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## INCOME TAX VALIDITY OF INVALID MIGRATORY DIVORCES AND "THE RULE OF VALIDATION"

### I. INTRODUCTION

A taxpayer's marital status is relevant in determining, among other things, whether a joint return may be filed,<sup>1</sup> an alimony deduction taken,<sup>2</sup> or certain dependency deductions claimed,<sup>3</sup> as well as whether alimony must be reported as income.<sup>4</sup> Federal courts, for the most part, have uniformly

1. INT. REV. CODE OF 1954, § 6013, provides in part:

(a) Joint returns

A husband and wife may make a single return jointly of income taxes . . . even though one of the spouses has neither gross income nor deductions. . . .

(d) Definitions

For the purposes of this section—

(2) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married. . . .

2. INT. REV. CODE OF 1954, § 215 provides in part:

(a) General Rule — In the case of a husband described in section 71 [see *infra* note 4], there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife. . . .

3. INT. REV. CODE OF 1954, §§ 151-54. Subject to certain qualifications, § 151(b) allows a taxpayer a \$600 exemption for his or her spouse. Subject also to certain qualifications, § 151(e) allows a \$600 exemption for each of taxpayer's dependents as defined in § 152; under the latter section, an individual whose principal place of abode is not in the taxpayer's home may not qualify as a dependent (§ 152(a)(9)), unless the individual is related to the taxpayer by blood, marriage or adoption within the degrees specified by § 152(a), (1)-(8).

Section 153, titled "Determination of Marital Status," provides in part:

For the purposes of this part—

(2) An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

Whether an individual qualifies as a taxpayer's spouse or dependent also determines the deductibility of certain expenses incurred by the taxpayer on another's behalf. *E.g.*, § 213 (Medical, Dental, Etc., Expense) and § 214 (Expenses For Child Care of Certain Dependents).

4. INT. REV. CODE OF 1954, § 71, provides in part:

(a) General Rule

(1) Decree of divorce or separate maintenance — If a wife is divorced or legally separated from her husband under a decree of divorce or of a separate maintenance, the wife's gross income includes periodic payments . . . received after such degree in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written separation agreement — If a wife is separated from her husband and there is a written separation agreement executed *after the date of the enactment of this title*, the wife's gross income includes periodic payments . . . received after such agreement is executed which are made under such agreement and because of the marital or family relationship. . . . (Emphasis added.)

Before 1954, payments were deductible by the husband and taxable to the wife only if they were divorced or legally separated under a *decree* of divorce or of separate maintenance; an out of court separation agreement was insufficient. See INT. REV. CODE OF 1939, §§ 22(k) and 23(u). In 1954, § 71(a)(2) was enacted to permit payments under a written separation agreement to qualify as alimony even though there was no decree of divorce or separate maintenance. However, § 71(a)(2) applies only to agreements executed after the 1954 code was enacted.

Section 682 of the 1954 code, relating to alimony trusts, contains provisions similar to §§ 71 and 215, *supra* note 3.

held that a taxpayer's marital status under local law fixes his marital status for tax purposes.<sup>5</sup> There has been no such unanimity, however, with regard to decisions involving a taxpayer who obtained a divorce that was invalid under the law of his domicile. Some courts have held that local law controls in this situation as in others,<sup>6</sup> while other courts have held that a taxpayer's marital status under local law does not necessarily determine his marital status for tax purposes.<sup>7</sup>

## II. CONFLICTING POSITIONS

American jurisdictions have uniformly refused to recognize *ex parte* divorces granted by other jurisdictions where the jurisdictional requisite of domicile has been missing.<sup>8</sup> Such decisions not only give rise to complications under state law, but also create certain federal income tax problems. For example, suppose *H* and *W-1*, New York domiciliaries, had executed a separation agreement prior to 1954<sup>9</sup> which provided that *H* would pay certain designated sums periodically for *W-1*'s support, that *H* then obtained an *ex parte* Mexican divorce, married *W-2* and lived with her in New York. Soon after the divorce and remarriage, *W-1* obtained an order from a New York court declaring that *H*'s Mexican divorce was invalid and that *W-1* and not *W-2* was *H*'s lawful wife. May *H* thereafter claim a deduction for the support payments made to *W-1*? May he file a joint return with *W-2* and claim her, her parents and her children by a former marriage as dependents?<sup>10</sup> In a recent Second Circuit decision involving an identical factual situation,<sup>11</sup> it was held that the husband is allowed an alimony deduction, and that he may file a joint return with his second wife and take dependency deductions for her, her parents and her children. The majority applied what it termed a "rule of validation" under which a subsequent decree of invalidity by a court other than the one rendering the divorce has no effect for tax purposes. It found justification for disregarding the parties' status under local law in the need for certainty and uniformity in the federal tax scheme.

