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almost certainly run afoul of Title VII because it would involve admitting or refusing to admit an individual because of race or color. If, on the other hand, there is a limited number of qualified Negro workers available as prospective members, it would seem that the local would have to initiate recruitment and training programs to induct Negroes into union membership. But while the court demands that the local include more Negroes, it is far from clear as to what the court would deem to be the proper proportion of Negroes.

Title VII was the product of legislative compromise. Through the give and take of the democratic process, Congress enacted legislation which made nondiscrimination the mandate. Perhaps Congress should go further. Mere nondiscrimination may be inadequate to remedy the inequities that have developed with respect to the Negro. Perhaps new legislation should be enacted. But until that time, courts should be hesitant to demand more than the law requires.

PAUL SEWARD TRIBLE, JR.

THE SCOPE OF EMPLOYMENT UNDER THE FEDERAL INSURANCE CONTRIBUTIONS ACT: INCLUDED AND EXCLUDED SERVICE

Section 3111(a) of the Federal Insurance Contributions Act (FICA)[1] imposes an excise tax upon employers[2] based on a percentage of wages paid with respect to "employment." Section 3121(b) then states the statutory definition of employment for purposes of taxation under FICA:

> "[E]mployment" means any service . . . either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States

[1]INT. REV. CODE of 1954, §§ 3101-26.

[2]Section 3111(a) does not impose "a tax on employees" as stated in the principal case. Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686 (Ct. Cl. 1969). Employees are taxed instead under section 3101(a) which provides for a tax "upon the income of every individual" equal to a fixed percentage of wages "received by him with respect to employment...." INT. REV. CODE of 1954, § 3101(a). The tax on employees is collected by the employer by deducting the amount of the tax from the employee's wages "as and when paid." INT. REV. CODE of 1954, § 3102(a). The employer is held liable for the payment of the employee's tax. *See* United States v. New York, 315 U.S. 510, 515 (1942); INT. REV. CODE of 1954, § 3102(b). The rates of taxation under sections 3101(a) and 3111(a) are identical.

> . . . or (B) outside the United States by a citizen of the United States as an employee for an American employer . . . except that . . . such term shall not include — [the Act here lists nineteen exceptions to its definition of employment].[3]

However, section 3121(c), entitled "Included and excluded service," operates to prohibit FICA taxation on *all* wages paid with respect to employment unless the employee's services[4] performed for his employer during at least one-half of any pay period[5] "constitute employment."[6] No reference is made in subsection (c) to the subsection (b) provisions or its specific exclusions. Thus, a questionable right of taxation under FICA could arise if a foreign employer, employing foreign citizens, utilized those employees to perform serviecs within the United States. Would the portion of employee service performed within the United States not be deemed taxable employment under FICA if such service comprised less than half of the total service in each pay period involved and was not of the type specifically excluded in section 3121(b)?

This question recently confronted the United States Court of Claims[7] in *Inter-City Truck Lines, Ltd. v. United States.*[8] The case involved a suit for the refund of employment taxes. The plaintiff taxpayer, a Canadian trucking corporation, was authorized to do business in the United States. The corporation employed Canadian citizens as its truck drivers. In the course of their employment, these drivers made pick-ups and deliveries of shipments in New York State. The taxpayer was required to pay employment taxes, assessed under

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[3]INT. REV. CODE of 1954, § 3121(b).

[4]The term "service" as used in this context, although not defined by FICA, has been held to mean "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." Social Security Bd. v. Nierotko, 327 U.S. 358, 365-66 (1946).

[5]The term "pay period," as used in subsection (c), means a period, not exceeding thirty-one consecutive days, "for which a payment of remuneration is ordinarily made to the employee by the person employing him." INT. REV. CODE of 1954, § 3121(c).

[6]INT. REV. CODE of 1954, § 3121(c). The pertinent language of subsection (c) reads as follows:

> [I]f the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment.

[7]The court of claims has jurisdiction pursuant to 28 U.S.C. § 1491 (1964).

[8]408 F.2d 686 (Ct. Cl. 1969).

