In the

Supreme Court of the United States

ROWAN COMPANIES, INC.,

PETITIONER,

V.

UNITED STATES

No. 80-780

Washington, D.C.
April 21, 1981

Pages 1 thru 31

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ROWAN COMPANIES, INC.,

Petitioner,

v.

UNITED STATES

No. 80-780

Washington, D. C.

Tuesday, April 21, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:22 o'clock p.m.

APPEARANCES:

K. MARTIN WORTHY, ESQ., Hamel, Park, McCabe & Saunders, 1776 F Street N.W., Suite 400, Washington, D.C. 20006; on behalf of the Petitioner.

STUART A. SMITH, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Rowan Companies v. the United States.

Mr. Worthy, you may continue when you're ready.

ORAL ARGUMENT OF K. MARTIN WORTHY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WORTHY: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether meals and lodging furnished without charge to employees solely for the convenience of the employer are wages subject to social security, that is, FICA and FUTA taxes. The court below said yes. We think that in light of this Court's decision in Central Illinois Public Service Company in 1978, emphasizing that wages is a narrowly defined term, much narrower than income, the legislative history of social security and income tax withholding indicating that Congress intended that the same wage base, the same exact tax base of wages with the same definition, be used for all employment tax purposes, and the 60-year history of rulings, regulations, and cases that meals and lodging for the convenience of the employer are not income, the answer is clearly that they are not subject to tax.

The essential facts are undisputed. The petitioner operates oil and gas drilling rigs up to 60 miles offshore, with crews of up to a dozen people. Because it's too costly

for the crews to leave at the end of each shift --

QUESTION: Too costly for?

MR. WORTHY: The crews to leave the --

QUESTION: Yes, but too costly for whom? The crew members or the employer?

MR. WORTHY: The employer. The record shows that the expense of transporting the men back and forth from the shore to the rig is borne by the employer and borne during the employer's time.

QUESTION: On their time or company time?

MR. WORTHY: On company time. They are paid while they are being transported. That's in the record, Your Honor.

QUESTION: And was there a figure on that? That cost?

MR. WORTHY: Yes, sir. The figure is --

QUESTION: How does it relate --

MR. WORTHY: $275 to $350 per crew per trip, which breaks down to about $25 to $29 per man, with a 12-man crew as compared to about $6 a day for furnishing food and lodging aboard the rig.

QUESTION: A little bit more than the food.

MR. WORTHY: I beg your pardon, sir?

QUESTION: A little bit more than the food.

MR. WORTHY: Yes, sir, about five times as much as the food and lodging.

QUESTION: Unless they're awful hungry.

MR. WORTHY: Unless they are awfully hungry, but I believe it's been stipulated that the value of the food and lodging is $6 per man per day, as compared to the $29 cost per man per day to transport them back and forth to shore. And as a result, therefore, they were kept aboard for 12-hour shifts for ten days and then every five days a crew went ashore and for five days off when a new crew came aboard. And so lodging was furnished aboard with three meals a day, cafeteria style, at petitioner's expense, to each crew member during the time he remained aboard.

Now, when he was aboard, off duty, a member of a crew was not expected to perform any services. There was no agreement to furnish the food or lodging, and there was no cash allowance if meals or lodging were refused, and the petitioner had no obligation to transport the crew members back ashore at the end of each shift, the only obligation being at the end of the 10-day shift.

QUESTION: I realize this hypothetical example is vastly different factually. But is it much different in principle from a household which employs a housekeeper to come in one day a week and, for their convenience or for her convenience furnishes her lunch?

MR. WORTHY: I don't think it's any difference in principle, Mr. Justice Rehnquist, however, I should say in candor --

QUESTION: In that case, perhaps the Members of the Court are -- perhaps you don't have a court here, because I'd venture to guess that most if not all of the Members of the Court have such household employees, at least part-time.

MR. WORTHY: I should say, in all candor, Mr. Justice Stewart and Mr. Justice Rehnquist, that by statute the meals and lodging furnished to household employees are exempt. I don't think the principle is any different, but the exemption is provided by statute in the case of domestic employees.

QUESTION: By statute.

