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in addition to the jurisdictions adopting the negligence rule,³³ more than thirty states have adopted statutes which in one way or another give protection to the radio stations. Some states have adopted a "due care" provision into their defamation-by-radio statutes³⁴ while others simply grant immunity to radio stations in regard to broadcasts made under section 315.³⁵ By either of these methods, the problem of the scope of section 315, at least as to liability, is obviated.

David C. Fielding

Excludability of Quarters Allowance From Gross Income for Tax Purposes

The taxpayer, a doctor employed by the Veteran's Administration, occupied quarters on hospital grounds owned by his employer. He was required, as a condition of his employment, and in order to perform his duties, to live on the grounds. Under authority of V. A. manuals, rental charges for the quarters occupied by the taxpayer were withheld from his official basic salary before he received it. Thus, instead of his full official salary, the taxpayer received an amount representing the difference between the official salary and the rental value of the premises. Under V. A. Regulations, the rental charges were considered part of taxpayer's compensation, and the V. A. was to be reimbursed for the cost of furnishing quarters to employees by means of payroll deductions. In 1954 and 1955 the taxpayer also made direct rental payments for the use of a garage on the hospital premises. On appeal from a Tax Court decision,¹ refusing to allow

33. *E.g.* New York (Josephson v. Knickerbocker Broadcasting Co., *supra* note 6); Pennsylvania (Summit Hotel v. N.B.C. *supra* note 6), Connecticut (Charles Parker Co. v. Silver City Crystal Co., *supra* note 12).

34. ARIZ. REV. STATS. §12-652 (1952); CAL. CIV. CODE §48.5 (1949); COLO. STAT. ANN. c. 138B §1 (supp. 1949); FLA. STAT. ANN. §770.04 (cum.supp. 1957); GA. CODE ANN. §105-712 (cum. supp. 1957); IOWA CODE ANN. §659.5 (1949); KANS. LAWS 1949 c. 320 §1; LA. REV. STAT. tit. 45 §1351 (1950); ME. LAWS 1949 c. 134; MICH. STAT. ANN. §27.1406 (1957 supp.); MONT. REV. CODE ANN. §§64-205-64-207 (1947) requires malice in addition to the due care requirement; MINN. STATS. c. 544.043 (1957); MISS. ACTS 1954; NEB. REV. STAT. §§86-601-86-603 (1959 re-issue); NEV. REV. STAT. §§41.340-41.360 (1957); N. C. GEN. STAT. ANN. §9915 (cum.supp. 1949); OHIO REV. CODE §2739.03 (1953); ORE. REV. STAT. §30.150 (1957); PA. STAT. ANN. tit. 12 §1583 (1953); S.D. LAWS 1949 c. 206; TEX. CIV. STAT. §5433a (1953 supp.); UTAH CODE ANN. §§45-2-5-45-2-10 (1953 supp.); VA. CODE ANN. §8-632.1 (1950); WASH. REV. CODE §§19.64.010-19.64020 (1952), limited to ad libs and then only if speaker is cut off the air immediately; W. VA. CODE §5482(1) (1955); WYO. COMP. STAT. §§3-8203-3-8204 (1957 cum.supp.).

35. ARK. STATS. §3-1606 (1954 supp.); IDAHO CODE §6-701 (1951 cum. supp.); MD. LAWS, ART. 75, §19A (1952); MO. ANN. STAT. §537-105 (1953); PA. STAT. ANN. tit. 12 §§1585, 1586 (1953); S.C. CODE OF LAWS §237 (1953 supp.). The same approach is taken in the "due care" statutes of the following states: Arizona, California, Colorado, Georgia, Maine, Michigan, Montana, Nebraska, Nevada, Virginia and Wyoming. See *supra* note 36. For a discussion of state legislation up to 1951, see Remmer, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L.R. 727 (1951), also published in CURRENT TRENDS IN STATE LEGISLATION, University of Michigan Law School, Legislative Research Center, Ann Arbor, 1952.

1. 29 T.C. 813, CCH, Dec. 22, 829 (1958).

the exclusion of the rental value of the premises from the taxpayer's gross income, a U. S. Court of Appeals, in *Boykin v. Commissioner*,² reversed the decision insofar as it disallowed the exclusion of the value of the living quarters, and affirmed the holding of the Tax Court that the garage rental payments were includible in gross income.

