

11-1928

Income-tax Department

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EDITED BY STEPHEN G. RUSK

Attention is directed to the decision of the United States circuit court of appeals, seventh circuit, in the case of *United States v. The John Barth Company*.

This decision, if upheld, will prevent, it is said, the reviving of the government's right to from \$100,000,000 to \$150,000,000 of taxes which were outlawed when the act of 1926 was enacted. In the act of 1928, an attempt was made by congress, in sections 611 and 612, to modify part of section 1106 and to repeal section 1106 (a) of the act of 1926, the repeal to be effective as of February 26, 1926, and thereby reinstate tax claims that were extinguished by the 1926 act.

Section 1106 of the act of 1926, reads as follows:

"(a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit nor refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

"(b) If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and commissioner, with the approval of the secretary, that such determination shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee or agent of the United States, and (2) no suit action or proceeding to annul, modify or set aside such determination or assessment, shall be entertained by any court of the United States."

The language of this section of the act of 1926 seems effectively to have closed the door to further proceedings upon such tax cases as were estopped by the statute of limitations.

In enacting the act of 1928, however, congress had a change of heart and with the object, apparently, of nullifying some of the strong points of section 1106, it enacted sections 611 and 612.

Section 611, act of 1928, reads as follows:

"If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement, was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 612, act of 1928, reads as follows:

"Section 1106 (a) of the revenue act of 1926 is repealed as of February 26, 1926."

With the repeal of section 1106 (a) in mind the United States petitioned for a rehearing of The John Barth Company case, claiming that the repeal of section 1106 (a) wiped out the taxpayer's only defense. It argued that the validity of such legislation is maintained on the ground that it (section 612) is a purely limitation statute, dealing only with the remedy.

The court gave it as its opinion, however, that:

"Section 1106 (a) of the revenue act of 1926, was something more than a limitation statute. It not only operated to bar the remedy but specifically extinguished the cause of action. Such being the character and effect of this statute, it was not within the power of congress to enact legislation to recreate the liability thus extinguished."

And the court made its decision in accordance with its opinion. It must be obvious that this decision, involving as it does such far-reaching effects, will be subject to further review by the courts, and the final decision will be awaited with much interest.

SUMMARY OF RECENT RULINGS

The estate of a decedent dying March 17, 1921, is not liable for the estate tax imposed by the act of 1918, which was repealed by the 1921 act effective on the passage of the latter act, such estate tax not having accrued at the time of the passage of the 1921 act. (Federal estate taxes not accruing until one year after the death of the decedent). The first sentence of the saving clause in sec. 1400 (b), act of 1921, applies to the assessment and collection of taxes repealed by the 1921 act "which have accrued under the revenue act of 1918, at the time such parts cease to be in effect," and the estate tax constitutes no part of the subject matter of the second sentence thereof since the estate tax imposed by the 1921 act in lieu of that imposed by the 1918 act went into effect upon the passage of the 1921 act. (U. S. district court, Delaware, *Wilmington Trust Co., executor, v. United States.*)

A decision of the board of tax appeals is not appealable under sec. 283 (j), act of 1926, where all the evidence had been submitted and the arguments had been made before, and the opinion of the board filed after, the effective date of the 1926 act. (U. S. circuit court of appeals, ninth circuit, *T. C. Cower and Brother v. Commissioner.*)

Collection of 1918 taxes shown on a completed return filed July 14, 1919, was held barred where a consent was filed on January 26, 1924, to a later "determination assessment and collection" of the tax to be in effect for a period of one year after the expiration of the statutory period, and the tax was assessed on March 18, 1925, and collected December 5, 1926, over five years after the date of the completed return (the court not deciding whether the tentative or completed return started the running of the statute), the waiver constituting a valid contract which can not be varied by subsequent legislation. (U. S. district court, Massachusetts, *Hood Rubber Co. v. Thomas W. White, collector.*)

Where a strict compliance with the statute is insisted upon by the government, a suit can not be maintained upon a claim of a different nature from that shown to have been filed. (U. S. district court, W. D. Missouri, western division, *Meinrath Brokerage Co. v. Noah Crooks, collector.*)

