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## WHEN IS A JUDGE NOT AN EMPLOYEE? *PORTER v. COMMISSIONER*

In *Porter v. Commissioner*,<sup>1</sup> the United States Tax Court held that Article III judges are not employees, as the term is used in § 219(b)(2)(A)(iv), and therefore they are not qualified participants in plans established for its employees by the United States. The deduction made by the petitioner<sup>2</sup> for an Individual Retirement Account (IRA) was therefore allowed. The deduction was disallowed by the respondent because the respondent determined that the petitioner was an active participant of a plan established for its employees by the United States.

This decision consolidated five cases.<sup>3</sup> All five petitioners were either United States Circuit Court or District Court judges. Pursuant to Article III, Section 1, of the United States Constitution, all of the judge-petitioners are entitled to hold office for life during good behavior and to receive a salary which cannot be diminished.<sup>4</sup>

Sections 371 and 372 of Title 28 of the United States Code (Judicial Code) establishes several mechanisms by which a judge or Justice who holds office for life during good behavior (Article III judge), such as the judge-petitioners herein, may separate from regular active service and continue to receive payments from the United States.<sup>5</sup>

Pursuant to Judicial Code Sec. 371(a), an Article III judge who is at least seventy years of age, and has served at least ten years, may resign and continue to receive the salary that he was receiving at the time of his resignation and he may receive it for the rest of his life.<sup>6</sup>

An Article III judge who is at least 70 years of age and has served at least ten years, or who is at least 65 years of age, and who has served at least fifteen years, is entitled to receive the same salary he was receiving at the time of his resignation for the rest of his life. Plus, he will receive any pay increases, whereas a resigned Article III judge does not.

Each judge-petitioner had established an IRA to which they had made timely cash contributions, which were not in excess of the applicable limits for the years of the contribution.

Internal Revenue Code Section 219 allows an individual a deduction for amounts that were paid in cash to an IRA for the benefit of such individual, and I.R.C. Section 220 allows a deduction for that person's spouse. These sections

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<sup>1</sup> *Porter v. Commissioner*, 88 T.C. 279 (1987).

<sup>2</sup> Deductions and contributions for tax years 1980 and 1981.

<sup>3</sup> The following cases were consolidated: Arlin M. and Neyssa C. Adams, #19368-84; William J., Jr., and Jean M. Nealon, #26149-84; Clarence C. and Jane M. Newcomer, #29669-84; and Daniel H., 3rd, and Mary J. Huyett, #39130-84.

<sup>4</sup> *Porter*, 88 T.C. at 285.

<sup>5</sup> *Id.* at 280-81.

<sup>6</sup> *Id.*

disallow the deduction in a taxable year if the person is an active participant in a plan established by the United States for its employees.

In 1981, Congress amended I.R.C. Section 219 and repealed Section 220.<sup>7</sup> The effect of this repeal was to allow individuals (and their spouses) to deduct amounts contributed to IRAs for their benefit, regardless of whether such individuals (or their spouse) were participants of any of the proscribed plans. In 1986, Congress amended Section 219,<sup>8</sup> which phased out the IRA deduction for any individual (and their spouse) who earned above certain proscribed amounts where such individuals (or their spouse) are active participants of certain proscribed plans.<sup>9</sup>

The *Porter* court had to determine whether the judge-participants were active participants in a plan established by the United States for its employees. The first step in the analysis was to determine if the Article III judges were employees of the United States. If Article III judges were not employees, then Sec. 219 (b)(2)(A)(iv) will not apply because the Article III judges would not be active participants in a plan established by the United States for its employees.<sup>10</sup> After an in-depth review, the court determined that the definition of "employee," for the purpose of a qualified retirement plan, is the common law definition, purposes of Sec. 219.<sup>11</sup>

There are three classifications of the common law employee definition recognized by the Supreme Court. These three classifications are: (1) employer-employee relationship, (2) employee, or independent contractor, and (3) officer.<sup>12</sup> The more applicable classification in *Porter* is that of an officer. The Sixth Circuit listed five indispensable elements of an officer: (1) the office must be created by the Constitution or the Legislature, or municipality or other body with authority conferred by the Legislature; (2) there must be a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; (3) the power conferred and the duties to be discharged must be defined either directly or indirectly by the Legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law and; (5) the office must have some permanency and continuity and the officer must take an official oath.<sup>13</sup>

The U.S. Supreme Court added a sixth element in *Metcalf & Eddy v. Mitchell*,<sup>14</sup> which provided that the officer should be free of control by any superior

<sup>7</sup> The Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 311(e), 95 Stat. 280 (1981) (repealing I.R.C. § 220); and §§ 311(a), 312(c)(1) and 313(b)(2), 95 Stat. 274, 284 and 286 (1981) (amending I.R.C. § 219).