FICA, with respect to wages paid to these employees for services performed within the United States.[9] It was stipulated in the case that none of the nineteen vocational exceptions to the definition of employment listed in section 3121(b) was applicable, and that in every pay period in issue, each affected Canadian employee performed less than one-half of his services within the United States.

The court of claims held, with one dissent, that the taxpayer's petition for refund should be dismissed. The majority interpreted section 3121(c) "to apply only to the 'services' which are included or excluded in § 3121(b) . . . ."[10] This interpretation was based mainly upon the congressional intent reflected in the legislative history of section 3121(c)[11] and a contemporaneous construction of the statutory language by the Bureau of Internal Revenue.

The dissenting judge feared that the majority was being "lured into delivering pronouncements that we will live to regret."[12] He argued that the truck company might have acquired a "customary exemption" from FICA taxation prior to 1961;[13] and to tax international carriers under FICA might lead to a system of mutual double taxation which "could, if carried to its logical conclusion, bring international trade to a halt."[14]

To date the only other case which has construed substantially similar statutory language is *Gardner v. Travis*.[15] This case involved a suit to review a decision by the Secretary of Health, Education, and Welfare imposing deductions against old-age benefits which had accrued to Travis under the Social Security Act.[16] The deductions were

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[9]The taxes and interest for which refund is sought were paid from the first quarter of 1961 through the second quarter of 1964 and totaled $2,376.78. Brief for Plaintiff at 3-4, Brief for Defendant at 1, Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686 (Ct. Cl. 1969).

[10]408 F.2d at 687.

[11]The language of § 3121(c) was first enacted in the Social Security Act Amendments of 1939, ch. 666, § 606, 53 Stat. 1386, and was codified as Int. Rev. Code of 1939, ch. 9, § 1426(c), 53 Stat. 1386. In the Internal Revenue Code of 1954, section 1426(c) was renumbered and its provisions placed in the present INT. REV. CODE of 1954, § 3121(c).

[12]408 F.2d at 689.

[13]*Id.* By "customary exemption" the dissent apparently means that since the wages of Canadian truck drivers working for Canadian motor carriers were not taxed for social security purposes prior to 1961, this extended peiod of non-taxation conferred the right to be exempt from FICA taxation now being asserted. Note 51 *infra*.

[14]408 F.2d at 689.

[15]387 F.2d 508 (10th Cir. 1967).

[16]42 U.S.C. §§ 301-1396 (1964), *as amended*, (Supp. II 1965-66). It should be noted that the right to impose a tax was not an issue in *Travis* as it is in *Inter-City*.

imposed according to the provisions of section 203[17] of the Act which require deductions from old-age benefits if wages in excess of $125 per month[18] are received for services performed by the beneficiary. Section 209 then defines wages as "remuneration . . . for employment."[19] Thus the definition of employment in section 210(a)[20] of the Social Security Act (the language being substantially the same as that in section 3121(b) of FICA) was at issue. Travis contended that since less than half of his service for a Canadian firm was performed in Oklahoma, and more than half in Canada, section 210(b)[21] of the Act (the language being identical to that in section 3121(c)) required that none of his services in Oklahoma be deemed employment when determining his monthly wages from employment services.[22]

The United States Court of Appeals for the Tenth Circuit held that section 210(b) did not preclude a consideration of services performed in Oklahoma when determining benefit deductions since "Travis performed no service which could be classified as one of the nineteen 'excluded' services."[23] The court further concluded that the language of section 210(b), entitled "Included and excluded service," when read in its proper context within the Social Security Act and considered in light of the legislative purpose of the section, *"applies only where an employee performs, for the same employer, both an included and an excluded service within the meaning of Section 210(a)."*[24]

The judicial interpretation of the statutory language in FICA section 3121(c) finds support in a 1940 opinion rendered by the Bureau of Internal Revenue.[25] A foreign airline operating between foreign

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[17]42 U.S.C. §§ 403(b), (c), (f) (1964), *as amended,* (Supp. II 1965-66).

[18]42 U.S.C. § 403(f)(1)(D) (Supp. II 1965-66). The minimum monthly wage is now $140. 42 U.S.C. § 403(f)(1)(D) (Supp. IV 1965-68).

