

XIII. Taxation

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A. Introduction

Several interesting developments in the area of state taxation occurred during the survey period. The most important cases and statutes will be discussed within the following sections of this Survey Article: unitary business tax, property tax exemption, gross income tax, intangibles tax, sales tax exemption, and real estate reassessment procedures. The final section of this survey discusses cases decided by United States District Courts for the Northern and Southern Districts of Indiana and cases decided by the Court of Appeals for the Seventh Circuit¹ concerning federal income and estate taxation. The survey of federal tax cases is intended to cover only cases that are of interest to attorneys engaged in general practice in Indiana.

B. The Unitary Business Tax Concept

The unitary business tax concept has continued to be the tumultuous issue of state taxation. A cycle of conflicting judicial precedents, starting with the United States Supreme Court's decision in *Mobil Oil Corp. v. Commissioner of Taxes*,² followed by the Court's decision in *ASARCO, Inc. v. Idaho State Tax Commission*³ and *F.W. Woolworth Co. v. Taxation & Revenue Department*,⁴ and concluding with the Supreme Court's decision in *Container Corp. of America v. Franchise Tax Board*,⁵ illustrates that the unitary business concept has in recent years received more acrimonious attention by taxpayers and state revenue departments than any other facet of state or federal taxation. This bitter controversy involves the basic question of how far the states may reach out to tax the combined or unitary income of a multistate or multinational business as

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¹It should be noted that although some of the cases decided by the Seventh Circuit Court of Appeals did not involve Indiana taxpayers, those cases are precedent not only in the federal district courts in Indiana, but also in the United States Tax Court. See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

²445 U.S. 425 (1980).

³458 U.S. 307 (1982).

⁴458 U.S. 354 (1982).

⁵103 S. Ct. 2933 (1983).

conducted by affiliated subsidiaries or divisions located throughout the United States or the world.

Although Indiana has not yet taken an aggressive stance as to how this state might apply the unitary business concept, pressure is mounting for the state to decide the issue from taxpayers supporting and opposing the concept. Indiana taxpayers, in their future tax-planning endeavors, should therefore be alert to an inevitable determination by the state as to how it will administer the unitary business tax concept. Because an in-depth examination of *Container* and the other recent United States Supreme Court decisions concerning the unitary business concept really warrants a separate article,⁶ only one specific observation as to the status of this issue is appropriate in this Survey Article.

In *Container*, the Supreme Court, departing from its practice in both *ASARCO* and *Woolworth*, emphasized that it will not reweigh the findings of fact of the state trial court in determining whether the imposition of a particular state tax burdens interstate commerce or transgresses upon due process protection. Tax litigators are advised once again that "state tax cases are to be litigated with the same care and evidentiary concerns as any product liability, personal injury, or breach of contract case."⁷ Perhaps with an eye toward reducing the number of state tax appeals, the Supreme Court plainly reinstated the principle of appellate review in *Container* which our Indiana Supreme Court and Court of Appeals have long espoused. Namely, that in reviewing trial court state tax decisions, the appellate court will not reweigh the evidence and will accept the trial court's findings of facts if supported by substantial evidence. Thus, Indiana state tax cases, even those on appeal to the United States Supreme Court, can be won or lost at the trial court level.

C. Property Tax Exemption: Goods Held for Interstate Shipment

The major decision during the survey period in the field of property taxation was *Indiana State Board of Tax Commissioners v. Stanadyne, Inc.*⁸ In *Stanadyne*, the Indiana Court of Appeals considered an appeal from a trial court's grant of a personal property tax exemption for inventory held for interstate shipment by a taxpayer in its distribution warehouse. The trial court's grant of an exemption was based both on

⁶There are many fine publications which discuss this topic. See, e.g., P. HARTMAN, FEDERAL LIMITATIONS IN STATE AND LOCAL TAXATION ch. 9 (1981 & Supp. 1983); J. HELLERSTEIN, STATE TAXATION § 8.11(4) (1983); Hellerstein, *State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on ASARCO and Woolworth*, 81 MICH. L. REV. 157 (1982); Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After Container Corporation of America v. Franchise Tax Board*, 16 IND. L. REV. 783 (1983).

⁷King, *Taxation, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 523, 523 (1981).

⁸435 N.E.2d 278 (Ind. Ct. App. 1982).

the relevant statutory provision⁹ and on the commerce clause of the United States Constitution.¹⁰

It appears from the court's opinion that the taxpayer based its statutory exemption claim under both Indiana Code section 6-1.1-10-30(a) and (b).¹¹ The Tax Board contended that neither the "original package" nor the "original bill of lading" requirements of the two provisions were satisfied and that the repackaging which took place at the warehouse was illustrative of a break in transit which caused the commerce clause to be inapplicable.¹²

The stipulated facts indicated that at the taxpayer's out-of-state plant individual items (faucets and other fixtures) were sealed in separate packages, with groups of identical items then being packed in large boxes. These large boxes were then placed on pallets for transportation to the taxpayer's Indiana warehouse by its private trucking division. After arriving at the warehouse, the boxes containing identical packaged items were, on occasion, rearranged on separate pallets with boxes containing different packaged items to meet specific customer orders. The boxes, however, were rarely opened.¹³

The court found that most of the products remained in their original package.¹⁴ This finding was obviously premised on the court's conclusion that the unopened boxes, which contained the separately packaged individual items, constituted the original package rather than the small internal packages, which held the individual fixtures, or the pallets, which held the aggregated boxes.

⁹IND. CODE § 6-1.1-10-30 (1976) (amended 1981).

¹⁰U.S. CONST. art. 1, § 8, cl. 3.

¹¹IND. CODE § 6-1.1-10-30 (1976) reads in pertinent part:

(a) Subject to the limitations contained in subsection (c) of this section, personal property is exempt from taxation if:

(1) The property is owned by a nonresident of this state;

(2) The property has been shipped into this state and placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state or a within-the-state destination as evidenced by the original bill of lading; and

(3) The property remains in the original package and in the public or private warehouse.

(b) Subject to the limitation contained in subsection (c) of this section, personal property is exempt from property taxation if:

(1) The property has been placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination as evidenced by the original bill of lading; and

(2) The property remains in the original package and in the public or private warehouse.

Id. (amended 1981).

¹²435 N.E.2d at 280, 282.

¹³*Id.* at 280.

