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Murry v. Commissioner, 601 F.2d 892 (5th Cir. 1979)

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Income Tax—CONDOMINIUM RECREATION FACILITIES—EXCESSIVE RENTAL PAYMENTS TO OWNERS OF RECREATION FACILITIES NOT INCLUDIBLE IN DEVELOPER'S SALES INCOME—*Murry v. Commissioner*, 601 F.2d 892 (5th Cir. 1979).

At times, the oft-maligned recreation facility lease is an instrument for inordinate abuse and the subject of a variety of litigation.[1] *Murry v. Commissioner*[2] represents the Internal Revenue Service's most recent contribution to the cacophony of litigation. In *Murry,* the Commissioner of Internal Revenue (the Commissioner) unsuccessfully sought to increase the taxable income of a condominium developer by contending that a recreation facility lease, which purchasers were required to assume from the developer as part of a sale transaction, constituted an improper diversion of sales income from the developer to the lessors of the facility.[3] A Fifth Circuit panel disposed of his attempt to restructure the transaction according to its economic substance by noting that "the Commissioner has been unable to point to *any* precedent supporting his [desired form of restructure]."[4]

The factual setting in *Murry* is one commonly found in the condominium development industry.[5] In late 1964, Kenneth Murry, a building contractor in southeast Florida, joined forces with Elias Breath for the development of condominium apartments.[6] The project was implemented through Lakeside Garden Developers, Inc., a corporation formed and solely owned by Murry and Breath.[7]

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1. Numerous issues have been presented in litigation relating to common facilities leases. *See, e.g.*, Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002 (5th Cir. 1979) (alleging Sherman and Clayton Act antitrust violations); Bennett v. Behring Corp., 466 F. Supp. 689 (S.D. Fla. 1979) (alleging fraudulent misrepresentations, unconscionability of deed restrictions, breach of contract, and antitrust violations); Bessemer v. Gersten, 9 FLA. L.W. 106 (Feb. 29, 1980) (alleging unenforceability of lien due to violation of Florida's constitutional Homestead Provision); Harbor Club Condominium No. Three, Inc. v. Sauder, 380 So. 2d 449 (Fla. 2d Dist. Ct. App. 1979) (alleging failure to deliver quiet enjoyment of recreation facilities and unconscionability).

2. 601 F.2d 892, 79-2 USTC ¶ 9565 (5th Cir. 1979). In an appendix to its opinion, the Fifth Circuit adopted the Tax Court's memorandum opinion in Lakeside Garden Developers, Inc. v. Commissioner, 35 T.C.M. (CCH) 1294 (1976).

3. Brief for Appellant at 13, Murry v. Commissioner, 601 F.2d 892, 79-2 USTC ¶ 9565 (5th Cir. 1979).

4. 601 F.2d at 893, 79-2 USTC ¶ 9565 at 88,060 (emphasis in original).

5. The Commissioner remarked that "the use of . . . practices such as that [sic] in question here has [sic] been widespread among condominium developers in the state of Florida." Reply Brief for Appellant at 8 n.5, Murry v. Commissioner, 601 F.2d 892, 79-2 USTC ¶ 9565 (5th Cir. 1979).

6. Appendix for Appellant at 73-74, Murry v. Commissioner, 601 F.2d 892, 79-2 USTC ¶ 9565 (5th Cir. 1979).

7. 601 F.2d at 894, 79-2 USTC ¶ 9565 at 88,061. At its inception Lakeside was owned by

In 1965, Lakeside acquired title to a parcel of land upon which Murry and Breath planned to construct eleven apartment buildings and a common recreation facility. Early in the following year, as the first building neared completion, title to the facility was transfered to the corporation's shareholders at cost. Simultaneously, Lakeside, acting as the initial and sole member of the building's owners' association, entered into a ninety-nine year net lease, for the nonexclusive use of the facility, and thereafter entered into similar leases for each of the other owners' associations. As a condition to residency at the Lakeside Point Gardens development, each individual was required, inter alia, to pay a purchase price that was determined by the Commissioner to be below a fair market price for similar apartment units, become a member of the appropriate owners' association, and assume a proportionate share of the association's obligation to pay rent. As security for the rent payments, each individual's title was encumbered by the association's lien upon his apartment unit and all tangible personality within. Murry and Breath in turn held liens upon the property of the owners' associations, and in addition, appointed themselves association officers.[8]

