UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 54 | Number 2

Article 9

1-1-1976

Federal Income Taxation -- Transfers to and Leasebacks from a Short-Term Trust

Carl N. Patterson Jr.

should be punished, but the penalty should be substantive, and only after a due process conviction at a separate trial for the escape. Some procedural sanctions such as conditional dismissal of appeal may be justifiable when the escapee is still at large, but never after recapture when personal jurisdiction has reattached, especially if the appeal has not been delayed.

The preclusion of review allowed by *Estelle* means that a prison term must be served by the escapee regardless of errors in his original conviction which, had an appeal been allowed, might have resulted in a new trial or outright reversal. Apart from this borderline due process consideration, there is a serious equal protection issue not fully faced by the majority. As Justice Stewart indicates in his dissent,[107] a real possibility exists of two prisoners escaping at the same time and in the same manner and yet suffering completely disparate sentences dependent upon the fortuity of errors at trial, and wholly unrelated to the gravity of the offense of escape. Although the majority in *Estelle v. Dorrough* considered the interests of appellate courts in judicial economy, the interests of other appellants in expeditious appeals, and the interests of the state and the public in deterring escape, the most important interest—that of an inmate under a quarter-century prison term in having justice done—has been sadly neglected.

OTHO B. ROSS, III

Federal Income Taxation—Transfers to and Leasebacks from a Short-Term Trust

For almost thirty years[1] tax planners have been frustrated by the judicial confusion surrounding the deductibility of rental payments made by a settlor for property used in his trade or business which he has transferred to and leased back from a short-term trust.[2] To date, two

for duress due to homosexual threats. People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *noted in* 43 U. CIN. L. REV. 956 (1974). The escapee in *Estelle* apparently did not seek to justify his escape.

107. 420 U.S. at 542.

1. The first case to deal directly with this problem was Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948).

2. Deductions of rental payments for property used in the taxpayer's trade or business are generally allowed under section 162(a) of the Internal Revenue Code of 1954. That section provides in part:

somewhat divergent lines of decision have emerged.[3] Those cases allowing the deduction as an "ordinary and necessary" business expense have focused on the leaseback and have found "necessity" in the settlor's legal obligation to pay rent.[4] As part of this analysis courts so holding have emphasized the identity of an independent trustee who has the power and fiduciary obligation to enforce payment of the rent. Those cases denying the deduction have rejected this bifurcated approach and have viewed the transfer and leaseback as single steps in one integrated transaction. So viewed, it has been held that the transfer and leaseback is often merely a method of allocating the settlor's income to the trust beneficiaries and is void of business purpose. If the transaction as a whole is void of business purpose, rent paid pursuant to the lease cannot be a "necessary" expense.[5] In *Perry v. United States*[6] the United States Court of Appeals for the Fourth Circuit followed the decisions that deny the deduction and held that the active independence, not the identity, of the trustee is the controlling factor.[7]

> (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, including—
>
> . . . .
>
> (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

Prior versions of section 162, applicable to some cases hereinafter discussed, are comparable.

3. The line of demarcation between these two sets of cases has been described as "thin." Alden B. Oakes, 44 T.C. 524, 529 (1965); *see* Oliver, *Income Tax Aspects of Gifts and Leasebacks of Business Property in Trust*, 51 CORNELL L.Q. 21 (1965).

4. *See, e.g.*, Brown v. Commissioner, 180 F.2d 926 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948); C. James Mathews, 61 T.C. 12 (1973); Alden B. Oakes, 44 T.C. 524 (1965); Albert T. Felix, 21 T.C. 794 (1954). In several cases the identity of the trustee has been a factor in denying the deduction. *See, e.g.*, Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965) (grantor was trustee); White v. Fitzpatrick, 193 F.2d 398 (2d Cir. 1951), *cert. denied*, 343 U.S. 928 (1952) (grantor's wife was trustee); Jack Wiles, 59 T.C. 289 (1972), *aff'd mem.*, 491 F.2d 1406 (5th Cir. 1974) (grantor was trustee); Sidney W. Penn, 51 T.C. 144 (1968) (grantor was trustee); Irvine K. Furman, 45 T.C. 360 (1966), *aff'd per curiam*, 381 F.2d 22 (5th Cir. 1967) (grantor's wife was trustee).