5. *E.g.*, *Sullivan v. Commissioner*, 256 F.2d 664 (4th Cir. 1958); *Commissioner v. Ostler*, 237 F.2d 501 (9th Cir. 1956); *Commissioner v. Evans*, 211 F.2d 378 (10th Cir. 1954); *M. Garsaud*, 28 T.C. 1086 (1957).

6. See decisions cited *infra* note 21 and *Gersten v. Commissioner*, 267 F.2d 195 (9th Cir. 1959), discussed *infra*.

7. See *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965); *Estate of Borax v. Commissioner*, 349 F.2d 666 (2d Cir. 1965); *Feinberg v. Commissioner*, 198 F.2d 260 (3d Cir. 1952), and discussion *infra*.

8. 27B C.J.S., *Divorce* § 348 (1959).

9. Unless the parties are divorced or separated under a *decree* of divorce or separate maintenance, payments made by a husband to a wife under a separation agreement executed prior to 1954 are neither deductible by the husband nor taxable to the wife. See INT. REV. CODE OF 1939, §§ 22(k) and 23(u) and note 4 *supra*.

10. If *H* is not "divorced" from *W-1*, he cannot claim an alimony deduction for payments made to her under the support agreement. See *supra* notes 3 and 4. Similarly, if *H* is not "married" to *W-2*, he cannot file a joint return with her, see *supra* note 1, and *H*'s right to claim *W-2*, her parents and her children as dependents may also be adversely affected if *H* and *W-2* are not "married." See *supra* note 2.

11. *Estate of Borax v. Commissioner*, 349 F.2d 666 (2d Cir. 1965). Judge Friendly dissented.

In conflict with the Second Circuit's disregard of the taxpayer's marital status under the law of his domicile in *Borax*, is the Ninth Circuit's reliance upon the law of the domicile in *Gersten v. Commissioner*.<sup>12</sup> In that case, the first wife obtained a California interlocutory divorce decree which is not final under California law until one year after it is rendered.<sup>13</sup> Seven months after the first wife obtained the decree, the husband obtained a Mexican divorce and remarried. The court held that the second marriage was a nullity for tax purposes and that the husband could not file a joint return with his second wife. The court reasoned that the second marriage was invalid since under California law, the law of the domicile of the parties involved, a marriage of either party during the life of the other is void if contracted within one year of the entry of an interlocutory divorce decree.<sup>14</sup>

The majority in *Borax* attempted to distinguish *Gersten* by arguing that:

*Gersten v. Commissioner* . . . did not involve a state court judgment declaring the second marriage invalid because of the invalidity of the divorce from the first marriage. Instead, it involved a state prohibition against remarrying that operated independently of whether the divorce obtained in a foreign jurisdiction was valid. . . . In contrast, in the instant case the claimed invalidity of the second marriage is entirely derived from the invalidity of the divorce of the first marriage. We found it consonant with the tax purposes to recognize this divorce, and hence the underpinnings of not recognizing the second marriage are removed.<sup>15</sup>

The two decisions, however, are basically inconsistent. In *Gersten*, the court relied on specific provisions of the law of the taxpayer's domicile,<sup>16</sup> while in *Borax*, the taxpayer's marital status under the law of his domicile was disregarded. Moreover, whether a second marriage is invalid in the domiciliary state because it is specifically prohibited by that state (*Gersten*), or whether a second marriage is invalid in the domiciliary state because that state does not permit the type of divorce obtained from the first marriage (*Borax*), the result is the same — in both situations the second marriage is invalid under local law.<sup>17</sup> Consequently, when a federal court is presented with either situation, it must decide whether the taxpayer's marital status under the law of his domicile fixes his marital status for tax purposes.

In *Wondsel v. Commissioner*,<sup>18</sup> the Second Circuit applied its "rule of validation" to a Florida divorce decree subsequently declared invalid in New York. In accord with the result reached in that case is the Third

12. 267 F.2d 195 (9th Cir. 1959).

