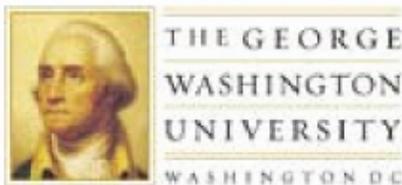


The Burger Court Opinion Writing Database

Hillsboro National Bank v. Commissioner
460 U.S. 370 (1983)

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



7A
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 15, 1982

RE: 81-485) - Hillsboro Natl. Bank v. CIR
81-930) - U.S. v. Bliss Dairy, Inc.

MEMORANDUM TO THE CONFERENCE:

I was "tentatively reverse" in this case but, depending on how narrowly an opinion is written, I may wind up to affirm. However in this state, I asked Byron to assign.

Both this case and Bliss should be written by the same author, especially since they seem to "diverge". I have assigned Bliss Dairy to Sandra and proceeded on the assumption that Byron would assign Hillsboro to Sandra.

Regards,

WRB

*He already did so
at conference on
Nov 3-*

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

CHAMBERS OF
THE CHIEF JUSTICE

December 28, 1982

Re: No. 81-485, Hillsboro National Bank v. Commissioner
81-930, United States v. Bliss Dairy, Inc.

Dear Sandra:

To help get this case moving, I join Parts I, II,
and IV and will stand by for other writing on Part III.

Regards,



Justice O'Connor

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

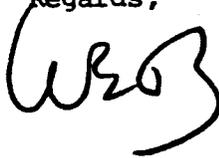
March 3, 1983

Re: 81-485 - Hillsboro National Bank v. Commissioner
81-930 - United States v. Bliss Dairy, Inc.

Dear Sandra:

You can now show me as a full "join."

Regards,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 15, 1982

SDO
I hope you can do something
with Part III as suggested
WJ

RE: No. 81-485 Hillsboro National Bank v. C.I.R.
No. 81-930 United States v. Bliss Dairy, Inc.

Dear Sandra:

Thank you very much for your letter of December 9 in the above. I finally got around to your proposed opinion. I think I can join Parts I, II and IV without difficulty, but I still have some reservations, notwithstanding the power of your argument, about Part III. I think therefore I'll await further writing.

Sincerely,

But

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 17, 1983

Re: No. 81-485 - Hillsboro National Bank v. CIR
No. 81-930 - United States v. Bliss Dairy, Inc.

Dear Chief and Thurgood:

I don't think I can go along with all of Harry's dissent. I do think, however, that Part I of his opinion convincingly responds to the analysis in Part III of Sandra's opinion. I am therefore inclined to circulate something very much like the enclosed. Do you have any thoughts?

Sincerely,

WJB
WJB, Jr.

The Chief Justice
Justice Marshall

wait for JPS

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 1/17/83

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-485 AND 81-930

81-485 HILLSBORO NATIONAL BANK, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE
UNITED STATES, PETITIONER
81-930 v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

No. 80-485. Decided January —, 1983

JUSTICE BRENNAN, dissenting in No. 81-485.

I join Parts I, II, and IV of the Court's opinion. For the reasons expressed in Part I of JUSTICE BLACKMUN's dissenting opinion, however, I believe that a proper application of the principles set out in Part II of the Court's opinion would require an affirmance rather than a reversal in No. 81-485.

Limited circulation

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 1/18/83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-485 AND 81-930

81-485 HILLSBORO NATIONAL BANK, PETITIONER
v.
COMMISSIONER OF INTERNAL REVENUE
UNITED STATES, PETITIONER
81-930 v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

No. 80-485. Decided January —, 1983

JUSTICE BRENNAN, dissenting in No. 81-485.

I join Parts I, II, and IV of the Court's opinion. For the reasons expressed in Part I of JUSTICE BLACKMUN's dissenting opinion, however, I believe that a proper application of the principles set out in Part II of the Court's opinion would require an affirmance rather than a reversal in No. 81-485.

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 1-21-83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE
UNITED STATES, PETITIONER
81-930
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

No. 80-485. Decided January —, 1983

JUSTICE BRENNAN, dissenting in No. 81-485.

I join Parts I, II, and IV of the Court's opinion. For the reasons expressed in Part I of JUSTICE BLACKMUN's dissenting opinion, however, I believe that a proper application of the principles set out in Part II of the Court's opinion would require an affirmance rather than a reversal in No. 81-485.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 15, 1982

Re: 81-485 and 81-930 -
Hillsboro Nat'l Bank v. CIR
United States v. Bliss Dairy, Inc.