¹⁴*Id.*

The court held that the bill of lading requirement of Indiana Code section 6-1.1-10-30 was satisfied, even though the shipping document used by the taxpayer showed the Indiana warehouse as the destination of the goods from the factory, rather than the address of the ultimate purchaser.¹⁵ In so holding, the court relied on the Indiana Supreme Court decision in *State Board of Tax Commissioners v. Carrier Corp.*¹⁶ The bill of lading in *Carrier*, unlike that in *Stanadyne*, contained a statement that the goods were placed in the warehouse for purposes of transshipment to an out-of-state destination;¹⁷ therefore, *Carrier* was entitled to the tax exemption. Broadening the scope of the statute, the *Stanadyne* court found that because the *Stanadyne* warehouse was a distribution warehouse with no retailing activities, the taxpayer intended to ship the goods to another destination from the warehouse. The court thus concluded that the taxpayer's shipping documents were sufficient to meet the original bill of lading requirement under the statute.¹⁸

The exemptions allowed by Indiana Code section 6-1.1-10-30(a) and (b) were subject to subsection (c) which provided that the exemptions applied "only to the extent that the property is exempt from taxation under the commerce clause of the Constitution of the United States."¹⁹ The Tax Board argued that no commerce clause exemption existed because (1) the goods were transported by a private carrier, (2) the goods were held in a private warehouse, (3) transshipment language was absent from the bill of lading, and (4) certain of the goods were rearranged to satisfy specific customer orders at the warehouse.²⁰ The court found that none of these factors indicated a legal break in interstate commerce, but rather merely reflected modern interstate marketing methods, all within the flow of such commerce. Thus, the court found the exemptions applicable both under the Indiana statute and the commerce clause of the United States Constitution.

Although Indiana Code section 6-1.1-10-30 has since been amended,²¹ subsection (a), applicable to property owned by a nonresident, still contains both the "original package" and "original bill of lading"

¹⁵*Id.* at 281.

¹⁶266 Ind. 615, 365 N.E.2d 1385 (1977).

¹⁷*Id.* at 617, 365 N.E.2d at 1386.

¹⁸435 N.E.2d at 281.

¹⁹IND. CODE § 6-1.1-10-30(c) (1976) (amended 1981).

²⁰435 N.E.2d at 282.

²¹IND. CODE § 6-1.1-10-30 (1982) currently provides:

Sec. 30. (a) Subject to the limitations contained in subsection (d) of this section, personal property is exempt from taxation if:

- (1) The property is owned by a nonresident of this state;
- (2) the property has been shipped into this state and placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state or a within-the-state destination as evidenced by the original bill of lading; and

requirements.²² However, the original bill of lading requirement has been replaced in subsection (b) with a requirement that the specific destination of the goods be known on the assessment date.²³ Thus, under the current statutory formula, a taxpayer in Stanadyne's position would most likely still qualify for exemption under subsection (a), but not under subsection (b). Therefore, the *Stanadyne* decision will continue to have relevance as long as subsection (a) remains unchanged and Indiana continues to be attractive to business as a major distribution center.

D. Gross Income Taxation: Interstate Commerce Exception

In *Indiana Department of State Revenue v. Brown Boveri Corp.*,²⁴ the Indiana Supreme Court adopted the part of the court of appeals' deci-

(3) the property remains in the original package and in the public or private warehouse.

For purposes of this subsection, a nonresident is a taxpayer who places goods in the original package and into the stream of commerce from outside of the state of Indiana.

(b) Subject to the limitation contained in subsection (d) of this section, personal property is exempt from property taxation if:

(1) the property has been placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination;

(2) the property remains in the original package and in the public or private warehouse; and

(3) the property had been ordered and is ready for shipment in interstate commerce to a specific known destination to which the property is subsequently shipped.

If a property tax exemption is claimed under this subsection for property which is not shipped to the specific known destination required under clause (3), the taxpayer shall file an amended personal property tax return for the year for which the exemption for that property was claimed.

(c) Subject to the limitation contained in subsection (d) of this section, personal property is exempt from property taxation if:

(1) the property has been placed in the original package in a public warehouse;

(2) the property was transported to the public warehouse by a common, contract, or private carrier;

(3) the owner is able to show by adequate records that the property is held in the public warehouse for purposes of transshipment to an out-of-state destination and is labeled to show that purpose; and

(4) the property remains in the original package and in the public warehouse.

However, no personal property is exempt from property taxation under this subsection if the property is owned by the same person who owns or leases the public warehouse where the property is held.

(d) An exemption provided by this section applies only to the extent that the property is exempt from taxation under the commerce clause of the Constitution of the United States.

²²*Id.* § 6-1.1-10-30(a).

²³*Id.* § 6-1.1-10-30(b).

²⁴439 N.E.2d 561 (Ind. 1982), *adopting in part* 429 N.E.2d 285 (Ind. Ct. App. 1981).

For a discussion of the court of appeals decision in *Brown Boveri*, see Boyd, *Taxation*,

sion recognizing that Brown Boveri's sale and installation in Indiana of an induction melting system²⁵ constituted a sale of tangible personal property in interstate commerce and was exempt from the Indiana gross income tax.²⁶ The supreme court's decision on the interstate commerce issue was a judicial direction to the Indiana Revenue Department that transactions in interstate commerce are to be considered exempt from gross income tax if the taxpayer's "activities in Indiana are so intrinsically related to and inherently a part of the interstate sale that it is seen as one continuing transaction."²⁷ In *Brown Boveri*, the taxpayer's activities in Indiana which related to the interstate sale included: (1) the removal of existing obsolete equipment at the factory site where the induction melting system was being installed, (2) pouring of foundations, trenching work, and reinforcement of existing structures, and (3) installation, testing, and adjustment of the melting system at the job site.²⁸ The court thus recognized that the interstate sale of machinery and equipment which is installed or assembled in Indiana by the seller and the performance of various local construction or erection functions by the seller will not taint the "interstate" character of the sale so long as such "activities are so intrinsically related to and inherently a part of the interstate sale" as to be considered "one continuing transaction."²⁹ The court of appeals, and in turn the supreme court, emphatically relied on *Gross Income Tax Division v. Surface Combustion Corp.*,³⁰ as "[t]he leading case for determining what activity constitutes interstate commerce."³¹

In past years, the Indiana Revenue Department has sought to constrain the holding of the supreme court in *Surface Combustion* to the express facts of the case.³² After the *Brown Boveri* decision, similarly situated taxpayers may properly claim a gross income tax exemption under the interstate commerce limitation. Therefore, taxpayers selling machinery and equipment in interstate commerce and installing that machinery and

1982 *Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 355, 359-60 (1983).

²⁵The induction melting system consisted of six furnaces, four preheating and after-burning systems, and two air pollution control systems. The equipment had been manufactured at and shipped from out-of-state plants. 439 N.E.2d at 562.

²⁶*Id.* at 564.

²⁷*Id.* (quoting *Indiana Dep't of State Revenue v. Brown Boveri Corp.*, 429 N.E.2d 285, 288 (Ind. Ct. App. 1981) (citing *Gross Income Tax Division v. Surface Combustion Corp.*, 232 Ind. 100, 111 N.E.2d 750 (1953))).

²⁸439 N.E.2d at 562-64.

²⁹*Id.* at 564 (quoting *Indiana Dep't of State Revenue v. Brown Boveri Corp.*, 429 N.E.2d 285, 288 (Ind. Ct. App. 1981)).

³⁰232 Ind. 100, 111 N.E.2d 50 (1953).

³¹*Indiana Dep't of Revenue v. Brown Boveri Corp.*, 429 N.E.2d 285, 287 (Ind. Ct. App. 1981), *quoted in Brown Boveri*, 439 N.E.2d at 563.

