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Taxation: Independent Contractor Within the Meaning of the Social Security Act

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as an affirmation of the *Elgin* case, but the minority interpreted this rejection of the amendment as a protest against the proposed extension of the clause to all carriers and not as a disapproval of its extension to those controlling the carrier as a matter of fact. Since the intent of a legislative body is undiscoverable in any real sense,[16] an affirmative duty should be placed on Congress to express itself, when considering legislative changes offered subsequent to judicial interpretation of a statute, in such positive and compelling language that the courts are fully and unequivocally apprised of the import of its action.[17] Otherwise a presumption arises that the failure to make any change indicates approval. This is obviously the view taken by the majority here.

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TAXATION: INDEPENDENT CONTRACTOR WITHIN THE MEANING OF THE SOCIAL SECURITY ACT

Fahs v. Tree-Gold Cooperative Growers of Florida, Inc.
166 F.2d 40 (C. C. A. 5th 1948)

Tree-Gold Cooperative Growers of Florida, Inc., accepted bids and entered into contracts with certain persons who were to supervise the assembling, labeling, and loading of fruit boxes. This work was accomplished by persons who were hired, directed, and paid by the supervisors independently. These supervisors were paid at a stipulated rate per box for all of the work done by their individual employees. The Government contended that the supervisors were employees within the meaning of the Social Security Act and not independent contractors. The corporation, under protest, paid social security taxes on the total amount paid to the supervisors, and then sued for a refund of the taxes paid. The district court held that the supervisors were independent contractors, and awarded a judgment to the taxpayer. The Government appealed. HELD, an employer-employee relationship, within the meaning of the Social Security Act, existed between the taxpayer and the supervisors, since the super-

[16]Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863 (1930).

[17]Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says,* 34 A. B. A. J. 535 (1948).

visors were economically dependent for their livelihood upon the business of the corporation. Judgment reversed, Justice Sibley dissenting.

At common law the indicia for determining whether one is an employee or an independent contractor are many.[1] Of these, three are considered to be most important. They are: the right of the employer to discharge,[2] the method of payment of wages,[3] and the extent of control.[4] By far the most significant factor is the extent of control which is reserved by the employer.[5] Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor.[6] Although it has been held that Congress does not intend a person to be considered an employee within the meaning of the Social Security Act unless he is subject to some sort of control and supervision, no general rule can be stated defining the control required to bring one within the scope of the legislative intent.[7] One must look to the purpose of the act to determine who shall be covered by it. Its framers planned to extend the benefits of the legislation to as wide a class as could be comprehended within the term "employee," rather than to limit the scope of the act by narrowly restricted definitions.[8] A number of cases have held that the Social Security Act recognizes the common-law definition of "independent contractor" and excludes such relationship from the burden of the tax;[9] so that

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[1]RESTATEMENT, AGENCY §§2, 220 (1933).

[2]Baltimore Boot & Shoe Mfg. Co. v. Jamar, 93 Md. 404, 49 Atl. 847 (1901).

[3]Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188 (1890).

[4]Reed v. Rideout's Ambulance, 212 Ala. 428, 102 So. 906 (1925).

[5]Metcalf v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172, 70 L. Ed. 384 (1926); McGowan v. Lazeroff, 148 F.2d 512 (C. C. A. 2nd 1945); Glenn v. Standard Oil Co., 148 F.2d 51 (C. C. A. 6th 1945); Radio City Music Hall Corp. v. United States, 135 F.2d 715 (C. C. A. 2nd 1943); Grace v. Magruder, 148 F.2d 679 (App. D. C. 1945); Yellow Cab Co. v. Magruder, 49 F. Supp. 605 (D. C. Md. 1943), *aff'd*, 141 F.2d 324 (C. C. A. 4th 1944); Fidelity & Casualty Co. v. Industrial Accident Comm'n, 191 Cal. 404, 216 Pac. 578 (1923); Northwestern Mut. Life Ins. Co. v. Tone 125 Conn. 183, 4 A.2d 640 (1939); Murray's Case, 130 Me. 181, 154 Atl. 352 (1931), Fox Park Timber Co. v. Baker, 53 Wyo. 467, 84 P.2d 736 (1938); see Note, 75 A. L. R. 725 (1931).

[6]Metcalf v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172, 70 L. Ed. 384 (1926).

[7]Deecy Products Co. v. Welch, 124 F.2d 592 (C. C. A. 1st 1941).

[8]United States v. Vogue, Inc., 145 F.2d 609 (C. C. A. 4th 1944); Willard Sugar Co. v. Gentsch, 59 F. Supp. 82 (N. D. Ohio 1944).

[9]Glenn v. Standard Oil Co., 148 F.2d 51 (C. C. A. 6th 1945); United States v Mutual Trucking Co., 141 F.2d 655 (C. C. A. 6th 1944); American Oil Co. v. Fly,

generally, when an individual is subject to the control or direction of another merely in the result to be accomplished by the work, and not as to the means and methods used, he is an independent contractor.[10]

The Supreme Court, in recent decisions, has rejected control as the sole test when applied to the Social Security Act.[11] The trend is that the employer-employee relationship, which determines liability for employment taxes under the act, is not to be determined *primarily* by the control which the alleged employer may exercise over details of services rendered by the worker; but the permanency of the relation, the skill required, the investment in facilities for work, and the opportunities for profit or loss from the activities are additional factors that should also be considered.[12] Although the ordinary and generally accepted meaning of the language used in this statute and in its interpretative regulations are not to be ignored,[13] application of the term "employee" to social security legislation should be construed in the light of the end to be attained.[14]

The taxes in dispute in the instant case were assessed on the total amount paid to the supervisors, although, in turn, the greater part was paid to their workmen as wages, and the supervisors paid social security taxes as employers themselves. When this is coupled with the fact that the taxpayer reserved no right to hire, control, or discharge the workmen, paying them no wages and owing them none, it is obvious that the court has extended the employer-employee relationship, by applying the "dependency upon the industry" doctrine, so as to allow coverage to an unprecedented degree.

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135 F.2d 491 (C. A. A. 5th 1943); 26 CODE FED. REGS. §400.205 (employed individuals).

[10]Glenn v. Standard Oil Co., 148 F.2d 51 (C. C. A. 6th 1945).

[11]Bartels v. Birmingham, 332 U. S. 126, 67 Sup. Ct. 1547, 91 L. Ed. 1947 (1947). United States v. Silk, 331 U. S. 704, 67 Sup. Ct. 1463, 91 L. Ed. 1757 (1947).

[12]Bartels v. Birmingham, 332 U. S. 126, 67 Sup. Ct. 1547, 91 L. Ed. 1947 (1947).

[13]Bartels v. Birmingham, 332 U. S. 126, 67 Sup. Ct. 1547, 91 L. Ed. 1947 (1947); Metcalf v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172, 70 L. Ed. 384 (1926); Latimer v. United States, 52 F. Supp. 228 (D. C. Cal. 1943); 26 CODE FED. REGS. §400.205 (employed individuals).

[14]See note 11 *supra*.