Journal of Accountancy

Volume 44 | Issue 6 Article 7

12-1927

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Stephen G. Rusk

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EDITED BY STEPHEN G. RUSK

Taxpayers confronted by the possibility of additional taxes for past years are much relieved to find less technical evasiveness in the representatives of the bureau of internal revenue than was apparent formerly and to encounter a genuine spirit of coöperation. It was not unusual for taxpayers in the past to go to Washington prepared to explain the questions raised by the bureau, only to find an entirely new set of questions propounded by a new representative who had just taken over their cases and needed information quite different from that required by the former questioner.

Then there used to be the type of bureau employee who would take no responsibility but, after hearing the taxpayer, denied all his contentions for no apparent reason and thus passed the matter to a higher authority. The highly technical type of bureau employee whose ideas were based on an interpretation of the printed regulations quite out of harmony with the generally accepted interpretation was another who formerly made himself felt.

It was quite interesting to note that a great many of them worded their objections to and denials of the taxpayer's contentions in the same manner, somewhat as follows:

> "We have had nothing presented to us that would indicate the commissioner's position to be erroneous and we, therefore, can not grant the relief desired."

This formula was given so frequently without deviation that one taxpayer's representative ventured to inquire what in the nature of evidence would be conclusive. He was duly impressed and awe-stricken with the rebuke of the official person, somewhat as follows: "The commissioner can not prescribe the evidence that will be convincing—that is up to the taxpayer."

Recovering somewhat from his humiliation, the representative drew the attention of the official person to the fact that the evidence adduced at this hearing had been presented to the United States board of tax appeals in a case identical with the one before the conferee and had been considered by the board sufficient to assist it in reaching a decision. It was a useless gesture, however, for this particular conferee was not impressed by the board.

The treasury department and the bureau of internal revenue have found that such obstructive methods do not facilitate the settling of cases, but result only in prolonging them and congesting every governmental agency having to do with the adjustment of income taxes. For years these agencies have been struggling with tax questions that should not have accumulated as they did, and would not, had there been a little more intelligent coöperation with taxpayers.

It is different today. When a taxpayer takes up his question with a representative of the bureau now, in his own locality or in Washington, he soon finds that he is dealing with one to whom he can frankly and fearlessly present his point of view. He finds that his opponent is well informed upon the laws and the regulations and is not afraid to appraise a fact. He feels that his opponent

can be met on the contention at issue, and that he will not find one who takes a new position each time a former one proves to be untenable.

An example of the kind of opposition a taxpayer formerly met may be found in the following actual experience: A taxpayer had deducted an amount of amortization he had sustained in the year 1918. In 1921, this taxpayer received a deficiency letter from the commissioner denying, among other things, the amortization deduction. Complying with the then rules for contending with the commissioner, the taxpayer had several conferences with the bureau conferees. Each time a new bureau representative had charge of his case, and each time there was a new set of conferees. At each hearing it developed that the commissioner required additional evidence not required at any of the others. After four or five trips to Washington and meeting with several sets of conferees, another conference was held at which an astute conferee discovered that in the original appeal and protest, the taxpayer had failed to include the required paragraph setting forth that "the taxpayer did not make the protest and appeal with the intent of delaying or evading the assessment of the just amount of additional tax, if any, that should be determined."

The discussion stopped instantly and the taxpayer was informed that all his contentions were denied and the taxpayer would be assessed without further recourse. It mattered not that the taxpayer had shown his original return to have been justified. It was of no avail to draw the conferees' attention to the fact that the points at issue had been considered and fairly well conceded at former meetings. The taxpayer's representative went out of that meeting to the office of a higher authority and soon had his case reinstated. It is interesting and indicative of former methods to recall that the persuasive argument used by this higher authority was that a former letter to the taxpayer written by the bureau was not in accordance with the regulations governing such matters. The bureau had used the wrong form letter, in other words, and, therefore, this taxpayer's case was saved, not because of its underlying merits, but because of a silly technicality.