MR. WORTHY: I think I should be perfectly fair about that. Now, no meals or lodging were provided to the crew members during their off duty days and they had to obtain meals and lodging, and maintain regular lodging ashore for their use during the five days they were off duty at their own expense. And the Court should know that in addition to the offshore rigs, the petitioner also operated land-based rigs. Land-based crews were paid substantially the same cash wages as the offshore crews but the land-based crews went home every night and they were not furnished any meals or lodging at the petitioner's expense.

Now, the Government admits that the meals and lodging were provided as a result of a unilateral decision by petitioner based on its own economic reasons and that since they were furnished for the convenience of the taxpayer as an employer, they

are not wages subject to income tax withholding.

QUESTION: They are not subject to --

MR. WORTHY: They are not subject to; they are not wages subject to income tax.

QUESTION: The employees don't have to include these for income tax purposes?

MR. WORTHY: That's correct, sir, but not only that, but more significantly they are not within the definition of wages for income tax withholding purposes, the income tax withholding being one of the four employment taxes imposed.

QUESTION: But the reason -- is that the reason for that, since they're not subject to tax? Why wouldn't you withhold?

MR. WORTHY: No, sir. It's been established since at least 1919 in all the rulings and regulations and cases which were reviewed very thoroughly by this Court in the Kowalski case just four years ago, that meals and lodging for the convenience of the employer have consistently been held not to be income, even though the statute defined income to include wages. And that's been the rule established --

QUESTION: My question was --

MR. WORTHY: -- for the last 62 years.

QUESTION: No, but isn't it logical, if they're not to be included as income for tax purposes, you wouldn't include them for withholding purposes, would you?

MR. WORTHY: Certainly that's logical, Mr. Justice Brennan. However, I should point out that in the Central Illinois case, just two years ago, this Court held that meal reimbursements were subject to income tax. However, they were not subject to withholding tax, simply because they were not wages, and income tax withholding is imposed on wages, which as this Court pointed out in that case is a much narrower term than income.

Now, aside from income tax withholding, the other three employment taxes are an employee income tax under the Social Security Act or FICA, which is also subject to withholding; an excise tax on employers under the Social Security Act or FICA, in the identical amount; and Federal Unemployment Insurance Tax on employers or FUTA. Now, all four of these taxes, the income tax withholding and the three social security taxes, are imposed on wages. And as acknowledged by the court below and by the Government, wages are defined for all four employment tax purposes in essentially identical terms, as all remuneration for services or employment. And as I've suggested, for over 60 -- yes, sir?

QUESTION: You say there are four, and that's repeated in the briefs, and I'm sure there are, but I count only three, the income taxes and FICA and FUTA.

MR. WORTHY: Well, FICA consists of two taxes.

QUESTION: I see.

MR. WORTHY: There's one tax which is by statute an income tax, which is highly significant; it's a tax on income limited to the wages of employees, which is withheld by the employer; and a tax in an additional amount -- the first tax is borne by the employee through the withholding system. The second FICA tax is on the employer, borne by the employer and paid by the employer. It has the identical tax base in the identical amount. And the third social security tax is FUTA, which is borne entirely by the employer.

QUESTION: Since there are two FICAs --

MR. WORTHY: There are two FICAs. It is a bit confusing, Your Honor, but --

QUESTION: Isn't it fairly common for, say, again, an employer of a domestic to agree to pay the domestic's share of the narrower wage?

MR. WORTHY: Yes, sir, it is common, and the Service has ruled that the employer can do so without that additional tax being counted as wages as a part of the tax base.

Now, as I previously indicated, for 62 years meals and lodging furnished employees for the convenience of the employer have been recognized as not being remuneration for services, and therefore not income for income tax purposes, even though the revenue acts from 1918 on repeatedly defined income as including wages of whatever kind and in whatever form paid.

Thus, although the Government in its briefs only talks about codification of the convenience of the employer rule in 1954, in Section 119, it was well understood that wages did not include meals and lodging for the convenience of the employer when the social security taxes were enacted in 1935. And the reason, as pointed out by this Court in reviewing the cases and rulings in Kowalski four years ago, is that such items simply are not compensation for services and hence not income.

Income tax withholding came in in 1942, requiring employers to withhold income tax on wages paid their employees. The Service almost immediately issued Regulation 115 which, if I may quote, "provides that if living quarters or meals are furnished to an employee for the convenience of the employer, the value thereof need not be included as wages subject to withholding." Now, this contemporaneous interpretation of the income tax withholding statute is highly significant because this was long before codification of the convenience rule in Section 119 and it's significant because of the legislative history of the income tax withholding, in which Congress expressed a clear and specific intent to adopt as a definitional base for income tax withholding exactly the identical base previously adopted for social security taxes.

