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reviewing court would be powerless to act where the agency had gone through the formality of listing the alternatives, thus complying with the procedural requirements of section 102(2)(c). This leaves NEPA with no muscle to halt an undesirable project after the agency has "filled in the blanks" by simply listing the alternatives.

Finally, the facts of *Froehlke* indicate that the inadequacies and inaccuracies of the environmental impact statement were so great as to constitute a breach of the procedural as well as the substantive requirements of NEPA. The court did not insist upon the detailed consideration of the project that is required by NEPA. Instead it accepted the self-serving description of the project presented by the Corps of Engineers which casually dismissed many of New Hope's costs and adverse effects while relying on exaggerated benefits. The inadequate consideration of the alternatives to the project also amounted to noncompliance with section 102. Section 102 implicitly requires that the reports of alternatives be complete and accurate. NEPA does not contemplate the submission of misleading reports. When inaccurate reports are submitted the agency has not even met the procedural requirements of NEPA.

This case could have become the cornerstone of substantive judicial review under NEPA without breaching the traditional limits on judicial power. Without doubt, substantive judicial review conjures up visions of the court completely disregarding a reasonable and well-supported administrative decision by substituting its own subjective beliefs and preferences. Agencies on occasion fail to fully consider the environmental impact of their programs and projects. Section 101 should be interpreted as providing a judicial solution to such situations without unduly restricting agency discretion.

STEPHEN T. SMITH

Income Taxation—Deductibility of Employment Agency Fees

Within the last few years executive level employees have been seeking new employment as frequently as blue-collar workers.¹ In a highly specialized technological or administrative field, employment opportunities are rare, and it is frequently necessary for the job seeker to engage

¹Tucker, *An Individual's Employment-Seeking Expenses: Analyzing the New Judicial Climate*, 34 J. TAX. 352 (1971).

the services of an executive employment agency. Is the fee which is paid to an employment agency or referral service a deductible business expense² when the agency is unsuccessful in its efforts to locate a new employment? The Tax Court, in *Leonard F. Cremona*,³ a decision by the full court, recently held that the deduction no longer depends upon whether a new job was actually obtained by the employment agency. Now the only determination⁴ is whether the new job is, or would have been, in the same trade or business in which the employee was working at the time of the expense.⁵

Leonard F. Cremona contracted with Harvard Executive Research Center, Inc., to pay a fee of \$1,500 for job counseling and referral services concerning available corporate administrative employment opportunities. No new job was obtained⁶ and Cremona continued to be employed by the same corporation in the same administrative capacity as when he first contracted the employment agency. Cremona believed that there was still a possibility of future job offers although the employment agency's service had terminated.

The Tax Court held that the employment agency fee was a deductible expense since it was a good faith effort to improve the job opportunities in the trade or business in which the employee was engaged prior

²INT. REV. CODE OF 1954, § 162(a) states:

"(a) IN GENERAL—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."

Id. § 212, states:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income"

In *Leonard F. Cremona*, 58 T.C. 219, P-H TAX CT. REP. & MEM. DEC. (58 P-H TAX CT. REP.) ¶ 58.20 (May 4, 1972), and *David J. Primuth*, 54 T.C. 374 (1970), the Tax Court found the expense to be deductible under § 162 and refrained from discussing the possibility that a deduction might also be allowed under § 212.

³58 T.C. 219, P-H TAX CT. REP. & MEM. DEC. (58 P-H TAX CT. REP.) ¶ 58.20 (May 4, 1972).

⁴*Id.* Although the court discusses only the requirement that the expense must be for seeking employment in the same trade or business, the discussion of *United States v. Geneser*, 92 S. Ct. 827 (1972), in this note indicates that an additional determination may be required in the future. See note 39 & accompanying text *infra*.

⁵*Id.* at 222, P-H TAX CT. REP. & MEM. DEC. at 153. See also *Gale C. Huber*, 39 P-H Tax Ct. Mem. 1047 (1970), which held that expenses incurred by unemployed persons are business expenses since those persons are still in the same trade or business of being a particular type of employee.

