RESPONDENTS' PETITION FOR REHEARING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 199

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GLENSHAW GLASS COMPANY,
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

WILLIAM GOLDMAN THEATRES, INC.,
Respondent.

RESPONDENTS' PETITION FOR REHEARING.

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The Scheffer Press, Inc.—ANdover 3-6850

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RESPONDENTS' PETITION FOR REHEARING.

Respondents, Glenshaw Glass Company and William Goldman Theatres, Inc., respectfully petition for a rehearing of the decision and judgment of this Court entered March 28, 1955 reversing the judgment of the United States Court of Appeals for the Third Circuit. The grounds urged by respondents in support of this petition are as follows:

I.

The Court's decision is predicated upon the broad proposition that Section 22(a) of the Internal Revenue Code of 1939 constitutes "a clear legislative attempt to bring the taxing power to bear upon all receipts constitutionally taxable." (p. 7) Prior decisions of this Court, not mentioned in the instant opinion, do not warrant this construction of the statute.

In *Gould* v. *Gould*, 245 U.S. 151 (1917), it was held that periodic alimony payments did not fall within the statutory definition of income. However, the Congress subsequently amended the statute for the purpose of expressly imposing a tax on such payments and the constitutionality of such treatment has been upheld by the lower courts, with certiorari having been consistently denied by this Court.[1]

The subsidy payments involved in *Edwards* v. *Cuba Railroad Co.*, 268 U.S. 628 (1925), were neither a return of capital nor specifically exempted by statute. Nevertheless, this Court held that they were not subject to tax. Although the payments were intended and used for capital purposes, it cannot be gainsaid that they provided the recipient with a gain "derived from any source whatever." The fact that payments may be earmarked for capital requirements is hardly a realistic distinction since the net effect of such a transaction is the release of other funds for general income purposes.

The continuing validity of the *Cuba Railroad* decision has been recognized as recently as 1950 in *Brown Shoe*

[1] Sec. 22(k), Internal Revenue Code of 1939; **Mahana v. United States**, 88 F. Supp. 285 (Ct. Cl. 1950), cert. denied 339 U.S. 978 (1950), rehearing denied 340 U.S. 847; **Fairbanks v. Commissioner**, 191 F. 2d 680 (9th Cir. 1951), cert. denied 343 U.S. 915 (1952).

Co. v. *Commissioner*, 339 U.S. 583. In that case community contributions were made to the taxpayer to induce the location of industrial plants. The Tax Court expressly said that "the petitioner did not realize taxable income as a result of the transfers." Upon review this Court noted, without expressing disapproval, that the receipts had not been taxed as income.

Similarly, in *United States* v. *Supplee-Biddle Co.*, 265 U.S. 189 (1924), the Court declined to subject insurance proceeds to the income tax even though there was considerable doubt that the statutory exemption extended to the receipts there involved. The Court assumed that there were no constitutional barriers to the imposition of the tax, but insisted that the legislative purpose to tax such payments be clearly expressed. The statutory definition of gross income was denied the pervasive sweep now accorded to it for the first time.

The prior decisions of this Court thus disclose that a variety of gains have been held to fall beyond the reach of the taxing statute even though there can be no doubt that they are constitutionally taxable. Adherence to these decisions requires an affirmance of the judgment of the Court of Appeals for the Third Circuit in this proceeding.

II.

The established concept of income, as expressed in *Eisner* v. *Macomber*, 252 U.S. 189, 207 (1920), is dismissed upon the ground that the decision in that case involved only the question of realization of income. The long line of decisions of this Court, cited in our principal briefs, which have utilized that concept in the ascertainment of what constitutes income, is thus ignored. No weight is

[2] 10 T.C. 291, 292 (1948); 339 U.S. at 587n.

accorded to the recognition of the *Eisner* v. *Macomber* concept in *Commissioner* v. *Culbertson*, 337 U.S. 733 (1939).

Since the inquiry in this case is one of ascertaining legislative intent, it is unfair to the respondents to disregard a series of decisions which extend over a period of many years and which have consistently characterized the essential attributes of income as gain derived from capital, from labor, or from both combined. The repeated reenactment of the statutory definition of gross income, in the light of these decisions, may be soundly said to have engrafted the judicial concept into the meaning of the statute.

III.

The legislative history of the Internal Revenue Code of 1954 convincingly demonstrates recognition by the Congress that punitive damages did not constitute taxable income under the 1939 Code. The joint recommendation of the Staff of the Joint Committee on Internal Revenue Taxation and the Treasury Department to insert a provision for the exclusion of punitive damages was rejected by the House Ways and Means Committee because some of the members thought that the question should be given further study before a decision was made *either to codify or to change existing law*. Moreover, the Committee did not enumerate punitive damages as an item of gross income *in order to avoid the implication that Congress thereby intended to tax such damages.*[3]

[3] The above statements were supplied to us by a member of the Staff of the Joint Committee on Internal Revenue Taxation. The information was released with the permission of the present and former Chairmen of the House Ways and Means Committee and the Chief of the Staff of the Joint Committee. See respondents' post argument memorandum dated March 18, 1955.

The opinion of the Court does not refer to this significant action in the legislative history of the 1954 Code. The fact that the decision of the Tax Court in this very proceeding was called to the attention of the Congress and that no measures were taken to change the rule of the case furnishes persuasive support for respondents' position that as a matter of Congressional understanding and purpose punitive damages are not within the statutory definition of gross income and are not subject to tax.

IV.

A recovery for libel *per se*, without a showing of actual damage, is nontaxable.[4] There is no fundamental distinction between such a recovery and the punitive damages involved in this case. In addition to its deterrent effect, a punitive damage award is intended to provide the injured party with a measure of recovery sufficient to make him whole and to cover the inevitable impairment of capital which is not susceptible of definite ascertainment and proof. It is upon this same reasoning that personal injury recoveries have consistently been treated as nontaxable by administrative rulings.

There is a clear basis for distinguishing between a recovery of actual damages and the additional amount awarded as punitive damages. The actual damages are received in lieu of ascertainable lost profits and must be treated as such for tax purposes. The punitive portion of the recovery, however, does not represent lost profits but represents a restoration, insofar as it can be accomplished by a monetary payment, of the intangible and

[4] C. A. Hawkins v. Commissioner, 6 B.T.A. 1023 (1927); acquiescence of Commissioner noted, VII-1 Cum. Bull. 14 (1928).

unascertainable loss of good will, reputation and standing that is necessarily experienced by a victimized enterprise.

Wherefore, respondents respectfully pray that a rehearing be granted and that upon such rehearing the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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Certificate of Counsel.

The undersigned hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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MAX SWIREN.