Then still later, in 1978, when Section 119 was amended by Congress to make the exclusion apply to meals furnished for the convenience of the employer, although the

employer imposes a partial charge, Senator Long, Chairman of the Finance Committee and manager of the bill on the floor of the Senate, stated on the Senate floor that it was expected that "an item excluded from gross income under the convenience of employer test will also be excluded from the definition of wages for all payroll tax purposes, specifically including income tax withholding, social security or FICA, and FUTA tax."

In Central Illinois, this Court found that even though lunch payments received by employees were subject to income tax in their hands, they simply were not wages subject to income tax withholding. The Government had contended there, as it contends here, that since the payments at issue were part of the employment relationship and a part of the total of the personal benefits that arose out of that relationship, they necessarily constituted wages. This Court, however, rejected what it described as "such an expansive and sweeping definition of wages," finding such contention to be inconsistent with the congressional purpose of setting forth a standard that is wages, which the Court described as being intentionally narrow and precise.

The Court emphasized that the base is limited to wages and that such term is limited by statute in the case of income tax withholding to mean "all remuneration for services performed by an employee for his employer," essentially, the identical words of the FICA and FUTA tax statutes. The Court

also emphasized that the term "wages" makes the tax base much narrower than subjectability to income taxation.

Now, it's true the Government has cited some authority for contrary conclusion. Although the 9th Circuit in Pacific American Fisheries in 1943, long before Central Illinois was decided by this case, suggested -- and it's only a suggestion -- that the convenience of the employer test might be inapplicable for social security tax purposes, and such suggestion was later cited by approval by a district court in the Kresge cases and by another district court in the Goldsboro case. Such statements are all dicta in those cases because in every single one of those cases, Pacific American Fisheries, Kresge, and Goldsboro, it was found that the meals or lodging involved were not furnished as a convenience to the employer, as has been conceded here.

Now, the Government has not been wholly consistent in its position on this question. Immediately after the social security tax was enacted in 1935, the Service in 1936 issued Regulation 90, specifically adopting the convenience of the employer test for FUTA tax purposes. And in 1937 the Service repeated that position in Social Security Tax Ruling 110 and interestingly enough, citing there as authority for its position that meals and lodging for the convenience of the employer were not subject to social security tax, its previous income tax ruling in 1920 to the same effect.

Now the Government makes essentially four arguments. It points out that it revised its regulations in 1940 to exclude mention of the convenience of employer test. And it claims that such regulations were issued pursuant to specific grant of statutory authority to the Social Security Board and the Treasury, and notes that such regulations, it says, have been in effect for 40 years and that the underlying purpose of social security justifies a different result for income tax and social security tax purposes.

But we submit that the Government is simply wrong. There is no specific statutory authority. The only authority to issue a regulation cited by the Government is in Internal Revenue Code Section 7805(a) authorizing the issuance of interpretive and procedural regulations for the entire Internal Revenue Code. And as Professor Davis has pointed out in his treatise on administrative law at Section 503, nearly all Treasury regulations are interpretative and not legislative regulations. I beg your pardon? Justice Blackmun?

QUESTION: No; no.

MR. WORTHY: This Court in 1945, in overturning an administrative determination as to whether certain payments were wages for social security purposes, under the very identical language and under the very identical act as is involved here, said, "Congress might have delegated to the Social Security Board to determine what compensation paid should be

treated as wages. Congress did neither."

Congress used a well-understood word, the Court said, wages, to indicate the receipts which were to govern taxes and benefits under the Social Security Act. Now, in the Royster case, the Government told the 4th Circuit on brief in 1972 that "We agree with the district court's conclusion that the term 'wages' has the same meaning for all of the employment taxes involved."

