

[J-70A-D-2013][M.O. – Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ERNEST & BEVERLY WIRTH,	:	No. 82 MAP 2012
	:	
Appellants	:	Appeal from the Order of
	:	Commonwealth Court at No. 424 FR
v.	:	2008 dated 8/16/12 overruling the
	:	exceptions to the 1/3/12 order and
	:	affirming in part the PA Board of
	:	Finance and Revenue order dated
COMMONWEALTH OF PENNSYLVANIA,	:	4/25/08 at No. 0619432 and vacating
	:	and remanding the amount of tax to the
Appellee	:	Board for recalculation
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JOHN K. HOUSSELS, JR.,	:	No. 83 MAP 2012
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Appellant	:	Appeal from the Order of
	:	Commonwealth Court at No. 757 FR
v.	:	2008 dated 8/16/12 overruling the
	:	exceptions to the 1/3/12 order and
	:	affirming in part the PA Board of
	:	Finance and Revenue order dated
COMMONWEALTH OF PENNSYLVANIA,	:	9/19/08 at No. 0712902 and vacating
	:	and remanding the amount of tax to the
Appellee	:	Board for recalculation
	:	
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THOMAS SHAKER,	:	No. 84 MAP 2012
	:	
Appellant	:	Appeal from the Order of
	:	Commonwealth Court at No. 932 FR
v.	:	2008 dated 8/16/12 overruling the
	:	exceptions to the 1/3/12 order and
	:	affirming in part the PA Board of
	:	Finance and Revenue order dated
COMMONWEALTH OF PENNSYLVANIA,	:	12/19/08 at No. 0813407 and vacating
	:	and remanding the amount of tax to the
Appellee	:	Board for recalculation

ROBERT J. MARSHALL, JR., Appellant v. COMMONWEALTH OF PENNSYLVANIA, Appellee	: No. 85 MAP 2012 : : : Appeal from the Order of : Commonwealth Court at No. 933 FR : 2008 dated 8/16/12 overruling the : exceptions to the 1/3/12 order and : affirming in part the PA Board of : Finance and Revenue order dated : 12/19/08 at No. 0811195 and vacating : and remanding the amount of tax to the : Board for recalculation : : : : SUBMITTED: August 19, 2013
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DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: June 17, 2014

I have much difficulty with the majority’s assertion that, upon foreclosure, the outstanding balance on nonrecourse debt associated with a mortgage unambiguously results in either an “amount realized” or “[n]et gains or income from the disposition of property,” under Section 303 of the Tax Reform Code of 1971. See Majority Opinion, slip op. at 27-32 & n.18.¹ Indeed, the federal tax case upon which the majority rests its

¹ With reference to the circumstances before the Supreme Court of the United States in Commissioner of Internal Revenue v. Tufts, 461 U.S. 300, 103 S. Ct. 1826 (1983), one commentator puts it this way: “How, one may ask, can the ‘fair market value’ of a nonrecourse loan, secured by a \$1.4 million property, be \$1.85 million? How can the taxpayer have realized \$1.85 million on being relieved of the loan, when he simply could have defaulted on the loan and surrendered a \$1.4 million property?” Michael Livingston, Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes, 51 TAX L. REV. 677, 693 (1996); accord John F. Coverdale, Text As Limit: A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. 1501, 1552 (1997) (“There is . . . no way in which the language Congress enacted can plausibly be read to treat the entire (continued...)”)

decision, Commissioner of Internal Revenue v. Tufts, 461 U.S. 300, 103 S. Ct. 1826 (1983), and its predecessor Crane v. Commissioner of Internal Revenue, 331 U.S. 1, 67 S. Ct. 1047 (1947), have been widely regarded as foregoing a plain-meaning approach to statutory interpretation in favor of a non-textual construction of the Internal Revenue Code.² Along these lines, the Tufts Court itself articulated its holding in terms of an extension of previous precedent (Crane) and an adoption of an administrative construction which the Court determined “cannot be deemed unreasonable.” Tufts, 461 U.S. at 319, 103 S. Ct. at 1832; see also id. at 308 n.5, 103 S. Ct. at 1831 n.5 (expressing that the Court’s construction of the statute was not a foregone conclusion, as the Court might have been amenable to considering other approaches if “Crane were

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amount of a nonrecourse mortgage as part of the amount realized when the remaining balance of the mortgage exceeds the value of the property.”). Put otherwise, it is very difficult to say that there is “gain” or “income” in “relief” from personal (or, here, partnership) liability which never lay in the first instance.