³²*See, e.g., Reynolds Metals Co. v. Indiana Dep't of State Revenue*, 433 N.E.2d 1 (Ind. Ct. App. 1982).

equipment in Indiana should carefully compare the facts of their particular transactions to the facts of both *Brown Boveri* and *Surface Combustion* to determine whether those decisions allow an appropriate claim of exemption.

E. Intangibles Tax

In *Indiana State Department of Revenue v. Valley Financial Services*,³³ the court addressed the issue of whether Valley Financial (taxpayer), by entering into a loan participation agreement with Valley Bank (Bank), purchased an interest in the loan or simply lent money to the Bank. Pursuant to the participation agreement, the Bank (1) was the creditor and its customer was the debtor, (2) processed the loan application, (3) controlled to whom the loan was made and the loan amount, (4) disbursed the loan money, (5) collected loan payments and remitted the appropriate portion to Valley Financial, and (6) serviced the loan.³⁴

Declining to accept the trial court's findings that the transactions between Valley Financial and the Bank constituted loans and that no agency relationship existed, the court of appeals found that Valley Financial purchased an interest in the loan between the Bank and the customer by entering into the participation agreement.³⁵ The court of appeals held that, to the extent of the purchase of such interest, the Bank was essentially acting as Valley Financial's agent in collecting the loan payments and in remitting to Valley Financial its share of the payments.³⁶ Therefore, the court concluded that Valley Financial acquired a taxable intangible under the participation agreement.

The court rejected the taxpayer's argument that, because the taxpayer and the Bank were affiliated corporations, the transaction between Valley Financial and the Bank, if deemed to be an intangible, would be exempt under Indiana Code section 6-5.1-5-2.³⁷ This statutory provision exempts from the intangibles tax intercompany intangibles between corporations where one corporation controls eighty percent or more of the voting stock of the other.³⁸ Valley Financial argued that the transaction was a loan to the Bank and, as such, constituted an intercompany intangible exempt under section 6-5.1-5-2.³⁹ The court held that, under the participation agreement, Financial owned an undivided interest in the original loan from

³³435 N.E.2d 68 (Ind. Ct. App. 1982).

³⁴*Id.* at 70-72.

³⁵*Id.* at 72.

³⁶*Id.* While the Revenue Department has promulgated rules in the gross income tax area as to the establishment of an agency relationship, 45 IND. ADMIN. CODE § 1-1-54 (1979), no such regulations exist in the intangibles tax area.

³⁷*Id.* at 73.

³⁸IND. CODE § 6-5.1-5-2 (1982).

³⁹435 N.E.2d at 73.

the Bank to its customer.⁴⁰ Consequently, since no intercompany intangible existed, the exemption⁴¹ was not applicable.

F. Sales Tax Exemption

The sales tax exemption⁴² of food for human consumption was construed in *Beasley v. Kwatnez*.⁴³ The Revenue Department challenged the taxpayer's claim that its sale of snack foods, such as potato chips, cookies, and prepared meats, was exempt from sales taxation under Indiana Code section 6-2.5-5-20(a).⁴⁴ The taxpayer sold the snack foods using cardboard display containers placed in over 4000 offices and business locations in Indiana. The sales were procured through a self-service honor system in which customers would simply choose one of the displayed items, manually remove the item, and deposit the proper amount of change in a deposit box which was part of the display container.⁴⁵

Initially, the court observed that exemption statutes are strictly construed in favor of taxation and against exemption,⁴⁶ and that the taxpayer has the burden of showing that he complied with the strict letter of the exemption statute.⁴⁷ Notwithstanding its recognition of these general principles, the court declined to eviscerate the food exemption simply because the taxpayer's method of selling food was unusual. Thus, while the food exemption is subject to express statutory exceptions,⁴⁸ the court construed the pertinent exceptions narrowly.

⁴⁰*Id.*

⁴¹IND. CODE § 6-5.1-5-2 (1982).

⁴²*Id.* § 6-2.5-5-20.

⁴³445 N.E.2d 1028 (Ind. Ct. App. 1983).

⁴⁴IND. CODE § 6-2.5-5-20(a) (1982).

⁴⁵445 N.E.2d at 1029.

⁴⁶*See* State Dep't of Revenue v. Bethel Sanitarium, Inc., 165 Ind. App. 421, 424, 332 N.E.2d 808, 811 (1975); *see also* State Dep't of Revenue v. Estate of Powell, 165 Ind. App. 482, 333 N.E.2d 92 (1975) (ambiguities in exemption statutes construed against party claiming exemption); *cf.* Gross Income Tax Div. v. L.S. Ayres & Co., 233 Ind. 194, 118 N.E.2d 480 (1954) (general rule that tax laws are construed against the state).

⁴⁷*See* City of Anderson v. State Dep't of Revenue, 406 N.E.2d 346, 350 (Ind. Ct. App. 1980).

⁴⁸IND. CODE § 6-2.5-5-20(c) (1982) provides:

(c) For purposes of this section, the term "food for human consumption" does not include:

- (1) candy, confectionery, and chewing gum;
- (2) alcoholic beverages;
- (3) cocktail mixes;
- (4) soft drinks, sodas, and other similar beverages;
- (5) medicines, tonics, vitamins, and other dietary supplements;
- (6) water, mineral water, carbonated water and ice;
- (7) pet food;
- (8) food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant;
- (9) meals served by a retail merchant off his premises;

The Revenue Department argued that the sales were taxable as confectionery,⁴⁹ an exception to the food for human consumption exemption. The court disagreed,⁵⁰ based upon a narrow definition of confectionery promulgated by the Department itself.⁵¹

The Revenue Department also contended that the taxpayer, by placing his cardboard display containers in various business locations, was actually conducting a portion of his business at such locations. The food exemption does not cover the sale of food served “for immediate consumption on or near the merchant’s premises”⁵² or “for consumption at a location . . . provided by the retail merchant.”⁵³ The court of appeals found these exceptions clearly inapplicable to the taxpayer’s business enterprise. Because the taxpayer placed his cardboard display containers in several thousand business premises, he could not be considered “the provider of the business premises where the sales occurred.”⁵⁴ Therefore, the taxpayer’s sales were *not* made “for immediate consumption on or near the merchant’s premises”⁵⁵ or “for consumption at a location . . . provided by the retail merchant.”⁵⁶

Finally, the Revenue Department argued that the cardboard display containers used by the taxpayer could be characterized as “vending machines.” Sales from a vending machine are statutorily excluded from the food exemption.⁵⁷ While the Revenue Department sought a functional interpretation of the vending machine provision,⁵⁸ the court of appeals

- (10) food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food sold on a “take out” or “to go” basis; and
 (11) food sold through a vending machine or by a street vendor.

⁴⁹*Id.* § 6-2.5-5-20(c)(1).

⁵⁰445 N.E.2d at 1031.

⁵¹The Department of Revenue defined confectionary items as:

Preparations of fruits, nuts or popcorn in combination with chocolate, sugar, honey, candy, or other confectionery, unless sold for cooking purposes, are not considered exempt “food” items. The method used in packaging and distributing these preparations, including the kind and size of container used, will be considered in determining [sic] the primary use for which these preparations are sold.

