The Burger Court Opinion Writing Database

United States v. Generes

405 U.S. 93 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

8 1P

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 31, 1972

Re: No. 70-28 - U. S. v. Generes

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

70-28

Supreme Court of the United States

Memorandum

70-28 .... 11-8 ...., 1971

Harry

We have decided ~~Col~~ you are our expert on Louisiana law

WOD

December sixth
1971

Dear Chief:

Re: No. 70-28 - United States v. Generes

This case was argued on November 8 and voted on at our Conference on November 12. The vote was five tà two to reverse, Thurgood and I voting to affirm. You assigned the case to Harry.

Over this last weekend a lawyer with the Department of Justice, at a social ofcasion, told one of my law clerks the precise vote in this case, saying that Thurgood and I were the only dissenters and that the case had been assigned to Harry to write. Since there seems to have been some leak concerning the case and since the information leaked was absolutely correct, I thought I should bring it at once to your attention.

William O. Douglas

The Chief Justice

70-28 - Wm Doyle Oct 71 Ln

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Douglas, J.

No. 70-28

Circulated: 1-24

Recirculated: _____

United States, Petitioner, *v.* Edna Generes, Wife of, and Allen H. Generes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The Treasury Regulations § 1.166–5 (b)(2), 25 CFR, which govern this case, provide that "the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer." The Regulations do not use the words "primary and dominant." They state "If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless," the debt is deductible. *Ibid.*

The jury was instructed in the words of the Regulations: "Do you find a preponderance of the evidence that the signing of the blanket indemnity agreement by Mr. Generes was proximately related to his trade or business of being an employee of the Kelly-Generes Construction Company?" The jury unanimously answered "Yes."

There was evidence to support the finding. Generes was an officer of the company and received a salary of $12,000 a year. His job as officer was to obtain the bonding credit needed by the company to perform the jobs on which it bid. To get the bond Generes, the president, and Kelly, the vice-president, were required to sign personally an indemnity agreement.

The bond was essential if the company was to operate. Without the bond the company could not obtain business

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 19, 1972

RE: No. 70-28 - United States v. Generes

Dear Harry:

I am very happy to join you in the above but would prefer that the case be remanded for a new trial rather than that judgment in favor of the United States be ordered by us. I think you are right that his chances of establishing dominant motive are very slim but I'd rather he had the opportunity.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

January 31, 1972

RE: No. 70-28 - United States v. Generes

Dear Harry:

The suggested appendage to your opinion in the above suits me fine.

Sincerely,

WJB

Mr. Justice Blackmun

cc: Mr. Justice White

OCT 71

Wm. Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 7, 1972

RE: No. 70-28 - United States v. Generes

Dear Harry:

I've joined Byron's expansion on the thought behind the statement at the foot of your opinion. In the circumstances won't you please delete the statement.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1972

70-28 - United States v. Generes

Dear Harry,

I am glad to join your opinion for the Court in this case. I am content with the disposition of the case contained in Part IV, but would not object if a majority are in favor of remanding for a new trial.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 20, 1972

Re: No. 70-28 - U. S. v. Generes

Dear Harry:

I join Parts I-III of your opinion but am hesitant about Part IV. I would rather not foreclose a new trial.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 3, 1972

Re: No. 70-28 - U.S. v. Generes

Dear Harry:

I was thinking of filing the attached in this case.

Sincerely,

Byron

Mr. Justice Blackmun

But I don't see why this should trigger any change in your opinion. I take it you agree with me in principle + disagree only in application. I simply want to restate the rule.

BRW

You have — to Concurrence NAB 4p.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 2-7-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-28

United States, Petitioner, *v.* Edna Generes, Wife of, and Allen H. Generes. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE WHITE.

While I join Parts I, II, and III of the Court's opinion and its judgment of reversal, I would remand the case to the District Court with directions to hold a hearing on the issue of whether a jury question still exists as to whether respondent's motivation was "dominantly" a business one in the relevant transactions under 26 U. S. C. §§ 160 (a) and (d). Federal Rule of Civil Procedure 50 (d) provides that when an appellate court considers a motion for judgment n. o. v., it may "determin[e] that the appellee is entitled to a new trial, or . . . direct the trial court to determine whether a new trial shall be granted." Because of the drastic nature of a judgment n. o. v., this Court has emphasized that such motions should be granted only when the procedural prerequisites of the Federal Rules have been strictly complied with. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 215–217 (1947). In the present case, this Court has the power to reverse the judgment without the grant of a new trial since the Government properly moved for a judgment n. o. v. (or, in the alternative, for a new trial) in the District Court. *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967). The circumstances here are inappropriate for such a decision, however, since respondent has never had an opportunity to be heard, after it is determined that his verdict cannot stand, as to whether factual issues

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 2-8-72

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–28

United States, Petitioner, v. Edna Generes, Wife of, and Allen H. Generes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins.

While I join Parts I, II, and III of the Court's opinion and its judgment of reversal, I would remand the case to the District Court with directions to hold a hearing on the issue of whether a jury question still exists as to whether respondent's motivation was "dominantly" a business one in the relevant transactions under 26 U. S. C. §§ 160 (a) and (d). Federal Rule of Civil Procedure 50 (d) provides that when an appellate court considers a motion for judgment n. o. v., it may "determin[e] that the appellee is entitled to a new trial, or . . . direct the trial court to determine whether a new trial shall be granted." Because of the drastic nature of a judgment n. o. v., this Court has emphasized that such motions should be granted only when the procedural prerequisites of the Federal Rules have been strictly complied with. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 215–217 (1947). In the present case, this Court has the power to reverse the judgment without the grant of a new trial since the Government properly moved for a judgment n. o. v. (or, in the alternative, for a new trial) in the District Court. *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967). The circumstances here are inappropriate for such a decision, however, since respondent has never had an opportunity to be heard, after it is determined

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–28

United States, Petitioner, *v.* Edna Generes, Wife of, and Allen H. Generes.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1972]

MR. JUSTICE MARSHALL, concurring.

