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MEDICAL RESIDENT STIPENDS: EXCLUSION FROM INCOME AS "SCHOLARSHIPS" OR "FELLOWSHIPS"

Mizell v. United States[1]

In the past, many medical residents have failed in their attempts to avoid inclusion of their stipend payments in gross income by treating them as scholarships or fellowships.[2] A recent decision by the United States Court of Appeals for the Eighth Circuit, however, creates new hope for medical residents in their quest to escape taxation. The case also points up the need for the United States Supreme Court to decide the status of medical resident payments as a matter of law in order to avoid varied decisions in cases with virtually identical facts.

In *Mizell v. United States*,[3] the plaintiff taxpayers served in non-degree residency programs in the Departments of Medicine, Anesthesiology, and Dermatology at the University of Missouri-Columbia Medical Center, where they were to obtain the necessary training and prerequisites for board certification in their areas of specialization.[4] The plaintiffs received stipend payments from the University,[5] a portion of which they excluded from gross income on their tax returns for the years 1972, 1973, and 1974.[6]

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1. 663 F.2d 772 (8th Cir. 1981).
2. *See* cases cited note 13 *infra*.
3. 663 F.2d 772 (8th Cir. 1981).
4. *Id.* at 773. In addition, residents performed identical services for the Veterans Administration Hospital. Brief for Appellee at 13, *Mizell*. The major purpose of the residency program is to provide residents with the opportunity to diagnose a patient's condition and initiate proper treatment. In the first year of the program, residents spend at least eleven months providing primary patient care. During that period, they engage in a wide range of patient care activities, including interviewing incoming patients, performing physical examinations, recording patient histories, providing follow-up care, treating patients on a continuing basis in the out-patient clinic, and providing medical care in the emergency room. In the second year, residents spend only five or six months performing these functions; the remainder of the year is spent diagnosing patients in the ten major subspecialties of internal medicine. Residents usually spend one hundred hours a week at the hospital. They are part of a team that works a 24-hour shift every third day as well as on specified weekends. In addition to the treatment given to a particular patient at the hospital, residents generally continue treating that patient in the out-patient clinic. Brief for Appellant at 6-7, *Mizell*.
5. 663 F.2d at 773.
6. Plaintiffs could not exclude all of their stipends because they were certificate, not degree, candidates. *Id.* Certificate candidates cannot exclude more than $3,600 per year for three years. I.R.C. § 117(b)(2) (1976).

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The Internal Revenue Service (IRS) asserted that the excluded stipend payments were not excludable "scholarships" or "fellowships" within the meaning of section 117 of the Internal Revenue Code[7] and assessed additional taxes.[8] The plaintiffs paid the additional taxes and, upon subsequent denial of their claims for refunds by the IRS, filed an action in the United States District Court for the Western District of Missouri. A jury found that the stipends were scholarships or fellowships, not taxable compensation.[9] The IRS appealed. The Eighth Circuit affirmed the lower court, holding that the jury decision was supported by substantial evidence.[10]

A great many cases under section 117 have involved medical residents seeking to exclude their stipends on the theory that the work they do for hospitals is educational, not occupational, and that stipends are therefore not compensation for services rendered.[11] The vast majority of these decisions have gone against the residents,[12] the courts holding that monies received while working at hospitals are compensation for services and fully taxable.[13] The decision in *Mizell* thus creates a breakthrough for medical residents.

Section 117 states generally that scholarships and fellowships should not be included in a taxpayer's gross income.[14] In determining what constitutes a scholarship or fellowship, courts use the definitions set out in the Treasury Regulations.[15] Scholarships are amounts paid or allowed to a

7. I.R.C. § 117 (1976).

8. 663 F.2d at 773.

9. *Id.*

10. *Id.* The court found that on the facts presented, there was substantial evidence that the stipends were scholarships or fellowships.

11. *See, e.g.*, Rockswold v. United States, 471 F. Supp. 1385, 1390 (D. Minn. 1979), *aff'd*, 620 F.2d 166 (8th Cir. 1980).