445 N.E.2d at 1030 (quoting Department of Revenue Circular (Revised) ST-6 (1973)).

⁵²IND. CODE § 6-2.5-5-20(c)(10) (1982) excepts from the “food for human consumption” exemption: “food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food served on a ‘take out’ or ‘to go’ basis.”

⁵³*Id.* § 6-2.5-5-20(c)(8) excepts from the “food for human consumption” exemption: “food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant.”

⁵⁴445 N.E.2d at 1031.

⁵⁵IND. CODE § 6-2.5-5-20(c)(10) (1982).

⁵⁶*Id.* § 6-2.5-5-20(c)(8).

⁵⁷*Id.* § 6-2.5-5-20(c)(11) excepts from the “food for human consumption” exemption: “food sold through a vending machine or by a street vendor.”

⁵⁸Namely, if a nonmechanical device can fulfill the function of a machine, then the

was instead guided by the definition of vending machine from the property tax code.⁵⁹ The court relied on this statute, as well as case law, in adopting a definition of vending machine that included "working mechanical parts which, when activated will automatically dispense some item without further human intervention."⁶⁰ Therefore, the court rejected the Revenue Department's approach because it would "impermissibly strain the meaning of the statute; merely for the sake of interpretation."⁶¹

G. Procedures Under the 1979 General Real Estate Reassessment

The 1979 general reassessment of real property in Indiana was the subject of judicial attention during this survey period. In *Indiana State Board of Tax Commissioners v. Ropp*,⁶² the court of appeals was faced with a challenge to the validity of the 1979 reassessment procedures.⁶³ In *Ropp*, the taxpayers, owners of real estate in Pike County, challenged the State Tax Board's order equalizing the 1979 real property tax reassessments in Pike County on the grounds that the Board had failed to properly apply Regulation 17 and had failed to give proper notice to the township trustees of Pike County regarding an equalization hearing held by the Board.⁶⁴

The Pike County taxing officials used the thirty percent factor in calculating the 1979 reassessments of Pike County real property. Consequently, the State Tax Board issued an equalization order modifying the Pike County reassessments by removing the thirty percent adjustment factor.⁶⁵ The taxpayers in *Ropp* contended that the unappealed *McCloskey*

nonmechanical device comes within the vending machine provision for tax purposes. 445 N.E.2d at 1031.

⁵⁹The property tax code defines a vending machine as:

(b) For purposes of this section, the term "vending machine" means a machine which dispenses goods, wares, or merchandise when a coin is deposited in it and which *by automatic action* can physically deliver goods, wares, or merchandise to the depositor of the coin.

IND. CODE § 6-1.1-3-8(b) (1982) (emphasis added).

⁶⁰445 N.E.2d at 1032.

⁶¹*Id.*

⁶²446 N.E.2d 20 (Ind. Ct. App. 1983).

⁶³In 1976, the State Board of Tax Commissioners adopted Regulation 17, Real Property Appraisal Manual, in connection with a statewide reappraisal of real property. 50 IND. ADMIN. CODE §§ 2-1 to 2-13 (1979). As promulgated, Regulation 17 provided that "the value of all land and improvements should be [reduced by] 30 percent, an inflation adjustment factor, to determine true cash value." 446 N.E.2d at 21-22. The 30% inflation adjustment factor was challenged in *McCloskey v. State Bd. of Tax Comm'rs*, Cause No. 37226 (Hancock Cir. Ct. Oct. 24, 1977). In that case the trial court enjoined the enforcement of the 30% factor of Regulation 17. Rather than appealing the *McCloskey* decision, the State Tax Board sent a letter to *all* taxing officials in the state stating that the 30% factor should be disregarded in making the 1979 general reassessment.

⁶⁴446 N.E.2d at 22.

⁶⁵*Id.*

decision was not binding on the Pike Circuit Court.⁶⁶ The taxpayers also asserted that, because Regulation 17 was duly promulgated by the State Board, that regulation could only be rescinded in the same way that it was enacted. Consequently, the Board's more expedient course of action, sending letters to taxing officials advising them of the Board's decision not to follow its own regulation, was of no force and effect. Therefore, the taxpayers contended that Regulation 17, with the thirty percent inflation adjustment factor, should remain in full force and effect.⁶⁷

The court only addressed one of these contentions, namely, the validity of the regulation. The court observed that the legislature provided in Indiana Code sections 4-22-2-2⁶⁸ and 4-22-2-11⁶⁹ that all rules and regulations of state agencies, in order to be considered validly promulgated and

⁶⁶*Id.* at 22-23 (citing *Hagood v. State*, 395 N.E.2d 315 (Ind. Ct. App. 1979) (unappealed decision of a trial court binding only as to the parties to the action and is not *stare decisis*)).

⁶⁷446 N.E.2d at 23.

⁶⁸This section provides:

(a) All rules, regulations . . . which the issuing agency intends to have the effect or force of law but which are not promulgated, approved and filed as rules in conformity with the provisions of this chapter, *shall be invalid, void and of no force or effect after the first day of January 1978.* . . .

(b) Within thirty (30) days after January 1, 1978, the secretary of state shall deliver to the legislative council a copy of every rule in effect on that day according to his records. Between February 1, 1978, and January 1, 1979, the secretary of state shall deliver to the council a copy of every rule filed with his office after January 1, 1978, within thirty (30) days from the date it was filed. The council shall compile the rules according to the format and numbering system it develops under section 7.1(c) [4-22-2-7.1(c)] of this chapter and arrange for them to be converted to computer data base form. On or before January 1, 1979, the council shall deliver to each agency a computer printout or galley proofs of the agency's rules as they are known to the council and the secretary of state. On or before March 1, 1979, the governing body of the agency shall by resolution certify to the council and the secretary of state from the printout or galley proofs those rules which are in effect on December 31, 1978. If there is no governing body, the chief administrative officer of the agency shall make the certification by affidavit. In the case of an agency that fails to make a certification as to any of its rules within the time required, the secretary of state shall examine the computer printout or galley proofs and make the certification by affidavit. After March 1, 1979, the legislative council shall arrange to have the certified rules indexed and published as the "Indiana Administrative Code."

IND. CODE § 4-22-2-2 (1982) (emphasis added).

