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Recent Cases

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TAXATION—INCOME TAX—COMPENSATION FOR SERVICES RENDERED OVER A PERIOD OF YEARS

Heath v. *Early*

Maupin v. *Same*[1]

Plaintiff Heath's decedent, and plaintiff Maupin were attorneys employed in October, 1932 by a group of stockholders to assert claims alleged to arise from wrongful conduct by the American National Bank in the liquidation of the stockholders' corporation, the First National Bank of Portsmouth. The attorneys were employed on a small retainer and a contingent fee basis. Their efforts involved protracted litigation which was completed in 1938 and resulted in the recovery of a large sum for the benefit of all stockholders of the First National Bank, although some stockholders were not represented by counsel. The attorneys petitioned the Hastings Court of the City of Portsmouth for an allowance to them against stockholders as were not represented by counsel. Total compensation to each of the attorneys was as follows: (1) In 1932 and 1933, by way of retainer from stockholders who employed them, an aggregate of $3,182.50; (2) in 1938, upon completion of their services, as contingent fee from the stockholders who employed them, an aggregate of $22,723.30; and (3) in 1939, after completion of their services, by court order, from the stockholders not represented by counsel, an aggregate of $42,645.00, making a total of $68,550.80 received from all sources. The attorneys allotted the payments in the year 1939, in equal shares, over the period of 1932 to 1939, inclusive, pursuant to their conception of the provisions of Section 107 of the Internal Revenue Code.[2] This application of Section 107 was disallowed by the collector, and the attorneys paid an additional tax for the year 1939. Claims for refund were denied, and these actions followed.

Plaintiffs contended that Section 107 was plainly applicable to the situation presented. Defendants, however, contended that the section was not applicable for two reasons, *viz.*, that the compensation received in 1938 and that received in 1939 must be considered together as the "compensation" referred to in Section 107 and, further, that the section does not apply unless the compensation was received in a single taxable year after 1938.

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1. 77 F. Supp. 474 (E.D. Va. 1948).

2. 53 Stat. 878, 26 U.S.C. 107 (1940). "Sec. 107. Compensation for services rendered for a period of five years or more.

"In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period.

"(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938."

The court rejected the first of these defenses by distinguishing between the sources of the compensation, *i.e.*, the 1938 compensation coming from the stockholders who retained the attorneys, and the 1939 compensation coming from the other stockholders, on the basis of court order. Or, as the court said, from "clients" in the former instance, and from those persons "not clients" in the latter. Such a distinction seems unwarranted, as the statute refers only to *compensation for services.* "Service" has been defined as "the performance of labor for another,"[3] "the performance of labor for the benefit of another,"[4] and "conduct contributing to the advantage of another or others."[5] Clearly, all the compensation the attorneys received was for the same services, *i.e.*, for the same acts, and it should make no difference just who benefitted. The statute makes no such distinction. Helpful information in interpreting this portion of the statute is found in the Report of the Senate Finance Committee,[6] which says that Congress intended the Act for "writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon completion of their *undertaking.*" (Italics added.) It hardly seems debatable that the compensation resulted from the same undertaking.

In rejecting the second defense, the court, without discussing the point to any extent whatsoever,[7] relied almost entirely upon the case of *Slough* v. *Commissioner,*[8] in which case it was held that payment need not be made in one taxable year. In that case, the court said that the purpose of subsection (c) of the Act was to fix "the first year for which the relief becomes applicable," and that the only requirement concerning the receipt of 95%, or any other percentage, is in subsection (b). Such an interpretation seems illogical, in view of the way the statute is framed, and was expressly refuted in the well-reasoned case of *Bergh v. Pedrick,*[9] in which the court said that to accept the interpretation of the court in the *Slough* case would be interpreting the phrase "any taxable *year*" to read "any taxable *years.*" (Italics added.) Interpreting a singular as a singular and not as a plural seems to follow the "common sense" rule of interpretation, which the court in the *Slough* case says is the safest rule to follow in the administration of income tax laws.

In upholding the claims of the attorneys, the court apparently completely disregarded one of the well-established rules of income taxation, which is that any exemption or special benefit statute should be strictly construed and for any taxpayer to claim the benefit of the statute, he must show himself to come within the terms

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3. *Cf.* Mount Pleasant Cab Co. v. Rhode Island Unemployment Compensation Board, 53 A.2d 485, 489 (R.I. 1947).

4. *Cf.* Langley v. Imperial Coal Co., 234 Mo. App. 1087, 138 S.W. 2d 696 (1940).

5. WEBSTER, COLLEGIATE DICTIONARY (5th Ed. 1936).

6. SEN. REP. No. 648, 76th Cong., 1st Sess. (1939).

7. The court merely says that the Treasury Department Regulation 103, Sec. 19.107—1, which says the compensation must be received in one taxable year, was unreasonable and "constitutes an effort on the part of the Treasury Department to add restrictions to Section 107 which are not included in the statute. This conclusion, to me, seems inescapable. . ."

8. 147 F. 2d 836 (C.C.A. 6th 1945).

