The Burger Court Opinion Writing Database

Central Illinois Public Service Co. v. United States

435 U.S. 21 (1978)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 16, 1978

Re: 76-1058 - Central Ill. Public Service Co. v. U. S.

Dear Harry:

I have had much of the same difficulty with this "sticky" problem as others have experienced -- and as you have in trying to cover all the bases.

I join but will also join with Lewis' concurring opinion.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 22, 1978

Dear Lewis:

Re: 76-1058 Central Illinois v. United States

Please join me in your concurring opinion circulated February 17. I also have requested that my name be added to Bill Brennan's concurring opinion circulated February 17.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 13, 1978

Re: No. 76-1058, Central Illinois Public Serv. Co. v. United States

Dear Harry,

I agree with much of what you have written concerning the unfairness of exacting withholding taxes from petitioner when no one could have known prior to Kowalski that the payments involved in this case were "income," let alone "wages." But your view that the statutory concept of wages does not extend to meal and travel reimbursements which must be included within an employee's income under §§ 61, 119, and 162 of the Internal Revenue Code greatly troubles me. For should the Commissioner of Internal Revenue issue a Treasury Regulation defining wages in this way (with reference to payments that must be included in employees' income), I can't see how we could fail to sustain it.

This does not mean that I would sustain a retroactive application of this policy, however. You are entirely correct that heretofore the concept of wages subject to withholding has been considerably narrower. You are also entirely correct that statutory policies specific to the withholding tax require that employers know with certainty the elements of the withholding tax base. For this reason, retroactive application of a wage definition based on Correll and Kowalski would in my view be an abuse of discretion notwithstanding that the taxes sought to be imposed are within the statute of limitations. Prospective application of a Treasury Regulation embodying Correll and Kowalski would not, as I see it, violate the statutory policy of certainty.

This seems to follow almost equally well from much you have written in your opinion, and if you found it possible to incorporate it, I would certainly join your opinion. Otherwise, I will attempt a concurrence along these lines.

Bill

Mr. Justice Blackmun

Copies to the Conference

J

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 20, 1978

Re: No. 76-1058, Central Illinois Pub. Serv. Co. v. United States

Dear Harry:

1. This is in response to your letter of the sixteenth. Your suggested footnote is fine with me. However, may I trouble you with some comments on paragraph 2 of your letter.

Am I wrong in reading your opinion, especially the next-to-last paragraph on page 13, to decide that a "curative" regulation would not be permissible? May that not be read to be the purport of the statement:

> "This is not to say, of course, that the Congress may not subject lunch reimbursements to withholding if in its wisdom it chooses to do so by expanding the definition of wages for withholding. It has not done so yet. And we cannot justify the Government's attempt to do so by judicial determination." (emphasis added)

Or is there significance in the omission of the word "regulation" in the last sentence? Even so, however, the emphasis on Congress in the first two sentences, it seems to me, may mean to some readers that only Congress can change the law, an inference perhaps reinforced by your characterization of the Commissioner's position as an expansion of the definition of wages in § 3401(a). Of course, the Commissioner is not free by regulation to expand a statutory definition.

If this was not what you intended, I think my trouble could be eliminated if it appealed to you to have this paragraph read something like the following:

> "This is not to say, of course, that Congress may not subject lunch reimbursements to withholding if it so choses. Nor, for that matter, do we today hold that the Commissioner cannot issue an appropriate Treasury Regulation to clarify this aspect of withholding -- the bounds of the Commissioner's power

in this regard are not now before us and we express no opinion on where those bounds may be. But neither Congress nor the Commissioner have acted as yet. And in the absence of such action we cannot justify the Government's attempt to create new withholding rules (and especially new rules to apply retroactively) by an appeal to the courts."

2. There is one further point, unfortunately a major point, that escaped me on my first reading of your opinion: I wonder whether your discussion at page 11[1/] may not be inconsistent with Commissioner v. Kowalski. There as here the employer argued that fixed-amount lunch payments negotiated by the employer and the union representing his employees were for the "convenience of the employer." Compare Kowalski, slip op. at 3, with your op. at 2. There as here the "noncompensatory business reason of the employer," your op. at 11, tendered in support of the employer's convenience was that such payments allowed employees to remain in the field, near their employer's work. Compare Kowalski at 2 with your op. at 2-3. Our conclusions in Kowalski were, moreover, that Congress in 1954 intended to abrogate the common law convenience-of-the-employer doctrine with respect to meals and lodging, see Kowalski at 15-17, and, further, that in any case the prerequisites to a common law exclusion had

