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Treasury Department : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

Cumulative Bulletin XIII-1

JANUARY-JUNE 1934

SPECIAL ATTENTION is directed to the cautionary notice on this page that published rulings of the Bureau do not have the force and effect of Treasury Decisions and that they are applicable only to facts presented in the published case

Treasury Department : : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

Cumulative Bulletin XIII-1

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The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury. Each ruling embodies the administrative application of the law and Treasury Decisions to the entire state of facts upon which a particular case rests. It is especially to be noted that the same result will not necessarily be reached in another case unless all the material facts are identical with those of the reported case. As it is not always feasible to publish a complete statement of the facts underlying each ruling, there can be no assurance that any new case is identical with the reported case. As bearing out this distinction, it may be observed that the rulings published from time to time may appear to reverse rulings previously published.

Officers of the Bureau of Internal Revenue are especially cautioned against reaching a conclusion in any case merely on the basis of similarity to a published ruling, and should base their judgment on the application of all pertinent provisions of the law and Treasury Decisions to all the facts in each case. These rulings should be used as aids in studying the law and its formal construction as made in the regulations and Treasury Decisions previously issued.

In addition to publishing all Internal Revenue Treasury Decisions, it is the policy of the Bureau of Internal Revenue to publish all rulings and decisions, including opinions of the General Counsel for the Bureau of Internal Revenue, which, because they announce a ruling or decision upon a novel question or upon a question in regard to which there exists no previously published ruling or decision, or for other reasons, are of such importance as to be of general interest. It is also the policy of the Bureau to publish all rulings or decisions which revoke, modify, amend, or affect in any manner whatever any published ruling or decision. In many instances opinions of the General Counsel for the Bureau of Internal Revenue are not of general interest because they announce no new ruling or no new construction of the revenue laws but simply apply rulings already made public to certain situations of fact which are without special significance. It is not the policy of the Bureau to publish such opinions. Therefore, the numbers assigned to the published opinions of the General Counsel for the Bureau of Internal Revenue are not consecutive. No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau of Internal Revenue as a precedent in the disposition of other cases. Unless otherwise specifically indicated, all published rulings and decisions have received the consideration and approval of the General Counsel for the Bureau of Internal Revenue.

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON : 1934

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The Internal Revenue Bulletin service for 1934 will consist of weekly bulletins and semiannual cumulative bulletins.

The weekly bulletins will contain the rulings and decisions to be made public and all Treasury Department decisions (known as Treasury decisions) pertaining to Internal Revenue matters. The semiannual cumulative bulletins will contain all rulings and decisions (including Treasury decisions) published during the previous six months.

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Digest A (income tax rulings only, April, 1919, to December, 1930, inclusive)	$1.50

All inquiries in regard to these publications and subscriptions should be sent to the Superintendent of Documents, Government Printing Office, Washington, D. C.

INTRODUCTORY NOTES.

The Internal Revenue Cumulative Bulletin XIII-1, in addition to all decisions of the Treasury Department (called Treasury decisions) pertaining to Internal Revenue matters, contains General Counsel's opinions, and rulings and decisions pertaining to income, estate, gift, sales, capital stock, and miscellaneous taxes, as indicated on the title page of this Bulletin, published in the weekly Bulletins (Volume XIII-1, Nos. 1 to 26, inclusive) for the period January 1 to June 30, 1934. It also contains a cumulative list of announcements relating to decisions of the United States Board of Tax Appeals published in the Internal Revenue Bulletin Service from January 1, 1932, to June 30, 1934.

Income Tax rulings are printed in three parts. Rulings under the Revenue Act of 1932 are published as Part I, the section headings corresponding with the sections of that law and the article headings corresponding with the article headings of Regulations 77. Rulings under the Revenue Act of 1928 are published as Part II, the section and article headings corresponding with the section and article headings of the Revenue Act of 1928 and Regulations 74. Rulings under the Revenue Act of 1926 and prior Acts are printed as Part III, the section and article headings corresponding with the section and article headings of the Revenue Act of 1926 and Regulations 69.

ABBREVIATIONS.

The following abbreviations are used throughout the Bulletin:

A, B, C, etc.—The names of individuals.
A. R. M.—Committee on Appeals and Review memorandum.
A. R. R.—Committee on Appeals and Review recommendation.
B. T. A.—Board of Tax Appeals.
C. B.—Cumulative Bulletin.
Ct. D.—Court decision.
C. S. T.—Capital Stock Tax Division.
D. C.—Treasury Department circular.
E. T.—Estate Tax Division.
G. C. M.—General Counsel's memorandum.
I. T.—Income Tax Unit.
M, N, X, Y, Z, etc.—The names of corporations, places, or businesses, according to content.
Mim.—Mimeographed letter.
MS.—Miscellaneous Division.
O. or L. O.—Solicitor's law opinion.
O. D.—Office decision.
Op. A. G.—Opinion of the Attorney General.
P. T.—Processing tax decision.
S. T.—Sales Tax Division.
S. M.—Solicitor's memorandum.
Sol. Op.—Solicitor's opinion.
S. R.—Solicitor's recommendation.
T.—Tobacco Division.

T. B. M.—Advisory Tax Board memorandum.
T. B. R.—Advisory Tax Board recommendation.
T. D.—Treasury decision.
x and *y* are used to represent certain numbers, and when used with the word "dollars" represent sums of money.

The practice of promulgating Treasury Decisions that embody court decisions relating to the internal revenue has been discontinued. Hereafter opinions of the courts, with appropriate headnotes for the information and guidance of taxpayers and officers and employees of the Bureau of Internal Revenue, will be published in the Internal Revenue Bulletin without formal approval and promulgation by the Secretary of the Treasury.

ANNOUNCEMENT RELATING TO BOARD OF TAX APPEALS DECISIONS.

Under the provisions of the recent Revenue Acts, relating to appeals to the Board of Tax Appeals, the Commissioner may acquiesce in the decision of the Board or he may, if the appeal was heard by the Board prior to the passage of the 1926 Act, cause to be instituted a proceeding in court for the collection of any part of a tax determined by the Commissioner to be due but disallowed by the Board, provided that such proceeding is commenced within one year after final decision of the Board. As to appeals heard by the Board after the passage of the 1926 Act, the Commissioner may, within six months after the Board's decision is rendered, file a petition for a review of the decision by a Circuit Court of Appeals or by the Court of Appeals of the District of Columbia; however, as to decisions rendered on and after June 7, 1932, petitions for review must be filed within three months after the decision is rendered. In order that taxpayers and the general public may be informed as to whether or not the Commissioner has acquiesced in a decision of the Board of Tax Appeals disallowing a tax determined by the Commissioner to be due, announcement will be made in the weekly Bulletin at the earliest practicable date. A notice that the Commissioner has acquiesced or has nonacquiesced in a Board decision relates, however, only to the issue or issues decided in favor of the taxpayer. Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases before the Bureau.

For additional information which will be of assistance in the use of the Internal Revenue Bulletin service read the Introductory Notes to the latest Digest.

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726	XIII-9-6681	431
727	XIII-12-6711	447
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733	XIII-15-6745	379
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149	XIII-15-6750	546
150	XIII-19-6789	547
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3	XIII-7-6655	449
4	XIII-8-6667	452
5	XIII-10-6690	455
6	XIII-11-6700	450
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10	XIII-23-6837	453
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4120	XIII-2-6596	535
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BOARD OF TAX APPEALS.

CUMULATIVE LIST OF ANNOUNCEMENTS RELATING TO DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS PUBLISHED IN THE INTERNAL REVENUE BULLETIN SERVICE FROM JANUARY 1, 1932, TO JUNE 30, 1934, INCLUSIVE.

[Announcements relating to the acquiescence or nonacquiescence of the Commissioner in decisions of the United States Board of Tax Appeals, as published in the weekly Internal Revenue Bulletin, from December 22, 1924, to December 31, 1931, inclusive, are printed in Cumulative Bulletin X-2, pages 1-106. The list below, therefore, contains only such announcements published in the weekly Bulletins from January 1, 1932, to June 30, 1934, inclusive.]

[a] XIII-26-6864

The Commissioner acquiesces in the following decisions of the United States Board of Tax Appeals:

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
A.			
Abeles, Charles T	40546	24	435
Abeles, Clifford	37695	24	435
Abeles, Francis, estate of	37693	24	435
Abeles, John T	37694	24	435
Abeles, Katherine	37696	24	435
Abeles, Williemene H	41034	24	435
Acme Manifolding Co., Inc	25194 38687	24	429
Adelaide Park Land et al., trustees	39980	25	211
Afremow, David, estate of	39593	25	1246
Afremow, Sarah, executrix	39593	25	1246
Alabama Mineral Land Co	56960 69007	28	586
Albert Lea Packing Co., Inc	20765	24	376
Albrecht et al., Katherine B., executrices [1]	41295	27	1091
Alcoma Corporation	60700	28	1291
Alexander, J. F., estate of	39019	27	1210
Allen, Irene C	25414	25	834
Allied American Corporation	31704	25	1276
Ambassador Petroleum Co	40039	28	868
American Cigar Co	16229	21	464
American Feature Film Co	27623	24	18
American Printing Co	39721	27	1270
American Security & Trust Co. et al., executors [2]	39167	24	334
Anderson, C. K	33242	27	1305

[1] Estate tax decision; acquiescence relates to deduction of $133,000.
[2] Estate tax decision.

[a] Ruling No. 6864 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service from January 1, 1932, to June 30, 1934.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Board of Tax Appeals. Page.
Anderson, Gustave	36224	26	1208
Ann Arbor R. R. Co	25869	29	331
Arnold & Winsor Co	61553	29	670
Ashforth, Albert B., estate of [1]	47190 48009 49354	26	1188
Ashforth et al., Mabel A., executors [1]	47190 48009 49354	26	1188
Atkins, J. B., estate of	38520	28	500
Atkins, Mrs. J. B	38519	28	500
B.			
Baldwin, Florence G	32387	23	512
Balfour, Sir Robert	40230	25	154
Ball, Philip D. C	36737	27	388
Baltimore & Ohio R. R. Co	53702	29	368
Bankers Dairy Credit Corporation	48329	26	886
Barber, Arthur	26747	25	513
Barber, Philip C	26755	25	513
Barber, St. George	26757	25	513
Barber Trusts, Sarah P	26747–26757	25	513
Barclay, W. L	8743	26	970
Barker, Fred	51102	28	657
Basch, N. J	45928	30	305
B & B Ice & Coal Co	67637	27	1346
Beaumont, Louis D	31931 46569 49422	25	474
Bebb, Richard E., estate of [2]	41295	27	1091
Beggs, John I. (Trusts)	65675	30	370
Bell, Ivor B.[3]	22335	27	377
Bellows Falls Power Co	18592 29104	25	195
Benedum, M. L.[4]	30990	28	917
Bent Co., R. G	57312 59796	26	1369
Bernstein, Isaac M	36729	28	744
Best, Frank E	36746	26	1070
Billups, George W	54917	29	804
Bingham, Robert W	51051	27	186
Birdneck Realty Corporation	46079	25	1084
Biscayne Bay Islands Co	27616 35098 40147	23	731
Bloodgood, Edith B	26750	25	513
Blum, Julius, trustee	39242 40939 45741 51507	25	119
Blumenthal, Lucy A	64975	30	591
Boehringer, Rudolph [5]	49891	29	8

[1] Nonacquiescence published in Bulletin XII–1, page 1, withdrawn.
[2] Estate tax decision; acquiescence relates to deduction of $133,000.
[3] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[4] Acquiescence relates to right of overriding royalty owners to benefit of section 211(b), Revenue Act of 1918.
[5] Acquiescence relates to issue involving section 115(g) of the Revenue Act of 1928.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Boos Bros. Cafeteria Co	39200	25	651
Borg & Beck Co	24223 34964	24	995
Bowden, Paul Akers	54923	26	1410
Brinton, Lillian McDonald	53715	28	472
Brown, Berenice	24667 36637	25	814
Bryan et ux., C. A	24036	19	111
Bryan et ux., L. J	24037	19	111
Buck, John A., estate of [1]	32584 44153 44684	25	780
Buck et al., Mary M., executors [1]	32584 44153 44684	25	780
Buena Vista Land & Development Co	2025	13	895
Buffalo Union Iron Furnace Co.[2]	16075 16076	23	439
Bullock, George [3]	31209	23	710
Burdick, Ella P., trustee	46322	29	731
Burdick, Joel W., estate of	46322 61009	29	731
Burnham, Silas H	53795	29	605
Burroughs, Ambrose H., estate of	59797	29	190
Burton, Benjamin T	61055	28	1241
Butler, U. H	46055	24	506
C.			
California Coast Oil Co	25018	25	902
Camp Manufacturing Co	35955	25	537
Canaday, Inc., Ward M	58632	29	355
Canning, John F	41482	29	99
Carman, F. J	44321 44939 50178	25	162
Carnie, Goudie Manufacturing Co	20074 27095	24	679
Carter Publications, Inc	44838 66891	28	160
Cathey, George	46056	24	506
Cathey, Luke	46057	24	506
Catlin, Daniel K	25421	25	834
Catlin, Theron E	25413	25	834
Central Market Street Co.[4]	24837	25	499
Central National Bank	42587	29	530
Central National Bank, trustee	28701	25	1123
Central Rendering Corporation	20776	24	376
Central Trust & Savings Bank	42588	29	530
Champion, David J.[5]	55569 63818	27	1312
Champion, T. Pierre [5]	55568	27	1312

[1] Estate tax decision; acquiescence relates to value of certain real estate in San Francisco and value of stock of Langendorf Baking Co. for estate tax purposes; and reasonableness of Commissioner's allowance for support of the widow.
[2] Acquiescence relates to issue regarding deductions for obsolescence of blast furnaces.
[3] Acquiescence relates to issue 2 of decision.
[4] Acquiescence relates to issue regarding apportionment of taxes among affiliated corporations.
[5] Acquiescence relates to basis upon which gain or loss upon redemption of stock should be computed.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Chapman & Dewey Land Co	37403 51059	25	1166
Chapman & Dewey Lumber Co	33466 37402 47130 50196 51058	25	1166
Chicago & Northwestern Ry. Co.[1]	36343	22	1407
Christopher, Rachel S.[2]	47704	26	292
City Bank Farmers Trust Co., executor	59797	29	190
City Bank Farmers Trust Co. et al., executors [2]	31869	23	663
Clark et al., James, executors	34499	24	1235
Cleland Estate Co., Inc., Henry A.[3]	33585 40890 51197	29	436
Clements, W. L	46058	24	506
Cleveland Trinidad Paving Co.[4]	41962 46297	20	772
Clinchfield Securities Co	40554	25	446
Clinton Cotton Mills, Inc	54880	28	1311
Coats, Inc. (R. I.), J. & P.[5]	38904	28	1127
Cochrane, David K	60428	26	1167
Colgate, Mary	61882	27	506
Colorado & Utah Coal Co	53799	26	588
Columbian Carbon Co.[6]	42743	25	456
Columbus Brick & Tile Co.[7]	42707	26	794
Commercial Investment Trust Corporation [8]	43495 50051	28	143
Connecticut River Power Co	18591 29106	25	195
Contractors Construction & Supply Co.[4]	41963	20	772
Cook, Elizabeth E.[9]	38579	25	1351
Cook, M. M., estate of	53044	27	33
Cooke, Beatrice B	26751	25	513
Coombs, Elizabeth M	44768	25	1320
Coombs, J. Howard	44769	25	1320
Cooper, John I	32610 40115	24	216
Corbett, Elliott R	40926	27	388
Corning Trust Co., trustee	29252	26	1359
Cornwell, F. L	30303	24	915
Costello, Joseph [10]	22640	27	377
Cotton, G. E	59655	25	866
Couchman, William Venning	67729 70957	30	118

[1] Acquiescence relates to following issues: Material and supplies adjustment; amortization of bond premium; assessment of association of railway executives; railroad Y. M. C. A.

