IN THE

Supreme Court of the United States

October Term, 1954.

No. 199

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

GLENSHAW GLASS COMPANY
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM GOLDMAN THEATRES, INC.
Respondent.

BRIEF OF RESPONDENT GLENSHAW GLASS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented.

Did the court below err in holding that the punitive damages received by the respondent did not constitute taxable income?

Statement of the Case.

The petition for a writ of certiorari seeks to bring before this Court the tax treatment to be accorded to a portion of a lump sum payment made to the respondent by Hartford-Empire Company in settlement of litigation in which respondent had been obliged to engage for many years in the federal courts and which has already consumed much time and attention on the part of this Court. Petitioner has obscured the nature of that litigation by erroneously characterizing it as based merely upon claims for lost profits. A brief counterstatement of the facts is required in order clearly to disclose the background out of which this proceeding arises.[1]

In 1931 and in the forepart of 1932, the respondent and others formed a corporation, Shawkee Manufacturing Company, which developed and built in respondent's glass container manufacturing plant a new glass feeding machine known as the Shawkee feeder. Respondent was licensed to use the Shawkee feeder free from the payment of any royalties and embarked upon a program of completely outfitting its plant with such feeders in replacement of those licensed by Hartford-Empire Company. (App. 3a-4a)

As the result of a gross fraud upon the United States Patent Office and the federal courts, Hartford obtained an injunction against the respondent in 1934 preventing it from manufacturing, using and selling the Shawkee feeders. In order to continue in business under the restraint of the fraudulent injunction, respondent was compelled to reinstall the Hartford licensed feeders pursuant to agreements imposing onerous royalty burdens upon the respondent and drastically limiting the type of glassware which it could manufacture. (App. 4a-5a, 6a-7a)

Hartford's fraud was brought to light in 1941 in the course of anti-trust proceedings instituted by the United States and which culminated in the opinions of this Court in *Hartford-Empire Co.* v. *United States*, 323 U.S. 386

[1] The term "respondent" as used in this brief refers only to Glenshaw Glass Company. References herein to "App." are to the Appendix to the petition for a writ of certiorari.

(1945); 324 U.S. 570 (1945), holding that Hartford had violated the federal anti-trust laws. (App. 5a)

Following the disclosure of Hartford's fraud in the anti-trust proceedings in the United States District Court for the Northern District of Ohio, respondent terminated its royalty payments to Hartford and instituted proceedings to vacate the fraudulent injunction and for restitution and compensatory as well as punitive damages. (App. 5a-7a) These proceedings also reached this Court in *Shawkee Manufacturing Co.* v. *Hartford-Empire Co.*, 322 U.S. 271 (1944). The Court ruled that Hartford had obtained its judgment against the respondent by successfully using a fraudulent judgment previously obtained against Hazel-Atlas Glass Co., and that under the circumstances, Hartford's failure to make a full disclosure of its fraudulent conspiracy "aggravated the previous deception it had practiced on the Patent Office and the courts." In the *Hazel-Atlas* case, decided by this Court on the same day as the *Shawkee* case, Hartford's fraud was described as follows:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." (322 U.S. 238, 245-6)

Following the decision of this Court in the *Shawkee* case, respondent filed a counterclaim in the original fraudulent injunction proceedings seeking restitution of the royalties paid to Hartford and certain other expenditures incurred as a result of the injunction, damages for the destruction of its fruit jar business, and punitive damages. (App. 7a-8a) A full trial was had and appeals were prosecuted. With the exception of the claim based on destruction of the fruit jar business, all of the respondent's claims were finally upheld by the United States Court of Appeals for the Third Circuit and the case was remanded to the District Court for the ascertainment of the exact amounts to be awarded to respondent by way of restitution and as punitive damages. *Hartford-Empire Co. v. Shawkee Manufacturing Co.*, 163 F. 2d 474 (3rd Cir., 1947). (App. 9a)

Before further proceedings were taken in the District Court, a settlement agreement was entered into by the respondent and Hartford which terminated the litigation and also concluded another pending action, not yet reached for trial, which Hartford had commenced for the collection of royalties and in which respondent had filed a counterclaim for treble damages under the federal anti-trust laws. (App. 6a, 10a-13a)

