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United States Court of Appeals,

Eleventh Circuit.

Richard A. CHILDS, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

Mimi P. CHILDS, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

John C. SWEARINGEN, Jr., and Suzanne N. Swearingen, Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

Ben B. PHILIPS, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

No. 95-8762.

December 18, 1995.

On Appeal from the Decisions of the United States Tax Court

Reply Brief for the Appellant

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***2** The issue in this appeal is whether taxpayers' right to receive attorney's fees in the form of annuity payments as the result of the settlement of personal injury litigation constituted "property" within the meaning of I.R.C. § 83. Both the Tax Court (Doc. 80 at 23) and taxpayers (CBr. at 14; *see* SPBr. at 18)[FN1] agree with our view that a promise to pay money in the future is "property," for purposes of I.R.C. § 83, if it is "funded." *See* Treas. Reg. § 1.83-3(e). As we explained in our opening brief (pp. 25-27), taxpayers' clients (*i.e.,* Mrs. Jones in her

three capacities--individually, on behalf of Garrett, and as administratrix of Mr. Jones's estate) received legal services from taxpayers on a contingent fee basis, and Mrs. Jones satisfied her obligation to pay legal fees to taxpayers upon the settlement of her personal injury suits in part by transferring to taxpayers a portion of the rights that she acquired in the settlements to receive payments in the future from the liability insurers of the defendant. Thus, we pointed out (p. 26) that taxpayers received from Mrs. Jones an asset, and (p. 28) that the transferred asset--the contractual right to receive future payments from an insurance company--was a type of asset that has repeatedly been treated as property in the field of employee compensation. In the alternative, we explained (pp. 26-27) that if taxpayers were deemed to have received a promise ***3** from Mrs. Jones, the promise was funded, even under the funding standard enunciated by the Tax Court, by the assignment to taxpayers of the liability insurers' promises to pay in the future. We further explained that even if taxpayers were deemed to have received the promises of the liability insurers (rather than the promise of Mrs. Jones) to make future payments to them, the insurers' promises were funded, and therefore constituted property, by reason of the insurers' purchases of annuity contracts to fund their payment obligations, without regard to whether the annuity contracts were beyond the reach of the insurers' creditors (as in the Garrett case) or within the reach of the insurers' creditors (as in the Jones case).

> FN1. "CBr." references are to the answering brief of taxpayers Childs. "SPBr." references are to the answering brief of taxpayers Swearingen and Philips.

Taxpayers contend that our position is wrong and that the Tax Court's decision was correct. But, as we shall explain, taxpayers' arguments lack merit.

1. The principal flaw in the reasoning both of taxpayers and of the Tax Court lies in the misplaced reliance on and mistaken application of the so-called "economic benefit doctrine." Taxpayers Childs explicitly rely on the economic benefit doctrine--indeed, they assert that the application of I.R.C. § 83 in this case would "create an unwarranted extension of the economic benefit doctrine" (CBr. 32)--and, as we shall explain, the approaches of the Tax Court and of taxpayers Swearingen and Philips similarly depend on that doctrine.

The most commonly used methods of tax accounting are the accrual method (used predominantly by businesses) and the cash receipts and disbursements method (used predominantly by ***4** individual taxpayers). In simplest terms, an accrual method taxpayer reports income in the year in which it was earned, whether or not the income actually was received in that year, while a cash method taxpayer reports income in the year in which it was received, *See* Treas. Reg. § 1.451-1(a). As a practical matter, the time as of which a payment is to be made may be prearranged, so that the timing of income under the cash method is subject to manipulation. The economic benefit doctrine--like the related, but not identical, doctrines of constructive receipt and cash equivalency--is a non-statutory doctrine developed to remedy attempts by cash method taxpayers to defer income to a later year. John F. Cooper, *The Economic Benefit Doctrine: How an Unconditional Right to a Future Benefit Can Cause a Current Tax Detriment,* 71 Marq. L. Rev. 217, 218-220 (1988). The doctrine has been said to have arisen from dictum in *Commissioner v. Smith,* 324 U.S. 177 (1945). Cooper, 71 Marq. L. Rev. at 221. Under the doctrine, where an obligor irrevocably transferred money beyond the reach of his creditors into a fund in which the obligee/taxpayer to be benefited had vested rights, the taxpayer was said to have received the economic benefit of the transferred money and, therefore, to be currently taxable thereon even though he had not actually or constructively received it. *See* Cooper, 71 Marq. L. Rev. at 222-223; Gen. Couns. Mem. 33733 (Nov. 21, 1966). Although the economic benefit doctrine developed in the context of the employer/employee relationship, it has found application in other areas, such as personal injury awards and escrow arrangements on sale. Cooper, ***5**71 Marq. L. Rev. at 221, 233. The concept of economic benefit has had far less independent significance in the

