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Taxation--Receipt of Income--Satisfaction of Judgment After Assignment as Income to Assignor

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no federal constitutional point is directly decided, strained statutory constructions or exceptionable interpretations of fact grounded on avoidance of unconstitutionality should themselves be avoided where the United States Supreme Court has removed the constitutional threat. For a fundamental discussion of state taxes on gross receipts from interstate commerce see Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1917-18) 31 HARV. L. REV. 321, 572, 721, 932, (1918-19) 32 HARV. L. REV. 234, 374, 634, 902; Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909; Morrison, *State Taxation of Interstate Commerce* (1942) 36 ILL. L. REV. 727.

E. I. E.

TAXATION—RECEIPT OF INCOME—SATISFACTION OF JUDGMENT AFTER ASSIGNMENT AS INCOME TO ASSIGNOR.—*T*, on the cash basis, acquired for \$928 an interest in a syndicate prosecuting a claim against the United States. In November 1936, judgment was rendered against the government for \$2,777,333. *Briggs & Turivas v. United States*, 83 Ct. Cl. 664 (1936). The Supreme Court denied certiorari in October 1937. *United States v. Briggs & Turivas*, 302 U. S. 690, 58 S. Ct. 9, 82 L. ed. 533 (1937). An appropriation to pay the judgment was approved by the President March 5, 1938. On December 31, 1937, *T* transferred by deeds of gift shares of his interest in the syndicate to his minor sons, and on January 12, 1938, like shares to his sons and his wife. The judgment was paid by the government, and *T*'s share, amounting to \$34,926, was divided by the judgment creditor among *T* and his transferees proportional to their interests. *Held*, that *T* is liable for income tax on the entire \$34,926. *Doyle v. Commissioner*, 147 F. (2d) 769 (C. C. A. 4th, 1945), affirming 3 T. C. 1092 (1944).

The tax court decided the case squarely on the ground that the transactions between the taxpayer and his wife and sons were mere assignments of expected gains. "We can see no escape from the proposition that the taxpayer never owned, and therefore never transferred to his wife and sons, anything but an interest in a possible future gain to be derived from the realization of proceeds of a judgment against the United States for its breach of contract." *Richard S. Doyle*, 3 T. C. 1092, 1098 (1944). The circuit court of appeals, while approving the reasoning of the tax court, laying stress on the certainty of gain and absence of any necessary activity on the part of the transferees to realize the gain, as well as the intra-familial nature of the transactions, seemed to feel that *Helvering v. Horst*, 311 U. S. 112, 61 S. Ct. 144, 85 L. ed. 75, 131 A. L. R. 655 (1940), *Harrison v. Schaffner*, 312 U. S. 579, 61 S. Ct. 759, 85

L. ed. 1055 (1941), and *Helvering v. Clifford*, 309 U. S. 331, 60 S. Ct. 544, 84 L. ed. 788 (1940), made a pinpoint location of income unnecessary to establish the taxpayer's liability.

The case brings into play a rule simple to state but puzzling to apply. In general, income, especially such as arises apart from proprietorship, is taxable to him who earns or creates the right to receive it, and assignment of the right to receive leaves the assignor still taxable. 2 MERTENS, FEDERAL INCOME TAXATION (1942) §18.02. On the other hand, income which fairly can be said to arise after transfer of its property source is taxable to the transferee. *Ibid.* But in deciding particular cases subsidiary rules have been generated. Where an act or forbearance of the transferor subsequent to transfer is a requisite to receipt by the transferee, the former is taxable. *Burnet v. Leininger*, 285 U. S. 136, 52 S. Ct. 345, 76 L. ed. 665 (1932); *Lucas v. Earl*, 281 U. S. 111, 50 S. Ct. 241, 74 L. ed. 731 (1930). So, too, when the transferor has earned but not received the income, *Helvering v. Eubank*, 311 U. S. 122, 61 S. Ct. 149, 85 L. ed. 81 (1940); and when he retains interest in or control over the flow of income from the transferred property. MAGILL, TAXABLE INCOME (1945) 296. Assignment of dividends or interest apart from the stock or principal debt will not relieve the assignor of taxes. *Helvering v. Horst*, 311 U. S. 112, 61 S. Ct. 144, 85 L. ed. 75, 131 A. L. R. 655 (1940); *Hyman v. Nunan*, 143 F. (2d) 425 (C. C. A. 2d, 1944). No shift in tax incidence occurs when the assigned income discharges an obligation of the assignor. 2 MERTENS, TAXABLE INCOME, at §17.22. A further class, one that needs a great amount of limiting description, is that of enjoyment of income by substitution—upon the rationale that there is no essential difference between receipt followed by gift to a natural object of bounty and previous assignment to the same person. *Helvering v. Horst*, 311 U. S. 112, 61 S. Ct. 144, 85 L. ed. 75 (1940).