Dear Sandra,

I find your opinion in these cases
persuasive and join it, although I was the
other way in the Bliss Dairy case.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 16, 1982

Re: No. 81-485-Hillsboro National Bank v. C.I.R.
No. 81-930-U.S. v. Bliss Dairy, Inc.

Dear Sandra:

I hope you can do something with Part III as suggested by Brennan.

Sincerely,



F.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

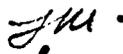
February 28, 1983

Re: Nos. 81-485 and 81-930-Hillsboro National Bank v.
Commissioner Of Internal Revenue and United
States v. Bliss Dairy, Inc.

Dear John:

Please join me in your opinion.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

RECEIVED Supreme Court of the United States
SUPREME COURT, U.S. Washington, D. C. 20543
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

82 DEC 35 P1:35

January 4, 1983

Re: No. 81-485) Hillsboro National Bank v. CIR
No. 81-930) United States v. Bliss Dairy, Inc.

Dear Sandra:

After struggling with these cases, I have decided to write separately. I shall try not to hold you up too long.

Sincerely,



Justice O'Connor

cc: The Conference

January 14, 1983

Re: No. 81-485 - Hillsboro National Bank v. CIR
No. 81-930 - United States v. Bliss Dairy, Inc.

Dear Sandra:

I have struggled with these cases and have concluded to adhere to my votes expressed at conference. The enclosed is an individualistic view of the tax benefit rule and its operation, but it is the conclusion to which I have come.

Sincerely,

HAB

Justice O'Connor

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 14, 1983

Re: No. 81-485 - Hillsboro National Bank v. CIR
No. 81-930 - United States v. Bliss Dairy, Inc.

Dear Chief, Bill, Thurgood, and John:

Each of you has indicated concern about parts of Sandra's opinion for these cases. I, too, am concerned about parts III and IV. Except for John, however, no one has displayed much enthusiasm about undertaking a dissent.

Unfortunately, the enclosure, probably, is not an answer to the concerns you respectively have expressed, and thus I leave you to your own devices. It does set forth, in its second part, my simplistic view of the purpose and proper extent of the tax benefit rule, but I cannot expect anyone to share that view with me. I just think we can carry such a judge-made rule too far. This may shock the tax bar and the tax segment of the Academy, but it represents my conclusions.

Sincerely,

H. A. S.

The Chief Justice
Justice Brennan
Justice Marshall
Justice Stevens

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: JAN 14 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930 *v.*
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January —, 1983]

JUSTICE BLACKMUN, dissenting.

These consolidated cases present issues concerning the so-called "tax benefit rule" that has been developed in federal income tax law. In No. 81-485, the Court concludes that the rule has no application to the situation presented. In No. 81-930, it concludes that the rule operates to the detriment of the taxpayer with respect to its *later* tax year. I disagree with both conclusions.

I

In No. 81-485, the Court interprets § 164(e) of the Internal Revenue Code of 1954, 26 U. S. C. § 164(e). See *ante*, at 14-15. It seems to me that the propriety of a 1972 deduction by the Bank under § 164(e) depended upon the payment by the Bank of a state tax on its shares. This Court's decision

February 21, 1983

Dear John:

Re: No. 81-485 - Hillsboro National Bank v. CIR
No. 81-930 - United States v. Bliss Dairy, Inc.

I have carefully read your opinion concurring in the judgment in No. 81-485 and dissenting in No. 81-930. You have asked me to advise you of any technical slips that might be apparent to me. I see none whatsoever. Your opinion is an interesting and, obviously, carefully prepared one that, in my estimation, presents a valid point of view. I shall not join it because of the peculiar approach I have to these two particular cases, with their successive-tax-year fact situations.

Your footnote 3 on page 3 brought back memories. The cases cited there (there were four consolidated ones) all originated in my old Minneapolis office. I worked on them a little, but they were handled primarily by our tax chief, Leland W. Scott, and my associate, John W. Windhorst. The 30's and the 40's were dismal days in tax practice, for the Government was scraping the bottom of the barrel and all the cases with tax issues seemed to be going in favor of the Government. When we lost in the Eighth Circuit, however, we took a last gasp shot at this Court, feeling that, despite a conflict, we would not get anywhere. At the time, Bill Prosser was in the office and we were hard put to find something for him to do. Mr. Scott came up with the idea that these cases would be an ideal assignment for Bill. He protested, saying that he had had no experience in the tax field. His protest was not very loud, however, for I think he relished the opportunity to go to Washington and to argue before the Court. He did. He reported back that, while he had been treated politely, the cause was lost. Much to our surprise, and much to the utter amazement of Bill Prosser, the cause turned out not to be entirely lost. This was because the Court sua sponte adopted a new approach about findings of fact made by the Tax Court. The whole office hastened to congratulate Prosser about his winning a case on a point that he had not argued at all. We got a lot of mileage out of it and, of course, he took the lofty position that his personal dignity and his well-known position in the field of torts persuaded the Court to decide in his favor.

