RESPONDENT'S BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GUY C. EARL,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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STATEMENT OF CASE.

This brief is in opposition to a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit. That court reversed a decision of the Board of Tax Appeals in a proceeding for review taken under the provisions of the Revenue Act of 1926, as amended. This Court has upheld the constitutionality of such review provisions in *Old Colony Trust Company v. Commissioner of Internal Revenue*, decided on June 3, 1929 (October term, 1928, No. 130).

The facts of this case are not disputed. They are:

In 1901 the respondent and his wife, residents of California, entered into an agreement in writing as follows:

"Oakland, June 1, 1901.

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.

Guy C. Earl.
Ella F. Earl."

This agreement was supported by ample and adequate consideration, not only in the fact that section 160 of the California Civil Code (see Appendix A of this brief) provides that the mutual consent of the parties to such an agreement is sufficient consideration, but also in the fact that at the time the agreement was made respondent had considerable property and his wife had property worth about $30,000. The agreement has been consistently lived up to by the respondent and his wife throughout the years. At the time of its making, a bank account in their joint names, and subject to check by either of them, was opened, and in this account all income, including the earnings of the respondent, has been deposited immediately upon receipt.

This being the situation, the respondent and his wife made out separate income tax returns and each returned as his or her income one-half of their joint income. In 1920 and 1921, the years here involved, the respondent earned for personal services the sums of $24,839.00 and $22,946.20, respectively. The Commissioner of Internal Revenue, petitioner herein, ruled that notwithstanding the agreement providing that all earnings should be joint property, the earnings of respondent were his and taxable to him, and no part thereof was taxable to his wife. As a result the Commissioner determined that there were deficiencies in the taxes paid by respondent in the sum of $2420.12 for 1920 and in the sum of $2432.46 for 1921. From this determination the respondent appealed to the Board of Tax Appeals, where the ruling of the Commissioner was sustained. Respondent then petitioned the Circuit Court of Appeals for the Ninth Circuit to review the decision of the Board of Tax Appeals, and upon such review the Circuit Court of Appeals reversed the decision of the Board.

The Board of Tax Appeals, in its opinion, (Tr. p. 15, 10 B. T. A. 723) conceded that the agreement was valid and binding between the parties, but held, and here is the gist of the whole controversy, that while the agreement was effective to make the earnings of the husband the joint property of the husband and wife, it operated to make them such joint property only after they had been received by the husband, so that there was an instant of time in which the husband held all his earnings as the beneficial owner thereof,—as a result of which they were taxable to him alone.

The Circuit Court of Appeals reversed this ruling as inconsistent with the California law applicable to agreements between husbands and wives and with the terms of the agreement, and held, on the contrary, that the agreement operated on future earnings *as they were earned*, and vested the right to such earnings before their receipt jointly in husband and wife, so that there was never a moment when they were the sole property of the husband. (See its opinion, Tr. p. 38, 30 F. (2d) 898.)

I.

THERE IS NO REASON FOR THIS COURT TO REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO THE LAW OF CALIFORNIA GOVERNING AGREEMENTS BETWEEN HUSBANDS AND WIVES OR AS TO THE PROPER CONSTRUCTION OF THE CONTRACT BETWEEN RESPONDENT AND HIS WIFE UNDER THE CALIFORNIA LAW; THE CIRCUIT COURT OF APPEALS WAS FULLY QUALIFIED TO, AND DID, DETERMINE THESE QUESTIONS CORRECTLY.

Petitioner does not in his petition to this court contend, and could not successfully contend, that the Circuit Court of Appeals in this case erred in its interpretation of the California law applicable to agreements between husbands and wives or in its construction of the contract in question in the light of such California law. On these matters the Circuit Court of Appeals was fully qualified to pass final judgment. Furthermore, its holdings on these questions were manifestly correct and petitioner does not deny that this is so. The Circuit Court of Appeals decided, according to its opinion:

(1) That although property acquired after marriage by a husband and wife domiciled in California, (other than property acquired by gift, bequest, devise or descent), is community property in the absence of agreement to the contrary, nevertheless California Civil Code Sections 158 and 161 expressly permit such husband and wife to alter this normal situation by agreement as if they were unmarried, and to receive and hold property as joint tenants, or tenants in common. (See Appendix A for these code sections.)

(2) That an agreement between a husband and wife domiciled in California, without any other consideration than their mutual consent, providing that the future earnings of the wife should be her separate property is valid "and such earnings do not become community property". (Citing *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775; *Cullen v. Bisbee*, 168 Cal. 695, 144 Pac. 968; *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272, and *Krull v. Commissioner of Internal Revenue*, 10 B. T. A. 1096).

(3) That "under the California system there is no difference between the earnings of the wife and the earnings of the husband," and that accordingly an agreement that the husband's earnings shall be joint property "is valid and such as a husband and wife may legally make". (Citing, *Martin v. Southern Pacific Company*, 130 Cal. 285, 62 Pac. 515, and *Estate of Harris*, 169 Cal. 725, 147 Pac. 967).

(4) That the language of the contract between respondent and his wife clearly indicates an intention "that the earnings should be received, taken and held from the very beginning as the joint property of both", and is thus clearly distinguishable from the contract considered by the same Circuit Court of Appeals in *Blair v. Roth*, 22 F. (2d) 932, which merely provided that the husband and wife in that case "*would* contribute their earnings to a common fund, out of which their personal and community ex-

penses would be paid, and the savings, if any, would be owned by them jointly."

We do not propose in this brief to reargue the above points of California law, and of contract interpretation. Not only does petitioner leave these points unchallenged, but the California authorities cited and relied upon in the opinion of the Circuit Court of Appeals fully support the conclusions above summarized; a reference to these authorities is sufficient to demonstrate that there is no reason for invoking the extraordinary reviewing power of this court to pass on these questions of California law and contract interpretation.

II.

THE REASONS ASSIGNED BY THE PETITIONER FOR GRANTING THE WRIT OF CERTIORARI ARE UNSUBSTANTIAL AND INSUFFICIENT.

What then are the reasons advanced as grounds for the prayer that this court review the case? Our examination and analysis of the petition and brief in support thereof reveals only the four following arguments:

(1) The argument that the judgment in this case countenances an evasion of taxation.

(2) The argument that the Revenue Acts of 1918 and 1921 evince the paramount intention of Congress to tax a husband upon all of his earnings regardless of any agreement with his wife, and regardless of the effectiveness of such agreement under applicable state law.

(3) The argument that the judgment ignores the theory of "constructive receipt".

(4) The argument that an assignment of future earnings does not operate *in praesenti* except to give a right enforceable in equity.

We shall now proceed to discuss each of these arguments briefly in order to demonstrates that they are unsubstantial and insufficient to invoke the reviewing power of this court.

(a) The argument that the judgment in this case countenances an evasion of taxation is an unwarranted attempt to attract attention.

On page 9 of petitioner's brief it is said:

> "The principal question presented by this petition is whether the express purpose of Congress may be *evaded** by an agreement made by a taxpayer sharing his compensation for personal services with another, with the result that instead of paying a tax which reflects his comparative ability to pay, his compensation is so divided that he pays the tax which would have been due if his compensation had been one-half of what it actually was."

A brief examination of the record is sufficient to demonstrate not only the unsoundness but the unfairness of this argument on behalf of petitioner. The contract in question in this case was a written contract made in 1901 at a time when the only practicable kind of federal income tax law, namely, the kind which did not apportion the tax among the states, had been held unconstitutional by this court in the *Pollock* case, (157 U. S. 429, 15 Sup.

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*Italics ours.