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1/ "The crucial determination, of course is whether the payments in question are remuneration for services performed or are, as petitioner chooses to characterize them, payments made for a noncompensatory business reason of the employer. We conclude that petitioner's classification is the correct one. The payments were not measured by services performed and were not intended for such services. They were unrelated to the particular employee's job status, wage rate, the value of his services to the employer, or whether or not he was away overnight. They were, instead, amounts expended in business circumstances dictated by the requirements of the Company and the advancement of the Company's own legitimate business purposes. . . .

". . . The reimbursement policy was for the economic benefit of the Company and in furtherance of its business."

not been made out, see id., at 17-18. Am I wrong in thinking that your opinion would hold -- inconsistently with these Kowalski holdings -- not only that the very same Congress in the very same law intended to exempt payments made for the convenience of the employer from the concept of "wages" in § 3401(a) of the Internal Revenue Code of 1954, but also that the payments here qualify for the convenience-of-the-employer exclusion, see your op. at 11?

I have difficulty seeing how such a result can be justified by the language or legislative history of the 1954 Code. At the very least, I would suppose that Congress, if it chose to differentiate between wages in § 3401(a) and -- what? -- non-wages by means of the convenience-of-the-employer test, would have adopted the "business necessity" view of that test, since that is the only aspect of the test that even arguably survived the 1954 recodification of the income tax code. See Kowalski at 15-18. But the payments here would not qualify under that test because, as in Kowalski, they are not made to allow petitioner's employees "properly to perform [their] duties" as that phrase was defined by Congress in adopting the common law "business necessity" test as part of § 119 of the Code. See id., at 18.

3. I know that both of us want to avoid adding to the already extreme confusion in the tax law of meals and meal payments in the employment setting. Indeed, we took these cases to attempt some clarification of that confusion. I offer these comments in furtherance of what I know is our common determination to have the two opinions fully consistent.

Sincerely,

Bill

Mr. Justice Blackmun

Copies to the conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 23, 1978

RE: No. 76-1058 Central Illinois Public Service v. United States

Dear Harry:

I very much appreciate your consideration of my suggestions and expect that I should put my views in a separate concurrence. I'll try to circulate one shortly.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BRENNAN, concurring in the judgment.

I agree with so much of the opinion of the Court as holds that petitioner met its obligations under Treas. Reg. § 31.3401 (a)-1 (b)(2) as that regulation was most reasonably interpreted in 1963. However, if I correctly understand that the Court goes on to hold that meal payments like those at issue here can *never* be wages under § 3401 (a) of the Internal Revenue Code, 26 U. S. C. § 3401 (a), and therefore cannot be treated as such, *e. g.*, under pertinent income tax regulations, to that extent I disagree with the Court's opinion. Not only can I find no support for that conclusion in the legislative history but indeed the Court's analysis conflicts, in my view, with our recent decision in *Commissioner* v. *Kowalski, ante,* p. —. Nonetheless, I join the Court's judgment, but solely on the ground that the interpretation of "wages" urged by the United States here cannot be applied retroactively.

I

The Court states that

> "The crucial determination, of course, is whether the payments in question are remuneration for services performed or are, as petitioner chooses to characterize them, payments made for a noncompensatory business reason of the employer." *Ante,* at 11.

Were this statement limited to the question of the proper

J

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1978

RE: No. 76-1058 Central Illinois Public Service Co. v. United States

Dear Harry:

In light of your revised footnote 12 in the third draft of your opinion for the Court I shall shortly circulate a revised draft of my opinion concurring in yours and omitting my Part I.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion, emphasizing that it does not decide "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid." *Ante*, at 12 n. 12. I share the Court's conclusion that petitioner met its obligations under Treas. Reg. § 31.3401 (a)–1 (b)(2) as that regulation was most reasonably interpreted in 1963. I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the Government. See *ante*, at 7–8.

