

February 1938

Internal Revenue--Administrative Law--Finality of Findings of the Board of Tax Appeals

H. A. W. Jr.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Tax Law Commons](#)

Recommended Citation

H. A. W. Jr., *Internal Revenue--Administrative Law--Finality of Findings of the Board of Tax Appeals*, 44 W. Va. L. Rev. (1938).

Available at: <https://researchrepository.wvu.edu/wvlr/vol44/iss2/9>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

tiff was undetermined at the time the contract was entered into was also an obstacle to his claim after his status had been determined. But it is settled that if the beneficiary satisfies the other requisites entitling him to sue it does not matter that he is not named in the contract, and the fact that he is not known at the time of the making of the contract is immaterial. He may even be one of a class of persons, if the class is sufficiently designated.¹²

The result in *Aetna Life Insurance Company of Hartford Conn. v. Maxwell* is correct beyond a doubt. The rules of law governing the status of the plaintiff were clearly against his claim as a sole beneficiary, and the case adds clarity to the proposition.

H. G. W.

INTERNAL REVENUE — ADMINISTRATIVE LAW — FINALITY OF FINDINGS OF THE BOARD OF TAX APPEALS. — The stockholders of *X* corporation, contemplating a sale of the entire stock of *X*, organize a dummy corporation, *Y*, to which some of the assets of *X* are transferred. After the sale, the former stockholders of *X*, now stockholders of *Y*, vote that *Y* make a "gift or honorarium" to former employees of *X*. The commissioner of internal revenue treated the amount received by *B*, one of the former employees of *X*, as taxable income. This payment was likewise held by the Board of Tax Appeals to be "compensation," taxable as income, and not a tax-exempt "gift."¹ The circuit court of appeals (one judge dissenting) upheld the finding of the Board,² and the Supreme Court granted *certiorari*.³ Held (four justices dissenting), that the ultimate finding that this payment constituted compensation involved a question of law, or at least a mixed question of law and fact, and the Court could look into all the circumstances and substitute its judgment for that of the Board of Tax Appeals. Judgment reversed. *Bogardus v. Commissioner of Internal Revenue*.⁴

The Revenue Act of 1924, which created the Board of Tax Appeals,⁵ provided for no appeal from the Board; the result being that a proceeding before this administrative tribunal was considered

¹² *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398 (1887); *Lenz v. Chicago, etc. R. Co.*, 111 Wis. 198, 86 N. W. 607 (1901); RESTATEMENT, CONTRACTS § 139.

¹ 45 STAT. 798 (1928), 26 U. S. C. A. § 22 (b) (3).

² *Bogardus v. Helvering*, 88 F. (2d) 646 (C. C. A. 2d, 1937).

³ 57 S. Ct. 790 (1937).

⁴ 58 S. Ct. 61, 5 U. S. L. Week 203 (1937).

⁵ 43 STAT. 336 (1924), 26 U. S. C. A. § 600.

to be merely a preliminary skirmish—"a run for luck"⁶—because either party, if dissatisfied, could bring a court action and get a trial *de novo*. In 1926 Congress made provisions for a right of review which was restricted to questions of law.⁷ Generally speaking, the courts have construed this statute liberally and have accorded finality to the findings of fact made by the Board.⁸ Out of twenty-one cases decided by the Supreme Court, the decision of the Board was affirmed in thirteen,⁹ and in six of the eight reversals rather clear-cut questions of law were presented.¹⁰

The other two cases in the group of reversals referred to above, which might, at first blush, seem to be indicative of a retrogressive tendency of the Court, are the recent cases of *Helvering v. Tex-Penn Oil Co.*,¹¹ and the principal case, *Bogardus v. Commissioner*.¹² In the *Tex-Penn* case, decided some seven months before the *Bogardus* case, the issue was whether a certain cash sum was a part of the consideration for the transfer of the stock of a corporation¹³

⁶ *Blair v. Curran*, 24 F. (2d) 390 (C. C. A. 1st, 1928).