In determining his adjusted gross income for 1954 and 1955, Dr. Boykin had excluded an amount representing the total rental charges for quarters and garage. The Commissioner disallowed these exclusions on the ground that rental payments were not made to the V. A. out of a cash allowance received specifically for quarters. It was undisputed that the taxpayer was required as a condition of his employment to live upon the employer's premises and that this served the employer's convenience. The Commissioner took the position, however, that satisfaction of these section 119(2)³ requirements did not automatically entitle the taxpayer to the claimed exclusions, and that unless the additional requirements of Regulation 1.119-1(3)(2) were met, the exclusion could not be allowed. The Tax Court, in accepting the Commissioner's position, held that since the quarters were, in effect, rented with money received as compensation, the amounts paid could not be excluded from gross income.

Before the 1954 Code, problems similar to the one presented in the instant case were dealt with by regulations which supplemented the Code sections defining gross income. In general, these regulations required that if a salary were received as compensation, and in addition thereto living quarters or meals were furnished, the value to the employee of the quarters or meals so furnished was income subject to taxation. If, however, the quarters or meals were furnished for the convenience of the employer, their value was not added to the compensation otherwise received. Liberal though this provision appeared, the exclusion which it allowed was restricted to a narrow range of cases all of which suggest that once the compensatory nature of the lodging furnished was established, its value constituted taxable income regardless of the convenience served.⁴

In 1940 the potential liberality of the Regulations was partially, but only temporarily realized. *Mim. 5023*⁵ ruled that if quarters were furnished to employees their value was includible in gross income as compensation. "If, however, the quarters furnished are not compensatory *or* (emphasis added) are furnished for the convenience of the employer, the value thereof need not be added to the compensation otherwise received by the employee." The clear indication was that

2. *Boykin v. Commissioner of Internal Revenue*.—F.2d—CCH 1958 STAND. FED. TAX REP.. (58-2 U.S. Tax Cas.) ¶9900 (8th Cir. Oct. 30, 1958).

3. Int. Rev. Code of 1954.

4. *Ralph Kitchen*, 11 B.T.A. 855 (1928); *Charles Frueauff* 30 B.T.A. 449 (1934); *Reynard Corp.* 30 B.T.A. 451 (1934).

5. 1940-1 Cum. Bull. 14.

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even if lodging were furnished as compensation, its value would be excludable if it were furnished for the convenience of the employer.

Any liberality fostered by Mim. 5023⁶ was completely reversed in 1950 by Mim. 6472⁷. That communication was issued to clarify what the Commissioner felt was a possible inconsistency in Regulation 29.22(a)-3. It was said that the "convenience of the employer" rule was to be construed so as to prevent violation of the statutory definition of gross income. This was to be accomplished by applying the rule only in cases where it was not evident from other circumstances that the receipt of quarters represented compensation. Thus, where it appeared from a statute or employment agreement that the lodging constituted compensation, the convenience served was immaterial. As an illustration of the importance to be placed on the general issue of compensation and the subordination of the "convenience" rule, Mim. 6472 set out a fact situation substantially the same as that of the present case, and arrived at the conclusion that the value of meals and lodging was includible in gross income.

It has been suggested, and it would undoubtedly have been true in many cases, that Mim. 6472 had no startling effect on the excludability of meals and lodging furnished in kind.⁸ So long as the maintenance was not referred to as compensation in the employment contract or in a statute, the compensatory nature of the benefits would always be doubtful and the "convenience" rule would be brought into play. In a case like the one under consideration, however, it is clear that Mim. 6472 would have been determinative of the issue because under the V. A. Regulations, in pursuance of which the employment contract was entered, the rental value of the lodging was considered part of Dr. Boykin's compensation.

It is important at this point to mention a 1953 case which proved to have great bearing upon the formulation of section 119 and therefore upon the outcome of the *Boykin* case. In *Diamond v. Sturr*,⁹ the trial court held that maintenance received as compensation is always taxable regardless of the convenience served. The taxpayer in that case was a doctor employed by a state hospital and was required to live on the hospital premises in order to perform his duties. Under section 41 of the New York Civil Service Law, which applied to the taxpayer, maintenance was considered part of the employee's salary. The decision of the Court was in strict compliance with Mim. 6472. Regulation 29.22(2)-3 could not be read so as to violate the definition of gross income contained in section 22(a) of the 1939 Code. The court felt that to allow the fact that the

6. Cf. Herman Martin, 44 B.T.A. 186 (1941) for a decision *contra* the position announced in Mim. 2053.

7. 1950-1 Cum. Bull. 15.