13. *Id.* at 199-200, citing CAL. CIVIL CODE § 132.

14. *Commissioner v. Gersten*, 267 F.2d 195, 199-200 (9th Cir. 1959) (citing CAL. CIVIL CODE § 61(1)).

15. *Supra* note 11, at 675-76.

16. See *supra* notes 13 and 14, and accompanying text.

17. Judge Friendly, who dissented in *Borax*, also rejected the majority's distinction in *Gersten*. *Supra* note 11, at 677.

18. 350 F.2d 339 (2d Cir. 1965).

Circuit's decision in *Feinberg v. Commissioner*<sup>19</sup> which also held valid for tax purposes a Florida divorce decree declared invalid in New York. The *Feinberg* court, however, did not expressly enunciate any general rule of validation, but supported its decision by relying on the position taken by the Treasury Department in General Counsel's Memo. 25250.<sup>20</sup> If the parties had relied in good faith upon the validity of the Florida decree, it was to be recognized for tax purposes, even though it was probably invalid under the law of the parties' domicile.

Two interpretations of the *Feinberg* decision are possible. The court's reliance on the Treasury regulation may mean that the court adheres to the position that the taxpayer's good faith reliance on the decree is determinative. On the other hand, it is possible to read the *Feinberg* decision as supporting a rule of validation similar to that announced by the Second Circuit. The foreign divorce decree, while probably invalid in the parties' domicile, had not actually been declared invalid by the regulation relied upon in *Feinberg*; yet the foreign divorce decree in *Feinberg*, like the decrees in *Borax* and *Wondsel*, had been declared invalid by a court of the parties' domicile.

In opposition to the Second Circuit's "rule of validation" is the Tax Court's adherence to a "local law theory." In a long line of decisions involving migratory divorces invalid in a taxpayer's domicile, the Tax Court has held that the law of the taxpayer's domicile determines his marital status for tax purposes.<sup>21</sup>

The Treasury Department's position is set forth in General Counsel's Memo. 25250<sup>22</sup> and Revenue Ruling 57-113.<sup>23</sup> As stated above, the taxpayer's good faith reliance on the questionable divorce is controlling. In the factual situation presented by General Counsel's Memo. 25250, the taxpayer and his first wife, Connecticut domiciliaries, had executed a separation agreement providing for the wife's support. The wife had then obtained a Mexican divorce and the taxpayer remarried, continuing to pay his first wife in accordance with the separation agreement until she was advised by counsel that the Mexican divorce would not be recognized in Connecticut. The husband claimed a deduction for payments made under the separation agreement relying upon the Mexican divorce,<sup>24</sup> a question was therefore raised with regard to whether the Mexican decree should be recognized for tax purposes. Acknowledging that the Mexican decree would probably not be recognized in Connecticut, but finding that both parties acted in good faith in relying upon the decree, the memorandum stated:

19. 198 F.2d 260 (3d Cir. 1952).

20. 1947-2 CUM. BULL. 32. See discussion *infra*.

21. *E.g.*, *Ruth Borax*, 40 T.C. 1001 (1963), *rev'd sub nom.* *Estate of Borax v. Commissioner*, *supra* note 11; *J. J. Untermann*, 38 T.C. 93 (1962); *Albert Gersten*, 28 T.C. 756 (1957), *aff'd on this issue*, 267 F.2d 195 (9th Cir. 1959).

22. *Supra* note 20.

23. 1957-1 CUM. BULL. 106.

24. See *supra* note 9.

There is no doubt that many persons affected by Mexican decrees have acted in good faith in relying on such divorces. . . . To allow deductions . . . in such cases seems to be within the general intent of Congress. . . .

Since the parties in the instant case took affirmative steps which clearly indicate *their reliance on the validity of the Mexican decree*, and since the facts negate any effort on their part to use such decree as a device to avoid or evade taxes, . . . the monthly payments by the husband to his wife . . . are deductible. . . .<sup>25</sup> (Emphasis added.)