[19]42 U.S.C. § 409 (1964), *as amended,* (Supp. II 1965-66). This is the same definition given to wages under FICA. INT. REV. CODE of 1954, § 3121(a).

[20]42 U.S.C. § 410(a) (1964), *as amended,* (Supp. II 1965-66).

[21]42 U.S.C. § 410(b) (1964), *as amended,* (Supp. II 1965-66).

[22]Gardner v. Travis, 387 F.2d 508, 512 (10th Cir. 1967). Travis was employed as a management consultant by a Canadian firm at a monthly salary of $600. He resided in Oklahoma and made about six trips a year to Canada, each lasting for a period of ten to sixteen days. Between trips, only about 5% of his research time was devoted to studying material directly related to his Canadian employer. *Id.* at 510-11.

[23]*Id.* at 513. According to the court of appeals, however, even if a service did not fall within the section 210(a) definition of employment, section 203(f)(5)(C) requires that any wages so received for the performance of services within the United States he considered when determining whether benefit deductions are warranted. *Id.* at 513. FICA has no similar provision.

[24]*Id.* at 512 (emphasis added).

[25]S.S.T. 402, 1940-2 CUM. BULL. 252.

and United States airports sought a ruling with respect to whether its flight personnel were wholly taxable or wholly exempt under section 1426(c) of the Internal Revenue Code of 1939[26] (the predecessor of FICA section 3121(c)). The Bureau was of the opinion that section 1426(c) was not intended to include or exclude service as taxable employment on the basis of the quantity of service performed within the United States in relation to the total amount of services performed both within and without the United States.[27]

It is questionable whether this position taken with regard to airlines in 1940 should be respected as a contemporaneous construction of the statute when applied to highway carriers in 1961.[28] Services performed by foreign citizen employees on or in connection with a foreign aircraft or vessel have since been specifically excluded from being considered employment under FICA.[29] However, the opinion of the Bureau is consistent with the applicable Treasury Regulation on the matter.[30] In addition, it is generally held that expressions of opinion by the Treasury Department in defining terms in the tax field, when substantially contemporaneous with the enactment of a tax statute, are "highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute."[31] Although such in-

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[26]Social Security Act Amendments of 1939, ch. 666, § 606, 53 Stat. 1386.

[27]S.S.T. 402, 1940-2 CUM. BULL. 252, 253.

[28]Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686, 689 (Ct. Cl. 1969) (dissenting opinion). The majority in the instant case referred to the Bureau's opinion as a contemporaneous construction. *Id.* at 688.

[29]INT. REV. CODE of 1954, § 3121(b)(4). The exclusionary language is as follows:

> (4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B) (i) such individual is not a citizen of the United States or (ii) the employer is not an American employer....

[30]Treas. Reg. § 31.3121(b)-3 (1970). The Regulation reads in part as follows: (b) "Services performed within the United States."

> Services performed after 1954 within the United States... by an employee for his employer, *unless specifically excepted by section 3121(b),* constitute employment.... The citizenship or residence of the employee or of the employer also is immaterial except to the extent provided in any specific exception from employment. *Thus, the employee and the employer may be citizens and residents a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment* (emphasis added).

[31]White v. Winchester Country Club, 315 U.S. 32, 41 (1942); *see* Better Business Bureau v. United States, 326 U.S. 279 (1945).

terpretative opinions and regulations are not binding on the courts,[32] it has been held that they "should not be overruled except for weighty reasons."[33]

The probable legislative intent of the language used in section 3121(c) of FICA is also a pertinent consideration in any judicial attempt to clarify its ambiguity. The court of claims in *Inter-City* cities Senate Report No. 724 accompanying the 1939 amendments to the Social Security Act as determinative of the intent of Congress with respect to the meaning of "Included and excluded services." That Report reads:

> 8. *Included and excluded services.* — The law is changed with respect to services of an employee performing both included and excluded employment for the same employer so that the services which predominate in a pay period determine his status with that employer for that period.[34]

