

1962

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Recommended Citation

Frederick McKean Lombardi, *Alimony or Child Support–Income Tax Deduction*, 13 W. Rsr. L. Rev. 400 (1962)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol13/iss2/27>

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boundaries results in tortious consequences within the state.²⁰ Such a holding would appear to be in line with the general trend of liberal extensions of personal jurisdiction over nonresidents (individual and corporate) evident in areas other than that of automobile litigation.

JUSTIN LUMLEY

ALIMONY OR CHILD SUPPORT — INCOME TAX DEDUCTION

Lester v. Commissioner, 366 U.S. 299 (1961)

In *Lester v. Commissioner*¹ the United States Supreme Court resolved, in part, a problem which has vexed the federal courts of appeal for some time.

Sections 22(k) and 23(u) of the Internal Revenue Code of 1939² provide that a husband may take an income tax deduction for periodic payments to his wife pursuant to a decree, or an agreement incident to a decree, of separation or divorce. However, a deduction is not allowed for any portion of the payments which the decree or written instrument "fixes" as a sum payable for the support of the minor children of the husband.³

The problem in the *Lester* case concerns the interpretation of what constitutes the "fixed sums" referred to by this exception. The litigation concerned a divorce decree which had incorporated a previous alimony and support agreement between the husband and wife. The decree pro-

20. In *Young v. Masci*, 289 U.S. 253 (1933), the Supreme Court upheld a judgment against a nonresident owner for the negligence of his bailee in another state but the suit was commenced by the plaintiff in the owner's own state. Cf. *Scheer v. Rockne Motors Corp.* 69 F.2d 942 (2d Cir. 1943) (The owner was not liable because he did not consent to the taking of his automobile by an employee.). See *Fischl v. Chubb*, 30 Pa. D.&C. 40 (C.P. 1937) (The owner was liable for acts of his dog in another state on an absolute liability theory.).

If the foreseeability of consequences resulting from an automobile owner's authorization of the use of his automobile in another state becomes the paramount factor in determining jurisdiction, then the problem arises as to how far and under what circumstance a state's judicial jurisdiction may be extended and still be within the constitutional limitations. In automobile litigation, this would not be as great a problem as it would be in other areas of the law. The purpose of nonresident motorist statutes is to enable those injured on a state highway to recover by suit within the state. Here, the state's jurisdiction could be expanded to include anyone who is legally responsible for such accidents. However, if this reasoning is applied to other areas of the law the problem becomes evident. For example, a breach of contract, unlike tortious conduct involving an automobile, is usually manifested by a failure to act. It would be very difficult to say that a meaningful act occurred or an injury resulted in any particular place. Suppose that a contract was entered into beyond a state's boundaries and was breached with resulting damages to a resident within the state. Would this be enough to give that state in personam jurisdiction over the nonresident wrongdoer? Indications are that the answer will be yes. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957), where Justice Black states that a "trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." See also, Note, *Development In The Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

vided for the alimony and support of the wife and children and included a clause which reduced the payments by specific amounts upon the emancipation, marriage, or death of the children. The question was whether the portions of the payments so reduced, were sufficiently "fixed" within the meaning of the exception in section 22(k) to deny the husband's deduction, as a sum payable for the support of his minor children.

The Supreme Court in the *Lester* case, in affirming the Court of Appeals for the Second Circuit,⁴ allowed the full deduction to the husband, basing its decision on the legislative history of the statute. The Court concluded that Congress intended the exception to include only agreements specifically stating the amounts allocable to the support of minor children.⁵

Though purporting to resolve a conflict in the courts of appeal⁶ on the question, the Court, in fact only followed the established line of decisions permitting the deduction. The problem was not entirely settled because the fact situation in the *Lester* case was distinguishable from that in two courts of appeal cases which did not allow the deduction.⁷ The question the Supreme Court left unanswered is this: Are the portions of the payments sufficiently "fixed" within the meaning of section 22(k) when, in addition to the reductions of the payments to the wife and children upon emancipation, marriage, or death of any of the children, the decree provides for a reduction of payments upon the remarriage of the wife and an express direction that the remaining portions are to be used for the children alone? The *Lester* case left this open, but two courts of appeal have declared such payments to be sufficiently "fixed."⁸

1. 366 U.S. 299 (1961).