The limits of the Treasury's position are set out in Revenue Ruling 57-113. There, soon after the husband had obtained a Mexican divorce and remarried, his first wife instituted an action in the state of her domicile contesting the validity of the Mexican divorce and asking for a separation and an allowance *pendente lite*. The state court granted the wife the allowance and the husband made the payments. The question presented was whether these payments otherwise deductible under section 215<sup>26</sup> (because taxable to the wife under section 71(a)(3)),<sup>27</sup> were rendered nondeductible because of the Mexican divorce. The Treasury Department, in ruling that the payments were deductible, stated:

In G.C.M. 25250 . . . payments made under an agreement incident to a Mexican divorce decree . . . were held deductible. Payments made in good faith incident to a Mexican decree or other decree, the validity of which has been questioned, are generally includible in the wife's gross income . . . and deductible by the husband. . . . *This does not mean that payments made under a later decree which does not recognize the earlier decree are not to be similarly treated. The position taken by the service in G.C.M. 25250, supra, was not intended to recognize the Mexican decree over subsequent decrees of other jurisdictions.* (Emphasis added.)

Accordingly, it is held that the existence of a Mexican divorce decree prior to a decree granted in a state which does not recognize the validity of the Mexican divorce does not preclude the deductibility of the *pendente lite* payments made pursuant to the state decree.<sup>28</sup> (Emphasis added.)

By stating that prior questionable decrees will not be recognized "over subsequent decrees in other jurisdictions," the ruling implies that if a later state court decree declares a prior decree of another jurisdiction to be void, the Treasury will not give the prior decree tax effect.<sup>29</sup> This was the posi-

25. *Supra* note 20, at 33.

26. See *supra* note 3.

27. INT. REV. CODE OF 1954, § 71(a)(3). Under this section, a wife separated from her husband must include in her gross income support payments received by her from her husband under a decree requiring the husband to make the payments. The payments in the above ruling did not fall under § 71(a)(1) or § 71(a)(2), *supra* note 4, since they were neither imposed nor incurred by the husband under a decree of divorce or separate maintenance nor were they made under a separation agreement.

28. *Supra* note 23, at 107.

29. See Garelik, *Some Further Questions In The Taxation of Alimony and Child Support Payments*, 30 BROOKLYN L. REV. 42-43 (1963).

tion taken by the Commissioner in *Feinberg*, *Borax* and *Wondsel*. The Treasury Department will therefore recognize a questionable divorce if a taxpayer relies in good faith upon its validity and if it has not been declared invalid by a court of the taxpayer's domicile. If, however, the divorce has been declared invalid, it will not be recognized for tax purposes.

### III. THE RULE OF VALIDATION — ITS SCOPE AND PROBLEMS

*Borax* and *Wondsel* decided only that a divorce declared invalid by a jurisdiction other than the one rendering it is valid for tax purposes and left open questions as to the applicability of the "rule of validation" to certain related but distinct situations. One such question is whether the rule of validation applies where a foreign divorce has not been formally declared invalid in the taxpayer's domicile, but prior decisions of the domicile indicate that the divorce is invalid there. It would seem that such a situation presents an even stronger case for application of the rule of validation than did *Borax* and *Wondsel*, since in those cases the domiciliary state had actually adjudged the foreign divorce invalid. Moreover, non-application of the rule in this situation would involve a federal court in the resolution of questions under the domicile state's domestic relations law — the type of involvement the rule of validation was apparently designed to avoid.<sup>30</sup>

It would seem, however, that the rule of validation would not apply where the rendering jurisdiction itself declares the divorce invalid. Non-application of the rule in this situation would not involve a federal court in questions as to the validity of a divorce under state law in as much as a state court would have already adjudged the divorce invalid. On the other hand, application of the rule in this situation would be inconsistent with the Internal Revenue Code's requirement that there be a "legal obligation"<sup>31</sup> to make payments to a former spouse; if the rendering jurisdiction itself declares the divorce invalid, the divorce would be without legal effect anywhere and no "legal obligation" could therefore exist. There is dicta in both the *Borax* and the *Wondsel* opinions to the effect that the rule of validation would not apply to such a situation. In *Borax*, the majority stated that it was "possible" that there was a distinction between the situation before it and the situation where the rendering jurisdiction itself declares the divorce invalid,<sup>32</sup> while in *Wondsel*, the court stated that, as the Florida divorce in issue had not been declared invalid by the Florida courts, the *Borax* decision had the effect of validating it for tax purposes.<sup>33</sup>

The conclusion that the rule of validation would not be applicable to the situation where a divorce has been overturned by the rendering jurisdic-

30. See *Estate of Borax v. Commissioner*, *supra* note 11, at 670 and 676 (Friendly, J., dissenting).

31. INT. REV. CODE OF 1954, § 71(a)(1), *supra* note 4.

32. *Supra* note 11, at 672.