The court of appeals in *Travis* supports its decision by citing the House Report which is substantially identical.[35] It is difficult to see, however, that this language, on its face, makes it "inescapably clear"[36] that Congress intended the term "excluded service," as used in FICA section 3121(c), to refer only to the nineteen exceptions contained in section 3121(b). To so conclude still would require, *a priori,* that "excluded services" refer only to the nineteen exceptions, since the congressional reports, like the section 3121(c) language itself, make no statement that "excluded service" is *limited* to the specific exceptions in section 3121(b).[37]

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[32]Schwing v. United States, 65 F. Supp. 227, 229-30 (E.D. Pa. 1946), *rev'd on other grounds,* 165 F.2d 518 (3d Cir. 1948); Hirsch v. Rothensies. 56 F. Supp. 92, 96 (E.D. Pa. 1944). An administrative regulation is binding on the courts, however, when issued pursuant to a valid congressional grant of legislative power to the administrative agency. *See, e.g.,* Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955); American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936).

[33]Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686, 688 (Ct. Cl. 1969); *accord,* Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); *see* White v. Winchester Country Club, 315 U.S. 32 (1942); Nicholas v. Richlow Mfg. Co., 126 F.2d 16 (10th Cir. 1941); U.S. Thermo Control Co. v. United States, 372 F.2d 964 (Ct. Cl.), *cert. denied,* 389 U.S. 839 (1967).

However, even the "weighty reasons" test could not permit a construction of statutory words and phrases to be given unusual or strained meanings unjustified by legislative intent. Better Business Bureau v. United States, 326 U.S. 279, 283 (1945).

[34]S. REP. No. 734, 76th Cong., 1st Sess. 20 (1939).

[35]387 F.2d at 512; H.R. REP. No. 728, 76th Cong., 1st Sess. 18 (1939).

[36]387 F.2d 508, 512 (10th Cir. 1967).

[37]The testimony of A. J. Altmeyer, Chairman of the Social Security Board in 1939, gives greater insight into the intention which the House and Senate inadequately expressed in their respective reports. Altmeyer testified in hearings

It is important to note that FICA is one of the taxing devices[38] by which funds are acquired for disposition as benefits under the provisions of the Social Security Act.[39] Thus the construction of the statutory language in question should be considered in light of the broad

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before the House Committee on Ways and Means relative to the Social Security Act Amendments of 1939:

Mr. ALTMEYER.

....

Then we are suggesting the clarification of the law regarding the services of employees who perform both excluded and included employment, the suggestion being that the major portion of his time shall determine whether all of his time shall be considered as having been devoted to excluded or included employment. You do get some cases where an employee divides his time between excluded and included employment. The present law is silent, and that makes it difficult for the Treasury and for the Board to determine these cases, which are not large in number, but, nevertheless, should be cleared up, if some slight amendment may do so.

Mr. COOPER [Representative from Tennessee]. Will you give us an illustration of the type of case you have in mind?

Mr. ALTMEYER. The instances that occur to me are these border-line cases between agricultural and nonagricultural employment. For instance, a man works in a greenhouse and greenhouse work is held to be agricultural employment now. If that fellow comes into town and does some work for the employer not connected with the greenhouse, perhaps delivering flowers from the retail flower store, he would be in "included employment." The question is, does the employer have to split up his time, or how shall that sort of case be handled?

Mr. COOPER. Well, now, do you have in mind a man working for an employer, who is engaged in more than one line of business?

Mr. ALTMEYER. Yes, sir; that is where he works for the same employer, but works in two different lines, two different occupations.

Mr. COOPER. Two different kinds of work?

MR. ALTMEYER. Yes.

Mr. COOPER. That would not have any relation, then, to the man who worked on the farm, and after the crops were laid by, then he went to work for a sawmill for awhile.

Mr. ALTMEYER. No, sir.

Mr. COOPER. That would not have any connection with him?

Mr. ALTMEYER. No, sir. It is just my suggestion that there be laid down in the law a rough, mathematical statement, so that employers who are engaged partly in an excluded and partly in an included occupation may have a standard by which to report on these employees.