5. Perry v. United States, No. 74-1852 (4th Cir., July 29, 1975); *see, e.g.*, Audano v. United States, 428 F.2d 251 (5th Cir. 1970); *cf.* Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965). *Compare* Chace v. United States, 303 F. Supp. 513 (M.D. Fla. 1969), *aff'd per curiam*, 422 F.2d 292 (5th Cir. 1970) *with* Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962). *See also* Jack Wiles, 59 T.C. 289 (1972), *aff'd mem.*, 491 F.2d 1406 (5th Cir. 1974); Sidney W. Penn, 51 T.C. 144 (1968); Irvine K. Furman, 45 T.C. 360 (1966), *aff'd per curiam*, 381 F.2d 22 (5th Cir. 1967).

6. No. 74-1852 (4th Cir., July 29, 1975).

7. *Id.* at 8.

The taxpayers in *Perry* were two physicians practicing medicine in a partnership located in Louisburg, North Carolina. In 1963 construction was completed on an office building on property they had acquired as tenants in common. Since that time the building had been used solely for their medical practice.[8]

In 1968 each taxpayer established a Clifford trust[9] for the benefit of his minor children. Except for differences in beneficiaries and in duration,[10] the two trusts were identical and the same bank was named as trustee. Broad administrative powers were granted to the corporate trustee and remainders were reserved in the grantors. Each physician's undivided interest in the office building was the sole asset of his trust.

Prior to the formal conveyance of the *res* into trust, a leaseback of the office building was arranged with the corporate trustee. This arrangement covered all the terms of the lease,[11] and the lease was executed

8. Dr. Medders, Dr. Perry's partner, filed a separate refund suit, No. 74-1853 (4th Cir., July 29, 1975). In each case the taxpayer's wife was joined since each couple filed joint tax returns for the year in question. The two cases were consolidated for trial. No. 74-1852 at 3.

9. The parties stipulated that the short-term trusts were valid under the "Clifford" sections of the Internal Revenue Code of 1954 (sections 671 through 678). No. 74-1852 at 3. These sections require that a qualifying trust have a minimum duration of ten years, list certain powers that the grantor cannot retain, and prohibit the use of trust income for the grantor's benefit. If a trust qualifies, the income therefrom is taxed to the trust and not to the grantor. Thus, the Clifford trust coupled with a leaseback to the grantor has been a popular means of intra-family income splitting among those taxpayers whose wealth is tied up in business property. Oliver, *supra* note 3, at 22; Note, *The Use of Business Property as Short-Term Trust Corpus*, 19 VAND. L. REV. 811 (1966). The taxpayer who owns business property can maximize tax savings by transferring such property to a short-term trust, retaining a reversion, and taking back a lease on the property. If the trust qualifies under the Clifford sections the income from the property is taxed to the trust, presumably at a lower rate. And, at least in 1957, the grantor-tenant could be reasonably confident of getting a deduction for rentals paid to the trust under section 162(a)(3) if the rent was reasonable and the trustee was an entity with which he had no affiliation. John T. Potter, 27 T.C. 200 (1956), *acquiescing* 1957-2 CUM. BULL. 6; Oliver, *supra* note 3, at 21.

Some commentators have argued that the tests for determining under the Clifford sections to whom short-term trust income will be taxed should be used to determine the deductibility of rentals paid to the trust under a leaseback situation. *See* Oliver, *id.* at 31; Note, 19 VAND. L. REV., *supra*, at 822. While this may seem to be a logical approach it has consistently been rejected by the courts. *See, e.g.*, Perry v. United States, No. 74-1852. This rejection is based on legislative history which specifically denies the applicability of sections 671 through 678 to this situation and which has been expressly adopted by the Treasury. *Id.* at 3 n.2, *quoting* S. Rep. No. 1622, 83d Cong., 2d Sess. 365 (1954); Treas. Reg. § 1.671-1(c) (1956).

10. The Perry trust was to terminate ten years and one day from its establishment. The Medders trust was to terminate in fourteen years. Each lease was for a term equal to the life of the trust. Perry v. United States, 376 F. Supp. 15 (E.D.N.C. 1974).

