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ment right to silence and testify in his own behalf. This situation is constitutionally untenable as the accused is, in fact, forced to waive his right to remain silent to present a viable defense. To forestall this dilemma, qualitative guarantees of effective representation must accompany any denial of the right to proceed *pro se*. Without such guarantees, the dissenters' position is constitutionally defective.

The majority opinion is praiseworthy at the very least for its concern with freedom of individual choice. With the present awesome concentration of power in governmental bodies, any minor victory for individual autonomy is meritorious on its face. However, society's interest in achieving a fair and impartial judicial process must predominate over the autonomy interest. Public doubt concerning the fairness of criminal proceedings strikes at the very core of government. While paying lip service to this ideal, the minority's position fails to insure the essence of a fair trial, *i.e. effective* assistance of counsel. Until the Supreme Court deals decisively with the spectre of inadequate representation for indigent defendants that haunts many criminal proceedings, the right of self-representation must remain unfettered. Hopefully, if the Supreme Court does promulgate guidelines to guarantee effective representation for indigent defendants, the Court will re-examine the *Faretta* decision in the context of the preeminent public interest in ensuring justice in the trial courts.

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Federal Income Tax—Use of Installment Sale Reporting for Sales Between Related Taxpayers: The Separate v. Single Economic Entity Argument

Nye v. United States,[1] a case of first impression,[2] presented the issue whether a purported installment sale by a wife to her husband, followed by an outright disposition of the property by the husband to a

1. No. C-374-D-73 (M.D.N.C., May 16, 1975) [hereinafter cited as The District Court Opinion]. The case was decided on a stipulation of facts and cross motions for summary judgment. The United States initially appealed the case to the Court of Appeals for the Fourth Circuit (Court of Appeals No. 75-1905) but subsequently withdrew the appeal. Counsel for plaintiffs in *Nye* reports that he has received correspondence from attorneys in a number of other jurisdictions who are currently involved with factually similar cases. Interview with R. Roy Mitchell Jr., attorney for plaintiffs, in Durham, North Carolina, Jan. 20, 1976. Apparently the Internal Revenue Service has decided to

third party, could qualify for installment sale treatment under section 453 of the Internal Revenue Code.[3] The court, after determining that the form of the transaction comported with the requirements for installment sales treatment,[4] approached the section 453 question on the basis of whether the marriage relationship alone was sufficient to preclude use of the installment sale reporting method.[5] Although noting that transactions between husband and wife that have significant tax consequences are traditionally viewed with suspicion,[6] the court, by holding for the taxpayers here, refused to allow that relationship, standing alone, to defeat an otherwise valid installment sales agreement.[7]

Plaintiffs, husband and wife, were both active professionals, he a lawyer and she a medical doctor.[8] Both had achieved a considerable degree of financial success and maintained completely separate records and accounts of their respective financial affairs.[9] In 1964 plaintiff wife, on the advice of her husband, purchased certain stock for approximately 30,000 dollars.[10] For this purchase she used money from her separate account, and after acquisition of the stock always listed it as her separate property on state tax returns.[11] The investment was a significant financial success and by early 1969, when she sold the stock to her husband, the stock was worth slightly more than ten times the original purchase price.[12]

As part of his separate business dealings plaintiff husband was obligated under a construction financing agreement to make a 100,000 dollar payment to a third party in mid-1969 and had clearly sufficient personal resources to meet this obligation.[13] However, instead of using

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let *Nye* stand as the law in the Middle District of North Carolina while continuing to litigate the point in other jurisdictions. This is a fairly standard tactical approach by the Service in hopes of getting a favorable trial court decision on similar facts, and approaching any appellate resolution in the position of appellee rather than appellant.