One last word -- Mr. Harwick was the lay head of the Mayo Clinic. He is the one who lured me out of practice to go to Rochester. He is the only one who could have done that, for I greatly admired him. I suppose that if that move had not been made, I would not be here today. He certainly influenced my life.

Sincerely,

Justice Stevens

HAB

STYLISTIC CHANGES

Page References changed

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: _____

Recirculated: _____ FEB 23 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[February —, 1983]

JUSTICE BLACKMUN, dissenting.

These consolidated cases present issues concerning the so-called "tax benefit rule" that has been developed in federal income tax law. In No. 81-485, the Court concludes that the rule has no application to the situation presented. In No. 81-930, it concludes that the rule operates to the detriment of the taxpayer with respect to its *later* tax year. I disagree with both conclusions.

I

In No. 81-485, the Court interprets § 164(e) of the Internal Revenue Code of 1954, 26 U. S. C. § 164(e). See *ante*, at 21-24. It seems to me that the propriety of a 1972 deduction by the Bank under § 164(e) depended upon the payment by the Bank of a state tax on its shares. This Court's decision

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January 3, 1983

81-485 Hillsboro National Bank v. CIR
81-930 United States v. Bliss Dairy

Dear Sandra:

I have taken a further look at your opinion. Although it is quite persuasively written, I have thought of these cases as involving the recovery theory of the tax benefit rule and, as I read your opinion, you rely on the inconsistent event theory.

Although I agree with the result in Hillsboro, my concern is that the reasoning underlying your opinion will not protect other similarly situated taxpayers from the inequity of being taxed for money they never recovered or controlled.

I also remain inclined to stay with my tentative vote in Bliss Dairy, which was to affirm.

I will therefore await further writing.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

January 28, 1983

81-485 and 81-930 Hillsboro and Bliss Diary

Dear Sandra:

Kathy and Rives have worked out some language that, if acceptable to you, will bring us close enough together for me to join your opinion.

I enclose a copy that incorporates some editing by me that was intended merely for clarification.

If you find this acceptable, I will be glad to join your entire opinion. I have not reexamined it to be sure that no conforming changes are required in other portions of the opinion. Kathy and Rives can check this.

I am glad we can get this difficult case decided.

Sincerely,

Justice O'Connor

lfp/ss

February 1, 1983

81-485 Hillsboro National Bank v. Commissioner
81-930 United States v. Bliss Diary

Dear John:

After further consideration and in light of changes Sandra has made in her opinion, I have decided to join her.

Sincerely,

Justice Stevens

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 1, 1983

81-485 Hillsboro National Bank v. Commissioner
81-930 United States v. Bliss Diary

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 16, 1982

Re: No. 81-485 Hillsboro National Bank v. CIR
No. 81-930 United States v. Bliss Dairy, Inc.

Dear Sandra:

Like Byron, I had voted the other way at Conference in the Bliss Dairy case, but I am persuaded by your opinion in these two cases. I therefore join them.

Sincerely,



Justice O'Connor

cc: The Conference

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'82 DEC 16 AM 0:53

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 9, 1982

Re: 81-485 - Hillsboro National Bank v.
Commissioner of Internal Revenue; and
81-930 - United States v. Bliss Dairy

Dear Sandra:

It seems to me that the analysis of the tax benefit rule which you develop in part II of your opinion comes much closer to the government's "inconsistent event" theory than it does to the "recovery" theory. Perhaps further study will persuade me to accept your analysis, but for the present I still believe that the "recovery" approach is the correct one.

Your analysis of the Hillsboro case in part III is most persuasive. Because it applies the "inconsistent event" theory of the tax benefit rule, however, I am not sure that I will be able to join it. Perhaps some language changes will make it possible for me to do so.

As far as the Bliss case discussed in part IV is concerned, my acceptance of the "recovery" theory leads me to part company with you on page 16, without even reaching the §336 issue. In addition, I am not persuaded that cases arising under §337 necessarily apply to the quite different problem covered by §336. In sum, I do not expect to join parts II or IV and will await further comments before coming to rest on part III.

Respectfully,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'82 DEC 35 P1:33

January 3, 1983

Re: 81-485 & 81-930 - Hillsboro National
Bank v. CIR

Dear Sandra:

After further work on these cases, I have decided to write a separate opinion which will dissent from the Bliss Dairy holding and concur separately in your conclusion in Hillsboro Bank. I have prepared a rough first draft but it will take a little while to put it into final form. I will try not to hold you up too long.