In May, 1973, the Commissioner issued ninety-day letters assessing income tax deficiencies to Lakeside for the fiscal years 1966 through 1969, and to Murry and Breath for the tax years 1966 through 1968.[9] His determination was predicated upon the theory that the amount of the rental obligation assumed by purchasers in excess of a fair rental amount represented additional sales income to Lakeside, and a constructive dividend from Lakeside to its shareholders.[10] Accordingly, the Commissioner evoked "traditional assignment of income principles" and the "substance over form rule" as the basis for increasing the taxable income of the three taxpayers by the present value of the total excessive rent amount.[11]

The cases of Murry and Lakeside were consolidated and presented before the Tax Court in Miami, Florida, on December 16, 1975.[12] On the Commissioner's motion, the court severed the

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three individuals. Murry and Breath each held 45% of the outstanding shares while Harry Topal held 10%. After Topal's death, Murry and Breath each assumed one-half of Topal's interest. *Id.*

8. *Id.* at 894, 79-2 USTC ¶ 9565 at 88,061-62.
9. Appendix for Appellant at 12, 26.
10. 601 F.2d at 897, 79-2 USTC ¶ 9565 at 88,064.
11. Brief for Appellant at 15.
12. Appendix for Appellant at 59. Breath's case was settled before trial. 35 T.C.M. (CCH) 1294 n.1 (1976).

issue of proper valuation from the issue of whether the capitalized excess rents could be allocated to Lakeside in the first place.[13] Subsequently, the court, considering only the allocation issue, entered judgment for the taxpayers, noting that it found "no basis in the law for the corrective action sought . . . by the respondent."[14] On appeal to the Fifth Circuit, the Commissioner reiterated his lower court arguments in language that contained interesting antitrust elements. This note's analysis will begin with a discussion of these elements.

The Commissioner contended that Murry's scheme constituted a "tying arrangement."[15] A tying arrangement exists whenever "a seller, having a product which buyers want (the tying product), refuses to sell it alone and insists that any buyer who wants it must also purchase another product (the tied product)."[16] Under some circumstances, it is possible for valueless products or intangible goods to be the objects of a tying arrangement.[17] In order to provide a buyer an incentive to participate in an arrangement, however, the tying product must be offered for sale at a price below the price it would normally command in the marketplace. A tying product offered at its fair value cannot compete in the marketplace with similar unemcumbered goods.[18] While tying devices may come within the antitrust proscriptions of the Sherman and Clayton Acts,[19] they normally present few controversies involving the taxable income of the taxpayer.[20] It becomes far more likely that the tax consequences will be controversial, however, in cases in which a

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13. Brief for Appellant at 13.

14. 601 F.2d at 898, 79-2 USTC ¶ 9565 at 88,064.

15. Brief for Appellant at 12.

16. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 431 (1977).

17. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcast Sys. Inc., 441 U.S. 1 (1979) (copyrighted music in an alleged tying arrangement); United States v. Loew's, 371 U.S. 38 (1962) (worthless films as the tied product in a tying arrangement); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) (restaurant trademark in a tying arrangement). Antitrust issues were raised against a condominium developer in Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976). The *Buckley Towers* court stated that a tying arrangement existed in which the tying product was the condominium apartment unit and the tied product was the obligation to make rental payments for use of a common facility. *Id.* at 938.

18. *See generally* L. SULLIVAN, note 16 *supra*, at 445-54.

19. Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1976); Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1976).

20. In the traditional circumstance, the total amount of income generated by a tying arrangement will inure to a single taxpayer. For example, in International Salt Co. v. United States, 332 U.S. 392 (1947), leasing of salt processors supplied by the appellant corporation was tied to sale of salt from the same corporation. *Id.* at 398.

corporate developer offers the tying product at a price below its market value and, in addition, requires the "purchase" of the use of a recreation facility owned by a third party for a "price" that exceeds a fair market price. As the Commissioner alluded to, it is conceivable that participants in a *Murry* scheme could attempt to "treat the entire consideration [received in] the sale of apartment units as rental income for the use of the recreational facilities."[21]

To shield himself against such machinations, the Commissioner petitioned the Fifth Circuit to include the *Murry* leases within the definition of gross income found in section 61(a) of the Internal Revenue Code (the Code).[22] Section 61(a) defines gross income as "all income from whatever source derived."[23] Treasury Regulation section 1.61-1[24] includes within this definition amounts realized in the form of "services, meals, accommodations, stocks, or other property, as well as . . . cash." Section 1001(b) of the Code and related cases further require that deferred payment obligations received in sales transactions be included in gross income in the year of sale.[25] In *Warren Jones Co. v. Commissioner,*[26] a case presented in argument by the appellant, a building was sold for a cash down payment and an obligation to pay a fixed monthly sum over fifteen