8. N.Y.U. 11TH INST. ON FED. TAX 1147, 1152, 1153.

9. 116 F. Supp. 28 (N.D.N.Y. 1953).

employer's convenience was served to affect the question of excludability would be to overlook the compensatory nature of the maintenance and to exclude from gross income an item specifically included by section 22 (a).

In 1955, on appeal to the Circuit Court, the decision was reversed.¹⁰ The court said: "We hold that the 'convenience-of-the-employer test' as the measuring-rod of compensation, having persisted through the interpretations of the Treasury and the Tax Court throughout years of re-enactment of the Internal Revenue Code, constituted the applicable standard . . . and that, since the food and lodging received by [taxpayers] were clearly for the convenience of the employer, they are not taxable as 'compensation.'" This seems to be the first judicial statement of the position apparently rejected by the Tax Court and adopted by the Circuit Court in the *Boykin* case. Under that theory, it is impossible to view the lodging as compensation to the employee once the fact of employer's convenience is established; what is convenience to the employer cannot, at the same time, be compensatory to the employee.

It is interesting to note that the 1954 Code, with the new section 119 added, became effective between the District Court decision in *Diamond v. Sturr* and the reversal of that decision by the Circuit Court. It is difficult to see how the Circuit Court, faced as it was with *Mim. 6472* and the cases which followed,¹¹ reached the conclusion it did without reference to section 119.

The legislative history of section 119 indicates that Congress was fully aware of the District Court decision in *Diamond v. Sturr* and desired an opposite result under the new section. The House requirements for excludability under the new section were that the meals or lodging be furnished at the place of employment and that the employee be required to accept them as a condition of his employment. If these criteria were met, the exclusion was to apply even though the maintenance represented additional compensation to the employee.¹² The Senate Finance Committee amended section 119 so as to make it clear that the basic test of exclusion was to be whether the lodgings were furnished primarily for the convenience of the employer, regardless of their compensatory nature.¹³ The Senate also added the provision that in determining whether meals or lodging were furnished for the employer's convenience, the terms of a state statute or an employment contract should not be determinative of whether the meals or lodging were intended as compensation.

In view of the obvious influence of the *Diamond* case, the Circuit Court in

10. *Diamond v. Sturr*, 221 Fed.2d 264 (2d Cir. 1955).

11. Joseph Doran, 21 T.C. 374 (1953); Joseph Brasher 22 T.C. 637 (1954).

12. U.S. CODE CONG. AND ADMIN. NEWS, 83d Cong. 2d Sess., 1954, Vol. 3, p. 4175.

13. *Id.* at 4825.

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Boykin was probably correct when it suggested that this provision was added because of the great weight given the New York statute by the District Court in its *Diamond* decision. The suggestion¹⁴ that it may be inferred from this provision that the compensatory aspects of the maintenance still have some relevance to the general issue of taxability, and that the compensation question is to be determined by reference to some other circumstances, is not supported by the legislative history or the Regulations to section 119. It is true that in reaching its decision in the *Boykin* case, the Circuit Court found it necessary to hold that Regulation 1.119-1(c)(2) and the Regulation as a whole were inconsistent. The first part of the Regulation requires that before the exclusion can be allowed, the lodgings must be on the employer's business premises, they must be furnished for the convenience of the employer, and the employee must be required to accept them as a condition of his employment. Rule 2 of sub-section c requires, in addition, that the lodging be furnished in kind, without charge or cost to the employee, and also that the employee not be obligated to reimburse the employer for the lodging so furnished. If effect had been given to these (c)(2) requirements, it would have been necessary to ignore the exclusive emphasis placed on "convenience" in the remainder of the Regulation and in the Code section itself.

The position of the Commissioner and the decision of the Tax Court to the effect that it was possible for lodging to be furnished for the convenience of the employer and still be compensation for Dr. Boykin's services and therefore includible in his gross income, was clearly correct under the law as it existed prior to the 1954 Code. In the light of the legislative history of section 119, however, it is equally clear that Congress intended a change in the results of cases arising under the new section. The decision of the Circuit Court recognized and gave effect to the liberality intended.

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14. Note, 53 MICH. L. REV. 871 (1955).