Respectfully,



Justice O'Connor

Copies to the Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6, 18, 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: FEB 18 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[February —, 1983]

JUSTICE STEVENS, concurring in the judgment in No. 81-485 and dissenting in No. 81-930.

These two cases should be decided in the same way. The taxpayer in each case is a corporation. In 1972 each taxpayer made a deductible expenditure, and in 1973 its shareholders received an economic benefit. Neither corporate taxpayer ever recovered any part of its 1972 expenditure. In my opinion, the benefits received by the shareholders in 1973 are matters that should affect their returns; those benefits should not give rise to income on the 1973 return of the taxpayer in either case.

Both cases require us to apply the tax benefit rule. This rule has always had a limited, but important office: it determines whether certain events that enrich the taxpayer—re-

Jan 27

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: FEB 25 '83

7. 6, 13, 16-18

JPS
Please from [unclear] and [unclear]
[unclear]

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930 v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February —, 1983]

JUSTICE STEVENS, concurring in the judgment in No. 81-485 and dissenting in No. 81-930.

These two cases should be decided in the same way. The taxpayer in each case is a corporation. In 1972 each taxpayer made a deductible expenditure, and in 1973 its shareholders received an economic benefit. Neither corporate taxpayer ever recovered any part of its 1972 expenditure. In my opinion, the benefits received by the shareholders in 1973 are matters that should affect their returns; those benefits should not give rise to income on the 1973 return of the taxpayer in either case.

Both cases require us to apply the tax benefit rule. This rule has always had a limited, but important office: it determines whether certain events that enrich the taxpayer—re-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAR 4 '83

72. 1, 16, 17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 AND 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930 *v.*
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March —, 1983]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in the judgment in No. 81-485 and dissenting in No. 81-930.

These two cases should be decided in the same way. The taxpayer in each case is a corporation. In 1972 each taxpayer made a deductible expenditure, and in 1973 its shareholders received an economic benefit. Neither corporate taxpayer ever recovered any part of its 1972 expenditure. In my opinion, the benefits received by the shareholders in 1973 are matters that should affect their returns; those benefits should not give rise to income on the 1973 return of the taxpayer in either case.

Both cases require us to apply the tax benefit rule. This rule has always had a limited, but important office: it deter-

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 9, 1982

No. 81-485 Hillsboro National Bank v. CIR
No. 81-930 U. S. v. Bliss Dairy, Inc.

Dear Bill,

My conference notes on Bliss Dairy show that you expressed some concern over the amount of income to be recognized by the corporation. Since the taxpayer has argued only that it has no income and not that, if there is income, the amount is less than the amount previously deducted, I prefer not to decide the question, and that is the approach that I take in the draft currently circulating. I have, however, given some thought to the problem, and, if we were to resolve the question, I doubt that the result would be any different for the reasons set forth below.

Some commentators have argued that the correct measure of the income that Bliss should include is the lesser of the amount it deducted or the basis that the shareholders will take in the asset. See Feld, The Tax Benefit of Bliss, 62 B.U. L. Rev. 443, 463-464 (1982); see also Rev. Rul. 74-396, 1974-2 Cum. Bull. 106. There is a certain appeal to this proposed rule if one views the problem here solely as one of the shareholders' benefiting from a deduction after the corporation has already taken a deduction, for, if the basis allocated to the feed here by the shareholders is less than its fair market value, the total deductions taken by the corporation and by the shareholder will not add up to the historic cost originally paid by the corporation to acquire the feed. Nonetheless, I believe, for a number of reasons, that Bliss must recognize the full amount of the deduction, whatever the basis allocated by the shareholders to the grain.

First, we look to §1245, which reflects the solution that Congress adopted for the similar problem of excessive depreciation. This provision overrides §336. Section 1245(a); Treas. Reg. §1.1245-6(b), 26 CFR §1.1245-

6(b) (1982). Therefore, if a corporation has depreciated an asset and then distributes it in liquidation, under §1245, it must recognize as income the amount of the depreciation deductions which did not actually reflect the depreciation in value of the asset. See §1245(a)(1), (2). As long as the shareholder's basis is not determined by reference to the corporation's basis in the assets, §1245(b)(3), there is no mechanism to reflect the basis that the shareholder takes in the asset. See Treas. Reg. §1.1245-1(c)(2) example 2, 26 CFR §1.1245-1(c)(2) example 2. Thus, if the corporation takes depreciation deductions of \$90 on an asset with a historic cost of \$100, and if the asset has a fair market value of \$50 on the date of liquidation, and the shareholder allocates basis of \$20 to that asset, under §1245, the corporation must take \$40 into income. Even though the cost of the asset in the last arm's-length sale was \$100, the corporation and shareholder will only be able to take a total of \$70 in depreciation deductions -- precisely the result under the rule we adopt here for §162.

