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Allen D. Altman

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# TAX NOTE

## A UNIFORM CRITERION TO DETERMINE MARITAL STATUS FOR FEDERAL INCOME TAX PURPOSES

A husband and his first wife entered into a separation and maintenance agreement in New York in 1946. In 1952, the husband obtained an *ex parte* divorce in Mexico,<sup>1</sup> and remarried there with a second ceremony later performed in Connecticut. He returned to New York with his second wife, and in 1953, the first wife obtained a judgment in New York<sup>2</sup> which invalidated the Mexican divorce decree and declared the first wife to be his lawful wife. For the years 1953-55 and 1957 the husband and his second wife had filed joint income tax returns. The Commissioner disallowed the joint return and issued a deficiency notice. The Tax Court sustained the Commissioner's position<sup>3</sup> and the taxpayers<sup>4</sup> petitioned for redetermination of the deficiencies. On review by the Second Circuit, *held*, reversed: for federal income tax purposes it is of no consequence that a divorce is invalidated subsequently by a jurisdiction other than the one that issued the decree. *Estate of Borax v. Commissioner*, 349 F.2d 666 (2d Cir. 1965).

The Internal Revenue Code does not define the status of husband and wife for purposes of federal income taxation.<sup>5</sup> The Code merely requires the taxpayers in a joint return to be married on the last day of the taxable year.<sup>6</sup> Accordingly, the tax consequences incident to the marital relationship cannot always be predicted with reasonable certainty. Where taxable situations arise from the marital relationship entered into under state law, the nature and rights of the parties under such law are generally determinative for purposes of federal taxation.<sup>7</sup>

Rules of local law have been applied in construing the tax law to define and control the status of the parties in bigamous and putative marriages,<sup>8</sup> common law marriages,<sup>9</sup> divorces and interlocutory decrees

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1. Although the agreement was made six years prior to the Mexican divorce it was held to be "incident to such divorce." The term divorce was in reference to the status of divorce rather than the actual decree of divorce. *Newton v. Pedrick*, 212 F.2d 357, 361 (2d Cir. 1954).

2. *Borax v. Borax*, 119 N.Y.S.2d 819 (Sup. Ct. 1953).

3. *Ruth Borax*, 40 T.C. 1001 (1963).

4. Prior to the completion of the proceedings in the Tax Court, husband, co-petitioner, died and his executors were substituted in his stead.

5. *Trapp v. United States*, 177 F.2d 1 (10th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950). Legal rights and interests of husband and wife are created by state law, and federal revenue acts merely determine when and how the interests created in that manner shall be subject to income taxes.

6. INT. REV. CODE OF 1954, § 6013(d)(1)(A).

7. *Ward v. Commissioner*, 224 F.2d 547 (9th Cir. 1955).

8. *Charles Edward Barr*, 10 T.C. 1288 (1948). The Tax Court refused to recognize the marital status of a taxpayer who innocently married a married woman, even though discovery of this fact was not made until after the taxable year. Had the taxpayer's putative

of divorce,<sup>10</sup> and annulments.<sup>11</sup> State law, however, has not been determinative of the marital status where its implementation would be dissonant with the general purpose of Congress to establish a nationwide scheme of taxation uniform in its applications and provisions.<sup>12</sup> Thus, a common law marriage, if valid where entered into, is recognized for tax purposes even after the parties move to another state where the marriage is not recognized,<sup>13</sup> and alimony payments, even where prohibited by state law, nevertheless may be deductible for tax purposes.<sup>14</sup>

The general rule on the application of state law works well when it is clear which state's law would apply. But uncertainty arises when the state of marital domicile invalidates a foreign decree of divorce.<sup>15</sup> In this situation, the courts have taken inconsistent positions with the result that

wife entered the marriage in good faith, thinking she were free to do so, the court intimated that it might have considered the case in a different light. "Even if that principle [of good faith assumption of a putative marriage] be accepted, the record is devoid of any showing that petitioner's putative wife entered the marriage in good faith . . . we are hence under no necessity to consider that petitioner has not shown any ground for treating his salary as community income." *Id.* at 1291.

9. Rev. Rul. 66, 1958-1 CUM. BULL. 60. A common law marriage is recognized for the purposes of filing a joint return if it is valid in the state in which it was entered.