The settlement payment ultimately accepted by respondent on December 23, 1947, was in the amount of \$813,358.24. (App. 12a) Accepting the method of allocation proposed by respondent as a fair and reasonable way of separating the lump sum payment into its component parts, the Tax Court allocated \$324,529.95 to punitive damages, and held that this amount did not constitute taxable income. (App. 16a, 20a)[2] As to the balance of the settlement payment, the major portion was admittedly taxable because it represented the restitution of royalties and other expenses for which income tax deductions had previously been

[2] The preponderant portion of the amount allocated to punitive damages was based upon respondent's claim for such an award in the fraudulent injunction proceedings. A relatively small amount was based upon respondent's counterclaim against Hartford for treble damages under the federal anti-trust laws. (App. 13a)

taken and allowed. (App. 15a) Only a relatively small amount of the settlement payment was regarded by the Tax Court as representing the recovery of lost profits. (App. 13a, 14a)

Upon the Commissioner's appeal from the decision of the Tax Court to the United States Court of Appeals for the Third Circuit, no question was presented as to the correctness of the Tax Court's decision in treating the balance of the settlement payment, after the deduction of punitive damages, as taxable income. Nor was any question presented as to the propriety of allocating the amount of \$324,529.94 to punitive damages. The single question presented was whether the Tax Court correctly held that the portion of the settlement payment which it allocated to punitive damages did not constitute taxable income to the respondent. The Court of Appeals, with six Judges sitting *en banc*, unanimously affirmed the decision of the Tax Court. (App. 34a-44a)

Summary of Argument.

There is no conflict between the decision below and that of any other court. Apart from the instant case, the only other decisions dealing with the taxability of punitive damages are those which have been decided by the Tax Court, and all of such decisions are in accord with the decision below.

There is no conflict with the decisions of the Court of Appeals for the Second Circuit and the Court of Claims holding that the recovery of short-swing insider profits is subject to tax. As the courts have expressly held, such a recovery is distinguishable from punitive damages. Nor is there a conflict in these decisions with respect to the interpretation to be placed upon the decision of this Court in *Eisner v. Macomber*, 252 U.S. 189 (1920).

The court below has carefully followed the applicable decisions of this Court regarding the nature of taxable income. The opinion below similarly follows the definition of income contained in the Treasury Regulations to which Congress has given approval by the repeated re-enactment of Section 22(a) of the Internal Revenue Code. The rule that punitive damages do not constitute taxable income is clearly correct and should not be retroactively changed in the absence of express legislative direction.

The instant case does not present a question of sufficient importance to warrant review by this Court. The opinion is narrowly confined to the single issue of the taxability of punitive damages and has no broader significance in the field of income taxation.

ARGUMENT.

I.

The decision of the court below is not in conflict with the decision of any other court.

The holding of the court below is that punitive damages for fraudulent conduct and the punitive portion of a treble damage award under the federal anti-trust laws do not constitute taxable income. No case decided by any other court has reached a different result so as to present a conflict requiring review by this Court. On the contrary, the only other reported cases dealing with such payments are those decided by the Tax Court, and they have uniformly and consistently reached the same result as did the court below. *Highland Farms Corp.* v. *Commissioner*, 42 B.T.A. 1314 (1940); *Obear-Nester Glass Co.* v. *Commissioner*, 20 T.C. 1102 (1953); *Telefilm, Inc.* v. *Commissioner* 21 T.C. ...., No. 77 (1954)

Petitioner attempts to find a conflict between the decision below and those cases which held that taxable income is received by the recovery of short-swing insider-profits under section 16(b) of the Securities Exchange Act of 1934. However, the court below carefully distinguished those cases and made it abundantly clear that it was not in conflict with them. The court said:

> "* * * In our opinion the theory of recovery under Section 16(b) of the Securities Exchange Act of 1934 is not a purely punitive one. The statute was designed to prohibit profit being made by an 'insider' possessing peculiar knowledge of future profitable operations of his corporation. The making of a profit by the 'insider' is the mainspring of the statute, a profit required by law to be passed on to the corporation prob-

ably because the corporation is the most convenient receptacle. An 'outsider' purchasing stock in the open market, theoretically at least, would be compelled to pay a higher price because an insider was purchasing stock in the market against him. But, under the operation of the statute, all of the stockholders, save only the 'insider' whose operations were prohibited by statute, would receive via the corporate entity the profit made by the prohibited transaction.

