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Section 117(j), 1951 Revenue Act, Breeding Stock

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NOTES

SECTION 117 (j), 1951 REVENUE ACT, BREEDING STOCK

The Revenue Act of 1951 included a number of amendments affecting income taxes other than raising the rates. Of all of the amendments, none is of more general interest throughout Wyoming, and the western states, than the amendment to Sec. 117 (j), Internal Revenue Code.[1]

Section 117 (j), I.R.C. was added by the Revenue Act of 1942 as a relief measure, for the most part, to allow the advantages of capital gains provisions for depreciable assets used in the trade or business.

A request was made of the Commissioner of Internal Revenue for a ruling on Sec. 117 (j) as to its application to livestock acquired or raised and retained for draft, breeding or dairy purposes. In reply the commis-

1. Sec. 325 (a), 1951 Act amending Title 26 U.S.C. Sec. 117 (j).

sioner recognized the applicability.[2] But he excluded "the sale of animals culled from the breeding herd as feeder or slaughter animals in the regular course of business." Later he amplified his earlier ruling[3] and defined "animals culled from the breeding herd" in a manner which cut straight across the practical aspects of cattle raising practices.

Litigation was thereby generated in which livestock raisers generally prevailed and enjoyed the tax savings of long term capital gains. The first circuit court case was *Albright v. United States.*[4] In that action the government conceded that the taxpayer met all tests (statutory and regulatory) except proving that "the animals were not held primarily for sale to customers in the ordinary course of his trade or business." The cattle in question were dairy cattle. The court said, "A dairy farmer is not primarily engaged in the sale of beef cattle. His herd is not held primarily for sale in the ordinary course of his business. Such sales as he makes are incidental to his business and are required for its economical and successful management."

Taxpayers rushed to the courts even more and put greater pressure upon getting equal recognition for beef animals. The commissioner's administrative revetment was finally stormed by the case of *United States v. Bennett,*[5] wherein the commissioner was given even less kind treatment.[6] The commissioner then attempted to save his position by establishing the measure of "substantially full period of usefulness" as being the requirement before a breeding animal could be considered such for the capital gains benefits.[7] This ruling was destroyed by legislation.

> By the amendment livestock is now separately mentioned as follows:
>
> "Such term [i.e., 'Property Used in the Trade or Business'] also includes livestock, regardless of age, held by the taxpayer for draft, breeding or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry."

Thus, it would seem the problem of applying the capital gain benefits to livestock sales is solved by legislation. But such is not likely to be so, for every word of the code is scrutinized for tax savings and this new addition is bound to be no exception.

Doubtlessly many difficulties will devolve upon the sale of heifers. Upon first reading of the new part of Sec. 117 (j), supra, it would appear

2. I.T. 3666, 1944 C.B. 270, 52-3 CCH 875.07.
3. I.T. 3712, 1945 C.B. 176, 52-3 CCH 875.075.
4. 173 F.(2d) 339 (8th Cir. 1949).
5. 186 F.(2d) 407 (5th Cir. 1951).
6. In *Albright* at 173 F.(2d) p. 345 the Court said, ". . . we have not overlooked the rule that the administrative interpretations of an ambiguous statute by those in charge of its administration and enforcement are to be given great weight by the courts. . . . Such ambiguity or doubt as confronts us in the present case comes from the administrative interpretation rather than from the act interpreted." In *Bennett* at 186 F.(2d) p. 410 the Court regarded the commissioner's rulings as, "having no more binding or legal force than the opinion of any other lawyer."
7. Mim. 6660, June 27, 1951, 52-3 CCH 875.068.

heifers are no exception because of the words "regardless of age." However, the Report of the Senate Finance Committee on H.R. 4473, 82 Cong.[8] makes it clear that these three words were inserted to do away with the effect of the commissioner's "substantially full period usefullness" requirement (the House bill did not include the words). The holding period of "12 months or more" is clearly stated and should present few grounds of difference between the bureau and taxpayers. It is the requirement of being "held . . . for . . . breeding . . . purposes" which leaves the stockman's tax problem almost where it was before all of the litigation ensued. Will 1951 heifer calves sold in the fall of 1952 be Sec. 117 (j) assets? If sold in the fall of 1953? The amendment appears to allow age to be disregarded in respect to having been *held* for more than twelve months. But will they have been *held* for breeding purposes and, may age be disregarded?

