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Taxation

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In *Leach v. State*[15] it was decided that an employee placed on leave of absence because of pregnancy, the request for leave having been made only after advice that her employment would be terminated, had not voluntarily removed herself from the labor market and, thus, was entitled to unemployment benefits during the early stage of her condition, while her ability to work continued.

In *Ferreli v. Leach*[16] it was held that an employee had quit, where the choice of whether to retire at age sixty-five was in effect left up to the employee and he chose to accept retirement.[17]

In *Davis Cabs, Inc. v. Leach*[18] it was held that a taxicab driver who leased a taxicab and dispatch service from a taxicab company was an independent contractor and not an employee of the company within the meaning of the Unemployment Compensation Act. The lessor company exercised no control over the operation of the cab and the driver simply paid a percentage of his fares for the use of the cab.[19]

EDWIN R. TEPLE

TAXATION

PERSONAL PROPERTY TAX

The treatment of both distributed and undistributed portions of capital gain and ordinary income realized by a "tax-option" corporation[1] in computing the Ohio intangibles tax has apparently been determined in *Michael v. Bowers.*[2] The taxpayer was the owner of 666 shares of stock in an Ohio corporation, herein called Crane Company. The shareholders of Crane Company had elected to be taxed for federal income tax purposes under the provisions of Sub-chapter S of the Internal Revenue Code[3] which in substance allows the income of the corporation to be

15. 184 N.E.2d 704 (Ohio C.P. 1962).

16. 186 N.E.2d 868 (Ohio C.P. 1962).

17. Under the collective bargaining agreement referred to in the court's opinion, employees normally retired at age sixty-five but were permitted to continue working until sixty-eight, with the consent of the employer and the union. The claimant in this case, upon reaching his sixty-fifth birthday, was notified that he would be retired and left without protest or without specifically requesting permission to continue working in accordance with the terms of the agreement. The court suggested that the result would be different if no choice in the matter had been afforded him, with which position the author agrees. See Quick Mfg., Inc., 39 Lab. Arb. 1003 (1962), for an arbitration award that age alone is not just cause for discharge.

18. 115 Ohio App. 165, 184 N.E.2d 446 (1962).

19. The definition of "employment" in the Unemployment Compensation Act of Ohio, like that of a number of other states, contains a special clause setting forth three specific tests for the purpose of determining coverage in situations like this. However, this provision has been rendered ineffective by the decisions of the Ohio courts. For a discussion of this subject, see Teple, *The Employer-Employee Relationship,* 10 OHIO ST. L.J. 153 (1959).

treated as the proportionate income of the shareholders, whether distributed or not, and capital gains of the corporation to be taxed to such shareholders as their individual capital gains. In 1958 Crane Company had realized capital gains of $48.32 a share resulting from the sale of stock of another corporation held by Crane Company and ordinary income of $2.98 per share, $1.30 of which was not distributed by Crane Company to its shareholders. During 1958 Crane Company distributed $50.00 a share in cash to its shareholders. On her 1958 federal income tax return, the taxpayer properly reported capital gains of $48.32 a share and ordinary income of $2.98 a share. On her 1959 Ohio personal property tax return, the taxpayer elected to use the federal-election method[4] in reporting her investments yielding income. The taxpayer listed her capital gains and the undistributed part per ($1.30) share of Crane Company's ordinary income on the federal-election form[5] and claimed that only the distributed portion of the ordinary income ($1.68) a share was income yield upon which the personal property tax should be computed. The Tax Commissioner determined that the undistributed ordinary income as well as the capital gains received by Crane Company should be included in calculating income yield for Ohio personal property tax purposes. The determination was affirmed by the Board of Tax Appeals.

On appeal the Ohio Supreme Court considered the nature of the Ohio personal property tax stating that it was not an income tax, but was a property tax, the value of such property being measured by the yield or income. The taxpayer contended that since she elected to use the federal-election method instead of the alternative method[6] of listing her investments and their income yield, and since the capital gain reported was not dividend income for federal income tax purposes, it should be excluded. The supreme court held that Ohio is not bound by the federal classification of this income and concluded that the taxpayer's receipt of the capital gain was income yield and properly includable in the valuation of her stock under Ohio personal property tax law. The court further held that since the taxpayer had chosen the federal-election method of reporting, the undistributed income must also be included as income yield in the tax assessment against the taxpayer. As authority

1. INT. REV. CODE OF 1954 §§ 1371-77. Corporations may elect not to be subject to federal income tax. Where such election is made, the shareholders of such corporations include in their own income for tax purposes the current taxable income of such "tax-option" corporation, both the part which is distributed and that which is not. The special characteristics of capital gains carry over to the shareholders.

2. 174 Ohio St. 169, 187 N.E.2d 890 (1963).