² See, e.g., Robert A. Green, Justice Blackmun’s Federal Tax Jurisprudence, 26 HASTINGS CONST. L.Q. 109, 145 (1998) (explaining that Tufts’ rationale is “impossible to reconcile” with the language of the Code”); Coverdale, A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. at 1550-56 (characterizing Tufts as “anti-textual” and explaining that “[t]he Tufts Court did not attempt to reconcile its holding [that the outstanding amount of a non-recourse mortgage obligation must be included among assets realized upon disposition of the property] with the statutory language that directs that gain or loss is calculated by subtracting basis from the amount realized from the disposition of the property and defines ‘amount realized’ as the cash or other property received from the sale. In fact, ‘no such explanation is possible.’”); id. at 1529 (referencing Tufts as exemplifying “the pernicious tendency of courts interpreting the Code to ignore Congress’s commands to achieve the results they consider desirable.”); Livingston, Practical Reason, 51 TAX L. REV. at 703 (couching Tufts as as embodying a “nonliteral” construction); Lawrence Zelenak, Thinking About Nonliteral Interpretations of the Internal Revenue Code, 64 N.C. L. REV. 623, 625 (1986) (“One might conclude from Tufts that the Court prefers to deal with conflicts between Code language and Code logic by pretending that the conflicts do not exist.”).

not on the books”). An explanation subject to such reservations and conditions can hardly be said to be in the nature of plain-meaning implementation.

Finding that neither Tufts nor the majority’s present decision embracing it embodies straightforward statutory interpretation, I believe this appeal reflects the debate concerning whether the appropriate judicial role in the tax arena should be limited to ordinary statutory interpretation, or whether the courts should undertake a more direct role in implementing tax policy. See, e.g., Coverdale, A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. at 1504 (“Antitextual interpretations are not peculiar to tax, but they occur in tax with unusual frequency.”). One commentator encapsulated some of the competing positions as follows:

One of the classic scenarios in tax adjudication involves a conflict between the language of the [Internal Revenue] Code and the “tax logic” or policy of the case. There is a pattern to these cases: The “logical” or policy argument typically favors the government and is supported by major tax scholars, while the literal language usually favors the taxpayer and is cited by practicing lawyers. Proponents assert that the logical argument is self-evident and unavoidable, with dire consequences (including revenue losses) if the court fails to adopt the argument. The cases thus form a sort of statutory interpretation equivalent to the “form and substance” doctrine applied to tax transactions: The statute (or so the argument runs) may appear to say A, but must be interpreted to say B, if the foundations of tax law are to be preserved and undesirable consequences avoided.

Livingston, Practical Reason, 51 TAX L. REV. at 691 (footnotes omitted);³ accord Coverdale, A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. at 1501

³ Notably, the author identifies Crane and Tufts as “[a]rguably the most famous example[s] of tax logic,” implemented by the judiciary, as contrasted with ordinary application of principles of statutory construction. Id. at 691.

“Courts frequently interpret the Internal Revenue Code in ways that fall outside the plausible range of meanings of its language taken in context. They usually adopt such antitextual interpretations of the Code in an effort to close loopholes and achieve results in keeping with their perceptions of how the Code is intended to work.”).

For my own part, I am on record as favoring a more restrained role for the judiciary in matters of statutory interpretation across the board, including the tax-law arena. I am of this view, because I believe that such approach demonstrates appropriate respect for separation of powers, encompassing an appreciation for the General Assembly’s superior resources in policymaking ventures.⁴ Furthermore, taxpayers should be afforded sufficiently clear, advance guidance regarding the reach of Pennsylvania’s taxing regime so that they may order their personal and business affairs appropriately.⁵ Were the Court to establish and enforce a sharper line of

⁴ See, e.g., Official Comm. of Unsecured Creditors of Allegheny Health Educ. and Research Found. v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 301 & n.27, 989 A.2d 313, 333 & n.27 (2010) (referencing the broader tools available to the legislative branch in making social policy judgments, such as policy hearings and comprehensive investigations); Naylor v. Twp. of Hellam, 565 Pa. 397, 408, 773 A.2d 770, 777 (2001) (recognizing the General Assembly’s superior ability to examine social policy issues and determine legal standards so as to balance competing concerns); Program Admin. Servs., Inc. v. Dauphin County Gen. Auth., 593 Pa. 184, 192, 928 A.2d 1013, 1017–18 (2007) (“[I]t is the Legislature’s chief function to set public policy and the courts’ role to enforce that policy, subject to constitutional limitations.”).