field of employee compensation since the enactment in 1969 of I.R.C. § 83, which, according to one commentator, "both codifies and expands the common-law notions of economic benefit as they relate to property transferred in connection with the performance of services." Patricia Ann Metzer, *Constructive Receipt, Economic Benefit and Assignment of Income: A Case Study in Deferred Compensation,* 29 Tax L. Rev. 525, 552 (1974). One aspect of the economic benefit doctrine found its way into the regulations' definition of "property" for purposes of I.R.C. § 83 (Treas. Reg. § 1.83-3(e); emphasis added):

For purposes of section 83 and the regulations thereunder, the term "property" includes real and personal property other than either money or an unfunded and unsecured promise to pay money or property in the future. *The term also includes a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account.*

Thus, as the emphasized sentence reflects, the term "property," for purposes of I.R.C. § 83, includes--but is not limited to--a beneficial interest of the type that clearly would fall within the reach of the economic benefit doctrine if the taxpayer were granted a nonforfeitable interest therein.[FN2]

FN2. Contrary to the view of taxpayers Childs (CBr. at 24-25), the emphasized second sentence of Treas. Reg. § 1.83-3(e) does not purport to provide a standard for determining whether a promise is funded or unfunded. Rather, its plain language merely clarifies that certain beneficial interests in assets constitute property.

***6** As noted in our opening brief (pp. 22-23), the Tax Court distilled its formulation of a standard for determining whether a promise is funded from three cases, *Sproull v. Commissioner,* 16 T.C. 244 (1951), *aff'd,* 194 F.2d 541 (6th Cir. 1952); *Centre v. Commissioner,* 55 T.C. 16 (1970); *Minor v. United States,* 772 F.2d 1472 (9th Cir. 1985). (Doc. 80 at 23-26.) Those were among the leading economic benefit doctrine cases. *See* Cooper, 71 Marq. L. Rev. at 238-240, 244-249. The Tax Court drew from those cases the following standard for determining when the funding of a promise occurs (Doc. 80 at 26):

[F]unding occurs when no further action is required of the obligor for the trust or insurance proceeds to be distributed or distributable to the beneficiary. Only at the time when the beneficiary obtains a nonforfeitable economic or financial benefit in the trust or insurance policy is the provision for future payments secured or funded. However, if the trust or policy is subject to the rights of general creditors of the obligor, funding has not occurred.

The Tax Court's formulation clearly is, in essence, merely a restatement of the economic benefit doctrine. In applying that standard, the Tax Court in effect applied the economic benefit doctrine to the facts of this case in holding that, since taxpayers never acquired any vested interest in the funding assets here--*i.e.,* the annuity policies purchased to fund the liability insurers' payment obligations to taxpayers--the insurers' promises to pay were not funded. (Doc. 80 at 27.) ***7** Taxpayers' analysis is virtually identical to that of the Tax Court and thus also depends on the economic benefit doctrine: taxpayers contend that the promises to make future payments to them were not funded under any view of the case because taxpayers did not have a nonforfeitable interest in the funding assets (the annuity policies). (CBr. at 23-24; SPBr. at 24-25, 27.)

The Tax Court's decision is erroneous, and taxpayers' arguments in support thereof lack merit, because the economic benefit doctrine simply does not apply here. Rather, the case is controlled by I.R.C. § 83 and the regulations thereunder, and there is nothing in either of those to suggest that they are to be interpreted in light of the economic benefit doctrine. The Tax Court explained its reliance on *Sproull, Centre,* and *Minor* as the source of a test for determining whether a promise is funded by stating that those cases addressed "the question of when an

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obligation was funded." (Doc. 80 at 23-24.) But, contrary to the Tax Court's statement, those cases did *not* involve a determination of whether an obligation was funded or otherwise interpret the terms "funded" or "unfunded." Rather, they were economic benefit doctrine cases and, as described more fully in our opening brief (pp. 22-23), those cases addressed the altogether different question whether, in the circumstances there presented, the taxpayer could be said to have received the economic benefit of, and therefore be taxable with respect to, a certain fund or asset in a tax year in which the taxpayer had not yet actually received the fund or asset.