2. 56 pt. 1 Stat. 816-17 (1942) (now INT. REV. CODE OF 1954, §§ 71, 215) [hereinafter cited as CODE §]. Other than the expanded applicability of section 71 discussed on page 403 *infra*, there is no significant substantive change in the provisions.

3. If the wife must include the payments in her gross income under section 22(k) (or 71), the husband may deduct them from his under section 23(u) (or 215).

4. *Lester v. Commissioner*, 279 F.2d 354 (2d Cir. 1960).

5. The Tax Court had, in most instances, held that under provisions similar to those in the support decree in the *Lester* case the portions of the payments were sufficiently "fixed" as support for the minor children and as such were taxable to the husband. *Truman W. Morsman*, 27 T.C. 520 (1956); *Saxe Perry Gantz*, 23 T.C. 576 (1954); *Beulah Weil*, 22 T.C. 612 (1954); *Warren Leslie, Jr.*, 10 T.C. 807 (1948); *William E. MacKay*, 23 P-H Tax Ct. Mem. 128 (1954); *Charles B. Hicks*, 22 P-H Tax Ct. Mem. 638 (1953); *Jason R. Swallen*, 20 P-H Tax Ct. Mem. 450 (1951). But see *Dorothy Newcombe*, 20 P-H Tax Ct. Mem. 141 (1951); *Elsa B. Chapin*, 16 P-H Tax Ct. Mem. 782 (1943) (The wife was in a higher income bracket than the husband.).

6. Certiorari was granted to resolve a conflict in the courts of appeal in 364 U.S. 890 (1960). *Metcalfe v. Commissioner*, 271 F.2d 288 (1st Cir. 1959), and *Eisinger v. Commissioner*, 250 F.2d 303 (9th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958) arrived at conclusions contrary to that of the court of appeals in the *Lester* case.

7. *Eisinger v. Commissioner*, 250 F.2d 303 (9th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958); *Budd v. Commissioner*, 177 F.2d 198 (6th Cir. 1947).

8. *Ibid.*

The conflict of decisions within the Sixth Circuit illustrates the effect of the distinction. On the one hand is *Ashe v. Commissioner*,⁹ where the husband agreed to pay \$250 per month "alimony" for the support and maintenance of his three minor children. The payments were to be reduced by one-third as each child became twenty-one years old or self-supporting. The Court of Appeals for the Sixth Circuit, as did the Supreme Court in the *Lester* case, permitted the deduction to the husband, because the amount for the support of the children was not definitely fixed by the decree.¹⁰ The decision was based upon the complete discretion and control that the wife had over the use of the money, which the court found consistent with true ownership and basically inconsistent with the interpretation that the payments were "fixed" for the use and support of the children.¹¹

However, in *Budd v. Commissioner*,¹² the court in the same Sixth Circuit reached an opposite conclusion. The decree of divorce in that case provided for the reduction of the payments contingent upon the child reaching twenty-one years of age, dying before that age, or the remarriage of the wife. Further, the decree provided that upon remarriage of the wife the payments received thereafter were to be used *only* for the support of her son until he became twenty-one years old. Thus, upon the remarriage of the wife, her discretion and control over the money were taken from her and the payments became "fixed" for the support of her child. Although the court did not say that the absence of discretion and control over the money was the deciding factor, it appears to be the reason why the husband was disallowed the deduction in the *Budd* case.¹³

9. 288 F.2d 345 (6th Cir. 1961).

10. In the Second Circuit similar results have been reached. See *Lester v. Commissioner*, 279 F.2d 354 (2d Cir. 1960); *Hirshon's Estate v. Commissioner*, 250 F.2d 497 (2d Cir. 1957). (In this case the payments continued for the wife even though she no longer was obligated to support the children.)

