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Taxation—Section 223 of the 1964 Revenue Act—Remittance in Response to Asserted Liability—Interest Deductibility in Year of Transfer.—Charles Leich and Co. v. United States

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CASE NOTES

A filing . . . in an improper place or not in all the places required . . . is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article. . . .

The proper place to file a security interest in a fixture is in the local office of the recorder of deeds.²⁹

ROBERT J. DESIDERIO

Taxation—Section 223 of the 1964 Revenue Act—Remittance in Response to “Asserted Liability”—Interest Deductibility in Year of Transfer.—*Charles Leich and Co. v. United States*.¹—This is a motion for rehearing and amendment of a judgment on the ground that the judgment was inconsistent with Section 223 of the Revenue Act of 1964.² Events leading up to the present litigation began in 1949 when the taxpayer claimed a refund for overpayment of an excess profits tax for the taxable year 1942. The alleged overpayment was made in response to a deficiency assessment. Refund was refused and while this litigation was pending the tax authorities notified Leich and Company by letter that an agent’s report had been filed indicating another excess profits tax deficiency for the years 1943-1949. Taxpayer sent a letter of protest but was informed by the Internal Revenue Service that consideration of its protest would be postponed, pending the outcome of the litigation between taxpayer and the Government relating to 1942. The Service warned that the issues of the 1942 litigation were the same as those in 1943-1949, and thus the latter would be controlled by the doctrine of collateral estoppel. The trial court deciding the 1942 case ruled against the taxpayer in 1952. While the appeal period ran and while motions were pending, Leich and Company remitted to the Internal Revenue Service the sums, plus interest, totalling the amounts purported to be the 1943-1949 deficiencies. The 1952 decision respecting the 1942 deficiency was reversed on appeal. Taxpayer then brought action for refund of the remittances he had made for the 1943-1949 deficiencies. In this action taxpayer also sought the allowance of an interest deduction for the tax years 1952 and 1953.

statement against any person who has *knowledge* of the contents of such financing statement. (Emphasis supplied.)

²⁹ UCC § 9-401(1)(b).

¹ *Charles Leich and Co. v. United States*, 333 F.2d 871 (Ct. Cl. 1964).

² Section 223 of the Revenue Act of 1964 will be known as § 461(f) of the Internal Revenue Code of 1954. In the Senate Report and in the Senate Supplemental Report, this section is referred to as § 224. It is set forth as follows:

Contested Liabilities—If—(1) the taxpayer contests an asserted liability, (2) the taxpayer transfers money or other property to provide for satisfaction of the asserted liability, (3) the contest with respect to the asserted liability exists after the time of transfer, and (4) but for the fact that the asserted liability is contested, a deduction would be allowed for the taxable year of the transfer (or for an earlier taxable year), then the deduction shall be allowed for the taxable year of the transfer. This subsection shall not apply in respect of the deduction for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States.

Taxpayer contended that the portion of the overpayment which represented interest was properly deductible in the year of payment from taxpayer's gross income. The court refused to grant this deduction and as a result taxpayer moved for a rehearing on this issue. HELD: The remittances in question were deposits in the nature of a cash bond rather than in response to an "asserted liability," thus the claim for deduction in the year of transfer was unfounded and the motion for rehearing denied. Judge Whitaker dissented.

It is suggested that the majority's decision does not adhere to the purpose of section 223 of the 1964 tax revision respecting the taxable year in which deductions may be taken. The court, before 1964, was limited to the Code section which stated, "There shall be allowed as a deduction all interest *paid* or accrued within the taxable year of indebtedness."³ (Emphasis supplied.) The issue of interest deductibility was automatically settled, as it was in the original report of the *Leich* case, by determining whether remittances were "payments" and hence were "overpayments," as are prerequisite to the interest refunding section. That section specifies, "Interest shall be allowed and paid upon any *overpayment* in respect to any internal revenue tax at the rate of 6 per cent per annum."⁴ (Emphasis supplied.) The court in the original hearing connected the two sections and stated:

[T]he remittances made by the taxpayer in 1952 and 1953 did not constitute "payments" of a tax but were deposits in the nature of cash bonds in order to stop the running of interest, it follows *a fortiori*, that the portion of the remittances which represented interest were not "paid" in those years and consequently could not be deducted as an interest expense in those years.⁵

After 1964, however, a taxpayer who was contesting an asserted liability could allege a new theory of deductibility. The new theory is set out in Section 223 of the Revenue Act of 1964. Moreover, by its provision in section 223 (2) (a) the new revision was made retroactive to 1939.⁶ On the 1964 motion for rehearing, therefore, the *Leich* and Company claim was based on whether the contested remittance came as a response to an "asserted liability" within the new addition to Section 43 of the Internal Revenue Code of 1939. It is contended that the purpose of this addition was to prevent precisely what occurred in the ruling on the motion in the principal case.