***8** The cases on which the Tax Court relied further are inapposite because the question presented here has nothing to do with whether taxpayers received the economic benefit of the annuity policies--the funding assets here--or, for that matter, of any other property that was not actually transferred to them. To the contrary, taxpayers here *actually received* contract rights to receive future payments from someone other than the service recipient, so there is no occasion to consider whether taxpayers received the economic benefit of those contract rights so as to be subject to taxation under the economic benefit doctrine. The issue here is whether the contract rights--promises of future payment--that taxpayers *actually received* constituted "property" that is includible in income under I.R.C. § 83 if the remaining conditions of that statute have been satisfied. As already stated, under Treas. Reg. § 1.83-3(e), a promise to pay money in the future is property if it is funded.

Under taxpayers1 view, the economic benefit doctrine would apply in determining whether taxpayers received an economic benefit with respect to the funding assets here, *i.e.,* the annuity policies purchased by the liability insurers to fund their payment obligations. According to taxpayers, their having such a beneficial interest is necessary in order for the insurers' promises of payment to be funded. Taxpayers' insistence upon an interest in the funding assets is misconceived, however, because Treas. Reg. § 1.83-3(e) indicates that a funded promise of future payment is property. The receipt of a funded promise of future payment obviously is something ***9** quite different from the receipt of an interest in the money (or other asset) with which the promise is funded. There is no support in legal authority or logic for the general proposition that a promise (made by someone other than the recipient of the promisee's services) to pay money is funded only if the promisee also is granted a nonforfeitable interest in the asset with which the promise is funded.[FN3] That is nevertheless what taxpayers here contend and what, in effect, the Tax Court held. To the contrary, as we explained in our opening brief (pp. 34-36), in ordinary and statutory parlance, an obligation is funded if assets are set aside, appropriated, or invested in a funding asset to provide a source of funds with which to pay the obligation as it becomes due. It is clear that where (as here) there exists what may properly be described as a funding asset with respect to a promise, then the promise is funded, without regard to whether the promisee has an interest in the funding asset.

FN3. As noted in our opening brief (pp. 38-39), the insurers' promises were not made in the context of promises of future payments to their own employees; the policy of insuring that employees actually receive promised pension payments has led to the requirement that employers not have beneficial ownership of the money and assets with which their pension obligations are funded.

2. As noted, it is the Commissioner's principal position that taxpayers received from Mrs. Jones an asset--the contractual ***10** right to receive future payments from an insurance company--of a type that is itself property, and that if, in the alternative, taxpayers were deemed to have received a promise of future payment from Mrs. Jones, the promise was funded (even under the Tax Court's standard) by Mrs. Jones's assignment to taxpayers of a portion of her right to receive future payments from the insurers. Taxpayers Swearingen and Philips contend in response that our position is flawed in that it "assumes there can be only one obligor" for purposes of I.R.C. § 83. (SPBr. at 22.) They further interpret our position as being that only the recipient of services can be the obligor for purposes of I.R.C. § 83. (SPBr. at 23.)[FN4]

FN4. Taxpayers Childs contend (CBr. at 27) that our position is a surreptitious reprise of the constructive receipt argument that the Commissioner made below but, as noted in our opening brief (p. 15 n.7), is not reasserted on appeal. Taxpayers Childs are wrong. Our position is that taxpayers *actually received* a contract right to future payments; we do *not* contend on appeal that taxpayers should be taxed with respect to the constructive receipt of any property.