[2] Estate tax decision.

[3] Acquiescence does not relate to basis of property devised subject to a life estate.

[4] Nonacquiescence notice published in Cumulative Bulletin X-2, pages 83 and 84, revoked

[5] Acquiescence relates to contributions issue and issue respecting deduction of amount paid to treasurer of Rhode Island on account of increasing capital stock.

[6] Nonacquiescence published in Bulletin XI-14, page 1, revoked.

[7] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc.

[8] Acquiescence relates to the following issues: Deduction of expenses in connection with issuance of preferred stock; deduction for dividends credited to accounts of employees for purchase of stock.

[9] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.

[10] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

ACQUIESCENCES—Continued.

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		Volume.	Page.
Croker, Bula E	41121	27	588
Cromwell et al., William Nelson, executors [1]	42619	24	461
Crouse, George N	43446 51419	26	477
Crowley, Joseph J., estate of [2]	35472	25	340
Crowninshield Shipbuilding Co	18987	24	925
Culver, Wilmer T	37574	24	1013
Cunard Coal Co. [3]	26874 26875 28792	26	234
Curtis, Laura M	56314	28	631
D.			
Dahl, Andrew H., estate of	44845	24	1167
Dahl et al., Julia, executors	44845	24	1167
Daley, Eugene S., executor	26645	25	949
Dana, Myer	50248	30	83
Davis, John A	20703	24	36
De Forest, Kate R. [4]	37284	27	373
Delaware & Hudson Co. [5]	50553 50629	26	520
Dennett, Carl P. [6]	71858	30	49
Dennett, Marie G. [6]	72023	30	49
Dennis, Frank H., estate of [2]	50263	26	1120
Dennis, Merry M., executrix [2]	50263	26	1120
Detroit Trust Co. et al., executors [2]	35472	25	340
Dickinson, Albert G	35015 43176	23	1211
Dirksen, Anna L., executrix	17717	24	1152
Dirksen, Theodore H., estate of	17717	24	1152
Dome Co	41887	26	967
Dominion National Bank	52165	26	421
Douglas Co., John	38726	23	1307
Drexel Packing Co	20775	24	376
Duff, Robert C. [7]	37552	23	1342
Dunham, Walter E	66308	27	1068
Dunne, Finley Peter	54444	29	1109
E.			
Eagle Pass & Piedras Negras Bridge Co	42460	23	1337
Easterwood, Jr., W. E	40181 63416	28	1283
Easterwood, Jr., Mrs. W. E	40182 63417	28	1283
Eisendrath, Edwin W	36726	28	744
Eisendrath et al., Edwin W., executors	36724	28	744
Eisendrath, Marion	36727	28	744
Eisendrath et al., Rose L., trustees	36728	28	744
Eisendrath, William B	36725	28	744
Eisendrath, William N., estate of	36724	28	744

[1] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2, page 84, revoked.
[2] Estate tax decision
[3] Acquiescence relates to deductions for additional royalties and officers' salaries and directors' fees.
[4] Gift tax decision.
[5] Nonacquiescence published in Cumulative Bulletin XI-2, page 12, withdrawn.
[6] Acquiescence relates to deductibility of losses sustained by petitioners upon alleged sales of stock to each other during the tax year.
[7] Acquiescence relates to issue 1 of decision.

ACQUIESCENCES—Continued.

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		Volume.	Page.
Elkins, Hallie D.[1]	39255	24	572
Elliott-Granite Linen Corporation	48212	26	936
Elmore Milling Co	46768 52972	27	84
Emery, Mary M., estate of [1]	40899	25	585
Enameled Metals Co	19011	25	186
Ennis Ice Co	22021 22022 26259 42184	24	40
Erb et al., Ray L., executors [2]	29260	29	1350
Evans et al., Anson, trustees	62664	29	710
Evans Products Co	43044	29	992
Evergreen Cemetery Association	30726	25	544
F.			
Falck, Alexander D	20452	26	1359
Falls City Ice & Beverage Co	67636	27	1346
Fame Canning Co	20774	24	376
Farmers Life Insurance Co.[3]	43317	27	423
Farmers' Loan & Trust Co., trustee	29465	26	1359
Federal Street & Pleasant Valley Passenger Ry. Co	29758	24	262
Fidelity Savings & Loan Association	14862 31801 39406 45215	23	1059
First National Bank of Boston, administrator	36438 46583	25	252
First National Bank of Key West	45186	26	370
Fitch, Florence H	51670	29	1299
Florence Manufacturing Co	15383 26079	25	676
Folk, H. B	28396 31018	25	599
Forest Products Chemical Co	46621	27	638
Forres, Lord	40229 43973	25	154
Foster, L. B.[4]	43086	26	1328
Foster, N. C., estate of [5]	32984	25	414
Foster et al., Willard, executor [5]	32984	25	414
Fox, Fontaine [6]	71084	30	451
Frank, Emil	50224	27	1158
Frischkorn Development Co	30496 35170 42452	30	8
G.			
Gambill, A. A	47902	26	995
Gamble & Stockton Co.[7]	42707	26	794
Gardner, Charles E.[8]	38575	25	1351
Garron et al., Isabel K. J., executors [5]	47705	26	292

[1] Nonacquiescence published in Cumulative Bulletin XI-1, page 9, revoked.
[2] Acquiescence relates to market value of oil and gas leases on March 1, 1913.
[3] Acquiescence relates to issue in connection with option payment received for purchase of land.
[4] Acquiescence relates to issue regarding filing of separate return for 1925.
[5] Estate tax decision.
[6] Acquiescence relates to deduction for depre iation on premises; and inclusion in year 1930 in petitioner Fox's income, $7,400 representing rental value of premises occupied by him.
[7] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc
[8] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.

ACQUIESCENCES—Continued.

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George Machinery Co., R. B	61218	26	594
Gibbs, G. Wildy	31329	28	18
Ginsberg, Albert A	27628	24	18
Ginsberg, Nathan A	27629	24	18
Globe Construction Co	43438, 51694, 53310	25	146
Golden, Edward A	27625	24	18
Goldman, Maxwell	30302	24	915
Goldsmith, Max	59722	29	804
Gordon, Alfred W	57483	29	275
Gordon, Kizzie [1]	22332	27	377
Gordon, Max L.[1]	22333	27	377
Gottlieb Realty Co	42528	28	418
Graeper, W. A	46619	27	632
Grand River Gravel Co	23085	22	1124
Green, Robert D.[2]	53647	24	719
Green, W. S	43786, 46373, 63487	26	1017
Grey Bull Corporation	47376	27	853
Griffis, Stanton [3]	38577	25	1351
Griffiths, George W	42498	25	1292
Griffiths, John	43074	25	1292
Guaranty Building & Loan Co	55352	27	754
Gulf Coast Irrigation Co.[4]	33694, 40081, 41343	24	958
Gurnee, Augustus Coe, estate of [5]	42619	24	461
H.			
Haberland, Paul	29289	25	1370
Hailey-Ola Coal Co	30962	24	895
Halladay, Sarah P	26754	25	513
Hamburg, Jr., Sam	30304	24	915
Hanscom, Edward E., estate of [6]	44992	24	173
Hanscom et al., Melville, executors [6]	44992	24	173
Harbeson Lumber Co., W. B	33076, 51012	24	542
Harbison, Ralph W	54346	26	896
Harbison, William Albert	54347	26	896
Harrah, Marie E	25269	27	1305
Harrah, William F	21643	27	1305
Hartford-Empire Co	29958, 41736, 53600	26	134
Hastings, Clive, estate of	63789	29	163
Hastings, E. E	63790	29	163
Hastings, Frederick A	38864	27	1305
Havard, Charles	32841	25	1161
Hawk, Henry C., estate of	60690	29	1061

[1] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee, and to limitation issue.
[2] Acquiescence relates to transactions 1, 2, 3, and 4.
[3] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[4] Acquiescence relates to all issues except affiliation issue.
[5] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2, page 88, revoked.
[6] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Hawk, Ida W., executrix	60690	29	1061
Hay, W. H	37499	25	96
Hayman Co., B	16552	25	736
Hazlewood, N. H	61334	29	595
Hemphill, Clifford [1]	38573	25	1351
Hervey, W. R	46806	25	1282
Hess, Nathaniel J	33279	24	475
Hettman, Walter E.[2]	22341	27	377
Hickman, Fannie Snyder	16253	24	438
Himelhoch Bros. & Co	41728 42769 45663	26	541
Hires Co., Charles E	47781	26	1351
Hobbs, Henry	27352	26	241
Hobbs, Teck	27351	26	241
Hoffer, Anita Owens	33374	24	22
Hoffer, T. B	33375	24	22
Hollingsworth, A. E	54282	27	621
Hollister, George Buell	29461	26	1359
Holmes, George W	53797	29	605
Houghton, Alanson B	29445	26	1359
Houghton, Jr., Amory, estate of	29444	26	1359
Houghton, Arthur A	29446	26	1359
Houghton, Charles F., estate of	29465	26	1359
Houston Bros.[3]	12052	22	51
Houston, George T.[3]	13104 22008	22	51
Houston, Horace K.[3]	22009	22	51
Houston, Philip D.[3]	22007	22	51
Hunter, C. W., executor	45417	26	417
Hunter, George H., estate of	45417	26	417
Huntington, Henry E., estate of [4]	45429	28	289
Huyler's, Inc	28369 29154 39841	24	425
I.			
Independent Ice & Coal Co	67639	27	1346
Indiana Lamp Corporation	52761	28	491
Ingalls, Charles C., estate of [5]	57835	25	773
Interstate Realty Co	46272 50981	25	728
Iten Biscuit Co	16429 20899	25	880
Iverson, I. C	48838	29	863
Iverson, Ruphane B	48837	29	863
J.			
James, William L	70278	30	491
Jones, R. D	69858	29	928

[1] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.

[2] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

[3] Acquiescence relates only to deduction for business expenses in 1920 and to number of feet of timber cut during 1919.

[4] Acquiescence relates to issue regarding loss from operation of a farm in 1925 and 1926 and issue regarding increasing deficiency for 1925 by amount of interest accrued on bonds exchanged for art objects.

[5] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
K.			
Kammerdiner, J	41643 46555	25	495
Kansas City Leasehold & Improvement Co.[1]	35718	17	213
Kansas City & Memphis Farms Co	51060	25	1166
Kansas City Southern Railway Co. and affiliated companies [2]	22668 35527 35528 35529 35530 35531	22	929
Kasch, Ed	48293	25	284
Kasch, Theodora	48293	25	284
Kelley, John P	38233	26	212
Kent, Everett E	39576 42589 46064	26	482
Kibele, O. B.[3]	24882	27	377
Kinney Co., Inc., G. R	31397 32980	26	1091
Kirchner, Julius C	25428	27	1305
Knight, E. D	56865	28	188
Kraemer, Samuel	37822	25	686
Kuhn, Ida L	32609 40267	24	216
Kunau et al., Oscar F. C., trustees	64815	27	509
L.			
Lake Charles Naval Stores	34630 36940	25	173
Landers, Douglas J., estate of [4]	35443	21	1347
Lawson, John	40232	25	154
Leamington Hotel Co	48413	26	1004
Leidesdorf, Samuel D	48305	26	881
Leonard Holding Corporation, George B., estate of	48871	26	46
Ley, George W.[3]	22336	27	377
Ley, Mary C.[3]	22337	27	377
Liberty Farms Co	26717 29899	22	1298
Lincoln, Robert Todd, estate of [4]	39167	24	334
Lippincott et al., J. Bertram, executors [4]	49233	27	735
Lippincott, Walter, estate of [4]	49233	27	735
Littauer, Eugene, estate of [5]	51858	25	21
Littauer et al., Lucius N., executors [5]	51858	25	21
Little, C. B	61821	27	1022
Livingood, Charles J., executor [6]	40899	25	585
Loeb, Jr., et al., William, trustees	34161	26	635

[1] Acquiescence relates to March 1, 1913, value for purposes of calculating gain or loss upon sale of land at Versailles, Mo.; whether the invested capital of the Simcoe Realty Co. should be increased for 1918; and the March 1, 1913, value for amortization purposes of a leasehold belonging to Kansas City Leasehold & Improvement Co.

[2] Acquiescence relates to the following issues: Deduction of contributions to Y. M. C. A., Priests of Palace, and Association of Railway Executives; and amortization of commissions and expenses incurred in sale of bonds.

[3] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

[4] Estate tax decision.

[5] Estate tax decision; acquiescence relates to issues 4, 5, and 7 of decision.

[6] Nonacquiescence published in Cumulative Bulletin XI-1, page 10, revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Vo ume.	Page.
Logel, Joseph F	37762 40071	24	798
Longyear, Jr., John M	47117 56027 62410	28	1085
Longyear, Mary B., estate of	36438 46583	25	252
Loughborough Development Corporation	51064	29	95
Lourie, David A	27630	24	18
Luhrig Collieries Co	40048	26	194
M.			
Manistique & Lake Superior R. R. Co	35337	29	331
Markham Irrigation Co.[1]	41344	24	958
Marston, Edgar L	61961	29	976
Martin Hotel Co. and affiliated corporations	16275	24	899
Martin et al., J. Earle, trustees	44583	24	862
Martin, T. S., estate of	44583	24	862
Martins, Andy[2]	22334	27	377
Marvin, Walter S.[3]	38578	25	351
Matagarda Canal Co.[1]	40082 41345	24	958
Matthews, J. P	26250	22	858
Mauldin, I. M	26239	22	858
McAuliffe, Agnes A	49071	29	624
McCall, Florence[4]	47702	26	292
McConnell, Stella H	43478	29	32
McCool, Bess	46059	24	506
McDonald, L. G	25427	27	1305
McEwan, Anna B	25996	26	727
McEwan et al., Anna B., executors	25997	26	727
McEwan, A F	25995	26	727
McEwan, Lillian G	25994	26	727
McEwan, W. H., estate of	25997	26	727
McGrew, Elizabeth W	26753	25	513
McLaughlin, Thomas J	59788	29	247
McLennan, A. R	26730	25	1052
McMillan, William Northrup, estate of[5]	45966	27	318
Mead Coal Co., C. H	42718 42719 54660	28	599
Memphis Memorial Park	49259 53458	28	1037
Mente & Co., Inc	51305	29	804
Mente, Eugene W	54701	29	804
Mente, J. G	54708	29	804
Mercantile-Commerce National Bank in St Louis et al., executors and trustees[4]	35443	21	1347
Messer, Richard B., estate of[4]	42513	27	556
Metropolitan Properties Corporation	45032	24	220

[1] Acquiescence relates to all issues except affiliation issue.
[2] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[3] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence, except in so far as concerns the question of situs.

ACQUIESCENCES—Continued.