⁶The \$1,500 fee was nevertheless paid because it was not contingent on securing a new job.

to the expenditure.⁷ The court stated that outside factors, such as economic conditions in the field in which Cremona sought to obtain a new job, should not determine deductibility.⁸

After *David J. Primuth*,⁹ in 1970, there was a two-part test to determine the deductibility of employment agency fees. First, the new employment had to be within the same trade or business in which the person had been previously employed; secondly, the expenses had to be for securing a job rather than for merely seeking one.

The requirement that the new job had to be in the same trade or business as the old job relates to section 162¹⁰ of the Internal Revenue Code. Because a deduction under section 162 is not allowed for expenses incurred prior to going into a business,¹¹ the business had to have existed at the time the expense was incurred. Thus, an employment fee for changing from one trade or business to another would not have been deductible since it did not involve carrying on the old trade or business, and the new trade or business had not yet begun.

For many years, the courts have recognized that a person may be in the trade of being in a particular profession.¹² Teachers,¹³ engineers,¹⁴ and even corporate executives¹⁵ have been recognized as persons engaging in a trade or business. This concept has been expanded to the point that expenses incurred by persons who were unemployed have been allowed as deductible business expenses because they were still in the

⁷58 T.C. at 222, P-H TAX CT. REP. & MEM. DEC. at 153. The Tax Court was willing to accept the taxpayer's contention that he was in the trade or business of being an "administrator." If such broad categories are considered a trade or business in the future, the possible difficulties in obtaining a business expense deduction for employment agency fees which are discussed in this note will be substantially reduced.

⁸*Id.*

⁹54 T.C. 374 (1970). The taxpayer in *Primuth* was secretary-treasurer of one corporation and paid a noncontingent fee to an employment agency. As a result of the efforts of the agency, the taxpayer accepted employment with another corporation as controller and assistant to the vice president of finance. The new employment was held to be in the same trade or business and the business expense deduction was allowed under § 162(a).

¹⁰See note 2 *supra*.

¹¹*Richmond Television Corp. v. United States*, 345 F.2d 901 (4th Cir. 1965). In this case expenses of a television corporation to train personnel several years before receiving an operation license were denied. These expenses were not incurred in "carrying on a trade or business" as required by § 162.

¹²*E.g.*, *Furner v. Commissioner*, 393 F.2d 292 (7th Cir. 1968); *Harold A. Christensen*, 17 T.C. 1456 (1952).

¹³*Furner v. Commissioner*, 393 F.2d 292, 294 (7th Cir. 1968).

¹⁴*Kenneth R. Kenfield*, 54 T.C. 1197, 1199 (1970).

¹⁵*David J. Primuth*, 54 T.C. 374, 379 (1970).

trade or business of being a particular type of employee.¹⁶ However, some judges have expressed a desire to limit this concept severely by restricting the taxpayer's business to being an employee for the particular employer for whom he is working.¹⁷ Consequently, expenses in seeking a job with a new employer would not be deductible because the new employment would be another trade or business and nearly all employment agency fee deductions would be destroyed. Fortunately, this conception has yielded to a broad trade or business test such as that utilized in *Cremona*.¹⁸

The second requirement for the deductibility of employment agency fees prior to *Cremona* was that the expense had to be for securing rather than seeking a job.¹⁹ The job-seeking and job-securing distinction was initially evoked in Office Decision 579 in 1920,²⁰ which stated that fees paid to secure employment would be allowed as a deduction. Revenue Ruling 60-158,²¹ however, specifically stated that all fees paid to employment agencies were not deductible. In the same year, Revenue Ruling 60-223²² revoked Revenue Ruling 60-158 and stated that "the Internal Revenue Service will continue to allow deductions for fees paid to employment agencies for securing employment." Although the Service, through a series of Revenue Rulings, stated that it would only allow employment agency fees paid for securing a job to be deducted as a business expense, it made no attempt to develop guidelines to determine whether a fee was paid for seeking or for securing a job.