• • •

"The facts of the Park and Tilford and the General American Investors decisions are distinguishable both from the at bar and from *Central R. Co. v. Commissioner, supra.*" (App. 40a-41a)

It is apparent from the above language that if a case involving the taxability of a recovery of insider-profits were presented to the court below, its holding would be identical to that of the Court of Appeals for the Second Circuit and the Court of Claims in such cases.

Similarly, the Court of Appeals for the Second Circuit in its insider-profit case expressly pointed out distinguishing considerations which remove any semblance of a conflict between its decision and the punitive damages rule. In *General American Investors Co., Inc. v. Commissioner,* 211 F. 2d 522, 523 (2nd Cir., 1954), petition for certiorari pending, No. 114, the court said:

"Policy considerations may in the end play a decisive or persuasive role in the punitive damage, anti-trust and faithless fiduciary cases. For, despite the fact that the moneys received in those instances are at the free disposal of those to whom they are paid, and the rationale of such tribunals as have held them not to be 'income' is based principally upon the *Eisner v. Macomber* definition, it may be thought by some that the public interest will be better served if such receipts are held not to be subject to the income tax."

Since the court made clear in the *General American Investors Co., Inc.* case that it was expressing no opinion as to the taxability of punitive damages, no conflict exists between the Circuits on this issue.

Nor can any conflict be established by the dictum in *Park & Tilford Distillers Corp. v. United States,* 107 F. Supp. 941 (Ct. Cl. 1952) certiorari denied, 345 U.S. 917. That case was decided prior to the entry of the decision below and the only punitive damages case referred to in the opinion is *Highland Farms Corp. v. Commissioner,* 42 B.T.A. 1314 (1940). The fact that the Court of Claims did not regard that decision of the Board of Tax Appeals as persuasive on the issue of whether insider-profits constitute taxable income, certainly does not establish a conflict between its decision and the subsequent opinion in the case at bar.

A conflict between the insider-profits and punitive damages cases would have compelled the Tax Court to choose one rule or the other in its disposition of such cases. However, as noted above, the Tax Court has consistently held that punitive damages do not constitute taxable income, and it has also uniformly ruled that the recovery of insider profits does represent taxable income. *General American Investors Co., Inc. v. Commissioner,* 19 T.C. 581 (1952), aff'd, 211 F. 2d 522 (2nd Cir., 1954); *Noma Electric Corp. v. Commissioner,* 12 T.C.M. 1, (1953). The Tax Court has shown that the rules in the two types of cases can co-exist in harmony with each other, and the consistency of its decision emphatically underscores the absence of conflict and the lack of any basis for review.

Petitioner misreads the opinion of the court below when he asserts that it presents a conflict as to the interpretation to be given to the decision of this Court in *Eisner v. Macomber,* 252 U.S. 189 (1920). The court below fully recognized that the definition of income, expressed in *Eisner v. Macomber,* can not be applied with wooden rigidity and that it should be accepted only as a guide. Thus the court said:

> "* * * Of course, as the United States points out, in *Eisner* v. *Macomber* the Supreme Court was primarily concerned with distinguishing between capital and income, not between sources of property which came into the hands of the taxpayer and we cannot doubt but that the Supreme Court has departed in some degree from the *Eisner* v. *Macomber* definition. This is apparent from *United States* v. *Kirby Lumber Co.*, 284 U.S. 1, 3 (1931) where Mr. Justice Holmes stated: 'We see nothing to be gained by the discussion of judicial definitions.'" (App. 38a)
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> * * *
>
> "* * * We concede that no definition is too helpful, *United States* v. *Kirby Lumber Co., supra,* and that the decisions relating to income tax law contain charts rather than definitions, as Mr. Mertens has aptly stated. But it should be borne in mind that in *Eisner* v. *Macomber,* albeit where severability was the primary issue, the Supreme Court said, 252 U.S. at pp. 206-207, that 'only a clear definition of the term "income" as used in common speech * * *' was required. We do believe that a 'windfall'—and the payments at bar were 'windfalls'—would not be regarded as 'income' within the terms of common speech. Certainly the payments to the taxpayers cannot fairly be regarded as products of capital or labor. We believe that the ordinary man regards income as something which comes to him from what he has done, not from something which is done to him. This is perhaps an oversimplification but we are of the opinion that the ordinary man using terms of common speech would not regard punitive damages as 'income.'" (App. 43a-44a)