Taxpayer.	Docket. No.	Board of Tax Appeals. Volume.	Page.
Michigan Central R. R. Co.[1]	19930	28	437
Michigan Trust Co. et al., executors[2]	42513	27	556
Milby & Dow Coal & Mining Co	22021 22022 26259 42184	24	40
Milgrim & Bros., Inc., H.[3]	33177	24	853
Milliken, Sallie Gibbs	31330	28	18
Mississippi Packing Co., Inc	20772	24	376
Missouri State Life Insurance Co.[4]	58241 62386	29	401
Mitchell, L. C	41610	28	767
Mitchell, Oscar[5]	41680 41874 54673	27	101
Mobile Light & Railroad Co.[6]	41026 42062	23	543
Morehead, William A	25853	22	858
Moorshead, O	57045	28	253
Muchnic, H. E., administrator	63789	29	163
Murchison, Mrs. A. H	62838	28	257
Murphy, Mae A. Kelley	38222	26	212
Murray, Edward J	40176 58858	28	624
Murray, Rebecca J	40174 58857	28	624
Murtha & Schmohl Co	17911	17	442
Musgrove, Floyd L	42591	27	554
Mutual Assurance Society of Virginia	43911	24	1102
N.			
Nail et al., R. E., executors	53044	27	33
National Capital Insurance Co. of the District of Columbia	56748	28	1078
National Casket Co., Inc.[7]	50320	29	139
National Contracting Co.[8]	24520	25	407
National Mill Supply Co	37001	23	1362
National Packing Corporation	31668 33971	24	952
National Tile Co	64013	30	32
Netcher, Charles, estate of	38053	26	101

[1] Acquiescence relates to the following issues: Whether amount paid by New York Central R. R. Co. to State of Illinois in connection with issuance of bonds was a tax or fee; salvage recovered from ore docks; credit representing depreciation on property retired in 1918.

[2] Estate tax decision.

[3] Acquiescence relates to issue 1 of decision.

[4] Acquiescence does not relate to following issues: Deduction for reserve set up to meet liability upon matured coupons; adjustment of income for rental of space occupied in home office building and depreciation upon such building.

[5] Acquiescence relates to issues regarding assignment of earnings of iron mines in payment of legal services, and deduction of amount paid to son for alleged services rendered.

[6] Acquiescence relates to following issues: 1. Whether payments received by a trustee on behalf of petitioner in the taxable years in accordance with a written agreement entered into by and between petitioner and another in 1906 constitute taxable payments of rent or nontaxable payments on the selling price of assets. 2. Whether petitioner sustained statutory net losses for 1924 and 1926 which can be deducted from its income for 1925 and 1926, respectively.

[7] Acquiescence relates to deduction of corporation excise taxes.

[8] Acquiescence in Board's decision that petitioner had the right to allocate overhead expenses to each contract on completed basis and that formula used by petitioner was permissible; and issue relative to negligence.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Netcher, Gladys Oliver, executrix	38053	26	101
Netcher, Irving	38052	26	101
Netcher, Townsend	38050	26	101
Newaygo Portland Cement Co	36319	27	1097
Newblock Oil Co. of Texas [1]	28045	26	696
Newbury, Mollie Netcher	38049	26	101
Newbury, Mollie Netcher, trustee	38052	26	101
Newell et al., Sterling, executors [2]	57835	25	773
New England Power Co	18593 29105	25	195
New Market Investment Co.[3]	35719	17	213
Newton, Elizabeth K.[2]	47703	26	292
Newton, Joseph R., estate of [2]	47705	26	292
New York Central R. R. Co.[4]	19932 34437 62040	28	437
New York, Chicago & St. Louis R. R. Co	21047	23	177
Noonan Estate Trust, F. R	62664	29	710
North Side Lumber & Timber Co	34924	27	1187
Northern Coal Co.[5]	34945	24	307
Noyes, Jansen [6]	38574	25	1351
O.			
Oakley, Richard H	45778	24	1082
Olympia Harbor Lumber Co	64272	30	114
Ontario Realty Co.[3]	35721	17	213
O'Rear, E. C. [7]	32335	28	698
P.			
Package Machinery Co	54334	28	980
Paine et al., Francis Ward, executors	34113	25	764
Paine, William A., estate of	34113	25	764
Palm Beach Mather Co	43850	24	536
Parkland Ice & Coal Storage Co	67640	27	1346
Parriott, F. B.[8]	30989	28	917
Peavy-Byrnes Lumber Co	15824 16354 25984	25	223
Peavy-Moore Lumber Co	15823 16355 25986	25	223
Peavy-Wilson Lumber Co	15822 16356 25985	25	223

[1] Nonacquiescence published in Cumulative Bulletin XI-2, page 15, revoked.
[2] Estate tax decision.
[3] Acquiescence relates to March 1, 1913, value for purposes of calculating gain or loss upon sale of land at Versailles, Mo.; whether the invested capital of the Simcoe Realty Co. should be increased for 1918; and the March 1, 1913, value for amortization purposes of a leasehold belonging to Kansas City Leasehold & Improvement Co.
[4] Acquiescence relates to the following issues: Whether amount paid by New York Central R. R. Co. to State of Illinois in connection with issuance of bonds was a tax or fee; salvage recovered from ore docks; credit representing depreciation on property retired in 1918.
[5] Acquiescence relates to inventory issue.
[6] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[7] Acquiescence relates to issue as to allowable deduction of cost of operating automobile partly used in taxpayer's business in 1924.
[8] Acquiescence relates to right of overriding royalty owners to benefit of section 211(b), Revenue Act of 1918.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Pegg, Albert O.[1]	22338	27	377
Pennsylvania Investors Co	20766	24	376
Perkins et al., Jacob	28701	25	1123
Pershouse, Alice E	26749	25	513
Pershouse, Mabel B	26748	25	513
Phillips, C. J	47901	26	995
Phoenix Insurance Co	48867	29	291
Pictorial Review Co	43995	26	472
Piggly Wiggly Corporation	25126 43860	28	412
Pizitz Dry Goods Co., Louis	46585	22	161
P-M-K Petroleum Co.[2]	50576 54779	24	360
Polar Ice & Coal Co	67638	27	1346
Pope, Olive R	29274	25	1161
Powell, Benjamin I	50380	26	509
Prairie Oil & Gas Co	57117	29	113
Price, Laura M	40659	24	216
Price, W. E	41072	24	216
Prophylactic Brush Co	32996 47845 47846	25	676
Prosperity Co., Inc.[3]	45896 59468	27	28
Prosser, Constance B	26752	25	513
Putnam Trust Co	34743	26	655
Q.			
Quinn, Evan V	8544	26	970
Quinn, Martin M	8598	26	970
Quinn, Paul H	8574	26	970
R.			
Rapp, John W., estate of	28618	24	1061
Rauh Realty Co	32822	26	48
Ray Oil Co.[4]	34332	28	1204
Reardon & Sons Co., John	20773	24	376
Reynard Corporation [5]	67386 70795	30	451
Rhea, Isaac T	54960	29	804
Rhea, Mrs. Isaac T	54959	29	804
Rialto Mining Corporation	48692 56877	25	980
Richards & Hirschfeld, Inc	21715	24	1280
Riggs National Bank [6]	30903	17	615
Robson, Clara P., estate of	26645	25	949
Rodeo-Vallejo Ferry Co.[7]	36411 48528	24	936
Rosenberg, Louis	27626	24	18

[1] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[2] Acquiescence relates to third issue of decision.
[3] Acquiescence relates to deduction of loss resulting from liquidation of one of its subsidiaries.
[4] Acquiescence relates to issue whether petitioner was taxable in 1923 as a trust or as an association.
[5] Acquiescence relates to deduction for depreciation on premises; and inclusion in year 1930 in petitioner Fox's income, $7,400 representing rental value of premises occupied by him.
[6] Nonacquiescence published in Cumulative Bulletin X-2, page 99, withdrawn.
[7] Acquiescence relates to deduction of contribution to Victory Highway Association.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Rosenbloom Finance Corporation [1]	35778, 40903	24	763
Roth, Gorton	22568	26	631
Roy & Titcomb, Inc	29138	24	969
Russell, C. C	46060	24	506
Russell, Mrs. C. C	46061	24	506
S.			
St. Louis Union Trust Co. et al., cotrustees	65675	30	370
St. Louis Union Trust Co., executor [2]	45966	27	318
Sanders, W. C	26651	25	949
San Martinez Oil Co	37447, 43121	25	218
Sappington, G. Ridgely	51944	25	1385
Schepp Co., L	42908	25	419
Schermerhorn, Harriet Pullman	43145	26	1031
Scovill Manufacturing Co	29854, 30238	25	265
Scruggs, Gross R	33610	24	1174
Scruggs Investment Co	46270	24	1174
Scruggs, Marian P	38711	24	1174
Seaconnet Coal Co.[3]	18089	24	307
Searles Real Estate Trust	24489	25	1115
Securities Co	40553	25	446
Security First National Bank of Los Angeles et al., executors [4]	45429	28	289
Selbert, Ltd	57059	29	319
Sells Sporting Goods Co	20771	24	376
Shaffer, C. B.[5]	29259	29	1350
Shand, Gadsden	26238	22	858
Shapiro, Samuel	65158	29	1012
Shaw, David, estate of	34499	24	1235
Shea, R. P	37835, 40034	24	798
Simcoe Realty Co.[6]	35720	17	213
Simms Oil Co.[7]	61497	28	1106
Simms Petroleum Co.[7]	61496	28	1106
Sinclaire et al., Helen B., executors	37703	26	1359
Sinclaire, Henry P., estate of	29252	26	1359
Sinclaire, Jr., Henry P., estate of	37520	26	1359
Sinclaire et al., Murray, executors	37520	26	1359
Sinclaire, Reginald	37864	26	1359
Sinclaire, William, estate of	37703	26	1359
Sioux Falls Metal Culvert Co	41070	26	1324
Smathers, E. E., estate of [5]	29260	29	1350
Smathers Power Typewriter Co	43968	28	327

[1] Acquiescence relates to holding of Board that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.

[2] Estate tax decision; acquiescence, except in so far as concerns the question of situs.

[3] Acquiescence relates to inventory issue.

[4] Acquiescence relates to issue regarding loss from operation of a farm in 1925 and 1926 and issue regarding increasing deficiency for 1925 by amount of interest accrued on bonds exchanged for art objects.

[5] Acquiescence relates to market value of oil and gas leases on March 1, 1913.

[6] Acquiescence relates to March 1, 1913, value, for purposes of calculating gain or loss upon sale of land at Versailles, Mo.; whether the invested capital of the Simcoe Realty Co. should be increased for 1918; and the March 1, 1913, value for amortization purposes of a leasehold belonging to Kansas City Leasehold & Improvement Co.

[7] Acquiescence relates to basis for computing depreciation on assets acquired by Simms Oil Co. in 1925 from Clayton Oil & Refining Co.

ACQUIESCENCES—Continued.

Taxpayer.	Docket. No.	Board of Tax Appeals.	
		Volume.	Page.
Smith et al., Elizabeth D., executors	39291 49668	25	291
Smith, I. N., estate of	39291 49668	25	291
Smith, Jessie, executrix	18876	24	807
Smith, Mrs. Jessie	22313	24	807
Smith, Louis, estate of	18876	24	807
Smoot, Lewis E	32578	25	1038
South Memphis Land Co	44500	27	897
Southard, Jennie	42592	27	554
Southern Railway Co. et al.[1]	21481 29951 37887– 37898	27	673
Spangler, Georgia M	56320	29	263
Spangler, J. W	56321	29	263
Sprague & Son Co., C. H.[2]	34946	24	307
Sprunt & Son, Inc., Alexander	38408	24	599
Standard Beef Co	20770	24	376
Standard Conveyor Co	33159 36393 40873	25	281
Standifer Construction Corporation, G. M	51636	30	184
Stauffen, Theodora B	26756	25	513
Stearns, Robert L	37573	24	1013
Stegeman, A. V	26643	25	949
Stegeman, Jr., Albert V	26650	25	949
Stegeman, Fannie L	26644	25	949
Stegeman, H. M	26647	25	949
Stegeman, H. R	26646	25	949
Stegeman, Mabel K	26649	25	949
Stegeman, William L	26648	25	949
Stevens, John H	29685	24	52
Stevenson Consolidated Oil Co.[3]	43416	23	610
Stock Yards Bank of Cincinnati	41085	25	964
Stockham, Elijah	22569	26	631
Stone et al., Irving K., executors and trustees [4]	43830	26	1
Stone, Irving Lee, estate of [4]	43830	26	1
Stoneman, David	27627	24	18
Straubel, F. L. G	56867	29	516
Stromeyer, Irene	55341	28	472
Stromeyer, William A	55342	28	472
Strong, Harold C.[5]	38576	25	1351
Stuart, Charles	53796	29	605
Sullivan, Eugene C	29389	26	1359
Summerfield Co	58711	29	77
Sunburst Oil & Refining Co	45979	23	829
Sweinhart, James	54784	29	1179

[1] Acquiescence relates to following issues: 1. Did petitioner realize taxable income from unrefunded portions of amounts deposited by shippers for construction of facilities for use of such shippers? 2. Where bonds were sold at a premium prior to March 1, 1913, is the amortized portion of such premium taxable income? 3. Did Commissioner erroneously exclude from adjustment for material and supplies an amount equivalent to inflation contained in book value of such materials and supplies as were not used during 1920?

[2] Acquiescence relates to inventory issue.

[3] Acquiescence relates to issues regarding reduction of income for fiscal year ending November 30, 1924, by loss sustained for 11 months ending November 30, 1922, and inclusion in income for all years of $1 par value of capital stock of Sunburst Oil & Gas Co. received by petitioner as a premium.

[4] Estate tax decision; acquiescence relates to issue involving deductions from gross estate.

[5] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.

