

The Burger Court Opinion Writing Database

Commissioner v. First Security Bank of Utah, N.A.

405 U.S. 394 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States

Washington, D. C. 20543

HAMBERS OF
THE CHIEF JUSTICE

Re Comm. v.
First Security
70-305

Dear Lewis

Hugo Black often
counselled all of us to be
wary of the words "fair"
and unfair. As a
result I usually try
to link any suggestion
of the fairness concept
to a statute, a case,
or the Constitution.

See small
suggestion on page 10
WEG

11th Bank - 70-385-

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

CHAMBERS OF
THE CHIEF JUSTICE

2/9/72

Dear Lewis

Your "maiden
effort" as a Justice is
a professional job, as
I anticipated it would
be. I have a feeling
it will perhaps pick
up a vote or so
from the dissenting wing.

It is clear, to the
point, with no extra
words. Congratulations
Warren

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

CHAMBERS OF
THE CHIEF JUSTICE

March 9, 1972

Re: No. 70-305 - CIR v. First Security Bank of Utah

Dear Lewis:

Please join me.

Regards,

Mr. Justice Powell

cc: The Conference

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 22, 1972

Dear Lewis:

In No. 70-305 - Commissioner

v. First Security Bank, I am happy
to join your first -- and fine --
opinion.

W.O.D.
William O. Douglas

Mr. Justice Powell

CC: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 23, 1972

RE: No. 70-305 - Commissioner of Internal
Revenue v. First Security Bank of Utah

Dear Lewis:

I agree.

Sincerely,

Biel
7.

Mr. Justice Powell

cc: The Conference

B
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 24, 1972

70-305 - Commissioner v. First
Security Bank of Utah

Dear Lewis,

In a dull and complicated case it is hard to write a clear and persuasive opinion. But I think you have succeeded admirably in your maiden effort, and I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543B
M
CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1972

Re: No. 70-305 - CIR v. First
Security Bank of Utah et al.

Dear Harry:

Please join me.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

thus good,
I think Harry's treatment / the illegality
issue is the better part of discretion. I am
dissent and will not write
joining his (BOW)

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-305

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE MARSHALL, dissenting.

The facts of this case illustrate the natural affinity which lending institutions and insurance companies have for each other. Congress depends on the ability of the Commissioner of Internal Revenue to utilize § 482 of the Internal Revenue Code, 26 U. S. C. § 26, to insure that this affinity does not provide a basis for tax avoidance. H. R. Rep. No. 1098, 84th Cong., 1st Sess., 7; S. Rep. No. 1571, 84th Cong., 2d Sess., 8. In my opinion, today's decision renders § 482 a less efficacious weapon against tax avoidance schemes than Congress intended and provides the respondents with an unwarranted tax advantage. I dissent.

Section 482 of the Code, 26 U. S. C. § 482 provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of tax or clearly to reflect the income of any such organizations, trades, or businesses."

PP 5,678,1011

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-305

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE MARSHALL, dissenting.

The facts of this case illustrate the natural affinity which lending institutions and insurance companies have for each other. Congress depends on the ability of the Commissioner of Internal Revenue to utilize § 482 of the Internal Revenue Code, 26 U. S. C. § 26, to insure that this affinity does not provide a basis for tax avoidance. H. R. Rep. No. 1098, 84th Cong., 1st Sess., 7; S. Rep. No. 1571, 84th Cong., 2d Sess., 8. In my opinion, today's decision renders § 482 a less efficacious weapon against tax avoidance schemes than Congress intended and provides the respondents with an unwarranted tax advantage. I dissent.

Section 482 of the Code, 26 U. S. C. § 482 provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of tax or clearly to reflect the income of any such organizations, trades, or businesses."

Supreme Court of the United States

Washington, D. C. 20542

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

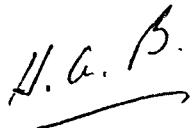
February 23, 1972

Re: No. 70-305 - CIR v. 1st Security Bank of Utah

Dear Lewis:

Your first opinion for the Court is a strong and persuasive one. I have not come to rest on this case as yet, and it is entirely possible that I may write a dissent. I shall probably not get at this, however, until after the February session. I hope you do not mind that much of a delay.