10. Commissioner v. Eccles, 208 F.2d 796 (4th Cir. 1953) *affirming per curiam* 19 T.C. 1049. The taxpayer was entitled to file a joint return for the taxable year ending prior to the final date of an interlocutory divorce decree. The Commissioner acquiesced in Treas. Reg. § 1.6013-4(a)(2) (1959):

An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married. However, the mere fact that spouses have not lived together during the course of the taxable year shall not prohibit them from making a joint return. A husband and wife who are separated under an interlocutory decree of divorce retain the relationship of husband and wife until the decree becomes final. The fact that the taxpayer and his spouse are divorced or legally separated at any time after the close of the taxable year shall not deprive them of their right to file a joint return for such taxable year under section 6013.

In Sullivan v. Commissioner, 256 F.2d 664 (4th Cir. 1958), the fact that both parties filed appeals from a separation decree before the close of the taxable year involved did not affect the fact that they were no longer married at the close of the year under Maryland law. Therefore, a joint return was disallowed. Where an appeal does defer the time when a divorce becomes effective, a joint return may be filed during this period. Tillinghast v. Tillinghast, 25 F.2d 531 (D.C. Cir. 1928); Eiermann v. Modenbach, 198 La. 1062, 5 So. 2d 335 (1941); Westphalen v. Westphalen, 115 Neb. 217, 212 N.W. 429 (1927).

11. A decree of "annulment" operates as a divorce where it is effective only from the time of the decree and where payments in the nature of alimony are required. Lily R. Reighley, 17 T.C. 344 (1951). Alimony payments for medical care and maintenance under a New York decree annulling the marriage on the ground of incurable insanity were held deductible, as being equivalent to payments for divorce. Rev. Rul. 130, 1959-1 CUM. BULL. 61. See also Reginald B. Parsons, 20 P-H Tax Ct. Mem. 888 (1951), where deductible payments were made under an agreement incident to a German annulment for a cause sufficient to justify a divorce in Illinois.

12. Auerbach Shoe Co. v. Commissioner, 216 F.2d 693 (1st Cir. 1954).

13. Rev. Rul. 66, 1958-1 CUM. BULL. 60.

14. Tuckie G. Hesse, 7 T.C. 700 (1946).

15. Williams v. North Carolina [II], 325 U.S. 226 (1945). The rendering state's finding of jurisdiction is not itself entitled to full faith and credit. See, e.g., Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888 (1962).

taxpayers from different states, with identical foreign divorces, have been taxed differently.<sup>16</sup>

The Ninth Circuit faced this problem in *Gersten v. Commissioner*,<sup>17</sup> where a California court had invalidated a Mexican divorce obtained by the husband five months prior to the finality of a California interlocutory divorce decree. The court chose to apply the law of the domicile and denied a joint return by the husband and his second wife, both California residents. The court held that since the second marriage was not recognized by the state of California, it could not be recognized by the federal taxing authorities.<sup>18</sup> To the same effect was the holding of the Tax Court in *John J. Untermann*,<sup>19</sup> which recognized as controlling a New Jersey court's invalidation of the husband's Mexican divorce and remarriage. However, the Third Circuit in *Feinberg v. Commissioner*,<sup>20</sup> took a different view in recognizing alimony payments made incident to a Florida divorce which subsequently was invalidated by the marital domicile.<sup>21</sup> The court concluded that "the mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for Federal income tax purposes."<sup>22</sup>

In the instant case, the Second Circuit was obviously in conflict with the *Gersten* and *Untermann* decisions.<sup>23</sup> By application of the rule of validation,<sup>24</sup> first applied in *Feinberg*, recognition was given the Mexican

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16. An excellent example of this can be seen where identical Mexican divorce decrees are obtained by New York and New Jersey domiciliaries, both of which are invalidated by their marital domiciles. For purposes of filing a joint return, however, only the New York taxpayer's divorce would be recognized, thereby entitling him to file with his second wife. Compare *Estate of Borax v. Commissioner*, 349 F.2d 666 (2d Cir. 1965) with *John J. Untermann*, 38 T.C. 93 (1962).

17. 267 F.2d 195 (9th Cir. 1959) (*remanded on other grounds*).

