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Internal Revenue - Income Tax - Business or Non-Business Bad Debts - Scope of Trade or Business

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necessitated strict proof of the averment.[5] Apparently, one of the reasons for requiring strict proof of the fact was to make certain the accusation against a defendant so that he might prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense.[6] It is said that: "If a necessary allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as the main part, since the one is essential to the identity of the other."[7]

Some jurisdictions have weakened the effect of the exacting common law rule.[8] An early Illinois case stated that the office of a videlicet is "to indicate that the party does not undertake to prove the precise circumstances as alleged."[9] It should be noted, however, that in a later case the Illinois Supreme Court declared that proof is required if the matter laid under the videlicet is *material to the charge.*[10] A requirement of proof when the allegation under a videlicet is material appears to be a clearly establish rule.[11] When the fact alleged is not material, it is generally treated as surplusage.[12]

The court in the instant case relied on a Dakota Territory case which suggested that an allegation of "kind" is material if "descriptive of the identity of the subject of the action."[13] Admittedly, the allegation of Stillbrook whiskey was descriptive and made specific that which before was general. However, it is submitted that the allegation is not material to the *offense charged,* the statutory offense of selling "any intoxicating liquor" to a minor.

MAURICE R. HUNKE

INTERNAL REVENUE — INCOME TAX — BUSINESS OR NONBUSINESS BAD DEBTS — SCOPE OF "TRADE OR BUSINESS" —

5. State v. Scovill, 15 S.W.2d 931, 935 (Mo. 1929).
6. See, **e.g.,** McLendon v. State, 121 Ga. 158, 48 S.E. 902 (1904); State v. Sinnott, 72 S.D. 100, 30 N.W.2d 455 (1947).
7. 2 BISHOP'S NEW CRIMINAL PROCEDURE § 485(2) (2d ed. 1913).
8. See, **e.g.,** Columbian Three Color Co. v. Aneta Life Ins. Co., 183 Ill. App. 384 (1913); State v. Heck, 23 Minn. 549 (1877); Culp v. Virginian Ry. 80 W. Va. 98, 92 S.E. 236 (1917).
9. Chicago Terminal Transfer R.R. v. Young, 118 Ill. App. 226, 229 (1905).
10. People v. McCanney, 205 Ill. App. 91, 98 (1917).
11. See, **e.g.,** cases cited in note 8, **supra.**
12. See, **e.g.,** Tullis v. Shaw, 169 Ind. 662, 83 N.E. 376 (1908).
13. Brugier v. United States, 1 Dak. 5, 46 N.W. 502 (1867).

The petitioner was employed by the debtor company. The employment was conditioned by the fact that the petitioner was expected to make loans to the company until the company's cash condition improved. Pursuant to this agreement the petitioner made such loans which were never completely repaid. His employment was terminated when he refused to make further loans. When the company became insolvent petitioner sought to deduct the amount of the worthless advances as a business bad debt. The United States Court of Appeals, Second Circuit, *held* without dissent that the unpaid debts would be fully deductible as a business bad debt, stating that they were made in the scope of "trade or business," which term included all means of making a living, even those which "would scarcely be so characterized in common speech." *Trent v. C. I. R.*, 291 F.2d 669 (2d Cir. 1961).

The treatment of bad debts and losses for income tax purposes is dependent on whether or not the debt or loss is incurred as an incident of business or nonbusiness.[1] If a bad debt or loss may be attributed to one's business[2] such debt or loss is deductible from that party's gross income in full.[3] On the other hand, a nonbusiness[4] bad debt or loss is treated as a loss from the sale or exchange of a capital asset held less than six months.[5] In other words, the nonbusiness bad debt or loss is treated as a "Short Term Capital Loss".[6] When subjected to this treatment, the taxpayer is not necessarily allowed a full deduction of the loss.[7]

The terms "trade" and "business" have been held to be synonymous.[8] A 1939 case defined the term "business" as embracing every area in which a person can be employed for gain or profit.[9] It must be noted, however, that earlier cases have held the term "profit" alone as too restrictive, stating that the proper test is whether or not an enterprise is carried

1. See Int. Rev. Code of 1954, § 166(a), (d).
2. See Gray v. Board of County Comm'rs. of Sedgwick County, 101 Kan. 195, 165 Pac. 867, 868 (1917).
3. See Int. Rev. Code of 1954, § 166(a)(1).
4. See Int. Rev. Code of 1954, § 166(d)(2).
5. See Int. Rev. Code of 1954, § 166(d)(1)(B).
6. See Int. Rev. Code of 1954, § 1222(2).
7. See Fed. Tax Reg. §§ 1.166-5, 1.1222-1 (1962).
8. See Gray v. Board of County Comm'rs. of Sedgwick County, 101 Kan. 195, 165 Pac. 867, 868 (1917).
9. Cecil v. C.I.R., 100 F.2d 896 (4th Cir. 1939).

on in good faith with the intention to make a profit.[10] Another case has held that the term "carrying on any trade or business" is to be construed by the popular import given to these words.[11]

Decisions in the area of whether or not an activity is business or nonbusiness requires an examination of the facts in each case, since the element of the intent of the taxpayer is of importance.[12] In *Morton v. C. I. R.* the taxpayer attempted to deduct the expenses incurred on a farm where he and his family resided. The court held that the intent of the taxpayer to convert the farm to an income producing purpose was the important element, and denied the deduction when it concluded that no such intent existed.

Thus, a careful scrutiny of the case law and various factual situations may enable the attorney to cause his client's losses to fall within the scope of "trade or business". By constant attention to the new development of the broadening of the areas of definition perhaps the taxpayer may at least receive the benefit of the doubt in close cases.

MAURICE E. COOK

STATUTES — ENACTMENT — MODE OF VOTING — MAY A LIEUTENANT GOVERNOR GIVE THE "CASTING VOTE" IN A STATE LEGISLATURE? — A bill was presented to the Montana State Senate which would raise the fee for a drivers license from $3 to $4. A vote was taken which resulted in a tie. The Lieutenant Governor cast the tie breaking vote. The Supreme Court of Montana *held* that the power vested in the Lieutenant Governor to give the "casting vote" when the Senate is equally divided vests in the Lieutenant Governor alone, and such vote is to be counted, and when counted, it determines the fate of the bill or proposition being voted on and produces "a majority vote of all the members" in the Senate. *State v. Highway Patrol Board,* 372 P.2d 930 (Mont. 1962).

In arriving at this result the court was compelled to dis-

10. Wallace's Estate v. C.I.R., 101 F.2d 604 (4th Cir. 1939); Doggett v. Burnet, 65 F.2d 191, 194 (D.C. Cir. 1933).
11. Higgins v. C.I.R., 111 F.2d 795 (2nd Cir. 1940). This case held that expenses incurred while protecting one's own investments was not acting within the scope of trade or business.
12. Morton v. C.I.R., 174 F.2d 302 (2nd Cir. 1949).