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TAX—DEPENDENCY DEDUCTIONS FOR PARAMOURS—
Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979).

INTRODUCTION

In adhering to a constitutionally derived recognition of the states within the federal system, Congress has consistently deferred to the states in the regulation of marriage, family life and domestic affairs. In the application of the federal tax laws, Congress has demonstrated its respect for the individual states by the enactment of § 152(b)(5) of the Internal Revenue Code. This 1958 enactment denies a taxpayer an exemption for a dependent if the relationship between the claimed dependent and the taxpayer violates local law.

In Ensminger v. Commissioner, the United States Court of Appeals for the Fourth Circuit upheld a decision by the Commissioner of Internal Revenue that denied a dependency exemption for a live-in lover, because the relationship between the North Carolina taxpayer and his claimed dependent violated state law. This note will review the decision in Ensminger and will explore its implications.

THE CASE

Petitioner, a 28 year old man, shared his four room house in Siler City, North Carolina, in 1974 with Frommeyer, a 21 year old unrelated woman. Petitioner’s house was Frommeyer’s principal place of residence and Frommeyer was a member of his household. Frommeyer was unemployed, had a gross income of less than $750 and received no support from anyone other than petitioner.

Petitioner and Frommeyer were never legally married to each other.

2. All Internal Revenue Code references are to the Internal Revenue Code of 1954, as amended.
3. I.R.C. § 152(b)(5) provides: “An individual is not a member of the taxpayer’s household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.”
4. 610 F.2d 189.
6. Id.
other or to anyone else under any recognized state law or within any ceremonial or common law meaning of the term. Nevertheless, on his federal income tax return for 1974 petitioner categorized Frommeyer as a dependent and claimed an exemption deduction for her. In addition, under sections 2(b) and 1(b) of the Internal Revenue Code petitioner claimed the filing status and tax rates reserved for "head of household." Subsequently, the Commissioner disallowed petitioner's exemption deduction and his use of the preferential "head of household" rates based upon the Commissioner's determination that petitioner's claimed dependency exemption was foreclosed by § 152(b)(5) of the Internal Revenue Code. The Commissioner concluded that by living together during the taxable year, petitioner and Frommeyer had violated North Carolina General Statute § 14-184, which forbids wanton cohabitation between an unmarried man and woman. Since the claimed dependency was denied and because petitioner had no other dependents, the Commissioner recomputed petitioner's tax liability without applying the "head of household" rates and determined a deficiency of $128.

By joint motion the parties submitted the dispute to the tax court on totally stipulated facts. In a memorandum opinion the tax court upheld the Commissioner's decision and refused to con-

7. Id.
8. Id.
9. All references to the Commissioner refer to the Commissioner of Internal Revenue.
10. N.C. Gen. Stat. § 14-184 (1969) provides: "Fornication and adultery — If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor. . . . Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."
11. 36 T.C.M. (CCH) at 934.
12. Id. at 935. See also, Rule 122, Tax Court Rules of Practice provides: "Submission Without Trial - (a) General. Any case not requiring a trial for the submission of evidence (as, for example, where sufficient facts have been admitted, stipulated established by deposition, or included in the record in some other way), may be submitted at any time by notice of the parties filed with the Court. The parties need not wait for the case to be calendared for trial and need not appear in Court. The Chief Judge will assign such a case to a Division, which will fix a time for filing briefs or for oral argument."
13. A tax court decision may not be reported officially if it involves primarily factual determinations and the application of settled legal principles. However, Commerce Clearing House and Prentice-Hall report the Memorandum decisions.
DEPENDENCY DEDUCTIONS

sider petitioner’s claims of a constitutional right of privacy or the alleged unconstitutional vagueness of the North Carolina statute. 14 The court determined that since petitioner chose not to allege a lack of habitual sexual intercourse and since no mention of sexual conduct existed within the stipulated facts, petitioner had failed to carry the burden of proof placed upon him by Rule 142 of the Tax Court Rules of Practice. 16

The United States Court of Appeals for the Fourth Circuit affirmed the tax court’s decision. 16 The court reiterated the deference that Congress has for the states in the regulation of matters affecting marriages and held that it would be inappropriate for the Commissioner to make subjective judgments about the constitutionality of local laws affecting taxable status. The court also held that § 152 (b)(5) of the Internal Revenue Code did not unconstitutionally violate petitioner’s privacy rights and that North Carolina General Statute § 14-184 was not unconstitutionally vague.

BACKGROUND

The tax court and Congress have consistently refused to confer the status of a dependent upon one living in an illicit relationship with a taxpayer. This refusal serves the policy of federal deference to state authority in the regulation of domestic affairs and serves to prevent the grant of the federal tax advantages of the married status to taxpayers who are not married.