As a result of the new methods it is interesting to learn that the auditing of tax returns is almost "current," and that the treasury department's advisory committee has set itself to the task of relieving the congestion in the United States board of tax appeals and of adjusting, as far as possible, tax cases that would otherwise go to the board.

The board has worked well and indefatigably, but decisions are long delayed because of congestion. After the board hears a case, the taxpayer frequently must wait over a year before he is apprised of the board's decision.

Some years ago it was thought that tax cases would decrease in number. If there is any decrease of protests and appeals it is not apparent to the bureau of internal revenue, nor has it been apparent to tax practitioners.

SUMMARY OF RECENT RULINGS

Interest is collectible under section 250 (b) act of 1921, on a late voluntary payment of additional tax made before the taxpayer's original and amended returns were audited. (U. S. district court, S. D., New York, *Union Pacific Railroad Company* v. *Frank Bowers, collector.*)

A corporation holding timber lands was engaged in doing business in the years of purchase and sale of lands but not in the year when the only business transactions were the receipt of payments on sale theretofore made and the

lending of such receipts to its stockholders. (U. S. district court, W. D., Washington, S. D.; *Monroe Timber Company* v. *Burns Poe, collector.*)

Expenses disallowed by a revenue agent without giving reason for disallowance are deductible unless it is affirmatively shown what such expense is. (U. S. district court, S. D., West Virginia; *Bankers Pocahontas Coal Company* v. *Albert B. White, collector.*)

The value of property transferred in trust in 1915, when the transfer was intended to take effect in possession and enjoyment at or after the donor's death, should not be included in gross estate under sec. 402 (c) act of 1918. The enactment of the 1918 act did not create any affirmative duty to exercise or annul rights reserved upon creation of a trust, which otherwise is beyond the effect of the act. (U. S. district court, S. D., Ohio; *Edgar Stark, executor,* v. *U. S. A.*)

A decedent was held to be a resident of the United States upon evidence of his announced intention of coming to the United States to become a resident, supported by his acts and conduct. (U. S. district court, Wyoming; *Richard F. and Barbara Cooper* v. *Marshall S. Reynolds, collector.*)

The statute of limitations applicable to a suit to recover the penal sum of a bond, which was filed pending action on a claim for abatement of a tax, is that governing suit upon bonds of such character and not that governing suits for collection of tax. (U. S. district court, Wyoming; *United States* v. *Onken Brothers, Inc., and Royal Indemnity Company.*)

The creator of a revocable trust, who was also one of the beneficiaries, was allowed to deduct a loss upon the sale of securities held by the trustees under the acts of 1918 and 1921, the creator of the trust at all times having retained control of the securities and directed and controlled their management. (U. S. district court, Connecticut; *Henry Stoddard* v. *Robert O. Eaton, collector.*)

Mandamus was issued to compel the U. S. board of tax appeals to enter the findings of fact and decision of a division as that of the board in the case of a review by the entire board, where the taxpayer was given no opportunity to be heard and where there was no specific action by the chairman directing that this particular decision should be reviewed. (Supreme court of the District of Columbia; U. S. ex rel. *James S. McCandless* v. *U. S. board of tax appeals.*)

The purchase price is the amount actually collected where a vendor of jewelry, sold under a conditional contract, charged off the uncollectible unpaid portion of certain sales, since in doing so he elected not to retake possession of the property, in accordance with his option under the sales contract, and the sale was then completed. (U. S. district court, S. D., California, S. D.; *Slavick Jewelry Company* v. *John P. Carter, et al.*)

The government may recover by suit taxes erroneously refunded and is not estopped by the judgment in a former suit brought by the government against the defendant on the theory that it had failed to pay the tax refunded. (U. S. district court, Minnesota; fourth division; *United States* v. *Standard Spring Manufacturing Company.*)

A return by a corporation in the year of its dissolution showing on its face a deficit, apparently resulting from the sale of its property in that year because of an excessive (in view of the facts known to the directors) valuation placed upon the property by the board of directors as the basis of determining gain or loss, and carrying a rider that the corporation had dissolved in that year, without information as to the sale of such assets, was held to be incorrect, misleading and false. (U. S. district court, S. D., New York; *United States* v. *Thomas F. Cole, et al.*)