The Government told the Court of Claims the same thing in the Conquistador case in 1978, when they expected this Court to affirm rather than reverse Central Illinois. And the 4th Circuit in the Royster case and the 7th Circuit in the recent Oscar Mayer case have all agreed that the term wages has the same essential meaning in the income tax withholding FICA and FUTA tax situations. We submit, therefore, that the lower court was wrong and should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SMITH: Mr. Chief Justice, and may it please the Court:

Like many other tax cases that have come before the Court in recent terms, this case is governed by longstanding Treasury regulations that explicitly support the Internal Revenue Service's position. The regulations in question are set

forth in our brief at the Appendix, page 7a. They say, in defining wages for both FICA and FUTA purposes -- the regulations on this score are identical -- "Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts...), furnished or offered by an employer to his employees generally are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees."

But then, in language that we consider crucial, the regulation goes on to say, "The term 'facilities or privileges', however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees."

We consider that the language of this regulation, which has been extant since 1940, some 41 years, control this case.

QUESTION: That's a FUTA regulation?

MR. SMITH: That is a FICA and a FUTA regulation.

QUESTION: Applicable to both.

MR. SMITH: Applicable to both, Mr. Justice Stewart.

QUESTION: And to both taxes under FICA?

MR. SMITH: To both taxes under FICA; exactly. These regulations are, of course, consistent with the statutory definition of wages as all remuneration for employment, including the cash value of all remuneration paid in any other medium than cash.

QUESTION: Now, were these regulations adopted in 1954?

MR. SMITH: These regulations -- to trace the history in some detail, the regulations first came out in 1936, right after social security was enacted. From 1936 to 1940, the FUTA regulations for some peculiar reason incorporated the convenience of the employer doctrine that petitioner relies upon in this case. In 1940, the FICA regulations, and indeed the analog of the social security regulations, never included the convenience of the employer doctrine.

QUESTION: So the contemporaneous construction of one of the sets of regulations, at any rate, is not in accordance with the Government's present position?

MR. SMITH: Well, the contemporaneous construction, that was short-lived in the sense that it was only for four years. And the initial regulation was at variance on FUTA. The point that we stress is that in 1940 that was corrected and since 1940, for the last 41 years, the regulations have consistently required that meals and lodging be included in the tax base. Those regulations, we submit, are consistent with

the committee reports which accompanied the enactment of the social security legislation, indicating that wages were to include compensation paid in any form, such as room and board. And viewed against the background of the way -- when social security was enacted in the mid-1930s, Mr. Justice Rehnquist, I would suggest that many people worked for little more than room and board, and Congress was terribly concerned that those people be covered and that they get benefits consistent with those wages.

QUESTION: Well, I was covered as a Saturday Evening Post carrier.

MR. SMITH: Without meals or lodging.

QUESTION: That's how I got my social security card.

MR. SMITH: In any event --

QUESTION: Your colleague doesn't agree with you, does he, as to when the administrative construction became consistent with your present position?

MR. SMITH: He doesn't, and I find that quite peculiar, because --

QUESTION: He thinks it was not till 1960 or '62, or something?

MR. SMITH: Well, if I may explain his argument -- but I would like to do so by first --

QUESTION: I've read it, but all I really want to -- he disagrees with you.

MR. SMITH: He disagrees with me, but we would submit that he is wrong. The regulations --

QUESTION: And he submits you're wrong.

MR. SMITH: Exactly. That's why we're here.

QUESTION: Well, I don't know. You'd still be here if you didn't pick it up until '62, wouldn't you?

MR. SMITH: That's true. His only point --

QUESTION: You'd best have changed your mind before.

MR. SMITH: Exactly. May I simply suggest, on that four-year period from 1936 to 1940, I would suggest that the Court has dealt with a similar problem a few terms ago in the National Muffler Dealers Association case. Indeed, where the regulations were amended after about eight or nine years from the -- I think from 1919 to 1927, the regulations were at variance with the way they were finally recast. But our point simply is that the regulations now that have been extant for 41 years have been extant during a period in which Congress recodified the tax law in 1954 and there were a number of appellate decisions that upheld the inclusion of meals and lodgings. And to point simply that the result would be otherwise with respect to income tax purposes, for income tax purposes, or income tax withholding purposes, is really beside the point. I mean, nobody's quarreling here that these meals and lodging were excludable under 119 and I think, as Mr. Justice Brennan pointed out, the reason they're excluded from income

tax withholding is simply they're not subject to income tax, so why should they be subject to income tax withholding? The court of appeals here, below, said the same thing. A rationale is not difficult to surmise, because income tax withholding is to set aside amounts to pay the recipient's income taxes. There isn't any income tax due on this by operation of statute, Section 119, which the Court dealt with a few terms ago in the Kowalski case. Now --

QUESTION: How many courts of appeals have supported your position other than the 5th Circuit?

