

not taxable. Benefit payments are considered in part a return of previously taxed contributions, which are not taxed, and in part a payment from contributions of the employer and the earnings of the pension fund, which are taxable.

Assistant Secretary of the Treasury Stanley Surrey holds that this tax treatment results in a loss of Federal revenue of between \$1.4 and \$3.8 billion, depending on how one reckons the taxable nature of the payments, but estimated roundly at \$3 billion. He holds that the payments by employers do not meet the general requirements for deductibility; there must be a fixed liability on the employer to make a fixed payment to a definite person. The mere possibility that the employer may in the future have to provide his workers with a pension and that he is recognizing that obligation with a payment into a pension fund is not sufficient under the general principles of tax law to permit a deduction by the employer. Further, he notes, if the contribution is vested for the employee, general tax principles would hold that he has received taxable income (12, pp. 412-417).

The sums cited by Surrey are significant and would appear to contribute to income maintenance for the aged. But, since benefits are taxable to the extent not previously taxed, the tax savings must accrue from some source other than the partial exemption of benefits. It is the exemption from present tax accorded to contributions by employers and the exemption of earnings of pension funds that are considered tax favor. Yet two arguments may be offered to support the present treatment: one on the basis of definition of income and one on the basis of comparison with the treatment of similar payments.

Payments by employers into a pension fund are customarily required by an agreement between employer and employees. These payments cannot be recaptured by the employer until all obligations of the fund are met. The payments would appear then to be legitimate costs of doing business, paid to the fund and properly deductible to the employer, although Surrey holds that these conditions are not sufficient.

Payments by employers into the OASDHI fund are similar in all relevant respects except that they are required by law while pension plan contributions arise from employer-employee negotiations. If it is feared that employers will abuse this relationship by contributing and deducting more than is necessary to fund the obligations and later recovering these funds, penalties equal to the value of the tax postponement could be levied. If abuses can be handled as they develop, similar tax treatment of the employer contributions to the two funds would seem appropriate. Nowhere does anyone seem to have questioned the deductibility of the employer contribution to OASDHI.

Surrey holds out the possibility that employer contributions could be held deductible for the employer but considered as income to the employee, but, that this treatment would apply only where the employee receives a vested interest in the fund. Where the employee has no vested interest, he cannot be held to have received anything of value for his consumption or increased net worth and so he should not be taxed.

This treatment seems to misconstrue the meaning of the term "vested." Vesting does not customarily mean that the employee is assured of a payment from the fund. It does mean that even though he leaves his present employer, he will be eligible for a retirement