21. Reply Brief for Appellant at 5-6. The total amount of income that the Commissioner alleged to have been diverted to the shareholders via the tying device was $584,527.84. Appendix for Appellant at 30. Judge Tuttle's dissenting opinion notes that Lakeside reported losses in two of the four fiscal years in question and that Murry and Breath recovered a 95.7% annual return on their investment in the recreation facility during the tax years in question. 601 F.2d at 900, 79-2 USTC ¶ 9565 at 88,066.

22. The Commissioner also claimed that the provisions of I.R.C. § 482 allowed him to allocate the value of the rent obligation to Lakeside. Section 482, as it appeared in the tax years in question, stated that:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses.

Internal Revenue Code of 1954, ch. 1, § 482, 68A Stat. 162 (current version at I.R.C. § 482). The opinion briefly dismissed this argument by stating that the obligation did not represent "income" and thus was not allocable to Lakeside under § 482. 601 F.2d at 899, 79-2 USTC ¶ 9565 at 88,065.

23. I.R.C. § 61(a).

24. (1980).

25. *See* Caruth v. United States, 566 F.2d 901, 78-1 USTC ¶ 9204 (5th Cir. 1978); *In re* Steen, 509 F.2d 1398, 75-1 USTC ¶ 9199 (9th Cir. 1975); Warren Jones Co. v. Commissioner, 524 F.2d 788, 75-2 USTC ¶ 9732 (9th Cir. 1975).

26. 524 F.2d 788, 75-2 USTC ¶ 9732 (9th Cir. 1975).

years. The *Warren* court held that, under section 1001(b), such an obligation is properly characterized as income from the sale of real estate, taxable in the year of sale, and valued at the market value, if ascertainable.[27] In *Murry,* the Commissioner's argument was based on these principles. He asserted that the excess portion of the rents received by the shareholders was, in effect, a deferred payment obligation incurred by buyers as partial consideration for the sale of condominium units, and that *Murry* was distinguishable from *Warren Jones* largely because the proceeds from the *Murry* obligations were diverted to third parties.[28] In the Commissioner's view, diversion to third parties was justification under *Gregory v. Helvering*[29] and its progeny[30] to restructure, for tax purposes, transactions whose forms conceal their true substance.

The Fifth Circuit majority opinion did not dispute the Commissioner's right "to pierce the apparent and discover the real transaction."[31] Nevertheless, the court declared that the Murry transactions were bona fide and that the Commissioner could not restructure them simply to arrive at a more favorable tax result.[32] Clearly, the court felt that the transactions fell on the permissible side of the boundary separating form from substance.

The general rule for most form-substance controversies is that a taxpayer must have a purpose other than mere tax avoidance before a transaction form will be recognized.[33] In a dissenting opinion in *Gilbert v. Commissioner,*[34] Judge Learned Hand summarized the form-substance issue by commenting that:

> [I]f . . . the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the [income tax] act to provide an escape from the liabilities that it sought to impose. . . . [If, however,] a taxpayer supposes that the transaction, in addition to its effect on his tax,

27. *Id.* at 793-94, 75-2 USTC ¶ 9732 at 88,216-17.

28. Brief for Appellant at 23-24.

29. 293 U.S. 465, 35-1 USTC ¶ 9043 (1935).

30. *See, e.g.,* Higgins v. Smith, 308 U.S. 473, 40-1 USTC ¶ 9160 (1940); Commissioner v. Court Holding Co., 324 U.S. 331, 45-1 USTC ¶ 9215 (1945); United States v. General Geophysical Co., 296 F.2d 86, 61-2 USTC ¶ 9698 (5th Cir. 1961), *cert. denied* 369 U.S. 849 (1962).

31. 601 F.2d at 893, 79-2 USTC ¶ 9565 at 88,060.

32. *Id.*

33. *See,* Blum, *Motive, Intent, and Purpose in Federal Income Taxation,* 34 U. Chi. L. Rev. 485, 518-24 (1966-67).

34. 248 F.2d 399, 57-2 USTC ¶ 9929 (2d Cir. 1957).