Taxpayers Swearingen and Philips misinterpret out position. We do not assert either that there can be only one transferor of property for purposes of I.R.C. § 83 or that only the recipient of services ever can be the transferor. Rather, our point is that, as a matter of fact, what happened here is that Mrs. Jones transferred property to taxpayers in satisfaction of her ***11** obligation to pay legal fees to them. As we explained in our opening brief (pp. 25-26), Mrs. Jones (in her three capacities--individually, on behalf of Garrett, and as administratrix of Mr. Jones' estate) was the only person who owed anything to taxpayers; she was obligated to pay legal fees of specified percentages of the gross amounts that taxpayers recovered on her behalf. (Exs. 1-A, 54-BB.) The various agreements settling the Garrett and Jones cases and setting up the structured settlements provided a mechanism for satisfying Mrs. Jones's promises to taxpayers. Instead of having the liability insurers pay money to Mrs. Jones, who in turn would pay a portion to taxpayers, the parties arranged to have the liability insurers make current and future payments directly to taxpayers. That this is essentially what occurred here is made explicit by the language of the release agreement in the Jones litigation, which describes the future payments to taxpayers as "additional payments otherwise payable to Annette Jones" that "at her direction are to be made to her attorneys in discharge of all obligations of the parties executing this release to pay attorney's fees" (Ex. 35-AI at 8), and, further, as being "in discharge of her obligation for attorneys fees" (Doc. 35-AI at 9). Although not specifically spelled out in that manner in the Garrett release, the substance of that transaction was identical.

Furthermore, as stated on our opening brief (p. 28), it is clear that the promise of an insurance company to make payments in the future (such as the promises that taxpayers here received) is property the receipt of which may be a taxable event. Indeed, ***12** as the Tax Court recognized below (Doc. 80 at 22), a contract right is property for purposes of I.R.C. § 83 (citing *Montelepre Systemed, Inc. v. Commissioner,* 956 F.2d 496 (5th Cir. 1992)). And it can not be gainsaid that the contractual undertaking of a financial institution to make payment in the future (such as a bank's certificate of deposit or an insurance company's annuity contract) is generally viewed as a financial asset. In this regard, it has been held that the receipt of an insurance policy, or of a beneficial interest in such a policy, would result in the inclusion in income of the value of the policy. Thus, in *Centre v. Commissioner,* 55 T.C. 16 (1970), the value of an insurance policy, of which the employer was owner and beneficiary, that had been purchased by the employer to fund a deferred compensation liability to an employee was held to be taxable as income to the employee when the policy was assigned to him after his termination. In *Ward v. Commissioner,* 159 F.2d 502 (2d Cir. 1947), the Second Circuit held that the value of an assignable annuity contract for the taxpayer's benefit purchased and delivered to the taxpayer by his employer as additional compensation was taxable income to the taxpayer in the year the taxpayer received the policy. And, in *United States v. Drescher,* 179 F.2d 863 (2d Cir. 1950), *cert. denied,* 340 U.S. 821 (1950), the taxpayer's employer had purchased, as additional compensation to the taxpayer, a single premium annuity policy naming the taxpayer as the annuitant, but the employer retained possession of the policy. The policy gave the taxpayer, as annuitant, the ***13** right to accelerate the date when payments would commence under the policy, but he could not exercise that right while the policy remained in his employer's possession. The taxpayer could designate a beneficiary, but the annuity policy was not assignable and had no cash surrender or loan value. On those facts, the court of appeals held that the taxpayer had received taxable income to the extent of the value of the annuity policy in the year of its purchase, saying (*Drescher,* 179 F.2d at 865):

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It cannot be doubted that in 1939 the plaintiff received as compensation for prior services something of economic benefit which he had not previously had, namely, the obligation of the insurance company to pay money in the future to him or his designated beneficiaries on the terms stated in the policy. That obligation he acquired in 1939 notwithstanding the employer's retention of possession of the policy and notwithstanding its non-assignability. The perplexing problem is how to measure the value of the annuitant's rights at the date he acquired them.

In a related vein, in *Goldsmith v. United States,* 586 F.2d 810, 821-822 (Ct. C1. 1978), the court held that although other unsecured elements of a deferred compensation plan were not currently taxable, the taxpayer received an economic benefit from, and therefore was taxable on the value of, promises in the nature of death or disability insurance coverage made to the taxpayer by his employer, even though the employer was not an insurance company.

As we pointed out in our opening brief (pp. 28, 37), the contract rights that taxpayers received in the settlements of the Garrett and Jones cases essentially amounted to annuity contracts or policies, that is, the contractual undertakings of an insurance company to pay an annuity (*i.e.,* a determinable series of money payments in the future). Those rights were themselves ***14** property, and their value, therefore, is includible in taxpayers' incomes as provided in I.R.C. § 83.