In *Thomas W. Ryan*,²³ an employment agency fee was disallowed as a business expense deduction even though evidence was presented that the final part of the fee was contingent upon the acquisition of a new job and that a new job was obtained. Ryan was required to pay a \$250 retainer to the employment agency and a \$250 final fee contingent upon the acquisition of a new job. The Tax Court disallowed the retainer as being an expense for seeking a new job and then disallowed the contingent fee because of lack of proof of payment. This different reason for denying the final fee was an early indication that the tax court would

¹⁶Gale C. Huber, 39 P-H Tax Ct. Mem. 1047 (1970).

¹⁷David J. Primuth, 54 T.C. 374, 384 (1970) (Tietjens, J., dissenting).

¹⁸See note 7 *supra*.

¹⁹David J. Primuth, 54 T.C. 374, 380 (1970).

²⁰3 CUM. BULL. 130 (1920).

²¹1960-1 CUM. BULL. 140.

²²1960-1 CUM. BULL. 57.

²³28 P-H Tax Ct. Mem. 506 (1959).

distinguish contingent employment agency fees from those which were paid regardless of whether new employment was obtained.

After *Ryan*, the Service had argued that deductions for contingent fees were allowable if the job were actually obtained as a result of the efforts of the employment agency,²⁴ but fees paid whether or not the agency was successful in obtaining employment were for job-seeking, not job-securing, and were not deductible even if employment was obtained.²⁵ In *Primuth* this argument was again made, but the Tax Court found this a "distinction without a difference."²⁶ The purpose and results of the payments were said by the court to be the same in either event. The employment agency had practically guaranteed Primuth that they would find a new job for him.²⁷ Therefore the existence of noncontingent fee did not preclude deductibility so long as the taxpayer was successful in obtaining a new job in the same trade or business.

The requirement that employment be secured was expanded still further by *Kenneth R. Kenfield*.²⁸ In *Kenfield*, the taxpayer paid a noncontingent employment agency fee and accepted a new job in the same trade or business found for him by the employment agency. However, the taxpayer reconsidered, declined the new job offer, and decided to remain at this old job because he was given a raise and a promotion. The Tax Court found that the promotion and raise given by his old employer was a direct consequence of the new job offer and allowed the employment fee as a business expense deduction.²⁹ This case moved the Tax Court one step closer to completely abandoning the requirement that the employee must be successful in his attempt to find a new job.

The job-securing half of the two-part test for deductibility has now been removed by *Cremona*. The job sought still must be in the same trade or business, but it does not actually have to be secured before the

²⁴In *Carson J. Morris*, 36 P-H Tax Ct. Mem. 1424 (1967), *aff'd*, 423 F.2d 611 (9th Cir. 1970), an employment agency fee was denied as a business expense deduction because the new job resulted from the efforts of the taxpayer rather than from those of the employment agency. The court felt that this was an indication that the fee was for seeking rather than for securing new employment.

²⁵*Francois Louis*, 35 P-H Tax Ct. Mem. 1174, 1177-1178 (1966): "While the effect of such rulings and instructions is not entirely clear, it seems that they would allow as deductions payments (to employment agencies and perhaps others) for having secured employment for the taxpayer, but would disallow as deductions amounts paid for seeking employment which are payable irrespective of whether employment is secured."

²⁶54 T.C. at 380.

²⁷*Id.*

²⁸54 T.C. 1197 (1970).

²⁹*Id.* at 1200.

business deduction is allowed. Does the new test allow a deduction if the title or description of the new job is the same as that of the old job, or must the basic skills which are to be used in the new job also be the same as those used in the old one? Although the requirement that the new employment must be in the same trade or business existed prior to *Cremona*,³⁰ its coexistence with the job-securing requirement prevented any thorough development of this test because the deduction could be denied solely on the basis of failure to secure new employment.