> will promote his beneficial interests in the venture, he will, of course, secure the desired [tax] reduction . . . .[35]

In *Waterman Steamship Corp. v. Commissioner*,[36] a Fifth Circuit panel allowed the restructure of a complex set of transactions it described as "another attempt by a taxpayer to ward off tax blows with paper armor."[37] Waterman was a corporation which agreed to sell all of the capital stock in a wholly owned subsidiary for a cash amount equal to its basis in the stock. Pursuant to the sale agreement, however, a taxfree intercorporate dividend in the form of a promissory note was declared by the subsidiary's board of directors moments prior to the completion of the sale. The amount of the promissory note was approximately equal to the taxable gain that Waterman would have realized had it accepted the purchaser's earlier cash offer of $3,500,000.[38] Upon completion of the sale, the purchaser made a loan to the subsidiary so that it would extinguish its obligation to its former parent.[39] After a series of transactions, a corporation controlled by the purchaser's shareholders bought the subsidiary's note to the purchaser, and thereafter cancelled it.[40] In holding for petitioners, the Tax Court recognized a valid purpose for the arrangement in that the purchaser was seeking to escape Interstate Commerce Commission regulation of the acquisition.[41] It further noted that in any sale of stock, the price the purchaser is willing to pay will be reduced by the amount of any dividend paid just prior to the closing of the sale.[42] Judge Tannenwald's dissent stated, however, that the above rationale did not apply under these circumstances because the subsidiary was no richer or poorer at the completion of the sale than it had been before the promissory note dividend was declared, and because the full amount of the funds used for purchase had come from the purchaser just as if it had paid by cash or by a deferred payment obligation.[43] The Fifth Circuit reversed, holding that, while regulatory purposes justified the purchase of the subsidiary's stock rather than its assets, they

35. *Id.* at 411, 57-2 USTC ¶ 9929 at 58,334 (citations omitted).
36. 430 F.2d 1185, 70-2 USTC ¶ 9514 (5th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971).
37. *Id.* at 1185, 70-2 USTC ¶ 9514 at 84,173.
38. *Id.* at 1187, 70-2 USTC ¶ 9514 at 84,174.
39. *Id.* at 1189-90, 70-2 USTC ¶ 9514 at 84,176.
40. 50 T.C. 650,657-58 (1968).
41. *Id.* at 660-61.
42. *Id.* at 666.
43. *Id.* at 667. The dissent notes that, in cases relied upon by the Tax Court majority, the dividends were paid in cash before the sales were closed. *Id.* at 666-67.

did not justify the hollow transactions entered into by the appellees.[44]

The circumstances in *Murry* are analogous to those in *Waterman.* Like the subsidiary in *Waterman,* Lakeside was a closely held corporation whose shareholders caused it to incur a liability payable to them that was subsequently satisfied by a third party.[45] The Commissioner contended that the *Waterman* obligation was, in substance, a portion of the price paid for the stock.[46] In *Murry,* the Commissioner similarly asserted that the excess portion of the obligation was actually a part of the price paid for the condominiums.[47] Thus, the only relevant feature distinguishing the *Murry* and *Waterman* opinions appears to be that the exclusive purpose for the *Waterman* transactions was tax avoidance,[48] while in *Murry* it was not.[49] This distinction may have been considered relevant by the court in upholding one transaction and allowing restructure of the other.[50] Unfortunately, the opinion does not explain precisely why the outcome sought by the Commissioner was inappropriate.

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44. 430 F.2d at 1195-96, 70-2 USTC ¶ 9514 at 84,181. The opinion notes that "Waterman's sole objective [for participating in this kind of transaction] was to receive $3,500,000 with approximately $2,800,000 . . . eliminated from income . . . ." *Id.* at 1191, 70-2 USTC ¶ 9514 at 84,177.

45. Although the obligation of the subsidiary in *Waterman* was not technically assumed by the purchaser of the property, the purchaser provided the funds with which to pay the obligation via a loan that he later cancelled. Waterman Steamship Co. v. Commissioner, 50 T.C. at 657-58. Although the form and intricacy of the transactions differ, the economic reality in *Murry* is essentially identical to the economic reality in *Waterman.* In each instance, the purchaser supplied funds to the seller or its controlling shareholders in conjunction with a sale of property. Moreover, the payments were essentially a portion of the purchase price.

46. 430 F.2d at 1186, 70-2 USTC ¶ 9514 at 84,173.

47. 601 F.2d at 897, 79-2 USTC ¶ 9565 at 88,063.

48. 430 F.2d at 1191, 70-2 USTC ¶ 9514 at 84,177.