Far from evoking a conflict with the interpretation given to *Eisner* v. *Macomber* by the Court of Appeals for the

Second Circuit, this language is a striking counterpart of the following expression by that court in the *General American Investors Co., Inc.* case:

> "Is there some common principle or touchstone by the application of which one may infallibly determine what is and what is not in a given case 'gains or profits and income derived from any source whatever'? We think not. The old definition of *Eisner* v. *Macomber* was perhaps contrived in the hope that a final and definitive solution had been found. But by reason of the very nature of the subject matter this was not to be. The decision in *Eisner* v. *Macomber* still stands, but the definition has met the common fate of generalities, and it has long since given way to an empirical case by case approach, which has the virtue of elasticity and makes possible a more sensible solution of new problems as they arise." (211 F. 2d at 523)

Thus, both courts disavowed a slavish adherence to an inflexible definition of income and expressed complete agreement in their views as to the interpretation and weight to be given to the *Eisner* v. *Macomber* formula. Similarly, the court below expressly recognized that in *Eisner* v. *Macomber*, a stock dividend case, severability or realization of income was the primary issue, and accordingly the decision below is in harmony with the views of the Court of Claims in *Park & Tilford Distillers Corp.*, where *Eisner* v. *Macomber* was distinguished on that ground.

Petitioner cites a number of decisions of this Court in an endeavor to show what it regards as a departure from the *Eisner* v. *Macomber* definition of income. Since the court below did not place undue reliance upon that definition, petitioner's argument is without weight. None of the cases cited by petitioner involved the taxability of punitive damages or any other receipt of a similar nature, and the decision below is not in conflict with the holdings or the principles of those cases.

Thus in *Rutkin* v. *United States*, 343 U.S. 130 (1952), it was held that money obtained by extortion is taxable income. The case establishes the principle, without applicability here, that the reach of the taxing statute is not confined to legitimate earnings but extends as well to gains derived by a person from an unlawful enterprise.

United States v. *Safety Car Heating & Lighting Co.*, 297 U.S. 88 (1936), holds that the recovery of lost profits arising out of a patent infringement is taxable income. The theory, of course, is that if the taxpayer had not been wronged, it would have earned the profits in its own business and paid a tax thereon. The recovery, being compensatory, takes the nature of the income which it replaces and is subject to tax. No such reasoning can be applied to the recovery of punitive damages.

Helvering v. *Bruun*, 309 U.S. 461 (1940), decided that a building erected by a tenant constituted a taxable gain to the lessor upon the forfeiture of the leasehold. The lease provided that all buildings erected would be surrendered to the lessor, and accordingly, the gain realized by the lessor was in the nature of rent. Section 22(a) of the Internal Revenue Code specifically includes rent within the statutory definition of gross income.

In *Douglas* v. *Willcuts*, 296 U.S. 1 (1935), trust income paid to the taxpayer's wife in discharge of his obligation to pay alimony was held to be taxable income of the taxpayer. The receipt in question was admittedly income, and the case merely involved the question of the person upon whom the tax should fall.

United States v. *Kirby Lumber Co.*, 284 U.S. 1 (1931) is similarly inapposite. The Court held that the purchase

by a corporation of its own bonds at less than the issuing price resulted in a realization of taxable income to the corporation. Provisions of the Treasury Regulations, which had been in effect during repeated re-enactments of the statutory definition of gross income, were relied upon.

The cases of *Taft* v. *Bowers*, 278 U.S. 470 (1929), and *Cooper* v. *United States*, 280 U.S. 409 (1930), both held that a donee, upon the sale of stock received as a gift, is taxable on the full amount of the difference between the ultimate sales price and the original cost of the stock to the donor.