I

Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. See 26 U. S. C. § 7805 (b),[1] construed, *Dixon* v. *United States*, 381 U. S. 68 (1965); *Automobile Club of Michigan* v. *United States*, 353 U. S. 180 (1957).[2] That authority is not unfettered, however, and con-

[1] "(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

[2] This case is very unlike either *Dixon* or *Automobile Club of Michigan* in each of which the Commissioner was held authorized to correct what we

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 16, 1978

Re: No. 76-1058, Central Illinois Pub. Serv. Co. v. United States

Dear Lewis,

I did not mean to suggest in my n.2 that the Commissioner's power to define income or wages is unfettered. I've made revisions to that note which I attach. I hope they may meet the concerns reflected in the asterisk note in your concurrence.

Bill

Mr. Justice Powell

Brenn 0077

ditions are present that would make retroactive application of the withholding tax to the lunch payments at issue here an abuse of discretion.

The legislative history of the Internal Revenue Code does not reveal any evidence of congressional intent to make employers guarantors of the tax liabilities of their employees. which would in all likelihood be the result if withholding taxes can be assessed retroactively.[3] Far from it. When Congress has changed the withholding provisions to enlarge the scope of the withholding base or to increase the tax rate, its uniform practice has been to give employers a grace period in which to

characterized as "mistakes of law." See 381 U. S., at 72; 353 U. S., at 183, 184. There is no simple sense in which the Commissioner is here merely undoing a mistake of law. Instead, as the Commissioner's recent withdrawal of his fringe benefit regulations witnesses, see Treasury Department Statement, Dec. 17, 1976, on Withdrawal of Discussion Draft of Proposed Regulations on Taxation of Fringe Benefits, BNA Daily Tax Rep. No. 245, at J-9 (1976), the bifurcation of payments made to employees by employers into those that are fringe benefits—and hence income and hence taxable—and those that are merely reimbursements of moneys expended by the employee for the benefit of the employer's business—and hence are a cost of doing business as an employee and hence excludable or deductible from income—is by no means easy. In the field of fringe benefit taxation, therefore, the fact that something is taxed today that was not taxed yesterday is not so much evidence of mistake corrected as of an evolving understanding of what changed circumstances and equity require. I feel no compulsion in approving such an incremental process to insist that fringe benefit law must always have been as it is newly announced on the theory that administrative interpretation must reflect a constant congressional intent. Cf. *Dixon* v. *United States*, *supra*, at 73–75. The Commissioner, in promulgating fringe benefit rulings, is not performing a judicial interpretation of the Internal Revenue Code, but is exercising the substantial discretion Congress obviously intended to confer on its tax administrators by couching the definition of income in the Code in broad and flexible language.

[3] It is possible that the employer could sue each of his employees to recover the amount of withholding taxes retroactively assessed by the Government. The chance that such a method of recovery would be either practical or cost-effective is remote, however.

I of course do not suggest that the Commissioner's power to define income or wages is unfettered. It will be time enough to consider whether any particular fringe benefit regulation is valid when and if such a regulation comes before this Court.

P. 2

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

3rd DRAFT

2/17/78

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion, emphasizing that it does not decide "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid." *Ante*, at 12 n. 12. I share the Court's conclusion that petitioner met its obligations under Treas. Reg. § 31.3401 (a)-1 (b)(2) as that regulation was most reasonably interpreted in 1963. I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the Government. See *ante*, at 7-8.

I

Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. See 26 U. S. C. § 7805 (b),[1] construed, *Dixon* v. *United States*, 381 U. S. 68 (1965); *Automobile Club of Michigan* v. *United States*, 353 U. S. 180 (1957).[2] That authority is not unfettered, however, and con-

[1] "(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

[2] This case is very unlike either *Dixon* or *Automobile Club of Michigan* in each of which the Commissioner was held authorized to correct what we

J

pp. 3, 4, 5

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 2/17/78

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion, emphasizing that it does not decide "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid." *Ante*, at 12 n. 12. I share the Court's conclusion that petitioner met its obligations under Treas. Reg. § 31.3401 (a)–1 (b)(2) as that regulation was most reasonably interpreted in 1963. I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the Government. See *ante*, at 7–8.

I

Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. See 26 U. S. C. § 7805 (b),[1] construed, *Dixon* v. *United States*, 381 U. S. 68 (1965); *Automobile Club of Michigan* v. *United States*, 353 U. S. 180 (1957).[2] That authority is not unfettered, however, and con-

[1] "(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

[2] This case is very unlike either *Dixon* or *Automobile Club of Michigan* in each of which the Commissioner was held authorized to correct what we

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

From: Mr. Justice Brennan

Circulated: 2/22/78

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, concurring.