12. In holding against the residents, courts reason that interns and residents normally are considered employees of the hospitals in which they work and are paid in exchange for the extensive and valuable medical services they render. *Id.*

13. *See, e.g.*, Rockswold v. United States, 620 F.2d 166 (8th Cir. 1980); Parr v. United States, 469 F.2d 1156 (5th Cir. 1972); Hembree v. United States, 464 F.2d 1262 (4th Cir. 1972); Quast v. United States, 428 F.2d 750 (8th Cir. 1970); Woddail v. Commissioner, 321 F.2d 721 (10th Cir. 1963); Wertzberger v. United States, 315 F. Supp. 34 (W.D. Mo. 1970), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971); Burstein v. United States, 622 F.2d 529 (Ct. Cl. 1980); Rosenthal v. Commissioner, 63 T.C. 454 (1975); Fisher v. Commissioner, 56 T.C. 1201 (1971); Rev. Rul. 57-386, 1957-2 C.B. 107. *But see* Leathers v. United States, 352 F. Supp. 1244 (E.D. Ark. 1971), *aff'd*, 471 F.2d 856 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Bieberdorf v. Commissioner, 60 T.C. 114 (1973); Bailey v. Commissioner, 60 T.C. 447 (1973); Rev. Rul. 57-560, 1957-2 C.B. 108.

14. I.R.C. § 117(a) (1976). *See also id.* § 61(a) (definition of gross income).

15. *See* Treas. Reg. § 1.117 (1956). Courts use this regulation in conjunction with § 117 to determine whether a resident's stipend can be excluded from gross income. The Supreme Court has upheld the validity of the regulation, noting that "the definitions supplied by the Regulation clearly are prima facie proper, comport-

student at an educational institution to aid in pursuit of study,[16] while fellowships are amounts paid or allowed to an individual to aid in the pursuit of study or research.[17]

Once payments are characterized as scholarships or fellowships, they are subject to certain limitations. Section 117 itself places two limitations:[18] the grantor of the scholarship or fellowship must be a tax-exempt organization,[19] and the amount excluded cannot exceed $3,600 per year for three years.[20] The IRS imposes two additional limitations: amounts paid must not represent compensation for past, present, or future employment services,[21] and study or research performed by the recipients must not be primarily for the benefit of the grantor.[22]

Recognizing these limitations, the test that courts generally apply in determining whether amounts received are scholarships or fellowships is whether the amounts paid are "relatively disinterested 'no-strings' educational grants, with no requirement of any substantial *quid pro quo* from the recipients."[23] Scholarship or fellowship recipients can meet this test by showing that the "primary purpose of the studies or research is to further the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purposes does not represent compensation or payment for the services."[24]

It is well settled in the Eighth Circuit[25] and elsewhere[26] that the ultimate question of whether a payment is excludable as a scholarship or fellowship under section 117 is a question of fact. In *Mizell*, the jury acted as the finder of fact and determined that the stipends received by the taxpayers were excludable to the extent allowed under section 117.[27] In only one

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ing as they do with the ordinary understanding of 'scholarships' and 'fellowships' as relatively disinterested, 'no-strings' educational grants, with no requirement of any substantial *quid pro quo* from the recipients." Bingler v. Johnson, 394 U.S. 741, 751 (1969).

16. Treas. Reg. § 1.117-3(a) (1956).

17. *Id.* § 1.117-3(c).

18. Medical residents are considered to be non-degree candidates and therefore are subject to these limitations. 663 F.2d at 773.

19. I.R.C. § 117(b)(2)(A) (1976). *See also id.* § 501(c)(3) (definition of "tax exempt organization").

20. *Id.* § 117(b)(2)(B).

21. Treas. Reg. § 1.117-4(c)(1) (1956).

22. *Id.* § 1.117-4(c)(2).

23. Bingler v. Johnson, 394 U.S. 741, 751 (1969).

24. Treas. Reg. § 1.117-4(c)(2) (1956).

25. *See, e.g.*, Leathers v. United States, 471 F.2d 856, 858 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973).

26. *See, e.g.*, Woddail v. Commissioner, 321 F.2d 721, 723-24 (10th Cir. 1963); Ussery v. United States, 296 F.2d 582, 586-87 (5th Cir. 1961).