2. The District Court Opinion at 8.
3. INT. REV. CODE OF 1954, § 453(b).
4. The District Court Opinion at 10.
5. *Id.*
6. *Id.*
7. *Id.* at 11-12.
8. *Id.* at 3.
9. *Id.*
10. *Id.*
11. *Id.*
12. Plaintiff wife initially invested $30,134.00 in the stock of Colorcraft Corp. After a corporate reorganization she received 834 shares of Fuqua Industrial Preferred "B" stocks in exchange for her Colorcraft shares. At the time of the transaction between plaintiffs husband and wife, the husband purchased from her 334 shares of the Fuqua stock. Her per/share basis at the time of sale was $36.13 with a per/share market price at that time of $363.77. *See id.* at 3-4.
13. *Id.* at 4.

his own resources outright, he decided to purchase a portion of the greatly appreciated stock from his wife with a view toward resale to obtain the required cash.[14] Both plaintiffs were aware of the planned resale and of the tax postponement reasons for the initial sale.[15] The sale of the wife's stock to her husband was structured as an installment purchase at four percent interest[16] and met all of the technical requirements set forth in section 453 of the Internal Revenue Code for such a transaction.[17]

Plaintiff husband resold most of his newly acquired shares within a six month period, realizing and reporting a short-term capital loss on the plaintiffs' 1969 joint tax return. On the stock sold to her husband plaintiff wife reported a long-term capital gain totaling more than 109,000 dollars on plaintiffs' joint 1969 and 1970 tax returns using the installment reporting method.[18] The stipulated purpose of the transaction was to allow the wife to postpone the full payment of the long-term capital gains tax by spreading it over a twelve year period.[19]

The Internal Revenue Service disallowed the installment sale reporting method and its attendant tax consequences upon audit of plaintiffs' 1969 and 1970 tax returns and assessed a deficiency plus interest, which totaled more than 30,000 dollars. Plaintiffs paid the deficiency and, after having exhausted all administrative remedies, sued for refund of the deficiency assessment in United States District Court.[20]

At trial the government advanced two arguments, both of which viewed plaintiffs as a single economic entity with the effect of placing the seller wife in the position of having at least indirect control of the entire sale proceeds[21] rather than a fractional share as required by section 453. The government first pressed a "substance over form" argument on the basis of its assertion that the sale in question was no

14. *Id.*

15. *Id.* at 6.

16. *Id.* at 4. Some point is made in the opinion and briefs about the low four percent interest rate involved here. However, the rate is clearly irrelevant to the discussion or resolution of the problem as it will result in a "wash" on plaintiffs' joint return. So long as the interest is actually paid and reported, as was the case here, the income that was received by the wife would exactly equal the income deduction allowable to the husband. INT. REV. CODE OF 1954, §§ 163, 267.

17. INT. REV. CODE OF 1954, § 453(b). For the form of the transaction in the instant case see The District Court Opinion at 4.

18. The District Court Opinion at 5.

19. *Id.* at 4, 6.

20. The suit was filed pursuant to 28 U.S.C. § 1346(a)(1) (1970). The District Court Opinion at 2.

21. Brief for Defendant at *i*, Nye v. United States, No. C-374-D-73 (M.D.N.C., May 16, 1975).

more than a single complete transaction involving one taxpaying unit, the plaintiffs husband and wife.[22] Relying on *Commissioner v. South Texas Lumber Co.*,[23] which states that the installment method of reporting was included in the Internal Revenue Code as a relief provision for taxpayers who receive only a small portion of the sale price in the year of sale, the government argued that this "well-coordinated tandem"[24] (referring to the plaintiffs) indeed received the entire selling price in the year of sale. The second argument advanced by the government was the "step transaction doctrine,"[25] a theory under which ostensibly separate transactions are viewed merely as steps in completing a single transaction. Here again the entire argument hinged on the treatment of the plaintiffs as a single unit or entity, because the argument is simply that despite the separate sales actually involved, the effect of the transaction was no more than a single sale of stock by the plaintiffs husband and wife.

