

SUPREME COURT OF UNITED STATES

William B. Cammarano and Louise Cammarano, his wife

Vs.

United States of America. F. Strauss & Son, Inc., of Arkansas, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE.

Nos. 29 and 50.

Argued Nov. 19, 1958.

Decided Feb. 24, 1959.

Frederick Bernays Wiener, Washington, D.C., for petitioners, William B. Cammarano and Louise Cammarano.

Oscar H. Davis, Washington, D.C., for the United States.

E. Chas. Eichenbaum, Little Rock, Ark., for petitioner, F. Strauss & son, inc.

Mr. Justice HARLAN delivered the opinion of the Court.

These cases, coming to us from two different Circuits, present identical issues, and may appropriately be dealt with together in one opinion. The issues involve the interpretation and validity of Treas. Reg. 111, § 29.23(o)—1 and § 29.23(q)—1 as applied by the courts below to deny deduction as 'ordinary and necessary' business expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939 to sums expended by the respective taxpayer petitioners in furtherance of publicity programs designed to help secure the defeat of initiative measures then pending before the voters of the States of Washington and Arkansas.

The Treasury Regulations in question each provides in pertinent part that no deduction shall be allowed to 'sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising * * *.'² Both Courts of Appeals held that these provisions render nondeductible sums paid by petitioners to organizations which expended them in extensive publicity programs designed to persuade the voters to cast their ballots against state initiative measures, even though the passage of those measures

would have seriously affected, or indeed wholly destroyed, the taxpayers' businesses—and that so interpreted the Regulations are a valid exercise of the Commissioner's rule-making power. We granted certiorari because of the recurring nature of the question, and because of its importance to the proper administration of the Internal Revenue laws. 355 U.S. 952, 78 S.Ct. 541, 2 L.Ed.2d 529; 356 U.S. 966, 78 S.Ct. 1007, 2 L.Ed.2d 1073.

A brief review of the facts in the two cases is necessary to an understanding of the issues.

No. 29: In 1948 petitioners William and Louise Cammarano, husband and wife, jointly owned a one-fourth interest in a partnership engaged in the distribution of beer at wholesale in the State of Washington. The partnership was a member of the Washington Beer Wholesalers Association. In December 1947 the Association had established a trust fund as a repository for assessments collected from its members to help finance a statewide publicity program urging the defeat of 'Initiative to the Legislature No. 13,' a measure to be submitted to the electorate at the general election of November 2, 1948, which would have placed the retail sale of wine and beer in Washington exclusively in the hands of the State. During 1948 petitioners' partnership paid to the trust fund \$3,545.15, of which petitioners' pro rata share was \$886.29. The trust fund collected a total of \$53,500, which was turned over to an Industry Advisory Committee organized by wholesale and retail wine and beer dealers, which in turn expended it as part of contributions totaling \$231,257.10 for various kinds of advertising directed to the public, none of which referred to petitioners' wares as such and all of which urged defeat of Initiative No. 13.3 The initiative was defeated.

In preparing their joint income tax return for 1948, petitioners deducted as a business expense the \$886.29 paid to the Association's trust fund as their share of the partnership assessment. The deduction was disallowed by the Commissioner, and petitioners paid under protest the additional sum thus due and sued in the District Court for refund. That court ruled that the payments made to the trust fund were 'expended for * * * the * * * defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23(o)—1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a)(1)(A) of the Internal Revenue Code of 1939. The Court of Appeals affirmed, holding the Regulation applicable and valid as applied. 9 Cir., 246 F.2d 751.4

No. 50: Petitioner F. Strauss & Son, Inc., is a corporation engaged in the wholesale liquor business in Arkansas. In 1950 an initiative calling for an election on statewide prohibition was placed on the ballot to be voted on in the state general election on November 7, 1950. In May of that year Strauss, together with eight other Arkansas liquor wholesalers, organized Arkansas Legal Control Associates, Inc., as a means of coordinating their efforts to persuade the voters of Arkansas to vote against the proposed prohibition measure. Between May 30 and November 30, 1950, Arkansas Legal Control Associates collected a total of \$126,265.84, which was disbursed for various forms of publicity concerning the proposed Act.5 Strauss' contribution amounted to \$9,252.67.