Acquiescences—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
T.			
Talbot, J. A.[1]	36191	23	792
Texas Irrigation Co.[2]	40083 41346	24	958
Thompson, Edward W	51103	28	657
Thompson, W. L	51104	28	657
Thrift Realty Co	50653	29	545
Tifft, Charles	31029 33464 42340 45957	25	986
Tifft, Lewis E	31030 33465 42341 45958	25	986
Times-Picayune Publishing Co	48892 49539	27	277
Tobey, Maurice	27624	24	18
Tolerton & Warfield Co.[3]	45320	23	892
Tracy, William R	45513	25	1055
Tricou, Sallie S	28093 40258	25	713
Trinity Drilling Co.[4]	61498	28	1106
Trout, H. W	39020	27	1210
Turner, Kathleen M.[5]	22340	27	377
Turrish, Henry	44742	24	913
Twin Bell Oil Syndicate	29518	26	165
U.			
Ulster & Delaware R. R. Co	28927	25	109
Union Lard Corporation	20769	24	376
Union Pacific R. R. Co. et al.[6]	35639– 35649 35684 35685 40060 40061 40062	26	1126
Union Trust Co. of Pittsburgh, trustee	61009	29	731
United Autographic Register Co	30384	27	433
United States Trust Co. of New York, trustee	26747– 26757	25	513
V.			
Vaillant, Ethel Netcher	38051	26	101
Vermont Hydro-Electric Corporation	59638	29	1006
Virginia Iron, Coal & Coke Co	51576	29	1087
W.			
Walker, George H., estate of [7]	31869	23	663
Ward Bros. Co	30992	24	989

[1] Acquiescence relates to loss incurred in sale of a boat.
[2] Acquiescence relates to all issues except affiliation issue.
[3] Acquiescence relates to issue regarding deduction of loss sustained by petitioner during nonaffiliated period.
[4] Acquiescence relates to basis for computing depreciation on assets acquired by Simms Oil Co. in 1925 from Clayton Oil & Refining Co.
[5] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[6] Acquiescence relates to donations issue; amortization of discount on bonds issued prior to 1913; computation of tax for 1920.
[7] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Warner Co. [1]	53039, 53040, 59190	26	1225
Washington Market Co	43912	25	576
Watson, Jr., John H	53414	27	463
Wayne County & Home Savings Bank [2]	49144	26	761
Weis, Samuel W	62126	30	478
Wheelock, R. L	37806	28	611
Wheelock, Mrs. R. L	37805	28	611
White Oak Transportation Co. [3]	18088	24	307
Whitman, Ward & Lee Co	61552	29	670
Whitney, Williard M	37927	26	212
Whitson, Thomas J	40233	25	154
Wilcox, C. B	46371	27	580
Williams, Jr., Alford J	66915	29	892
Williams, Ella J	29273	25	1161
Williams, W. W	46062	24	506
Williamson, Alexander B	40231, 43972	25	154
Williamson, Archibald (Lord Forres)	40229, 43973	25	154
Wilson & Co., Inc., of California	20768	24	376
Wilson Commission Co	20767	24	376
Wilson Furs, Inc	57058	29	319
Wilson & Co., Lee	33826	25	840
Wilson Shipbuilding Co. [4]	34337	25	182
Winne, Walter G	60900	27	369
Wood, Fred T	38808	27	162
Wood Lumber Co., E. K	23605, 24156	25	1013
Wray, Eliza J	25881	24	94
Wright, George M	25854	22	858
Wright, Leonard Marshall	45508	26	21
Y.			
Young, Ethel P	38868	24	815
Yukon Alaska Trust	34161	26	635
Z.			
Zinsser & Co	5242	21	152

[1] Nonacquiescence published in Cumulative Bulletin XII-1, page 24, withdrawn.
[2] Nonacquiescence published in Cumulative Bulletin XI-2, page 18, revoked.
[3] Acquiescence relates to inventory issue.
[4] Acquiescence does not relate to issue 5 of decision.

The Commissioner has withdrawn his acquiescence in the following decisions of the United States Board of Tax Appeals:

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume	Page.
McIlhenny et al., Frances Plumer, executors [1]	45008	22	1093
McIlhenny, John D., estate of [1]	45008	22	1093
Wade, Jeptha H., estate of [1]	43164	21	339
Wade, Jr., et al., Jeptha H., executors [1]	43164	21	339

[1] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, pages 46 and 73.

The Commissioner does NOT acquiesce in the following decisions of the United States Board of Tax Appeals:

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
A.			
Abelson Realty Co., Inc	53792	24	686
Abelson's, Inc	53793	24	686
Ackerman, Irving C	30311, 31634, 40948, 40949	24	512
Alameda Park Co	8355	25	850
Albrecht et al., Katherine B., executrices [1]	41295	27	1091
Alker, Vera M. Kohler	36116	25	243
Allied Furriers Corporation	50059	24	457
American Brick & Tile Corporation	29994	22	1121
American Seating Co.[2]	14676	14	328
Ames, Jr., Ward	49817	27	624
Apartment Corporation	42024	26	849
Arabol Manufacturing Co	50489	26	1068
Archbald, Edward B	61660, 65064	27	837
Archbald, Joseph A	61661, 65062	27	837
Archbald, Jr., Joseph A	61673, 65063	27	837
Armstrong, William M	40419	25	928
Ashton, Willard H	39148	28	582
Atlas Life Insurance Co	40544, 40751, 67199	29	750
Auto Strop Safety Razor Co., Inc	57374	28	621
B.			
Babson, Fred K	52224	27	859
Babson, Gustavus	52223	27	859
Babson, Henry B	52222	27	859
Ballinger, Bessie M., executrix [3]	32177	23	1311
Ballinger, Walter F., estate of [3]	32177	23	1311
Bankers Trust Co., trustee	32459	24	10
Bartlett, J. Kemp	63632	28	285
Bass, Francis M	73626	30	4
Bay, Robert P	66014	28	1168
Bebb, Richard E., estate of [1]	41295	27	1091
Beebe, Junius, trustee	52707	26	190
Beebe, Marcus, estate of	52707	26	190
Belfast Investment Co.[4]	19128	17	213
Bell & Sons, Samuel	38056, 41647, 45616	22	793
Bindley, Mary M., estate of	58871	28	113
Bliss, Sydney R	55902	26	962
Bliss, Valentine	53422	26	732
Blum, Bessie	52221	29	580
Blum, David	52220	29	580

[1] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[2] Acquiescence published in Cumulative Bulletin VIII-2, page 2, withdrawn.
[3] Estate tax decision.
[4] Nonacquiescence in issue as to whether petitioner is entitled to deduction for amortization of the Lee tract warehouse for 1918.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Board of Fire Underwriters of the City of Duluth	43150	26	860
Boca Ceiga Development Co	40446	25	941
Boehringer, Rudolph [1]	49891	29	8
Bowman-Biltmore Hotels Corporation	41472 43629	24	1193
Bowman Hotel Corporation	10651 24912 28971 38006	24	1193
Brackman, J. W	45714	24	259
Bradbury, I. C	45780	23	1351
Briskey Co	60899	29	987
British-American Tobacco Co., Ltd	41224	27	226
Brooklyn City R. R. Co	20353	27	77
Brooklyn & Queens Transit Corporation	20353	27	77
Brown, Frank A., estate of	47677	26	901
Brown, H. C	33343	25	631
Brown, Harry A	48136	26	901
Brown, Pearl B., executrix	47677	26	901
Buck, John A., estate of [2]	32584 44153 44684	25	780
Buck et al., Mary M., executors [2]	32584 44153 44684	25	780
Buffalo Union Iron Furnace Co.[3]	16075 16076	23	439
Bullock, George [4]	31209	23	710
Bunge North American Grain Corporation	47800	27	150
Burdette, Clara	37321	25	692
Burley, Blanche B., executrix	44909	26	615
Burrill, Edward L	58795	26	1401
Busche, F. C.[5]	9447 10202 10755	10	1345
Business Real Estate Trust of Boston	33469 42684 50305	25	191
Butler-Veitch Co	45169 45170	23	953
C.			
Cadwalader, Mary Helen	46327	27	1078
Carey Fibre Products Co., Emerson	36381	26	675
Carey Salt Co	36382	26	675
Carroll, J. J	51880	27	65
Carroll, Lena Carter	51881	27	65
Carson, John E	45393	28	236
Carson, Rose L	45392	28	236
Carter, A. L	51882	27	65
Carter, A. L., administrator	47669	27	65

[1] Nonacquiescense relates to issue involving reorganization.
[2] Estate tax decision; nonacquiescence relates to deduction of amount of a claim filed against the estate and allowed by probate court.
[3] Nonacquiescence relates to issue regarding deduction from gross income of fiscal year ended April 30, 1919, of reserve for relining blast furnaces.
[4] Nonacquiescence relates to issue 1 of decision.
[5] Acquiescence published in Cumulative Bulletin X-1, page 10, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket. No.	Board of Tax Appeals.	
		Volume.	Page.
Carter, Mrs. A. L	51883	27	65
Carter, E. A	51884	27	65
Carter, Lillie N	51885	27	65
Carter, Maude, H., estate of	47669	27	65
Carter, Jr., W. T	51886	27	65
Cassels, Robert	58793	26	1401
Central Market Street Co.[1]	24837	25	409
Central Union Trust Co. of New York, executor	31736	25	757
Champion, David J.[2]	55569 63818	27	1312
Champion, T. Pierre[2]	55568	27	1312
Chapman, C. F	52496	28	53
Charavay, Marius A	70005 71592	29	1255
Chenowith, H. C	38349	26	301
Chicago & Northwestern Ry. Co.[3]	36343	22	1407
Clark Thread Co.[4]	38903 47974	28	1127
Cleland Estate Co., Inc., Henry A.[5]	33585 40890 51197	29	436
Coastwise Transportation Corporation	39916	28	725
Cobleigh, Margaret Edwards, estate of[6]	40765	24	176
Columbia Pacific Shipping Co	50968	29	964
Columbus Brick & Tile Co.[7]	42707	26	794
Commercial Garage Co	41646	22	793
Commercial Investment Trust Corporation[8]	43495 50051	28	143
Community Bond & Mortgage Corporation	43784	27	480
Cone, Edward K	58777	26	1401
Cook, Elizabeth E.[9]	38579	25	1351
Cook, Sam	35014	25	92
Cooper, A. T.[10]	3144	7	798
Crane, Alexander B., estate of	71718	30	29
Crane et al., Alexander M., executors	71718	30	29
Crile, Grace McBride	43136	26	1020
Crispin, Mrs. Egerton	45267	28	236
Crosby, Oscar T	51317	27	1234
Cross, Maurice	32735	24	1079
Cunard Coal Co.[11]	26874 26875 28792	26	234
Cuppia, Jerome C	58545	26	1401
Curlee, Shelby H., trustee	48833	28	773

[1] Nonacquiescence relates to issue regarding Board's jurisdiction of subsidiaries.
[2] Nonacquiescence relates to issue whether redemption of stock was equivalent to taxable dividend.
[3] Nonacquiescence relates to following issues: Undermaintenance; profit and loss on bonds retired; amortization of bond discount.
[4] Nonacquiescence relates to issue respecting depreciation.
[5] Nonacquiescence relates to basis for determination of gain or loss on the sale of property devised subject to a life estate.
[6] Estate tax decision.
[7] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.
[8] Nonacquiescence relates to deduction in 1926 of excess of market value over sale price of stock sold to employees.
[9] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[10] Acquiescence published in Cumulative Bulletin VII-1, page 1, withdrawn.
[11] Nonacquiescence relates to expenditures for mine equipment.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
D.			
Davidson, Watson P	46486	27	158
Davis, C. R.[1]	10299 32950	10 20	1233 931
Davis, Frederick H	37324	24	405
Davis, Thomas L	37395	24	405
Degener, John F., estate of [2]	38500	26	185
Degener, Jr., et al., John F., executors [2]	38500	26	185
De Lisser, Horace, estate of [3]	2459	2	102
Dennett, Marie G.[4]	72023	30	49
Depew, Ganson	50860	27	515
Des Moines Improvement Co.[5]	8573	7	279
Dohrmann, Andrew B. C	20658 23969	19 19	507 466
Dolomite, Inc	60661	28	1270
Dort, J. Dallas, estate of [2]	44735	26	1321
Drawoh, Inc	45014	28	666
Drumheller, George	41515 45752	27	209
Duff, Robert C.[6]	37552	23	1342
Dunham et al., Lucy Belle, executors [2]	46603	26	286
Dunham, Mary Virginia, estate of [2]	46603	26	286
E.			
Edison Securities Corporation	52662	29	483
Eifert, Earl C	45781	23	1351
Elkins, William L., estate of	56449	28	367
Erb et al., Ray L., executors [7]	29260	29	1315
Ethel D. Co	32032	27	25
Evening Star Newspaper Co	61870 66855	28	762
Everhart, James William	26675	26	318
F.			
Fairmount Cemetery Association	30925 42811	25	1272
Farmers Cotton Oil Co	42679	27	105
Farmers Life Insurance Co.[8]	43317	27	423
Feldman, Henry O	45359	28	236
Field, Marshall	36908	26	116
Fifth Street Building	16627 29264 45537	24	876
First National Bank in St. Louis [9]	44278 48078	23	1124
First National Bank of Boston, administrator [2]	44746	25	612

[1] Acquiescence published in Cumulative Bulletin X-1, page 17, withdrawn.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 18, recalled.
[4] Nonacquiescence relates to deductibility of $10,000 because of the fact that a bond in which petitioner had invested became worthless in 1930, although that fact was not ascertained until 1931.
[5] Acquiescence published in Cumulative Bulletin VII-1, page 9, withdrawn.
[6] Nonacquiescence relates to issue 2 of decision.
[7] Nonacquiescence relates to the following issues: Reduction of cost basis (March 1, 1913, value) of assets sold by a partnership in 1919 by depreciation allowed in computing income for period March 1, 1913, to December 1, 1915; computation of 1919 partnership profit on sale of assets by considering as part of the sale price taxes of the partners paid in 1920 by the vendee.
[8] Nonacquiescence does not relate to issue in connection with option payment received for purchase of land.
[9] Acquiescence notice published in Cumulative Bulletin X-2, pages 23 and 24, recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
First Peoples Trust	45403	26	551
Fitzgerald, Thomas	62075	29	1113
Fleitmann, William M., estate of [1]	28449	22	1291
Fleitmann, Jr., et al., William M., executors [1]	28449	22	1291
Fletcher, Salathiel R	33041	24	75
Folger & Co., J. A	22212 30721	27	1
Folger Estate Co	31200 35147	27	1
Foster, Caroline B., estate of [2]	46672	26	708
Foster et. al., Charles H. W., executors [2]	46672	26	708
Foster, L. B.[3]	43086	26	1328
Founders Associates	62684	29	326
Fox, Fontaine [4]	71084	30	451
Fox River Paper Co	20878	28	1183
G.			
Gale, Emily A	61672	27	837
Gamble & Stockton Co.[5]	42707	26	794
Garcin, Edward H	21657	22	1027
Gardner, Charles E.[6]	38575	25	1351
Garrie, Daniel T., estate of	31736	25	757
Garvan, John Joseph, estate of [2]	44746	25	612
Gassner, Louis [7]	4017	4	1071
General Utilities & Operating Co	52770	29	934
Gerard, Erle	45221	28	236
Gerlach, Theodore R	38042 41641	27	565
Gladding, Mary D., estate of [2]	31435	27	385
G. M. & S. Co	16383	26	223
Goetjen & Metson Co	17875	26	223
Goldberg, Harry S.[7]	5389	4	1073
Goldschmidt et al., Georgette, executors [8]	16138	14	1010
Goldschmidt, Henry P., estate of [8]	16138	14	1010
Graham, M. H	38335	26	301
Grant, Helen E	62029 65577 68324	29	760
Green, Robert D.[9]	53647	24	719
Greenleaf Textile Corporation	46746	26	737
Gregory, Evelyn F	55299	27	223
Griffis, Stanton [6]	38577	25	1351
Guitar Trust Estate	35102	25	1213
Gulf Coast Irrigation Co.[10]	33694 40081 41343	24	958

