Michigan Law Review

Volume 38 | Issue 3

1940

ADMINISTRATIVE LAW - TAXATION - POWER OF BOARD TO ADOPT RULES AND REGULATIONS - INFLEXIBILITY OF PRIOR RULING BY REENACTMENT OF STATUTE WITHOUT CHANGE

William F. Anderson
University of Michigan Law School

RECENT DECISIONS

ADMINISTRATIVE LAW — TAXATION — POWER OF BOARD TO ADOPT RULES AND REGULATIONS — INFLEXIBILITY OF PRIOR RULING BY REENACTMENT OF STATUTE WITHOUT CHANGE — The respondent oil company in computing its net income for the years 1929-1930 for the purpose of applying the depletion deduction provisions of the Revenue Act of 1928 [1] refused to deduct certain development expenditures, although it had deducted those development expenditures in computing its taxable net income for these years. Under the rule-making power of section 23 (1) of that act, the commissioner defined "net income of the taxpayer" as used in section 114 (b)(3) as meaning gross income from the sale of gas and oil less certain deductions, including development expenses (if the taxpayer had elected to deduct development expenses rather than charging them to capital account returnable through depletion).[2] The depletion provision of the Revenue Act of 1928 was substantially the same as the 1921 Act,[3] the 1924 Act,[4] and the 1926 Act.[5] Under the Acts of 1921 and 1924, the admitted Treasury practice was to permit net income from the property for the purposes of depletion to be computed without regard to development expenditures, that practice being embodied in a ruling under the Act of 1924.[6] In a controversy to determine whether respondent was compelled to deduct development expenses to reach net income for the purposes of depletion, the Board of Tax Appeals held for respondent,[7] deciding that the prior Treasury ruling had received judicial sanction under the 1926 Act [8] and had been adopted by Congress by the reenactment of the same provision in the 1928 Act. The decision was affirmed by the United States Circuit Court of Appeals,[9] one judge dissenting, upon the theory that Congress by repeated reenactment of the provision adopted the prior ruling as the proper expression of legislative intent. The Supreme Court reversed and held for the commissioner, deciding that the rule

[1] 45 Stat. L. 791 at 800, § 23 (l), provides: "In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary."

45 Stat. L. 791 at 822, § 114 (b) (3): "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance not to exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

[2] Treas. Reg. 74, art. 221 (i) (1931).

[3] 42 Stat. L. 227 at 256, § 234 (a) (9).

[4] 43 Stat. L. 253 at 260, § 204 (c).

[5] 44 Stat. L. 9 at 16, § 204 (c) (2).

[6] Treas. Reg. 65, art. 201 (h) (1924).

[7] Wilshire Oil Co. v. Commissioner, 35 B. T. A. 450 (1937).

[8] Ambassador Petroleum Co. v. Commissioner, (C. C. A. 9th, 1936) 81 F. (2d) 474.

[9] Commissioner v. Wilshire Oil Co., (C. C. A. 9th, 1938) 95 F. (2d) 971.

of statutory construction contended for is not so inflexible as to preclude a change of interpretation through the exercise of rule-making power. *Helvering v. Wilshire Oil Co.*, (U. S. 1939) 60 S. Ct. 18.

It has been a well-recognized rule of statutory construction that contemporaneous interpretation of a statute by the officers charged with its administration is entitled to great weight.[10] And in accord therewith is the view that the reenactment of a statute which has been construed by the executive department, or the courts of last resort, is indicative of the intent of the legislature to adopt such construction.[11] The extent to which the federal courts would follow this rule was somewhat clouded by the decision of the Supreme Court in *Helvering v. R. J. Reynolds Tobacco Co.*,[12] wherein it was held that a subsequent amended Treasury ruling would not be applied retroactively after repeated reenactment without substantial change of the statute after the prior ruling. This and other decisions have made it appear likely that a court might through such a rule of construction impair the flexibility of the administrative process.[13] While the rule contended for by respondent in the principal case is hedged with exceptions and qualifications[14] it is submitted that such excep-

[10] Logan v. Davis, 233 U. S. 613, 34 S. Ct. 685 (1914); Swendig v. Washington Water Power Co., 265 U. S. 322, 44 S. Ct. 496 (1923); 59 C. J. 1025 (1932).

[11] United States v. G. Falk & Brother, 204 U. S. 143, 27 S. Ct. 191 (1907); United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 28 S. Ct. 532 (1908); National Lead Co. v. United States, 252 U. S. 140, 40 S. Ct. 237 (1920); Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115 (1930); United States v. Dakota-Montana Oil Co., 288 U. S. 459, 53 S. Ct. 435 (1933); 59 C. J. 1061 (1932).

[12] 306 U. S. 110 at 117, 59 S. Ct. 423 (1939), stating: "We need not now determine whether, as has been suggested, the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reënactment of the statutory provision unaltered after a change in the applicable regulation." The case is commented on in 39 COL. L. REV. 716 (1939), and 33 ILL. L. REV. 468 (1939) (circuit court decision).

[13] "But in any event it seems to us that the uniform interpretation, so long placed upon § 22(a) . . . by the regulation and confirmed by the inaction of Congress, was imbedded in the statute so deep that only legislation could dislodge it." Justice Learned Hand in E. R. Squibb & Sons v. Helvering, (C. C. A. 2d, 1938) 98 F. (2d) 69 at 70, where confronted with the problem of the Reynolds case. But compare with that Justice Hand's language in F. W. Woolworth Co. v. United States, (C. C. A. 2d, 1937) 91 F. (2d) 973 at 976, cert. denied, 302 U. S. 768, 58 S. Ct. 479 (1938): "But not every ruling is incorporated in the text because it is not repudiated; no one ever suggested anything of the sort. At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. . . . To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already."

[14] No adoption if the administrative construction is erroneous, United States v. Missouri Pacific R. R., 278 U. S. 269, 49 S. Ct. 133 (1929); or if the statute needed no construction as not being ambiguous, 59 C. J. 1065 (1932); or if the administrative construction is not uniform, ibid. The regulation must be in harmony with the statute and be reasonable, otherwise no adoption. Manhattan General Equipment Co. v. Commissioner, 297 U. S. 129, 56 S. Ct. 397 (1936).

The reason for the rule is the inference drawn from the fact that the legislators,

tions and the rule itself are hypertechnical and should be handled advisedly in view of the nature of the demands made upon administrative tribunals. The rule would be especially burdensome in a situation such as that in the principal case involving the administration of a revenue statute, for the effect would be to require Congressional approval of administrative rulings in a field where ease of adjustment to change is needed to meet new and emergency situations. The rule is not questioned here as an instrument, i.e., as an aid, to a court in attempting to reach the intent of a legislature. However, it is submitted that the rule has no place as a limitation upon the power of an administrative agency to make rules and regulations in the administration of a revenue measure.[15]

William F. Anderson

knowing of the administrative construction, must have approved of it or otherwise they would have made correcting amendments. Mayes v. Paul Jones & Co., (C. C. A. 6th, 1921) 270 F. 121.

[15] ". . . the Treasury Department was authorized to supply rules for the enforcement of the Act within the permissible bounds of administrative construction. Nor can this authority be deemed to be so restricted that the regulations, once issued, could not later be clarified or enlarged so as to meet administrative exigencies or conform to judicial decision." Morrissey v. Commissioner, 296 U. S. 344 at 354-355, 56 S. Ct. 289 (1935). See also Murphy Oil Co. v. Burnet, 287 U. S. 299, 53 S. Ct. 161 (1932), where the repeated reënactment of the revenue statute without substantial change did not prevent the Treasury Department from deriving a new formula for reasonable allowance.