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TAXATION-FEDERAL INCOME TAX-TAXABILITY TO NONRESIDENT ALIEN OF LUMP SUM PAYMENTS FOR COPYRIGHT

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TAXATION—FEDERAL INCOME TAX—TAXABILITY TO NONRESIDENT ALIEN OF LUMP SUM PAYMENTS FOR COPYRIGHT—Taxpayer, a nonresident alien author not engaged in trade or business within the United States, delivered certain literary works to American publishers under agreement whereby the latter were to copyright and publish these stories and reassign to the taxpayer after publication all rights except the American serial rights. Lump sum payments for each story were received during the years 1938 and 1941. No tax was paid on these amounts and a deficiency was assessed on the ground that they constituted royalties received for the use of United States copyrights and were taxable as ordinary income. The circuit court of appeals sustained the taxpayer's contention that the payments were proceeds from the sale of personal property and therefore exempt under Section 211 (a) (1) (A) of the Internal Revenue Code.[1] On certiorari to the Supreme Court, *held*, reversed. Justices Frankfurter, Murphy and Jackson dissented. *Commissioner of Internal Revenue v. Wodehouse*, 335 U.S. 807, 69 S.Ct. 1120 (1949).

For the purposes of determining the right to sue for an infringement in copyright cases, courts have adopted the theory that a copyright is indivisible, and that an assignment of less than all of the rights represented by a copyright does not confer legal title upon the assignee, but is merely the granting of a license.[2] Although originally limited in application to matters of pro-

[1] Wodehouse v. Commissioner, (C.C.A. 4th, 1948) 166 F. (2d) 986.

[2] M. Witmark & Sons v. Pastime Amusement Co., (D.C. S.C., 1924) 298 F. 470, affd., (C.C.A. 4th, 1924) 2 F. (2d) 1020; BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 539 (1944); AMDUR, COPYRIGHT LAW AND PRACTICE 790 (1936). That this rule is not unanimous, see Roberts v. Myers, (C.C. Mass., 1860) 20 F. Cas. 898. The pro-

cedure, the indivisibility doctrine has been extended to tax cases. On this basis, courts have characterized proceeds from the exclusive and irrevocable assignment of partial rights under a copyright as ordinary income and not gains from the sale of property.[3] This application of the rule is clearly untenable when the real nature of copyrights is considered and business realities recognized. Under the "bundle of rights" concept of property, the several parts of a copyright are property rights which can be individually transferred so as to confer all the incidences of legal ownership upon a grantee.[4] This fact has been recognized in the literary world where these different rights are invariably transferred separately in transactions treated and spoken of as sales. Reliance upon the indivisibility doctrine is especially difficult to justify in view of the well-accepted principle that tax law is concerned with substance, not form and technical refinements of title.[5] On this analysis, the decision of the circuit court in the principal case seems uncontrovertible. A majority of the Supreme Court failed to consider the propriety of the lower court's reasoning and held the proceeds taxable solely on the grounds that legislative history and taxing policy indicated Congressional intent to reach such readily collectible gains.[6] This justification for upholding a tax in the principal case, however, does violence to the clear language of Section 211,[7] whereby the gains of nonresident aliens from sales of property are excluded from taxation. However, it must be noted that this analysis does not, in itself, benefit the American author or artist whose tax burden is lightened only if the sale involves a capital asset. There is authority for the proposition that partial rights under a copyright, when held by a professional author, constitute "property held ... primarily for sale to customers in the ordinary course of his trade or business ..."[8] and therefore are not capital assets.[9] It would seem that more equitable treatment should be accorded our creative artists, whose incomes are variable and irregular, by recognizing that the exclusive and irrevocable assignment of any one of the rights embraced by a copyright results in a capital gain. Since a judicial declaration to this effect

cedural necessity for the rule has been vitiated by the decision in Independent Wireless Telegraph Co. v. Radio Corporation of America, 269 U.S. 459, 46 S.Ct. 166 (1926), where it was held that an exclusive licensee under a patent could sue for infringement by joining the patent owner.

[3] Rohmer v. Commissioner, (C.C.A. 2d, 1946) 153 F. (2d) 61; Goldsmith v. Commissioner, (C.C.A. 2d, 1944) 143 F. (2d) 466; Sabatini v. Commissioner, (C.C.A. 2d, 1938) 98 F. (2d) 753. But see the concurring opinion of Judge L. Hand in Goldsmith v. Commissioner, supra, note 3, where it was concluded that an exclusive and irrevocable assignment of movie rights was a sale.

[4] Fulda, "Copyright Assignments and the Capital Gains Tax," 58 YALE L. J. 245 (1949); 54 YALE L. J. 879 (1945).

[5] Griffiths v. Commisisoner, 308 U.S. 355, 60 S.Ct. 277 (1939); Corliss v. Bowers, 281 U.S. 376, 50 S.Ct. 336 (1930).

[6] Principal case at 1130.

[7] 26 U.S.C.A. Int. Rev. Code, 211 (a).

[8] 26 U.S.C.A. Int. Rev. Code, 117 (a) (1).

[9] Concurring opinion in Goldsmith v. Commissioner, note 3, supra.

is unlikely in view of the decision in the principal case, this result can be achieved only through an amendment to the code.[10]

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[10] Schulman, "The Artist and His Tax Burden," 27 TAXES 101 (1949); Swartz, "Authors and the Federal Income Tax," 26 TAXES 51 (1948). A bill, attaching the benefits of a capital gains transaction to assignments of movie rights only, has been introduced in Congress. H.R. 5562, 80th Cong., 2d sess., 1948. This proposal should be extended to encompass all of the rights represented by a copyright, however, if it is to provide an effective solution to the problem.