None of the foregoing decisions involved punitive damages or point to a result contrary to that reached by the court below. The Court of Appeals carefully followed the applicable decisions of this Court and adhered as well to the long-standing provisions of the Treasury Regulations. There is no conflict between the decision below and that of any other court and no basis exists for further review.

II.

The question decided below is not of sufficient importance to warrant further review by this Court.

There being no conflict between the decision below and that of any other court, there are no considerations present which clothe this case with an importance superior to that of other tax cases decided daily in the federal courts. In the entire period since the adoption of the Sixteenth Amendment in 1913 until 1952, only two reported cases have arisen involving the taxability of punitive damages. The first was *Highland Farms Corp.* v. *Commissioner*, 42 B.T.A. 1314, decided in 1940, and the second is the instant case. The four additional pending cases cited by the petitioner leave the total less than impressive. Since the decisions in all of these cases are in accord, there is no danger of confusion in the administration of the revenue laws nor occasion for further litigation.

The Court of Appeals carefully confined its ruling to the precise issue before it. By assuming an impact beyond that limitation, petitioner reads into the opinion below an unwarranted significance on the whole area of taxable income. The express restraint of the unanimous opinion below renders that contention wholly inadmissible. Moreover, petitioner's view is inconsistent with that taken by the Government in its brief in opposition to the granting of the writ in *Park & Tilford Distillers Corporation v. United States*, certiorari denied, 345 U.S. 917 (1953). The conclusion in that brief states that "the petition for writ of certiorari presents no question of importance warranting review."

III.

The rule of the decision below is clearly correct and should not be retroactively changed.

A. The decision below is in conformity with the decisions of this Court.

The decision below was unanimously reached by six Judges sitting *en banc*. The opinion carefully analyzes and follows the decisions of this Court dealing with the nature of taxable income. A brief review of those decisions will disclose that the Court of Appeals followed established principles and that its decision is clearly correct.

In *Stratton's Independence, Limited v. Howbert*, 231 U.S. 399 (1913), this Court, in construing the Corporation Tax Act of 1909, stated in part as follows:

> " • • • for 'income' may be defined as the gain derived from capital, from labor, or from both combined. • • •" (at 415)

This concept of income was reiterated in *Doyle v. Mitchell Brothers Company*, 247 U.S. 179, 185 (1918), decided under the same statute.

Following the adoption of the Sixteenth Amendment, the Income Tax Act of 1913 was enacted and in *Southern Pacific Co. v. Lowe*, 247 U.S. 330 (1918), the Court said:

> "Certainly the term 'income' has no broader meaning in the 1913 Act than in that of 1909 (see *Stratton's Independence v. Howbert*, 231 U.S. 399, 416, 417), and for the present purpose we assume there is no difference in its meaning as used in the two acts." (at 335)

It was with this background that *Eisner v. Macomber*, 252 U.S. 189 (1920) was decided. The Court, in expressing what it considered to be "a clear definition of the term 'income' as used in common speech" said:

> "'Income may be defined as the gain derived from capital, from labor, or from both combined', provided it be understood to include profit gained through a sale or conversion of capital assets * * *" (at 207)

Following *Eisner v. Macomber*, the Court made clear that the concept of income expressed in that case had been consciously adopted as representing the commonly understood meaning of the term at the time of the ratification of the Sixteenth Amendment. Thus in *Merchants' Loan & Trust Company v. Smietanka*, 255 U.S. 509 (1921), the Court said:

> "In determining the definition of the word 'income' thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution." (at 519)

Similarly, in *United States* v. *Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936), the Court said that the term "income" should be given the meaning "as the word is known in the common speech of men."