Mr. COOPER. And that would only relate to the employer who used the employee for two or more different types of work?

Mr. ALTMEYER. Yes, sir.

Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 2288-89 (1939).

[38]Other employment tax acts that operate to provide funds for social security benefit payments are the Federal Unemployment Tax Act, INT. REV. CODE of 1954, §§ 3301-09, and the Railroad Retirement Tax Act, INT. REV. CODE of 1954, §§ 3201-33.

[39]42 U.S.C. §§ 301-1394 (1964), *as amended*, (Supp. IV 1965-68).

purpose of the Social Security Act. The intent of Congress in passing the Act was to promote the general welfare by providing, through taxation, a fund for the needy worker.[40] The taxing phases of the Act have been held to be "secondary and incidental."[41] In furtherance of the Act's remedial purpose it has been held that doubtful questions should be resolved in favor of employment where the right to social security benefits is concerned.[42] However, it is doubtful that the Canadian employees paying taxes under FICA in the present case could qualify for social security benefits. The Social Security Act suspends the payment of benefits to an employee who is a foreign citizen if he stays outside the United States for over six months, unless he has ten years of covered service.[43] Thus it is possible that a Canadian employee paying FICA taxes could not enjoy any of the benefits received by United States residents paying similar taxes unless he continued to perform services within the United States for his Canadian employer according to the statutory criteria.[44]

Any interpretation of employment as defined in FICA depends on the scope of "Included and excluded service" as used in the title of section 3121(c). Section 3121(b) sets out the three categories of service

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[40]Hearst Publ., Inc. v. United States, 70 F. Supp. 666, 670 (N.D. Cal. 1946), *aff'd*, 168 F.2d 751 (9th Cir. 1948). *See generally* Reynolds v. Northern Pac. Ry., 168 F.2d 934 (8th Cir. 1948); United States v. Vogue, Inc., 145 F.2d 609 (4th Cir. 1944). It has been held that the payments of disability benefits under the Act are designed to go to those workers who contributed to this nation's labor force. Coleman v. Gardner, 264 F. Supp. 714, 718 (S.D.W.Va. 1967).

[41]Grace v. Magruder, 148 F.2d 679, 680 (D.C. Cir.), *cert. denied*, 326 U.S. 720 (1945).

[42]Texas Carbonate Co. v. Phinney, 307 F.2d 289 (5th Cir.), *cert. denied*, 371 U.S. 940 (1962); Westover v. Stockholders Pub. Co., 237 F.2d 948 (9th Cir. 1956); Ringling Bros.—Barnum & Bailey Combined Shows v. Higgins, 189 F.2d 865 (2d Cir. 1951); Hearst Publ., Inc. v. United States, 70 F. Supp. 666 (N.D. Cal. 1946), *aff'd*, 168 F.2d 751 (9th Cir. 1948).

[43]§ 202(t), 42 U.S.C. § 402(t) (1964), *as amended*, (Supp. IV 1965-68).

[44]The dissenting judge in *Inter-City* argued that the Canadian drivers could not qualify for benefits "unless the Canadian employer persisted in using them repeatedly on international trips to his own financial detriment." 408 F.2d at 689. However, this consideration is weakened by the holding that, barring arbitrary governmental action, a person only has a right to social security benefits to the extent that such right is supported by provisions of the social security statutes. Price v. Folsom, 168 F. Supp. 392 (D.N.J. 1958), *aff'd*, 280 F.2d 956 (3d Cir. 1960), *cert. denied*, 365 U.S. 817 (1961). It has also been held that the taxing provisions of the Social Security Act do not unfairly deny benefits simply because they exempt certain classes of American employers and employees from their benefits and burdens. *See* Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); W.H.H. Chamberlin, Inc. v. Andrews, 271 N.Y. 1, 2 N.E.2d 22, *aff'd without opinion by an equally divided Court*, 299 U.S. 515 (1936).

to be considered: (1) services which do not come within the section's definition of employment;[45] (2) services which do come within the definition of employment,[46] and (3) services which fall within the definition of "employment" but are specifically excluded from being considered as such.[47] The court of claims in *Inter-City* takes the position that section 3121(c) is used only to determine what is employment when the employee has performed services for this employer which fall partly in category (2) and partly in category (3) above. The taxpayer contended that all service which is not included within the subsection (b) definition of employment must, therefore, be "excluded service." By this interpretation, if the portion of services in category (1) predominate, section 3121(c) would have the effect of placing the services in (2) in the same category as those in (1), and none of them could be taxed under FICA.