<sup>8</sup> As amended by the Tax Reform Act of 1986, Pub. L. No. 99-514, § 301(c), 100 Stat. 2218 (1986).

<sup>9</sup> I.R.C. § 219 (1981).

<sup>10</sup> *Porter*, 88 T.C. at 281-82.

<sup>11</sup> *Id.* at 282-83.

<sup>12</sup> *Id.* at 283 (citing family of cases following "master test" set forth in *Reed v. Commissioner*, 13 B.T.A. 513 (1928), *rev'd*, 34 F.2d 263 (3d Cir. 1929), *rev'd per curiam*, 281 U.S. 699 (1929)).

<sup>13</sup> *Id.* at 284 (citing *Pope v. Commissioner*, 138 F.2d 1006, 1009 (6th Cir. 1943)).

<sup>14</sup> *Id.* (citing *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926)).

power other than the law.

In determining whether the Article III judges are officers or employees, the court considered the duties and powers of the judge-petitioners. In the opinion of the court, Article III judges were officers of the United States since all five *Pope* elements for such status were present.<sup>15</sup>

Since Article III judges were officers exclusively and not *common law* employees, they were not employees of the United States within the meaning of Sec. 219. As such, they were not covered by a plan established by the United States for its employees and, therefore, Sec. 219(b)(2)(A)(iv) was not applicable to disallow petitioners' claimed IRA deductions.<sup>16</sup>

Even if the court had held that Article III judges were employees of the United States, the court would not readily have concluded that the judges were not entitled to their claimed IRA deductions. "Plan," as used in § 219(b)(2)(A)(iv), refers to a retirement plan.<sup>17</sup> Under Sections 371(b) and 372(a) of the Judicial Code, Article III judges only technically retire as they may and often do continue to perform the same functions they performed prior to separation from regular active service. Thus the payments that Article III judges receive pursuant to Judicial Code Sections 371(b) and 372(a) are not of the same nature as payments that retired employees receive pursuant to a retirement plan where the retired employees actually cease to perform service. Under another mechanism, Judicial Code Sec. 372(b), the right of retired judges to continued payment is granted by the Constitution.<sup>18</sup> This constitutional right is not considered to be a retirement plan. Further, under Judicial Code Sec. 371(a), Article III judges no longer perform the services they performed during regular active service. A forerunner of this provision, however, "has been held not to be in the nature of a pension, but rather an inducement to superannuated judges to voluntarily relinquish their offices."<sup>19</sup> Accordingly, it does not appear that Judicial Code Sections 371 and 372 establish a retirement plan.

Unlike the payments a retired employee receives from a trust established pursuant to a qualified retirement plan, the payments an Article III judge receives pursuant to Sections 371 and 372 are not made from a fund established by contributions of before-tax earnings which can grow tax-free.<sup>20</sup> Rather, the payments are made from current congressional appropriations and are administered identically to the manner in which the payments are administered to Article III judges in regular active service.<sup>21</sup> Therefore, the Article III judges are not receiving the

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<sup>15</sup> *Porter*, 88 T.C. at 285.

<sup>16</sup> *Id.* at 287.

<sup>17</sup> Treas. Reg. § 1.219-1(b)(2)(A)(4)(19 ).

<sup>18</sup> *Porter*, 88 T.C. at 287.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

double tax benefit that Congress sought to prevent by Sec. 219(b)(2)(A).

The House Committee on Ways and Means has submitted an additional tax proposal on revenue reconciliation consideration. Under present law, a taxpayer is permitted to make the maximum permissible deductible IRA contribution if the taxpayer (1) has adjusted gross income that does not exceed an applicable dollar amount, or (2) is not an active participant.

Under the proposal by the committee, the decision in *Porter v. Commissioner* would be overturned. Officers of the United States, or political subdivisions as described in the decision, would be treated as employees for purposes of the Code. They would be active participants for purposes of the IRA deduction limit. This would result in a gain of less than \$50 million in each of the next three fiscal years.<sup>22</sup>

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<sup>22</sup> *supra* note 22.