I join the Court's opinion, emphasizing that it does not decide "whether a new regulation that, for withholding purposes, would require the treatment of lunch reimbursements as wages under the existing statute would or would not be valid." *Ante*, at 11 n. 12. I share the Court's conclusion that petitioner met its obligations under Treas. Reg. § 31.3401 (a)-1 (b)(2) as that regulation was most reasonably interpreted in 1963. I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the Government. See *ante*, at 7-8.

I

Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. See 26 U. S. C. § 7805 (b),[1] construed, *Dixon* v. *United States*, 381 U. S. 68 (1965); *Automobile Club of Michigan* v. *United States*, 353 U. S. 180 (1957).[2] That authority is not unfettered, however, and con-

[1] "(b) Retroactivity of regulations or rulings.—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

[2] This case is very unlike either *Dixon* or *Automobile Club of Michigan* in each of which the Commissioner was held authorized to correct what we

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

From: Mr. Justice Stewart

Circulated: 17 JAN 1978

Recirculated: _____

No. 76-1058

CENTRAL ILLINOIS PUBLIC SERVICE CO. v. UNITED STATES

MR. JUSTICE STEWART, concurring in the judgment.

The so-called overnight rule of United States v. Correll, 389 U.S. 299, has nothing whatever to do with the definition of either "income" or "wages". It is exclusively concerned with what deductions employees may take when they prepare their own tax returns.

The obligation of an employer to withhold upon wages depends not at all on what deductions his various employees may eventually report on their individual income tax returns. That is a question about which, as a matter

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 8 FEB 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1058

Central Illinois Public Service Company, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much that is said in the Court's opinion, I join only in its judgment.

The so-called overnight rule of *United States* v. *Correll*, 389 U. S. 299, has nothing whatever to do with the definition of either "income" or "wages." It is exclusively concerned with what deductions employees may take when they prepare their own tax returns.

The obligation of an employer to withhold upon wages depends not at all on what deductions his various employees may eventually report on their individual income tax returns. That is a question about which, as a matter of fact and of law, the employer can neither know nor care. The importation of the *Correll* rule into this case can do nothing, therefore, but confuse the issues actually before us.

I concur in the judgment of the Court because I think the reimbursements here involved were not, at the time they were made, "wages" within the meaning of § 3401 (a) of the Internal Revenue Code of 1954 as interpreted by Treas. Reg. § 31.3401 (a)–1 (b)(9).

✓

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 17, 1978

Re: 76-1058 Central Illinois Public Service Company
v.
United States

Dear Harry:

I agree.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 12, 1978

Re: No. 76-1058 - Central Illinois Public Service Co. v. United States

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: 1/12/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Join

[January —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an employer, who in 1963 reimbursed lunch expenses of employees who were on company travel but not away overnight, must withhold federal income tax on those reimbursements. Stated another way, the issue is whether the lunch reimbursements qualify as "wages" under § 3401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 3401 (a).

I

The facts are not in any real dispute. Petitioner Central Illinois Public Service Company (the Company) is a regulated public utility engaged, in downstate Illinois, in the generation, transmission, distribution, and sale of electric energy, and in the distribution and sale of natural gas. Its principal office is in Springfield. It serves a geographic area of some size. In order adequately to serve the area, the Company, in accord with long-established policy, reimburses its employees for reasonable, legitimate expenses of transportation, meals, and lodging they incur in travel on the Company's business. Some of these trips are overnight; on others, the employees return before the end of the business day.

In 1963, the tax year in issue, the Company had approximately 1,900 employees. It reimbursed its union employees

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 16, 1978

Re: No. 76-1058 - Central Illinois Public Service Co.
v. United States

Dear Bill:

This is in response to your letter of January 13. I have two comments:

1. My conference notes indicate that you were particularly bothered by the belated and seemingly retroactive feature of the assessments here. Others shared this view. I had prepared a footnote which bore upon this aspect, but at the last minute deleted it. Because of the content of the second paragraph of your letter, it may be well to put the footnote back in again. It reads:

> "An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in the light of the facts of this case."

It will be appended at the end of the paragraph which concludes at the top of page 12. I am assuming that others will have no objection to this.

2. I am somewhat concerned about going along with a statement to the effect that a regulation would be curative. Perhaps it would, but I am not certain and I hesitate to indulge in dictum to that effect. This feature really is not before us and, unless others join you, I prefer not to go that far.