The new phrase, "asserted liability" has no precedent. The meaning of the term "liability" is clear. "Asserted," on the other hand, is less definite, in that it suggests only some unspecified claim by some unspecified opposing party. Legislative intent, at least, is clear that this party need *not* be the Internal Revenue Service.

The new subsection (f) is not limited to an asserted liability for

³ Int. Rev. Code of 1954, § 163(a).

⁴ Int. Rev. Code of 1954, § 6611(a).

⁵ *Charles Leich and Co. v. United States*, 329 F.2d 649, 654 (Ct. Cl. 1964).

⁶ S. Rep. No. 830, 88th Cong., 2d Sess. 101 (1964); 1964 U.S. Code Cong. & Ad. News No. 3, p. A-464.

CASE NOTES

taxes, but applies to any asserted liability where the requirements of the new subsection (f) are met.⁷

Examples given by the Senate Supplemental Report following this statement show adverse activity by private parties as constituting asserted liability.⁸ It is true that the Senate further illustrated the new phrase saying:

The amendment provides that if a taxpayer contests an asserted liability, *such as a tax assessment*, . . . then the item involved is allowed as a deduction. . . .⁹ (Emphasis supplied.)

The court relies heavily on this statement as a clue to the intent of Congress. This illustration, however, does not go far enough. A private litigant, for example, could not levy an assessment, yet he could assert a liability. The formal notice and tax assessment procedures of the Internal Revenue Service, then, should not be the test of "asserted liability." The primary issue becomes, what is an asserted liability and does the Government's activity in the *Leich* case constitute asserted liability?

In *Leich* the remittances in issue were made at a time when the taxpayer could not, in good faith, see any other practical alternative. An adverse judgment relating to the year 1942 had just come down. Appeal time was still running but *Leich* and Company had been apprised by the Internal Revenue Service that the same law and facts would cause that judgment, if finalized, to collaterally estop dispute of the large 1943 to 1949 deficiency. The deficiency was \$66,000 in principal, with compounded interest of nearly \$27,000. Moreover, interest was accruing on the total at the rate of 6 per cent per annum. Several motions on the appealable judgment were pending. Whatever the chances of reversing this collaterally estopping judgment might be, they must surely have appeared even smaller in the shadow of the accumulating interest. The majority, looking at these facts and seeing no formal assessment, found no asserted liability.

As was indicated above, the meaning of the new phrase was suggested by Congress in a context other than tax assessment. "Asserted," as defined by Black's Law Dictionary means: "To state as true, declare; maintain."¹⁰ The majority's suggestion that the term "asserted liability" is "something akin" to tax assessment seems untenable not merely because parties other than the revenue authorities can assert liabilities, as has been shown, but also

⁷ S. Supp. Rep. No. 830, 88th Cong., 2d Sess. 243 (1964); 1964 U.S. Code Cong. & Ad. News No. 3, p. A-603.

⁸ *Ibid.*

A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property to the person who is asserting the liability, or by transfer to an escrow agent provided that the money or other property is beyond the control of the taxpayer. However, purchasing a bond to guarantee payment of the asserted liability, an entry on the taxpayer's books of account, or a transfer to an account which is within the control of the taxpayer is not a transfer to provide for the satisfaction of an asserted liability. (Emphasis supplied.)

⁹ S. Rep. No. 830, 88th Cong., 2d Sess. 100 (1964); 1964 U.S. Code Cong. & Ad. News, No. 3, p. A-463.

¹⁰ Black, Law Dictionary (4th ed. 1951).

because the tax authorities, themselves, can contest a liability to finality without actual assessment.¹¹ It could therefore be argued that the decision of the majority in the *Leich* case too narrowly construes the congressional and common intentment of the term in issue.

On the other hand, Judge Whitaker in his dissent looked to the realities, as Congress would seem to prefer.¹² His interpretation of the new phrase is in keeping not only with the ordinary meaning of the words but also with the practicalities of business and litigation and the doctrine of collateral estoppel. His grounds may be briefly stated in equation form: actual notice of the 1943-1949 deficiency plus collateral estoppel from the 1942 litigation is equivalent to "asserted liability." It would have been more in keeping with the utilitarian year-of-outgo-year-of-deduction purpose of the Congress to require that the Commission permit Leich and Company the interest deduction claimed here. Again, the Senate Report states Congress's intent:

[Y]our committee . . . believes that it is unfortunate to deny taxpayers a deduction with respect to an item where the payment has actually been made, even though the liability is still being contested either as to amount or as to the item itself.¹³

The facts alluded to indicate that the taxpayer's remittance was not "voluntary" as the majority would characterize it. Rather, the remittance was made to the Government in response to activity by the tax authorities, which activity in common and congressional understanding could well be construed as "asserted liability."