MR. SMITH: Three.

QUESTION: And how many opposed it?

MR. SMITH: Let's see, the 9th Circuit and the 6th Circuit and the 4th Circuit support our position in addition to the 5th Circuit. The Court of Claims has rejected our position, and the 7th Circuit in the Oscar Mayer case has rejected our position. And this leads me to what I think is really the nub of the problem here. The nub of the problem here is that the Court of Claims in Hotel Conquistador and the 7th Circuit in Oscar Mayer believe that the climate somehow changed in this area after this Court decided the Central Illinois Public Service Company case. And we submit that the court of appeals below here correctly found that that question in that case does not bear on this case.

As the Court will recall, the issue before the court

there was reimbursements for noon meals. And we argued that those reimbursements were subject to income tax withholding. The Court's opinion in that case stressed heavily the fact that the employer in that case in 1963 could not reasonably have been held to be aware of the fact that it was required to withhold on such meal reimbursements. And because of that so-called unfair notice or lack of notice, the Court was unwilling to impose secondary tax liability on the employer in that case.

If I may just read a few excerpts from the Court's opinion, where the Court says at page 32, "In 1963 not one regulation or ruling required withholding on any travel expense reimbursement. The intimation was quite the other way. No employer in viewing the regulations in 1963 could reasonably suspect that a withholding obligation existed. The first published pronouncement by the Internal Revenue Service with respect to withholding came only in 1969," many years after -- well, six years after the tax year in that case.

Those considerations don't bear here. There can be no question that since 1940 employers were on notice, employers like Rowan Company, that they were required to include meals and lodging in FICA and FUTA, whatever the income tax or the income tax withholding situation might have been. Indeed, the Service in the 1940s was publishing rulings which we cite in our brief that the result would be different under income tax withholding.

QUESTION: Mr. Smith, let me ask you about a sentence on page 28 of the Central Illinois Public Service Company case, the beginning, after IV, where the Court says, "The Government straightforwardly and simplistically argues that the definition of 'wages' in Section 3401(a) corresponds to the first category of gross income set forth in Section 61(a)(1), and that the two statutes, although not entirely congruent in their relationship, have equivalent scope." Do you still take that position?

MR. SMITH: No. No. We don't take that position because we all benefit from the Court's statement in that respect. Here Congress --

QUESTION: Well, you're just backing off one step at a time.

MR. SMITH: No, no. I think our position is strongly buttressed by these regulations which have survived reenactment and, as the Court has said on a number of instances, that Treasury regulations in that kind of context, which survive reenactments of the statute, which are extant during approbative appellate decisions which can reasonably be believed to have come to the attention of Congress, that those kinds of regulations have the effect of law. The Court has said that in the Cammarano case and in the Correll case. And we think that the differences, the qualitative differences between the kind of case that we brought to the Court in Central Illinois and

this case are very marked. In Central Illinois, I argued to this Court that the Correll rule had to be imported into the withholding tax regulations, and the Court rejected that, because the Correll rule came many years after the regulations, and in fact the regulations that the Court cited in the Central Illinois case could reasonably have been read to support the taxpayer's position in that case.

Here there can be no question that the regulations fit this case like a glove. These are meals and lodging afforded to seamen and people who work on vessels, they constitute an appreciable part of their remuneration --

QUESTION: Mr. Smith, following up on Justice Rehnquist's question, there you said that the two concepts were the same and we said, no, the concept of income is the larger concept and wages are smaller. Here you're saying wages is a larger concept than income.

MR. SMITH: No, I'm saying that wages for purposes of FICA and FUTA, under the social security statute --

QUESTION: It's a larger concept than income for income tax purposes.

MR. SMITH: -- is a different kind of concept.

QUESTION: But then larger.

MR. SMITH: Because Congress wanted it to be larger, and we think that, unlike our case in Central Illinois, Congress explicitly indicated that it wanted it to be larger.

The Treasury has specifically indicated that it wanted it to be larger by regulations that explicitly govern the case, and it wasn't --

QUESTION: If Congress had said explicitly, wages shall include matters that are not income?

