

(ii) What findings of fact, if any, outside the of the stipulation of facts, were made and were such findings relied on by the Board.

ANSWER: The Board relied only upon the stipulation of facts and the allegations of the Petition admitted by the Respondent.

(iii) On what authorities did the Board rely and thus what was the law of the case.

ANSWER: The Board relied upon the authorities cited in the parties' briefs. In particular the Board placed reliance upon the cases of Natco Corporation v. United States, 3rd Cir., 240 F.2d 398 (1956), J.D. Real Estate Co. v. Commissioner, T.C. Memo 1985-069 (1985), Treas. Reg 1.451-1(a), and Harmont Plaza, Inc. v. Commissioner, 64 T.C. 632 (1975), aff'd, 549 F.2d 414 (6th Cir. 1977). The law of the case is that a taxpayer reporting on an accrual basis shall include income in the taxpayer's gross income in the year in which "all the events have occurred which fix the **right to receive such income** and the amount thereof can be determined with reasonable accuracy." Treas. Reg. 1-451-1(a).

(iv) What was the reasoning of the Board in applying the law of the case to the specific facts relied on in coming to its conclusion of law.

ANSWER: There is no indication in the facts or otherwise that there was need of Petitioner to perform additional services to earn the commission after 1981. There is no question that the amount of the commission earned by Taxpayer was able to be determined with reasonable accuracy in 1981. Thus the general rule is that the accrual method taxpayer must accrue the income in the year that these events have occurred, in this particular case 1981.

In this case, Petitioner (among other arguments for non-recognition of the income in 1981) claims that the payment of the sale commission was "contingent" upon payment of the mortgage to Wilmington Trust and thus an exception from the general rule of reporting for

an accrual based taxpayer. The Board cannot find that the delay in payment of the commission until such time as the mortgage had been retired amounted to a "contingency" which would avoid the general rule.

Factually the Petitioner did not treat this as a "contingency." Petitioner claims the requirement of Wilmington Trust that its mortgage be paid was the "contingency" which negated the mandate of the statute to include the commission in income in 1981. Yet once the mortgage was retired in 1984, the purported contingency having been satisfied, Petitioner still treated the transaction as if Petitioner was a cash basis taxpayer, for only those amounts received in 1984 were reported in 1984 and those amounts received in 1985 were reported in 1985. (See STIP 7). As Petitioner was not treating the retirement of the mortgage as a contingency, the Board cannot treat it as a contingency which would take this out of the general rule for accrual method taxpayers. Arbern Wilmington, one of the other taxpayer involved in this case, utilized the accrual method and accrued the entire commission (as a payable) in 1981. (See STIP 6).

Assuming, for purposes of argument, that the facts as determined by this Board were that the Petitioner had treated the payment of the Wilmington Trust mortgage as a contingency; this Board still believes that the requirement that the mortgage be retired prior to the payment of the commission was not a contingency recognized by the regulations or the cases so as to avoid reporting of the income after Petitioner had performed all services requisite to earn the commission in 1981. In two of the cases cited by Respondent, J.D. Real Estate Co. v. Commissioner, T.C. Memo 1985-069 (1985) and Harmont Plaza, Inc. v. Commissioner, 64 T.C. 632 (1975), aff'd, 549 F.2d 414 (6th Cir. 1977), the Court held that the taxpayer must include income in the year in which the services were completed even though they were not to be paid until payments were made by other parties. Petitioner agrees that

the income in those cases was properly included in income and there was no contingency to take these situations out of the general rule. Petitioner distinguishes those cases from the case at bar by arguing that the payments in the cases cited were made to a number of creditors as the moneys were received and not all to one creditor (Wilmington Trust) and then to others (Petitioner) as is true in this case. The Board finds this to be a difference without import.

As the Board has found that the payment of the Wilmington Trust mortgage was neither factually nor legally a "contingency" Petitioner must, as an accrual basis taxpayer, report the income in the year when all events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. Those events took place in 1981.

IT IS SO ORDERED, this 9th day of November, 1990.

John H. Cordery

[Signature]

Harry B. Roberts

[Signature]