Mention should be made of the situation that would arise for a taxpayer if deductions once allowed under section 461(f) were found to be unwarranted due to actual liability having later been avoided. Concepts of income would clearly include the overpayment of the deduction in the year of refund.¹⁴

Whether specification of the purpose of the remittance as being other

¹¹ Int. Rev. Code of 1954, §§ 6212-6216. These sections provide for the 90-day letter and Tax Court procedures whereby assessment is postponed while liability is asserted with all the forces of the Internal Revenue Service.

¹² S. Rep. No. 830, 88th Cong., 2d Sess. 100 (1964); 1964 U.S. Code Cong. & Ad. News, No. 3, p. A-463:

The objective of the reporting of items of income and deduction under the internal revenue laws generally is to realistically and practically match receipts and disbursements attributable to specific taxable years. The internal revenue laws contain a number of adjustments designed to accomplish this result. Your committee believes that allowing the deduction of items in the year paid, even though they are still being contested in the courts or otherwise, more realistically matches these deductions up with the income to which they relate than would the postponement of the deduction, perhaps for several years, until the contest is settled. (Emphasis supplied.)

¹³ Ibid.

¹⁴ Ibid.

To the extent that deductions are allowed under this rule and then subsequently as a result of the contest the items were found not to be payable, adjustment can be made for this overstatement of the deduction by the inclusion of the overstatement in income in the year in which the amount of the liability is finally determined.

than for bond filing would have avoided the pitfall of the *Leich* case is not clear. Specification of purpose was a factor not unemphasized in a case cited in the original hearing on the issue of "payment."¹⁵ Nevertheless, the court also considered other factors. In some few cases where the prerequisites are fulfilled for its application, Section 6501(d) of the Internal Revenue Code of 1954 will allow a "Request for Prompt Assessment." A preliminary judicial or administrative ruling might be sought, to provide certainty that a remittance was in response to an "asserted liability."¹⁶

PETER E. PICHE

Trade Regulation—Federal Trade Commission Act—Gasoline-TBA Tying Agreements as Unfair Competition.—*Goodyear Tire & Rubber Co. v. FTC*;¹ *Texaco, Inc. v. FTC*.²—In the first of these two cases, the Atlantic Refining Co. and the Goodyear Tire & Rubber Co. entered into a written sales commission agreement by the terms of which Goodyear was to pay Atlantic a ten per cent commission on all sales of Goodyear tires, batteries, and accessories (TBA) to Atlantic dealers in return for Atlantic's promoting Goodyear products to these dealers. The majority of Atlantic dealers leased stations from Atlantic; the leases, in addition to being cancellable at the will of either party, contained provisions giving Atlantic control over station advertising, hours, maintenance, and other particulars. The FTC, after an original finding by a Hearing Examiner that Atlantic had coerced its dealers to stock Goodyear TBA, entered a sweeping order, not only upholding this ruling, but also condemning the whole sales commission system as a violation of Section 5 of the Federal Trade Commission Act.³ In addition, the Commission prohibited both Goodyear and Atlantic from entering into any future similar agreements with any other companies. The court, affirming the FTC, HELD: Apart from overt coercive methods, Atlantic had sufficient economic power over its dealers to force their purchase of sponsored TBA; and, considered in the context of this economic power, the sales commission contracts were, in effect, tying arrangements and illegal since a substantial amount of commerce had been affected.

In *Texaco*, sales commission agreements were again involved, here be-

¹⁵ *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 766 (Ct. Cl. 1940). Discussion of the meaning of the term, "payment" has been purposely avoided in this note, as the matter was not directly in question. It should be pointed out, however, that "payment" and "asserted liability" may, in some cases, be constituted by similar circumstances when Internal Revenue Service activity is in issue. For an excellent discussion of the term, "payment" see, Alexander, *Overpayments of Taxes or Government Investment at Six Per Cent: The Problem of Allowance of Interest*, 7 Tax L. Rev. 231 (1952).

¹⁶ Emmanuel, *Federal Tax Refund Procedures*, 5 U. Fla. L. Rev. 133 (1952); Stark, *Claims for Refund of Federal Taxes*, 41 Iowa L. Rev. 496 (1956).

¹ 331 F.2d 394 (7th Cir. 1964).

² Trade Reg. Rep. (1964 Trade Cas.) ¶ 71189 (D.C. Cir. July 30, 1964).

³ 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."