The initiative measure was defeated in the November election. On its 1950 income tax return Strauss deducted the \$9,252.67 as a business expense. The Commissioner disallowed the deduction and Strauss filed a timely petition in the Tax Court seeking a redetermination of the deficiency asserted. That court upheld the action of the Commissioner in disallowing the claimed deduction, and the Court of Appeals unanimously affirmed. 8 Cir.[1958] USCA8 51; , 251 F.2d 724.

Since 1918 regulations promulgated by the Commissioner under the Internal Revenue Code have continuously provided that expenditures for the 'promotion or defeat of legislation * * *,' or for any of the other purposes specified in the 'corporate' Regulation now before us, are not deductible from gross corporate income; and since 1938 regulations containing identical language have forbidden such deductions from individual income.⁶ During this period of more than 40 years these regulatory provisions have been before this Court on only one occasion. In *Textile Mills Security Corporation v. Commissioner of Internal Revenue*, [1941] USSC 152; 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249, it was held that the Commissioner properly disallowed the deduction of sums paid by a corporation to a publicist and two legal experts employed to help secure the passage of legislation designed to secure the return of certain properties in this country seized during World War I under the provisions of the Trading With the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq. This holding was squarely based on the regulatory provisions now embodied in Treas.Reg. 111, § 29.23(q) 1, which were found valid and applicable to the facts involved in that case, although the very business of the taxpayer seeking the deduction was the direction of the publicity program in the course of which the expenditures were made.

Petitioners suggest that *Textile Mills* is not dispositive of the present cases, either as to the applicability of the Regulations upon the facts disclosed by these records or as to the validity of those Regulations under the statute if they are found to be applicable. Essentially, petitioners' contentions are (1) that the Regulations cannot properly be construed as applicable to expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies, that is 'lobbying'; (2) that in any case the Regulations are inapplicable to expenditures made in connection with initiative measures; and (3) that if construed as applicable to the facts here presented the Regulations are invalid as contrary to the plain terms of § 23(a) (1)(A) of the 1939 Code and possibly as unconstitutional under the First Amendment.

We need not be long detained by the question of the applicability of the Regulations to petitioners' expenditures. First, we see no justification for reading into these regulatory provisions the implied exceptions which petitioners would have us there find. We cannot accept petitioners' argument that *Textile Mills* should be read as limiting such provisions to direct dealings with legislators, insidious or otherwise. The deductions whose propriety was before the Court in that case were for expenditures, characterized by the Court of Appeals as being for 'matters of publicity, 'including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items,' and for the preparation of 'brochures' involving 'a comprehensive study of the history of the treatment of persons and property in war,' 3 Cir., 117 F.2d 62, 65, 63, all designed to influence the opinions of the general public.⁷ Apart from *Textile Mills*, the Courts of Appeals have uniformly applied these Regulations to expenditures for publicity directed to the general public on legislative matters. See e.g., *Revere Racing Ass'n v. Scanlon*, 1 Cir.[1956] USCA1 45; , 232 F.2d 816; *American Hardware & Equipment Co. v. Commissioner of Internal Revenue*, 4 Cir.[1953] USCA4 40; , 202 F.2d 126; *Roberts Dairy Co. v. Commissioner of Internal Revenue*, 8 Cir.[1952] USCA8 54; , 195 F.2d 948; *Sunset Scavenger Co. v. Commissioner of Internal Revenue*, 9 Cir., 84 F.2d 453. Petitioners' reading of these Regulations would make all but the reference to 'lobbying' pure surplusage. We think that the Regulations must be construed to mean what they say—that not only lobbying expenses, but also sums spent for 'the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising' are nondeductible.