I shall get out another circulation with the added footnote and some minor suggestions that come from Potter's office.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

pp. 2, 9, 10, 11, 12

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 1/16/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an employer, who in 1963 reimbursed lunch expenses of employees who were on company travel but not away overnight, must withhold federal income tax on those reimbursements. Stated another way, the issue is whether the lunch reimbursements qualify as "wages" under § 3401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 3401 (a).

I

The facts are not in any real dispute. Petitioner Central Illinois Public Service Company (the Company) is a regulated public utility engaged, in downstate Illinois, in the generation, transmission, distribution, and sale of electric energy, and in the distribution and sale of natural gas. Its principal office is in Springfield. It serves a geographic area of some size. In order adequately to serve the area, the Company, in accord with long-established policy, reimburses its employees for reasonable, legitimate expenses of transportation, meals, and lodging they incur in travel on the Company's business. Some of these trips are overnight; on others, the employees return before the end of the business day.

In 1963, the tax year in issue, the Company had approximately 1,900 employees. It reimbursed its union employees

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1978

Re: No. 76-1058 - Central Illinois Public Service Co. v. United States

Dear Bill:

I have your letter of January 20 and have the following comments:

1. I am pleased to know that you approve of the suggested new footnote 12. It was included in my second draft circulation of January 16, and I have had no expression of concern from any of the other chambers.

2. You are correct in concluding that I did not wish to indicate that a curative regulation would be effective. Perhaps it would and perhaps it would not. In any event, that situation is not before us and, as I indicated in my note of January 16, I hesitate to indulge in dictum to that effect.

3. I may view the situation too simplistically. I thought, however, that this case concerned withholding and that Kowalski concerned inclusion in gross income. I attempted in the opinion to trace the roots of the withholding statutes to show their origin far back beyond the 1954 Code when, on your approach, the Congress reassessed the income aspect. This justified, it seemed to me -- as I thought it did for a majority -- a different conclusion for withholding than for income.

4. I fully agree that all of us are trying to bring some order out of the confusion that has heretofore existed. Certainly Correll and Kowalski bring order on the income side, and I had hoped that this case would do the same for withholding.

I should add that it seems to me that what Potter has written may well not be in agreement with what you are proposing. That, of

course, is for him to say. As his circulation of January 17 indicates, he is critical of the arguments and of the proposed opinion because of their references to Correll and because he thinks that "the reimbursements here involved were not 'wages' within the meaning of § 3401(a)." Is not that point of view inconsistent with what is contained in part 2 of your letter? Perhaps I just do not understand.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

February 10, 1978

Re: No. 76-1058 - Central Illinois Public Service Co. v. United States

Dear John:

I think your suggestion is a good one. I shall add a short paragraph to this effect at the end of footnote 12 on page 12.

Sincerely,

HAB

Mr. Justice Stevens

✓

p. 12

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 2/13/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an employer, who in 1963 reimbursed lunch expenses of employees who were on company travel but not away overnight, must withhold federal income tax on those reimbursements. Stated another way, the issue is whether the lunch reimbursements qualify as "wages" under § 3401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 3401 (a).

I

The facts are not in any real dispute. Petitioner Central Illinois Public Service Company (the Company) is a regulated public utility engaged, in downstate Illinois, in the generation, transmission, distribution, and sale of electric energy, and in the distribution and sale of natural gas. Its principal office is in Springfield. It serves a geographic area of some size. In order adequately to serve the area, the Company, in accord with long-established policy, reimburses its employees for reasonable, legitimate expenses of transportation, meals, and lodging they incur in travel on the Company's business. Some of these trips are overnight; on others, the employees return before the end of the business day.

In 1963, the tax year in issue, the Company had approximately 1,900 employees. It reimbursed its union employees

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 20, 1978

Re: No. 76-1058 - Central Illinois Public Service Co.
v. United States

Dear Bill:

After rereading the several opinions and the correspondence that has passed between us, I have concluded to eliminate the first two paragraphs on page 11 of my opinion. These were troublesome to you, and I now agree that they should come out.

I do not believe this will occasion any change in the other writings. In any event, I am putting the case over.

Sincerely,

HAB.