⁷ 44 STAT. 110 (1926), 26 U. S. C. A. § 641.

⁸ *Fisher v. Com'r of Internal Revenue*, 59 F. (2d) 192 (C. C. A. 2d, 1932); *Lougee v. Com'r*, 63 F. (2d) 112 (C. C. A. 1st, 1933); *Olson v. Com'r*, 67 F. (2d) 726 (C. C. A. 7th, 1933); *Avery v. Com'r*, 22 F. (2d) 6 (C. C. A. 5th, 1927); *Meinrath Brokerage Co. v. Com'r*, 35 F. (2d) 614 (C. C. A. 8th, 1929); *Sheppard & Myers, Inc. v. Com'r*, 45 F. (2d) 50 (C. C. A. 3rd, 1930); *Simons Brick Co. v. Com'r*, 45 F. (2d) 57 (C. C. A. 9th, 1930); *Wright v. Com'r*, 50 F. (2d) 727 (C. C. A. 4th, 1931); *Helvering v. Ward*, 79 F. (2d) 381 (C. C. A. 8th, 1935).

⁹ *Old Colony Trust Co. v. Com'r of Internal Revenue*, 279 U. S. 716, 49 S. Ct. 499 (1929); *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732 (1935); *Snyder v. Com'r*, 295 U. S. 134, 55 S. Ct. 737 (1935); *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289, 55 S. Ct. 158 (1934); *Burnet v. Leininger*, 285 U. S. 136, 52 S. Ct. 345 (1932); *Phillips v. Com'r of Internal Revenue*, 283 U. S. 589, 51 S. Ct. 608 (1931); *Burnet v. Clark*, 287 U. S. 410, 53 S. Ct. 207 (1932); *Lucas v. Kansas City Structural Steel Co.*, 281 U. S. 264, 50 S. Ct. 263 (1930); *Burnet v. S. & L. Bldg. Corporation*, 288 U. S. 406, 53 S. Ct. 428 (1933); *Elmhurst Cemetery v. Com'r*, 300 U. S. 37, 57 S. Ct. 324 (1937); *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200, 56 S. Ct. 185 (1935); *Hulburd v. Com'r*, 296 U. S. 300, 56 S. Ct. 197 (1935); *Palmer v. Com'r*, 58 S. Ct. 67, 5 U. S. L. Week 197 (1937).

¹⁰ *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115, 50 S. Ct. 173 (1930); *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 53 S. Ct. 161 (1932); *Helvering v. Salvage*, 297 U. S. 106, 56 S. Ct. 375 (1936); *Helvering v. Independent Life Ins. Co.*, 292 U. S. 371, 54 S. Ct. 758 (1934); *Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 56 S. Ct. 269 (1935); *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415, 53 S. Ct. 198 (1932).

¹¹ 300 U. S. 481, 57 S. Ct. 569 (1937).

¹² 58 S. Ct. 61, 5 U. S. L. Week 203 (1937).

¹³ Under Act, 1918, § 202 (b), 40 STAT. 1060 (1918) and Treasury Regulation 45, art. 1567, had the sole consideration for the transfer been stock, no taxable income could have been derived from the transfer.

and therefore taxable as income, or whether this sum was merely a loan made by the transferee to the transferor. The Board of Tax Appeals considered the evidence and on the basis thereof made "probative or evidentiary findings" of fact which almost conclusively proved that the sum was not a part of the consideration for the transfer. The Board then made an "ultimate finding" that the sum was a part of the consideration for the transfer and constituted taxable income. This was the first case in which the Supreme Court was faced with the problem of inconsonance between the probative findings made by the Board and the conclusion drawn from those findings or the "ultimate findings."¹⁴ It is submitted that so far as the reviewing court is concerned, the questions presented by a conclusion drawn from evidentiary findings which are supported by evidence and a conclusion drawn from uncontroverted facts, are identical, because such evidentiary findings are just as incapable of disputation by the reviewing court as are agreed facts. Ergo, while a casual reading of the *Tex-Penn* case might leave the impression that the reason for reviewing the findings was that it was an *ultimate* finding and intrinsically involved a question of law or a mixed question of law and fact, the true basis of the case is that the question presented was whether or not the finding was contrary to the evidence, which is a question of law, being analogous to the question as to whether a verdict of a jury is contrary to the evidence.

