University of Miami Law Review

Volume 18 | Number 3 | Article 10

5-1-1964

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be that this statutory "civil action" will also be entitled to the rules of civil procedure on the law side, such as trial by jury. Generally, those states making a will contest a common law action confer jurisdiction on the common law courts by statute.[47] Thus, in the absence of statute in Florida, the action will probably be initially characterized as equitable.

Though the instant case is one of first impression in Florida, it has solid support by foreign case law and by Florida statutory construction. It should serve to establish new guideposts for proceedings in probate courts within the Third District Court of Appeal's jurisdiction —an area which formerly was noted for its lack of uniformity from county to county.[48] The utopian situation, however, can only be reached by state-wide uniformity in this area.

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INCOME TAX—EMPLOYEE'S REIMBURSEMENT FOR LOSS ON SALE OF RESIDENCE

The petitioner accepted new employment which required that he move to a distant city. His family remained to attend to the sale of their residence. It became apparent, however, that the house could not be sold at its appraised value. When the new employer realized that this situation was interfering with the employee's performance, he offered to reimburse him for the difference between the appraised value of the home and the amount realized from the sale. Pursuant to the employer's offer, the employee received a reimbursement of five thousand dollars, which he failed to include in his reported income. The Tax Court held that the amount was compensation for services and consequently taxable income to the taxpayer.[1] On appeal, *held, affirmed*: a payment which constitutes an economic benefit to the taxpayer which arises out of his employment is to be treated as compensation for services. *Bradley v. Commissioner*, 324 F.2d 610 (4th Cir. 1963).

The Internal Revenue Code defines "gross income" as "all income from whatever source derived."[2] The code uses three categories to afford

47. Statutes in some states providing for a will contest make it a common law action, conferring jurisdiction on the common law courts. Miles v. Long, 342 Ill. 589, 174 N.E. 836 (1931); Dean v. Swayne, 67 Kan. 241, 72 Pac. 780 (1903); Hans v. Holler, 165 Mo. 47, 65 S.W. 308 (1901); People *ex rel.* Lewis v. Fowler, 229 N.Y. 84, 127 N.E. 793 (1920); 3 PAGE, WILLS § 26.50 (3d ed. 1961).

48. BROOKER, PRACTICE AND PROCEDURE IN THE COUNTY JUDGE'S COURT OF HILLSBOROUGH COUNTY, FLORIDA (2d ed. 1954).

1. Harris W. Bradley, 39 T.C. 652 (1963).

2. "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ." INT. REV. CODE OF 1954, § 61(a).

specificity to this broadly defined term: (1) it sets forth certain enumerated receipts to be *included* in income;[3] (2) it excludes other named receipts from income;[4] and (3) it declares that the list of includible items is not limited to the items enumerated,[5] whereas only specified exclusions are allowed.[6] The courts and the Internal Revenue Service have been active in relegating various types of receipts into the catchall category of includible items. They have made their determinations in one of two forms. Either *new categories* of receipts have been created to be added to the list of items includible in income, the most notable example being subsidy *payments*,[7] or *new receipts* have been brought under existing categories, an early example of which occurred in the case of *Old Colony Trust Co. v. Commissioner*.[8] In *Old Colony Trust*, the employer had paid the employee's income taxes. The payment was to be income derived from employment and was brought under the category of compensation for services.[9]

In dealing with the problem of income, the Supreme Court has taken the position that it was the intent of Congress "to tax all gains except those specifically exempted."[10] Under this theory, the Court has held that the category of compensation for services was "broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected."[11] Consistent with the Supreme Court's expressed position, the following receipts have been brought into gross income: punitive damages,[12] employee's stock options,[13] transactions previously considered as gifts,[14] reimbursements for moving expenses,[15] insiders'