Amounts paid by a citizens' committee as an inducement to a public utility corporation to erect a cotton compress and warehouse in the community are not income to the recipient. (B. T. A. Dkt. 4378; *Arkansas Compress Company.*)

A life tenant is not taxable on gain from the sale of the fee simple, when the gain accrued to the remainderman. (B. T. A. Dkts. 7963, 7964; *Henrietta Bendheim, et al.*)

An account charged off in 1924 by a so-called correcting entry as of the close of 1920, when its worthlessness was alleged to have been ascertained, was disallowed as a bad debt deduction for 1920. (B. T. A. Dkt. 6511; *Rochester Last Works, Inc.*)

Distributions in liquidation of a corporation are taxable as dividends within the meaning of sec. 201, act of 1921, to the extent of the earnings and profits accumulated since February 28, 1913, contained therein. (B. T. A. Dkt. 929; *Frank D. Darrow.*)

The value of goodwill was disallowed, under sec. 331, act of 1918, in computing invested capital where the stockholders of the transferor corporation acquired more than 50% of the transferee's stock, even though such acquisition was necessitated by the regulations imposed during the war by the capital issues committee, a governmental agency. (B. T. A. Dkt. 7645; *Stratton Grocery Company.*)

The right to receive royalties over a given term is depreciable property and a deduction for exhaustion was allowed to an estate, the income of which arose from royalty contracts. (B. T. A. Dkts. 8624 and 8625; *Executors of Estate of Phillip M. Reynolds.*)

The commissioner is not precluded in view of the evidence from making, within the limitation period, a determination in respect to the tax liability of a taxpayer for certain periods considered by his predecessor, who had assessed additional taxes for such periods, there being no evidence that the true facts and circumstances, upon which he based his determination were before his predecessor. (B. T. A. Dkt. 5522; *Younker Bros., Inc.*)

Invested capital for 1919 should not be reduced by a portion of dividends paid in 1919 claimed to be in excess of available current earnings at the time of payment. (B. T. A. Dkt. 9494; *Nashua and Lowell Railroad Corporation.*)

Inventories of a corporation selling women's ready-to-wear apparel at retail were approved, where based on retail sale value or cost, whichever was lower, since there was no replacement market price for most of the merchandise, reorders could not be made, the method was generally used by the trade and conformed to the best accounting practice of the trade, and was consistently used by the taxpayer for all business purposes. (B. T. A. Dkt. 4601; *The Women's Apparel Company* and *The Weakly Coat and Suit Company.*)

A corporation return for the fiscal year 1920 on form 1120 (a) completely filled in except for the computation of the tax, which was returned to the taxpayer by the collector, started the running of the statute of limitations, although form 1120 stamped as filed on time was filed later. An assessment made after five years from the filing of the first return is barred by the statute of limitations. (B. T. A. Dkt. 11584; *Conrad Hardware Company.*)

Personal-service classification was granted a corporation engaged in the photo-engraving business from 1919 to 1921, since photo-engraving is an art rather than a commodity, the income of the corporation was ascribable primarily to the activities of the two chief stockholders, skilled engravers, employing assistants who were skilled engravers; capital invested in materials and equipment used in rendering service purchased by customers was not a material income-producing factor, and the corporation was not trading as a principal within the meaning of the act. (B. T. A. Dkt. 66041; *Cocks-Clark Engraving Company.*)

Inventories on basis of cost or market, whichever was lower, from which the average cash discount allowed by manufacturers was deducted, consistently followed, were allowed in computing taxable income, the effect being to allow cash discount as a deduction when the goods are sold and not when payment is made. (B. T. A. Dkt. 4691; *Higgenbotham-Bailey-Logan Company.*)

TREASURY DECISIONS

(T. D. 4090, September 21, 1927)

Capital-stock tax—Revenue act of 1924—Decision of court

CORPORATIONS—HOLDING COMPANY—DOING BUSINESS.