In the *Bogardus* case the Court quotes from the *Tex-Penn* case some language that might lead one to imply that something akin to necromancy will inject a question of law or a mixed question of law and fact into a finding based upon uncontroverted facts, but no more in this case than in the *Tex-Penn* case did the Court review the finding of the Board on any such principle. Under the statute here involved, a payment which was "compensation" was taxable, while a payment which was a "gift" was tax-exempt; the facts were of such a nature that lexicographical research was inadequate to determine into which category this payment should fall—the question was whether the statute should be interpreted

¹⁴ Two circuit courts had differed in the solution of this problem. In *Washburn v. Com'r*, 51 F. (2d) 949 (C. C. A. 8th, 1931), the "ultimate finding" was held to be a conclusion of law which could be set aside if contrary to the "probative findings." *Tricon v. Helvering*, 68 F. (2d) 280 (C. C. A. 9th, 1933), and *Winnett v. Helvering*, 68 F. (2d) 814 (C. C. A. 9th, 1934), say that evidentiary facts cannot be used to overcome the finding of ultimate fact unless they compel an opposite conclusion as a matter of law.

to include such a payment as this in the term "gift"; therefore the question was one of statutory interpretation, which is a question of law. The argument made in the dissenting opinion is that the sole differentiating factor between a payment which is a gift and a payment which is compensation is the intent with which the payment is made, and intent is always a question of fact. This would be perfectly correct if it were conceded that the statutory tax-exempt "gift" is the same as the ordinary gift referred to in the law of personal property, but whether such be the case calls for a judicial interpretation of the statute and the consequent decision of a question of law. Hence the *Bogardus* case may be reconciled on the basis that it involved a question of statutory interpretation, although this is not clearly set forth in the opinion.

H. A. W., JR.

LIMITATION OF ACTIONS — STATUTE OF LIMITATIONS APPLIED TO QUASI-CONTRACTUAL RIGHTS ARISING UPON ANTICIPATORY BREACH OF AN EXISTING CONTRACT.— Plaintiff paid defendant premiums on three industrial insurance policies from November, 1921, to September, 1932. In 1932, the plaintiff's request for payment of the cash value of the policies was refused on the ground that the policies had lapsed in 1921, 1922, and 1925 respectively. The plaintiff had no knowledge or notice of this fact and in 1935 instituted this action in quasi contract to recover the premiums paid since the policies lapsed. Defendant pleaded the Statute of Limitations on the theory that the Statute commenced to run when the defendant treated the policies as having lapsed.¹ Held, that the Statute begins to run only when the injured party manifests his intention to treat the anticipatory repudiation as a "rescission" or as a breach. *Harless v. Western and Southern Life Insurance Co.*²

West Virginia has frequently upheld a right of action based on an anticipatory repudiation of an executory contract³ and now joins a majority of other courts in allowing suit upon a repudiation

¹ It was conceded that the five year statute of limitations was the correct limitation to apply in this case. W. VA. REV. CODE (Michie, 1937) c. 55, art. 2, § 6.

² 192 S. E. 137 (W. Va. 1937).

³ *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630 (1896); *Connolly v. Bollinger*, 67 W. Va. 37, 67 S. E. 71 (1910). For a complete discussion of W. Va. cases see Riley, *Anticipatory Breach in West Virginia* (1925) 31 W. VA. L. Q. 182.