11. Under the prearranged lease the trustee was required to pay all real property taxes and to make all exterior repairs. He reserved the right to declare the lease terminated upon the taxpayer's non-payment of rent. Each taxpayer agreed to pay his one-half of all utility expenses, to make interior repairs, and to pay a monthly rent of

contemporaneously with the conveyance into trust. For the taxable year 1969 the taxpayers deducted under section 162(a)(3) of the Internal Revenue Code[12] the rental payments made to the trustee. These deductions were not allowed and the taxpayers paid the additional tax. Each brought a refund suit in federal district court.[13] That court, while acknowledging that there were two divergent views[14] concerning the deductibility of such rental payments, felt that the *Perry* facts were squarely within the line of cases allowing the deduction on the basis of the existence of an independent, non-related trustee.[15]

On appeal the Fourth Circuit reversed. Rejecting the lower court's analysis, the Fourth Circuit focused on the realities of the entire transaction.[16] It concluded that, under the *Perry* facts, even though the corporate trustee was an independent entity, he had no actual powers or duties other than rent collection and disbursement to the beneficiaries. The trust principal was irrevocably reserved to the grantor's possession from the moment the trust was created.[17] Thus there "was literally no area in which the broad powers of management vested in the bank as trustee could operate. Its 'independence' from the settlors was largely iluusory . . . ."[18] The Fourth Circuit concluded that, when viewed in its entirety,[19] there was no real business purpose to the transaction.[20]

two hundred dollars. It was stipulated by the parties that this rental was reasonable. Perry v. United States, No. 74-1852. For the importance of reasonable rent in determining deductibility under section 162(a)(3), *see* Audano v. United States, 428 F.2d 251, 259 (5th Cir. 1970); Oliver, *supra* note 3, at 35; Note, 19 VAND. L. REV., *supra* note 9, at 819.

12. *See* note 2 *supra*.

13. Perry v. United States, 376 F. Supp. 15 (E.D.N.C. 1974). *See* note 8 *supra*. Cross motions for summary judgment were filed on the stipulated facts. From an adverse judgment the government appealed.

14. In the district court the government had argued that the rental payments were not deductible because the taxpayers had a reversion in the trust corpus. Thus, the government contended, they had an "equity" in the property expressly forbidden by section 162(a)(3). *See* note 2 *supra*. The district court rejected this argument, and this ruling was not appealed. 376 F. Supp. at 19-20. For an analysis of this argument, *compare* C. James Mathews, 61 T.C. 12 (1973) *and* Alden B. Oakes, 44 T.C. 524 (1965) *with* Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962) *and* Sidney W. Penn, 51 T.C. 144 (1968).

15. 376 F. Supp. at 19.

16. Perry v. United States, No. 74-1852 at 9.

17. *Id.* at 7, *quoting* Van Zandt v. Commissioner, 341 F.2d 440, 443 (5th Cir. 1965).

18. No. 74-1852 at 8.

19. The Fourth Circuit explicitly rejected the "bifurcated" business purpose test as articulated in Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948). No. 74-1852 at 9. *See also* Alden B. Oakes, 44 T.C. 524 (1965). Under the "bifurcated" approach the transaction is viewed as it existed after the transfer into trust has been completed. Thus the settlor's need for office space supplies the "business purpose" for his renting of the building and, therefore, the rent should be deductible under section 162(a)(3).

20. It is well established that for an expenditure to be "necessary" within the

Therefore, no expenses incident to elements of the transaction could be "ordinary and necessary" business expenses deductible under section 162.[21]

Before considering the import of the *Perry* decision, it is necessary to examine briefly the two lines of transfer and leaseback cases that preceded it. The Seventh Circuit was first to face the present problem in the leading case of *Skemp v. Commissioner.*[22] The taxpayer had established an irrevocable, twenty-year trust to which he conveyed the building that housed his medical offices.[23] Upon termination of the trust the corpus was to be distributed to the beneficiaries by the corporate trustee. Prior to the transfer the taxpayer had arranged to reserve the right to rent all or part of the building from the trustee for a ten-year renewable term. However, the rental amount was to be determined by the trustee.[24] Under these facts the Seventh Circuit reversed a divided Tax Court[25] and held that the rental payments made by the taxpayer to the trust were deductible as ordinary and necessary business expenses.[26] In so holding, the court of appeals emphasized that the existence of a corporate trustee negated the Commissioner's contention that the taxpayer had "fixed" the rental amount. The court reasoned that such a contention could be valid only if the trustee had breached its fiduciary duty.[27] The Seventh Circuit also rejected the Commissioner's "incomplete gift" argument since the taxpayer had irrevocably conveyed the property while retaining no reversion.[28] Finally, the court was faced with the Commissioner's