11. *Deutsch v. Commissioner*, 249 F.2d 534 (6th Cir. 1957), is another Sixth Circuit case permitting the husband's deduction. The husband was to pay \$250 per month for the support and maintenance of the wife and their two minor children. If the wife would remarry, the payments were to be \$150 per month. The payments in either case were to be reduced by one half upon the eldest child reaching eighteen years of age, becoming emancipated, or dying before that age. When the second child became eighteen years old or both children became emancipated or died before reaching eighteen, the payments were to stop altogether. The court allowed the husband's deduction, being unable to find a provision which indicated that the \$3,000 yearly payment was to be made for the benefit of the children alone.

12. 177 F.2d 198 (6th Cir. 1947).

13. *Eisinger v. Commissioner*, 250 F.2d 303 (9th Cir. 1957), *cert. denied*, 356 U.S. 913 (1958), reached the same result on a similar set of facts. In *Metcalf v. Commissioner*, 271 F.2d 288 (1st Cir. 1959), *Mandel v. Commissioner*, 185 F.2d 50, (7th Cir. 1950), and its companion case, *Mandel v. Commissioner*, 229 F.2d 382 (7th Cir. 1956), the courts disallowed the deduction to the husband on the basis of the reduction of payments to the children upon their emancipation, marriage, or death and to the wife upon her remarriage. The issues in these cases presumably have now been resolved by the Supreme Court in the *Lester* case.

The Tax Court has unequivocally chosen to follow the *Lester* decision in similar situations where the agreement and decree reduced the amount to both the children and the wife as the

Viewing the *Budd* decision in relation to the later language of the *Ashe* case, where the arrangement for payments so strongly favored the children,¹⁴ there is a strong impression that the Court of Appeals for the Sixth Circuit would follow the exception under the applicable Code provisions¹⁵ and disallow the husband's deduction where the facts are similar to those in the *Budd* case until the ramifications of the *Lester* decision become clear. This fact situation, which the *Lester* case does not cover, could continue to trouble the courts.

At the very least the *Lester* case ensures a tax-free method to the husband for reducing alimony and support payments as the children exempt themselves from the husband's legal obligation to support. In addition, the 1954 Internal Revenue Code¹⁶ expands the usefulness of the provisions for such a reduction in the divorce decree or decree of separation and maintenance.¹⁷ The deduction for the full payments is now also available when the couple is separated under a written separation agreement¹⁸ and a decree for support,¹⁹ which includes an interlocutory decree.²⁰

CONCLUSION

The courts will probably follow the Supreme Court's decision not only in the *Lester* fact situation, but also in the fact situation which was before the court in the *Budd* case.²¹ The language of the Supreme Court decision, although somewhat vague, is sufficiently inclusive to permit the courts of appeal to ignore this dubious distinction if they so choose. No court has yet disallowed the deduction to the husband specifically on the

contingencies would arise. Lindley S. Bettison, P-H 1961 TAX CT. RBP. & MEM. DEC. (30 P-H Tax Ct. Mem.) ¶ 61168 (June 9, 1961); Robert E. Dolan, P-H 1961 TAX CT. RBP. & MEM. DEC. (30 P-H Tax Ct. Mem.) ¶ 61165 (June 7, 1961).

In *Hirshon's Estate v. Commissioner*, 250 F.2d 497 (2d Cir. 1957), the Court of Appeals for the Second Circuit allowed the deduction despite the decree's direction that the reduced payments should go for the support of the child upon the remarriage of the wife. However, there was no provision for the reduction of payments upon the emancipation, marriage, or death of the child. The court based its decision on a consistent following of *Weil v. Commissioner*, 240 F.2d 584 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957), which allowed the deduction under a fact situation similar to the *Lester* case.

14. See the discussion of the *Ashe* case p. 402 *supra*.

15. Int. Rev. Code of 1939, ch. 1, z§§ 22(k), 23(u), 56 pt. Stat. 816-17; CODE §§ 71, 215.

16. CODE §§ 71, 215.

17. CODE § 71(a)(1).

18. CODE § 71(a)(2). (The husband and wife must not make a single return jointly.).

19. CODE § 71(a)(3) (This applies provided the husband and wife do not make a single return jointly); Treas. Reg. § 1.71-1(b)(6) example (3) (1957) [hereinafter cited as Reg. §].

20. Reg. §§ 1.71-1(b)(3), (6) example (4) (1957).

21. See note 13 *supra* and accompanying text.