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Taxation

Stephen L. Green

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Since 601(a) provides for an investigation when the Secretary "believes it necessary," simple curiosity can launch one. This intentional omission of a "probable cause" requirement allows an inquisitorial power analagous to that of the grand jury. In the case of an objection on the grounds of irrelevancy, the evidence sought will be admitted unless the irrelevancy is plain and obvious and the documents sought could not possibly disclose anything material. Objections to the unreasonableness of a subpoena are governed by the rules applicable to grand jury investigations.

The new law applies to the Secretary those provisions which Sections 9 and 10 of the Federal Trade Commission Act apply to the Federal Trade Commission. Evaluating the decisions under the latter Act, the writers conclude that the basic concepts to bear in mind respecting documentary production and immunity are: (1) The procedural requirements of a subpoena, production before the Secretary, and possibly the oath are all applicable in determining immunity. (2) Records of the union are nonprivileged. (3) Personal records, required to be maintained by law, are probably nonprivileged. (4) Immunity for the production of non-privileged records will probably not be conferred. (5) Oral testimony concerning non-privileged records will create immunity for the witness.

Raising objections to investigative subpoenas results in certain procedural problems which the authors summarize as follows: First, a refusal to comply may cause either a noncriminal action under Section 9 or a prosecution under Section 10. Secondly, the Secretary of Labor apparently has discretion to make this choice. Moreover, federal district courts have no jurisdiction to enjoin the Secretary's proceedings. Also, the criminal provisions of Section 10 may not stand attack constitutionally. Finally, the mere challenging of a subpoena or investigative procedure runs the risk of criminal prosecution.

This article should be helpful to those who first test the investigatory provisions of this statute.

BRIAN E. CONCANNON

TAXATION

THE NEW TAX POLICY ON DEFERRED COMPENSATION, by Ralph S. Rice, 59 Mich. L. Rev. 381 (January 1961).

In this article Professor Rice analyzes the effect of the Commissioner's 1960 ruling, 60-31, as to past and present informal deferred compensation arrangements. After examining the ruling the author establishes its practical effect and its place in current legislative and administrative structures for the taxation of income.

Due to the progressive rates of the federal income tax, devices have been established through which employees may defer income from periods of great productivity to subsequent periods when their income will not be so large. The simplest method of achieving this result is where the em-

ployer makes an agreement with an employee to postpone payment of salary to him until a subsequent date. The Bureau of Internal Revenue has not closed its eyes to such a device and it has attempted to restrict its use through the constructive receipt theory.

Under Treasury Regulation §§ 1.45-(a) and 1.446-1(c)(1) (i) (1957), income is attributed to the taxpayer in the year it is constructively received. Section 1.451-2(a) of the Income Tax Regulations provides that income is constructively received by the taxpayer in the taxable year during which it is credited to his account, or set apart for him so that he may draw upon it at any time. The Regulations go on to state that such income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. The Commissioner and the courts have been very vague as to the taxability of informal deferred compensation plans. The definition of constructive receipt, as promulgated by the above mentioned Regulations, was ambiguous to the extent that draftsmen could not forsee what plans would qualify for deferred treatment under the present tax structure. As a result of these uncertainties the Commissioner, in February 1960, clarified his position as to informal deferred compensation agreements through the issuance of Revenue Ruling 60-31.

In considering the new Ruling, Mr. Rice investigates the extent to which informal deferred compensation arrangements are currently allowable and the practical effect of Ruling 60-31.

The Commissioner, in Ruling 60-31, interprets the regulation as prohibiting a taxpayer from "deliberately turning his back upon income and thereby selecting the year in which he will report it." This language would appear to frustrate the very purpose of deferred compensation plans. However, as Mr. Rice points out, the qualifying examples actually reduce the restrictions on such plans instead of limiting the deferred compensation device as the Commissioner's general statements would lead one to believe.

Example One in Ruling 60-31 presented a situation where no conditions were attached to the subsequent payment of deferred compensation as required by Section 1.451-2(a) of the Income Tax Regulations. The Commissioner held that under these circumstances the deferred income would be taxable to the employee when actually received. The existence of substantial limitations or restrictions, e.g., non-compensation clauses, as attached to informal deferred compensation agreements seems, therefore, no longer necessary. The new ruling also negates the belief that if the employee could have induced the employer into making payment during the year in which the services were rendered, taxable income would be constructively received in that same year.

As the author points out, Ruling 60-31 strengthens the position that future payments for past earnings may be deferred, as declared in *Commissioner v. Oates* where an insurance agent was allowed to defer commissions on existing insurance policies by a subsequent deferral agreement. This decision does not allow the taxpayer unlimited authority to make deferred compensation arrangements after income has already been earned

but before it has been received. This area in the tax field has not been trod upon with frequency and the allowable paths are not very clear.

While the Ruling gives greater elasticity to informal deferred compensation arrangements between an employer and his employee, no such leniency appears for entrepreneurs and professional persons. Example Five in Ruling 60-31 presented a situation where a boxer attempted to make a deferred compensation agreement with a boxing club for his share of the gross receipts from a prize fight. The Commissioner held that since the boxer, his opponent, and the boxing club were engaged in a joint venture and the taxpayer was not an employee of the boxing club, the gross receipts were income to the taxpayer in the year they were paid to the boxing club. This decision, however, appears to be inconsistent with the Commissioner's allowance of a similar deferred compensation agreement between an author and a publishing corporation in reference to specific royalties based on proceeds received from the sale of the author's work.

In the second part of his article Mr. Rice comments on problems that draftsmen may run into in drawing up such deferred compensation plans. He emphasizes that the deferred fund should not be put in trust or in escrow. Under such arrangements the employee will be taxed in the year services were rendered. Mr. Rice points out two features that draftsmen must be cognizant of in using special accounts for deferred compensation. They are: (1) The Commissioner might conclude that where the employer was setting up an informal reserve he could do this only where payment to the employee was not vested. (2) Draftsmen should make it clear that an informal reserve and not a trust is being used.

The author's main criticism of Ruling 60-31 was the Commissioner's failure to settle on a positive approach to deferred compensation in regard to professional people and entrepreneurs. Mr. Rice presents the situation of a client who agrees to pay his attorney over a period of years without putting money into an account or setting it aside. This problem is yet to be answered.

STEPHEN L. GREEN

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ANTITRUST LAW

General Examination of the Antitrust Laws: A Symposium. 5 Antitrust Bull. 5 (January-February 1960)

New Approaches to the Control of Oligopoly. L. B. Schwartz, 109 U. Pa. L. Rev. 31 (November 1960)

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