Likewise unpersuasive is petitioners' suggested distinction between expenses incurred in attempting to promote or defeat legislation pending before legislatures and those incurred in furthering or combatting an initiative measure. We think that initiatives are plainly 'legislation' within the meaning of these Regulations. Had the measures involved in these cases been passed by the people of Washington and Arkansas they would have had the effect and status of ordinary laws in every respect. The Constitutions of the States of Washington and Arkansas both explicitly recognize that in providing for initiatives they are vesting legislative power in the people.⁹ Every court which has considered the question has found these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation. See *Revere Racing Ass'n v. Scanlon*, supra; *Old Mission Portland Cement Co. v. Commissioner of Internal Revenue*, 9 Cir., 69 F.2d 676, affirmed on other issues [1934] USSC 176; , 293 U.S. 289, 55 S.Ct. 158, 79 L.Ed. 367; *Mosby Hotel Co. v. Commissioner*, decided October 22, 1954, P—H 1954 TC Mem.Dec. 54,288; *McClintock-Trunkey Co. v. Commissioner of Internal Revenue*, 19 T.C. 297, reversed on other issues, 9 Cir.[1954] USCA9 352; , 217 F.2d 329 (involving payments, like those of petitioners Cammarano, made to the Washington Beer Wholesalers Association in connection with 'Initiative to the Legislature No. 13').

A contrary reading of the Regulations would, indeed, be anomalous, for it would mean that expenses of publicity campaigns directed to the public to influence it in turn to persuade its legislative representatives to vote for or against pending bills would be encompassed by the Regulations and denied deductibility, whereas a less diluted form of persuasion and influence, directed to the voters as legislators, would be left at large so far as the Regulations are concerned. We see no reason to give so artificial and strained a construction to the pertinent language.

The cornerstone of petitioners' argument is that *Treas.Reg.* 111, § 29.23(o)—1 and § 29.23(q)—1 are invalid if interpreted to apply to the expenditures here at issue. It is contended that sums expended by a taxpayer to preserve his business from destruction are deductible as ordinary and necessary business expenses under the Code as a matter of law, and that therefore a regulation purporting to deny deductibility to such expenditures is plainly contrary to the statute and ipso facto invalid. Petitioners rely upon *Commissioner of Internal Revenue v. Heininger*, [1943] USSC 167; 320 U.S. 467, 64 S.Ct. 249, 88 L.Ed. 171, where this Court held that attorney's fees incurred by a mail-order dentist in resisting a postal fraud charge which would have ended his business were deductible as an ordinary and necessary business expense.

We do not think that *Heininger* governs the present cases, nor that it establishes as broad a rule of law as petitioners suggest. In *Heininger* this Court held no more than that expenditures without which a business enterprise would inevitably suffer adverse effects, and the granting of deductibility to which would frustrate no 'sharply defined national or state policies,' 320 U.S., at page 473, 64 S.Ct. at page 253 (see also *Commissioner of Internal Revenue v. Sullivan*, [1958] USSC 50; 356 U.S. 27, 78 S.Ct. 512, 2 L.Ed.2d 559), were deductible as ordinary and necessary business expenses under the statute.¹¹ Here the deductions sought are prohibited by Regulations which themselves constitute an expression of a sharply defined national policy, further demonstration of which may be found in other sections of the Internal Revenue Code.

As was said in *Textile Mills*, 'the words 'ordinary and necessary' are not so clear and unambiguous in

their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that.' 314 U.S., at page 338, 62 S.Ct. at page 279. In the present cases there is before us regulatory language of more than 40 years' continuous duration expressly providing that sums expended for the activities here involved shall not be considered an ordinary and necessary business expense under the statute. The provisions of the Internal Revenue Code which underlie the Regulations have been repeatedly re-enacted by the Congress without the slightest suggestion that the policy expressed in these regulatory measures does other than precisely conform to its intent.

In 1934 the Court of Appeals for the Ninth Circuit denied deduction to expenses incurred in connection with a referendum which would, if passed, have increased the taxpayer's business. *Old Mission Portland Cement Co. v. Commissioner of Internal Revenue*, supra.¹⁴ And in 1936 the same court in *Sunset Scavenger Co. v. Commissioner of Internal Revenue*, supra, reversed the Board of Tax Appeals to hold that the regulatory language now before us, through repeated re-enactment by Congress of the underlying legislation, already had acquired the force of law, and applied it to deny deductibility to expenditures made by an incorporated association of garbage collectors for a publicity program directed to the general public urging the defeat of legislation which would have injured the business of the Association's membership. The court recognized that the Board of Tax Appeals had twice previously held similar expenditures deductible so long as not made for an illegal purpose,¹⁵ but pointed out that in both of those cases the effect of the Regulation had been entirely disregarded, and that they were therefore not sound authority. Three years later the Congress, in the face of these decisions, again re-enacted without change in the 1939 Code the 'ordinary and necessary' business expense section.