33. *Supra* note 18, at 341.

tion, prompts another question undecided by *Borax* and *Wondsel*. Would the rule apply where the divorce has not been declared invalid by the rendering jurisdiction but where it would probably do so if litigated, because, for one reason or another, the divorce should not have been originally granted? It is likely that the rule would apply to such a situation and that the divorce would be valid for tax purposes, since non-application of the rule would involve a federal court in the resolution of questions of state domestic relations law. Application of the rule in this situation, however, would meet the same objection as its application where the rendering jurisdiction has actually declared the divorce invalid; if the divorce is void in the rendering jurisdiction, it would have no legal effect anywhere, and no "legal obligation" could therefore exist.

The majority in *Borax* did answer one question as to the scope of its rule of validation:

[W]e are not dealing with a situation where the rendering jurisdictions' concept of divorce is totally alien to that contemplated by the *tax laws*. The test would not be whether the divorce would be declared invalid in every state, but rather *whether the divorce frustrated the revenue purposes of the tax laws*. . . .<sup>34</sup> (Emphasis added.)

The rule of validation will, therefore, not give tax validity to every questionable divorce, nor will the validity of a divorce for tax purposes be determined by standards set by the domestic relations laws of the states. Questions as to a divorce's tax validity are to be resolved with reference to the revenue purposes of the tax law itself. The court did not define, however, precisely what it meant by "a divorce that frustrated the revenue purposes of the tax laws." If a divorce obtained solely to gain some tax advantage falls within this category, as certainly would be the case, the court's "test" is susceptible to two possible extremes: A divorce that meets the standards of every state, may nevertheless be invalid for tax purposes, if it was obtained solely to gain some tax advantage; conversely, a divorce that fails to meet the standards of any state (*e.g.*, a Mexican "mail order" divorce)<sup>35</sup> may be given tax effect if it was not obtained solely to gain a tax advantage.

The requirements of the full faith and credit clause of the Constitution<sup>36</sup> could pose a problem in the application of the rule of validation. While it is settled that one state may refuse to give full faith and credit to an *ex parte* divorce decree rendered by another state if it finds that the rendering state lacked jurisdiction,<sup>37</sup> it is not settled that the rendering jurisdiction

34. *Supra* note 11, at 672.

35. A Mexican "mail order" divorce is one in which a party, without ever becoming a resident of Mexico, corresponds with an attorney who prepares the necessary papers which the party signs. A Mexican decree is then obtained without the party being present in Mexico. 24 AM. JUR. 2d *Divorce and Separation* § 965, n.7 (1966). It has generally been held in United States jurisdictions that such divorces are absolutely void and will not be recognized by comity. *Supra* at § 965.

36. U.S. CONST. art. IV, § 1.

37. *Williams v. North Carolina*, 325 U.S. 226 (1945).



must give full faith and credit to such a finding.<sup>38</sup> Accordingly, in a factual situation similar to that of the *Wondsel* case — *i.e.*, where one United States jurisdiction declares a divorce granted by another jurisdiction invalid — the full faith and credit clause may or may not require that the declaration of invalidity be recognized by the jurisdiction granting the divorce. If full faith and credit does not require that the rendering jurisdiction recognize another jurisdiction's declaration of invalidity, application of the rule of validation would not be inconsistent with the Internal Revenue Code's requirement that a "legal obligation" exist, since the divorce, though invalid in the domicile, is still valid in the rendering jurisdiction. But if full faith and credit does require the rendering jurisdiction to recognize another jurisdiction's declaration of invalidity, the divorce is neither valid in the domicile state nor in the rendering state, and application of the rule of validation again produces the result that a divorce valid nowhere is valid for tax purposes.