I agree with and join the opinion of the Court. In doing so I add a few additional words of legislative history in support of the face of the Internal Revenue Code itself.

It is now well-established law that a corporate employee is entitled to deduct as a business bad debt a bad debt incurred because of his employee status—*e. g.*, a loan made to protect his job which becomes unrecoverable. See, *e. g., Trent* v. *Commissioner,* 291 F. 2d 669 (CA2 1961); *Lundgren v. Commissioner,* 376 F. 2d 623 (CA9 1967); *Smith* v. *Commissioner,* 55 T. C. 160 (1970). See also *Whipple* v. *Commissioner,* 373 U. S. 193, 201 (1963). The law is equally well-established, however, that a shareholder is not entitled to a business bad-debt deduction when a loan which he has made to enhance his stock interest in a corporation goes bad.

The taxpayer in this case is both an employee and a shareholder of a single corporation, and the question thus presented is how to determine the proper characterization of loans made by him to the corporation which subsequently became uncollectible.

The Internal Revenue Code itself does not offer any test for determining when a bad debt is a business bad debt, but § 1.166–5 (b) of the Treasury Regulations, 26 CFR § 1.166–5 (b), provides that a loss from a worth-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 18, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-28 - United States v. Generes

Some of you may feel I have gone too far in proposing the content of Part IV. I feel that this is correct, but if a majority is of the contrary opinion I would be willing just to send the case back for a new trial.

H. A. B.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 1/18/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-28

United States, Petitioner, v. Edna Generes, Wife of, and Allen H. Generes. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

A debt a closely held corporation owed to an indemnifying shareholder-employee became worthless in 1962. The issue in this federal income tax refund suit is whether, for the shareholder-employee, that worthless obligation was a business or a nonbusiness bad debt within the meaning and reach of §§ 166 (a) and (d) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 166 (a) and (d),[1] and of the implementing Regulations § 1.166-5.[2]

[1] "§ 166. Bad debts.

"(a) General rule.—

"(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

. . . . .

"(d) Nonbusiness debts.—

"(1) General rule.—In the case of a taxpayer other than a corporation—

"(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

"(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.

"(2) Nonbusiness debt defined.—For purposes of paragraph (1), the term 'nonbusiness debt' means a debt other than—

"(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or

"(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business."

[*Footnote 2 on p. 2*]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 31, 1972

MEMORANDUM TO

Mr. Justice Brennan
Mr. Justice White

Re: No. 70-28 - U.S. v. Generes

I believe that there are now four votes joining in the opinion and judgment as proposed. Do you wish something along the following line to be appended:

> "Mr. Justice Brennan and Mr. Justice White join Parts I, II and III of the Court's opinion and its judgment of reversal, but would remand the case with directions that a new trial be granted."

You may prefer some other recital. I shall await your instructions.

Sincerely,

H.A.B.

OCF 71
Wm. Brennan

February 4, 1972

Re: No. 70-28 - United States v. Generes

Dear Byron:

Thank you for sending over a copy of what you are thinking of filing in this case. There is, of course, no reason at all why you should not file it. You are correct when you say in your postscript that I agree with you in principle and disagree only in application here.

It may be that if you circulate your material, a majority will join you. In that case, I suppose I would have to change Part IV of the opinion as originally proposed.

Sincerely,

HAB

Mr. Justice White

B

pp. 1, 12, 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70–28

Recirculated: 2/4/72

United States, Petitioner, v. Edna Generes, Wife of, and Allen H. Generes. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

A debt a closely held corporation owed to an indemnifying shareholder-employee became worthless in 1962. The issue in this federal income tax refund suit is whether, for the shareholder-employee, that worthless obligation was a business or a nonbusiness bad debt within the meaning and reach of §§ 166 (a) and (d) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 166 (a) and (d),[1] and of the implementing Regulations § 1.166–5.[2]

[1] "§ 166. Bad debts.

"(a) General rule.—

"(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

. . . . .

"(d) Nonbusiness debts.—

"(1) General rule.—In the case of a taxpayer other than a corporation—

"(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

"(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss

[*Footnote 2 on p. 2*]

Wm Douglas Oct 71

70-28

Misc. Dec.

B
1st
Your concurrence
dated 1/20
p. 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 70-28

Recirculated: 2/9/72

United States, Petitioner, v. Edna Generes, Wife of, and Allen H. Generes. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1972]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

A debt a closely held corporation owed to an indemnifying shareholder-employee became worthless in 1962. The issue in this federal income tax refund suit is whether, for the shareholder-employee, that worthless obligation was a business or a nonbusiness bad debt within the meaning and reach of §§ 166 (a) and (d) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 166 (a) and (d),[1] and of the implementing Regulations § 1.166-5.[2]

[1] "§ 166. Bad debts.

"(a) General rule.—

"(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

. . . . . .

"(d) Nonbusiness debts.—

"(1) General rule.—In the case of a taxpayer other than a corporation—

"(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

"(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss

[*Footnote 2 on p. 2*]