To adopt the taxpayer's interpretation of employment would lead, nonetheless, to an expansion of the scope of FICA not contemplated by Congress. It must be considered that the taxpayer's interpretation of section 3121(c) excludes from the employment tax all wages paid for services performed both within and without the United States only if less than half of the total services are performed within the United States. The obverse of this argument is equally significant. If the predominance of services performed outside the United States exempts wages paid for *all* services, *a predominance of services within the United States could result in taxing wages paid for services performed outside the United States.* Accordingly, a Canadian employer could be required to pay FICA taxes on the *entire* wages of a Canadian employee, although as much as 49 percent of the employee's services may have been performed in Canada and the wages paid in Canada.[48] To assert the FICA tax on the Canadian service, however, would require the United States to extend its present taxing jurisdiction to wages paid by a foreign employer to a foreign citizen for services performed outside the United States. Such taxation would be contrary to the express limitation in section 3121(b) that service performed outside the United States is taxable *only* if performed by a United States citizen

[45]This category would encompass all services not performed within the United States except those performed by a United States citizen for his American employer. INT. REV. CODE of 1954, § 3121(b).

[46]INT. REV. CODE of 1954, §§ 3121(b)(A)-(B).

[47]INT. REV. CODE of 1954, §§ 3121(b)(1)-(19).

[48]Brief for Defendant at 11-12, Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686 (Ct. Cl. 1969). This very persuasive reasoning is only alluded to in the majority's opinion in *Inter-City*. 408 F.2d at 688.

for an American employer.[49] Conversely, the interpretation of the court of claims would not require an extension of FICA jurisdiction in this situation since only the amount of service performed within the United States, regardless of the percentage of such service to the total service in a pay period, would be taxable. Thus the taxpayer's interpretation of the statutory language at issue, while reasonably within the letter of the statute, is plainly not within its spirit, and not within the intention of the legislature.[50]

The view of the dissenting judge in *Inter-City* is that international highway carriers might have acquired a "customary exemption"[51] from FICA taxation altogether, and to tax them now would result in double taxation.[52] Yet if the Canadian corporation did not have to pay FICA taxes on any of the wages earned by its employees for services performed within the United States, it would gain an economic advantage over an American employer engaged in the same occupation:

> Such a corporation could effectively eliminate competitors, actual and potential, since it could undersell corporations,

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[49]INT. REV. CODE of 1954, §§ 3121(b); text accompanying note 3 *supra.*

[50]Inter-City Truck Lines, Ltd. v. United States, 408 F.2d 686, 688-89 (Ct. Cl. 1969). It is a recognized rule of statutory construction that a court should interpret a statute so as not to distort the intention of its makers. *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); Select Tire Salvage Co. v. United States, 386 F.2d 1008 (Ct. Cl. 1967). The taxpayer's interpretation could also work an injustice upon a Canadian employee who performed a minority of his employment within the United States. If the employee performed such service according to the requirements of section 202(t) of the Social Security Act [42 U.S.C. § 402(t) (1964), *as amended,* (Supp. IV 1965-68)], he could still be denied its benefits since no tax would be collected on the service. Text accompanying note 43 *supra.*

[51]408 F.2d at 689. The dissent analogizes certain "customary exemptions" from duties under the customs laws to the situation in the present case and states:

> I would like to be shown that Canadian highway carriers did not obtain, for trips between Canadian and United States points, after the enactment of the Social Security Act and before 1961 a "customary exemption" of equal validity.

Id.; see The Conqueror, 166 U.S. 110 (1897); 19 U.S.C. § 1322(a) (1964).