The widow's interest whether dower or an estate in lieu of dower, in decedent's gross estate, under the Missouri laws, should not be included in decedent's gross estate under the 1918 act. (U. S. district court, W. D. Missouri, southwestern division, *A. H. Waite, et. al., executors, v. United States.*)

The order of the referee, secured by a trustee in bankruptcy on his own motion, fixing the amount of the claim of the government for excise taxes was held to be a final adjudication of the tax claim, and the trustee may not, nearly a year after the amount was fixed, without any allegation of fraud, accident or

mistake in the making of the order, have the matter opened and the government required to refund part of the amount paid. (U. S. circuit court, third circuit, *H. M. Stephens, trustee, v. D. B. Heiner, collector.*)

Liability upon a bond given prior to the expiration of the statutory period on collection, conditioned upon the rejection of a claim in abatement and the failure of the taxpayer to pay the tax, is not extinguished under sec. 1106 (a), act of 1926, by the expiration of the statutory period on collection of the tax, such bond creating a new liability governed by a different statute of limitations. (U. S. district court, S. D. New York, *United States, v. Rennolds et al.*)

The value of ground rents and other real estate in Pennsylvania, acquired in 1923, and held by the decedent and his wife as tenants by the entirety should not be included in decedent's gross estate, the death of the decedent under the Pennsylvania law not effecting the transmission of such property. (U. S. district court, E. D. Pennsylvania, *United States v. Provident Trust Co. of Pennsylvania, et al., administrators.*)

The 25% reduction for the calendar year 1923 under section 1200 (a), act of 1924, should be computed upon the tax shown by the return after taking credit for foreign taxes allowed by sec. 222 (a) (1), act of 1921. (U. S. district court, E. D. Pennsylvania, *C. J. Stover v. Blakely D. McCaughn, collector.*)

Congress does not have the power to recreate the liability extinguished by section 1106 (a), act of 1926. (U. S. circuit court of appeals, seventh circuit, *United States v. The John Barth Co. et al.*)

An overpayment of the 1917 taxes by reason of an increase in invested capital for such year by a taxpayer to whom had been refunded an overpayment of 1917 taxes resulting from a decrease in invested capital for 1918 because of inadequate deductions in 1917, is not within the scope of section 281 (c), act of 1924, but is subject to the statute of limitations, sec. 281 (c), excepting from the four-year limitation period on claims for refund only overpayments resulting from a decrease in invested capital due to the failure to take adequate deductions in previous years. (U. S. district court, W. D. Pennsylvania, *Southwestern Oil and Gas Co. v. United States.*)

An oral claim for refund is insufficient in law to meet the requirement for a claim for refund as a prerequisite to a suit for recovery of a tax, and the government is not estopped from pleading the failure of a claim by the statement to the taxpayer by its field agent that it was not necessary to file one. (U. S. circuit court of appeals, third circuit, *Daniel Ritter v. United States.*)

Salary paid an officer of a corporation for services in the fiscal year 1920 in excess of that allowed by the commissioner, under a contract providing for commissions of a percentage of the gross receipts in addition to the payment of a specified salary, subject to the provision that such officer was to refund the amount of any loss resulting from the payment of the commissions, was held to be unreasonable on the record. (U. S. district court, E. D. Virginia at Norfolk, *H. L. Trimyer & Co., Inc. v. Noel, collector.*)

Proceeds from the sale in 1920 by a partnership organized to acquire certain land and to drill oil and gas wells thereon, of ownership certificates entitling the owners to a share in future net earnings, if any, which proceeds were used for drilling and operating oil and gas wells, were held to be capital and not income to the partnership. (U. S. circuit court of appeals, third circuit, *R. E. Thompson v. Commissioner.*)

Annual amounts irrevocably assigned to her husband and children by the beneficiary of a trust fund from the income of such fund are income to the assignees and not to the assignor, the assignor thus disposing of a vested estate in a trust fund and the state law (New Jersey) not prohibiting a wife making a gift to her husband of her separate estate. (U. S. district court, New Jersey, *Alice B. Young v. Edward E. Gmichtel, collector.*)