It is also noteworthy that Congress, in its 1954 re-enactment of the Internal Revenue Code, again adopted the 'ordinary and necessary' provision without substantive change,¹⁶ following consistent rulings by the courts subsequent to the 1939 re-enactment holding these Regulations applicable to sums spent in efforts to persuade the general public of the desirability or undesirability of proposed legislation affecting the taxpayer's business. See *Textile Mills; American Hardware & Equipment Co. v. Commissioner of Internal Revenue*, supra; *Roberts Dairy Co. v. Commissioner of Internal Revenue*, supra; *McClintock-Trunkey Co. v. Commissioner of Internal Revenue*, supra. Although the tax years involved in the cases before us are 1948 and 1950, and a 1954 re-enactment of course cannot conclusively demonstrate the propriety of an administrative and judicial interpretation and application as made to transactions occurring before the re-enactment, the 1954 action of Congress is significant as indicating satisfaction with the interpretation consistently given the statute by the Regulations here at issue and in demonstrating its prior intent. Cf. *United States v. Stafoff*, [1923] USSC 17; 260 U.S. 477, 480[1923] USSC 17; , 43 S.Ct. 197, 199[1923] USSC 17; , 67 L.Ed. 358.

Under these circumstances we think that the Regulations have acquired the force of law. This is not a case where the Government seeks to cloak an interpretative regulation with immunity from judicial examination as to conformity with the statute on which it is based simply because Congress has for some period failed affirmatively to act to change the interpretation which the regulation gives to an otherwise unambiguous statute. Cf. *Jones v. Liberty Glass Co.*, [1948] USSC 29; 332 U.S. 524, 68 S.Ct. 229, 92 L.Ed. 142. Nor is it a case where no reliable inference as to Congress' intent can be drawn from re-enactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of its re-enactment. Cf. *Commissioner of Internal*

Revenue v. Glenshaw Glass Co., [1955] USSC 43; 348 U.S. 426, 431[1955] USSC 43; , 75 S.Ct. 473, 476[1955] USSC 43; , 99 L.Ed. 483. Here we have unambiguous regulatory language, adopted by the Commissioner in the early days of federal income tax legislation, in continuous existence since that time, and consistently construed and applied by the courts on many occasions to deny deduction of sums expended in efforts to persuade the electorate,¹⁷ even when a clear business motive for the expenditure has been demonstrated.

In these circumstances we consider that what was said in *Massachusetts Mutual Life Ins. Co. v. United States*, [1933] USSC 29; 288 U.S. 269, 273[1933] USSC 29; , 53 S.Ct. 337, 339[1933] USSC 29; , 77 L.Ed. 739, applies here:

'This action (of Congress in re-enacting a statute) was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous, it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (citations) unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. (citation).'

This Court has heretofore recognized that the 'ordinary and necessary' language of the Code is hardly unambiguous, see *Textile Mills Securities Corporation v. Commissioner of Internal Revenue*, supra, and we cannot say that these Regulations are clearly, or even apparently, inconsistent with it. Cf. *Trust of Bingham v. Commissioner of Internal Revenue*, [1945] USSC 104; 325 U.S. 365, 65 S.Ct. 1232, 89 L.Ed. 1670.

The statutory policy is further evidenced by the treatment given by Congress to the tax status of organizations, otherwise qualified for exemption as organized exclusively for 'religious, charitable, scientific, literary or educational purposes,' which engage in activities designed to promote or defeat legislation. As early as 1934 Congress amended the Code expressly to provide that no tax exemption should be given to organizations, otherwise qualifying, a substantial part of the activities of which 'is carrying on propaganda, or otherwise attempting, to influence legislation,' and that deductibility should be denied to contributions by individuals to such organizations. Revenue Act of 1934, §§ 101(6), 23(o)(2), 48 Stat. 700, 690. And a year thereafter, when the Code was for the first time amended to permit corporations to deduct certain contributions not qualifying as 'ordinary and necessary' business expenses, an identical limitation was imposed. Revenue Act of 1935, § 102(c), 49 Stat. 1016. These limitations, carried over into the 1939 and 1954 Codes,¹⁹ made explicit the conclusion derived by Judge Learned Hand in 1930 that 'political agitation as such is outside the statute, however innocent the aim * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.' *Slee v. Commissioner of Internal Revenue*, 2 Cir., 42 F.2d 184, 185, 72 A.L.R. 400. The Regulations here contested appear to us to be but a further expression of the same sharply defined policy.