The Court in the principal case was loath to concede that the taxpayer's interests in the syndicate was property; and if there was no property in fact, there was nothing but income to transfer. However, it is suggested that the same result might have been reached treating the syndicate interest as property, under a rule that has emerged from analogous situations: when realization of gains from dealings in property has been changed from contingent to practically certain by a crystallizing event (in this case a judgment with possibility of appeal exhausted), subsequent transfer does not relieve the transferor from taxes. Thus where property is transferred after a binding sales contract has been made, or even where the transferee sells in keeping with the transferor's prearranged plan, profits are attributed to the latter. *McInerney v. Com-*

missioner, 82 F. (2d) 665 (C. C. A. 6th, 1936). The same result was reached when the owner of a building subjected to eminent domain proceedings conveyed after condemnation but before award. *Louis Schoen*, 30 B. T. A. 1075 (1934). But where a sales contract was no further along than the bargaining stage, the transferor escaped income taxes. *Isaac S. Peebles, Jr.*, 5 T. C. 14 (1945).

Logically, transfers of stock "dividend on" should come under this category, the declaration of the dividend being the determinative event, but it seems unlikely that the rule that dividends are income to the holder who receives them will be disturbed. *Matchette v. Helvering*, 81 F. (2d) 73 (C. C. A. 2d, 1936); cert. denied, 298 U. S. 677, 56 S. Ct. 942, 80 L. ed. 1398 (1936).

R. F. M.

TAXATION—SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS—PERSONAL PROPERTY LOCALLY SITUATED NOT SUBJECT TO ASSESSMENT.—Pursuant to W. Va. Acts 1935, c. 68, empowering municipalities to construct public works, including flood control projects, to be paid for by rents, tolls, fees, and charges other than taxation, the city of Huntington issued bonds to pay for building flood walls, with provision that the bonds should be retired by making an assessment on all real property benefited. In an attempt to refund the bonds the city extended the assessment to personalty as well as realty. Mandamus to compel the city clerk to countersign and attest the refunding bonds; writ denied. *Held*, that a special assessment of flood control improvement may not extend to personal property within the assessment district. *State ex rel. Huntington v. Heffley*, 32 S. E. (2d) 456 (W. Va. 1944).

In *Duling Bros. Co. v. Huntington*, 120 W. Va. 85, 196 S. E. 552 (1935), the supreme court had announced that a local assessment would come within the methods of paying for a flood control project, and stated that such assessment to the property benefited would not come within the definition of taxation. In the instant case the court, adopting the language of *Snetzer v. Gregg*, 129 Ark. 542, 196 S. W. 925 (1917), said that personalty is not to be assessed for such a project as flood control. The reasoning was that personalty could be moved in event of flood and so could not be benefited by local improvement. "The owner may be benefited in the enjoyment of the use of his personal property in that locality, but the property itself derives no benefit . . . The situs of the personal property follows the domicile of the owner." *Id.* at 546, 196 S. W. at 926.

The Arkansas decision held unconstitutional Ark. Acts 1917, No. 249, §14, in so far as it attempted to tax personal property for flood