A corporation, organized to hold for profitable sale the assets of a deceased person, to invest funds and to liquidate the assets whenever that could be done advantageously, and which pursues the purposes for which organized, even though not actively engaged in business in

the ordinary sense, is subject to the capital-stock tax imposed by section 700 of the revenue act of 1924.

The following decision of the United States district court, district of Minnesota, third division, in the case of *Conhaim Holding Co., a corporation*, v. *Levi M. Willcuts, collector of internal revenue*, is published for the information of internal-revenue officers and others concerned.

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION
(100)

Conhaim Holding Co., a corporation, plaintiff, v. *Levi M. Willcuts, collector of internal revenue, defendant*

(August 10, 1927)

This cause came on to be tried before the court on the 14th day of April, 1927, in the city of St. Paul, Minnesota. Benjamin H. Flesher, of Minneapolis, Minnesota, appeared for the plaintiff, and Leland W. Scott, assistant United States attorney, and Ralph S. Scott, special assistant United States attorney, for the defendant.

In December, 1920, the plaintiff, Conhaim Holding Co., was incorporated under the laws of Minnesota. Its main object was to hold and conserve the assets belonging to the estate of Louis Conhaim, deceased, to liquidate them when that could be done advantageously, and to distribute their avails among the stockholders of the corporation. The estate consisted of stocks, leaseholds, timberland and life-insurance renewal commissions. The corporation has maintained an office, but has no employees. It has never dealt in securities. It has never sold the timberland because no opportunity has arisen to sell it. No income is received from it. The secretary of the corporation receives a salary of $100 a year for his services and is an auditor and accountant. The income of the corporation consists of dividends upon the stocks, renewal commissions upon life insurance written by Louis Conhaim in his lifetime, and rentals from the leaseholds. Numerous loans have been made by the corporation to its stockholders, who—with the exception of a son-in-law and the secretary, who hold qualifying shares—are the heirs of Louis Conhaim. One loan was made to the American Security Co. at the request of the son-in-law. The loans were apparently made for the accommodation and benefit of the stockholders, but interest was paid and collected. In some cases, the company has loaned its credit to the stockholders, and in other cases, when in funds, has permitted them to have the use of funds, paying the current rate of interest therefor. No distribution of assets or income has been made, and the carrying charges of the property require most of the income.

The revenue act of 1924, section 700 (a) (1), provides that "every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of $5,000." The plaintiff paid this excise tax for 1921, 1922 and 1923, amounting in all to $156, and then decided that it was not doing business within the meaning of the revenue act, and has brought this suit to recover what it has paid to the government.

The question is whether the corporation was required to pay the tax.

The powers of the corporation, as enumerated in its articles, are as follows: . . . to hold, own, acquire, use, manage, develop, improve, lease, buy, sell, transfer, convey, deal in, ehcumber, pledge, mortgage, assign, exchange and otherwise dispose of any and all kinds of property, real, personal and mixed, and wheresoever situated, including lands, and any interest therein, chattels, bonds, stocks and other securities and evidences of indebtedness, whether corporate or not; loan and borrow money, either with or without security, but not to engage in a banking business; to purchase or otherwise acquire, hold and reissue, subject to the provisions of law, the shares of its own capital stock; to acquire, undertake, carry on and dispose of all or any part of the business, assets, liabilities and securities of any person, partnership, association or corporation, and to become surety or guarantor for the debts and obligations of

the same, and to do any and all things essential, necessary or convenient or advisable in the conduct of such business.

It has been held that, in determining whether a corporation is obliged to pay the tax, the question is what the corporation is doing, and not what it could do. (*United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32.)

In *Von Baumbach* v. *Sargent Land Co.* (242 U. S. 503, 516) the supreme court said:

"It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.

In the case of *Flint* v. *Stone-Tracy Co.* (220 U. S. 107, 171) the court said:

"Business" is a very comprehensive term and embraces everything about which a person can be employed. (Black's *Law Dictionary*, 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244.) "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." (Bouvier's *Law Dictionary*, Vol. I, p. 273.)