⁶⁹This section provides:

(a) Subject to the provisions of this section, any such rule (including matter incorporated by reference in compliance with section 7.1 [4-22-2-7.1] of this chapter) adopted, approved, recorded, and published as provided in this chapter shall be . . . prima facie evidence that said rule was adopted, approved, and filed in accordance with this chapter and that the text of the rule published is the text adopted; however, the 1979 edition of the Indiana Administrative Code shall be conclusively presumed to contain the accurate, correct, and complete text of all rules in effect on December 31, 1978. *All rules filed with the secretary of state before December*

in effect on December 31, 1978, were to be certified to the Legislative Council and to the Secretary of State on or before March 1, 1979, and that state agency rules and regulations not certified were deemed void.⁷⁰ Because the thirty percent inflation adjustment factor had never been certified and published as required by Indiana Code sections 4-22-2-2 and 4-22-2-11, the court concluded that "whatever vitality [the thirty percent factor] may once have had, it expired pursuant to statutory enactment prior to its application on April 2, 1979, by the Pike County taxing officials."⁷¹

H. Federal Taxation

1. *Family Trusts*.—In *Schulz v. Commissioner*,⁷² the Seventh Circuit Court of Appeals examined the use of "family trusts"⁷³ for federal income tax purposes. The *Schulz* decision involved a consolidated appeal of three cases from the United States Tax Court⁷⁴ and concerned two trusts—the Schulz family trust and the White family trust. The taxpayers had created family trusts based on forms and information in prepackaged kits that they had purchased. Pursuant to the instructions in these kits, the taxpayers conveyed all of their real and personal property to the trusts, as well as their right to receive salaries from their employers. In return, the taxpayers, as grantors of the trusts, received shares representing their beneficial interests in the trusts.⁷⁵

The taxpayers were attempting to convert nondeductible, personal expenses into administrative or business expenses of the trusts. Among the administrative expenses the trusts deducted were home and automobile insurance premiums, educational expenses, household expenses, and health

2, 1978, but not compiled in the 1979 edition of the *Indiana Administrative Code* are void.

Id. § 4-22-2-11 (emphasis added).

⁷⁰446 N.E.2d at 24.

⁷¹*Id.*

⁷²686 F.2d 490 (7th Cir.1982).

⁷³Family trusts generally have the following features in common: (a) the assignment of the grantor's right to future income to the trust; (b) the assignment of substantially all of the grantor's property to the trust; (c) virtually unlimited discretion on the part of the trustees with respect to management and distribution of trust property; (d) the trust beneficiaries are generally the grantor's children or other members of his family; and (e) the trustees are the grantor, the grantor's spouse, and a third party. Typically, the grantor will contract to serve as the manager or consultant for the trust. His salary is determined by the trustees and can be changed at any time the trustees deem appropriate. The net profits of the trust are then either distributed to the beneficiaries or left to accumulate as trust property.

⁷⁴*Schulz v. Commissioner*, 41 T.C.M. (CCH) 599 (1980); *LaVerne Schulz Family Trust v. Commissioner*, 41 T.C.M. (CCH) 599 (1980); and *White v. Commissioner*, 41 T.C.M. (CCH) 931 (1981).

⁷⁵686 F.2d at 491-92.

care expenses.⁷⁶ The taxpayers also sought to spread the income generated by services of the grantors (and allegedly assigned to the trusts) among the grantors, the trusts, and potentially, the trust beneficiaries. They paid themselves a consultant's fee or management fee in an amount less than the trust income, in an effort to shift income to their children.⁷⁷ Because the amounts of these fees were completely within the grantors' control in their capacities as trustees, the ability to shift income between the grantors and their children was unlimited.

The Seventh Circuit held that the taxpayers could not avoid taxation in this manner, basing its decision on three different doctrines.⁷⁸ First, adopting a substance over form analysis, the court stated that the trusts were merely "transparent attempts" to convert family expenses into trust administration expenses.⁷⁹ The court added that "if this device worked, [these taxpayers] would, unlike the rest of us, make all of their consumptive expenditures with pre-tax dollars."⁸⁰ Under the substance over form analysis, the existence of the trusts could simply be ignored for federal income tax purposes regardless of the trusts' validity under state law. All the issues in the *Schulz* case could have been resolved by this approach because all the income and expenses of the trusts could be treated as directly incurred by the taxpayer.⁸¹

The court also sustained the Internal Revenue Service's position under a second doctrine, holding that the arrangements between the grantors and the trusts constituted an anticipatory assignment of income.⁸² In the White family trust the taxpayer was a salaried employee of an unrelated company. He assigned all his rights to future wages from his employer to the trust. The taxpayer in the Schulz family trust operated a dairy farm and real estate business as a sole proprietor prior to assigning those assets to the trust.⁸³ The court relied on the assignment of income principles set forth in *Lucas v. Earl*⁸⁴ and held that the income attributable

⁷⁶*Id.* at 492. The taxpayers excluded from gross income the value of the homes and meals provided to them on the basis that these items qualified under section 119 of the Internal Revenue Code (Code). I.R.C. § 119 (1982). The cost of health and accident insurance was excluded by the taxpayers from gross income under section 106 of the Code. I.R.C. § 106 (1982)

⁷⁷686 F.2d at 492.

⁷⁸*Id.*

⁷⁹*Id.* at 493.

⁸⁰*Id.*

⁸¹*Id.* The court explained that it was not relying solely on this approach because it would be inefficient and costly for the Internal Revenue Service to audit every return, and the possibility of avoiding an audit would encourage this form of tax evasion. *Id.*

⁸²*Id.* at 493-94.

⁸³*Id.* at 491-92. Mrs. Schulz conveyed her right to receive her salary as an employee in the county courthouse to her husband, who in turn assigned it to the trust. *Id.* at 491 n.5.

⁸⁴281 U.S. 111 (1930) (income is taxed to the person who earns it, regardless of attempts to divert the income elsewhere).

to the services performed by the trusts' grantors was taxed to the grantors and not to the trusts. The court reasoned that if assignment of income principles were not applied, taxpayers would be able to defeat the progressivity of the income tax rate structure by shifting income to individuals in lower tax brackets through the use of family trusts.⁸⁵ This would occur, the court pointed out, regardless of whether the trust income was distributed annually or upon the trust's termination,⁸⁶ owing to the special feature of trust taxation under sections 666 and 667 of the Internal Revenue Code (Code).⁸⁷

In the case of the White family trust, involving an attempted assignment of wages, there is little doubt as to the correctness of the court's decision.⁸⁸ The assignment of income approach is more difficult, however, in the case of a taxpayer who derives income from business assets held by the trust, as was the case in the Schulz family trust. A taxpayer can enter into an employment arrangement or consulting arrangement with a trust, as long as that transaction is a bona fide arm's length arrangement. Therefore, the court should not have applied the assignment of income approach to the Schulz family trust. Instead, the Seventh Circuit should have recognized a distinction between the two trusts and limited its decision in favor of the Internal Revenue Service on the Schulz family trust to a finding that the trust was a sham.⁸⁹

The Seventh Circuit's third basis for its decision involved the grantor trust provisions in sections 671 through 677 of the Code.⁹⁰ These Code sections are applicable even if the trust is a bona fide trust for federal income tax purposes. If these grantor trust provisions are not satisfied, the grantor is treated as the owner of the trust and all items of income and expenses are treated as received or incurred directly by the grantor.⁹¹ In holding that the trusts clearly failed to satisfy these provisions, the *Schulz* court explicitly relied upon the detailed analysis of family trusts in *Wesenberg v. Commissioner*.⁹²

A fundamental issue in determining if a trust satisfies the grantor trust provisions is whether the grantor has the power to take certain actions, specified in sections 674 through 677 of the Code, without the concurrence of an "adverse party."⁹³ If the grantor has the power to

⁸⁵686 F.2d at 493.