The basic problem in any case involving an installment sales agreement, and one specifically confronted by the court in *Nye*,[26] is to establish an appropriate standard by which to test the validity of the transaction. As the court in *Nye* recognized,[27] no prior case offered a sufficiently similar fact pattern to be of serious precedential value in the context of installment sales between related taxpayers. The court, however, found in *Rushing v. Commissioner*[28] a standard which could be applied to installment sales transactions in general.[29] *Rushing* established as the test for validity whether the seller has achieved, regardless of the form employed, the same result as if he had made an outright sale.[30] If he has, then installment treatment will be disallowed because the seller

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22. *Id.* at 13.
23. 333 U.S. 496, 503 (1948), *cited in* Brief for Defendant at 10.
24. Brief for Defendant at 13.
25. *Id.* at 17. For more on the "step transaction doctrine" see B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 101-03 (3d ed. 1971).
26. The District Court Opinion at 9.
27. *Id.* at 8.
28. 441 F.2d 593 (5th Cir. 1971). In *Rushing* the taxpayers' wholly owned corporation had sold all of its assets pursuant to a section 337 plan of liquidation. After the sale they created an irrevocable trust for their children with a bank as trustee and sold their corporate stock to the trust in an installment sale transaction. The trustee then authorized and received the distribution of the corporate assets. The government argued that plaintiffs were then taxable on the entire liquidating distribution. The court found the controlling factor to be whether the taxpayer had ever gained or retained control over the proceeds. Relying on the independent nature of the trustee, the court ruled that he had not and that the installment sale was therefore valid.
29. The District Court Opinion at 9.
30. 441 F.2d at 598.

will have the full economic return of the transaction at his immediate disposal and thereby be able currently to absorb the full tax consequences. Thus the question in the husband and wife context presented in *Nye* is indeed reduced to whether the couple will be treated as single or separate economic entities. This is the crucial issue because the *Rushing* test would disallow installment sales treatment when the seller received even indirect control of the proceeds or economic benefit of the entire transaction.[31]

It is clear that for most non-tax purposes husband and wife are treated as separate legal entities. Unlike the earlier common-law approach, it is now well settled that they may own separate property, that their individual contracts are binding even with each other,[32] and that they may establish legitimate debtor-creditor relationships.[33] The legal trend is quite obviously toward more individual autonomy for each spouse. Of course, to say that husband and wife are separate legal entities may not be to say that they are or should be separate economic entities for purposes of the special situation of joint filers under the federal income tax law. The filing of a joint return is an election by married taxpayers to be treated as an economic unit for tax purposes,[34] and because it is elective it is chosen by the informed taxpayer (as the plaintiffs in *Nye* unquestionably were) only when it produces a tax advantage.[35]

The court in *Nye* decided that on the facts presented the wife and husband were indeed separate economic entities,[36] even though they filed jointly for federal tax purposes. The court found it impossible on the facts presented to find that plaintiff wife maintained either direct or indirect control over the economic benefit of the outright sale of the stock by her spouse to a third party.[37] At the very least, the opinion if followed means that the Internal Revenue Service may not "automatical-

31. *Id.*

32. N.C. GEN. STAT. § 52-10 (1966). This statute establishes the validity of contracts between husband and wife in North Carolina.

33. *See* Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889). This case held that notes executed by husband payable to wife constitute a valid indebtedness.

34. INT. REV. CODE OF 1954, § 6013 governs joint returns.

35. The use of a joint return will produce a tax advantage when there is a difference in the percentage contributed by each spouse to the net taxable income. This is true even in the higher tax brackets. For example, if we assume a total net taxable earned income of $60,000 split 40/20, the total tax filing separately would be $22,740; while the tax filing jointly would be $22,300 or a savings of $440. This result is produced using the 1975 tax rates.

36. The District Court Opinion at 10.

37. *Id.*

ly and perfunctorily [conclude] that any person is the agent of his or her spouse for the purposes of section 453(b) installment method reporting,"[38] even though in the court's own words such a rule would be "valid in the vast majority"[39] of such transactions.