3. Taxpayers disagree with our looking to Mrs. Jones's transfers (or, alternatively, promises) as the object of our analysis. They contend instead that the proper focus of analysis is on the liability insurers' obligations to make future payments to taxpayers, and that those obligations were not funded under any view of the case because taxpayers did not receive a nonforfeitable interest in the funding assets (the annuity policies). (CBr. at 23-24; SPBr. at 24-25, 27.) But, even apart from its misplaced reliance on the economic benefit doctrine, taxpayers' position is defective because it is founded on an internally inconsistent, anomalous line of reasoning.

It is necessarily implicit in their argument that taxpayers would agree that the liability insurers' promises were funded, and that taxpayers therefore had received property, if taxpayers had received an interest in the funding assets. On the facts here, however, there is no reasoned basis on which to distinguish between the obligations to be funded, which are the promises of an insurance company to make specified payments in the future, and the funding assets-- annuity policies--which likewise are the promises of an insurance company to make specified payments in the future. Taxpayers' assertion that contract rights to future payments from insurance companies (the liability insurers here, Georgia Casualty and Stonewall) are not property can not be reconciled with their evident assertion that substantially identical contract rights against different insurance companies ***15** (the issuers of the annuity policies that are the funding assets here, Executive Life and Manufacturers Life) are property.

Furthermore, the test for funding endorsed by taxpayers would not be satisfied even if taxpayers had a nonforfeitable interest in the annuity policies that were the funding assets here. In fact, taxpayers' test could virtually never be satisfied. In the circumstances here, if taxpayers had been granted an interest in the annuity policies, they would still be in the position to contend that they had not received property because they had received only the unfunded promise of the insurance company that issued the policy, since they would have no vested interest in the assets from which the insurance company would make the annuity payments and such assets would be subject to the claims of the issuing insurance company's general creditors. Indeed, taxpayers have made just such an argument with respect to the qualified assignment to First Executive-- which assignment resulted in yet another insurance company's being obligated to make payments to taxpayers--with respect to the Garrett settle-

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ment. (CBr. at 24; SPBr. at 23, 27.)

Under taxpayers' view of the Tax Court's funding standard, a promise of future payment seemingly could only be funded if the money with which to pay the obligation were placed in an irrevocable escrow or trust--rather than invested in the promise of an insurance company to pay in the future--and the promisee were granted a non-forfeitable interest therein. Even then, if the escrow or trust funds were then deposited in a bank, the same problem would arise, for the escrow or trust would then hold only ***16** the promise of the bank to repay, the initial promisee would have no interest in the assets out of which the bank would repay, and those assets would be subject to the claims of the bank's creditors. In short, the Tax Court's funding standard, as taxpayers evidently interpret it, would be virtually impossible to satisfy. It simply can not be correct.

4. Taxpayers contend (CBr. at 17-18; SPBr. at 28-29) that the Commissioner's position in this case is inconsistent with the position taken in Rev. Rul. 79-220, 1979-2 C.B. 74. Contrary to taxpayers' contention, that ruling is consistent with, and indeed supports, the Commissioner's position here.

The Internal Revenue Code provides that the amount of damages received (whether by suit or agreement) on account of personal injuries is excludable from the recipient's income. I.R.C. § 104(a)(2). In Rev. Rul. 79-220, the Commissioner ruled that where the insurer of a tortfeasor purchased and retained exclusive ownership of a single-premium annuity contract to fund specified future payments pursuant to settlement of a personal injury damage suit, the recipient of the payments could exclude the full amount of the payments from his gross income under I.R.C. § 104, and not merely the discounted present value of the payments.[FN5] The rationale of the ruling was that the exclusion ***17** under I.R.C. § 104 applied because the taxpayer "had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield that monthly payment." Rev. Rul. 79-220, 1979-2 C.B. at 75.

FN5. The holding of Rev. Rul. 79-220 has since been codified by an amendment to I.R.C. § 104(a)(2) that clarified that the income exclusion applies to damages received for personal injury "whether as lump sums or as periodic payments." Act of January 14, 1983, Pub. L. No. 97-473, § 101(a), 96 Stat. 2605.