3. INT. REV. CODE OF 1954, § 61(a).
4. INT. REV. CODE OF 1954, § 61(b) and §§ 101-19.
5. See note 2 *supra*.
6. INT. REV. CODE OF 1954, §§ 101-19.
7. Texas & Pac. Ry. v. United States, 286 U.S. 285 (1932); Baboquivari Cattle Co. v. Commissioner, 135 F.2d 114 (9th Cir. 1943); Helvering v. Claiborne-Annapolis Ferry Co., 93 F.2d 875 (4th Cir. 1938).
8. 279 U.S. 716 (1929).
9. The Court reasoned that discharge by a third person of the taxpayer's obligation to the government was equivalent to a receipt by the taxpayer. In Levey v. Helvering, 68 F.2d 401 (D.C. Cir. 1933), the taxpayer was reimbursed by his employer for the amount of his income taxes. The court followed Old Colony Trust Co. v. Commissioner, and held that the receipt was compensation for services which arose out of his employment.
10. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-30 (1955). A similar pronouncement appears in Commissioner v. Jacobson, 336 U.S. 28, 49 (1949).
11. Commissioner v. Smith, 324 U.S. 177, 181 (1945).
12. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955). This case had the effect of overruling Central R.R. of N.J. v. Commissioner, 79 F.2d 697 (3d Cir. 1935), and Highland Farms Corp., 42 B.T.A. 1314 (1940).
13. Commissioner v. Lo Bue, 351 U.S. 243 (1956); Commissioner v. Smith, 324 U.S. 177 (1945); Joseph Kane, 25 T.C. 1112 (1956), *aff'd per curiam*, 238 F.2d 624 (2d Cir. 1956).
14. Commissioner v. Duberstein, 363 U.S. 278 (1960).
15. Koons v. United States, 315 F.2d 542 (9th Cir. 1963); United States v. Woodall, 255 F.2d 370 (10th Cir. 1958), *cert. denied*, 358 U.S. 824 (1958); Alan J. Vandermade,

profits reimbursed to a corporation under section 16(b) of the Securities Act of 1934,[16] severence payment to an employee upon liquidation of the company,[17] and contributions by customers toward the construction of a television signal transmission service.[18]

The fact pattern of the instant case was first before the courts in *Otto Sorg Schairer.*[19] The government contended that the payment constituted additional compensation and supported its position with the *Old Colony Trust* case.[20] The court, however, distinguished the cases in that, in *Old Colony Trust*, the payments were not "reimbursements for losses in capital."[21] The court pointed out that the amount received in *Schairer* was "restoration of capital"[22] and was treated as part of the amount realized from the sale of the house. The court also reasoned that the amount paid was not intended as additional compensation for services because the taxpayer would not have been paid, had he not sold the house. And finally, the court analogized this situation to the results obtained under an insurance policy; had the taxpayer been insured against such a loss, the proceeds would not have been income.

Five years after the *Schairer* decision, cases presenting related fact patterns began to appear.[23] (In *Schairer*[24] and in the instant case, the employer reimbursed the employee for the loss on the sale of his house.) In these subsequent cases,[25] the employer paid part of the purchase price of a house bought by the employee in his new location. The employee failed to include the amount received in his reported income and litigation ensued. Basing their position on the *Schairer* decision the taxpayers argued that the payment operated to reduce the price of the house. In the first case,[26] the Tax Court reasoned that the facts did not involve a compensation for loss. By distinguishing the cases on this basis, the Tax Court avoided following the *Schairer* decision. In the second case,[27] the district court based its decision on the grounds that

36 T.C. 607 (1961). Note, however, that the new § 217 incorporated in the Internal Revenue Code by the Revenue Act of February 26, 1964, allows a deduction for moving expenses under certain conditions.

16. General Am. Investors Co. v. Commissioner, 348 U.S. 434 (1955); Park & Tilford Distillers Corp., 124 Ct. Cl. 845, 107 F. Supp. 941 (1952).

17. Carragan v. Commissioner, 197 F.2d 246 (2d Cir. 1952).

18. Teleservice Co. v. Commissioner, 254 F.2d 105 (3d Cir.), *cert. denied*, 357 U.S. 919 (1958).

19. 9 T.C. 549 (1947).

