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Income Tax--Payment by Sublessee for Cancellation of Lessee's Interest

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with prior cases, this fact alone does not even closely approach a justification for the minority criticism that the Court dispensed with the safeguard of the presumption of innocence, since (1) the presumption of innocence as it applies to the burden of persuasion was not under consideration by the Court at the time, and (2) the presumption of innocence as it applies to the burden of producing evidence was sufficiently assured to the satisfaction of the majority of the Court. No other requirements are necessary to preserve the safeguard.

Although the dissent in the instant *McPhaul* case asserts that the Court is departing from accepted procedure and is taking a backward step, careful analysis of the decision does not substantiate the broad assertions. The minority opinion is helpful to focus sharply the issues involved, but the majority opinion appears to restate and reaffirm settled principles of law practically applied in a modern setting.

Esdel Beane Yost

Income Tax — Payment by Sublessee for Cancellation of Lessee's Interest

A sublessee, desiring to deal directly with the owner of real property, paid a sum of money to the lessee in consideration of the lessee's right and interest under the lease. The Tax Court considered the sum received by the lessee as ordinary income. *Held*, reversed. It is not the person of the payor which controls the nature of the transaction. Rather, it is the fact that the transaction constituted a bona fide transfer of the entire leasehold interest, not merely a liquidation of a right to future income. *Metropolitan Bldg. Co. v. Commissioner*, 282 F.2d 592 (9th Cir. 1960).

At present, there is little problem in determining the tax treatment resulting when only the lessor and lessee are involved in the situation. Rev. Rul. 56-531, 1956-2 CUM. BULL. 983. Payment by the lessee to the lessor in order to absolve the lessee of his contractual obligation is nothing more than the relinquishment of the right to future rentals and is taxable at the ordinary rates. *Hort v. Commissioner*, 313 U.S. 28 (1941). Conversely, payment by the lessor to the lessee in consideration of the lessee's surrendering his leasehold interests in the real property is ordinarily considered to constitute proceeds from the sale of capital assets receiving the

preferential capital gain treatment. *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F.2d 752 (2d Cir. 1954).

In order to qualify for capital gain treatment, the transaction must satisfy the requirements concerning a capital asset and a sale or exchange. INT. REV. CODE OF 1954, § 1222(3). The leasehold interest surrendered by the lessee for a payment by the lessor is considered a capital asset in the ordinary situation. INT. REV. CODE OF 1954, §§ 1221, 1231. A situation in which the asset would not qualify is where the property is held primarily for sale to customers in the ordinary course of taxpayer's trade or business. As to whether a sale or exchange occurred in the lease cancellation case, the 1939 Code was vague as it contained no specific provision. However, the 1954 Code removes any doubt in certain situations that a cancellation shall be treated as an exchange. INT. REV. CODE OF 1954, § 1241.

The problem in the principal case quite naturally evolved as the lessee here has characteristics of both landlord (ordinary income) and tenant (capital gain). A ruling by the Commissioner, when the question was first considered, reasoned that payments received by the lessee-sublessor are essentially a substitute for rental payments owed to the lessee by the sublessee and are taxable as ordinary income. Rev. Rul. 129, 1953-2 CUM. BULL. 97. The approach of the Tax Court in considering the principal case followed this reasoning. *Metropolitan Bldg. Co.*, 31 T.C. 971 (1959). The court stated that even though the transaction took the form of a transfer of the lease to the lessor, in substance the amount was received as cancellation of the sublease and was in the nature of a lump-sum payment for the right to future rental payments. Summarily, the lessee-sublessor was looked upon as a lessor in the transaction. However, the Ninth Circuit court saw the exchange in a different light as evidenced by its holding in the principal case. The situation of the taxpayer was regarded as analogous to a lessee rather than a lessor. The court stated that the lease had value over the amount of the rentals due by virtue of the fact that its relinquishment was of importance to the sublessee; that the identity of the payor does not determine the nature of the transaction; that the consideration moving from the sublessee should not produce different results than if the payment were from the lessor; and that this was a surrender of an entire leasehold interest, ". . . a disposition of income producing property itself." 282 F.2d at 594.

Before the appearance of the principal case, one view concerning the same question was noted. Note 69 HARV. L. REV. 737, 745 (1956). The test given as the determining factor was whether there was a reversion in the transferor after the disposition, an answer in the negative resulting in capital gain treatment. The author admits that the application of this test would be harder than the rule that the possessory interest be transferred for a minimum time in order to qualify for preferential treatment. From an examination of the principal case it is not clear whether "reversion or not" accurately describes the differences in result, though it would also be satisfied under the fact situation presented in this case.

The Commissioner has acquiesced in the holding of the principal case. See 1959-2 CUM. BULL. 6.

Robert Glenn Lilly, Jr.

**Income Tax — Travel Expense Deductions —
New Approach to Implement the
"Temporary and Indefinite" Test**

The taxpayer was transferred by his employer to a work site located one-hundred and seventeen miles from his place of residence. The taxpayer was employed in this area for approximately one year, and he deducted his travel expenses, including food and lodging, incurred during that year. The Tax Court held that since the taxpayer's tenure was of an indefinite duration, then he cannot be considered as being "away from home" so as to allow a deduction. *Held*, in reversing the Tax Court, that the "indefinite" test is no longer a feasible guide in absolutely determining that a person is not "away from home." A more functional approach to the problem is to establish whether the taxpayer should reasonably know that he is to be employed for a long period of time so as to warrant a removal of the taxpayer's domicile to the new area of work. *Harvey v. Commissioner*, 283 F.2d 491 (9th Cir. 1960).

The dilemma created by the determination of what constitutes "away from home" has provided the courts with a prolonged flow of litigation. The Tax Court and a few circuit courts have consistently equated "home" with "taxpayer's place of business." *Com-*