#### IV. THE RULE OF VALIDATION — AN EVALUATION

The Second Circuit's rule of validation was advanced in an attempt to promote certainty and uniformity in the Federal tax scheme.<sup>39</sup> The rule itself does promote uniformity by employing one federal standard in determining a taxpayer's marital status rather than the diverse domestic relations laws of some fifty jurisdictions. Also, a large degree of certainty will be promoted by the rule if it is applied so as to give tax validity to all divorces, except where the rendering jurisdiction has itself adjudged a divorce invalid. The court's statement in *Borax* on the other hand, that the rule of validation is not applicable to a divorce that "frustrates the revenue purposes of the tax laws" is certainly not conducive to certainty inasmuch as a divorce will always be open to attack for this reason. This type of uncertainty, however, pervades the tax law generally; many transactions that meet the formal requirements of other rules of law are open to attack by the Commissioner since questions are decided by examining the practical and substantial aspects of a transaction rather than its formal or legal effect.<sup>40</sup> It therefore should not be surprising that a divorce which

38. See, *e.g.*, *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888 (1962), holding that the rendering jurisdiction is not required to give full faith and credit to another jurisdiction's finding that the rendering state lacked jurisdiction. Conflicting answers to this question have been given in dicta by several Supreme Court Justices. Mr. Justice Reed indicated in *Sutton v. Lieb*, 342 U.S. 402, 408 (1952), that the rendering jurisdiction must recognize a subsequent declaration of invalidity by another state, while in *Williams v. North Carolina*, *supra* note 37, Mr. Justice Murphy, concurring, *id.* at 239, and Mr. Justice Rutledge, dissenting, *id.* at 244, indicated that a divorce might still be valid in the rendering jurisdiction, even though later invalidated for lack of jurisdiction by a court of another state.

39. The majority in *Borax* also justified the rule as tending to further the "indicated congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment." *Supra* note 11, at 670.

40. *E.g.*, *Knetsch v. United States*, 364 U.S. 361 (1960); *Commissioner v. Hansen*, 360 U.S. 446 (1959); *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945); *Helvering v. Clifford*, 309 U.S. 331 (1940); *Bridges v. Commissioner*, 325 F.2d 180 (4th Cir. 1963); *Estate of Delano T. Starr v. Commissioner*, 274 F.2d 294 (9th Cir. 1959); *Brown v. Commissioner*, 258 F.2d 829 (2d Cir. 1958).

meets all the requirements of state law may be denied tax effect if it is merely a device to avoid or evade taxes.

Moreover, the other views as to when a divorce should be given tax effect also lack this element of certainty. The Treasury Department's requirement that the taxpayer must in *good faith* rely on the validity of the questionable divorce also leaves a divorce open to attack as a tax avoidance device.<sup>41</sup> Similarly, it would seem that courts taking the "local law" approach would also look at substance and not form and deny a divorce tax effect, even though valid in the taxpayer's domicile, if it were employed merely as a tax avoidance device.<sup>42</sup>

As noted previously, a more basic criticism of the "rule of validation," is that its application in certain instances may result in holding a divorce valid for tax purposes that is invalid everywhere. It is possible, however, for the same result to be reached under the other views. For example, in the situation where the jurisdiction of the taxpayer's domicile has not declared a divorce rendered by another jurisdiction invalid, but would probably do so if litigated, the Treasury would give the questionable divorce tax validity if the parties in good faith relied upon it.<sup>43</sup> The effect of such a ruling could be to hold a divorce, valid nowhere, valid for tax purposes if the rendering jurisdiction would have to give full faith and credit to a declaration of nullity rendered by the jurisdiction of the taxpayer's domicile. A similar result would be reached in this situation if a court adhering to the "local law" theory gave a questionable divorce income tax validity.

## V. CONCLUSION

Whether questions as to the income tax validity of a questionable migratory divorce are resolved by reference to the taxpayer's marital status in the state of his domicile, by a rule that makes reliance upon the divorce determinative, or by a "rule of validation," it is entirely possible that a divorce valid nowhere will be valid for tax purposes, unless Federal courts deciding tax questions also involve themselves in abstract questions of full faith and credit. It would seem the "lesser evil" is to permit the somewhat anomalous result that, in certain instances, a divorce valid nowhere will be valid for tax purposes. Since such a result is unavoidable under any of the theories advanced, resolution of questions concerning a taxpayer's marital status through the use of the Second Circuits "rule of validation" is preferable, since it is capable of being uniformly applied in all jurisdictions.

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41. See Chief Counsel's Memo. 25250, quoted *supra*, implying that the divorce in issue there would not have been recognized for tax purposes if the parties had used the decree "as a device to avoid or evade taxes."

42. *Cf.*, J. H. Bridges, 39 T.C. 1064 (1963), *aff'd*, 325 F.2d 180 (4th Cir. 1963).

43. Chief Counsel's Memo. 25250, *supra* note 20.