49. Apparently, Murry and Breath neither received tax advice nor engaged in any consideration of taxes when contemplating the structure of their transactions. In cross-examination at trial, Murry stated that his sole purpose for selecting the particular form of his transactions was to receive a stream of rents. Appendix for Appellant at 70.

50. Normally, the presence of a tax avoidance purpose is not dispositive of the form-substance issue. In United States v. General Geophysical Co., 296 F.2d 86, 61-2 USTC ¶ 9698 (5th Cir. 1961), *cert. denied,* 369 U.S. 849 (1962), the court noted that the absence of a tax avoidance motive "lend[s] support to taxpayer's case, but [does] not control the disposition of the case." *Id.* at 90, 61-2 USTC ¶ 9698 at 81,812. The court further noted that "[i]ntent often is relevant in questions of taxation . . . but in most cases tax treatment depends on what was done, not why it was done." *Id.* Thus, the absence of a tax motive in *Murry* will not justify the outcome unless the court also found another purpose. Judge Quealy's opinion in *Murry* states that the transactions were bona fide, but does not identify the purpose that made them so.

Instead, the *Murry* opinion presents two arguments that are inapposite to the proposition asserted by the Commissioner. First, the opinion, relying upon *Willow Terrace Development Co. v. Commissioner,*[51] asserted that when "the developer does not dedicate [the recreation] facilities to the exclusive use of the property owners, but instead elects to make the facilities a commercial venture in and of itself, the cost of the facilities does not become part of the basis of each property sold."[52] In *Willow Terrace,* the cost of common water and sewage facilities was properly includable in the developer's basis in a subdivision, because the developer had not retained control of the facilities and had not intended to operate them as a profitable independent investment.[53] Because Murry retained full control over his facilities and intended to operate them at a profit, their cost should properly have been excluded from Lakeside's basis in the unsold condominiums. The *Willow Terrace* case has no relevance to the issue in *Murry,* however, because in *Murry* the Commissioner did not suggest that the basis of the facility itself should be allocated among the condominium units.[54]

Second, the opinion relied upon the "Maryland ground rent cases"[55] to support the proposition that "to attempt to tax the value of such a leasehold at the time that the lease is entered into, or when such [a lease] is assumed by a third party, would run directly counter to what has been . . . presumably the law, since the first revenue act."[56] In *Estate of Simmers v. Commissioner,*[57] the developer acquired unimproved land, divided it into lots, and built houses upon it. As each group of houses neared completion, the developer would cause a wholly owned corporation to enter into a ninety-nine year renewable lease of the land on which the houses stood. The ground lease was assumed by the purchaser when each house was sold.[58] The Commissioner characterized such perpetual leases as a sale of the underlying land, and accordingly sought to

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51. 345 F.2d 933, 65-2 USTC ¶ 9449 (5th Cir.), *cert. denied,* 382 U.S. 938 (1965). *See also* Country Club Estates, Inc. v. Commissioner, 22 T.C. 1283 (1954).

52. 601 F.2d at 899, 79-2 USTC ¶ 9565 at 88,064.

53. 345 F.2d at 939, 65-2 USTC ¶ 9449 at 96,023.

54. Brief for Appellant at 25-26.

55. Since colonial times, it has been a common practice among developers in Maryland to sell the improvements and lease the underlying land to the purchasers for lengthy periods. *See* Kaufman, *The Maryland Ground Rent—Mysterious But Beneficial,* 5 MD. L. REV. 1 (1940).

56. 601 F.2d at 899, 79-2 USTC ¶ 9565 at 88,065.

57. 23 T.C. 869 (1955), *aff'd,* 231 F.2d 909, 56-1 USTC ¶ 9403 (4th Cir. 1956).

58. 23 T.C. at 873.

increase the taxable income of the developer by the present value of the stream of payments to be received.[59] The Commissioner's characterization was rejected by the Tax Court. Instead the court held that the house purchasers were "lessees whose leases were subject to being avoided in the event of default in payment of the ground rent or other items [of expense]."[60]

