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## CRIMINAL LAW AND PROCEDURE - STATUTES- CONSTITUTIONALITY OF CRIMINAL PENALTIES FOR UNREASONABLE DEDUCTIONS UNDER FEDERAL INCOME TAX STATUTE

William H. Shipley  
*University of Michigan Law School*

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CRIMINAL LAW AND PROCEDURE — STATUTES — CONSTITUTIONALITY OF  
CRIMINAL PENALTIES FOR UNREASONABLE DEDUCTIONS UNDER FEDERAL  
INCOME TAX STATUTE — Defendant was indicted for attempting to evade the  
federal tax on the income of a certain corporation for the years 1933 to 1936.  
In providing for deductions from gross income, the statute permits a reasonable

allowance for salaries or other compensation for personal services.<sup>1</sup> The government charged that the defendant was a party to a fraudulent scheme whereby, under the guise of paying commissions for services, which commissions were deducted from gross income, the corporation distributed profits to its stockholders. The trial court submitted to the jury the issue whether the deduction represented a reasonable allowance for the services rendered.<sup>2</sup> The circuit court of appeals held that defendant could not be found guilty of criminal violation of the statute merely by virtue of payment of unreasonable compensation for services actually rendered,<sup>3</sup> but only for deductions taken for payments made when no services were in fact rendered.<sup>4</sup> *Held*, defendant may be found guilty if the payments were unreasonable, and it was not error to submit this issue to the jury. *United States v. Ragen*, 314 U. S. 513, 62 S. Ct. 374 (1942).<sup>5</sup>

Due process requires that criminal statutes be so explicit in themselves or by reference to some other definite standard that those who are subject to their penalties may know what standards of conduct to pursue.<sup>6</sup> Since it has been said that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable,"<sup>7</sup> the defendant in the principal case contended that the jury could not pass upon the question whether or not the deduction represented reasonable compensation for services. In sustaining this contention the circuit court held that the defendant could be liable only if there were no services rendered.<sup>8</sup> In the case of *International Harvester Co. of America v.*

<sup>1</sup> In computing net corporate income a deduction is permitted for "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered. . . ." 48 Stat. L. 688, § 23 (a) (1934), now 26 U. S. C. (1940), § 23(a). "Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed [by the act] shall . . . be guilty of a felony. . . ." 48 Stat. L. 725, § 145 (1934), now 26 U. S. C. (1940), § 145(b).

<sup>2</sup> See *United States v. Molasky*, (C. C. A. 7th, 1941) 118 F. (2d) 128.

<sup>3</sup> *Id.*

<sup>4</sup> "It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined." *United States v. Molasky*, (C. C. A. 7th, 1941) 118 F. (2d) 128 at 139.

<sup>5</sup> This reversed the decision of the circuit court of appeals in *United States v. Molasky*, (C. C. A. 7th, 1941) 118 F. (2d) 128, and reinstated the decision of the district court.

<sup>6</sup> *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 S. Ct. 220 (1908); *Nash v. United States*, 229 U. S. 373, 33 S. Ct. 780 (1913); *International Harvester Co. of America v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853 (1914); *State v. Gaster*, 45 La. Ann. 636, 12 So. 739 (1893); *Brown v. State*, 137 Wis. 543, 119 N. W. 338 (1909); *Augustine v. State*, 41 Tex. Cr. 59, 52 S. W. 77 (1899).

<sup>7</sup> *Tozer v. United States*, (C. C. Mo. 1892) 52 F. 917 at 919. The full quotation is: "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

<sup>8</sup> *United States v. Molasky*, (C. C. A. 7th, 1941) 118 F. (2d) 128.

