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Taxation—Interest on "Overpayments"—Recovery of Interest on Voluntary Payments in Excess of Amount Due

opinion apparently is based upon the idea that the time element was the only material factor.[15] This, however, is a departure from the sound rule of *Sconce v. Jones,* holding that the time element is one, but not the only, type of evidence for proving the spontaneity of the statement.

R. H. E.

TAXATION—INTEREST ON "OVERPAYMENTS"—RECOVERY OF INTEREST ON VOLUNTARY PAYMENTS IN EXCESS OF AMOUNT DUE—[Federal].—On the date of federal estate tax and return were due, a thirty day extension for filing the return was granted, and the trustee sent a check for the estimated amount of the tax, which upon filing of the return was found to be excessive. The taxpayer sued for interest on the excess from the due date to the date of the refund. *Held:* This was a voluntary remittance based on the taxpayer's own estimate and not an "overpayment" within the meaning of the statute governing payment of interest. *Busser v. United States.*[1]

The Internal Revenue Act provides that "interest shall be paid upon any overpayment in respect of any internal revenue tax at the rate of six per cent per annum."[2] The Supreme Court has not yet determined the application of this statute to a factual situation similar to the principal case. The decisions of the lower federal courts have split into two lines of authority. In the case of *Moses v. United States,*[3] a district court held that such a voluntary remittance was a deposit rather than an overpayment, and that consequently the taxpayer could recover no interest on it.[4] The court reasoned that the payment was entirely voluntary, a benefit to the taxpayer, and an accommodation rather than a requirement by the government. Accordingly, it decided that the government should not have to pay interest, especially since the amount was based solely upon the taxpayer's estimate and since any excess was the result of his own inaccuracy. This view seems to be analogous to earlier state decisions on state tax laws,[5] although the

15. Brinkley v. United Biscuit Co. of America (Mo. 1942) 164 S. W. (2d) 325, 330.

1. (C. C. A. 3, 1942) 130 F. (2d) 537.
2. Internal Revenue Act (1928) 45 Stat. 876, c. 852, §614(a); 26 U. S. C. A. §3771(a).
3. (D. C. S. D. N. Y. 1939) 28 F. Supp. 817.
4. Moses v. United States (D. C. S. D. N. Y. 1939) 28 F. Supp. 817, 818. The court said that although it might regard the sum as a payment to the extent of the actual liability, any excess over that amount could not be considered a discharge of a valid obligation.
5. Cf. Socolow v. Murphy (1927) 219 App. Div. 184, 219 N. Y. S. 78, where the court held that a voluntary estimated payment permits more leisurely settlement to the benefit of the taxpayer, and that to allow interest would offer a convenient method for an executor to deposit funds. But note that there was no directly applicable statute in this case, and that the executor had not determined the amount for five years; it might well be inferred that interest could be allowed under different circumstances; Kaemmerling v. State (1924) 81 N. H. 405, 128 Atl. 6. No interest was allowed, but the statute in this case provided that the time for payment could be extended until the amount was determined, without any penalty or increased liability for the delay, and did not specifically provide for interest on the amount of the overpayment.

Moses case appears to be the first decided under the federal statute, and, considering the length of time the statute has been in operation, there have been surprisingly few decisions on the point by the federal courts. In *Atlantic Oil Producing Company v. United States*,[6] the Court of Claims allowed interest in a similar case, expressly refusing to follow *Moses v. United States*. Responding to the government's contention that the company had only made a deposit, the court in this case held that an "overpayment" meant a payment that more than satisfied the debt, and that the only requirement was that the payment be made "in respect of" the tax liability. The deposit was said to be a payment of a debt then due, the amount of which had not been ascertained.[7] The circuit court in the principal case chose the rule of the *Moses* case on the grounds that, first, since the time for the filing of the return had been extended, the payment was entirely voluntary and for the benefit and at the request of the taxpayer, and second, that if interest were allowed, money could be invested with the government intentionally, at attractive interest rates.

The instant case places the taxpayer in a peculiar position. Apart from statute, he could not recover interest[8] or even the overpayment itself.[9] Under the federal statutes, if he underpays or makes no payment until the return is filed, he is charged six per cent interest on the amount of the tax from the original due date until the time of payment.[10] But if he pays an amount which will surely cover the liability, by the rule of the principal case he is not entitled to any return upon the excess, though he has

6. (1940) 92 Ct. Cl. 441, 35 F. Supp. 766. Compare the statement here that there was an obligation, though the amount was uncertain (which caused it to be an "overpayment") with the view of the Moses case, note 4, supra.

