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Taxation--Income Taxes--Negligence Penalty

P. N. B.

West Virginia University College of Law

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has nothing to confer in exchange for defendant's consent to service. Unless defendant is suable in the state courts the *Neirbo* doctrine does not apply nor support venue in the federal courts. Had defendant corporation done business elsewhere in the body of the state outside the military reservation or had the act of cession expressly reserved to the state authority to regulate entry of foreign corporations to do business therein, other issues would be presented: and of course the principal case is not authority that doing business on a federal reservation invokes the state statutes on venue and constructive appointment for service regardless of the terms of the act of cession. What is involved is the proper construction and operation of a conventional reservation of jurisdiction clause.

D. B. H.

TAXATION — INCOME TAXES — NEGLIGENCE PENALTY. — The Internal Revenue Commissioner assessed a five per cent negligence penalty on a deficiency resulting from taxpayer's failure to report as his income dividends on stock in form sold to his son and on a deficiency resulting from omission of two items from 1941 income. The taxpayer contested the treatment of the dividends as his income and asserted that he was not aware of a duty to report the two items as income in 1941. The tax court upheld the assessment of deficiencies and the penalty and taxpayer appealed. *Held*, assessments sustained. Assessment of the negligence penalty is an administrative act depending upon a finding of the existence of negligence, and taxpayer could easily have obtained advice as to the proper course to be pursued. *Gouldman v. Commissioner*, 165 F. 2d 686 (C. C. A. 4th 1948).

INT. REV. CODE 293 (a) (1) provides: "If any part of any deficiency is due to negligence, . . . 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency . . ." The holding in the principal case is in accord with settled judicial treatment of this provision of the statute. *Board v. Commissioner*, 55 F. 2d 73 (C. C. A. 6th 1931), *cert. denied* 284 U. S. 658 (1931); *Bothwell v. Commissioner*, 77 F. 2d 35 (C. C. A. 10th 1935); *Guaranty Trust Co. v. United States*, 44 F. Supp. 417 (E. D. Wash. 1942). In ascertaining whether tax-

payer is liable for the negligence penalty, the courts have applied the "reasonable and ordinary prudent man" test in the surrounding circumstances. *John T. Kennedy*, 16 B. T. A. 1372 (1929); *A. M. Standish*, 4 T. C. 995 (1945), *aff'd*, 154 F. 2d 1022 (C. C. A. 9th 1946). Necessarily a finding of negligence and assessment of the negligence-penalty will depend upon the facts of the particular case. However, once the commissioner has made a determination of negligence, the burden is on the taxpayer to prove due care. *Milton A. Mackay*, 11 B. T. A. 569 (1928); *Western Valve Bag Co.*, 13 B. T. A. 749 (1928); *John T. Kennedy*, 16 B. T. A. 1372 (1929); *First National Securities Co.*, 20 B. T. A. 999 (1930); *May E. Kaderly*, 21 B. T. A. 582 (1930); *John Laing*, 22 B. T. A. 380 (1931); *Edmond A. Hughes*, 27 B. T. A. 1022 (1933); *aff'd sub nom. Little v. Helvering*, 75 F. 2d 436 (C. C. A. 5th 1935); *Gibbs & Hudson, Inc.*, 35 B. T. A. 205 (1937); *Valhram Chimchirian*, 42 B. T. A. 1437 (1940), *aff'd*, 125 F. 2d 746 (C. C. A. D. C. 1942); *cf. Austin Co. v. Commissioner*, 35 F. 2d 910 (C. C. A. 6th 1929). The taxpayer is entitled to have the judgment of the commissioner exercised specifically upon the issue of negligence and is entitled to whatever administrative review of that conclusion the law at the time may provide. *Duffin v. Lucas*, 55 F. 2d 786 (C. C. A. 6th 1932), *cert. denied*, 287 U. S. 611 (1932); *Wilson Bros. v. Commissioner*, 124 F. 2d 606 (C. C. A. 9th 1941); *Thomas J. McLaughlin*, 29 B. T. A. 247 (1933); *A. M. Standish*, 4 T. C. 995 (1945), *aff'd*, 154 F. 2d 1022 (C. C. A. 9th 1946); *Tatem Wofford*, 5 T. C. 1152 (1945). The commissioner may assert fraud and negligence in the alternative, and if the facts do not show fraud but do show negligence, assessment of the negligence penalty will be upheld. *Lucian Wilcox*, 44 B. T. A. 373 (1941); *L. A. Meraux*, 38 B. T. A. 200 (1938); *Watson-Moore Co.*, 30 B. T. A. 1197 (1934); *American Packing Co.*, 3 B. T. A. 195 (1925). But if fraud only is asserted and the facts do not sustain such assertion, the court will not impose the negligence penalty even if the facts clearly show negligence. *American Ideal Cleaning Co.*, 30 B. T. A. 529 (1934); *Ned Wayburn*, 32 B. T. A. 813 (1935); *James Nicholson*, 32 B. T. A. 977 (1935), *aff'd*, 90 F. 2d 978 (C. C. A. 8th 1937); *Duffin v. Lucas*, 55 F. 2d 786 (C. C. A. 6th 1932); *cf. Louis Wald*, 8 B. T. A. 1003 (1927). Under circumstances indicated in connection with the following cases the negligence penalty has been held applicable. *American Packing Co.*, 3 B. T. A. 195