MR. SMITH: Well, yes, in a sense. For example, the regulations under withholding point to the fact that, you know, they have a cross-reference to Section 119. It says meals and lodging that is excludable for income tax purposes are excludable for wages for purposes of the income tax withholding. See Section 1.119-1. And the point simply is, there's no point in withholding income taxes from amounts that are not subject to income tax. This is -- the social security system, we submit, is a completely different system. It's a completely different statutory system designed to afford benefits. The Court has said that on a number of occasions in social security tax cases.

QUESTION: And yet there's no vested right in the benefit.

MR. SMITH: No, there's no vested right in the benefit but we think that given the Court's careful construction of its opinion in Central Illinois indicating that the Government's view was not to prevail because of the lack of notice to the affected industry, simply doesn't apply here where the notice could not have been more explicitly stated. There can be no

question here that these meals and lodging constitute 17 percent of these employees' cash wages. That is an appreciable part of their wages. It's on a daily basis. Nobody can quarrel with the fact that the regulation fits this case. And while the taxpayer here attempts to argue to the contrary, the argument really is an assault on these regulations, and for the taxpayer to prevail, I would suggest the regulations would have to be declared invalid. I see no basis for declaring them invalid, given the fact that they have been outstanding for such a long time and have been -- where the affected industries that supply meals and lodging to their employees have long been on notice of the rule in this case.

QUESTION: If they're outside of the scope of the congressional authorization to the Commissioner, they would be.

MR. SMITH: Indeed, that's so. But given the committee reports' plainly stated intention to include room and board in taxable wages in 1935, I don't see how they could be outside the congressional -- Congress indicated that it wanted to include this kind of compensation in taxable wages for social security, notwithstanding the fact that at that time the convenience of the employer test for income tax purposes had been around for quite some time. It just doesn't apply here, and the Service has indicated that it doesn't apply, it has indicated for the last 45 years that it doesn't apply here. That's why Central Illinois, we suggest, has no bearing on this case,

and indeed, one of the other aspects of Central Illinois was the fact that the Court intimated that it was -- that they thought that perhaps the cash payments in Kowalski -- that the cash payments, or the income tax aspects of the cash payments, weren't really clear until this Court's opinion in Kowalski. Assuming that that was the case, that consideration has no application here where everyone has long been aware of the fact that meals and lodging furnished to seamen aboard vessels -- nothing could be more applicable, I submit. And given the Court's many quoted statements about the deference to be given Treasury regulations, here the Treasury has issued a regulation that carefully and explicitly is addressed to this very case.

QUESTION: You seem to be overlooking one marked difference between the seamen and these fellows. The seamen can't be transported to shore for breakfast, lunch and dinner, or even for lunch.

MR. SMITH: I would suggest that the fact that they could be but weren't really is not a qualitative difference in terms of seamen.

QUESTION: When they're out at sea they can't be sent somewhere like MacDonald's or other food shops.

MR. SMITH: That is true but, Mr. Chief Justice, here the affected employees were 60 miles out in the Gulf of Mexico and as a practicable matter, if they were going to do their work in an efficient way, I would suggest that they really

couldn't have --

QUESTION: Well, apparently the Government would rather trade a $29 deduction for each one of these people from a high bracket taxpayer to a $6 addition to income for a low one.

MR. SMITH: Well, I think --

QUESTION: I suppose you aren't concerned with the economics of the situation.

MR. SMITH: No, we have to be concerned with the case as it comes to the Court, and here I would suggest that the rule has been settled in this area. And indeed, until the Court of Claims broke stride in Hotel Conquistador and the 7th Circuit in Oscar Mayer, it had been settled among the lower courts that the rule was in our favor.

QUESTION: I take it you by implication agree that if you prevail, if you win, IRS is going to lose some revenue, net?

MR. SMITH: That may well be the case.

QUESTION: How can it possibly be otherwise?

MR. SMITH: But isn't that really a question of tax policy for the Treasury rather than for the Department of Justice?

QUESTION: That's right. Not relevant; just a little curious.

MR. SMITH: That is true.

QUESTION: Usually IRS is out for the largest amount

of the take.

QUESTION: But isn't your take, is the take into the general revenue?

MR. SMITH: I assume that social security funds go into special --

QUESTION: Yes. And those funds would be increased if you win.

MR. SMITH: Those funds would be increased if we win.