We agree that taxpayers here, like the taxpayer involved in Rev. Rul. 79-220, received only the right to receive future payments from the liability insurers. We do not contend that taxpayers had the actual or constructive receipt or the economic benefit of the lump-sum amounts that were used to acquire the annuity policies that served to fund the payments to them. But what constitutes damages excludable from income under I.R.C. § 104 is a completely different question from what constitutes property that is includible in income under I.R.C. § 83. It is our position here that the contract right to receive a determinable series of future payments from an insurance company that is not the payee's employer or the recipient of the payee's services is "property," and that the value of such property is includible in taxpayers' incomes under I.R.C. § 83. Nothing in Rev. Rul. 79-220 suggests a conclusion to the contrary.

Taxpayers also contend (CBr. at 22; SPBr. at 29-30) that the Commissioner's position here is inconsistent with a series of IRS private letter rulings respecting so-called "rabbi trusts." Those rulings essentially apply the economic benefit doctrine to ***18** hold that an employee is not currently taxable with respect to amounts placed in trust by the employer as a source of funding nonqualified employee benefits where the trust assets remain subject to the claims of the *employer's* creditors. Taxpayers Swearingen and Philips conclude from the rulings that "it is clear that placing the obligor's assets beyond the reach of its creditors is a valid--and essential--part of the

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funding test for purposes of Code Section 83." (SPBr. at 30.)

Taxpayers Swearingen and Philips's reliance on the private rulings is misplaced. In the first place, as a matter of law, taxpayers may not properly use or cite such unpublished rulings as precedent. I.R.C. § 6110(j)(3); *American Ass'n of Christian Schools Vol. Emp. v. United States,* 850 F.2d 1510, 1515 n.6 (11th Cir. 1988). Further, the cited rulings do not address the precise question presented here. Although the rulings consider whether the employers' transfers of property into trust to fund nonqualified employee benefits are taxable to the employees, they do not go on to specifically consider whether the very making of the promises to pay such benefits to the employees constituted property for purposes of I.R.C. § 83 on which the employees might be taxed. And, in any event, the rulings are inapposite. The rulings relate to employee benefit plans, an area in which, as we noted in our opening brief (pp. 38-39), courts generally have held that, for a benefit plan (*i.e.,* an employer's promise to pay money in the future) to be funded, funding assets must be placed beyond the reach of the employer's creditors. The Commissioner's position has long been otherwise where the promise in question is ***19** that of someone other than the employer or service recipient. Thus, even before I.R.C. § 83 was enacted, the Commissioner ruled that where a health insurer who was not the service provider's employer promised to pay deferred compensation to the service provider (a physician) for services provided to an insured patient, the promise to pay in the future was currently taxable to the physician, even where the insurer did not set aside assets to fund its payment obligation. Rev. Rul. 69-50, 1969-1 C.B. 140. *See also* Rev. Rul. 77-420, 1977-2 C.B. 172 (likewise holding that physician was currently taxable on receipt of promise of health insurer to pay physician in the future for services rendered to patient/subscriber, even where deferred payment agreement provided for a substantial risk of forfeiture to the insurer). The instant appeal does not involve an employee benefit plan. Further, neither the contract rights to future payments that taxpayers received, nor the annuity contracts that were to provide the money with which to make the promised future payments to taxpayers, were subject to the claims of creditors of taxpayers' "employer," *i.e.,* Mrs. Jones (in her various capacities).

5. In our opening brief (pp. 28-29), we pointed out that, under the plain language of I.R.C. § 83, whether a taxpayer's interest in something is forfeitable is a separate inquiry from whether the thing in which the taxpayer has an interest is "property," and that forfeitability is relevant only to determining the *time* as of which a taxpayer who receives property as payment for services must take the value of the property into ***20** income under I.R.C. § 83(a). In response, taxpayers Swearingen and Philips contend, evidently on the basis of the cases on which the Tax Court relied (*i.e., Sproull, Centre, and Minor*), that "[t]he concept of 'forfeitability' applies in determining whether what has been transferred is in fact 'property.' " (SPBr. at 25.)