[1] Acquiescence notice published in Cumulative Bulletin X-2, pages 23 and 24, recalled.
[2] Estate tax decision.
[3] Nonacquiescence relates to deductions in 1924 and 1925 on account of losses resulting from alleged sales of securities.
[4] Nonacquiescence relates to inclusion in income of corporation for years ended March 31, 1930, and March 31, 1931, amounts representing rental of premises occupied by its president.
[5] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.
[6] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[7] Acquiescence published in Cumulative Bulletin X-1, pages 24, 27, withdrawn.
[8] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 27, recalled.
[9] Nonacquiescence relates to transaction 5.
[10] Nonacquiescence relates to affiliation issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Gulf, Mobile & Northern R. R. Co.[1] [2]	24887 42150	22	233
Gummey, Frank B	61056	26	894
H.			
Hall, Harry E. R., estate of	70004 71598	29	1255
Hancock, G. Allan	36867	25	607
Hanson, Charles C	15398	23	590
Harris, Allen [3]	10980	10	1374
Harris, Simon	31632	24	512
Harrison, J. E	45361	28	236
Hart, John H	52795 60115	27	528
Hartley, Cavour, executor	42343	27	952
Hartley, G. G., estate of	42343	27	952
Hauser, W. E	43301 43302	26	1178
Hawley Investment Co	45169 45170	23	953
Hedrick, J. T	33533	24	444
Heller, B. G	40634	25	259
Hemphill, Clifford [4]	38573	25	1351
Henn, A. W	37102	20	1133
Henritze, J. B	60609	28	1172
Henritze, Nell	60607	28	1172
Henritze, T. R	60608	28	1172
Henritze, T. W	60606	28	1172
Hermann, John C	51959	27	409
Hertenstein, Freda M	55938	29	216
Hertenstein, Frederick	55936	29	216
Hickman, Howard C	37369	27	807
Hieronymus, Carl Richard, estate of	48930	24	269
Highway Trailer Co	44568	28	792
Higley & Co., E. B	51003	25	127
Hill, D. F., estate of [5]	29399	24	1144
Hill et al., Paul F., executors [5]	29399	24	1144
Hodges, Agnes Wiley, executrix	38336	26	301
Hodges, W. L., estate of	38336	26	301
Hodges, W. L., trustee	38337	26	301
Holmes Bakery & Confectionery	44943 52861	27	1229
Holmes, Carl F	51473 53395	27	660
Holmes, E. A., trustee	44943 52861	27	1229
Holmes, Margaret A	48631 51570 53394	27	660

[1] Nonacquiescence relates to issues involving award of Interstate Commerce Commission in 1920 for transportation of United States mails in 1916 and 1917; and deduction in 1926 for depreciation on ways and structures.
[2] Nonacquiescence applies to the entire decision of the Board in so far as it is adverse to the Commissioner. Partial acquiescence published in Bulletin XI-28, page 1, revoked.
[3] Acquiescence published in Cumulative Bulletin X-1, pages 24, 27, withdrawn.
[4] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[5] Estate tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Household Products, Inc	44809	24	594
Housman, Clarence J	58798	26	1401
Housman, Frederick	58774	26	1401
Houston Baseball Association	43985 45430	24	69
Houston Bros.[1]	12052	22	51
Houston, George T.[1]	13104 22008	22	51
Houston, Horace K.[1]	22009	22	51
Houston, Philip D.[1]	22007	22	51
Hulburd, Charles H., estate of	22028	27	1123
Hulburd, De Forest, individually and as executor and trustee	22028	27	1123
Hunter, G. W., estate of [2]	33564	25	1078
Huntington, Henry E., estate of [3]	45429	28	239
Hutchison Coal Co	34939	24	973
I.			
Imperial Elevator Co	35688	25	234
Imperial Investment Co	29291	23	1281
Indianapolis, Crawfordsville & Danville Electric Ry. Co	33859	24	197
Indianapolis & Northwestern Traction Co	33861	24	197
Iten Biscuit Co	43667 45164	25	870
Ives, Charles E	51527	29	822
Ives Dairy, Inc	39873	23	579
J.			
Jackson & Eastern Ry. Co	38295 [4] 42149	22	233
Jackson, Wermich Trust	32307	24	150
Jamison Coal & Coke Co	31690 34088	24	554
Janotta, Stella S.[5]	51172	28	39
Jefferson Standard Life Insurance Co	43149	25	1335
Johnston, Hugh McBirney, individually and as executor and trustee	22028	27	1123
Jones, Bessie R	58285	27	171
K.			
Kansas City Southern Ry. Co. and affiliated companies [6]	22668 35527 35528 35529 35530 35531	22	949
Keeys, Edward L	45360	28	236

1 Nonacquiescence relates to March 1, 1913, value, and to the basis for the deduction for depletion and for the computation of gain or loss upon subsequent sale of the timber.
2 Estate tax decision.
3 Nonacquiescence relates to issue whether taxpayer sustained a net loss in any business regularly carried on in 1924 which could be carried forward and deducted from taxable income in 1925.
4 Nonacquiescence relates to issue involving deduction for depreciation on ways and structures.
5 Gift tax decision.
6 Nonacquiescence relates to the following issues: Deduction of amounts expended to restore petitioner's property notwithstanding the fact that the Director General of Railroads made payment to petitioner for his failure to maintain the property; exclusion from gross income of intercompany freight charges on material and supplies used in making additions and betterments to petitioner's property.

NONACQUIESCENCES—Continued.

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Kerbaugh, Henry S	68976	29	1014
Kerrigan, Arthur L	58794	26	1401
King, John M	41549	26	1158
Knapp, Kittie A.[1]	2775	7	790
Koch, Harry A	55318	26	1025
Kountze, Charles T	37323	24	405
Kountze et al., Charles T., executors	37535	24	405
Kountze, Luther L., estate of	37535	24	405
Krull, Francis [2]	16985	10	1096
L.			
Lafayette Life Insurance Co	41721 42663	26	946
Langford Investment Co., trustee	57203	28	222
Langford, Jr., et al., Pierce P	57203	28	222
Laube, Justus	70007 71595	29	1255
Laun, Alfred A	45347	26	764
Laun, J. B	45348	26	764
Leeper, Frank E., estate of	45266	28	236
Leeper, Pearl E	45265	28	236
Leetonia Furnace Co	32272	23	979
Leon & Son, Inc., Albert	53440	29	251
Levine, Hyman [2]	7435	8	298
Liebes & Co., H	28544 35038	23	787
Linderman, William S., executor	58871	28	113
Littauer, Eugene, estate of [3]	51858	25	21
Littauer et al., Lucius N., executors [3]	51858	25	21
M.			
Mallory, L. W., estate of	33231	27	750
Manchester Coal Co	33392	24	577
Manhattan Life Insurance Co	60827	28	129
Margay Oil Corporation	44891	26	199
Markham Irrigation Co.[4]	41344	24	958
Marvin, Walter S.[5]	38578	25	1351
Matagarda Canal Co.[4]	40082 41345	24	958
McCormick et al., Cyrus H., trustees	44139	26	1172
McCrory, Luke W., trustee	32444	25	994
McIlvaine et al., William B., trustees	52931 57226	29	304
McLister, Frank	48562	27	155
McMillan, William Northrup, estate of [6]	45966	27	318

[1] Acquiescence published in Cumulative Bulletin VII-1, page 17, withdrawn.
[2] Acquiescence published in Cumulative Bulletin X-1, pages 36, 38, withdrawn.
[3] Estate tax decision; nonacquiescence in respect to that part of decision which holds that accrued interest paid on Federal income taxes for 1927 and 1928 from date of decedent's death to November 5, 1930, is a proper allowable administrative expense.
[4] Nonacquiescence relates to affiliation issue.
[5] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[6] Estate tax decision; nonacquiescence as to question of situs.

NONACQUIESCENCES—Continued.

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Meyer, Robert R	44032	27	44
Michigan Central R. R. Co.[1]	19930	28	437
Miglietta, Olga K	36379	25	243
Miller, Albert	45368	28	236
Mills, J. H. Goadby	58797	26	1401
Missouri State Life Insurance Co.[2]	58241 62386	29	401
Mitchell, Oscar[3]	41680 41874 54673	27	101
Mitchell, William	58799	26	1401
Mitten Management, Inc	42494 53990 61861	29	576
Modjeski, Ralph	49517	28	1051
Moore Bread Co	41645	22	793
Moore, G. H	38351	26	301
Morganite Brush Co., Inc	26369	24	776
Moro Realty Holding Corporation	37406 44759 50490	25	1135
Morriss et al., Julia L	41023 41024 45863 45864	23	1076
Morriss Realty Co. Trust No. 1	41023 45863	23	1076
Morriss Realty Co. Trust No. 2	41024 45864	23	1076
Morse, Emma R., estate of[4]	44652	27	1070
Moser, Carolyn L	55937	29	216
Mosser, Charles F	55399	27	513
Mueller, Earl W	45362	28	236
Murphy et al., Fred T., trustees	43795	25	724
Murphy Personal Property Trust	43795	25	724
Mutual Life Insurance Co. of New York	9764	23	749
Myrick, Julian S	51526 63376	29	822
N.			
Nashville, Chattanooga & St. Louis Ry	33799	24	856
National Casket Co., Inc.[5]	50320	29	139
National Contracting Co.[6]	24520	25	407
National Land & Construction Co	40126	25	562
National Pipe & Foundry Co.[7]	32997	19	242
Neal et al., J. Henry, trustees	45403	26	551

[1] Nonacquiescence relates to following issues: Whether mail pay received in 1921 constituted income in 1920; rental interest received on completed addition and betterments in final settlement with the Director General.

[2] Nonacquiescence relates to deduction for reserve set up to meet liability upon matured coupons; adjustment of income for rental of space occupied in home office building and depreciation upon such building.

[3] Nonacquiescence relates to issue regarding deduction from income of sprinkling tax.

[4] Estate tax decision.

[5] Nonacquiescence relates to the application of a net amount of operating losses after applying the profits of a subsidiary during the period of affiliation to reduce the loss sustained by a parent company on the liquidation of a subsidiary company.

[6] Nonacquiescence relates to issue 1 of decision and issue regarding deductibility of overhead costs in 1925.

[7] Acquiescence published in Cumulative Bulletin IX-2, page 43, revoked. Revocation of prior acquiescence and present nonacquiescence are due to the failure of the Board's decision to limit the word "distributed" to the cash distributions made to the stockholders.

NONACQUIESCENCES—Continued.

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Neill, James [1]	9290	8	299
Nelms, Frank Haywood	51887	27	65
Nelms, Mrs. Frank Haywood	51888	27	65
Newport Co	35431	24	1246
New York Central R. R. Co.[2]	19932 34437 62040	28	437
New York Life Insurance Co	38880	24	1217
New York, Ontario & Western Ry. Co	52693	30	408
Nibley-Mimnaugh Lumber Co	17527	26	978
Nichols & Cox Lumber Co	23601	24	54
Nicodemus, Jr., F. C	52326 62569	26	125
Nielsen Co., E. H	8899	26	223
North American Investment Co	30183	24	419
Northern Coal Co.[3]	34945	24	307
Noyes, Jansen [4]	38574	25	1351
O.			
Oakman et al., Mamie R	42917	24	84
Ogden, Hugh W	23943	24	1239
Old Mission Portland Cement Co	38853	25	305
Olinger Mortuary Association	36502	23	1281
Omaha Coca-Cola Bottling Co	52641	26	1123
O'Rear, E. C.[5]	32335	28	698
Oregon Terminals Co	68893	29	1332
Osborne, Owen, estate of	59957	29	374
Oswego Falls Corporation	28301 32673 34352	26	60
Owens, J. T	63149	27	469
Owens, Mrs. J. T	63150	27	469
Owens, O. O	31986	26	1147
P.			
Pacific Nash Motor Co	45169 45170	23	953
Pacific Rock & Gravel Co	28776	26	296
Parriott, F. B.[6]	30989	28	917
Peabody, Cornelia Haven, estate of [7]	39647	24	787
Peabody et al., Stephen, executors [7]	39647	24	787
Petaluma & Santa Rosa R. R. Co.[8]	13830	11	541
Peters, Andrew J	54050	28	976
Phelps et al., Luis James, executors [9]	50336	27	1224

[1] Acquiescence published in Cumulative Bulletin X-1, page 46, withdrawn.
[2] Nonacquiescence relates to following issues: Whether mail pay received in 1921 constituted income in 1920; rental interest received on completed addition and betterments in final settlement with the Director General.
[3] Nonacquiescence relates to statute of limitations issue.
[4] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[5] Nonacquiescence relates to issue regarding amount of loss sustained by petitioner by reason of destruction by fire of his residence and furniture.
[6] Nonacquiescence relates to interpretation of article 1567, Regulations 45, as applied to exchange of stock of Pittsburgh Texas Oil & Gas Co.
[7] Estate tax decision.
[8] Nonacquiescence relates to that part of decision concerning purchase of taxpayer's own bonds at less than par which were held as an investment. Acquiescence notice as to this issue published in Cumulative Bulletin VII-2, page 31, revoked.
[9] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Phillips, William S	24446, 31769	24	98
Pierce, Edward A	58796	26	1401
Pittsburgh Athletic Co	60569, 66964, 67422	27	1074
Pittsburgh & Lake Erie R. R. Co.[1]	42764	28	259
Plettner, Maude Brown	33345	25	631
P-M-K Petroleum Co.[2]	50576, 54779	24	360
Post & Sheldon Corporation	56695	28	26
Powel, T. I. Hare	64464	27	55
Price, Harry	70008, 71596	29	1255
Prosperity Co., Inc.[3]	45896, 59468	27	28
Providence Trust Co. of Philadelphia, executor	59957	29	374
Pryor & Lockhart Development Co	38872, 45668, 51326	26	1054
Purse, James N	54124	27	725
R.			
Randolph, Frankie Carter	51890	27	65
Randolph, R. D	51889	27	65
Randolph, Virgil P., trust	48833	28	773
Ray Oil Co.[4]	43123, 45219, 48015, 61554	28	1204
Raymond, Howard W	58544	26	1401
Realty Associates, as syndicate manager[5]	27921	17	1173
Reed, Latham R	58800	26	1401
Reese, Augusta Bliss	70410	30	1
Rehtam, Inc	45016	28	666
Reynard Corporation[6]	67386, 70795	30	451
Richardson et al., Forrest, executors[7]	44652	27	1070
Richfield Oil Co	42921	25	101
Riffel, Henry[8]	3576	3	436
Riley, Anna E	61066	29	160
Riley Stoker Corporation	36584	26	749
Roberts, Walter B	37534	24	405
Robertson, J. G	49552, 52370	28	53
Rodeo-Vallejo Ferry Co.[2]	36411, 48528	24	936
Rorimer, Louis	58850	27	871

[1] Nonacquiescence relates to rental interest question and Board's decision with respect to portion of mail pay received in 1921.
[2] Nonacquiescence relates to first issue of decision.
[3] Nonacquiescence relates to overstatement of loss sustained as a result of liquidation of subsidiary.
[4] Nonacquiescence relates to issue whether petitioner was taxable for years 1926 to 1929, inclusive, as a trust or as an association.
[5] Acquiescence published in Cumulative Bulletin X-2, page 59, withdrawn.
[6] Nonacquiescence relates to inclusion in income of corporation for years ended March 31, 1930, and March 31, 1931, amounts representing rental of premises occupied by its president.
[7] Estate tax decision.
[8] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 60, recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page
Rosenbloom Finance Corporation[1]	35778 40903	24	763
Ross, Blanche S.[2]	51171	28	39
Rosser, E. M., executor[3]	40765	24	176
Roth, W. A.[4]	45065	22	587
S.			
St. Louis Southwestern Ry. Co	13319 27768 33938	24	917
St. Louis Union Trust Co., executor[5]	45966	27	318
Salomon, Leon[4]	3725 12231	4 8	1109 979
San Carlos Milling Co., Ltd.[6]	39525	24	1132
Sand Springs Ry. Co	32438 32439	21	1291
Sather Lease—Thomas Sather & Co	31979	26	86
Schwartz-Kasser Improvement Co	36876	26	322
Scott, Thomas B., estate of[7]	50336	27	1224
Seaconnet Coal Co.[8]	18089	24	307
Seatree, William Ernest	22094 33640	25	396
Security First National Bank of Los Angeles et al., executors[9]	45429	28	289
Security Savings & Commercial Bank	59523	29	176
Selwyn Eddy Co	21612	25	1341
Shaffer, C. B.[10]	29259	29	1315
Shaffer, John C	50086 59511	28	1293
Sheaffer Pen Co., W. A	36604	27	1056
Shepherd Syndicate	48332 51327	26	1062
Shlenker, Simon J	58801	26	1401
Silberblatt, Solomon	46335	28	73
Skewes-Cox, Edith Page	61669 68335	29	167
Skiff, Frank V.[2]	51173	28	39
Small's, Inc	53791	24	686
Smathers, E. E., estate of[10]	29260	29	1315
Smith, Mrs. Grant	43300 43305 43306	26	1178
Smith, Milton, estate of	52132	28	422
Smith, Jr., Milton, executor	52132	28	422
Snyder, Inc., H. S. & M. W	36686	26	692
Southern California Rock & Gravel Co	30898	26	296

