Brief of Respondent, William Goldman Theatres, Inc., in Opposition...

IN THE

Supreme Court of the United States

October Term, 1954.

No. 199.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

GLENSHAW GLASS COMPANY

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM GOLDMAN THEATRES, INC.

BRIEF OF RESPONDENT, WILLIAM GOLDMAN THEATRES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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QUESTION PRESENTED.

Did respondent's receipt of punitive damages pursuant to Section 4 of the Clayton Act (15 U. S. C. § 15) constitute taxable income?

ARGUMENT.

Respondent, William Goldman Theatres, Inc., adopts the arguments in opposition to the petition for a writ of certiorari which have been made in the brief filed by respondent, Glenshaw Glass Company.

It is desired, however, to emphasize the following:

1. There is no conflict in the decisions. No court has held that the punitive portion of a treble damage award under the federal anti-trust laws is taxable as income under Section 22(a) of the Internal Revenue Code. Conversely, every court which has considered the question has held that the recovery of profits, whether by virtue of Section 16(b) of the Securities Exchange Act of 1934 (15 U. S. C. § 78p) or otherwise, is taxable as income under Section 22(a).

The analogy of *Park & Tilford Distillers Corp. v. United States*, 107 F. Supp. 941 (Ct. Cl., 1952), certiorari denied 345 U. S. 917 (1953), and *General American Investors Company v. Commissioner*, 211 F. 2d 522 (C. A. 2d, 1954) (petition for certiorari pending, No. 114) is to that portion of the respondent's recovery in the anti-trust proceeding which compensated it for lost profits, and which the respondent never denied was taxable income. As the Commissioner has stated in his Memorandum filed in the *General American Investors* case (p. 1), the question there "is whether the profits of insiders . . . which were recovered by the taxpayer . . . constitute income to the taxpayer under Section 22(a) of the Internal Revenue Code (26 U. S. C. 22)."

Section 16(b) does not provide for punitive damages. Rather it provides that in order to prevent "the unfair use of information which may have been obtained . . . [by an insider] . . . by reason of his relationship to the issuer, any profit realized . . . shall inure to and be recoverable by the issuer . . .." As a matter of legislative policy, the insider having access to information belonging to the corporation is treated in the situations specified as having traded upon that information, and any profits which he realizes are recoverable by the corporation. Within the definition of income of *Eisner v. Macomber*, 252 U. S. 189 (1920), they have been derived from information belonging to the corporation and thus from its "capital". The recovery is taxed to the corporation just as the *profits* recovered by the respondent in the anti-trust proceeding are admittedly taxable to it. *United States v. Safety Car Heating & Lighting Co.*, 297 U. S. 88 (1936).

2. The decision below presents no departure or variation from the prior decisions of this Court. In each of the several cases cited by petitioner, the receipt which was held to be income had come from a business or property transaction or from earnings in the ordinary sense, or (as in the case of lost profits) it had been received as compensation for the loss of one of these.[1] The only case in which, as in the case at bar, this was not true was *Gould v. Gould*, 245 U. S. 151 (1917). There, the Court held that alimony payments were not income under the gross income provision of the law then in effect, corresponding to the present Section 22(a).[2] Whether such receipts, which

1. *Rutkin v. United States*, 343 U. S. 130 (1952), represented *earnings*, although illegally obtained; *United States v. Safety Car Heating Co.*, 297 U. S. 88 (1936), involved the recovery of lost profits; *Helvering v. Bruun*, 309 U. S. 461 (1940), involved a gain resulting from a business and property transaction; *Douglas v. Willcuts*, 296 U. S. 1 (1935), merely involved the question of *to whom* a receipt which was admittedly income was to be taxed; *United States v. Kirby Lumber Co.*, 284 U. S. 1 (1931), like the *Bruun* case, involved a realization from a business and property transaction which was covered explicitly by long standing Treasury Regulations. *Taft v. Bowers*, 278 U. S. 470 (1929), and *Cooper v. United States*, 280 U. S. 409 (1930), involved questions of *basis*; the receipts involved were clearly from property transactions, and the decisions are indeed far afield from the question here involved. See *Glenshaw Glass Co.* brief, pp. 11-13.

2. The statute involved in the *Gould* case was the Income Tax Act of October 3, 1913, c. 16, Sec. II, 38 Stat. 114, 166.

were not derived from capital or labor, should be taxed to the recipient was left to specific action by the Congress.[3] Similarly, a determination whether, in what years, or to what extent an anti-trust punitive damage award should be subjected to tax involves considerations which can best be presented and evaluated through the legislative process.

Although the anti-trust laws were on the books in 1913 when the present income tax laws were first enacted; although the rule that a penalty is not income was enunciated nineteen years ago in *Central R. Co. v. Commissioner*, 79 F. 2d 697 (C. A. 3d, 1935); and although *Highland Farms Corp. v. Commissioner*, 42 B. T. A. 1314 (1940), was decided fourteen years ago, Congress has never adopted the simple amendment which is necessary to include punitive damages among the specific items of gain enumerated in Section 22(a). This remains true even today following the extensive revision of the income tax laws which has just been completed by the Congress (H. R. 8300, 83d Cong. 2d Sess.).

This legislative history indicates an absence of Congressional dissatisfaction with the result reached by the courts below. Particularly in the absence of any conflict among the decisions, it supports the view that any change should stem from Congressional consideration rather than from further judicial review.

3. In the amendments made to the Internal Revenue Code in 1942, Congress included Section 22(k) (26 U. S. C. 22(k)), which provided for the taxation of alimony to the recipient in certain specified and limited circumstances. In all other circumstances, the receipt of alimony continues to be free from tax in accordance with the *Gould* decision. See Treas. Reg. 111, Sec. 29.22(k)-1.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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