27. 663 F.2d at 773.

other Eighth Circuit decision, *Leathers v. United States*,[28] had the fact finder—a jury—found in favor of the taxpayers. The taxpayers lost in all other decisions involving such stipend payments in that circuit.[29] With one exception,[30] the decision of the fact finder, whether judge or jury, has never been overturned in any of the reported cases involving this problem.[31]

The main factor in determining the tax status of a medical resident's stipend is the "primary purpose" of the payment.[32] To be excludable, the

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28. 352 F. Supp. 1244 (E.D. Ark. 1971), *aff'd*, 471 F.2d 856 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973). The taxpayers in *Leathers* were licensed physicians in the residency program at the University of Arkansas Medical Center. Evidence showed that (1) the clear purpose of the Center was to train physicians, (2) the stipend appointments did not require any rendering of services, (3) the stipends were made for the support of the doctors, (4) yearly increases were based on need rather than services rendered, (5) the hospital could function without the aid of the residents, and (6) there was no requirement that the residents remain with the hospital after residency. From these facts, the jury inferred that the monies paid were not compensation for services rendered. 471 F.2d at 857, 861. *See also* Note, *Taxation: The Section 117 Exclusion and Medical Residents—To Exclude or Not to Exclude*, 27 OKLA. L. REV. 115, 118-21 (1974).

29. *See, e.g.*, Rockswold v. United States, 471 F. Supp. 1385 (D. Minn. 1979) (judge), *aff'd*, 620 F.2d 166 (8th Cir. 1980); Wertzberger v. United States, 315 F. Supp. 34 (W.D. Mo. 1970) (judge), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971); Quast v. United States, 293 F. Supp. 56 (D. Minn. 1968) (jury), *aff'd*, 428 F.2d 750 (8th Cir. 1970).

30. In Hembree v. United States, 464 F.2d 1262 (4th Cir. 1972), the court reversed the district court jury verdict and held the residents' stipends includable in gross income because the lower court had erroneously applied the "primary purpose" test to the *facility* rather than to the *payment* to the resident. *Id.* at 1264. *See* note 32 *infra*.

31. 471 F.2d at 864 n.3. The fact finder may be judge or jury; the taxpayer has a choice. He may either refuse to pay the additional tax and seek a deficiency review in the Tax Court, where he will get a judge, or pay the tax and sue for a refund in district court, where he can get a jury. In determining which avenue to follow, the taxpayer must remember that:

> [a] jury verdict is subject to a more restricted review on appeal than a single judge's finding of fact. A trial judge's finding may be set aside if it is "clearly erroneous." . . . This means that although there exists substantial evidence to support the finding, if the court of appeals possesses a firm conviction that a mistake has been committed, it may still reverse. . . . On the other hand, a jury verdict may not be set aside where substantial evidence exists notwithstanding the court of appeals disagreement with it.

Id. As the results of *Mizell* and *Leathers* indicate, a medical resident increases his chances of winning if he brings his case before a jury in district court.

32. This test is derived from Treas. Reg. § 1.117-(4)(c)(2) (1956), which states that payments made primarily for the benefit of the grantor will not be considered a scholarship or fellowship grant. *See* Leathers v. United States, 471 F.2d 856, 870 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Hembree v. United States, 464 F.2d 1262, 1264 (4th Cir. 1972). The test, as applied to residency stipends, has under-

primary purpose must be to further the education and training of the recipient, not to compensate him for services rendered.[33] If the primary purpose is to compensate or reward the recipient for any past, present, or future services, no exclusion will be allowed under section 117.[34] The *Mizell* court, in support of the jury's determination, found the payments to be relatively disinterested because (1) they were designed to defray the taxpayers' living expenses; (2) they were based on the reasonable amount of necessary living expenses in the community; and (3) they were not in any way conditioned upon job performance or the number of patients treated.[35] In contrast, however, the Eighth Circuit in three other cases, *Rockswold v. United States*,[36] *Wertzberger v. United States*,[37] and *Quast v. United States*,[38] all of which had similar facts, affirmed district court determinations that the stipends were paid to residents as compensation for their services as resident physicians and were therefore fully taxable.[39]

Such inconsistency within the Eighth Circuit is attributable to the relative emphasis that fact finders have placed on various factors. The only situation in which medical resident stipends unquestionably are excludable

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gone a subtle shift in focus. Courts no longer look at the primary purpose of the institution, but rather to the primary purpose of the payment. The primary function of a hospital as an exclusively teaching facility no longer is sufficient to support a claim that a stipend is a relatively disinterested educational grant with no requirement of a substantial quid pro quo. *See* Tucker, *Federal Income Taxation of Scholarships and Fellowships: A Practical Analysis*, 8 IND. L. REV. 749, 786 (1975).