7. In Busser v. United States (D. C. E. D. Penn. 1942) 45 F. Supp. 327, the lower court in the principal case, followed the Atlantic Oil Producing Co. case, adding that if an overpayment existed only where there was an exact knowledge of the amount due, overpayments would be rare, and also that since the government charged interest on underpayments, it should allow interest on overpayments. See Chicago Title and Trust Co. v. United States (D. C. N. D. Ill. 1941) 45 F. Supp. 323, where the tax as tentatively determined by the government was paid under protest to release a lien on the estate; the court distinguished the Moses case on the ground that it involved a voluntary payment, but recognized and approved the decision in the Atlantic case, though it was distinguishable on the same ground. Cf. Tserioni v. United States (1941) 94 Ct. Cl. 142, where the claimants alleged that the amount paid was a deposit, not subject to the statute of limitations, and the court held that it was not a deposit, citing the Atlantic case.

8. Tillson v. United States (1879) 100 U. S. 43; United States v. North Carolina (1890) 136 U. S. 211; See notes, 57 A. L. R. 357, 76 A. L. R. 1012, 112 A. L. R. 1183.

9. Elliot v. Swartwout (1836) 10 Pet. 137; United States v. Norton (1877) 97 U. S. 164; Railroad Company v. Commissioners (1878) 98 U. S. 541; Little v. Bowers (1890) 134 U. S. 547; Chesebrough v. United States (1904) 192 U. S. 253; Carr v. City of Memphis (C. C. A. 6, 1927) 22 F. (2d) 678.

10. Internal Revenue Act (1926) 44 Stat. 76, c. 27, §309(a)(1), as amended by (1935) 49 Stat. 1027, c. 829, §404; 26 U. S. C. A. §893(a)(1), (b)(1).

been precluded from the use of this money himself. Thus, the rule is extremely hard on the taxpayer. Moreover, as a matter of statutory interpretation, it seems that the language of the act favors the taxpayer's claim. Since the payment is in excess of the amount actually due, there is an "overpayment" within any fair definition of the word, and the statute should apply. The fact that the estimation is made by the taxpayer himself should be considered only when the overestimation is not in good faith. But the principal case has a firm practical basis. The fear of intentional overpayments by shrewd taxpayers is not purely imaginary. Due to economic changes the interest rate of six per cent prescribed by the statute, while not excessive at the time the statute was enacted,[11] is now well above normal interest rates. Such a rate, offered by the government, presents a particularly attractive investment. The real solution would thus seem to lie in an alteration of the statute so that it would allow interest either at a rate consonant with present conditions or at a "reasonable" rate which could vary with economic conditions. If this were done, the desire of the courts to avoid paying an excessive interest rate would not force them to the rather strained conclusion that such sums are not "overpayments"; then the statute's real purpose, to protect the taxpayer who pays his obligation (though the amount may be uncertain) from loss, could be served, without fear of abuse.

R. E. H.

WORKMEN'S COMPENSATION—ARISING "OUT OF" THE EMPLOYMENT—"SPECIAL HAZARD"—[Illinois].—Employees of defendant were working on hospital grounds on which there was a single water tap which was supplied from a public water system. Water was brought from this tap by bucket to the workmen by water boys employed by defendant. The employees and several other persons who drank water from this same tap contracted typhoid fever. The arbitrator and commission found that the employees, by drinking the contaminated water, furnished them by their employer, suffered accidental injuries arising "out of" their employment. *Held,* affirmed on appeal. *Permanent Construction Co. v. Industrial Commission.*[1]

An accidental injury arises "out of" the employment when there is apparent to the rational mind upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.[2] Under the majority view "the causative danger must be peculiar to the work and not common to the neighborhood."[3] The mere fact that the employee is in the neighborhood

11. May 29, 1928. 45 Stat. 876, c. 852, §614(a); 26 U. S. C. A. §3771(a).

1. (Ill. 1942) 43 N. E. (2d) 557.
2. Mazursky v. Industrial Commission (1936) 364 Ill. 445, 449, 4 N. E. (2d) 823, 825; Burroughs Adding Machine Co. v. Dehn (Ind. 1942) 39 N. E. (2d) 499; In re McNicol (1913) 215 Mass. 497, 102 N. E. 697; Adams v. Industrial Commission (1939) 65 Ohio App. 74, 29 N. E. (2d) 228; Ashbrook v. Industrial Commission (1939) 136 Ohio St. 115, 24 N. E. (2d) 33.
3. Central Illinois Public Service Co. v. Industrial Commission (1920) 291 Ill. 256, 126 N. E. 144; Permanent Construction Co. v. Industrial