---

meaning of section 162, there must have been a "business purpose" for making that expenditure. Gregory v. Helvering, 293 U.S. 465 (1935); *see* Treas. Reg. § 1.269-2(b) (1962). What is at issue in the *Perry* case is at what point in the transaction that test is to be applied.

21. No. 74-1852 at 9.

22. 168 F.2d 598 (7th Cir. 1948).

23. Dr. Skemp used only part of his building. The remainder he rented to third persons. *Id.* at 599.

24. The Tax Court appears to have assumed that the rent Dr. Skemp paid was reasonable. A.A. Skemp, 8 T.C. 415, 422-23 (1947). *See* note 11 *supra.*

25. There were two dissenters in the Tax Court. Tyson, J., concurred in the opinion of Black, J. Black's dissent, upon which the court of appeals looked with favor, emphasized that the taxpayer had retained no reversion, had paid reasonable rent, and was legally obligated by his lease from the corporate trustee, in arguing for the deduction. A.A. Skemp, 8 T.C. 415, 422-23 (1947).

26. Skemp was decided under Int. Rev. Code of 1939, ch. 1, § 23(2)(1)(A), 53 Stat. 12 (now INT. REV. CODE OF 1954, § 162(a)(3)). *See* note 2 *supra.*

27. 168 F.2d at 599. There was no evidence of such a breach. *Id.*

28. *Id.* at 600. The "incomplete gift" argument asserted that since the grantor retained dominion and control over the trust corpus, the gift was not completed. Thus if complete ownership had not been transferred, rental payments made to the trust were not "necessary." Rev. Rul. 54-9, 1954-1 CUM. BULL. 20, *cited in,* Note, 19 VAND. L. REV. *supra* note 9, at 814 & n.29.

contention that the rental payments were not "necessary" since the taxpayer had made a voluntary conveyance of this business property and it was this conveyance that made the rentals necessary. This argument was implicitly rejected. The court found "necessity" under section 162 in the taxpayer's legal obligation to pay rent.[29]

Skemp has been sporadically followed since it was decided. It has been cited as authority for purposes of determining the necessity of rent, for viewing the transaction from the point in time *after* the transfer into trust is made,[30] for considering the identity of the trustee as "crucial,"[31] "pivotal,"[32] and "controlling"[33] in determining his independence,[34] and for viewing the retention by the grantor of no reversion as indicative of release of all control over the property.[35]

The leading decision in the line of cases which denies the deduction under similar facts is *Van Zandt v. Commissioner*.[36] In that case the taxpayer, a physician, conveyed to two Clifford trusts[37] the office building in which he practiced and the equipment that it contained. The trusts were irrevocable and were to last for just over ten years. The taxpayer was trustee for both trusts. Contemporaneously with the conveyance the taxpayer, as trustee, leased the building and the equipment back to himself, as an individual. The Commissioner disallowed the deductions the taxpayer had claimed for the rent he had paid to himself as trustee.

The Tax Court denied the deduction,[38] distinguishing *Skemp* since in that case there was an independent trustee.[39] The Tax Court noted

29. "While the taxpayer voluntarily created the situation which required the payment of rent, the fact remains that the situation created did require the payments." 168 F.2d at 600. This approach, viewing the single element, the leaseback, to determine necessity under section 162, is referred to as the "bifurcated" approach. *See* note 19 *supra*. *E.g.*, No. 74-1852 at 9.

30. Brooke v. United States, 468 F.2d 1155, 1157-58 (9th Cir. 1972); Brown v. Commissioner, 180 F.2d 926, 929 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950); C. James Mathews, 61 T.C. 12, 18 (1973); Alden B. Oakes, 44 T.C. 524, 530 (1965).

