truck, D requested that P push on the rear of the truck as he, D, attempted to pull it forward. In the process the cable snapped and severed P’s foot. In an action for negligent tort the federal district court, sitting without a jury, found for P. Held, on appeal, that D was guilty of actionable negligence in using the cable and in failing to warn P, and that P was not guilty of contributory negligence in standing near the rear of the truck at D’s request. Ferguson v. Smith, 257 F.2d 694 (4th Cir. 1958).

The court in the principal case concluded that the plaintiff was not a social guest at D’s home as they were not on D’s property at the time of the accident. Thus P was not a licensee.