Buffalo Law Review

Volume 4 | Number 3 Article 17

4-1-1955

Income Tax—Dividends Held Taxable Income in Year of Actual Receipt

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pealable. 6 *Moore* 2321-2322. However, since the courts do not always follow this procedure, it would be better practice for either party to move explicitly for an interlocutory injunction under 28 U. S. C. A. 1292(1). *Morgenstern Chemical Co. v. Schering Co.,* 181 F. 2d 160 (3d Cir. 1950). Judge Frank, in the instant case, indirectly arrives at this result by treating the order as such a denial since part of the complaint asked for such temporary relief, but the fundamental difficulty of uncertainty of review remains. The need for reform has been recognized by the Supreme Court. *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507 (1950) (particularly Mr. Justice Black's dissent). It is hoped that the Supreme Court or Congress will make it clear what procedure should be followed.

Leonard F. Walentynowicz

INCOME TAX — DIVIDENDS HELD TAXABLE INCOME IN YEAR OF ACTUAL RECEIPT

Taxpayer, on a cash basis, received dividends on his federal savings and loan association shares by mail in 1950. They were declared and payable on December 31, 1949 at which time taxpayer had the right to appear personally at a company office and demand payment. *Held:* The dividends were not constructively received during 1949, but constituted 1950 income. *Commissioner v. Fox,* 218 F. 2d 347 (3d Cir. 1954).

INT. REV. CODE OF 1939, § 42(a), 53 STAT 47 (now INT. REV. CODE OF 1954, § 451(a) provides, "The amount of all items of gross income shall be included in the taxable year in which received by the taxpayer . . .." The Commissioner contended that the fact that the taxpayer could have gone to a company office and demanded payment on December 31 made the income taxable in 1949 under the doctrine of constructive receipt. This treats as taxable income which is unqualifiedly subject to the demand of a taxpayer on a cash basis, whether or not such income has been actually received in cash.

In *Avery v. Commissioner,* 292 U. S. 210 (1934), it was held that when it is the practice of the corporation to pay dividends by mail, it cannot be said that the dividends are "cash or other property unqualifiedly subject to the taxpayers demand" until the checks are actually received by the stockholders. Prior to the *Avery* decision, the Commissioner maintained and lower courts frequently decided that dividends were taxable to taxpayers on a cash basis in the year in which they were declared and mailed. See *Schearman v. Commissioner,* 66 F. 2d 256 (2d Cir. 1933).

As a result of the *Avery* case the Treasury Department promulgated the rule now found in Treasury Regulations 118, Section 39. 42-3 (1953), which provides that corporate dividends are taxable when unqualifiedly made subject to the demand of the shareholder. Where a corporation in the ordinary course of business sends out the checks by mail, dividends declared and payable on December 31 are not subject to the taxpayers demand prior to January when the checks are actually received.

Under the doctrine of constructive receipt, the Treasury may subject income to taxation when the only thing preventing its reduction to possession is the volition of the taxpayer. *Ross v. Commissioner,* 169 F. 2d 483 (1st Cir. 1948). This doctrine was applied in *Frank W. Kunze,* 19 T. C. 29 (1952), *aff'd. per curiam,* 203 F. 2d 957 (2d Cir. 1953), where the taxpayer, the president and one of two stockholders in the corporation, deliberately had his dividend check mailed to him to control the year of receipt. As it was actually available to him on December 31, it was held income on that date.

Bond coupons have been held income at the time of actual maturity despite the fact that the taxpayer was prevented by a physical disability from actually clipping and cashing them. *Loose v. U. S.,* 74 F. 2d 147 (8th Cir. 1934). Where a check was received on December 31 after 5 P. M. it was still regarded as income in December even though it was not deposited until the following year. *Charles F. Kahler,* 18 T. C. 31 (1952). An intent of the taxpayer to receive income earlier than it is actually due him may also be controlling in determining the year of actual receipt. See *McEuen v. Commissioner,* 196 F. 2d 127 (5th Cir. 1952).

The doctrine of constructive receipt has been rejected where the taxpayer received the check on December 31 but agreed with the maker that he would hold it a few days before cashing it, *L. M. Fisher,* 14 T. C. 792 (1950), and where geographical distance prevented a check mailed on December 28 from reaching the taxpayer until January 2. *George E. Rex,* 3 T. C. M. 1260 (1944).

The decisions of the Tax Court have followed the principle set forth in the *Avery* case where it is clearly the usual practice of the corporation to pay dividend checks by mail. *A. S. Eldridge,* 30 B. T. A. 1322 (1934), *Edward S. Harkness,* 31 B. T. A. 1100 (1935), *Anna F. Ardenghi,* 37 B. T. A. 345 (1938).

The instant decision takes a practical view of the modern business practices of dividend-paying associations and reaches a

just result. The doctrine of constructive receipt should be sparingly applied and used by the Commissioner only in situations where a taxpayer deviates from the normal course of action to manipulate the year of receipt.

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JURISDICTION — SINGLE TRANSACTION HELD TO BE "DOING BUSINESS"

Defendant foreign corporation sold machinery to plaintiff. Defendant had taken the order through an independent broker, recommended the manner of installation and sent a salesman to investigate performance after installation. Nothing more was done by defendant within the forum. *Held* (5-4): Defendant had done business in the forum and was subject to its jurisdiction in a breach of warranty suit. *S. Howes Co. v. W. P. Milling Co.*, ___ Okla. ___, 277 P. 2d 655 (1954).

Prior to *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), it was generally held that a single act by a foreign corporation within a state was insufficient to subject it to the *in personam* jurisdiction of the state. *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U. S. 516 (1923); *Hunau v. Northern Region Supply Corp.,* 262 Fed. 181 (S. D. N. Y. 1920). To be subject to jurisdiction it must have engaged in such a continuous and regular course of business that it was "present" in the state, *International Harvester Co. v. Kentucky,* 234 U. S. 579 (1914); or that its consent to suit could be implied, *Commercial Mutual Accident Co. v. Davis,* 213 U. S. 245 (1909). Incidental activities, such as mere solicitation of business, were not sufficient to confer jurisdiction. *Green v. Chicago, B. & Q. Ry. Co.,* 205 U. S. 530 (1907) (railroad with no tracks in state having an agent soliciting freight and passenger traffic); *People's Tobacco Co. v. American Tobacco Co.,* 246 U. S. 79 (1918) (advertisement of products and agents with no authority to take orders). However, solicitation by agents whose orders were accepted outside the state and who had authority to make collections amounted to "doing business." *International Harvester Co. v. Kentucky, supra; Tauza v. Susquehanna Coal Co.,* 220 N. Y. 259, 115 N. E. 915 (1917).

The *International Shoe* case discarded the presence and consent theories and substituted a test of reasonableness. Due process was held to be satisfied where the foreign corporation had such minimum contacts with the state that the maintenance of the suit did not offend traditional notions of fair play and sub-