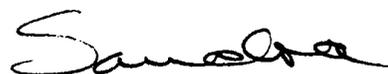
Second, the suggested refinement would introduce significant complexities in the tax treatment of both corporation and shareholder. If the corporation takes the deduction back into income before the liquidation, presumably that income increases its earnings and profits, 1 J. Mertens, *Law of Federal Income Taxation* §9.28 (J. Doheny rev. ed. 1981); B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶7.03 (4th ed. 1979), which increases the gain recognized by the shareholder on the liquidation under §333, which in turn increases the shareholder's basis in the assets acquired under §334(c)(2). If we were to make the amount of the income dependent on the shareholder's basis, the income would be a function of the basis and the basis a function of the income. Ascertaining the income then would require the solution of a pair of simultaneous equations -- which, though perhaps a reasonable junior high school algebra problem, is a mathematical assignment that the judiciary should be hesitant to impose on the taxpayer or the Government, particularly when Congress has not seen fit to create such complexities in the legislative version of the tax benefit rule, §1245.

Third, if the problem here is avoidance of the corporate tax on distributions to individual shareholders, see generally Note, The Tax Benefit Rule and Corporate Liquidations: Baiting the "Trap for the Unwary," 4 J. Corp. L. 681, 705 (1979), there is no reason for the income

recognized to be less than the deduction taken. The corporation has deducted the value of goods that were never consumed in its business against business income earned while taking advantage of the corporate form. The shareholders may take a basis less than fair market value in the assets, but they have "purchased" those assets by giving up only that much basis in their stock, and, in return for this basis lower than market, they are shielded from recognition of the appreciation in their stock when they exchange that stock for the assets.

I hope you agree we need not spell all this out in this opinion.

Sincerely,



Justice Brennan

pp. 2, 4, 9, 11, 20, 21, 22

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

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-485 and No. 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES, PETITIONER
81-930 *v.*
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[December —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

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

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

'82 DEC 17 A10:09

December 16, 1982

No. 81-485 Hillsboro Nat'l. Bank v. C.I.R.
No. 81-930 United States v. Bliss Dairy, Inc.

Dear Thurgood,

I understood Bill Brennan as joining Parts I, II and IV, but deciding to wait to take a look at any writing by others before deciding whether to join Part III. I had not, at this stage, planned to change Part III.

Sincerely,



Justice Marshall

Copies to the Conference

— Stylistic changes throughout
pp 1, 2, 7-9, 12-14, 17-18

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

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-485 and No. 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES, PETITIONER
81-930
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 28, 1983

Nos. 81-485 and 81-930 Hillsboro and Bliss Dairy

Dear Lewis,

I am absolutely delighted you can join the opinion. I think the additions which you have approved are very helpful in clarifying the circumstances in which no recognition of income is required.

I enclose an edited version of your enclosure which I trust will be satisfactory.

Thank you for your patience and your help.

Sincerely,

Sandra

Justice Powell

Attachment

*I agreed
to this. It
is substantially
what River
& I wrote.
L.F.P.
1/31*

Stylistic Changes Throughout
pp 11-13, 20

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

From: **Justice O'Connor**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 and 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930 *v.*
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

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Stylistic changes throughout
pp 7-20, 25, 26, 32, 33

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

From: Justice O'Connor

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 and 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

81-930
UNITED STATES, PETITIONER
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[February —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

Stylistic Changes Throughout

P.P. 7-19, 26, 29, 32

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

From: Justice O'Connor

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 and 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485 *v.*
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930 *v.*
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

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pp. 13, 14, 20, 24, 32

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

From: Justice O'Connor

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-485 and 81-930

HILLSBORO NATIONAL BANK, PETITIONER
81-485
v.
COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER
81-930
v.
BLISS DAIRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[March —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases present the question of the applicability of the tax benefit rule to two corporate tax situations: the repayment to the shareholders of taxes for which they were liable but that were originally paid by the corporation; and the distribution of expensed assets in a corporate liquidation. We conclude that, unless a nonrecognition provision of the Internal Revenue Code prevents it, the tax benefit rule ordinarily applies to require the inclusion of income when events occur that are fundamentally inconsistent with an earlier deduction. Our examination of the provisions granting the deductions and governing the liquidation in these cases lead us to hold that the rule requires the recognition of income in the case of the liquidation but not in the case of the tax refund.

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