Even before the passage of § 152(b)(5) in 1958, the tax court refused to grant an individual living in an adulterous relationship with a taxpayer the status of a dependent within the meaning of § 152(a)(9). 17 In Turnipseed v. Commissioner, 18 Turnipseed, an un-

15. Rule 142, Tax Court Rules of Practice provides: “Burden of Proof - (a) General. The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in his answer, it shall be upon the respondent.”
16. 610 F.2d 189.
17. I.R.C. § 152 provides: “Dependent defined - (a) General definition. For purposes of this subtitle, the term “dependent” means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 143, of the taxpayer)
married man, claimed as a dependent a married and undivorced woman with whom he lived as man and wife in the 1954 tax year. At trial, the issue before the tax court was whether \( \textsection \) 152(a)(9) should be construed to include an individual living in an illicit relationship with a taxpayer. The tax court disagreed with the proposition and reasoned that Congress had never intended for \( \textsection \) 152(a)(9) to be interpreted to permit a dependency exemption for an individual living in an illicit relationship with a taxpayer.

The court opined that to hold otherwise would ascribe to Congress the intent to encourage a status that openly and willfully violated the laws of Alabama.

The possibility of successful claims for dependency deductions in fact situations similar to \textit{Turnipseed} prompted Congress to enact \( \textsection \) 152(b)(5) in 1958. The Senate report on \( \textsection \) 152(b)(5) qualified the definition of a dependent. It stated:

On this point it is made clear that a person who is not a close relative but is living with the taxpayer may not be claimed as a dependent if the relationship between the taxpayer and the individual is an illegal one under the applicable local law. For example, this would make it clear that an individual who is a "common-law wife" where the applicable State law does not recognize common law marriages would not qualify as a dependent of the taxpayer. This qualification applies only to the definition of a dependent under section 152(a)(9).

Later cases in the tax court continued to refuse dependency deductions for relationships in violation of local law. In \textit{Eichbauer v. Commissioner}, Eichbauer claimed a divorced woman as his dependent. The claimed dependent had a child by Eichbauer and the couple was known in their community as husband and wife, but the couple had not fulfilled the statutory requirements for mar-
riage in the state of Washington where they lived. In addition, the couple had not contracted or consummated a legally sufficient marriage in any other state. The tax court noted that although the state of Washington had not prosecuted the couple for the statutory offense of lewd cohabitation, Eichbauer had failed to prove that his relationship with the woman did not violate local law. Consequently, the court denied Eichbauer's claimed exemption.

Similarly, in Martin v. Commissioner, the tax court found that Martin and his claimed dependent were never married in a civil or religious ceremony even though the couple lived together openly. The court also found that the couple's relationship violated the laws of each of the three states that the couple lived in during the 1970 tax year. The court concluded that the dependency exemption is founded on lawful relationships and that Martin's claimed dependency exemption must be denied.

The North Carolina statute activated and applied against Ensminger by § 152(b)(5) has never been declared unconstitutional by any court. Cases applying North Carolina General Statute § 14-184 have appeared in North Carolina appellate courts as recently as 1970. In State v. Robinson, Judge Hedrick based his decision on Judge Bobbitt's earlier analysis of the statute in the 1954 case of State v. Kleiman. Judge Bobbitt's decision insisted that a single act of illicit sexual intercourse is not fornication and adultery as defined by the statute because, "'[l]ewdly and lasciviously cohabit' plainly implies habitual intercourse in the manner of husband and wife." The court explained that the essence of the offense combined habitual intercourse with the absence of a marriage. Judge Bobbitt concluded that these elements distinguished the offense from single or non-habitual intercourse.

Therefore, when Ensminger arrived before the tax court,
North Carolina General Statute § 14-184 was a facially valid state statute made applicable by § 152(b)(5). To avoid paying the deficiency assessed against him and to obtain his claimed exemption, Ensminger had to navigate around both § 152(b)(5) and North Carolina General Statute § 14-184.