(1925) (charging capital expenditures to expense); *Louis Wald*, 8 B. T. A. 1003 (1927) (inaccurate, unorthodox accounting method); *Milton A. Mackay*, 11 B. T. A. 569 (1928) (faulty bookkeeping, mistake as to character of income, and failure to check return prepared by third person); *Thomas J. Avery*, 11 B. T. A. 958 (1928) (reliance in good faith on erroneous advice of third person); *First National Securities Co.*, 20 B. T. A. 999 (1930) (books kept on hybrid cash-accrual system and income reported on cash basis); *Edmond A. Hughes*, 27 B. T. A. 1022 (1933), *aff'd sub nom. Little v. Helvering*, 75 F. 2d 436 (C. C. A. 8th 1935) (lack of due care in reporting income); *Irving Fisher*, 30 B. T. A. 433 (1934) (failure to check return prepared by secretary); *Watson-Moore Co.*, 30 B. T. A. 1197 (1934) (faulty accounting system); *Oscar G. Joseph*, 32 B. T. A. 1192 (1935) (inadequate records, part of income reported on wife's separate return); *Harold B. Franklin*, 34 B. T. A. 927 (1936) (failure to check incorrect return prepared by secretary); *L. A. Meraux*, 38 B. T. A. 200 (1938) (inadequate accounting system, understated income and overstated deductions). The following cases illustrate situations where the negligence penalty has been held not applicable. *Hans Pederson*, 14 B. T. A. 1089 (1929) (good faith mistake in interpretation of law, combined with extensive and complex business interests); *Briggs-Weaver Mach. Co.*, 14 B. T. A. 1351 (1929) (followed advice of accountant on question of controversial and economic nature); *Desmond's, Inc.*, 15 B. T. A. 738 (1929) (bona fide belief that certain deductions were proper); *John T. Kennedy*, 16 B. T. A. 1372 (1929) (relied on statement from brokerage house as to income from brokerage transactions for tax purposes, and bona fide mistake on doubtful point of law); *Herman Senner*, 22 B. T. A. 655 (1931) (reasonable grounds to differ with commissioner as to treatment of item as income); *National Contracting Co.*, 25 B. T. A. 407 (1932), *aff'd*, 69 F. 2d 252 (C. C. A. 8th 1934) (minor divergencies from perfect set of books); *C. B. Wilcox*, 27 B. T. A. 580 (1933) (mistake in treating item of income as gift); *Davis Regulator Co.*, 36 B. T. A. 437 (1937) (full disclosure of income and reasonable grounds to differ with commissioner on items of income); *Clark G. Black*, 39 B. T. A. 1068 (1939), *rev'd on other grounds*, 114 F. 2d 355 (C. C. A. 9th 1940) (half of income reported as wife's income under ineffective community property agreement); *Charlotte L. Andrews*, 46 B. T. A. 607 (1942) (mistake of law-agent who

filed return acted on advice of counsel); *A. M. Standish*, 4 T. C. 995 (1945) *aff'd*, 154 F. 2d 1022 (C. C. A. 9th 1946) (reasonable honest misunderstanding of law); *Claire L. Canfield*, 7 T. C. 944 (1946) (clerical errors in accounting); *Pullman, Inc.*, 8 T. C. 292 (1947) (bona fide belief that item not taxable even though taxpayer did not make specific report of facts surrounding receipt, as advised by treasury regulations); *Commissioner v. Woods Mach. Co.*, 57 F. 2d 635 (C. C. A. 1st 1932), *cert. denied*, 287 U. S. 613 (1932) (acted on own view of law, honestly held and not untenable); *Bennett v. Commissioner*, 139 F. 2d 961 (C. C. A. 8th 1944) (mistaken conception of legal rights regarding gains and deductions).

P. N. B.