In *Zonne* v. *Minneapolis Syndicate* (220 U. S. 187) it was held that a corporation, the sole purpose of which was to hold title to a single parcel of real estate subject to a long lease and, for the convenience of the stockholders, to receive and distribute the rentals arising from the lease and proceeds of disposition of the land, and which had disqualified itself from doing any other business, was not a corporation doing business within the meaning of the corporation-tax provisions of the act of August 5, 1909 (ch. 6, 36 Stat. 11, 112), and was not subject to the tax.

In the case of *Nunnally Inv. Co.* v. *Rose* (D. C.), (14 Fed. (2d) 189) it appeared that the company, prior to June 30, 1921, had been doing business in a sense which required it to pay the tax. After that date, it intended to do no business which would render it liable to the tax. It had no separate office, and kept its books in the office of another corporation, whose officers were also officers of the investment company. There were but four stockholders, all belonging to the same family. The investment company held the proceeds of the sale of its corporate assets to the Nunnally Co. of Delaware. On July 1, 1921, the investment company's property consisted of a large amount of stocks, bonds and cash. It had loaned some money to employees and to its stockholders for their accommodation. It collected income on the stocks and bonds held by it, and declared dividends. The court concluded that it was not doing business within the meaning of the act.

The Nunnally case seems to be almost identical with this one, since the making of the one loan to the American Security Co., which was not a stockholder and apparently not interested in the estate of Louis Conhaim, would scarcely be enough to distinguish it; but there is in my mind considerable doubt as to the correctness of that decision.

In *Edwards* v. *Chile Copper Co.* (270 U. S. 452, 455) Mr. Justice Holmes said of the corporation there involved:

It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption "when not engaged in business" ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.

It is true that the Conhaim Holding Co. was not engaged actively in business, but its purpose was to hold the assets of the estate until they could be disposed of advantageously and profitably, and then to distribute the avails. In the meantime it was to handle the stocks, leaseholds, lands and other assets in such a way as would be to the best advantage of the corporation and those interested in it and so as to produce the largest amount for ultimate distribution,

and that is what has been done. No distribution has been made because the time has not been reached when that can be done profitably.

To my mind, the question is a very close one, and my first impression was that the company was not subject to the tax and should not have paid it; but I can not escape the conclusion that the company is something more than a mere intermediary or agency for the stockholders. They chose the advantages of corporate organization as the best solution of the problem with which they were confronted, and the best and most profitable means of disposing of the assets of Louis Conhaim and their ultimate distribution. Concededly the corporation was organized to get a better price for these assets than was obtainable when it was organized, and the stockholders are receiving and will receive whatever gains may accrue by reason of its corporate activities in connection with the holding of the property for a better price and the investment of the funds in the meantime. While it has these assets, it does and must necessarily do what any other corporation would do which owned such property and was holding it for sale at a profit.

In *Flint* v. *Stone-Tracy Co.*, supra, it was held that the tax is upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organization of the character described in the act. (See also *McCoach* v. *Minehill & S. H. R. Co.*, 228 U. S. 295; *Maxwell* v. *Abrast Realty Co.*, 218 Fed. 457; *Wilkes-Barre & W. V. Traction Co.* v. *Davis*, 214 Fed. 511; *Cambria Steel Co.* v. *McCoach*, 225 Fed. 278; *Lewellyn* v. *Pittsburgh, etc., R. Co.*, 222 Fed. 177; *Miller* v. *Snake River Valley R. Co.*, 223 Fed. 946; *New York Central & H. R. R. Co.* v. *Gill*, 219 Fed. 184; *Waterbury Gas Light Co.* v. *Walsh*, 228 Fed. 54; *State Line & S. R. Co.* v. *Davis*, 228 Fed. 246; *Public Service Ry. Co.* v. *Herold*, 229 Fed. 902.)

Finding the facts to be as hereinbefore stated, I reach the conclusion that the defendant is entitled to judgment that the plaintiff take nothing herein and that its complaint be dismissed, and for costs and disbursements as provided by law.

Let judgment be entered accordingly.