⁸⁶*Id.* (citing M. CHIRELSTEIN, FEDERAL INCOME TAXATION ¶ 9.01, at 182 (2d ed. 1979)).

⁸⁷I.R.C. §§ 666-667 (1982).

⁸⁸See *United States v. Basye*, 410 U.S. 441 (1973); *Commissioner v. Culbertson*, 337 U.S. 733 (1949).

⁸⁹See *Walter W. York Family Estate v. Commissioner*, 41 T.C.M. (CCH) 1612 (1981).

⁹⁰I.R.C. §§ 671-677 (1982).

⁹¹Treas. Reg. § 1.671-2(c) (1956).

⁹²69 T.C. 1005 (1978).

⁹³These powers include the power to dispose of the corpus or income of the trust, the power to deal for less than adequate and full consideration, the power to borrow from the trust, the power to revoke, and the power to use trust income for the grantor's benefit. See I.R.C. §§ 674(a), 676(a), 677(a) (1982).

take these actions, he will be treated as the owner of the trust.⁹⁴ An adverse party is defined in section 672(a) as a “person who has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust.”⁹⁵ The Tax Court has held, however, that even a person who comes within the statutory definition of an adverse party will not be treated as an adverse party where it is likely that person is subservient to the grantor.⁹⁶

In both trusts before the court in *Schulz*, the grantor served as one of the trustees. The other trustees of the Schulz trust were the grantor's wife and the wife of a bookkeeper employed by the trust who had no beneficial interest in the trust assets.⁹⁷ Two of the three trustees of the Schulz trust were authorized to make most decisions respecting the trust property. Accordingly, the grantor had authority to make decisions without the concurrence of an adverse party. Given the broad scope of the grantor's powers, the court held that the Schulz trust failed to satisfy the requirements of sections 674(a), 676(a), and 677(a) of the Code.

In the White family trust, the grantor and his spouse were the sole trustees during most of the taxable years at issue.⁹⁸ Although the court of appeals' reasoning on this trust is not entirely clear, it appears that the court applied a substance over form approach to determine that the grantor did in fact have uncontrolled discretion over use of the trust property. As previously noted, the court of appeals could have resolved all the issues before it by relying only on its finding that the trusts were shams. Under this approach, the trusts would not be the owners of the property for tax purposes, and the income from the property would be taxed to its true owners.

The *Schulz* opinion is not an in-depth analysis of family trusts. Nevertheless, the decision is consistent with decisions of other circuit courts of appeals,⁹⁹ as well as numerous decisions of the United States Tax Court.¹⁰⁰ The Seventh Circuit evidenced a hostility to family trusts that

⁹⁴686 F.2d at 495.

⁹⁵1.R.C. § 672(a) (1982).

⁹⁶See *Vercio v. Commissioner*, 73 T.C. 1246, 1258 (1980); *Cole v. Commissioner*, 41 T.C.M. (CCH) 820, 824 n.7 (1981).

⁹⁷686 F.2d at 492. In 1976 one of the Schulz daughters, who was a beneficiary, replaced the bookkeeper's wife. The court was not concerned, however, with tax liability after 1974. *Id.*

⁹⁸*Id.* When the trust was created, Mrs. White's brother was also a trustee; however, he immediately resigned and was not replaced. *Id.*

⁹⁹*Vnuk v. Commissioner*, 621 F.2d 1318 (8th Cir. 1980); *Paxton v. Commissioner*, 520 F.2d 923 (9th Cir.), *cert. denied*, 423 U.S. 1016 (1975).

¹⁰⁰See, e.g., *Vercio v. Commissioner*, 73 T.C. 1246 (1980); *Markosian v. Commissioner*, 73 T.C. 1235 (1980); *Wesenberg v. Commissioner*, 69 T.C. 1005 (1978); *Gran v. Commissioner*, T.C.M. (P-H) ¶ 80-558 (1980); *Taylor v. Commissioner*, T.C.M. (P-H) ¶ 80-313 (1980); *Horvat v. Commissioner*, T.C.M. (P-H) ¶ 77-104 (1977), *aff'd*, 671 F.2d 990 (7th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

is shared by the other decisions. Thus, there is little doubt that a family trust in the form typically marketed to the public will not accomplish any of the taxpayer's intended tax purposes.

Furthermore, although estate tax issues were not before the court in *Schulz* and are beyond the scope of this survey, in most cases, property transferred to a family trust will be included in the grantor's gross estate.¹⁰¹ In some cases, transfers of property can result in taxable gifts by the grantor and attempts to unwind the trust can result in taxable gifts by the beneficiaries of the trust.¹⁰² Attorneys should also be aware that if a family trust is not treated as a sham for tax purposes, it will likely be treated as an association taxable as a corporation.¹⁰³ Accordingly, an attorney faced with resolving a family trust must proceed with utmost caution.

2. *Estate Tax—Farm Valuation.*—In *Estate of Frieders v. Commissioner*,¹⁰⁴ the Court of Appeals for the Seventh Circuit discussed some of the principles involved in the valuation of farmland for federal estate tax purposes. The farm in question was located close to two urban areas and at the time of the decedent's death a shopping center was planned for a location two miles from the farm. There had been discussion of a freeway to be constructed near the farm¹⁰⁵ and prior to the decedent's death farmland near the decedent's farm had been purchased by investors for potential commercial development.¹⁰⁶

The Seventh Circuit held that there was substantial evidence to support the Tax Court's determination that the "highest and best use" of the farmland was as an investment for potential commercial use rather than a farming use.¹⁰⁷ The court also briefly discussed Treasury Regulation section 20.2031-1(b), which states that the fair market value of property is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."¹⁰⁸ The estate argued that the sellers of the other properties near the farm had been willing to sell their property only at a premium price and were able to hold out for that price due to the buyer's need

¹⁰¹See I.R.C. §§ 2036, 2037, 2038 (1982).

¹⁰²Frequently, however, the conveyance to a family trust will be incomplete for gift tax purposes because the grantor does in fact have the power to revest the property in himself. See Treas. Reg. § 25.2511-2(c), T.D. 7238, 1973-1 C.B. 565, 566; Rev. Rul. 74-365, 1974-2 C.B. 324.

¹⁰³See Treas. Reg. § 301.7701-1, T.D. 7515, 1977-2 C.B. 483; Treas. Reg. § 301.7701-2, T.D. 7515, 1977-2 C.B. 483; Treas. Reg. § 301.7701-4 (1967); Rev. Rul. 75-258, 1975-2 C.B. 503.

¹⁰⁴687 F.2d 224 (7th Cir. 1982), cert. denied, 103 S. Ct. 1251 (1983).

¹⁰⁵Prior to the decision, the plans for the freeway were abandoned. 687 F.2d at 225.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 226-27.