Superficially the circumstances in *Murry* are similar to those in *Estate of Simmers.* In each case, the Commissioner attempted to include the present value of a stream of rents in the taxpayer's current income. In *Murry,* however, the Commissioner did not question the nature of the leases. Neither did he claim that the leases were actually a sale of the leased property. Nor did he attempt to allocate the present value of the *entire* stream of rentals to the developer as he did in *Estate of Simmers.* Rather, he argued that the rentals were far in excess of the amount that would have been agreed upon had Lakeside and the lessors engaged in arm's length negotiation, and that the *excessive* portion of the rents represented an improper diversion of sales income.[61] Although arm's length negotiation between the developer and the lessor corporation was similarly absent in *Estate of Simmers,* there was no intimation in that case that any portion of the rental amount represented a diversion of part of the sale price. In *Murry,* the Commissioner did not challenge the right of lessors to report rental income throughout the duration of the lease to the extent that such income represented a fair rental amount. Instead, he sought to prevent the diversion of sums of money from the developer to its shareholders in a stream of small periodic payments as a device to avoid taxes. The propositions presented by the Fifth Circuit did not address the excess rent issue in *Murry.*

Why did the court reject the excess rentals theory? Apparently, the court found a purpose that made the *Murry* transactions bona fide.[62] Although it is unfortunate that neither the Fifth Circuit opinion nor the Tax Court memorandum opinion by Judge Quealy explain what this purpose might have been, another excess rent

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59. *Id.* at 876.

60. *Id.* at 878. *See also* Welsh Homes, Inc. v. Commissioner, 279 F.2d 391, 60-2 USTC ¶ 9498 (4th Cir. 1960) (addressing the allocation of basis issue under circumstances in which a developer sold houses and retained ownership of the underlying land).

61. Brief for Appellant at 20-22.

62. The opinion describes the Commissioner's position as an attempt to restructure "actual transactions . . . into different transactions so that more immediately taxable income would result." 601 F.2d at 893, 79-2 USTC ¶ 9565 at 88,060.

opinion by Judge Quealy hints at its nature.

The Tax Court decided the excess rental issue once again in *Friedman v. Commissioner*,[63] a case in which the facts were substantially similar to those in *Murry*. Although the *Friedman* opinion did not differ from the *Murry* opinion with regard to the excess rental issue, it provided a better exposition of the purpose that supported the transactions. The opinion noted that in the mid-1960's the condominium concept was new in the Florida market and that the early developments had to divert a portion of each unit's sale price into a stream of rental payments to successfully compete with the existing rental housing market. By using such devices, the amount of financing purchasers had to acquire could be reduced so that their monthly payment would approximate monthly rentals paid for similar apartments.[64] The presence of this competitive necessity justifies accepting the form of the transaction for tax purposes.

Furthermore, there is a second possible reason supporting the pro-taxpayer outcome in *Murry*. It is conceivable that the court simply chose to apply judicial restraint in an effort to limit litigation over new issues that would have been raised by a contrary decision.[65] Had the Commissioner prevailed in *Murry*, for example, the opinion would have created uncertain tax consequences for purchasers of condominium units used for the production of income. It is unclear whether such a purchaser could continue to deduct the entire rent expense periodically or would be required to capitalize a portion of it as part of the purchase price and claim depreciation deductions. Similarly, issues would have been raised relating to purchasers ejected for nonpayment of rent. Would the basis to such a purchaser include the present value of the full stream of excess rent or would it be adjusted at his ejectment to reflect only those excess payments that he actually made? Indeed, it is unclear whether any purchaser would be allowed to include any of the excess payments in his basis in the first place. Such issues can be more appropriately raised and resolved through congressional enactment than by a Fifth Circuit opinion.

Nevertheless, although the outcome in *Murry* is a proper exercise of judicial conservatism, it creates an anomalous consequence.

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63. 36 T.C.M. (CCH) 841 (1976). *See also* Mangurian v. Commissioner, 38 T.C.M. (CCH) 366 (1978) (dealing with the excess rental issue and the proper valuation issue).

64. 36 T.C.M. (CCH) at 850.

65. The opinion noted that there was a "total dearth of authority supporting the Commissioner's position." 601 F.2d at 893, 79-2 USTC ¶ 9565 at 88,060.

The effect of the *Murry* opinion is to permit the diversion of corporate income to the shareholders free from dividend taxation via tying devices. Assuming that the leases had an ascertainable market value, it is unlikely that Congress intended to allow such tax avoidance when it enacted sections 61 and 1001. Furthermore, while the employment of such devices may have been necessary in the southeast Florida condominium market during the late-1960's, it is uncertain whether it is currently necessary in Florida, whether it is necessary in other regions, and whether courts will ever allow diversion of amounts greater than those necessary for competitive purposes. Consequently, it is hoped that the *Murry* decision will receive a narrow application in future excess rental litigation.

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