33. *See* Burstein v. United States, 622 F.2d 529, 535 (Ct. Cl. 1980).

34. *Id.*

35. 663 F.2d at 776.

36. 620 F.2d 166 (8th Cir. 1980). The plaintiffs in *Rockswold* were "medical fellows" at the University of Minnesota. Most of their duties were the same as those performed by residents. Unlike residents, however, medical fellows were required to do a considerable amount of independent research and their regimen was much more academically oriented. The amount of their stipend payments was not based on need but increased automatically as a fellow progressed through the program. *Id.* at 167-68.

37. 315 F. Supp. 34 (W.D. Mo. 1970), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971). The plaintiffs in *Wertzberger* were resident physicians in the Department of Surgery at the University of Kansas Medical Center. Services performed by the residents were subject to constant direction, supervision, and control by the hospital staff. Stipends received were not based on financial need and taxes were deducted from the gross amount. Residents also received fringe benefits and could negotiate to get increases in the amount of stipend received. *Id.* at 35-36.

38. 428 F.2d 750 (8th Cir. 1970). The plaintiff in *Quast* was a "career resident" at the University of Minnesota Hospital. He was required to work at the hospital for a two-year period after his three-year residency at the hospital's option. The plaintiff signed an employment contract and received a much larger stipend than a regular resident. *Id.* at 753.

39. *Rockswold*, 620 F.2d at 169; *Wertzberger*, 441 F.2d at 1166; *Quast*, 428 F.2d at 754.

from gross income is when the recipient performs no services for the grantor, has no taxes withheld, receives no fringe benefits, performs without direct supervision,[40] and has no present or future obligation to work for the grantor.[41] Otherwise, whether such a stipend payment is excludable will depend on the weight and interpretation of the following factors:

1. whether the services performed by the resident were necessary and indispensable to the operation of the hospital;[42]
2. whether the recipient has been provided a number of the fringe benefits customarily received by employees;[43]
3. whether the resident has signed an employment contract and performs substantial services for the hospital;[44]
4. the degree of supervision over the resident;[45]
5. whether the hospital is engaged primarily in research and teaching or patient care;[46]

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40. Various courts treat the degree of supervision factor differently. The *Mizell* court considered a high degree of supervision to be a factor in favor of exclusion because it resulted in duplication of patient care services, making the residents' work of no benefit to the hospital. 663 F.2d at 776. On the other hand, the court in Burstein v. United States, 622 F.2d 529, 536-37 (Ct. Cl. 1980), considered that supervision and control of the activities of a resident was characteristic of compensable services in that it was evidence of an employment relationship and that such close supervision increased the value of the services to the employer.

41. *See* Krupin v. United States, 439 F. Supp. 440, 445 (E.D. Mo. 1977).

42. If services are necessary and indispensable, stipends usually are held includable in gross income. *See* Meek v. United States, 608 F.2d 368, 373 (9th Cir. 1979) (residents performed services that must otherwise have been performed by others); Hembree v. United States, 464 F.2d 1262, 1264-65 (4th Cir. 1972) (valuable services provided by residents were indicia of employment relationship); Wertzberger v. United States, 315 F. Supp. 34, 35 (W.D. Mo. 1970) (residents rendered valuable services resulting in benefit to hospital), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971).

43. Receipt of normal incidental benefits is a factor that weighs against exclusion from gross income. *See* Leathers v. United States, 471 F.2d 856, 861 (8th Cir. 1972) (free laundry service, free health and malpractice insurance, paid vacations), *cert. denied*, 412 U.S. 932 (1973); Quast v. United States, 428 F.2d 750, 752 (8th Cir. 1972) (paid vacation, sick leave, group health and life insurance, coverage under Federal Employment Retirement Act); Wertzberger v. United States, 315 F. Supp. 34, 36 (W.D. Mo. 1970) (monthly meal tickets, uniforms, laundry services, paid vacation, hospitalization coverage, medical care for residents and their families, malpractice insurance, free parking), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971).