31. C. James Mathews, 61 T.C. 12, 18 (1973).

32. Brooke v. United States, 468 F.2d 1155, 1157 (9th Cir. 1972).

33. Brown v. Commissioner, 180 F.2d 926, 929 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950).

34. *See* cases cited note 4 *supra*.

35. Brooke v. United States, 468 F.2d 1155, 1157 (9th Cir. 1972); Brown v. Commissioner, 180 F.2d 926, 929 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950); Alden B. Oakes, 44 T.C. 524, 530 (1965); John T. Potter, 27 T.C. 200, 213-14 (1956); Albert T. Felix, 21 T.C. 794, 803-04 (1954).

36. 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965).

37. *See* note 9 *supra*.

38. I.L. Van Zandt, 40 T.C. 824 (1963).

39. *Id.* at 830.

that, when the overall effect of this transaction was considered, the result was simply a shift in family income.[40] Thus, since the taxpayer would not have been required to pay rent before the transaction, and since the transaction had no business purpose, the rents he paid were not "necessary" under section 162.[41]

The Fifth Circuit affirmed. That court followed the Tax Court's analysis and viewed the transaction as a series of integrated steps.[42] So viewed, the court of appeals could find no reason for the transfer and leaseback other than an attempt to maximize tax savings.[43] *Skemp* was distinguished on its facts.[44] Indeed, the Fifth Circuit thought its holding in *Van Zandt* was not inconsistent with *Skemp* since the existence of trust income other than the rents paid by Dr. Skemp could provide management of the entire building as a valid business purpose.[45] In comparing the *Van Zandt* facts to those in *Skemp,* the court found the prearranged leaseback, which included in its terms the amount of rent to be paid, left the trustee with no active duties to perform in the interest of the beneficiaries. Since the trustee in *Van Zandt* was also the grantor, and since he had nothing to do but collect and disburse predetermined income, the Seventh Circuit concluded that he could not be independent. Coupling this lack of independence with a lack of necessity, the court concluded that the deductions were properly denied.

Van Zandt, like *Skemp,* has been widely followed.[46] Recently the Fifth Circuit reaffirmed several of its conclusions concerning transfers and leasebacks first articulated in *Van Zandt.* In *Audano v. United States,*[47] upon very similar facts, the court noted that even if the rental amount was reasonable, no deduction could be allowed if the obligation to pay "was created solely for the purpose of effectively creating a camouflaged assignment of income."[48] Such payments, the court concluded, were not "necessary" within the meaning of section 162.[49]

In *Perry* the Fourth Circuit, faced with these conflicting precedents, chose to follow the *Van Zandt* analysis.[50] Using that approach,

40. *Id.*
41. *Id.* at 831.
42. 341 F.2d at 443.
43. *Id.*
44. *Id.* at 442.
45. *Id.*
46. *See, e.g.,* cases cited note 5 *supra.*
47. 428 F.2d 251 (5th Cir. 1970).
48. *Id.* at 256-57.
49. In denying the deduction the Fifth Circuit emphasized that the trustee had done nothing to protect the beneficiaries' interests. *Id.* at 258.
50. No. 74-1852 at 8.

the court viewed the transfer and leaseback as integrated steps in a single transaction.[51] In order for the rent payments to be deductible there had to have been a real business purpose for the initial transfer into trust to make the subsequent rental payments "necessary."[52] Under the *Perry* facts no such purpose was found.[53]

There has been substantial controversy in the courts[54] and in the literature[55] concerning the point at which the business purpose test should be applied in a transfer and leaseback situation. Some early commentators[56] vigorously argued in favor of the "bifurcated" approach followed in *Skemp*. They reasoned that demanding a business purpose for the transfer into trust was inappropriate, especially in intra-family arrangements where a decision to create a trust for the benefit of the natural objects of one's bounty is seldom made for business reasons. Thus, they argued, the test proved "too rigorous."[57] On the other hand, applying the test at the time of the leaseback appears to provide a business purpose for all such transactions. In most cases there would be business purpose in renting office space. Therefore, all such rental payments would be "necessary."

