MEMORANDUM

AMICUS CURIAE

No. 738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

MARK E. SCHLEIDT AND MARZELL SCHLEIDT

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM AMICUS CURIAE OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

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May 22, 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 793

MARK E. SCHLUDE AND MARZALIE SCHLUDE

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM AMICUS CURIAE OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

As *amicus curiae*, the Institute submits this brief memorandum to set aright respondent's unsupported and erroneous assertions that the question presented for review is not of widespread importance and that the decision below turned on the "seemingly unusual features of the contracts involved" (Resp. Br., p. 13).

1. Respondent's assertion that the decision below turned on the "unusual features" of the dance instruction contracts is unfounded. The Institute knows of no such unusual features. Moreover, the Institute

requested permission to appear as *amicus* solely because it believed the question to be of widespread importance.

Drawing from the broad experience of its members and the accounting functions they perform for a wide variety of businesses, the Institute respectfully informs the Court that there is simply no merit in the suggestion that the issue presented is not of widespread importance. Contrary to respondent's assertion, contracts comparable to those employed in *Schlude* are commonplace in a wide variety of service industries far removed from dancing.* They may appear in any field of instruction—music, foreign languages, appliance re-

* A sampling of comparable contracts of which the Institute is aware would include those used in connection with the following: Correspondence schools; technical instruction courses such as radio and television repair instruction; investment counseling services; gymnasium facilities; subscriptions to book of car wash certificates; purchase of tax or other legal research services with commitment to keep material therein up-to-date over specified period; purchase of tickets for theatrical, dramatic or musical performances series; purchase involving series of dinners with accompanying entertainment at selected restaurants; services to be rendered for legal retainer; bookkeeping work to be performed over 3-year period; service of typewriters and other office equipment; purchase of encyclopedia with commitment to furnish supplementary volumes over next 5 or 10 years; purchase of toll road tickets; purchase of series of beauty treatments; purchase involving TV servicing and repair; purchase of flying lessons or driving lessons; purchase of instruction in foreign languages; contracts for taking of family photographs at half-year intervals; contracts to develop film negatives and provide film; premiums paid for health and medical treatment and facilities; contracts to provide telephone answering services; contracts for construction and sale of project homes; contracts to erect prefabricated houses; contracts for building upkeep and maintenance; *e.g.* window-washing services; contracts for exterminators' services and pest control; manufacturers' service contracts, *e.g.* service contracts on tabulators and computers or on canning equipment.

pair, to name but a few. Moreover, such contracts are the rule in other service industries. Typically, they are found where such services as investment counseling, business machine maintenance and building maintenance are provided. Such contracts also play an important role in the sale of goods where payment is made over a period that is unrelated to the time in which the goods are produced and delivered.

Accordingly, there is no ground upon which the decision below may be narrowed so that it will not apply to the contractual relations of other taxpayers in many divergent industry situations such as those to which we have referred above. With the decision below as precedent, it may be anticipated that respondent will seek to compel such taxpayers to accrue income for tax purposes under their executory contracts as the *Schlude* taxpayers have been required to do. Such a result alone, it is abundantly clear, is sufficient to make the decision below one of widespread importance that should be reviewed by this Court.

2. The Institute also believes that respondent's argument of contract law concerning "dependent" and "independent" covenants provides no basis for the charge that the *Schlude* contracts contained "atypical payment provisions" not found in the ordinary executory contract for the performance of services in the future. Relying solely upon what it calls the "seemingly unusual features" of the contracts, respondent acknowledges that it "might well agree that the question was of broad importance and warranted review by this Court" if the decision below required immediate accrual of the contract price upon the making of any contract to perform services in the future. Respondent now, indeed, disclaims taking the position that "an accrual basis taxpayer must accrue income whenever

he signs a contract to perform services" (Resp. Br., p. 11). Respondent thus appears to agree that if its understanding of the law of contracts is erroneous as it bears upon the *Schlude* contracts, the petition should be granted.

Respondent's reliance upon the distinction between "dependent" and "independent" covenants tells only half the story. Respondent neglects to state that the contract doctrine of "implied conditions" is an essential part of—indeed, if it has not superceded—the rule of dependent and independent covenants. It is true that hundreds of years ago, with the advent of the bilateral contract and influenced by the "consideration" of a promise for a promise, the common law courts were willing to interpret such contracts to hold one party on his promise without regard to the ability of the other party to render performance subsequently on his own promise, even in the extreme case in which the latter had already disabled himself from performance. It was not long, however, before the courts recognized that in order to do justice between the parties to such a contract, and looking to the rights and duties of the parties as a whole, it was essential to read into the agreement an "implied condition" that the party seeking to recover on the other's apparently independent promise must himself be in a position to perform as he had agreed.* It is today hornbook law, therefore, that a contract providing for payment prior to performance does not give the party who is to perform in the future an unconditional right to receive such payment if he disables himself from performing or attempts to alter the performance required of him

* Holmes, *Collected Legal Papers*, (1920) pp. 167, 181.

under the contract; 3A Corbin, *Contracts*, § 654 (1960 ed.); 3 Williston, *Contracts* §§ 812, 830, 860 (1936 ed.); *Restatement, Contracts*, §§ 269-270; Patterson, E. W., *Constructive Conditions in Contracts*, 42 Colum. L. Rev. 903, 914, *et seq.* (1942). Under this rule the sterile inquiry into whether the covenants of a contract are "dependent" or "independent" is of no significance in determining the parties respective liabilities.

Clearly, therefore, respondent's assertion that the *Schlude* taxpayers had "an unconditional right to receive" payments is without foundation. Under settled law, the *Schlude* taxpayers, as all other similarly situated contracting parties, were required to hold themselves in a position to perform in the manner that they had agreed as a condition to receiving payment. In other words, when respondent characterized the *Schlude* contracts as involving "an unqualified promise to pay that is neither conditioned upon performance nor related in time to the dates of performance" (Resp. Br., p. 12), it described a promise as to which the law imposes a condition: the proffer of performance.

Respectfully submitted,

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