Judge Delehant of the United States District Court of Nebraska, Lincoln Division, decided during 1951, two cases which were practically reasoned. They came late in the parade of cases. The first, *Miller v. United States,* 98 F.Supp. 948 (Feb. 19, 1951) involved a raiser of beef animals and the question was whether the sale of heifers, among cows and bulls, were taxable as long term capital gains. The second case is *Laflin v. United States,* 100 F.Supp. 353 (Sept. 18, 1951). Also in this case were heifers, but the seller was a raiser of registered stock.

In the former case considerable stress was laid upon the introduction of the heifers into the breeding herd, that is, into the presence of the bulls. The Court took cognizance of the fact that the particular rancher so introduced heifers when approximately fourteen months old. Furthermore, the Court accepted the fact that the rancher removed heifers between on and two years of age from the breeding herd during fall selection for shipping. This would add up to a rather short time of about five months during which long yearling heifers might have been held for breeding purposes. In fact, 1945 and 1946 sales included 126 and 94 head, respectively, of heifers which were of the calf category at the first of those years. Judge Delehant observed a practical test for determining heifers once introduced into the breeding herd. It is, "In the sale on the market of heifers after they have been put into a breeding herd and exposed to the service of bulls, the seller has to suffer a 'dock' or reduction in price, in recognition of the probability of their pregnancy, in comparison with the price they would command as 'open' or unbred heifers."[9] Not willingly, however, did the Court find these animals to be Sec. 117 (j) assets. Rather, the judge accepted the testimony and followed the *Albright* case, supra, as stare decises because in that case two bred heifers were so considered.

8. The Revenue Act of 1951.
9. As a practical matter it would be well to point this out to clients in order that their commission slips might be marked to reveal "dock" or that the animals are "not open," for it could serve good evidentiary purposes.

In the *Laflin* case, supra, involving the breeding of registered stock, heifers were treated oppositely. In that case 34 cows ranging in ages from 9 years 1 month to 3 years, were allowed to be subject to capital gains but 68 females ranging from 1 year, 10 months to 1 year, were not so allowed. This was partially because of the test that the animals "must not have been held by the taxpayer in the ordinary course of his trade or business." The Court considered these heifers to be part of Laflin's "money crop." The other partial test favored by the Court was, "Admittedly none of the entire sixty-eight had ever had a calf, and, with virtual certainty, a large number of them were not pregnant and many of them, as their ages demonstrated, had never been exposed to pregnancy."

Note, in the earlier case the heifers were young but their ages did not govern the holding but in the later case the Court held the age of many of the heifers demonstrated they could not have been breeding animals. The stress in both cases was upon the probability or possibility of the heifers being bred. This is set forth in the judge's own words, "The record in the *Miller* case satisfactorily established the definitive inclusion of the heifers in the breeding herd. That in this[*Laflin*] case does not, but rather points clearly to its negation. Their breeding to bulls (insofar as it is indecisively shown) in this [*Laflin*] case is one . . . fact which has led to opposite conclusions in the two cases."

A new round of litigation will be but the second round of the same dance. The tune of the first was "not primarily held for sale" and that of the second will be "held for breeding." There should be this difference, whatever may be gained, formerly the taxpayer had the burden of proving a negative issue; now he should have the burden of proving an affirmative one.

W. A. COLE.

CONSTITUTIONALITY OF BARBERS' PRICE FIXING ACT

Since 1939, the Legislature of the State of Wyoming has almost continuously been confronted with a barbers' price fixing bill;[1] however, the bill has always failed to pass.

This article concerns itself primarily with the constitutionality of such a proposed law.

Although legislation on this subject is not uniform,[2] for the most part

1. H.B. No. 64, 1939; H.B. No. 96, 1941; H.B. No. 81, 1943; H.B. No. 15, 1945; H.B. No. 55, 1947; H.B. No. 64, 1949.
2. As representative of these statutes, see the following: Fla. Stat. 1949, sec. 476.27; Code of Ia. 1950, secs. 369.1 to 369.5; 1947 Supp. to Gen. Stat. of Kan. 1935, sec. 65-1830; La. Act No. 48, 1936; Mich. Comp. Laws 1948, sec. 338.653; Minn. Stat. 1949, secs. 186.01 to 186.08; 1939 Supp. to Mont. Rev. Codes 1935, sec. 3228.27; Neb. Rev. Stat. 1943 secs 71-225 to 71-237; Nev. Comp. Laws Supp. 1931-1941, sec. 763; N.M. Stat. 1941 secs. 51-1625 to 51-1638; N. Dak. Rev. Code 1943, secs. 43-0416 and 43-0417; Okla. Stat. 1941, sec. 59-102; S. Dak. Sess. Laws 1945, p. 117 (H.B. No. 157).