9. 71 F. Supp. 551 (S.D. N.Y. 1947).

of it.[10] This court approached the problem from the opposite view, and attempted to force the defendants to show why the plaintiffs should not recover. Such an approach seems quite erroneous, since any exemption merely places more burden upon other taxpayers.

Under the present statute the problem of when the compensation must be received is eliminated,[11] as it expressly states one taxable year. The problem of the source of the compensation, however, is still an open question and one which would seem to deserve fuller consideration than was given it in the principal case.

GARRETT R. CROUCH

TENANCY BY THE ENTIRETY—DISPOSITION OF PROPERTY WHERE ONE CO-TENANT MURDERS THE OTHER

Grose v. Holland[1]

William Edgar Holland and Mattie Mollie Holland were husband and wife and they owned the real estate in question as tenants by the entirety. In 1944 William murdered Mollie and was convicted and is now serving a life sentence in the state penitentiary. Plaintiffs are the heirs of Mollie and defendant Myrtle Watts is the duly appointed trustee of the estate of William. Plaintiffs asked to be adjudged owners of a one-half interest in the real estate and for partition of the same. Defendant's motion to dismiss was founded on the theories that the fee simple title had vested in William and to deprive him of any part of his title would be in violation of Missouri constitutional[2] and statutory provisions.[3] Defendant's motion was sustained and plaintiff appealed.

The Missouri Supreme Court reversed the lower court and awarded half of the real estate to the plaintiffs. The court refers to the common law theory, based on the fiction of oneness of husband and wife, that in a tenancy by the entireties there is no survivorship but simply a continuance of the original estate in the survivor.[4] Drawing

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10. *Cf.* Helvering v. Northwest Steel Rolling Mills, Inc., 311 U.S. 46, 49 (1940); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Commissioner v. Pierce, 146 F. 2d 388, 391 (C.C.A. 2d 1944).

11. 53 STAT. 878, 26 U.S.C. 107 (1940), as amended, 56 STAT. 837 (1942), 58 STAT. 39 (1944), 26 U.S.C. 107. The statute reads in part, "(a) PERSONAL SERVICES.—If at least 80 per centum of the total compensation for personal services. . . is received or accrued in one taxable year by an individual or a partnership, . . ." In referring to this statute, the court in the *Bergh* case, *supra* note 9, said it was designed to liberalize, not restrict, and the 1942 Act is more support for limiting application of Section 107 to a single taxable year.

1. 211 S.W. 2d 464 (Mo. 1948).

2. MO. CONST. Art. II, § 13 (1875): ". . .no conviction can work corruption of blood or forfeiture of estate. . ." This provision is enacted again in Art. I, § 30 of the present Constitution.

3. MO. REV. STAT. § 4858 (1939). "No conviction of any person for any offense whatever shall work corruption of blood, or any forfeiture of any estate, or any right or interest therein. . ."

4. See note, 13 Mo. L. REV. 321 (1948).

upon eminent domain[5] and divorce[6] cases and upon the fact that the wife is now entitled to share in the profits during her life, however, the court concludes that one tenant by the entirety actually does acquire something by surviving and that this right is effective only where death of the other tenant occurs in the ordinary course of events and subject only to the vicissitudes of life. These prerequisites are not met where one tenant by the entirety murders the other, and the maximum of equity that one cannot profit by his own crime prevents the murderer from asserting his normal right of survivorship. The court skirted the constitutional and statutory problem by saying that the surviving husband never acquired the whole estate in the property, thus there was nothing on which the constitutional and statutory provisions could be said to operate.

The problem presented by the principal case is when the murderer and the victim each have an interest in the property prior to the murder, but the murderer's interest is enlarged by the murder, what portion if any will the murderer be allowed to retain? Generally the courts use one of three approaches to this problem. The "legal or strict approach" is that the murderer will not be divested of any of the property.[7] In theory this seems sound, particularly as applied to tenants by the entireties, because it is difficult to perceive how an owner of a vested interest in property may be divested of his ownership by any act—lawful or otherwise—which is not a condition to such divestment operative either pursuant to some provision of statutory law or pursuant to some provision contained in the instrument creating such ownership. Especially when a "forfeiture for conviction" statute is present are these courts loathe to divest the wrongdoer of any interest. But the result—giving the murderer all the property—is inequitable.

The phrase "equitable approach" could characterize the position taken by other courts. This is the approach used by the Missouri court.[8] It is buttressed by the equitable maxim that a wrongdoer is not to be allowed to benefit by his own wrong. It is pointed out that the murderer, as in the above case, does acquire a practical

5. Holmes v. Kansas City, 209 Mo. 513, 108 S.W. 9 (1907). This was a condemnation proceeding that included an estate by the entirety. *H* was only made a party and *W* subsequently brought an injunction suit. The court said *W* ". . .had such an interest in the property as demanded at the hands of the city just compensation before the property or any part thereof could be taken for a public purpose."

6. Russell v. Russell, 122 Mo. 235, 26 S.W. 677 (1894). The court said that if two tenants by entireties are divorced, the legal fiction is destroyed and the former husband and wife become tenants in common.