20. In *Old Colony Trust*, the employer had paid the employee's income taxes. See note 8 *supra* and accompanying text.

21. 9 T.C. 549, 556 (1947).

22. *Id.* at 555.

23. Le Grand v. United States, 105 F. Supp. 177 (N.D. Ohio 1952); Jesse S. Rinehart, 18 T.C. 672 (1952).

24. 9 T.C. 549 (1947).

25. Cases cited note 23 *supra*.

26. Jesse S. Rinehart, 18 T.C. 672 (1952).

27. Le Grand v. United States, 105 F. Supp. 177 (N.D. Ohio 1952).

the "payment was remuneration for the services of the taxpayer designed to secure his continued employment and for that reason was taxable income."[28] In so holding the district court also avoided the effect of *Schairer*. From the time of these decisions, ten years elapsed before the *Schairer* holding was again challenged. In *Arthur J. Kobacker*,[29] the government again prevailed and the payment made by the corporation to the employee to reimburse him for a loss suffered on the sale of his residence was held to be additional compensation and taxable. The court again declined to overrule *Schairer*, making the distinction that Kobacker was a "new" employee while in the *Schairer* case, the taxpayer was an "old" employee.

The instant case, *Bradley v. Commissioner*, was decided shortly after *Arthur J. Kobacker*. The Tax Court held the distinction between "old" and "new" employees not to be significant and overruled *Schairer*. It reasoned that the payment received by the taxpayer was an economic benefit and, therefore, taxable. The district court, in affirming the overruling of *Schairer*, reiterated the principle stated in *Commissioner v. Lo Bue*[30] and *Duberstein v. Commissioner*[31] that any economic benefit flowing from the employer to the employee falls within the purview of section 61 of the Internal Revenue Code. The court, acknowledging the expanded scope of section 61, found it unnecessary to rely on analogies with other types of receipts. Analogies with reimbursements of moving expenses and bargain purchases, argued by the government were, therefore, not considered.[32] Under the facts of the case, the payment was held to be an incentive to the employee, within the employer-employee relationship. Its object was to relieve the employee's anxiety over the sale of his house and to insure his fullest dedication to a particularly difficult assignment. As such, it constituted additional compensation arising out of employment.

Even though the facts of the *Bradley* decision involved the reimbursement of a loss on the sale of property paid to a "new" employee, two factors should be considered in determining whether or not the distinction of "new" and "old" employees has survived the case. First, the overruling of *Schairer* was not necessary to reach the result of includibility

28. *Id.* at 178.
29. 37 T.C. 882 (1962).
30. 351 U.S. 243, 247 (1956).
31. 363 U.S. 278 (1960).
32. Bradley v. Commissioner, 324 F.2d 610, 612 (4th Cir. 1963). Apparently indulging in rather severe understatement, the tax court has stated: "In the meantime, the complexion of the law has materially changed on the subject of what is and what is not compensation." Harris W. Bradley, 39 T.C. 652, 655 (1963).

The Tax Court observed that the petitioner did not claim that the payment was a gift. It indicated, however, that the argument would have been rejected if it were raised. The court cited no authority for its position on this matter, but the following cases leave no doubt as to the weakness of the gift contention: Robertson v. United States, 343 U.S. 711, 713, 714 (1952); Bogardus v. Commissioner, 302 U.S. 34, 41 (1937).

in income. The court could have distinguished the cases on their facts, and followed the path of *Kobacker* holding that the taxpayer in the instant case was a "new" employee; this the court refused to do.[33] On the contrary, it directly overruled *Schairer*.[34] Second, an abortive attempt was made to introduce the distinction of "old" and "new" employees into the Revenue Act of 1964, for purposes of a differentiated tax treatment of reimbursements made by an employer to his employee upon a sale of his residence.[35] The Senate Report states:

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33. 324 F.2d 610, 612 (1963).