The court did not discuss Revenue Ruling 73-157[40] which states: "A taxpayer may not use the installment method to report gain from sale to a related taxpayer who pursuant to a prearranged plan resells the property to a third party and receives full payment in the year of sale."[41] The ruling seems to be on point in a situation like that presented in *Nye*. Surprisingly, the court did not mention the ruling although it was cited by one of the parties.[42] The only logically consistent conclusion given the facts here is that the court rejects the ruling's validity. While plaintiffs in *Nye* asserted that the ruling was not applicable because the transaction involved did not fit the "prearranged plan" language,[43] this is a strange position given the stipulation that both plaintiffs were at all times aware of the planned resale to a third party.[44] Indeed if the arrangement in *Nye* did not fit the ruling it is impossible to imagine any set of facts that would, and the court's failure even to mention the ruling may only be construed as an absolute rejection of it.

The opinion in *Nye* also stands in sharp contrast to earlier decisions that rejected attempts by taxpayers to interject controlled corporations between themselves and third party purchasers when the controlled corporation paid the purchase price to the seller in installments and the seller in turn reported the sale using the installment method.[45] Of course, in that context there is no question about the seller's control of the resale transaction, a control that the court in *Nye* refused to find in the husband-wife context when the only evidence was the existence of the marriage relationship.[46]

In holding for plaintiffs in *Nye* the court was strongly influenced by the separate and individually successful careers of the taxpayers and

38. *Id.*
39. *Id.*
40. Rev. Rul. 157, 1973-1 CUM. BULL. 213.
41. It is interesting to note that this Revenue Ruling was not issued until after the controversy in *Nye* arose. It is fairly common for the Internal Revenue Service to attempt to create favorable "law" in this manner looking toward trial, and this may explain the court's complete disregard of the ruling.
42. Brief for Plaintiff at 5, Nye v. United States, No. C-374-D-73 (M.D.N.C., May 16, 1975).
43. *Id.*
44. The District Court Opinion at 6.
45. *E.g.*, Griffiths v. Commissioner, 308 U.S. 355 (1939).
46. The District Court Opinion at 11-12.

their maintenance of "substantial personal estates separate and apart from each other."[47] The court apparently believed that such circumstances are extremely unusual (as evidenced by the comment that the government's approach would be "valid in the vast majority" of such cases), and that any opportunity for tax savings that might arise under this decision will therefore be limited.[48] In fact, at a time when the number of families in which the husband and wife have separate careers is increasing, the impact of the decision may be greater than the court seemed to believe. While few husbands and wives may find it necessary to keep separate business records and accounts, those for whom it is necessary are likely to have the largest combined incomes and, therefore, are most likely to own property of sufficient value to derive appreciable benefit from use of an installment sales agreement. This could mean that the dollar effect of the decision in *Nye* will be significant.

CONCLUSION

Given the facts presented in *Nye,* the current state of the relevant statutory law regarding treatment of spouses as separate legal entities and the evident trend toward expansion of such treatment, the decision must be viewed as sound. It is difficult to fault the court's reasoning as to its finding that the husband and wife in *Nye* are separate economic entities, however easy it may be to question its evident conclusions about the potential effect of the decision. Nonetheless, when taxpayers choose to avail themselves of the advantages of the joint filing method, it would not be unreasonable to require by *statutory* modification of the Internal Revenue Code that couples so reporting be denied the use of the installment reporting method for sales to each other. Completely denying installment reporting for sales between related persons would ignore the clear realities of some modern transactions between husband and wife. The former suggestion would have the effect of requiring couples who wish to use the installment reporting method to establish the requisite criteria for treatment as separate economic entities *and* to declare a willingness to be taxed as such by foregoing the advantages of the joint return.

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47. *Id.* at 10.
48. *Id.*