Both of these positions are supported by caselaw.[58] In choosing the *Van Zandt* approach, the Fourth Circuit relied on its customary view of the overall effect of a transaction.[59] Though there appears to be fundamental logic to this view, the court offered no analysis or policy for its choice. What is clear, however, from the *Perry* opinion, is that a transfer into trust with a subsequent leaseback should pass muster under the business purpose test as applied by the Fourth Circuit if (a) the trust income consists of something more than the rents paid by the settlor, and (b) the settlor has retained no reversion.[60]

The selection of the two factors that the Fourth Circuit described in *Perry* as "indices of a transaction having a real business purpose

51. *Id.* at 7.
52. *Id.* at 9. *See* note 20 *supra.*
53. No. 74-1852 at 8.
54. For cases applying the "bifurcated" analysis, see cases cited note 30 *supra.* For cases supporting the single transaciton approach, see Brooke v. United States, 468 F.2d 1155, 1159 (9th Cir. 1972) (Ely, J., dissenting); cases cited note 5 *supra.*
55. *E.g.*, Oliver, *supra* note 3, at 30, 31; Note, 19 VAND. L. REV., *supra* note 9, at 818-19.
56. *See* note 55 *supra.*
57. Oliver, *supra* note 3, at 31.
58. Cases cited note 54 *supra.*
59. No. 74-1852 at 9. "In our circuit we customarily view a multistep transaction by its overall effect and not simply by scrutiny of mutually dependent steps." *Id.*
60. *Id.* at 11.

. . ."[61] is consistent with prior law and with the court's analysis. In distinguishing precedent cited by the taxpayer,[62] the court noted that while the taxpayer in *Perry* retained a reversion, in none of the cases cited in support of the deduction was a reversion retained. Likewise, in analyzing the district court's opinion in *Perry*, the Fourth Circuit implied that the lower court did not realize that "a factor probably leading to the result in *Skemp* . . ."[63] was that in that case the taxpayer retained no reversion. While the use of this factor is supported by both lines of decisions,[64] the emphasis in *Perry* was unusual.

The other index of real business purpose cited by the court in *Perry* is not so well established in the caselaw.[65] Considering trust income other than the rents paid by the taxpayer-settlor as providing business purpose for the transfer stems from the *Van Zandt* court's distinction of *Skemp*.[66] The Fifth Circuit considered its denial of the rental deduction not inconsistent with the *Skemp* holding.[67] The court reasoned that real business purpose for the transfer into trust could be found in the settlor's desire to have a trustee manage the uncertain amount of income other than the rentals he paid.[68] The Fourth Circuit in *Perry* adopted this conclusion.[69] Since in *Perry* the taxpayer held a reversion, the Fourth Circuit concluded that the trustee was administering the trust for the ultimate benefit of the settlor. And since there was no trust income other than the rentals paid by the settlor, the court concluded that the trustee was merely a conduit through which the settlor could distribute his income.[70]

---

61. *Id.*

62. Brooke v. United States, 468 F.2d 1155 (9th Cir. 1972); Brown v. Commissioner, 180 F.2d 926 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948).

63. No. 74-1852 at 6.

64. In most cases allowing the deduction no reversion was retained. *E.g.*, cases cited note 62 *supra*. In most cases denying the deduction the retention of a reversion was considered as a retention of control in analyzing business purpose. *E.g.*, Audano v. United States, 428 F.2d 251 (5th Cir. 1970); Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965).

65. Three cases hold that trust income other than the payments made by the settlor should be a factor supporting business purpose: Perry v. United States, No. 74-1852; Van Zandt v. Commissioner, 341 F.2d 440 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948). This argument was rejected in Jack Wiles, 59 T.C. 289 (1972), *aff'd mem.*, 491 F.2d 1406 (5th Cir. 1974).

66. Van Zandt v. Commissioner, 341 F.2d 440, 442 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965).

67. *Id.* at 444.

