Tax Stories Can Be Ribald — Who Knew?

To the Editor:

I'm writing to comment on the romp through the juicy pages of history that Prof. Joel Newman provides in ''*Gilmore v. United States*: The Divorce,'' *Tax Notes* Aug. 6, 2007, p. 493, *Doc 2007-16601, 2007 TNT 152-38*. I thought I knew the *Gilmore* case, that well-worn Supreme Court opinion dealing with the tax treatment of damage awards. *Gilmore* is one of those cases that is fun to discuss. It provides a number of good illustrations in any presentation about the broad subject of litigation recoveries.

Yet, I had no idea that the case would stand up to the kind of tabloid scrutiny to which Newman (deliciously) subjects it. His article (with its copious footnotes) is a great diversion through the gutter of 1950s history. Since I sometimes tire of E! News and various other examples of tabloid-TV journalism that seem to be constantly blaring in my kitchen at home, this was useful demystification. Perhaps the generations haven't changed too much after all?

Indeed, notwithstanding changes in technology and information dissemination, Newman's article showed me that even 1950s culture (and perhaps by extension, mankind throughout the ages) focused on the prurient side of life just as stridently as we do today. Not only that, but 1950s marital life was not all Ozzie and Harriet or Ward and June Cleaver. Don and Dixie Gilmore punctuated their marriage and divorce with a lot more potent epithets than ''Lucy, you got some 'splainin' to do.'' These tenets weren't obvious to me, and the eye-opener was worth it.

Besides, there are many great stories and zippy one-liners in Newman's article. I hope anyone who didn't read it line-by-line goes back and does so now. The story is replete with alleged sexual perversion, plenty of thrown objects, drunken reverie and brawls, dirt digging by famous gumshoe Hal Lipset, mental hospitals, and lots and lots of name calling.

All of this is reason enough to read Newman's article again, and to even go back to the *Gilmore* case for a ceremonial review. But, if just plain good old fun is not enough reason to read this piece, here's another. *Gilmore* is widely cited for the notion that to be deductible, expenses must have a business origin (rather than merely a business consequence).

Don Gilmore deducted 80 percent of the legal expenses he incurred in the divorce because (1) had Dixie won, she would have taken over his car dealerships and fired him; and (2) if Dixie's many allegations about Don's misbehavior were confirmed in the case, General Motors would have terminated his dealer franchise. When Don tried to deduct the expensive cost of his (extremely volatile, messy, and profane) divorce, the Supreme Court held that marriage and divorce are personal, so there could be no deduction.

Newman succinctly notes that *Gilmore* doesn't give us much guidance on this ostensibly bright-line test. Newman notes that *Gilmore's* ''distinction between origins and consequences is almost incoherent. Yet, it is a Supreme Court opinion, so it is a leading case — a fixture of the casebooks.'' See *Tax Notes,* Aug. 6, 2007, p. 493 (citations omitted). Newman opines in a footnote that the origins/consequences test was incorrectly applied in *Kopp's Co., Inc. v. United States*, 636 F.2d 59 (4th Cir. 1980), and, inexplicably, was not applied at all in *Gilliam v. Commissioner*, T.C. Memo. 1986-81. See *Tax Notes*, Aug. 6, 2007, p. 493 n.4.

It is sad to note that something as engrained as the origin of the claim test is flawed, and that one can take different views not only of its import, but more disturbingly, of its application. While I don't have a solution to this, other than to note that awareness of its foibles may be half the battle, I do applaud Newman for his ribald (and yet still important) read.

Very truly yours,

Robert W. Wood
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