Mr. Justice Brennan

Brennan
2/77

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 20, 1978

Re: No. 76-1058 - Central Illinois Public Service Co.
v. United States

Dear Chief:

I request that this case not come down on February 21. I have advised Mr. Putzel and Mr. Cornio accordingly.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

p. 11

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

From: Mr. Justice Blackmun

Circulated: _____

4th DRAFT Recirculated: 2/21/78

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether an employer, who in 1963 reimbursed lunch expenses of employees who were on company travel but not away overnight, must withhold federal income tax on those reimbursements. Stated another way, the issue is whether the lunch reimbursements qualify as "wages" under § 3401 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 3401 (a).

I

The facts are not in any real dispute. Petitioner Central Illinois Public Service Company (the Company) is a regulated public utility engaged, in downstate Illinois, in the generation, transmission, distribution, and sale of electric energy, and in the distribution and sale of natural gas. Its principal office is in Springfield. It serves a geographic area of some size. In order adequately to serve the area, the Company, in accord with long-established policy, reimburses its employees for reasonable, legitimate expenses of transportation, meals, and lodging they incur in travel on the Company's business. Some of these trips are overnight; on others, the employees return before the end of the business day.

In 1963, the tax year in issue, the Company had approximately 1,900 employees. It reimbursed its union employees

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 14, 1978

No. 76-1058 Central Illinois Public Service Co.
v. United States

Dear Harry:

Your addition to footnote 12 takes me "off of the fence", and I am now glad to join your opinion.

I also will join Bill Brennan's concurring opinion, as I think it important to emphasize the abuse of discretion point. Indeed, this is a classic example of the type of overreaching by the Internal Revenue Service that should not be tolerated. I would be quite happy if you chose to make further comments along this line in your opinion.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Confernce

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

From: Mr. Justice Powell

Circulated: 15 FEB 1978

Recirculated: _____

76-1058 Central Ill. Public Service Co. v. U. S.

MR. JUSTICE POWELL, concurring.

In addition to joining the Court's opinion, I also join so much of Mr. Justice Brennan's concurring opinion as addresses the question of retroactive application of the withholding tax. It seems particularly inappropriate for the Commissioner, absent express statutory authority, to impose retroactively a tax with respect to years prior to the date on which taxpayers are clearly put on notice of the liability. In other areas of the law "notice", to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation. In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization.

As the Court observes, ante at 12, in 1963 not one regulation or ruling required withholding on any

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

From: Mr. Justice Powell

Circulated: 17 FEB 1978

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1058

Central Illinois Public Service Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1978]

MR. JUSTICE POWELL, concurring.

In addition to joining the Court's opinion, I also join MR. JUSTICE BRENNAN's concurring opinion addressing the question of retroactive application of the withholding tax. It seems particularly inappropriate for the Commissioner, absent express statutory authority, to impose retroactively a tax with respect to years prior to the date on which taxpayers are clearly put on notice of the liability. In other areas of the law "notice," to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation. In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization.

As the Court observes, *ante,* at 12, in 1963—the year in question—no regulation or ruling required withholding on any travel expense reimbursement, and the intimations were to the contrary. It can safely be said that until recently (perhaps until our decision this Term in *Commissioner* v. *Kowalski, ante,* p. ——), neither employers nor employees generally had notice of the asserted tax consequences of lunch reimbursement. In short, as MR. JUSTICE BRENNAN's opinion makes clear, the Commissioner abused his discretion in attempting the retroactive imposition of withholding tax liability.

February 20, 1978

No. 76-1058 Central Illinois v. United States

Dear Chief:

As Bill Brennan has made changes in his concurrence that leave open the question whether a Regulation would be valid, I have joined his opinion.

I still plan to file my concurring opinion, and will add your name - as you indicated - unless my joining Bill Brennan makes a difference to you.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 25, 1978

Re: No. 76-1058 Central Illinois Public Service Company v. United States

Dear Harry:

Please join me.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 13, 1978

Re: 76-1058 - Central Illinois Public Service Co. v. United States

Dear Harry:

Please join me.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 10, 1978

Re: 76-1058 - Central Illinois Public Service
v. United States

Dear Harry:

Although I realize Bill Brennan reads the opinion differently, I had thought your references to the Treasury Regulation and the unfairness of a retroactive application in this case were sufficient to indicate that we have not decided whether a new regulation under the existing statute that required treating meal payments as wages would be valid. Would you be willing to insert a sentence making it unambiguously clear that the question remains open? It seems to me that such a statement would take the steam out of Bill Brennan's opinion and would not weaken the force of your opinion at all.

Respectfully,

John

Mr. Justice Blackmun