¹⁰⁸*Id.* at 226 (quoting Treas. Reg. § 20.2031-1(b), T.D. 6826, 1965-2 C.B. 367).

for the properties as part of an assemblage. As a result, the sales of those properties were not comparable because “unwilling sellers” were involved. Although the court acknowledged that an “unwilling seller” may exist in situations other than a forced sale,¹⁰⁹ it refused to consider “a property owner an ‘unwilling seller’ simply because his property has development potential due to its proximity to a proposed freeway.”¹¹⁰ Thus, the court implicitly held that sellers who are willing to sell only at premium prices are not “unwilling sellers” for estate tax valuation purposes.

The court also recognized that property sold as part of an assemblage would sell at a higher price than if the same property were sold independent of other properties.¹¹¹ However, the court held that sales of property as part of an assemblage were comparable to sales not part of an assemblage, if the higher price resulting from the assemblage was taken into account in determining the value of the land.¹¹² The court determined that the Tax Court had recognized this fact and made an appropriate adjustment.¹¹³

The holding of the court in *Frieders* does not establish new legal principles in the valuation of real estate. The decision does, however, emphasize the importance of valuation of farmland under section 2032A of the Code in cases where the conditions of that section are satisfied.¹¹⁴ Valuation of farmland pursuant to the formula set forth in section 2032A will often result in an estate value of less than one-half of actual fair market value. Farmland that has potential for investment or other nonfarm uses will especially benefit from valuation under section 2032A.

3. *Section 482—Allocation of Income.*—The issue of the allocation of income between an individual and a closely held corporation dependent on that individual’s services for its income was presented in *Foglesong v. Commissioner*.¹¹⁵ Mr. Foglesong was a manufacturer’s representative who conducted his business as a sole proprietorship until August 30, 1966, when the business was transferred to a corporation of which he owned ninety-eight percent of the outstanding stock. The remaining stock was preferred stock which Mr. Foglesong transferred to his children. Mr. Foglesong worked exclusively as an employee of the corporation and received a salary for his services.¹¹⁶

The Internal Revenue Service contended that substantially all the net

¹⁰⁹687 F.2d at 227. The court referred to Treas. Reg. § 20.2031-2(b), T.D. 7432, 1976-2 C.B. 264 which provides that “[t]he fair market value . . . is not to be determined by a forced sale price.” 687 F.2d at 227.

¹¹⁰687 F.2d at 227.

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴See I.R.C. § 2032A (1982).

¹¹⁵691 F.2d 848 (7th Cir. 1982).

¹¹⁶*Id.* at 850.

income of the corporation was attributable to services of Mr. Foglesong and should be taxed to him. In 1976, the Tax Court sustained the position of the Internal Revenue Service and allocated most of the income of the corporation to Mr. Foglesong on assignment of income principles.¹¹⁷

On appeal, the Seventh Circuit held that assignment of income principles could not be applied where the corporation was not a sham, where the corporation and not the individual entered into service contracts with individuals, where the corporate formalities were honored, and where there were business purposes, not tax related, for the corporate entity.¹¹⁸ The court of appeals, however, remanded the case to the Tax Court for a determination of whether section 482 of the Code, which allows allocation of income among taxpayers,¹¹⁹ was applicable.¹²⁰

On remand, the Tax Court held that section 482 was applicable, and pursuant to that section, substantially all of the income of the corporation was allocable to Mr. Foglesong.¹²¹ The Seventh Circuit again reversed the Tax Court, with three judges dissenting.¹²²

Section 482 of the Code provides:

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.¹²³

Section 482 applies only when "two or more organizations, trades, or businesses" are involved. Treasury Regulation section 1.482-1(a)(1) explicitly states that a sole proprietorship is an organization subject to the provisions of section 482 of the Code.¹²⁴

The narrow issue before the court of appeals was whether a corporation and its sole employee could be deemed to be in separate trades or businesses although the employee's sole business activity was his employment with the corporation. The court of appeals distinguished cases the Tax Court had relied on in applying section 482, pointing out that such

¹¹⁷35 T.C.M. (CCH) 1309 (1976), *rev'd*, 621 F.2d 865 (7th Cir. 1980).

¹¹⁸621 F.2d 865 (7th Cir. 1980).

¹¹⁹See I.R.C. § 482 (1982).

¹²⁰621 F.2d at 873.

¹²¹77 T.C. 74 (1981), *rev'd*, 691 F.2d 848 (7th Cir. 1982).

¹²²691 F.2d 848 (7th Cir. 1982) (en banc).

¹²³I.R.C. § 482 (1982).

¹²⁴Treas. Reg. § 1.482-1(a)(1) (1962).

cases involved situations in which the taxpayer engaged in business activities other than in his capacity as an employee of his controlled corporation.¹²⁵ The court recognized that section 482 of the Code was intended to be broadly interpreted,¹²⁶ but determined that section 482 was primarily intended to apply to situations involving an attempt to offset the profits of one business with the losses of a separate business.¹²⁷ Therefore, the court of appeals concluded that a taxpayer who engages in no business activity, other than as an employee of a corporation he controls, is not engaged in a trade or business. Because section 482 of the Code can be applied only in the case of two or more commonly controlled trades or businesses, the court held that the Tax Court erred in its decision that section 482 could be applied to allocate income to Mr. Foglesong from his controlled personal service corporation.¹²⁸ However, the case was again remanded to the Tax Court for consideration of whether the dividends and preferred stock received by Mr. Foglesong's children should be allocated to him under assignment of income principles and whether income earned by Mr. Foglesong prior to incorporation, but subsequently paid to the corporation, should be allocated to him under the same principles.¹²⁹

The Internal Revenue Service is not likely to follow the decision of the Seventh Circuit in *Foglesong*. Furthermore, the decision in *Foglesong* is inconsistent with the suggestion in the Second Circuit's decision in *Rubin v. Commissioner*¹³⁰ that mere employee status is a separate trade or business.¹³¹ The Seventh Circuit, however, stated in *Foglesong* that the reasoning of the Second Circuit on this issue was mere dictum.¹³²

Attorneys giving advice with respect to personal service corporations should be aware not only that *Foglesong* will probably be challenged by the Internal Revenue Service, but that other weapons are also available to the Internal Revenue Service. For example, for taxable years beginning after December 31, 1982, section 269A of the Code permits the Internal Revenue Service to allocate income, deductions, and credits between a personal service corporation and its owner-employees to clearly reflect the income of those persons or to prevent the avoidance of federal income tax.¹³³ However, section 269A is applicable only if substantially all the services of the personal service corporation are performed for one other

¹²⁵See 691 F.2d at 851-52 (discussing *Borge v. Commissioner*, 405 F.2d 673 (2nd Cir. 1968), cert. denied sub nom. *Danica Enterprises v. Commissioner*, 395 U.S. 933 (1969); *Ach v. Commissioner*, 42 T.C. 114 (1964), aff'd, 358 F.2d 342 (6th Cir.), cert. denied, 385 U.S. 899 (1966)).

¹²⁶691 F.2d at 850.

¹²⁷*Id.* at 851-52.

¹²⁸*Id.* at 852.

¹²⁹*Id.*

¹³⁰460 F.2d 1216 (2nd Cir. 1972).

¹³¹*Id.* at 1218.

¹³²691 F.2d at 852 n.5.