The Commissioner sought to distinguish *Cremona* from prior³¹ cases which had allowed an employment agency fee as a deduction by citing *Eugene A. Carter*³² in which the taxpayer was not successful in obtaining a new job and the deduction was disallowed. *Carter* was held not applicable by the court because the taxpayer in *Carter* sought to obtain a job in a different trade or business.³³ Prior to *Cremona*, there seem to be no significant cases which denied the deductibility of employment agency fees solely on the basis that the new job was not in the same trade or business. It would seem that the uncertainty which has developed in applying the same trade or business test to business deductions for educational expenses has now been injected into the area of employment agency fee deductions.³⁴

The post-*Cremona* taxpayer who incurs expenses in obtaining a new job which carries a slightly different job title or requires somewhat different skills or a higher degree of the same skills³⁵ cannot be certain that he will be allowed a business expense deduction. It is possible that such a person, due to the prior lack of emphasis which was placed on the requirement that the new job be in the same trade or business, would

³⁰*E.g.*, *Eugene A. Carter*, 51 T.C. 932 (1969).

³¹*E.g.*, *Kenneth R. Kenfield*, 54 T.C. 1197 (1970); *Guy R. Motto*, 54 T.C. 558 (1970); *David J. Primuth*, 54 T.C. 374 (1970).

³²51 T.C. 932 (1969).

³³58 T.C. at 221, P-H TAX CT. REP. & MEM. DEC. at 152.

³⁴The test which is used to determine the deductibility of education costs as a business expense is whether the expense was incurred to maintain employment or proficiency in the same trade or business. The same trade-or-business test, as used in the education expense business deduction cases, has been characterized by uncertainty. *Compare, e.g.*, *Welsh v. United States*, 210 F. Supp. 597 (N.D. Ohio 1962), *aff'd per curiam*, 329 F.2d 145 (6th Cir. 1964), which held that an Internal Revenue agent could have a business deduction for his expenses in going to law school even though he quit his job shortly after graduating, *with James J. Engel*, 31 P-H Tax Ct. Mem. 1441 (1962), which held that a law degree qualified an Internal Revenue agent for a new profession and that a business deduction would not be allowed for the costs of going to school.

³⁵*See* 58 T.C. at 224, P-H TAX CT. REP. & MEM. DEC. at 154 (Sterrett, J., concurring).

have been allowed a business expense deduction prior to *Cremona* but may not be allowed such a deduction in the future. Since there is now only one criterion for the deductibility of employment agency fees, judges may feel compelled to apply it more strictly. Consequently, the new job may be required to involve exactly the same duties, rather than merely the same basic skills, as the old job. The Tax Court may no longer consider an unemployed person to be engaged in a particular trade or business.³⁶ There are many ways in which the same trade or business test could be modified by judicial interpretation so as to disallow deductions which had previously been allowed in situations in which the taxpayer was successful in obtaining new employment.

Another problem may be presented when the taxpayer has paid an employment agency fee but has been unsuccessful in obtaining new employment. A determination of the type of new employment which the taxpayer was seeking would have to be made before there could be any determination whether the job sought would constitute a new trade or business. If the taxpayer was seeking new employment which was not the same as his present trade or business, the deduction seemingly would be disallowed. Even though the requirement that a new job must be secured no longer exists, the business expense deduction apparently would be allowed only for a good faith effort to secure employment in the *same*³⁷ trade or business.

An even more difficult situation would be the one in which the taxpayer not only would be willing to accept new employment in the same trade or business in which he is presently employed but also would be willing to accept employment in a different trade or business. Such a consideration would seem to call for a determination of the dominant desires in seeking new employment. It would be impossible to determine, with any degree of exactness, whether the taxpayer wanted employment in a new trade or business more than he wanted new employment in the same trade or business. Faced with the difficulty of this determination, the Tax Court might restrict deductions in this area by disallowing the employment agency fee when the taxpayer is willing to accept employment in a field other than his present trade or business but is unsuccessful in obtaining either. If the taxpayer was willing to accept employment in a field other than his trade or business and was

³⁶See note 16 *supra*.