44. Existence of an employment contract is evidence of an employment relationship. Stipends received under such a contract usually are held includable in gross income. *See* Quast v. United States, 428 F.2d 750, 752 (8th Cir. 1970) (resident entered into "Contract for Full-Time Physicians"); Woddail v. Commissioner, 321 F.2d 721, 724 (10th Cir. 1963) (contract stated resident would be "full-time physician").

45. Courts treat this factor in conflicting ways. *See* note 40 *supra*.

46. In the past, if a hospital was engaged primarily in research and teaching,

6. whether there is a requirement to stay with the hospital after completion of the residency program;[47]
7. whether the hospital could have performed the same services without the resident;[48]
8. whether there were payroll deductions made from the stipend payments;[49] and
9. whether the resident received payroll increases on the basis of need or tenure.[50]

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stipends could be held excludable, whereas if the primary purpose was patient care, stipends usually were held includable in gross income. *See, e.g.*, Leathers v. United States, 471 F.2d 856, 861 (8th Cir. 1972) (hospital strictly teaching institution, primary purposes education and training of physicians), *cert. denied*, 412 U.S. 932 (1973); Woddail v. Commissioner, 321 F.2d 721, 724 (10th Cir. 1963) (primary purpose of hospital was care and treatment of patients). Today, however, this factor is not given as much weight as it once enjoyed. *See* note 32 *supra*.

47. A requirement to stay with the hospital after completion of the residency renders the stipend includable in gross income. *See* Quast v. United States, 428 F.2d 750, 753 (8th Cir. 1970) (resident required to stay with hospital for two years after residency); Woddail v. Commissioner, 321 F.2d 721, 724 (10th Cir. 1963) (resident obligated to remain in employment specified time for each year of residency training). *Cf.* Leathers v. United States, 471 F.2d 856, 861 (8th Cir. 1972) (no requirement that resident remain with hospital after completion of residency), *cert. denied*, 412 U.S. 932 (1973).

48. Some courts consider the ability of the hospital to operate without the residents as a factor in favor of exclusion from gross income. *See* Mizell v. United States, 663 F.2d 772, 776 (8th Cir. 1981); Leathers v. United States, 471 F.2d 856, 862 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973). Not all courts agree. "Even if the Center could do without residents, it did not do without them; it used their services, and it paid for them. Many employees may be dispensable in the sense that their employer could 'operate' without them. But such dispensability hardly renders their salaries noncompensatory." Fisher v. Commissioner, 56 T.C. 1201, 1215 (1971).

49. Payroll deductions are evidence that stipends are compensation and therefore includable in gross income, but courts do not apply much weight to this factor. *See* Quast v. United States, 428 F.2d 750, 752 (8th Cir. 1970) (federal income taxes withheld from stipend); Woddail v. Commissioner, 321 F.2d 721, 724 (10th Cir. 1963) (same); Wertzberger v. United States, 315 F. Supp. 34, 36 (W.D. Mo. 1970) (federal income taxes and social security contributions withheld from stipend), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971).

50. Stipend increases based on tenure often indicate that a payment is in the nature of compensation. *See* Wertzberger v. United States, 315 F. Supp. 34, 36 (W.D. Mo. 1970) (amount paid to resident increased over years of residency and was reflected as "Salary Changes" on "Change of Employment Status" report), *aff'd per curiam*, 441 F.2d 1166 (8th Cir. 1971); Burstein v. United States, 622 F.2d 529, 538 (Ct. Cl. 1980) (amounts received based on tenure, not academic standing or financial need). *Cf.* Leathers v. United States, 471 F.2d 856, 860 (8th Cir. 1972) (stipend payments unrelated to financial need but still excludable), *cert. denied*, 412 U.S. 932 (1973).