[1] Nonacquiescence does not relate to the Board's holding that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[2] Gift tax decision.
[3] Estate tax decision.
[4] Acquiescence published in Cumulative Bulletin X-1, pages 56, 57, withdrawn.
[5] Estate tax decision; nonacquiescence as to question of situs.
[6] Acquiescence as to issue 2 published in Cumulative Bulletin XI-1, page 6, and nonacquiescence as to issue 1 published in Cumulative Bulletin XI-1, page 11, withdrawn.
[7] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[8] Nonacquiescence relates to statute of limitations issue.
[9] Nonacquisecence relates to issue whether taxpayer sustained a net loss in any business regularly carried on in 1924 which could be carried forward and deducted from taxable income in 1925.
[10] Nonacquiescence relates to the following issues: Reduction of cost basis (March 1, 1913, value) of assets sold by a partnership in 1919 by depreciation allowed in computing income for period March 1, 1913, to December 1, 1915; computation of 1919 partnership profit on sale of assets by considering as part of the sale price taxes of the partners paid in 1920 by the vendee.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Southern Railway Co. et al.[1]	21481 29951 37887–37898	27	673
Sprague & Son Co., C. H.[2]	34946	24	307
Spring City Foundry Co	21169	25	822
Sredies, Inc	45015	28	666
Stanley Co. of America	31516 33142 40023	26	705
Stearns, Marshall, administrator	48930	24	269
Stern et al., Samuel E. A., executors[3]	2459	2	102
Stetson, Iola Wise	41743	26 27	390 173
Stevens, Byam K	70006 71593	29	1255
Stevens, William D	70009 71594	29	1255
Stevenson Consolidated Oil Co.[4]	43416	23	610
Stifel, Arthur C	60738	29	1145
Stifel, Edward W	60739	29	1145
Stifel, Henry G	60740	29	1145
Stockholms Enskilda Bank	55755	25	1328
Stone, H. C., estate of	38336	26	301
Stone, Mrs. H. C., executrix	38336	26	301
Stone et al., Irving K., executors and trustees[5]	43830	26	1
Stone, Irving Lee, estate of[5]	43830	26	1
Straub, Tecla M	55935	29	216
Straus, Aaron	65091	27	1116
Strayer, Walter A	48564	27	155
Streefkerk, Mrs. S	45363	28	236
Strong, Harold C.[6]	38576	25	1351
Sturgeon-Hubbard Trust	37095	25	368
Sturgeon et al., Rollin S., trustees	37095	25	368
Suncrest Lumber Co	33244	25	375
Swartz, Inc., Edward G	36650	25	1065
Swift, Mary Dodson, estate of	44909	26	615
Swisky, Toby W	42032	25	259
T.			
Talbot, Frederick C., estate of	20411	27	829
Talbot, J. A.[7]	36191	23	792
Talbot et al., Susan D., executors	20409	27	829
Talbot, William H., estate of	20409	27	829
Taylor, H. Seldon, estate of[8]	64444	27	220
Taylor, Jr., et al., H. Seldon, executors[8]	64444	27	220
Taylor, Jessie Carter	51891	27	65
Taylor, Judson L	51892	27	65

[1] Nonacquiescence relates to issues involving additional compensation, rental interest on additions and betterments, and back mail pay for use of properties during Federal control.
[2] Nonacquiescence relates to statute of limitations issue.
[3] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 67, recalled.
[4] Nonacquiescence relates to issue regarding inclusion in income for 1926 of $180,823.35 received upon exchange by petitioner of 250,000 shares of Sunburst Oil & Gas Co. stock with that corporation.
[5] Estate tax decision; nonacquiescence relates to issue involving property transferred by trust agreement.
[6] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[7] Nonacquiescence relates to depreciation allowance in computing loss in sale of a boat.
[8] Estate tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket. No.	Board of Tax Appeals.	
		Volume.	Page.
Ten Eyck, Peter G	68197	29	1113
Tennessee Consolidated Coal Co	33383	24	369
Terre Haute, Indianapolis & Eastern Traction Co	33858	24	197
Terre Haute Traction & Light Co	33860	24	197
Terry, Anna Davis	45446	26	1418
Texas Irrigation Co.[1]	40083 41346	24	958
The Hub, Inc	46298	26	1201
353 Lexington Avenue Corporation	65089	27	762
Tillotson Manufacturing Co	44167	27	913
Titus, C. Dickson	20705	24	36
Todd, Willis	37536	24	405
Tolerton & Warfield Co.[2]	45320	23	892
Towers & Sullivan Manufacturing Co	40508	25	922
Trojan Oil Co	33757	26	659
Twin Bell Oil Syndicate	45052	26	172
Tyler et al., Sidney F., trustees	56449	28	367
U.			
Union Guardian Trust Co., executor [3]	44735	26	1321
Union Pacific R. R. Co. et al.[4]	35639– 35649 35684 35685 40060 40061 40062	26	1401
Union Trust Co., trustee	42917	24	84
United Oil Co	38082 42922 51622	25	101
V.			
Van Camp Packing Co., Inc	46131	26	256
Voelbel, Jacob, estate of [5]	6009	7	276
Voelbel, Walter W., executor [5]	6009	7	276
Volunteer State Life Insurance Co	54176	27	1149
Von Gunten, Christian W	61278	28	702
Vonnegut Hardware Co	44940	28	784
W.			
Waggoner, Ella	33517	24	657
Waggoner, W. T	33516	24	657
Walker, Talbot C	20407	27	829
Wall, Frank E. [6]	7359	4	915
Walters, John W	70010 71597	29	1255
Ward et al., Daisy M	62644– 62649	29	1251

[1] Nonacquiescence relates to affiliation issue.
[2] Nonacquiescence relates to issue regarding deduction of loss sustained by two affiliated companies during fiscal year ended January 31, 1924, and the taxable period February 1 to April 25, 1924, in computing the consolidated net income for taxable period April 26 to December 31, 1924, and the year 1925.
[3] Estate tax decision.
[4] Nonacquiescence relates to issue regarding rental interest and issue concerning net loss of Los Angeles & Salt Lake R. R. Co. for period January 1 to April 30, 1921.
[5] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 73, recalled.
[6] Acquiescence published in Cumulative Bulletin X-1, page 68, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Wardman, Harry	22348	24	102
Warner Collieries Co. of Delaware	34679	26	1047
Watab Paper Co	24773 28082 38685 41733 46076 51387	27	488
Wells Fargo Bank & Union Trust Co., administrator	20411	27	829
Wells, James E	62948	29	222
West Virginia-Pittsburgh Coal Co	20337 25030	24	234
Wheeling Mold & Foundry Co. (Del.)	23410	27	929
White, Juliet C	58775	26	1401
White Oak Transportation Co.[1]	18088	24	307
White, Rita M. Kohler	36112	25	243
White, Sidney J	58776	26	1401
Wilcox & Sons, J. F	40619	28	878
Williams et al., Frank G., executors	33564	25	1078
Wilson, John P	52931 57226	29	304
Wilson, Luke F., estate of	32444	25	994
Wilson Shipbuilding Co.[2]	34337	25	182
Winston Bros. Co	59270	29	905
Wobber Bros	36875	26	322
Wobbers, Inc	36874	26	322
Wolpert, Urban F	48563	27	155
Wood Furniture Co., J. A	40565	21	564
Woodward, George [3]	42279	23	1258
Y.			
Youngstown Sheet & Tube Co	28149 35511	24	1246
Z.			
Ziegler, Albert W	46291	23	1091
Ziegler, Clifford E	46292	23	1091
Zobelein, George	45352	28	236
Zobelein, Mrs. Edward	45353	28	236

[1] Nonacquiescence relates to statute of limitations issue.
[2] Nonacquiescence relates to issue 5 of decision.
[3] Acquiescence published in Cumulative Bulletin X-2, page 78, withdrawn.

INCOME TAX RULINGS.—PART I.

REVENUE ACT OF 1932.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

SECTION 22(a).—GROSS INCOME: GENERAL DEFINITION.

ARTICLE 51: What included in gross income. XIII–6–6636
(Also Section 42, Article 331.) I. T. 2759

REVENUE ACT OF 1932.

"Recapture" amounts and interest received by the M Railroad Co. pursuant to section 206 of the Emergency Railroad Transportation Act, 1933 (48 Stat., 211, 220), should be included as income in the company's return for the taxable year embracing June 16, 1933, the date of the enactment of the Act.

An opinion is requested as to the treatment for income tax purposes of a distribution to the M Railroad Co. under section 206 of the Emergency Railroad Transportation Act, 1933, representing "recapture" amounts paid by the company to the Interstate Commerce Commission.

It appears that during the years 1922 to 1932, inclusive, the M Railroad Co. paid to the Interstate Commerce Commission 338*x* dollars under the provisions of section 15(a) of the Transportation Act, which amount represented one-half of its excess earnings. Due to the repeal of section 15(a) of the Transportation Act the amount previously paid, together with 98*x* dollars interest, has been returned to the company. If the distribution constitutes income, advice is requested as to how and in what year it should be reported.

Under section 15(a)6 of the Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920 (41 Stat., 456, 459), a carrier which received for any year a net railway operating income in excess of 6 per cent of the value of its railway property was required to pay to the Interstate Commerce Commission one-half of such excess, generally referred to as "recapture" amounts, for the purpose of establishing and maintaining a general railroad contingent fund. The other one-half of such excess was required to be placed in a reserve fund established and maintained by the carrier.

In General Counsel's Memorandum 4606 (C. B. VII–2, 256), it was held that the proper treatment of the "recapture" amounts in the audit of income tax returns of carriers was to exclude from gross income the amounts paid to the Interstate Commerce Commission. Consequently, the carrier paid no income, war-profits, or excess-profits tax on such amounts.

Section 206 of the Emergency Railroad Transportation Act, 1933, approved June 16, 1933, provides for the cessation of payments to the Interstate Commerce Commission under the recapture clause, and for the liquidation and distribution to carriers of the general railroad contingent fund established thereunder. The statute reads in part as follows:

SEC. 206. (a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

(b) The income, war-profits, and excess-profits tax liabilities for any taxable period ending after February 28, 1920, of the carriers and corporations whose income, war-profits, or excess-profits tax liabilities were affected by section 15a of the Interstate Commerce Act, as in force prior to the enactment of this Act, shall be computed as if such section had never been enacted, except that, in the case of carriers or corporations which have made payments under paragraph (6) of such section, an amount equal to such payments shall be excluded from gross income for the taxable periods with respect to which they were made. *All distributions made to carriers* in accordance with subdivision (a) of this section *shall be included in the gross income of the carriers for the taxable period in which this Act is enacted.* The provisions of this subdivision shall not be held to affect (1) the statutes of limitations with respect to the assessment, collection, refund, or credit of income, war-profits, or excess-profits taxes or (2) the liabilities for such taxes of any carriers or corporations if such liabilities were determined prior to the enactment of this Act in accordance with section 1106(b) of the Revenue Act of 1926 or section 606 of the Revenue Act of 1928, or in accordance with a final judgment of a court, an order of the Board of Tax Appeals which had become final, or an offer in compromise duly accepted in accordance with law. [Italics supplied.]

Inasmuch as the M Railroad Co. paid to the Interstate Commerce Commission under the recapture clause $338x$ dollars which has been returned to it in distribution, the amount should be included as income in the company's return for the taxable year embracing June 16, 1933, the date of enactment of the Emergency Railroad Transportation Act, 1933, in accordance with the express provisions of that Act. The interest of $98x$ dollars should be treated in the same manner as that part of the distribution which represents the return of the amount paid under the recapture clause.

ARTICLE 53: Compensation paid other than in cash. XIII-6-6637 I. T. 2760

REVENUE ACT OF 1932.

The pay and allowances in lieu of quarters received by a chaplain in the United States Army or Navy is not subject to Federal income tax. I. T. 1307 (C. B. I-1, 110) is revoked in so far as it is in conflict herewith.

Inquiry is made relative to the taxability of the rental allowance received by A in the year 1932.

The taxpayer, A, is a regularly ordained minister of the gospel and, as Army chaplain, holds the rank of major in the United States Army. As Army chaplain he is entitled to quarters on the post but as quarters are not available he receives an allowance for rental instead. He included the amount of such allowance as taxable income in his return for 1932, but now contends that it is not subject to tax, relying upon the decision of the Court of Claims in the case of *Clifford L. Jones* v. *United States* (60 Ct. Cl., 552; T. D. 3724, C. B. IV-2, 136).

In that case the court held that the rental value of quarters occupied by an Army officer and the cash received by him as commutation of quarters were not taxable income. Likewise, article 53 of Regulations 77, relating to the Revenue Act of 1932, holds that the value of quarters furnished Army and Navy officers, or amounts received as commutation of quarters by such officers, do not constitute taxable income. In I. T. 1307 (C. B. I-1, 110), it was held with respect to Army and Navy chaplains that the allowance in lieu of quarters is not exempt, and should be included in gross income. That ruling was based on the theory that a chaplain in the Army or Navy is primarily a minister of the gospel, since the Government requires that he be a regularly ordained minister, and that his status as minister takes precedence over his status as an Army or Navy officer. In view of the principle laid down by the Court of Claims in *Clifford L. Jones* v. *United States*, supra, which is recognized in Regulations 77, it is evident that I. T. 1307 is in conflict therewith in so far as it holds that a chaplain is taxable with respect to an allowance in lieu of quarters.

A chaplain in the Army or Navy is a commissioned officer, and the taxpayer's military rank, rather than his calling as a minister, determines his remuneration and emoluments. In other words, the pay and allowances are received by reason of his status as a commissioned officer in the United States Army or Navy and not by reason of his calling or vocation.

In the instant case, therefore, the rental allowance received in 1932 by A, the taxpayer, who is an Army chaplain, is not subject to Federal income tax. I. T. 1307 is revoked in so far as it is in conflict herewith

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ARTICLE 57: Gross income of farmers. XIII-12-6704 I. T. 2767

REVENUE ACT OF 1932.

The rental or benefit payments made to producers by the Secretary of Agriculture under the provisions of the Agricultural Adjustment

Act for the reduction in acreage, or the reduction in production for market of any basic agricultural commodity specified in section 11 of the Act, as amended, constitute taxable income to the recipients for Federal income tax purposes.

ARTICLE 66: Sale by corporation of its capital stock. XIII-20-6792
(Also Section 23(i), Article 176.) T. D. 4430

INCOME TAX.