*Kentucky*,<sup>9</sup> a statute was found too vague which provided penalties for raising prices of goods above market value under fair competition and under normal market conditions. But in *Nash v. United States*,<sup>10</sup> involving a prosecution under the Sherman Antitrust Act, the prohibition of unreasonable or undue restraints on trade was held to be sufficiently definite. The distinction<sup>11</sup> drawn between the two cases was that a statute is sufficiently definite if it imposes a standard of conduct with reference to existing facts,<sup>12</sup> but if the statute requires a man to disregard things as they actually are and create for himself a hypothetical set of circumstances on which to base his standard of conduct, it is invalid.<sup>13</sup> In the principal case, there must be a determination of what amounts to reasonable compensation, and this is calculated with reference to existing facts.<sup>14</sup> In many cases this is as definite as the test of negligence in criminal cases.<sup>15</sup> Furthermore, the

<sup>9</sup> 234 U. S. 216, 34 S. Ct. 853 (1914).

<sup>10</sup> 229 U. S. 373, 33 S. Ct. 780 (1913).

<sup>11</sup> In *International Harvester Co. of America v. Kentucky*, 234 U. S. 216 at 223, 34 S. Ct. 853 (1914), it was said: "We regard this decision as consistent with *Nash v. United States* . . . in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts."

<sup>12</sup> Adequately definite criminal statutes: *Omaechevarria v. Idaho*, 246 U. S. 343, 38 S. Ct. 323 (1918) (any cattle "range" previously or usually occupied by any cattle grower); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 45 S. Ct. 141 (1925) (meat represented to be "kosher"); *Lloyd v. Dollison*, 194 U. S. 445, 24 S. Ct. 703 (1904) (liquor restrictions varying according to sale at "wholesale" or "retail"); *Nash v. United States*, 229 U. S. 373, 33 S. Ct. 780 (1913) ("unreasonable or undue" restraints of trade); *United States v. Alford*, 274 U. S. 264, 47 S. Ct. 597 (1927) (building fires "near" any forest or inflammable material); *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 53 S. Ct. 42 (1932) ("reasonable variations" in weight or measure); *Kay v. United States*, 303 U. S. 1, 58 S. Ct. 468 (1938) ("ordinary fees" for services actually rendered); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 S. Ct. 220 (1908) (contracts "reasonably calculated" or which tend to fix prices).

<sup>13</sup> Criminal statutes held to be vague: *United States v. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298 (1921) (Lever Act, unreasonable prices for necessities); *Collins v. Kentucky*, 234 U. S. 634, 34 S. Ct. 924 (1914) (raising prices above market value under fair competition and under normal market conditions); *International Harvester Co. of America v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853 (1914) (same); *Weeds v. United States*, 255 U. S. 109, 41 S. Ct. 306 (1921) (exacting excessive prices for any necessities); *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 532 (1931) (displaying any symbol or emblem of opposition to organized government).

<sup>14</sup> A reasonable rental for real estate is commercially ascertainable with reference to existing conditions: *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 S. Ct. 289 (1922). Compensation for personal services would seem to be as ascertainable as rentals for real estate.

<sup>15</sup> There are many cases in which persons have been held guilty of manslaughter because of doing a lawful act negligently. Examples are: immoderate correction of a child by his parent, negligent use of drugs and negligent surgical operations by unskillful practitioners, negligent driving, and negligence in using a gun in target practice. See cases cited in CLARK and MARSHALL, *CRIMES*, 4th ed., 79 (1940).

statute in the principal cases imposes criminal liability only if there exists an intent to defraud the government.<sup>16</sup> Thus the possibility of a criminal liability for an innocent deduction would seem to be remote, and the statutory provisions would not become a trap for those who act in good faith. If, as the circuit court held,<sup>17</sup> the only question which could properly be submitted to the jury is whether the entire deduction is fabricated, an unconscionable taxpayer could immunize himself by padding a legitimate item of deduction.

*William H. Shipley*

<sup>16</sup> See statute quoted in note 1, supra. The Court in the principal case, 62 S. Ct. 374, at 379, construed the statute as requiring a fraudulent intent.

<sup>17</sup> United States v. Molasky, (C. C. A. 7th, 1941) 118 F. (2d) 128.