7. See Beddingfield v. Newman, 118 Tenn. 39, 100 S.W. 108 (1907).

8. Barnett v. Couey, 224 Mo. App. 913, 27 S.W. 2d 757 (1930), noted in 43 U. OF MO. BULL. L. SER. 31 (1931). Here *H* and *W* were tenants by the entireties of a bank deposit. *H* murdered *W* and three hours later committed suicide. The court held the administrator of *W* entitled to the one-half requested and said that the murder caused a severance of the interest, at least in equity.

In Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908), *W* was the sole owner of certain property before being murdered by *H*. No children were born of the marriage. The court gave an "equitable" interpretation of § 2938, Mo. REV. STAT. (1899) (§324, Mo. REV. STAT., 1939) which allowed a "widower" to receive half of the real and personal property belonging to the *W* at the time of her death, and said the word "widower" means one who has been reduced to that condition by the ordinary and usual vicissitudes of life, and not one who, by felonious act, has created that condition.

and substantial benefit by his act, *i.e.*, before the death of the victim each was entitled to enjoy the whole, and each had a chance of survivorship and consequent acquisition of the whole as a tenant in severalty; but after the death, the murderer does not have to share current profits with any one, and he has no possibility of loss of his interest impending over him.[9] Also it is pointed out that the intangible concept of public policy is against allowing a murderer to benefit by his crime. If a statute on forfeiture is present these courts make a distinction between barring a person from taking an interest and depriving him of an interest which he already owns absolutely. Note that in the *Barnett* case[10] the Missouri court did not even consider the forfeiture statute. Under this view, the result is the same as it would be if the parties had been divorced. There is much to be said in favor of it.

The "constructive trust approach" is the third approach to be considered. This is the view taken by the *Restatement of Restitution*,[11] which sets forth the general proposition that "Where two persons have an interest in property and the interest of one of them is enlarged by his murder of the other, to the extent to which it is enlarged he holds it upon a constructive trust for the estate of the other." The application of this approach is consistent with the concept of tenancy by entireties in that the murderer is assumed to have the legal title and is allowed to enjoy the property for his own life. But is considered reasonable to deny the ultimate interest in the property to the murderer and to conclusively presume against him that the victim would have survived him and would have received the fee in the absence of the act of murder.[12] In the application of this approach the constitutional prohibition against forfeiture is either ignored or it is said that the divesting is not uncon-

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9. 3 BOGERT, TRUSTS § 478 (1935).

10. Note 8, *supra*. Also note that in the Strawbridge case the court considered the constitutional prohibition against forfeiture but said their interpretation of the word "widower" prevented the murderer from acquiring the property at all.

11. Sec. 188, 3 SCOTT, TRUSTS §493 (1939) is in accord with the view expressed in the RESTATEMENT OF RESTITUTION.

12. In Sherman v. Weber, 113 N. J. Eq. 451, 167 A. 517 (1933) the interest held in constructive trust was a half of the property for the period of the wife's (i.e., the victim's) expectancy as ascertained by the mortality tables. This seems to give the wife's estate too little since she might have survived the husband to take a fee in the whole estate. The court in Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927) held the murderer was a constructive trustee for the heirs of the wife, subject to a beneficial life interest in the whole of the property in the murderer. This result is a much more favorable one for the estate of the victim. And in Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y. Supp. 173 (1918) the court held that person entitled under the will of the victim could compel the heirs of the murderer to surrender the whole of the property to them. This latter result was also reached in Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y. Supp. 176 (1935).

Professor Bogert, note 9, *supra* believes that the expectancy of the parties should enter into the determination of this question. He puts the following problem and solution, *i.e.*, "Thus, if *H* and *W* are tenants by the entirety, *H* has an expectancy of 10 years and *W* of 15 years, and *H* murders *W*, an equitable result would be that *H* should be declared a constructive trustee of an estate for 10 years in half the property and of the fee in the whole property, subject to an estate for 10 years in half of the property in *H*. Had the murder not occurred, for 10 years the profits would have been shared equally, and then, in all probability, *W* would have acquired the

stitutional, *i.e.*, saying that the word "conviction" means a criminal conviction and does not mean divesting by equitable decree.

The Missouri Supreme Court does not mention the *Restatement* in the principal case, but the plaintiff only asked for half the property. Under the *Restatement* rule the wrongdoer holds the whole property on a constructive trust but is entitled to continue to receive the whole of the income as long as he lives if he was entitled to control and the income from all the property while both parties were alive. In Missouri, the wife would have been entitled to share in the income. Therefore, had the *Restatement* rule been applied to the facts in the principal case apparently the murderer would have been held a constructive trustee of the whole of the estate for the benefit of the victim's heirs, subject to a life estate in one-half in himself.

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fee in severalty. *W*'s innocent successors should get from *H* this 10 year interest in half the estate and the fee, subject to an estate for 10 years in *H* in one-half the property. If the murderer, *H*, had a greater expectation than *W*, then the constructive trust should extend only to a half interest in the property for the period of *W*'s expectancy at the time of her death. . ."