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Income Tax—Entertainment Expense Attributable to Taxpayer Deductible Only If in Excess of Amount One Ordinarily Spends

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would otherwise be applied toward the satisfaction of the judgment. They also expressed their disapproval of the procedure adopted by the judgment creditor in this case of attempting to tie up the very funds which the judgment debtor had given to his wife for necessaries, while failing to proceed against the judgment debtor himself.

The failure of the court in this case to refer to its previous decision in *Gill v. Schwartz*, *supra* while laying down a rule in broad language which is not in harmony with that case is unfortunate. The use of the *Hancock v. Sears* formula, which previously had been confined to cases involving judgment debtors may find its justification in the proximity of relationship between the debtor and the third-party in this case. It would seem, however, that the better policy in third-party cases would be to allow the third-party to pay out funds for necessaries without peril of contempt until there has been a determination by the court as to how much of the debtor's money may be restrained.

Gerard Ronald Haas

INCOME TAX — ENTERTAINMENT EXPENSE ATTRIBUTABLE TO TAXPAYER DEDUCTIBLE ONLY IF IN EXCESS OF AMOUNT ONE ORDINARILY SPENDS

Taxpayer deducted the cost of food and entertainment which he spent on himself and his family while entertaining prospective clients. *Held*: Such expenditures are not considered ordinary and necessary business expense as there is no evidence to show that the costs were any greater than, or different from, the amounts the taxpayer would spend for his own purposes. *Sutter v. Commissioner*, 21 T. C. No. 20 (1953).

Previously, the deductibility of an expenditure for food and entertainment rested on the ability of the taxpayer to show that his business or profession was benefited, or that it was intended that it be directly benefited. Where the deduction was allowed, it included the amount the taxpayer spent on himself while incurring the expense. *Blackmer v. Commissioner*, 70 F. 2d 255 (2d Cir. 1934); *Johnson v. Commissioner*, 45 F. Supp. 377 (S. D. Cal. 1941); *Louis Boehm*, 35 B. T. A. 1106 (1937).

In the instant case the basis of the decision rests on the proposition that, presumptively, the costs of meals and entertainment paid by the taxpayer for himself and his family, if not incurred while away from home for a business purpose, are by their very nature personal expenditures and non-deductible under Int. Rev.

RECENT DECISIONS

Code § 24 (a). The court states that the presumption can only be overcome by detailed evidence that each expenditure is different from, or in excess of, the amount the taxpayer would otherwise spend for his own personal purposes. Therefore if the taxpayer is able to show that the portion of an expenditure for entertainment which he has spent for himself is in excess of his normal personal expenditures, the difference between what was spent and what he would have normally spent will be deductible.

The court sets a standard by which it ascertains the incidental benefit which an individual receives from a business expenditure, and declares that part to be a personal expense because of the fact that the taxpayer participates in, and benefits from, the activity for which the expenditure is incurred and is not in excess of his usual personal expenditure. This is in addition to the burden the taxpayer has always had, *i. e.*, showing that the reason for the expenditure was to directly benefit his business. Although the court in the instant case speaks only of food and entertainment, this new approach could logically be extended to all business expenses, a portion of which inures as an incidental benefit to the taxpayer as a result of his participation in the incurring of such expense. The basis for the apportionment is founded on the non-deductibility of personal expenditures under Int. Rev. Code § 24 (a). Application of this rule to business trips which result in partial vacation to the taxpayer, and other similar types of expenditures is not beyond a strict application of this decision.

Rudolph F. De Fazio.

INCOME TAX — EXERCISE OF EMPLOYEE'S STOCK OPTIONS

In August of 1945, at the same time that the taxpayer joined his employer corporation, he received an option to purchase shares of the corporation's stock at a price below the then market value. The option was freely assignable and was not dependent upon the continued employment of the taxpayer. The corporation spoke of the option as "additional compensation for the current year" (1945).

When the taxpayer exercised the option in 1946 and 1947 the stock was selling at a much higher price. The Commissioner assessed a deficiency on the excess of the market value at the time of exercise over the option price. *Held*, reversing the Tax Court: No income accrued to the taxpayer by reason of the exercise of the option in 1946 and 1947 since the only compensation intended was in the grant of the option in 1945. *McNamara v. Commissioner*, 210 F. 2d 505 (7th Cir. 1954).