18. *Id.* at 199. "In no case can the marriage of either of the parties during the life of the other be valid in California if contracted within one year after the entry of an interlocutory decree of divorce." CAL. CIVIL CODE § 61, subd. 1.

19. 38 T.C. 93 (1962). The material facts of this case are identical with *Borax*; only the holdings differ.

20. 198 F.2d 260 (3d Cir. 1952).

21. However, no determination was made as to the husband's marital status for purposes of filing a joint return with his second wife.

22. *Id.* at 263.

23. This position was taken again by the Second Circuit in *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965), where the decision was premised upon the validation rule applied in *Borax*. The unanimous majority felt that acknowledgement of the marital status of living with the second wife was a better choice than the recognition of a marriage "with a wife with whom he no longer lives." *Id.* at 341.

24. The purpose of this rule initially was to give tax recognition to alimony payments made incident to a foreign divorce decree which was invalidated by the marital domicile. Validation of these alimony payments was necessary to permit their deduction because under the pre-1954 Code such payments were deductible only where incident to a (valid) decree of divorce or legal separation. Payments made under a private written agreement were not deductible. INT. REV. CODE OF 1939, § 22(k).

The only limitation on the rule is that the rendering jurisdiction's concept of divorce

divorce decree. The court expressly declared that a divorce will be recognized for federal tax purposes so long as the jurisdiction which issued the decree has not set it aside.<sup>25</sup>

The results of *Borax* are consistent with the Congressional intent to achieve uniformity in the tax consequences incident to the marital relationship. The rule of validation gives certainty to the migratory taxpayer whose foreign<sup>26</sup> divorce and remarriage have been invalidated by the state of his marital domicile. Validation, as employed in the present case, gives recognition to a status of marriage "under color" of validity.<sup>27</sup>

The rule does, however, present serious problems. Its strict application would require recognition of mail-order divorce decrees and those obtained in Mexican divorce mills even after they had been invalidated by the marital domicile. This would, in fact, be tantamount to giving a tax boon to bigamists. In this respect, the rule hardly creates complete uniformity since, as shown in the two previous examples, necessary exceptions are already apparent.

Perhaps a federal tax definition of marriage and divorce may be forthcoming by Congress "to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law."<sup>28</sup> Unfortunately however, the adoption of a uniform nationwide definition would have the effect of recognizing some taxpayers as husband and wife for tax purposes who, under state law, are not married. It is suggested that a better rule, capable of more consistent application than the validation rule, would recognize the marital status of the migratory spouse as determined by the law of his domicile.<sup>29</sup>

ALLEN D. ALTMAN

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be similar to that contemplated by the tax laws. *Estate of Borax v. Commissioner*, 349 F.2d 666, 672 (2d Cir. 1965).

25. *Estate of Daniel Buckley*, 37 T.C. 664 (1962). A joint return with the second wife was disallowed because the husband's Mexican divorce from his first wife was subsequently set aside by the Mexican court which had issued the divorce.

26. By "foreign" is meant any divorce obtained outside of the marital domicile.

27. See note 25 *supra*. *Contra*, note 8 *supra*. It seems very doubtful that the tax recognition of a meretricious relationship was within the Congressional intent when the joint return was created.

28. *Commissioner v. Lester*, 366 U.S. 299, 301 (1961). The promotion of certainty and uniformity was intended by Congress to provide all taxpayers with "a uniform construction of all these provisions" dealing with the determination of marital status, including those related to joint returns. S. REP. NO. 1013, 80th Cong., 2d Sess. 50 (1948). The incongruities in the instant case may provide sufficient Congressional interest for needed action.

29. In the application of this proposal a choice must be made of the effect to be given retroactive state decisions which deny the validity of the migratory spouse's foreign divorce. To give tax consequences to the retroactive state decree would unduly burden the taxpayer. Therefore, it would appear better to recognize the decree only prospectively. *Cf. G.C.M. 25250, 1947-2 CUM. BULL. 18, 32*, permitted deduction for alimony payments made in good faith incident to a Mexican divorce. Upon advice that the Mexican divorce would not be recognized in the state of domicile, a lump sum settlement was made and the wife obtained a Nevada divorce. The alimony payments made for the two years prior to the Nevada divorce were held deductible.