Sincerely,



Mr. Justice Powell

cc: The Conference

B.M.
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

SUPREME COURT OF THE UNITED STATES

FROM: Blackmun, J.

Circulated: 3/13/72

No. 70-305

Recirculated:

Commissioner of Internal Revenue, Petitioner,
v.
First Security Bank of Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE BLACKMUN, dissenting.

As I read the Court's opinion, I gain the impression that it chooses to link legality with taxability or, to put it better oppositely, that it ties illegality to receive with inability to tax. I find in the Internal Revenue Code no authority for the concoction of a restrictive connection of that kind. Because I think that the Commissioner's allocation of income here, under the auspices of § 482 of the 1954 Code, and in the light of the established facts, was proper, I dissent.

1. Section 482¹ surely contemplates taxation of income without formal receipt of that income. That, indeed, is the scope and purport of the statute. It is directed at income distortion by a controlling interest among two or more of the controlled entities. I, therefore, am not convinced that the fact the income in question here did not flow through the Banks at any time—because it was deemed proscribed by the 1916 Act (if the pertinent portion thereof, 39 Stat. 753, is still in effect, a proposition

¹ Section 482 is not new. It appeared as § 45 of the Revenue Act of 1928, 45 Stat. 806, and has predecessors in § 240 (f) of the Revenue Act of 1926, 44 Stat. 46, and in § 240 (d) of the Revenue Act of 1924, 43 Stat. 288.

PA
R
R
3rd DRAFT

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

SUPREME COURT OF THE UNITED STATES

No. 70-305

3/15/72

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE
WHITE joins, dissenting.

As I read the Court's opinion, I gain the impression that it chooses to link legality with taxability or, to put it better oppositely, that it ties illegality to receive with inability to tax. I find in the Internal Revenue Code no authority for the concoction of a restrictive connection of that kind. Because I think that the Commissioner's allocation of income here, under the auspices of § 482 of the 1954 Code, and in the light of the established facts, was proper, I dissent.

1. Section 482¹ surely contemplates taxation of income without formal receipt of that income. That, indeed, is the scope and purport of the statute. It is directed at income distortion by a controlling interest among two or more of the controlled entities. I, therefore, am not convinced that the fact the income in question here did not flow through the Banks at any time—because it was deemed proscribed by the 1916 Act (if the pertinent portion thereof, 39 Stat. 753, is still in effect, a proposition

¹ Section 482 is not new. It appeared as § 45 of the Revenue Act of 1928, 45 Stat. 806, and has predecessors in § 240 (f) of the Revenue Act of 1926, 44 Stat. 46, and in § 240 (d) of the Revenue Act of 1924, 43 Stat. 288.

Concurrence
John M. Harlan II

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 23, 1972

Re: No. 70-305 - Commissioner v. First Security
Bank of Utah

Dear Lewis:

Inasmuch as this is your first published opinion for the Court, would you do me the honor of autographing the enclosed so that my great-grandchildren may be proud of it a century hence.

Sincerely,



Mr. Justice Powell

10 Harry Blackmun
With admiration

Lewis F. Powell, Jr.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* FIRST SECURITY BANK OF UTAH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 70-305. Argued January 10, 1972—Decided March 21, 1972

Respondent banks were subsidiaries of a holding company that also controlled a management company, an insurance agency, and, from 1954, an insurance company (Security Life). In 1948 the banks began to offer to arrange credit life insurance for their borrowers, placing the insurance with an independent insurance carrier. National banking laws were deemed to prohibit the banks from receiving sales commissions, which were paid by the carrier to the insurance agency subsidiary. The commissions were reported as taxable income for the 1948-1954 period by the management company. After 1954, when Security Life was organized, the credit life insurance on the banks' customers was placed with an independent carrier which reinsured the risks with Security Life, the latter retaining 85% of the premiums. No sales commissions were paid. Security Life reported all the reinsurance premiums on its income tax returns for the period 1955 to 1959, at the preferential tax rate for insurance companies. Petitioner, pursuant to 26 U. S. C. § 482, granting him power to allocate gross income among controlled corporations in order to reflect the actual incomes of the corporations, determined that 40% of Security Life's premium income was allocable to the banks as commission income earned for originating and processing the credit life insurance. The Tax Court affirmed petitioner's action, but the Court of Appeals reversed. *Held*: Since the banks did not receive and were prohibited by law from receiving sales commissions, no part of the reinsurance premium income could be attributed to them, and petitioner's exercise of the § 482 authority was not warranted. Pp. 9-13.