3. INT. REV. CODE OF 1954 §§ 1371-77.

4. OHIO REV. CODE § 5711.10.

5. Ohio Department of Taxation Form No. 912.

6. OHIO REV. CODE § 5711.22.

for this conclusion the court cited *Deeds v. Evatt*[7] where the supreme court held that a taxpayer who chooses the federal-election method of reporting his investments may not deduct from the total amount of income shown in his federal income tax return the value of a dividend in stock taxable under federal income tax law, and that a taxpayer who chooses the federal-election method may not modify the taxable aggregate of income from investments shown on his federal tax return by applying the definition of "income yield" under the alternative method of listing investments and their income.[8] At the end of its opinion the court properly noted that had the taxpayer chosen to list her investments and their income instead of reporting under the federal-election method, the undistributed ordinary income reported by the taxpayer in her federal tax return would *not* have been included in determining the taxpayer's personal property tax.[9]

In another case[10] involving the federal-election method of reporting productive investments, the taxpayer during the year 1959 had owned certain stock in an Ohio corporation, which stock was exchanged under a plan of reorganization for stock of a Delaware corporation, and the Ohio corporation was dissolved. During the year the taxpayer had received dividends from the stock of both corporations and had used the federal-election in filing his 1960 personal property tax return including all dividends received during 1959 from both corporations. The Tax Commissioner determined that the dividends of the Delaware corporation should be eliminated from the income yield and that the Delaware corporation's stock should be listed and assessed as nonproductive since such stock had not been outstanding for the full calendar year proceeding the date of listing.[11] The Board of Tax Appeals found for the taxpayer upon the authority of the *Deeds* case[12] and held that neither the taxpayer nor the Tax Commissioner has any authority to remove from the federal-election return any investment which produced income taxable under federal income tax law.

SALES TAX

The question of whether the sale of items used in making deliveries to retail customers is exempt from the sales tax was determined by the su-

7. 138 Ohio St. 567, 37 N.E.2d 581 (1941).

8. OHIO REV. CODE § 5701.10.

9. See Michael v. Bowers, Ohio B.T.A. No. 46723 (Jan. 31, 1962), 3 CCH OHIO TAX REP. ¶ 200-249 (1962).

10. Fisher v. Bowers, Ohio B.T.A. Nos. 49127-49133 (Oct. 5, 1962), 3 CCH OHIO TAX REP. ¶ 200-345 (1962).

11. OHIO REV. CODE § 5711.22.

12. 138 Ohio St. 567, 37 N.E.2d 581 (1941).

preme court in *Lakeside Truck Rental, Inc. v. Bowers.*[13] This case involved a deficiency assessment against the taxpayer due to non-payment of sales tax on rental charges paid by furniture dealers to the taxpayer for trucks used in delivering items sold by those dealers to their retail customers. The taxpayer contended that the trucks so rented were used by the dealers directly in the making of sales at retail, and accordingly, the rental payments were exempt under Ohio Revised Code section 5739.01(E)(2). The court referred to section 5739.01(B) which defines a "sale" for sales tax purposes and clearly indicates that there is no such "sale" until there is a transfer of either possession or title. The court determined that unless otherwise specified, title to items sold at retail will not pass until delivery if the contract of sale requires the delivery of the items sold. Since delivery is an essential part of making a retail sale under such a contract, a truck used directly in making such delivery is used "directly in making retail sales,"[14] and rentals for such trucks are exempt from the sales tax. The supreme court reversed the Board of Tax Appeals and remanded the case for further findings as to the question of delivery.

An interesting fact situation and conclusion is found in *Recording Devices, Inc. v. Bowers.*[15] The taxpayer was in the business of producing and installing door locking and recording devices on doors of various Ohio business concerns so that management could determine when and by whom the doors were locked or unlocked. The taxpayer made a monthly charge for this service and did not collect sales tax, believing that this was a personal service transaction. The taxpayer had relied upon a specific ruling by the then Tax Commissioner of Ohio given in 1938 upon its request to the effect that the taxpayer was rendering a service and did not need to collect sales tax. The ruling was never rescinded, amended, or modified. Though the Board stated that the ruling was erroneous, that the equitable principle of estoppel could not operate against the State of Ohio, and that the Tax Commission of Ohio could not be bound by the acts or opinions of employees, it held for the taxpayer. The Board stated that an administrative ruling, if long continued, should be given great weight, and held that the taxpayer was entitled to rely upon such ruling until it is rescinded in writing by the Tax Commissioner.

FRANCHISE TAXES

In *Northern Estates Corp. v. Bowers*[16] the taxpayer was engaged in the construction of homes, some of which were sold for a partial payment in cash with the balance of the sales price being represented by a second

13. 173 Ohio St. 108, 180 N.E.2d 140 (1962).
14. OHIO REV. CODE § 5739.01(E)(2).
15. Ohio B.T.A. No. 48148 (July 25, 1962), 3 CCH OHIO TAX REP. ¶ 200-312 (1962).
16. Ohio B.T.A. No. 49084 (Feb. 5, 1963), 3 CCH OHIO TAX REP. ¶ 200-373 (1963).