68. *Id.*

69. No. 74-1852 at 10.

70. *Id.*

The taxpayer's failure in *Perry* to meet either of the two indices of real business purpose previously discussed and his failure to show any business purpose for the transfer into trust should have been sufficient to defeat his claim for deductibility of the rentals.[71] However, the Fourth Circuit seized upon the opportunity presented in *Perry* to clear up some confusion concerning whether the identity of the trustee or his actual independence from the settlor is the proper inquiry when examining control retained by the grantor.[72] The taxpayer in *Perry* had argued that the existence of an independent, corporate trustee placed him directly on point with the *Skemp* facts. The Fifth Circuit in *Van Zandt* did seem to emphasize that an important factor in denying the deduction was that the settlor was also the trustee.[73] This emphasis also seemed consistent with the *Skemp* analysis in which the trustee's fiduciary duty was considered to refute the Commissioner's argument that the settlor had retained control.[74] The Fourth Circuit, however, concluded that a careful reading of the *Van Zandt* opinion invited the conclusion that the actual independence, rather than the identity, of the trustee was the proper inquiry.[75]

The *Perry* court's conclusion is directly in line with substantial precedent.[76] While the identity of the trustee has been examined in considering his independence, it is clear that this factor is not determinative.[77] Other factors bearing on the trustee's ability to actively protect the beneficiaries' interest have been considered.[78] Thus the conclusion compelled by precedent and reached by the Fourth Circuit in *Perry* is that regardless of the identity of the trustee, he must have actual independence and active functions through which he can protect his beneficiaries' interests. If he has such power, it can be fairly concluded that the

71. Regardless of who the trustee was, if the transaction had no business purpose, the rents paid were not "necessary" under section 162. *See* note 20 *supra; cf.* C. James Mathews, 61 T.C. 12, 18, 19 (1973).

72. No. 74-1852 at 7, 8.

73. Van Zandt v. Commissioner, 341 F.2d 440, 443 (5th Cir.), *cert. denied*, 382 U.S. 814 (1965).

74. Skemp v. Commissioner, 168 F.2d 598, 599 (7th Cir. 1948).

75. No. 74-1852 at 7, 8.

76. *E.g.*, Audano v. United States, 428 F.2d 251 (5th Cir. 1970); C. James Mathews, 61 T.C. 12 (1973); Alden B. Oakes, 44 T.C. 524 (1965).

77. *E.g.*, Brown v. Commissioner, 180 F.2d 926 (3d Cir.), *cert. denied*, 340 U.S. 814 (1950) (grantor's attorney was trustee, rents held deductible); John T. Potter, 27 T.C. 200 (1956) (grantor's father, wife and accountant were trustees, rents held deductible).

78. *E.g.*, cases cited note 11 *supra* (reasonableness of rents); Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962) (grantor's right to settle accounts with trustee); Jack Wiles, 59 T.C. 289 (1972), *aff'd mem.*, 491 F.2d 1406 (5th Cir. 1974) (no formal lease and sporadic rental payments).

grantor has not retained sufficient controls to be considered owner of the corpus.

The real significance of the *Perry* decision lies in the advice the Fourth Circuit has given tax planners. While the transfer and leaseback of business property to a Clifford trust remains a tax savings device, the court will demand strict compliance with two requirements. First, the Fourth Circuit will apply the business purpose test at the time of the transfer into trust. The retention of no reversion by the settlor and the existence of trust income other than the settlor's rental payments will be considered factors showing real business purpose. Second, the court will look past the identity of the trustee and will focus on his actual independence, indicated by his ability to protect and further the beneficiaries' interests, to determine whether the settlor has properly relinquished control over the corpus. It is hoped that the Fourth Circuit's clear articulation of the standards it will require in the transfer and leaseback situation will provide needed predictability to those prospective grantors who seek to avail themselves of this tax savings device.

CARL N. PATTERSON, JR.

Federal Jurisdiction—The Abstention Doctrine as Amended by Hicks v. Miranda: A Legal Definition and Ominous Omissions

The abstention doctrine[1] is a judicial device designed to reduce the tensions inherent in our dual system of government. The doctrine allows federal courts to defer to state courts and thus to avoid unnecessary confrontation when federal and state jurisdictions overlap.[2] Significantly, the impact of abstention extends beyond the procedural level to affect fundamental substantive rights.[3] Thus, in sensitive substantive areas,[4]

1. One commentator speaks of "abstention doctrines" since there are several distinguishable lines of cases. C. WRIGHT, HANDBOOK OF LAW OF FEDERAL COURTS § 52 (2d ed. 1970).

2. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941); Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1959); Comment, *The Abstention Doctrine: Some Recent Developments*, 46 TUL. L. REV. 762, 763 (1972).

3. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 87-88 (1973); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324, 1326-27 (1972).

4. Civil rights litigation is a particularly sensitive area in which courts have