34. *Id.* at 613.

35. Section 232 of the Senate version of the Revenue Act of 1964 provided for the incorporation in the Internal Revenue Code of a new § 1003. S. REP. No. 830, 88th Cong., 2d Sess. 10, 129 (1964). However, proposed § 1003 was deleted in conference. H.R. REP. No. 1149, 88th Cong., 2d Sess. 49-50 (1964). The relevant portions of the proposed section read as follows:

Sec. 1003. Amounts Received from Employer on Sale of Residence of Employee in Connection with Transfer to New Place of Work.

(a) *General Rule.*—If
  (1) property (in this section called "old residence") used by the taxpayer as his principal residence is sold by the taxpayer or his spouse pursuant to a sales contract entered into within the forced sale period for the old residence, and
  (2) the taxpayer's employer, not later than one year after the date such sales contract was entered into, pays part or all of the sale differential on the old residence, then, for purposes of this chapter, the amount so paid shall be treated by the taxpayer or his spouse (as the case may be) as an additional amount realized on the sale of the old residence to the extent that it does not exceed the lesser of
    (A) the sale differential, or
    (B) 15 percent of the gross sales price of the old residence.

(b) *Limitations.*—
  (1) *Period of Employment.*—This section shall not apply unless, for the six-month period ending on the day on which the taxpayer commences work at the new principal place of work, he was an employee of the employer.
  (2) *Location of New Place of Work.*—This section shall not apply unless the taxpayer's new principal place of work—
    (A) is at least 20 miles farther from the old residence than was his former principal place of work, or
    (B) if he had no former principal place of work, is at least 20 miles from the old residence.

(c) *Definitions: Special Rules.*—For purposes of this section
  (1) *Forced Sale Period.*—The term "forced sale period" means the period beginning 90 days before and ending 180 days after, the date on which the taxpayer commences work as an employee at the new principal place of work.
  (2) *Sale Differential.*—The term "sale differential" means the amount by which
    (A) the appraised value of the old residence exceeds
    (B) the gross sales price of the old residence reduced by the selling commissions, legal fees, and other expenses incident to the transfer of ownership of the old residence.
  (3) *Appraised Value.*—The appraised value of the old residence is the average of two or more appraisals of fair market value made, on or after the valuation date and on or before the date on which the sales contract is entered into, by independent real estate appraisers selected by the employer, but shall not exceed the fair market value. Determination of appraised value shall be made as of the valuation date.
  (4) *Valuation Date.*—The term "valuation date" means the date selected by the employer for purposes of determining the amount to be paid with respect to the sale differential. Such date shall be on or before the date the sales contract is entered into and within the forced sale period.

> Under present law, amounts received by *transferred* employees from their employers in reimbursement of "losses," selling commissions and legal fees incident to the sale of a principal residence have been held to be as ordinary income. *Harris W. Bradley*, 39 T.C. 652, aff'd, 324 F.2d 610 (4th Cir. 1963).
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> Prior to the Bradley opinion the treatment of these reimbursements was governed by a 1947 opinion of the Tax Court which treated the reimbursed amount as part of the selling price of the old residence (*Schairer*, 9 T.C. 549) . . . .[36]

Therefore, it is submitted that the *Bradley* rule will undoubtedly apply to all *transferred* employees, whether "old" or "new."[37]

The following suggestion is offered to minimize the tax consequences of a transaction of the *Bradley* type. The employee should not immediately sell his house at a loss, but rather, rent it for a period of time. A loss from the sale of a personal residence not used for business is not deductible.[38] However, by renting his residence, the taxpayer engages in a business venture[39] and when he later sells the house, his loss will be deductible.[40] A further tax advantage with regard to the current tax liability will be obtained by planning the sale and the contribution of the company toward the loss to occur during the same taxable year.