Taxpayers Swearingen and Philips's contention lacks merit, and it is without support even in the authority on which they rely. Specifically, taxpayers Swearingen and Philips quote (SPBr. at 25-26) from *Minor* to the effect that in those cases in which an economic benefit has been found to have been conferred, "the employer's contribution has always been secured or the employee's interest has been nonforfeitable." *Minor,* 772 F.2d at 1474. The quoted passage from *Minor* is inapplicable here, however, and it clearly does *not* support the proposition that if a taxpayer receives a forfeitable interest in something, the thing in which he received the interest is not property. To the contrary, the quoted passage indicates only that unless a taxpayer receives a secured or nonforfeitable interest in something, he will not be deemed to have received the economic benefit thereof. As previously explained, however, the economic benefit doctrine does not apply to the determination whether something is property for purposes of I.R.C. § 83.

Thus, there is nothing in *Minor,* or the other cases to which taxpayers Swearingen and Philips refer, that purports to interpret I.R.C. § 83 as requiring a nonforfeitable interest as a prerequisite to the existence of property. The

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definition of "property" set forth in Treas. Reg. § 1.83-3(e) certainly does ***21** not suggest that the character of something as property is in any way affected by whether the taxpayer's interest therein is vested or subject to forfeiture. That is consistent, moreover, both with logic and with the language of I.R.C. § 83 which, as noted, makes the vested status of a taxpayer's interest--*i.e.,* the lack of a substantial risk of forfeiture--a factor in determining the time as of which the value of property received is to be included in the taxpayer's income. Since the Tax Court determined that the rights to future payments that taxpayers received did not constitute property, it did not address the question whether taxpayers' interests in those rights were subject to a substantial risk of forfeiture. The Tax Court will have to address that question on remand.

6. Taxpayers Childs contend (CBr. at 30-32) that, on the facts here, there was no "transfer" of property, for purposes of I.R.C. § 83, because taxpayers did not bear the risk of loss should the value of the property decline. Taxpayers Childs evidently view the annuity policies that served to fund the promises of future payments to them as the property in question, and they assert that the liability insurers bore the risk of loss in value of those policies because the insurers remained liable as guarantors of the payments to taxpayers. (CBr. at 30-31.)

This argument is patently erroneous. As we have repeatedly explained, the relevant property is composed of the contract rights to future payments from the liability insurers that taxpayers received in payment of their fees in connection with the Garrett and Jones cases. Taxpayers plainly bore the risk of ***22** loss with respect to both the possibility that the promised future payments would not be made to them and the possibility that the value of the future payments, if they were made, would be eroded by inflation. In any event, since the Tax Court determined that the rights to future payments that taxpayers received did not constitute property, it did not address the question whether, assuming that the contract rights are property, the property was transferred to taxpayers. Like the matter of forfeitability, the transfer question would have to be addressed by the Tax Court on remand.

7. Finally, taxpayers Childs contend that the Commissioner's position in this case, if accepted by the Court, would create an unwarranted extension of the economic benefit doctrine (CBr. at 32-33), and that cases of the sort presented here are more properly considered under the constructive receipt doctrine or cash equivalency doctrine (CBr. at 34). That argument is devoid of merit.

As we have explained (pp. 4-5, *supra*), the economic benefit doctrine, the constructive receipt doctrine, and the cash equivalency doctrine are non-statutory rules developed to address the problem created by the attempts of cash method taxpayers to defer income to a later year. Quite clearly, to the extent that I.R.C. § 83 applies, it controls the tax consequences of a transaction. Taxpayers Childs do not contend that any of the cases cited by them (CBr. at 33) in support of their argument addressed facts resembling those presented here. Moreover, none of the cited cases involved I.R.C. § 83-- indeed, all but one of ***23** the cited cases pre-date the enactment of that statute in 1969. The Commissioner's position here is no more than the proper application of I.R.C. § 83 to the instant facts. To the extent, if any, that the Commissioner's position here would alter the rule of any of the cases cited by taxpayers Childs, the change in the rule would be attributable to the provisions of I.R.C. § 83. The possibility that applying a statute might alter decisional rules that existed before the statute was enacted hardly warrants declining to apply the statute to situations within its ambit.

CONCLUSION

For the reasons set forth above and in our opening brief, the decisions of the Tax Court should be reversed, and these consolidated cases should be remanded to the Tax Court for further proceedings.

Richard A. CHILDS, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appel-

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lant. Mimi P. CHILDS, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant. John C. SWEARINGEN, Jr., and Suzanne N. Swearingen, Petitioners-Appellees, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant. Ben B. PHILIPS, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL
1995 WL 17057705 (C.A.11) (Appellate Brief)

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