This position seems contrary to other cases arising under FICA which have held that the Government would not be estopped from subsequently denying exemption to a particular occupation although it had earlier permitted it an exemption from taxation. *See, e.g.,* United States v. La Societe Francaise De Bienfaisance Mutuelle, 152 F.2d 243 (9th Cir. 1945), *cert. denied,* 327 U.S. 793 (1946); S.S. Kresge Co. v. United States, 218 F. Supp. 240 (E.D. Mich. 1963); Williams Packing & Navigation Co. v. Enochs, 176 F. Supp. 168 (S.D. Miss. 1959), *aff'd,* 291 F.2d 402 (5th Cir. 1961), *rev'd on other grounds,* 370 U.S. 1 (1962).

[52]It has been held that the provisions relating to exemption set forth in United States—Canada Income Tax Convention, Nov. 21, 1951, 1955-1 CUM. BULL. 624, do not include exemption from FICA taxation. Rev. Rul. 56-609, 956-2 CUM. BULL. 1066. *See* S. ROBERTS & W. WARREN, U.S. INCOME TAXATION OF FOREIGN CORPORATION AND NONRESIDENT ALIENS IX/8A (1968).

> whose earnings are subject to dimunition (sic) by federal taxation. It is difficult to believe that Congress intended to countenance such a situation.[53]

In addition, double taxation[54] could occur whether the broad or narrow interpretation of employment was approved by the court of claims. Since the taxpayer's interpretation would permit FICA taxation on *all* employment if a majority of an employee's services were performed within the United States, at least the minority service performed in Canada would presumably be taxed under the Canadian social security system.[55]

It would appear that the *Inter-City* interpretation of the statutory language of sections 3121(b) and 3121(c) is most consistent with the intent of Congress and the broad purpose of social security legislation. However, the plaintiff taxpayer's assertion is not unreasonable due to the absence of specific reference in subsection (c) to the nine-

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[53]United States v. Community Services, Inc., 189 F.2d 421, 425 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952).

[54]The dissenting judge in *Inter-City* uses the term "double taxation" to infer the objectionable or prohibited practice of taxing the same subject matter twice when it should be taxed only once. However, it is often said that to constitute double taxation in this sense, both taxes must be imposed on the same subject matter, for the same purpose, and by the same government or taxing authority. *E.g.*, Estate of Good v. Good, 28 Cal. Rptr. 378 (Dist. Ct. App. 1963); Fox v. Board For Louisville & Jefferson County Children's Home, 244 Ky. 1, 50 S.W.2d 67 (1932); C.F. Smith Co. v. Fitzgerald, 270 Mich. 659, 259 N.W. 352, *appeal dismissed sub nom.* C.F. Smith Co. v. Atwood, 296 U.S. 659 (1935); Allegheny County Motor Co. v. City of Pittsburgh, 360 Pa. 407, 62 A.2d 64 (1948). By this view, no prohibitive double taxation occurs since the taxes are imposed by two different governments.

[55]Canada has numerous Acts which compromise its social security system, each with different taxing provisions, rates, and qualifications for benefits. *See, e.g.*, Canada Pension Plan, c. 51 (1965); Old Age Security Act, CAN. REV. STAT. c. 200 (1952), *as amended;* Old Age Assistance Act, CAN. REV. STAT. c. 199 (1952), *as amended.* However, since none of the Canadian social security acts is exactly comparable to FICA, the difficulty would lie in determining under which act(s) duplicate taxation occurs. It is possible that there would be no duplication since certain of the Canadian social security acts contain flexible provisions which would permit the agency charged with administration of an act to prevent double taxation on Canadian taxpayers. For example, the Unemployment Insurance Act provides:

> The Commission may... make regulations for excepting from insurable employment
>
> *(a)* any employment if it appears to the Commission that by reason of the laws of any country other than Canada a duplication of contributions or benefits will result;
>
> ....
>
> *(d)* the entire employment of a person who is engaged under one employer partly in insurable employment and partly in other employment....

Unemployment Insurance Act, 3-4 Eliz. II, c. 50, § 28(1), at 305 (Can. 1955).