

Joseph M. Dodge, Stearns, Weaver (et al.) Professor, Florida State University College of Law, *The Story of Glenshaw Glass: Toward a Modern Concept of Gross Income*.

Abstract:

This paper presents the story of *Glenshaw Glass Company v. Commissioner*, 348 U.S. 426 (1955), perhaps the leading case on gross income under the income tax. The Supreme Court decision in *Glenshaw Glass* held that punitive or “exemplary” damages recovered by a plaintiff in commercial litigation constituted gross income to the plaintiff in full. *Glenshaw Glass* did not create much of a stir at the time it was decided in 1955, but it is now considered a watershed case that consolidates the “modern era” in thinking about “income” issues under the federal income tax. In the early days of the income tax there was a good deal of confusion about the nature of income. Principally, discourse about “income” under the income tax tended to be framed by concepts borrowed from business accounting and trust accounting, where “income” was something distinct from “capital,” and “capital” was often thought to include not only “investment” but, more broadly, original endowment and nonrecurring receipts, such as gifts, contributions to capital, occasional gains from property transactions, and windfalls.

The paper examines prior doctrine (mainly, the attenuated legacy of *Eisner v. Macomber*), the decisions below (all holding in favor of the taxpayers), briefs, newspaper records, contemporaneous commentary, and current recollections of participants to illuminate how this case reached the Supreme Court, what strategies were pursued by counsel (for better or worse), and what choices the Supreme Court made in its resolution of this case. The Supreme Court’s opinion in *Glenshaw Glass*, authored by Chief Justice Earl Warren, is shown to be both sweeping and restrained.

The language of the opinion is sweeping in its eschewing of subtle distinctions and getting quickly to the point. After setting out the text of the gross income statute and noting that it was to be broadly construed, the opinion stated: “Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” Thus, apart from the specific holding that punitive damages in commercial litigation are gross income (and in a companion case, *General American Investors*, 348 U.S. 434 (1955), that recoveries by a corporation of insider profits under § 16(b) of the 1934 Securities Act were also gross income), *Glenshaw Glass* can be viewed as holding:

- (1) The tax statute, not language in judicial opinions, is the ultimate source of tax law; and
- (2) The catch-all phrase in the gross income statute (currently § 61(a), referring to “all income from whatever source derived,” covered all realized accessions to wealth, regardless of source, such as “windfall gains,” that are not specifically excluded by statute.

Thus, income is defined in an abstract way, rather than being constituted by an aggregate of specific statutory or regulatory examples and holdings in court cases. One *cannot* say that “such and such is not income because no court has ever held it to be income.” The *Glenshaw Glass* approach to gross income issues is the very opposite of the common law method of “extending” fact-specific holdings to new fact situations by analogy and synthesis.

In *Glenshaw Glass* the Supreme Court implicitly rejected “originalist” (1913), “common understanding,” and “dictionary definition” approaches to the concept of “income” and instead adopted a “dynamic plain meaning” approach, whereby the starting point for understanding “income” (“accession to wealth”) is something like the literal meaning, “gain coming in.” The “accessions to wealth” idea is inconsistent with various restrictive concepts of income, such a “consumed income” concept, a “portion of national income” concept, a concept that would limit income to regular and recurring receipts, and a concept that would limit income to the fruits of the taxpayers capital or labor. Thus, *Glenshaw Glass* implicitly (if not expressly) rendered obsolete in whole or in part, at least as to reasoning and *dicta*, various earlier Supreme Court cases limiting the concept of income, such as *Eisner v. Macomber*, *Gould v. Gould*, and *Edwards v. Cuba Rr. Co.* The approach of *Glenshaw Glass* is compatible with the expansive Haig-Simons concept of income (except insofar as *Glenshaw Glass* acknowledges the relevance of the realization principle), although the Haig-Simons concept is not expressly adopted. Finally, *Glenshaw Glass* is one of a line of cases that views “income” for income tax purposes as being a concept autonomous from the concept of income as used in other disciplines, such as economics, trust accounting, and financial accounting.

Despite the broad language in *Glenshaw Glass*, it did not purport to decide other cases. Apart from cryptic references to “realization” and “dominion and control” - which weren’t really at issue - there is nothing in the opinion that purports to bear on extraneous issues, the most salient being the circumstances under which non-compensatory in-kind consumption benefits are to be included in gross income.

Glenshaw Glass also has had some impact on the respective competencies of Congress, the courts (particularly the Supreme Court), and the Executive in interpreting tax statutes. Basically, the Court refused to give significant weight to Congress’s inaction, and (subsequent to the taxable years in question) re-enactment of the general gross income provision, in the face of two lower court decisions holding windfall gains to be non-income. Stating that it did not appear that Congress had specifically considered these cases, Congress could not be deemed to have approved them. Indeed, a holding to the contrary would have raised separation-of-powers concerns by allowing Congressional committees to act as “shadow” appeals courts. In any event, a later Congress cannot, without enacting legislation, “interpret” (in Committee Report language) earlier enactments.

The Court was more interested in administrative practice. Indeed, the concepts of congressional re-enactment and acquiescence possess greater vitality in relation to interpretation of statutes by administrative agencies (here the IRS and the Treasury

Department) than by courts, since such agencies derive their rule-making power from Congress in the first place. In other words, Congress would not be invading the turf of the judiciary by approving or disapproving, expressly or by implication, administrative interpretations of statutes. Perhaps ironically, to the extent that courts treat Congressional re-enactment of statutes or inaction as being implicit approval of administrative agency rule-making, the courts are allowing the Executive to stake out turf at the expense of Congress.

The Supreme Court in *Glenshaw Glass* simply ignored the argument that the damages in question should be excluded from income in order to further an asserted non-tax policy to encourage civil anti-trust and securities litigation. Although the taxability of the damages at issue might affect non-tax behavior, the extent of this influence is only speculative, and it is far from clear that non-tax policy would be furthered or contravened. The interaction of tax rules with non-tax policy is for legislatures to work out. Legislatures have more tools to use; tax rules are only one such tool.

In sum, the Supreme Court decision in the case known as *Glenshaw Glass*, although not considered earth-shaking in its day, is now recognized as being a classic for setting tax jurisprudence firmly on a modern footing. Here “modern” means being clear of the clutter and distractions inherited from the 19th century. In the modern era, tax jurisprudence is autonomous from other disciplines, while being cognizant of them. “Modernity” in tax means that courts give primacy to the tax statute and due deference to the Executive in its rule-making function. Finally, modernity means that there is a concept of income, as opposed to either an all-encompassing theory or an inherently restrictive definition.