QUESTION: They go into a special fund which in turn buys government bonds.

MR. SMITH: But they also go in to fund these pensions. I mean that's the point --

QUESTION: That's how the pensions are funded, with government bonds.

MR. SMITH: Yes.

QUESTION: I mean, it's not as if it were set aside in a vault somewhere.

MR. SMITH: No, I would hope not. I mean -- I hope it earns income.

QUESTION: Well, I would almost hope it were.

QUESTION: Mr. Smith, we asked Mr. Worthy about the meals furnished to household employees and his response was that they're covered by a specific statute.

MR. SMITH: Yes. Covered by Section 3121(a)(7)(a), which excludes meals and lodging, these non-cash benefits from

wages for domestic workers, for both FICA and FUTA --

QUESTION: For both, for tax purposes.

MR. SMITH: Right, and perforce for income tax purposes under Section 119.

QUESTION: Right.

MR. SMITH: In any event, to summarize simply, we don't really think that Central Illinois has altered what we think was the settled rule before it with respect to social security and FUTA and we don't think it has any bearing on this case. What is germane are these long-standing Treasury regulations which we believe, having survived reenactment, having survived approbative appellate decisions, and having been issued against the background of a long-standing and consistent body of revenue rulings that have put the affected industry on notice, unlike the public utility in Central Illinois, that the rule is that they are to be included in the taxable wage base. For that reason, we believe the court of appeals was correct and should be affirmed.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Worthy?

MR. WORTHY: Yes, sir.

ORAL ARGUMENT OF K. MARTIN WORTHY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WORTHY: Mr. Chief Justice, may it please the Court:

The Government repeatedly refers to this longstanding Treasury regulation issued in 1940. I would remind the Court that as late as 1957 in Revenue Ruling 57-471, in interpreting this very regulation, the Internal Revenue Service said that Social Security Tax Ruling 302 which had invoked the convenience of the employer test and said that meals and lodging for the convenience were excludable, were still in full force and effect. Thus, the Service itself, despite the notice supposedly given under the regulation, was still interpreting its own regulation 17 years later as applying the convenience of employer rule.

QUESTION: Was this in an individual case of an individual taxpayer?

MR. WORTHY: No, sir. This case -- let me explain. In 57-171, the Service issued a sort of a bifurcated opinion. It ruled in that case that meals and lodging for the convenience of restaurant employees were subject to social security tax but for reasons that fully escape me meals and lodging furnished for the convenience of other employees, including bank and trust company employees, were not subject to social security tax. And it was not until 19- --

QUESTION: Was that a GCM or a rev rule?

MR. WORTHY: That is a Revenue Ruling.

QUESTION: Revenue Ruling.

MR. WORTHY: GCMs are no longer issued. They're now called Revenue Rulings, in whatever form, by whomever issued.

QUESTION: It must have been -- the rev rule was prompted by some cases, wasn't it?

MR. WORTHY: I assume so. Most Revenue Rulings are prompted by --

QUESTION: Specific cases, that's what I asked you a while ago?

MR. WORTHY: -- specific facts. However, the ruling does recite that SST-302 is still in full force and effect.

QUESTION: Right. I thought that GCMs were still going in 1957. I understand.

MR. WORTHY: Well, with all due respect, since I filed many GCMs myself, I can tell you that they were discontinued, I believe, Your Honor, in 1954.

QUESTION: But there's a lot of difference --

MR. WORTHY: As far as being published. They are still issued, but not published.

QUESTION: But they're revenue rulings.

QUESTION: There's a lot of difference between restaurant workers and workers out on a rig. The restaurant worker, if you don't give him a meal, he knows where to get one.

MR. WORTHY: That's probably true, Mr. Justice Marshall.

QUESTION: That's the difference.

MR. WORTHY: Certainly, it would have been very difficult for these people to get meals and lodging. I would also like to suggest that I believe the Government is in error when

it says that the 4th Circuit has held in its favor. I believe the 4th Circuit in the Royster case made quite clear that it considers the rules to be identical, just as the Government had urged in that case, for FICA, FUTA, and income tax purposes.

I believe that's all I have. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:05 o'clock p.m. the case in the above-entitled matter was submitted.)

CERTIFICATE

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No. 80-780

ROWAN COMPANIES, INC.

V.

UNITED STATES

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BY: Wil S. Wilson