Acquisition or disposition by a corporation of its own capital stock.

Articles 543 and 563, Regulations 65 and 69, and articles 66 and 176, Regulations 74 and 77, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Articles 543 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, and articles 66 of Regulations 74, approved February 15, 1929, and Regulations 77, approved February 10, 1933, are hereby amended to read as follows:

Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of applicable statutes.

Articles 563 of Regulations 65, approved October 6, 1924, and Regulations 69, approved August 28, 1926, are hereby amended by striking out the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentences of those articles, and by adding the following sentence to those articles:

As to the acquisition or disposition by a corporation of its own capital stock, see article 543.

Article 176 of Regulations 74, approved February 15, 1929, is hereby amended by omitting the first and second sentences thereof, by substituting the words "a corporation" in place of the second word in the third sentence of this article, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

Article 176 of Regulations 77, approved February 10, 1933, is hereby amended by omitting the first and second sentences thereof, and by adding the following sentence to this article:

As to the acquisition or disposition by a corporation of its own capital stock, see article 66.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 2, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

SECTION 22(b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME.

ARTICLE 81: Exclusions from gross income. XIII–19–6781
I. T. 2779.

REVENUE ACT OF 1932.

Pensions and compensation received by veterans are subject to Federal income tax, unless such amounts are paid under the World War Veterans Act or the World War Adjusted Compensation Act.

Advice is requested whether, in view of section 17 of Public, No. 2 (48 Stat., 8), and section 20 of Public, No. 78 (48 Stat., 283, 309), enacted by the Seventy-third Congress, pensions, compensation, insurance, and adjusted compensation are exempt from Federal income tax under the provisions of section 22 of the World War Veterans Act, section 308(a) of the World War Adjusted Compensation Act, and section 4747 of the Revised Statutes of the United States.

Section 17 of Public, No. 2, repeals all laws granting compensation, pensions, disability allowance, or retirement pay to veterans and the dependents of veterans of the Spanish-American War, and the World War, or to former members of the military or naval service for injury or disease incurred or aggravated in the line of duty in the military or naval service, except so far as they relate to persons who served prior to the Spanish-American War and to their dependents, or to the retirement of officers or enlisted men of the Regular Army, Navy, Marine Corps, or Coast Guard. Section 17 also repeals all laws granting or pertaining to yearly renewable term insurance, except as to contracts which matured prior to the enactment of the Act and on which payments have been commenced, or any judgment rendered on contracts of yearly renewable term insurance. The provisions of section 17 do not apply to compensation or pensions being paid to veterans disabled, or dependents of veterans who died, as a result of disease or injury directly connected with active military or naval service, except as to rates, time of entry into active service, and special statutory allowances.

Section 22 of the World War Veterans Act, section 308(a) of the World War Adjusted Compensation Act, and section 4747 of the Revised Statutes, not being laws granting compensation, pensions, disability allowance, etc., were not, it is considered, repealed by section 17 of Public, No. 2.

Section 22 of the World War Veterans Act, as amended, reads as follows:

SEC. 22. That *the compensation, insurance, and maintenance and support allowance* payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and *shall be exempt from all taxation: Provided,* That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

That the provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Title III of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries. (43 Stat., 613.) [Italics supplied.]

Section 308(a) of the World War Adjusted Compensation Act, as amended, reads as follows:

SEC. 308. (a) *No sum payable under this Act* to a veteran or his dependents, or to his estate, or to any beneficiary named under Title V, no adjusted service certificate, and no proceeds of any loan made on such certificate *shall be subject to* attachment, levy, or seizure under any legal or equitable process, or to *National* or State *taxation,* and no deductions on account of any indebtedness of the veteran to the United States shall be made from the adjusted service credit or from any amounts due under this Act. (44 Stat., 827.) [Italics supplied.]

Section 4747, Revised Statutes, provides for certain exemptions to all pensioners from legal process but does not provide for any exemption from income tax. That section, therefore, has no bearing on the question here under consideration.

Section 20 of Public, No. 78, provides in part that any claim for pension or compensation allowance filed prior to March 20, 1933, may be adjudicated and paid by the Veterans Administration on proof and evidence received by the Veterans Administration prior to March 20, 1933, and any person found entitled to the benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws, provided that the payments shall continue only to June 30, 1933. Section 22 of the World War Veterans Act, therefore, applies to pensions or compensation allowances received by World War veterans up to and including June 30, 1933.

Although the Revenue Act of 1928 contained certain provisions which exempted from Federal income tax pensions and World War compensation payments, those provisions were omitted from the Revenue Act of 1932. (See section 22(b)6 of the Revenue Act of 1928 and page 14 of Senate Conference Report No. 665, relating to the Revenue Act of 1932.) Furthermore, neither Public, No. 2, nor Public, No. 78, contains any provisions which exempt from Federal income tax pensions, compensation, and other allowances paid to World War veterans. It follows that pensions and compensation received by veterans are subject to Federal income tax, unless such amounts are paid under the World War Veterans Act or the World War Adjusted Compensation Act. (See article 52 of Regulations 77.) Pensions or compensation allowances received up to and including June 30, 1933, by veterans of the World War who, in accordance with section 20 of Public, No. 78, filed claims therefor prior to March 20, 1933, are considered as being paid under the provisions of the World War Veterans Act and are exempt from Federal income tax. All amounts received by veterans or their beneficiaries from yearly renewable term or converted policies of Government insurance issued under the provisions of the World War Veterans Act are exempt from Federal income tax under the provisions of section 22 of that Act.

Pensions received from the United States by the family of a veteran for services rendered by the veteran to the United States in time of war are exempt from Federal income tax. (See I. T. 2665, C. B. XI-2, 19.) Amounts received as emergency officers' retirement pay under the Tyson-Fitzgerald Act of May 24, 1928 (45 Stat., 735), are subject to Federal income tax. (See I. T. 2660, C. B. XI-2, 21.)

ARTICLE 81: Exclusions from gross income. XIII-20-6801
T. D. 4431

INCOME TAX.

Exemption of Treasury bills.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Attention is invited to the Act entitled "An Act providing certain exemptions from taxation for Treasury bills," approved June 17, 1930 (46 Statutes at Large, 775), which amends section 5 of the Second Liberty Bond Act, as amended (46 Statutes at Large, 19), by adding at the end thereof a new subdivision known as subdivision (d). This new subdivision provides that any gain from the sale or other disposition of Treasury bills issued after the enactment of the Act approved June 17, 1930, shall be exempt from all Federal, State, and local taxation (except estate or inheritance taxes), and that no loss from the sale or other disposition of such Treasury bills shall be allowed as a deduction, or otherwise recognized, for the purposes of any tax imposed by the United States or any of its possessions. Section 5 of the Second Liberty Bond Act, as so amended, reads as follows, the tax-exemption provisions being contained in subdivisions (b) and (d) thereof:

SEC. 5. (a) That in addition to the bonds and notes authorized by sections 1 and 18 of this Act, as amended, the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, for the purposes of this Act, to provide for the purchase or redemption before maturity of any certificates of indebtedness or Treasury bills issued hereunder, and to meet public expenditures authorized by law, such sum or sums as in his judgment may be necessary, and to issue therefor (1) certificates of indebtedness of the United States at not less than par and at such rate or rates of interest, payable at such time or times as he may prescribe; or (2) Treasury bills on a discount basis and payable at maturity without interest. Treasury bills to be issued hereunder shall be offered for sale on a competitive basis, under such regulations and upon such terms and conditions as the Secretary of the Treasury may prescribe, and the decisions of the Secretary in respect of any issue shall be final. Certificates of indebtedness and Treasury bills issued hereunder shall be in such form or forms and subject to such terms and conditions, shall be payable at such time not exceeding one year from the date of issue, and may be redeemable before maturity upon such terms and conditions as the Secretary of the Treasury may prescribe. Treasury bills issued hereunder shall not be acceptable before maturity in payment of interest or of principal on account of obligations of foreign governments held by the United States of America. The sum of the par value of such certificates and Treasury bills outstanding hereunder and under section 6 of the First Liberty Bond Act shall not at any one time exceed in the aggregate $10,000,000,000.

(b) All certificates of indebtedness and Treasury bills issued hereunder (after the date upon which this subdivision becomes law) shall be exempt, both as to principal and interest, from all taxation (except estate and inheritance taxes) now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority; and the amount of discount at which Treasury bills are originally sold by the United States shall be considered to be interest within the meaning of this subdivision.

(c) Wherever the words "bonds and notes of the United States," or "bonds and notes of the Government of the United States," or "bonds or notes of the United States" are used in the Federal Reserve Act, as amended, they shall be held to include certificates of indebtedness and Treasury bills issued hereunder.

(d) Any gain from the sale or other disposition of Treasury bills issued hereunder (after the date upon which this subdivision becomes law) shall be exempt from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority; and no loss from the sale or other disposition of such Treasury bills shall be allowed as a deduction, or otherwise recognized, for the purposes of any tax now or hereafter imposed by the United States or any of its possessions.

The report of the Committee on Ways and Means (H. Rept. No. 1759, accompanying H. R. 12440, Seventy-first Congress) shows that it is the purpose of the Act approved June 17, 1930, to obviate the necessity, which existed under the law prior to its amendment by such Act, of keeping a complicated system of bookkeeping records in order to ascertain gain or loss from the sale or other disposition of Treasury bills as differentiated from the discount received on such bills.

Attention is also invited to section 22(b)4 of the Revenue Act of 1932, which provides in part:

SEC. 22. * * * (b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title: * * * (4) * * * Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from the taxes imposed by this title; * * *.

Article 81 of Regulations 77, promulgated under the Revenue Act of 1932, provides that "Every person owning obligations of a State, Territory, any political subdivision thereof, or the District of Columbia; securities issued under the provisions of the Federal Farm Loan Act or of such Act as amended; or obligations of the United States or its possessions, must, however, submit in his income tax return a statement showing the number and amount of such obligations and securities owned and the income received therefrom."

Under the above-quoted provisions of the Revenue Act of 1932 and egulations 77, in the case of Treasury bills issued after June 17, 930, (1) the "amount of such obligations and securities" is their ar (maturity) value and (2) the "income received therefrom" is e net excess of the amount realized during the taxable year from e sale or other disposition of the bills over the cost or other basis ereof, no separate computation of discount being necessary.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 3, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

RTICLE 85: Dividends and interest from Federal land banks, Federal intermediate credit banks, and national farm-loan associations. Also Section 25, Article 291.)

XIII-19-6782
I. T. 2780

REVENUE ACT OF 1932.

Dividends on the stock of the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under the provisions of the Farm Credit Act of 1933, constitute taxable income to the recipients for Federal income tax purposes. So long as those organizations are exempt from Federal income tax for the reason that some of their stock is owned by the United States, or in the case of Production Credit Associations by the Production Credit Corporation, the dividends may not be credited against net income for normal tax purposes under the provisions of section 25(a)1 of the Revenue Act of 1932. It follows that for such period the dividends received are subject to both normal tax and surtax.

Advice is requested relative to the taxability under the Revenue Act of 1932 of dividends on stock of the Central Bank for Cooperaives, Production Credit Corporations, Production Credit Associaions, and Banks for Cooperatives, organized under the provisions f the Farm Credit Act of 1933. (48 Stat., 257.)

It has been suggested that, in view of section 63 of the Farm Credit Act of 1933, the income derived by shareholders from dividends on stock of the organizations referred to in that section is exempt from Federal income tax so long as stock in the Central Bank for Cooperatives, Production Credit Corporations, and the Banks for Cooperatives is held by the United States Government, and stock in the Production Credit Associations is held by Production Credit Corporations; and that article 85 of Regulations 77, promulgated under the Revenue Act of 1932, supports that position. Article 85 provides that pursuant to the provisions of section 26 of the Federal Farm Loan Act of July 17, 1916 (39 Stat., 360), as amended, the income derived from dividends on stock of Federal land banks, Federal intermediate credit banks, and national farm-loan associations is exempt from Federal income tax. The suggestion that the dividends received from the corporations organized under the Farm Credit Act of 1933 are also exempt from taxation is based on the assumption that the language of section 26 of the

Federal Farm Loan Act of July 17, 1916, as amended, is similar to that contained in section 63 of the Farm Credit Act of 1933.

Section 26 of the Federal Farm Loan Act of July 17, 1916, as amended, provides:

That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section 11 and section 13 of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section 5219 of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed. (39 Stat., 380.)

Section 63 of the Farm Credit Act of 1933 provides:

The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired. (48 Stat., 267.)

It is apparent from the quoted sections of the Acts that the provisions of section 63 of the Farm Credit Act of 1933 are not similar to section 26 of the Federal Farm Loan Act, in that section 26 of the Federal Farm Loan Act specifically provides for the exemption of the capital, reserves, and surplus of the organizations designated therein and the income derived therefrom, whereas section 63 of the Farm Credit Act of 1933 provides that the organizations formed under that Act, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation. There is no provision in section 63, or any other section of the Farm Credit Act of 1933, specifically exempting from income tax the amount received by shareholders as dividends on stock issued by the organizations referred to in that section.

[t is therefore held that dividends on the stock of the organizans designated in section 63 of the Farm Credit Act of 1933 contute taxable income to the recipients for Federal income tax purses. It is also held that so long as those organizations are exempt om Federal income tax for the reason that some of their stock is ned by the United States, or in the case of Production Credit As-iations by the Production Credit Corporation, the dividends may t be credited against net income for normal tax purposes under the ovisions of section 25(a)1 of the Revenue Act of 1932, which secn provides for a credit against net income for the purpose of the rmal tax of the amount received as dividends "*from a domestic rporation which is subject to taxation*" under Title I, relating to come tax. It follows that for such period of exemption the divinds received are subject to both normal tax and surtax.

SECTION 23(a).—DEDUCTIONS FROM GROSS INCOME: EXPENSES.

RTICLE 121: Business expenses. XIII-4-6610
I. T. 2751

REVENUE ACTS OF 1918, 1921, 1924, 1926, 1928, AND 1932.

The ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection, and conservation of properties producing taxable income are deductible from gross income.

The question has been presented as to the deductibility of fees and penses paid in connection with the management, protection, and nservation of various income-producing properties.

The Revenue Acts have consistently provided for the deduction of ıll the ordinary and necessary expenses paid or incurred during e taxable year in carrying on any trade or business." (Section (a), Revenue Acts of 1932 and 1928, and section 214(a)1, Revenue cts of 1926, 1924, 1921, and 1918.) This provision of law has been nerally construed as disclosed by the following decisions:

In Office Decision 877 (C. B. 4, 123) it was held that a taxpayer nose income is derived principally from investments in stocks and nds may deduct as business expenses the rent of an office and the st of clerical help if he can show that such expenses are ordinary ıd necessary.

Fees, commissions, and other compensation of committees for competent persons, as well as expenses properly incurred by such mmittees, have been held to be allowable deductions for income tax ırposes if paid or incurred with respect to the management or conrvation of income-producing property or funds belonging to the competent or with respect to the collection or securing of any come inuring to such incompetent. (I. T. 2238, C. B. IV-2, 49.) has also been held that if a safety deposit box is used primarily connection with the safeguarding of income-producing securities, e rent paid therefor constitutes a deductible business expense. . T. 2579, C. B. X-2, 129.)