⁵ Professor Coverdale discusses this concern as follows:

The values of notice and predictability can outweigh achieving an optimal result in an individual case. These values are especially important in tax because, unlike most statutes that directly impact small numbers of people and that affect a restricted range of transactions, the tax laws influence a wide range of activities carried out by vast numbers of people. Often the decision to go forward with a transaction or not will depend on its tax treatment. In other

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demarcation relative to the policymaking function, such practice should encourage the legislative branch and administrative agencies (when imbued with an appropriate delegation of substantive lawmaking power, see, e.g., Borough of Pottstown v. Pa. Mun. Retirement Bd., 551 Pa. 605, 609-10, 712 A.2d 741, 743 (1998)), to give closer consideration to specific, emerging tax issues. Indeed, from my point of view, the absence of any particularized legislation or substantive regulations pertaining to the tax treatment of passive investors and non-recourse scenarios in Pennsylvania is surprising, particularly given the national attention focused on these subjects for several decades. See, e.g., David F. Shores, Deferential Review of Tax Court Decisions: Taking Institutional Choice Seriously, 55 TAX LAW. 667, 684, 690 (2002) (explaining that the Supreme Court of the United States' Crane decision set the stage for the aggressive growth of a tax shelter industry which widely undercut public confidence in the federal tax system).

I realize there would be collateral consequences associated with a decision holding that the personal income tax does not reach non-recourse debt associated with a mortgage upon foreclosure,⁶ and that, to the degree the essential choice must be

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cases, tax considerations will affect the form of the transaction. To plan their affairs intelligently, taxpayers need to know precisely the tax consequences of transactions.

Coverdale, A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. at 11524.

⁶ Certainly, the tax arena presents many pitfalls for policymakers given the potential range of spiraling collateral consequences attending different approaches. See, e.g., Shores, Deferential Review of Tax Court Decisions, 55 TAX LAW. at 690 (commenting that taxation is “a field beset with invisible boomerangs” (quoting Arrowsmith v. Commissioner of Internal Revenue, 344 U.S. 6, 12, 73 S. Ct. 71, 75 (1952) (Jackson, J., dissenting)). For example, as observed, the Crane decision is credited with spawning widespread pernicious tax-avoidance practices premised on detachment of tax benefits (continued...)

between extremes, the majority's approach of recharacterizing non-recourse obligations as income may represent the better tax policy.⁷ Still, there are strong competing policies at stake, *i.e.*, the desire to implement the best available tax policy versus the virtues of judicial adherence to principled means of statutory interpretation consistent with the structure of our democratic form of government. Accord Coverdale, A Plea for a Decent Respect for the Tax Code, 71 TUL. L. REV. at 1506-07 (opining, while recognizing that refusal to adopt antitextual constructions may lead to undesirable results in individual cases, such restraint "reflects the proper roles of the legislature and the courts under our democratic constitutional system, it respects the distinctive

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from economic ownership. See id. at 690 ("Perhaps no single event has done more to undercut the public's confidence in the federal income tax system than did the aggressive growth of tax shelter investments in the 1960's and 70's. Although congressional inaction is largely to blame, a fair share of the blame should lie at the feet of the Supreme Court's Crane decision and [the circuit court's] intentionalist interpretation that inspired it.").

⁷ Even so, it is difficult to overlook the apparent inequity in Appellants' situations. As they explain with reference to Appellant Marshall:

The partnership owned commercial real estate in Pennsylvania. The lender foreclosed on the property; the partnership lost the real estate; and the partnership liquidated as a result. The partnership and the partners received nothing upon foreclosure. The Pennsylvania Department of Revenue . . . took the position that the taxpayer realized a gain on the foreclosure in an amount more than 25 times what the taxpayer invested in the partnership and assessed [personal income tax] in an amount more than 75% of his investment. This result defies logic.

Brief for Appellants at 6. It must be acknowledged, at all events, that the one-size-fits-all application of the Tufts approach adopted by the majority functions as a particularly blunt instrument.

characteristics of the Code, and it promotes the values of certainty and predictability that are very important when dealing with tax statutes.”).

In summary, I find no basis in any Pennsylvania enactment or substantive regulation for recharacterizing an outstanding balance on nonrecourse debt associated with a mortgage as an “amount realized” or “[n]et gains or income from the disposition of property,” upon foreclosure. Furthermore, I would not engraft a non-textual federal tax overlay onto the Pennsylvania personal income tax regime. To the degree that collateral consequences would attend such decision, I would clarify that it is the responsibility of the General Assembly and/or the Department of Revenue to address these in a timely fashion, providing reasonable certainty to taxpayers. In terms of the appropriate judicial role, this should be limited to principled interpretation (or construction in the face of any ambiguities) of the existing statutes and valid substantive regulations.