¹³³I.R.C. § 269A (1982).

corporation, partnership, or other entity¹³⁴ and the principal purpose of forming the corporation is the avoidance of federal income tax.¹³⁵ In addition, attorneys advising personal service corporations must be aware of potential problems involving personal holding company tax¹³⁶ and accumulated earnings tax.¹³⁷ Finally, even if *Foglesong* represents the correct interpretation of section 482, care must be taken that: (a) all contracts with third parties are with the corporation and not the shareholder employee; (b) all corporate formalities are observed; (c) the shareholder-employee engages in no other business activities; and (d) a written employment agreement is entered into between the corporation and the employee.

4. *Scholarships and Fellowship Grants.*—The meaning of “scholarship” or “fellowship grant” was addressed in *Field v. Commissioner*,¹³⁸ a case of first impression for the Seventh Circuit. Section 117 of the Code provides that any amount received as a “scholarship at an educational organization” or “as a fellowship grant” is not included in gross income.¹³⁹ The Code does not define “scholarship” or “fellowship grant.” However, Treasury Regulation section 1.117-4(c) provides that a scholarship or fellowship grant does not include “any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.”¹⁴⁰

In sustaining the validity of this regulation, the United States Supreme Court held, in *Bingler v. Johnson*,¹⁴¹ that payments in exchange for substantial services do not come within the definition of scholarships or fellowship grants. The Court explained in *Bingler* that scholarships and fellowship grants must come within the usual understanding of “relatively disinterested, ‘no strings’ educational grants, with no requirement of any substantial *quid pro quo* from the recipients.”¹⁴²

An exception to the rule that compensation for services cannot be considered a scholarship or fellowship grant exists for compensation to an individual for teaching, research, or other services in the nature of part-time employment if: (a) the individual is a candidate for a degree at an educational institution, and (b) the services are required of all candidates for the degree as a condition to receiving the degree.¹⁴³ The tax-

¹³⁴*Id.* § 269A(a)(1).

¹³⁵*Id.* § 269A(a)(2).

¹³⁶*Id.* §§ 541-547.

¹³⁷*Id.* §§ 531-537.

¹³⁸680 F.2d 510 (7th Cir. 1982).

¹³⁹I.R.C. § 117 (1982).

¹⁴⁰Treas. Reg. § 1.117-4(c) (1960).

¹⁴¹394 U.S. 741 (1969).

¹⁴²*Id.* at 751.

¹⁴³I.R.C. § 117(b) (1982); Treas. Reg. § 1.117-2(a)(2) (1960).

payer in *Field*, however, did not argue that this exception was applicable.

Against this background, the Seventh Circuit was faced with the question of whether payments to a physician in a graduate hospital residency program were excludable from gross income under section 117 of the Code. The focus of the court was appropriately on the question of whether the hospital required a substantial quid pro quo in exchange for the payments to the physician. In determining that a substantial quid pro quo was required and that the payments were therefore taxable, the court considered the nature of the services, the method of determining the amount of the payments, the fringe benefits received, and the payor's treatment of the payments.¹⁴⁴

The nature of the services performed by the physician serving as a resident and the benefit received by the hospital from those services were the primary factors considered in determining whether the payments were excludable from the physician's income under section 117 of the Code. It was clear in this case that the physician performed substantial services of significant benefit to the hospital.¹⁴⁵ The physician argued that the evidence established that the hospital could function without residents and that accordingly the services of the residents should not be deemed to be substantial. The court of appeals held that, although an employer may be able to operate without the services of an employee, that fact does not establish that the employee did not render substantial services.¹⁴⁶

The physician also argued that the payments should have been excluded from his income under section 117 of the Code because the residence program provided invaluable educational training. The court held that this fact was not in dispute, but was merely irrelevant. An individual can render substantial services while at the same time gaining valuable education and training. In fact, that is usually the case with individuals newly employed in a profession or skilled trade.¹⁴⁷

The court of appeals noted that the amount of payments was determined solely by the length of time the physician spent in the program and not by financial need.¹⁴⁸ This indicated to the court that the physician was being compensated for the value of his services rather than being given payments based on need to enable him to continue his education. Moreover, the court of appeals observed that the physician received fringe benefits similar to those of hospital employees, including group insurance, paid sick leave, laundered uniforms, and paid vacations.¹⁴⁹ Implicitly, the

¹⁴⁴680 F.2d at 513-14.

¹⁴⁵*Dr. Field* performed such services as physical examinations, medical histories, diagnosis of medical problems, caring for hospital patients and out-patients, leading therapy sessions, and substantial emergency call duty. *Id.* at 513.

¹⁴⁶*Id.* at 514 (citing *Fisher v. Commissioner*, 56 T.C. 1201 (1971)).

¹⁴⁷680 F.2d at 514 (citing *Proskey v. Commissioner*, 51 T.C. 918, 925 (1969)).

¹⁴⁸680 F.2d at 513-14.

¹⁴⁹*Id.* at 512, 514.

court reasoned that an individual who was not performing substantial services for an employer would not receive fringe benefits normally provided to employees.

Finally, the court noted that the payor¹⁵⁰ withheld state and federal income taxes and FICA taxes from the alleged scholarship payments to the taxpayer.¹⁵¹ Thus, the payor was treating the payments as salary rather than as a scholarship or fellowship grant.

There is little doubt that the payments in the *Field* case constituted compensation rather than a scholarship or fellowship grant. In addition, most cases have held that payments to medical residents do not qualify as scholarships or fellowship grants.¹⁵² Nevertheless, the court of appeals stated that it was not adopting a per se rule with respect to payments to medical residents, but preferred to decide each case on its own facts.¹⁵³

¹⁵⁰Northwestern University Medical School made the payments to Dr. Fields and was then reimbursed by the Evanston Hospital, a related institution. *Id.* at 511 n.2.

¹⁵¹*Id.* at 512, 514.

¹⁵²*See, e.g., id.* at 513 (citing *Cooney v. United States*, 630 F.2d 438 (6th Cir. 1980); *Meek v. United States*, 608 F.2d 368 (9th Cir. 1979); *Parr v. United States*, 469 F.2d 1156 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262 (4th Cir. 1972); *Wertzberger v. United States*, 441 F.2d 1166 (8th Cir. 1971); *Quast v. United States*, 428 F.2d 750 (8th Cir. 1970); *Tobin v. United States*, 323 F. Supp. 239 (S.D. Tex. 1971); *Kwass v. United States*, 319 F. Supp. 186 (E.D. Mich. 1970); *Burstein v. United States*, 622 F.2d 529 (Ct. Cl. 1980); *Adams v. Commissioner*, 71 T.C. 477 (1978)). *See also* Comment, *Medical Resident and Section 117—Time for a Closer Examination*, 25 ST. LOUIS U.L.J. 117, 118 & n.3 (1981). *But cf.* *Leathers v. United States*, 471 F.2d 856 (8th Cir. 1972) (refusing to reverse jury verdict in favor of resident), *cert. denied*, 412 U.S. 932 (1973).

¹⁵³680 F.2d at 514 n.5.