**Analysis**

In the absence of any ruling or authority that North Carolina General Statute § 14-184 was invalid, Chief Judge Haynsworth declared that § 152(b)(5) required the Commissioner to apply the North Carolina statute to Ensminger. The court doubted that Congress deemed it appropriate for the Commissioner to make subjective judgments about the constitutionality of local laws; moreover, no qualifying language existed in § 152(b)(5) that would limit its applicability to just constitutionally valid local laws. Peripherally, the court observed that if the constitutionality of state statutes that activated § 152(b)(5) could be litigated in the tax court, then the state, which has the primary interest in upholding its statutes, would not even be present to defend them.37

Recognizing the deference that Congress holds for the states in the regulation of domestic affairs, the court stated that Congress itself had made no determination about the legality of any sort of interpersonal relationships. Instead, the court said that § 152(b)(5) simply extracted Congress from the awkward position of appearing to reward relationships that were in contravention of local law.38 Although noting that the statute might produce some inequality in taxation among the states, the court reiterated its support for the deference that Congress has for the states in domestic and interpersonal relationships. The court concluded it discussion of federal deference by holding that a frontal attack on the constitutionality of the North Carolina statute as an invasion of privacy rights was inappropriate in a federal tax proceeding.39

Since petitioner was unable to maintain a right of privacy claim against the North Carolina statute, the court entertained petitioner's supplemental brief in which petitioner redirected his attack against § 152(b)(5). By examining three landmark United States Supreme Court decisions,40 the court held that “[a]ny con-

37. 610 F.2d at 191.
38. Id.
39. Id. at 192.
40. Braunfeld v. Brown, 366 U.S. 599 (1961) (Court refused to strike down
ceivable impact of the federal statute upon the exercise of any constitutionally protected right of privacy is so indirect and remote . . . , that the federal statute may not be questioned on that ground."\(^{41}\) The court explained that § 152(b)(5) would not be subjected to the "strict scrutiny" level of judicial examination because of its indirect and remote nature. The court then determined that the appropriate level of judicial examination was the "rational relation" test, by noting that "[t]here is a rational basis for the federal statute in its attempt to conform the impact of the federal tax laws to state laws governing such personal relationships. . . ."\(^{42}\) Accordingly, the court determined that § 152(b)(5) had no impact on the couple's decision to cohabit and that the statute did not prevent them from living together.\(^{43}\) The court also noted that § 152(b)(5) places no barriers before a state if a state decides to permit sexual relations between unmarried and consenting adults.\(^{44}\) The court concluded that any interference with privacy rights by § 152(b)(5) is neither direct nor substantial.

The court quickly dismissed the final issue raised by petitioner by holding that North Carolina General Statute § 14-184 is not unconstitutionally vague. The court said that the statute had been held not to prohibit occasional sex acts but had been held to proscribe habitual sexual intercourse in the kind of relationship that Ensminger and Frommeyer exhibited.\(^{45}\) Given the prior constructions of the statute by the North Carolina courts, Judge Haynsworth determined that petitioner could not contend that he had any lack of fair notice of the statute's application to his relationship.\(^{46}\)

In conclusion, the court affirmed the tax court by denying petitioner his dependency deduction. Judge Haynsworth also indi-

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the blue law at issue because it imposed only an indirect burden on the exercise of religion); Califano v. Jobst, 434 U.S. 47 (1977) (Court refused to strike down a provision of the Social Security Act because its tangential impact upon a marital decision did not violate the Due Process Clause of the Fifth Amendment); Zablocki v. Redhail, 434 U.S. 374 (1978) (Court struck down a Wisconsin statute that directly and substantially interfered with the affected party's right to marry).

41. 610 F.2d at 192.
42. Id.
43. Id. at 194.
44. Id.
45. Id.

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cated that if petitioner wanted to pursue his claim of a constitutional right of privacy, his action would not be foreclosed by the court's decision and could be raised again in any court of competent jurisdiction.47

CONCLUSION

The court's decision in Ensminger v. Commissioner reconfirmed the right of the state of North Carolina to define and punish interpersonal relationships that the state considers criminal without the embarrassment of Congress rewarding the illicit activity through tax advantages. However, the policy of Congressional deference to the states in the area of domestic and personal relationships will produce inconsistent results in the amount of taxes that taxpayers of different states must pay to the federal government. For example, in 1975 California repealed its criminal sanctions for sexual relations between consenting adults.48 A fact situation identical to Ensminger set in California would have altered the result and Ensminger would have been allowed his dependency exemption. On this basis Congress appears to be countenancing direct geographic discrimination in the tax laws.

The court skirted the issue of an alleged constitutional right of privacy, but indicated that if it existed, the impact of § 152(b)(5) upon any privacy rights would not be direct or substantial enough to invalidate the statute. The court also established that the Commissioner does not have the authority to subjectively determine the constitutionality of state statutes, and that the tax court is an inappropriate forum for attacking the constitutionality of state statutes. Once again, this underscores that at least in the area of domestic and interpersonal relationships, the state is the primary authority. The Congressional role is limited to raising revenue without usurping the authority of the states.

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47. 610 F.2d at 194.