³⁷58 T.C. at 222, P-H TAX CT. REP. & MEM. DEC. at 153.

unsuccessful in getting a new job, then, under the rigid interpretation suggested above, he would be in the same position as he would have been before *Cremona* since the deduction would have been denied because no new job was obtained. Furthermore, the taxpayer might be in a less desirable position after *Cremona* if he had expressed a willingness to accept employment either in his present trade or business or in some other field and then acquired new employment in his present trade or business. The deduction would have been allowed prior to *Cremona* since he obtained new employment in the same trade or business. But the expense might now be disallowed because the taxpayer was willing to accept employment in some other trade or business when he incurred the expense. At present there is no way to determine the manner in which the Tax Court will treat a willingness to accept employment in some other trade or business. Although the same trade or business test was frequently mentioned prior to *Cremona*, the decisions had been made largely on the basis of a failure to secure a new job.³⁸

The general area of business purpose was discussed in *United States v. Generes*,³⁹ a recent Supreme Court decision which held that a business expense will be allowed only if the trier of fact determines that the dominant motive for the claimed business expenditure was a business purpose. *Cremona* requires that the expense must be for attempting to find a new job in the same trade or business. The determination in both *Generes* and *Cremona* concerns business purpose. *Generes* involves the entire area of business purpose while *Cremona* requires that a specific business purpose, to find a job in the same trade or business, must be present. *Generes* could affect the outcome of future cases in which employment agency fee deductions are sought since the specific business purpose required by *Cremona* could be present while the dominant motive, which *Generes* requires must be a business purpose, might be lacking. References to *Generes* and its possible impact upon *Cremona* were made in two of the concurring opinions in *Cremona*.⁴⁰ Judge Tannenwald, with whom two judges agreed, and Judge Sterrett indicated that *Generes* may have a restrictive influence on employment agency fee deductions. They stated that the majority's same trade or business determination, combined with the dominant motive require-

³⁸*E.g.*, *Eugene v. Carter*, 51 T.C. 932 (1969).

³⁹92 S. Ct. 827 (1972).

⁴⁰58 T.C. at 223-24, P-H TAX CT. REP. & MEM. DEC. at 154 (Tannenwald & Sterrett, JJ., concurring).

ment in *Generes*, was sufficient to prevent an unduly broad allowance of deductions in this area. An example of the effect which the *Generes* opinion could have upon *Cremona* would be if a taxpayer paid an employment agency fee to locate a new job in exactly the same trade or business and his dominant motive for changing jobs was a nonbusiness motive, such as a change of climate. If the *Cremona* criterion were used alone, the deduction would be allowed since this was an attempt to get a new job in the same trade or business. However, because the dominant motive for the expense was a nonbusiness purpose, the deduction would not be allowed under *Generes*.

When the Tax Court ceased to use the job-securing requirement for determining the deductibility of employment agency fees, it repudiated a test which was both unfair to the taxpayer and illogical in relation to section 162⁴¹ of the Internal Revenue Code. But the job-securing distinction did have one appealing advantage—it was definite and consequently easy to apply. The same trade or business test, applied alone, is both fair and logical in that it allows a deduction for an expense which is related to the taxpayer's trade or business. Unfortunately, it is presently undeveloped and offers no definite guidelines for the taxpayer. Additionally, it may be difficult to develop clear and definite guidelines due to the difficulty in determining a subjective factor such as the dominant motive and the room for interpretation in determining whether the new employment is within the same trade or business. In the area of educational expense deductions, where the same trade or business criterion has been used for years,⁴² the persisting uncertainty as to whether specific deductions will be allowed portends equal future uncertainty in predicting the deductibility of employment agency fees.

WILLIAM S. PATTERSON

Landlord and Tenant—Retaliatory Eviction and the Absolute Right to Choose Not to Have Any Tenants

When a landlord is unwilling to bring his rental units into compliance with housing code provisions, does his ownership of the property include the absolute right to discontinue rental of all such units? If so,

⁴¹See note 2 *supra*.

⁴²See note 34 *supra*.