As recently as 1949, the *Eisner* v. *Macomber* test of income was applied by this Court in determining whether members of a family had received taxable income under a family partnership agreement. In *Commissioner* v. *Culbertson*, 337 U.S. 733 (1949), the Court said:

> "Furthermore, our decision in *Commissioner* v. *Tower, supra,* clearly indicates the importance of participation in the business by the partners during the tax year. We there said that a partnership is created 'when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.' Id. at 286. *This is, after all, but the application of an often iterated definition of income—the gain derived from capital, from labor, or from both combined—to a particular form of business organization. A partnership is, in other words, an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services.*" (at 740) (Emphasis supplied)

Other leading examples confirming the validity of the *Eisner* v. *Macomber* concept of income are *Taft* v. *Bowers*, 278 U.S. 470, 481 (1929); *Bowers* v. *Kerbaugh-Empire Company*, 271 U.S. 170, 174 (1926); *Edwards* v. *Cuba Railroad Co.*, 268 U.S. 628, 633 (1925); *Goodrich* v. *Edwards*, 255 U.S. 527, 535 (1921).

In holding that punitive damages do not constitute taxable income, the court below faithfully adhered to the principles established by this Court in the foregoing decisions. The definition of income, as expressed in *Eisner* v. *Macomber*, was used, not as a conclusive prescription, but as a helpful guide. Appropriate regard was also given to the test of common usage in determining the meaning of the term "income." That term, the court correctly found, does not include the extraordinary item of punitive damage awards.

B. The rule that punitive damages are not taxable should not be retroactively changed.

At the time that respondent settled its litigation with Hartford-Empire Co., the Board of Tax Appeals had ruled that punitive damages did not constitute taxable income. Moreover, the Treasury Regulations for many years had provided as follows:

> "* * * In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets * * *" (Reg. 111, Sec. 29.22(a)-1)

This definition of income, which petitioner now seeks to discard, was taken from *Eisner* v. *Macomber* and has continuously remained in the Treasury Regulations throughout repeated re-enactment by Congress of the income tax statutes. Under these circumstances, respondent was entitled to rely upon that rule of law in negotiating its settlement with Hartford. The non-taxability of a portion of the settlement payment was a proper factor for the respondent to consider in its decision to compromise claims fairly valued at over $1,500,000 for a substantially lesser amount. (App. 10a, 14a)

Where a rule of tax law has been in effect for many years without any doubt ever having been cast upon its correctness and with the governing statute having been repeatedly re-enacted by Congress, there is ample precedent for holding that the harsh and oppressive consequences of a retroactive reversal should not be visited upon a taxpayer in the absence of express legislative direction.

Thus, in a case involving the taxability of life insurance proceeds, this Court stated that the popular conception of non-taxability was sufficently compelling to dissuade it from changing the rule without an express legislative command. In *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189 (1924) the Court said:

> "Assuming without deciding that Congress could call the proceeds of such indemnity, income, and validly tax it as such, we think that in view of the popular conception of the life insurance as resulting in a single addition of a total sum to the resources of the beneficiary, and not in a periodical return, such a purpose on its part should be express, as it certainly is not here." (at 195)

In *Lilly v. Commissioner*, 343 U.S. 90 (1952), the Court held that it was unwarranted to disallow deductions on the ground that the payments in question violated public policy since in the taxable years there was no governmentally declared public policy proscribing such payments. The Court refused to give effect to State legislation adopted subsequent to the taxable years on the express ground that to do so would work a retroactive hardship.

Also directly in point is *Fondren v. Commissioner*, 324 U.S. 18 (1945). In that case the question was whether certain gifts constituted gifts of future interests within the meaning of the gift tax statute. A Treasury Regulation promulgated prior to the re-enactment of the statute by the Congress was held to be controlling. The Court said:

> "The regulation has received the construction now reaffirmed with substantial consistency. The statute,

> with the meaning thus settled, has been reenacted by Congress. The construction should be followed until Congress sees fit to change it." (at 29-30)

The tax treatment of alimony payments also presents a forceful analogy. For many years the courts held such payments to be non-taxable until a specific change in the Internal Revenue Code was made to cover them. In *Gould v. Gould*, 245 U.S. 151 (1917), this Court, in holding that alimony was not taxable to the recipient prior to the change in the statute, said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." (at 153)

If, as has always been understood, the settlement of litigation is to be fostered and encouraged, a taxpayer who has acted in furtherance of that objective should not be penalized by the unexpected imposition of a heavy tax burden. The decision of the court below does not operate retroactively to reverse a rule upon which respondent had every justification to rely. In the absence of legislative action that rule should not be changed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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