436 F. 2d 1192, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined.

8
/

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

2nd DRAFT

From: Powell, J.

Distributed: FEB 22 1972

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 70-305

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[February —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents for review a determination by the Commissioner of Internal Revenue (Commissioner), pursuant to § 482 of the Internal Revenue Act,¹ that the income of taxpayers within a controlled group should be reallocated to reflect the true taxable income of each. Deficiencies were assessed against respondents. The Tax Court affirmed the Commissioner's action, and respondents appealed to the Court of Appeals for the Tenth Circuit. That court reversed the decision of the Tax Court, 436 F. 2d 1192 (1971), and we granted the Commissioner's petition for certiorari to resolve a conflict between the decision below and that in *Local Fi-*

¹ 26 U. S. C. § 482 (1970) provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

B
S/4 Justice

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

3rd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

Recirculated

FEB 24 1972

No. 70-305

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[February —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents for review a determination by the Commissioner of Internal Revenue (Commissioner), pursuant to § 482 of the Internal Revenue Act,¹ that the income of taxpayers within a controlled group should be reallocated to reflect the true taxable income of each. Deficiencies were assessed against respondents. The Tax Court affirmed the Commissioner's action, and respondents appealed to the Court of Appeals for the Tenth Circuit. That court reversed the decision of the Tax Court, 436 F. 2d 1192 (1971), and we granted the Commissioner's petition for certiorari to resolve a conflict between the decision below and that in *Local Fi-*

¹ 26 U. S. C. § 482 (1970) provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

BS

8, 9
3)

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

5th DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES
Recirculated:

No. 70-305

Recirculated MAR 9 1972

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE POWELL delivered the opinion of the
Court.

This case presents for review a determination by the
Commissioner of Internal Revenue (Commissioner),
pursuant to § 482 of the Internal Revenue Act,¹ that
the income of taxpayers within a controlled group should
be reallocated to reflect the true taxable income of each.
Deficiencies were assessed against respondents. The
Tax Court affirmed the Commissioner's action, and
respondents appealed to the Court of Appeals for the
Tenth Circuit. That court reversed the decision of the
Tax Court, 436 F. 2d 1192 (1971), and we granted the
Commissioner's petition for certiorari to resolve a
conflict between the decision below and that in *Local Fi-*

¹ 26 U. S. C. § 482 (1970) provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

Op. 11. 1972

13
11 1

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

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated:

No. 70-305

Recirculated: MAR 15 1972

Commissioner of Internal
Revenue, Petitioner,
v.
First Security Bank of
Utah, N. A., et al. } On Writ of Certiorari to the
United States Court of
Appeals for the Tenth
Circuit.

[March —, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents for review a determination by the Commissioner of Internal Revenue (Commissioner), pursuant to § 482 of the Internal Revenue Act,¹ that the income of taxpayers within a controlled group should be reallocated to reflect the true taxable income of each. Deficiencies were assessed against respondents. The Tax Court affirmed the Commissioner's action, and respondents appealed to the Court of Appeals for the Tenth Circuit. That court reversed the decision of the Tax Court, 436 F. 2d 1192 (1971), and we granted the Commissioner's petition for certiorari to resolve a conflict between the decision below and that in *Local Fi-*

¹ 26 U. S. C. § 482 (1970) provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 17, 1972

Re: No. 70-305 - CIR v. First Security Bank
of Utah, et al.

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference