IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5378
Summary Calendar

JOHN S. and ABAGAIL TRAIL,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from the Decision of the United States Tax Court
(29537 91)

(April 25, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

PER CURIAM:

From a decision of the Tax Court denying a dependency deduction for their daughter on their 1988 tax return, the taxpayers appeal. We find no error and affirm.

Elizabeth Ann Trail, the daughter of taxpayer appellants John S. and Abigail Trail, is mentally retarded. Her parents were members of a plaintiff class seeking relief on behalf of their children from the inadequate care, treatment, and education at Texas state schools for the mentally retarded. In settlement of

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

this litigation, the Texas Department of Mental Health and Mental Retardation offered to pay third-party providers if they followed Texas law and guidelines in providing the services formerly provided by the state schools. Pursuant to the terms of this settlement, the Trails signed an agreement with the Mental Health and Mental Retardation Authority of Harris County (MHMR) in which they agreed to function as independent contractors providing "appropriate, quality community alternative services" for Elizabeth.

The Trails received payments from MHMR in the amount of $16,470 during 1988 which they reported on Schedule C of their 1988 federal income tax return. The taxpayers reported offsetting amounts for cost of goods sold and deductions, thereby reporting no taxable income for the payments received from MHMR. The propriety of these amounts is uncontested; instead what lies at the heart of this dispute is the propriety of the Trails claiming a dependency exemption for Elizabeth for the 1988 tax year.

Following an audit, the Commissioner of Internal Revenue determined that the taxpayers could not claim a dependency exemption for Elizabeth because the payments furnished by MHMR exceeded the taxpayers' contribution to her support.[1] The Commissioner subsequently issued a deficiency notice to the Trails in the amount of $292 which they then challenged in the Tax Court. The parties agree that if the payments from MHMR are taken into

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[1] The Internal Revenue Code provides that a dependent son or daughter must receive over half of their support for the tax year from the taxpayer parent. See I.R.C. §152(a)(1) (1988).

account the Trails did not furnish more than half of their daughter's support and therefore could not claim her as a dependent. The Trails maintained below -- and they renew their argument in this court -- that the payments under the agreement with MHMR were a scholarship and should therefore not be taken into account in determining whether their daughter received more than half of her support from her parents.[2]

The Tax Court found that the amounts received from MHMR were not to enable Elizabeth to study but rather for her support. Further, the court concluded that these amounts were not paid to an educational organization as defined by the Internal Revenue Code but to Elizabeth's family. In sum, the Tax Court determined that the payments from MHMR were not a scholarship and consequently that the parents were not entitled to the dependency exemption.

The Trails assert two arguments on appeal. First, the taxpayers rely on a series of revenue rulings for the broad proposition that amounts expended by a state for the training and education of a handicapped individual *in state schools* should not be taken into account in determining support. Second, and relatedly, the taxpayers argue that the services provided in their home are determined by the state and are the equivalent of what

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[2] Under the Code's special support test for students, a son or daughter who is also a student within the meaning of section 151(c)(4) will not have scholarships count toward whether the child received more than half of her support from her taxpayer parents. See I.R.C. §152(d) (1988). The test further requires that the scholarship be for study at an educational organization as described in section 170(b)(1)(A)(ii). See id. This provision in turn defines an educational organization as "normally maintain[ing] a regular faculty and curriculum and normally ha[ving] a regularly enrolled body of pupils or students in attendance." See I.R.C. §170(b)(1)(A)(ii) (1988).

would be provided in a state school for the mentally retarded. Because the taxpayers' home is the functional equivalent of the state school, the Trails should receive the equivalent tax treatment and be able to exclude those amounts from the calculation of support payments.

The taxpayers' arguments suffer from a critical flaw. The revenue rulings upon which they rely unambiguously require the state schools for the mentally retarded to qualify as educational organizations under I.R.C. §170(b)(1)(A)(ii) (1988). See Rev. Rul. 64-221, 1964-2 C.B. 46; Rev. Rul. 61-186, 1961-2 C.B. 30; Rev. Rul. 60-190, 1960-1 C.B. 51; Rev. Rul. 59-379, 1959-2 C.B. 51. More pertinently, the Code's special support test for students requires that the scholarship be for study at an educational organization under I.R.C. § 170(b)(1)(A)(ii). See n.2 supra. The Trails stipulated, however, that their home did not meet the requirements of an educational organization for the 1988 tax year. This is unsurprising, as the Trails' home does not maintain the regular faculty, curriculum, and student body required by the Code. In short, the appellants would have us read the educational organization requirement out of the support test for students. We must decline this invitation to rewrite the statute.[3]

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[3] The appellants argue for the first time on appeal that the payments received from MHMR -- if not scholarships -- must be income to them and therefore they and not the state provided *all* of the support for their daughter. We are unconvinced. MHMR's use of independent contractors such as the Trails does not somehow recharacterize the support payments as being provided by the contractors. The payments at issue amount to support from MHMR, not the Trails. A contrary result would require an absurd reading of I.R.C. § 152(a)(1).

We appreciate the unfortunate irony in all of this: the taxpayers have incurred unfavorable federal tax consequences stemming from their attempt to better the lot of Elizabeth and mentally retarded children like her in Texas through litigation in the federal courts. The task of changing this result is properly left, however, to the legislative branch.

For the foregoing reasons, the judgement of the Tax Court is **AFFIRMED**.