> (5) *Employer*.—The term "employer" means the person who employs the taxpayer as an employee at the new principal place of work. Such term includes any predecessor or successor corporation and any parent corporation or subsidiary corporation. For purposes of the preceding sentence, the determination of whether a corporation is a parent corporation or a subsidiary corporation shall be made under subsections (e) and (f) of section 425 but by reference to the date on which the taxpayer commences work as an employee at the new principal place of work (in lieu as of the time of granting the option).

36. S. REP. No. 830, 88th Cong., 2d Sess. 129 (1964). (Emphasis added.)

37. The *Bradley* decision was followed in Willis B. Ferebee, 39 T.C. 801 (1963). Reimbursement by the employer to the new employee of the realtor's commission on the sale of his former residence was held to be compensation.

38. INT. REV. CODE OF 1954, §§ 165(c)(1), (2). See also Heiner v. Tindle, 276 U.S. 582 (1928).

39. The conversion of the property into rental property was first considered to meet the requirement of a transaction entered into for profit in Heiner v. Tindle, 276 U.S. 582, 585 (1928). However, unsuccessful attempts to rent the property have been held insufficient to constitute the inception of a transaction entered into for profit. See Schmidlapp v. Commissioner, 96 F.2d 680 (2d Cir. 1938); Rumsey v. Commissioner, 82 F.2d 158 (2d Cir.), *cert. denied*, 299 U.S. 552 (1936); Morgan v. Commissioner, 76 F.2d 390 (5th Cir.), *cert. denied*, 296 U.S. 601 (1935); E.R. Fenimore Johnson, 19 T.C. 93 (1952).

40. INT. REV. CODE OF 1954, §§ 165(c)(1), (2). A majority of cases have held that the single rental taxpayer is engaged in a trade or business so as to be able to qualify under § 165(c)(1), regardless of the extent of his activities in connection with the rentals. See Reiner v. United States, 222 F.2d 770 (7th Cir. 1955); Mercado v. United States, 215 F. Supp. 631 (S.D.N.Y. 1963); Anders I. La Greide, 23 T.C. 508 (1954); Leland Hazard, 7 T.C. 372 (1946); M.T. Thomas, 5 CCH Tax Ct. Mem. 805 (1946). *But see* Union Nat'l Bank v. United States, 195 F. Supp. 382 (N.D.N.Y. 1961) and Grier v. United States, 120 F. Supp. 395 (D. Conn. 1954), *aff'd per curiam*, 218 F.2d 603 (2d Cir. 1955).

The loss is an ordinary loss[41] and will offset the ordinary income resulting from the employer's reimbursement.

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41. INT. REV. CODE OF 1954, §§ 1221(2), 1231(a). The prevailing view is that the single rental taxpayer is engaged in a "trade or business" under § 165(c)(1). Section 1221(2) would allow ordinary loss treatment on the sale of the asset and § 1231(a) would only require capital treatment of a net gain considering all § 1231 assets transactions.

In the *Grier* and *Union Nat'l* cases, note 40 *supra*, the single rental taxpayer was held *not* to be engaged in a "trade or business." In *Grier*, however, the court agreed with the taxpayer that the property was a capital asset under the predecessor of § 1221 since the exception of § 1221(2) was not met. The court, therefore, allowed the deductions taken by the taxpayer under the capital loss carryover provisions. Under the pre-1954 Code provisions applicable in *Grier*, the carryover was available only on a capital loss. It should be noted that in the 1954 Code, § 172(d)(4) provides a carryover on *ordinary* losses resulting from the sale of property used in a trade or business.

Under this minority approach, the losses would be considered to have been incurred in a transaction "entered into for profit" under § 165(c)(2). Sections 1221(2) and 1231(a), therefore, would be inapplicable and capital treatment would be afforded to both gains and losses. And the taxpayer can now avail himself of an unlimited capital loss carryover period provided by § 1212, incorporated in the Internal Revenue Code by the Revenue Act of 1964. *Grier* and *Union Nat'l* are minority cases, and no recent decisions have been found which favor that approach.