Petitioners suggest that if the Regulations are construed to deny them deduction, a substantial constitutional issue under the First Amendment is presented. They rely upon *Speiser v. Randall*, [1958] USSC 154; 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, where a California statute, Wests' Ann.Rev. & Tax.Code, § 32 requiring the taking of a loyalty oath as a condition of property tax exemption was struck down on grounds of procedural due process. This contention, made by neither petitioner below, is without merit. *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are

simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas." 357 U.S., at page 519, 78 S.Ct. at page 1338. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

Affirmed.

Mr. Justice DOUGLAS (concurring).

Valentine v. Chrestensen, [1942] USSC 80; 316 U.S. 52, 54[1942] USSC 80; , 62 S.Ct. 920, 921[1942] USSC 80; , 86 L.Ed. 1262, held that business advertisements and commercial matters* did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection. That 'freedom of speech or of the press,' directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment, as Thornhill v. State of Alabama, [1942] USSC 81; 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, which placed picketing within the ambit of the First Amendment, teaches. And see Newell v. Chauffeurs, Teamsters & Helpers Local Union 795, 181 Kan. 898, 317 P.2d 817, 182 Kan. 205, 319 P.2d 171, reversed, 356 U.S. 341, 78 S.Ct. 779, 2 L.Ed.2d 809. A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. We held as much in Follett v. Town of McCormick, [1944] USSC 50; 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938. And I find it difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means. Chief Justice Hughes speaking for the Court in Lovell v. City of Griffin, [1938] USSC 81; 303 U.S. 444, 452[1938] USSC 81; , 58 S.Ct. 666, 669[1938] USSC 81; , 82 L.Ed. 949, defined the First Amendment right with which we now deal in the broadest terms, 'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' And see Jamison v. State of Texas, [1943] USSC 61; 318 U.S. 413, 416[1943] USSC 61; , 63 S.Ct. 669, 671[1943] USSC 61; , 87 L.Ed. 869; Martin v. City of Struthers, Ohio, [1943] USSC 90; 319 U.S. 141, 143[1943] USSC 90; , 63 S.Ct. 862, 863[1943] USSC 90; , 87 L.Ed. 1313; Burstyn, Inc. v. Wilson, [1952] USSC 66; 343 U.S. 495, 501—502[1952] USSC 66; , 72 S.Ct. 777, 780[1952] USSC 66; , 96 L.Ed. 1098.

In spite of the overtones of Valentine v. Chrestensen, supra, I find it impossible to say that the owners of the present business who were fighting for their lives in opposing these initiative measures were not exercising First Amendment rights. If Congress had gone so far as to deny all deductions for 'ordinary and necessary business expenses' if a taxpayer spent money to promote or

oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser v. Randall*, [1958] USSC 154; 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460. 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.' *Id.*, 357 U.S. at page 518, 78 S.Ct. at page 1338. Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right. *Commissioner of Internal Revenue v. Sullivan*, [1958] USSC 50; 356 U.S. 27, 78 S.Ct. 512, 2 L.Ed.2d 559. To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions (*Grosjean v. American Press Co.*[1936] USSC 33; , 297 U.S. 233, 250[1936] USSC 33; , 56 S.Ct. 444, 449[1936] USSC 33; , 80 L.Ed. 660; *Murdock v. Commonwealth of Pennsylvania*, [1943] USSC 91; 319 U.S. 105, 112[1943] USSC 91; , 63 S.Ct. 870, 874[1943] USSC 91; , 87 L.Ed. 1292; *Follett v. Town of McCormick*, *supra*, 321 U.S. at page 578, 64 S.Ct. at page 719), and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. See *People of State of Ill. ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill.*[1948] USSC 27; , 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649.

With this addendum, I concur in the opinion of the Court.