The *Mizell* court placed great emphasis on the evidence presented in support of the partial excludability of the stipends.[51] There was evidence that the stipend payments were designed to allow residents to meet living expenses and were not conditioned upon job performance; that although residents performed substantial services for the hospital, their work was supervised by the medical school faculty, duplicated by attending staff physicians, and not required for the operation of the hospital; and that there was no obligation to work for the hospital upon completion of the residency program.[52]

The court recognized, however, that the IRS had presented evidence that would indicate that the stipends were compensation,[53] including the deduction of taxes from the stipends;[54] annual increases in payments based on tenure and not financial need;[55] and availability to the residents of an extensive fringe benefit package.[56] Despite this evidence, the court affirmed the jury's verdict. Noting that the verdict must be upheld unless reasonable minds, viewing the evidence in the light most favorable to the taxpayers, could not have found for them,[57] the court decided that the verdict was supported by substantial evidence.[58]

The holding in *Mizell*, when compared with the decisions in *Leathers*, *Rockswold*, *Wertzberger*, and *Quast*, makes it virtually impossible for medical residents to know without litigation whether they must pay taxes on stipends paid to them by the institutions where they train. The cases show that juries as well as judges can reach contrary conclusions in cases with virtually identical facts. Something should be done to resolve this

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51. 663 F.2d at 777.

52. *Id.* at 776-77.

53. *Id.* at 777.

54. Although the withholding of federal taxes is indicative of compensation, *see* note 49 *supra*, the *Mizell* court found that the University's bookkeeping practices did not indicate the true nature of the payments. The University applied the same treatment to other clearly excludable payments made to purely academic researchers in order to avoid federal income tax disputes. 663 F.2d at 776.

55. 663 F.2d at 777. *See* note 50 *supra*.

56. The taxpayers in *Mizell* received group medical insurance, group life insurance, accidental death and dismemberment insurance, sick leave benefits, vacation benefits, free meals while on extended duty, laundry services, and malpractice insurance. Brief for Appellant at 9, *Mizell*. *See* note 43 *supra*.

57. 663 F.2d at 777. *See also* Commissioner v. Duberstein, 363 U.S. 278, 290-91 (1960); McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 158 (8th Cir.), *cert. denied*, 439 U.S. 864 (1978).

58. 663 F.2d at 776. *See also* Leathers v. United States, 471 F.2d 856, 858 (8th Cir. 1972) (court "will not reverse a jury's determination of a fact question where such determination is supported by substantial evidence" and will not "substitute [its] judgment for that of the finder of facts, whether it be judge or jury"), *cert. denied*, 412 U.S. 932 (1973); note 31 *supra*.

inconsistency.[59]

Because the issue in *Mizell* was a question of fact, the decision is not binding as a matter of law.[60] The decision illustrates, however, that unless the Supreme Court hands down a definitive ruling, the factual question of whether medical residents' stipends are to be excluded will continue to be decided on a case-by-case basis using the factors mentioned above.[61] It seems evident, therefore, that although *Mizell* reopened the doors for possible excludability of such stipends, medical residents will still not be able to determine the tax status of their stipends without litigation. The expense of such litigation suggests strongly that the Supreme Court "resolve, as a matter of law, the tax liability on stipends paid to resident physicians."[62]

JEFFREY J. COMOTTO

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59. The need for a solution to the problem was articulated by Judge Bright, the dissenting judge in *Leathers*, in his dissent from the order denying a rehearing en banc in *Mizell*:

> In the absence of a definite ruling by the Supreme Court, this court should take the responsibility of adopting an appropriate legal test for tax liability in cases such as this. . . . Residency programs do not differ greatly among hospitals. Yet residents may or may not pay taxes on identical types of stipends depending on jury determinations. . . . This court should take this opportunity to eliminate the confusion in ascertaining tax consequences caused by *Leathers* and the decision in the instant appeal. We should resolve, as a matter of law, the tax liability on stipends paid to resident physicians.

Mizell v. United States, 669 F.2d 552, 553-54 (8th Cir. 1982) (Bright, J., dissenting).

60. *See* Commissioner v. Duberstein, 363 U.S. 278, 290-91 (1968). If there is fear of undue uncertainty or excessive litigation, Congress could forestall many disputes by singling out certain factors and making them determinative of the matter. *Id.*

61. *See* notes 42-50 and accompanying text *supra*.

62. Mizell v. United States, 669 F.2d 552, 554 (8th Cir. 1982) (Bright, J., dissenting).