The Board of Tax Appeals has consistently held that expenses paid or incurred in preserving an estate, making sales and collections, and doing other things necessary for the maintenance of the estate and the production of income, are ordinary and necessary expenses, and therefore proper deductions in computing net income. (*Appeal of Grace M. Knox et al.*, 3 B. T. A., 143, C. B. X–2, 39; *Appeal of William W. Mead et al., Exs.*, 6 B. T. A., 752, C. B. X–2, 47; *Appeal of H. Alfred Hansen, Ex.*, 6 B. T. A., 860, C. B. X–2, 29; *Henrietta Bendheim* v. *Commissioner*, 8 B. T. A., 158, C. B. X–2, 6; *George W. Seligman, Ex.*, v. *Commissioner*, 10 B. T. A., 840, C. B. X–2, 64.)

In the case of *Kenan et al.* v. *Bowers* (48 Fed. (2d), 263), the court held that compensation for clerk hire and rent of a safe in connection with the taxpayer's income-producing property were deductible.

The foregoing decisions indicate an obvious intent to allow as deductions all the ordinary and necessary expenses paid or incurred in the production of taxable income. This principle rests upon the sound basis that business expenses represent the cost of producing income.

In view of the foregoing, it is held that all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection, and conservation of properties producing taxable income should be allowed as deductions in computing net income. In this connection care should be taken to distinguish expenditures of a capital or personal nature. This conclusion should not be extended to net loss cases, which are governed by different sections of the Acts and apply only to losses incurred in a trade or business regularly carried on by the taxpayer.

ARTICLE 121: Business expenses. XIII–7–6658
I. T. 2763

REVENUE ACT OF 1932.

> The expenses incurred by a taxpayer in connection with initiating and approving the code, under the National Industrial Recovery Act, applicable to its business are ordinary and necessary expenses incurred in carrying on a trade or business, and are an allowable deduction under section 23(a) of the Revenue Act of 1932.

Advice is requested whether expenses incurred by a taxpayer in connection with initiating and approving the code, under the National Industrial Recovery Act, applicable to its business are an allowable deduction for Federal income tax purposes.

Section 23(a) of the Revenue Act of 1932 provides that in computing net income there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. It is held that the expenses incurred by the taxpayer in connection with initiating and approving the code referred to are ordinary and necessary expenses incurred in carrying on its trade or business. Accordingly, such expenses are an allowable deduction under section 23(a) of the Revenue Act of 1932.

ARTICLE 121: Business expenses. XIII-8-6660
I. T. 2764

REVENUE ACT OF 1932.

The amount actually paid by the M Bank into the temporary Federal deposit insurance fund upon admission to the fund, as distinguished from the amount subject to call, may be deducted as a business expense in the bank's Federal income tax return for the taxable year in which the payment is made.

A ruling is requested whether the amount paid by the M Bank into the temporary Federal deposit insurance fund, created under the Banking Act of 1933, is deductible for Federal income tax purposes.

Section 8 of the Banking Act of 1933, approved June 16, 1933 (48 Stat., 162), amends the Federal Reserve Act, as amended, by adding section 12A and section 12B. Under section 12B there is created a Federal Deposit Insurance Corporation, hereinafter referred to as the "Corporation," whose duty it is to purchase, hold, and liquidate the assets of National and State member banks which have been closed and to insure the deposits of banks entitled to the benefits of the insurance provided. Subsection (y) reads as follows:

The Corporation shall open on its books a temporary Federal deposit insurance fund (hereinafter referred to as the "fund"), which shall become operative on January 1, 1934, unless the President shall by proclamation fix an earlier date, and it shall be the duty of the Corporation to insure deposits as hereinafter provided until July 1, 1934.

Each member bank licensed before January 1, 1934, by the Secretary of the Treasury pursuant to the authority vested in him by the Executive order of the President issued March 10, 1933, shall, on or before January 1, 1934, become a member of the fund; each member bank so licensed after such date, and each State bank trust company or mutual savings bank (referred to in this subsection as "State bank," which term shall also include all banking institutions located in the District of Columbia) which becomes a member of the Federal Reserve System on or after such date, shall, upon being so licensed or so admitted to membership, become a member of the fund; and any State bank which is not a member of the Federal Reserve System, with the approval of the authority having supervision of such State bank and certification to the Corporation by such authority that such State bank is in solvent condition, shall, after examination by, and with the approval of, the Corporation, be entitled to become a member of the fund and to the privileges of this subsection upon agreeing to comply with the requirements thereof and upon paying to the Corporation an amount equal to the amount that would be required of it under this subsection if it were a member bank. The Corporation is authorized to prescribe rules and regulations for the further examination of such State bank, and to fix the compensation of examiners employed to make examinations of State banks.

Each member of the fund shall file with the Corporation on or before the date of its admission a certified statement under oath showing, as of the 15th day of the month preceding the month in which it was so admitted, the number of its depositors and the total amount of its deposits which are eligible for insurance under this subsection, and shall pay to the Corporation an amount equal to one-half of 1 per centum of the total amount of the deposits so certified. One-half of such payment shall be paid in full at the time of the admission of such member to the fund, and the remainder of such payment shall be subject to call from time to time by the board of directors of the Corporation. Within a reasonable time fixed by the Corporation each such member shall file a similar statement showing, as of June 15, 1934, the number of its depositors and the total amount of its deposits which are eligible for such insurance and shall pay to the Corporation in the same manner an amount equal to one-half of 1 per centum of the increase, if any, in the total amount of such deposits since the date covered by the statement filed upon its admission to membership in the fund.

If at any time prior to July 1, 1934, the Corporation requires additional funds with which to meet its obligations under this subsection, each member of the fund shall be subject to one additional assessment only in an amount not exceeding the total amount theretofore paid to the Corporation by such member.

If any member of the fund shall be closed on or before June 30, 1934, on account of inability to meet its deposit liabilities, the Corporation shall proceed * * * to pay the insured deposit liabilities of such member; except that the Corporation shall pay not more than $2,500 on account of the net approved claim of the owner of any deposit. * * *

Before July 1, 1934, the Corporation shall make an estimate of the balance, if any, which will remain in the fund after providing for all liabilities of the fund, including expenses of operation thereof under this subsection and allowing for anticipated recoveries. The Corporation shall refund such estimated balance, on such basis as the Corporation shall find to be equitable, to the members of the fund other than those which have been closed prior to July 1, 1934.

Each State bank which is a member of the fund, in order to obtain the benefits of this section after July 1, 1934, shall, on or before such date, subscribe and pay for the same amount of class A stock of the Corporation * * *.

Under the provisions of the Banking Act, upon admission to membership in the fund the bank is required to pay to the corporation one-fourth of 1 per centum of the amount of its certified deposits, and an equal amount is subject to call. If necessary an additional assessment of a like amount may be made. Provision is also made for the return to member banks of an equitable share of the balance of the fund in the event that, prior to July 1, 1934, the entire fund is not required by the corporation. The question of the deductibility of the amount paid into the fund arises primarily because of the contingency whereby a part of the amount paid may be returned to the member bank.

In the opinion of this office the amount actually paid into the fund, as distinguished from the amount subject to call, constitutes an ordinary and necessary business expense under section 23(a) of the Revenue Act of 1932 and is deductible by the bank in its return for the taxable year in which payment is made irrespective of the contingency whereby a part of the amount paid may later be returned to the member bank. (G. C. M. 8474, C. B. IX-2, 281.) If a part of the amount paid into the fund and deducted as a business expense is returned to the taxpayer, the amount so returned constitutes income for the year in which received. (G. C. M. 10798, C. B. XI-2, 58.)

ARTICLE 121: Business expenses. XIII-17-6764
I. T. 2775

REVENUE ACT OF 1932.

The amount paid by a retail establishment as its assessment for the necessary expenses of the National Retail Code Authority is deductible as a business expense in its Federal income tax return.

A ruling is requested as to the deductibility for Federal income tax purposes of payments made by retail establishments to the National Retail Code Authority for the purpose of meeting the expenses of administering the code of fair competition for the retail trade under the National Industrial Recovery Act.

Under section 3 of Title I of the National Industrial Recovery .ct (Public, No. 67, Seventy-third Congress) provision is made for ıe creation of codes of fair competition. The code of fair competi- on for the retail trade was approved by the President on October 1, 1933. Section 2(f) of Article X of the code provides that "The xpenses of the National Retail Trade Council shall be equitably ssessed and collected by the Council, subject to the approval of the .dministrator." In accordance therewith, the National Retail Code .uthority (formerly the National Retail Trade Council) issued regu- ıtions, which were approved by the Administrator, under which ach retail establishment subject to the provisions of the code is equired to make payment "according to the number of workers in ach establishment on the basis of an annual assessment of twenty- ve cents (25¢) per worker for the necessary expenses of the National tetail Code Authority, and such other amount per worker as may e specified by the Local Retail Code Authority for its necessary xpenses; provided, however, that in no case shall the total assess- ıent be at a greater rate than one dollar ($1) for each worker." 'he assessment is levied as of October 30, 1933, the effective date f the code, for the year ending October 29, 1934. Insignia appar- ntly can be obtained only after payment of the assessment.

It is held that the amount paid by a retail establishment as its ssessment for the necessary expenses of the National Retail Code uthority is deductible as a business expense in its Federal income ax return. (Cf. I. T. 2763, page 44, this Bulletin.)

RTICLE 121: Business expenses.

REVENUE ACT OF 1932.

Insurance premiums paid in advance for period of more than one 'ear. (See G. C. M. 13148, page 67.)

RTICLE 126: Compensation for personal services. XIII-10-6685
Mim. 4151

Effect of decision of Supreme Court on treatment for Federal income tax purposes of deductions claimed for compensation paid to others where such deductions are not substantiated by appropriate evidence.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 12, 1934.

'ollectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

Reference is made to the decision of the Supreme Court of the 'nited States in the case of *The United States of America, peti- ioner*, v. *Harry Murdock* [Ct. D. 771, page 144, this Bulletin], dated December 11, 1933, which involved the issue of what constitutes a 'iolation of the provisions of section 1114(a) of the Revenue Act of 1926 and section 146(a) of the Revenue Act of 1928.

The respondent was indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 Federal income tax returns for moneys paid as compensation to others. The Government proved that the respondent had been duly summoned to appear before a revenue agent for examination; that questions had been put to him; and that he refused to answer, stating he feared incrimination and upon further inquiry disclosed that his fear was based upon possible prosecution under State statutes.

The court held that the Government in the trial below correctly assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith to exercise a privilege granted the witness by the Constitution; that although the respondent's refusal to answer was intentional and without legal justification the jury might find that it was not prompted by bad faith or evil intent, which the statute makes an element of offense; and that under the circumstances the trial judge erred in stating that the respondent was guilty beyond a reasonable doubt.

There is, however, nothing in the decision of the court which prevents the Bureau from disallowing deductions claimed for compensation paid or deductions claimed of any other nature which are not properly substantiated by competent evidence or appropriate information. Therefore, in cases in which deductions are claimed for compensation paid to others, the Bureau will continue to disallow the deductions so claimed unless the taxpayer furnishes the Bureau with the names and addresses of the persons to whom the compensation is paid.

Correspondence and inquiries regarding this mimeograph should refer to the number and the symbols IT: E: CTR.

GUY T. HELVERING,
Commissioner.

SECTION 23(c).—DEDUCTIONS FROM GROSS INCOME: TAXES GENERALLY.

ARTICLE 151: Taxes. XIII-3-6600
I. T. 2750

REVENUE ACT OF 1932.

The tax imposed by the emergency revenue act of 1933 of the State of North Carolina upon the retail sale of merchandise is deductible by the vendor for Federal income tax purposes. Where the vendor collects the tax from the vendee he must include the amount so collected in his gross income for Federal income tax purposes. The vendee may not deduct this amount as a tax notwithstanding it is passed on to him by the vendor. However, where an amount equal to the tax is paid by the vendee with respect to goods purchased for consumption or use in his trade or business, such amount may be deducted as a business expense, or it may be treated as a capital item where such costs are properly capitalized rather than deducted as expenses.

A ruling is requested whether the tax imposed by the State of North Carolina upon the retail sale of merchandise is deductible by the vendor or the vendee for Federal income tax purposes.

The act under which the tax is imposed is cited as the emergency ›venue act of 1933 and the tax is levied for the period beginning uly 1, 1933, and ending June 30, 1935. Section 401 of the act reads ı part as follows:

SEC. 401. *Purpose.*

* * * * * * *

The tax upon the retail sale of merchandise to persons in this State is vied as a license or privilege tax for engaging or continuing in the business ! merchandising as defined in this act, but merchants may add to the price : merchandise the amount of the tax on the sale thereof, and when so added ıall constitu'e a part of such price, shall be a debt from purchaser to merıant until paid, and shall be recoverable at law in the same manner as other ›bts. It is the purpose and intent of this act that the tax levied hereunder ıall be added to the sales price of merchandise and thereby be passed on to ıe consumer instead of being absorbed by the merchant.

Any retail merchant who shall by any character of public advertisement fer to absorb the tax levied in this article upon the retail sale of merchandise, : in any manner, directly or indirectly, advertise that the tax herein imposed not considered as an element in the price to the consumer, shall be guilty : a misdemeanor. * * *

Other pertinent provisions of the act are as follows:

SEC. 404. *Definitions.*

For the purposes of this article—

* * * * * * *

3. The word "merchant" shall include any individual, firm, or corporation, omestic or foreign, subject to the tax imposed by this article.

4. The words "wholesale merchant" shall mean every merchant who engages ı the business of buying any articles of commerce and selling same to merıants for resale. The sale of any article of merchandise by any "wholesale ıerchant" to anyone other than a merchant for resale shall be taxable at the ıte of tax provided in this article upon the retail sale of merchandise. In the ıterpreta ion of this act the sale of any articles of commerce by any wholesale ıerchant to anyone not taxable under this act as a retail merchant, except s otherwise provided in this act, shall be taxable by the wholesale merchant t the rate of tax provided in this article upon the retail sales of merchandise.

* * * * * * *

6. The words "retail merchants" shall mean every merchant who engages ı the business of buying any articles of commerce and selling same at retail.

7. The word "retail" shall mean the sale of any articles of commerce in ny quantity or quantities for any use or purpose on the part of the purchaser ther than for resale.

8. The word "sale" shall mean any transfer of the ownership or title of ıngible personal property to the consumer for use and not for purposes of ›sale, for a monetary consideration. * * *

* * * * * * *

SEC. 406. *Must obtain license.*

If any person after the 30th day of June, 1933, shall engage or continue in ny business for which a privilege tax is imposed by this article, such person ıall apply for and obtain from the commissioner, upon the payment of the sum f one dollar ($1), a license to engage in and to conduct such business for the ırrent tax year, upon the condition that such person shall pay the tax accruıg to the State of North Carolina under the provisions of this article; and › shall thereby be duly licensed to engage in and conduct such business. Said cense shall be renewed annually and shall expire on the 30th day of June ext succeeding the date of its issue. Additional tax shall be levied as follows:

Wholesale merchants.—Upon every wholesale merchant as defined in this rticle a tax of one twenty-fifth of 1 per cent (1/25%) of gross sales of every ıch person, and the minimum tax for each 6-months period shall be twelve ollars and fifty cents ($12.50).

Retail merchants.—Upon every retail merchant as defined in this article a tax of three per cent (3%) of total gross sales by every such person.

In the preamble to the supplement to the emergency revenue act, which was enacted to provide for regulations under the taxing act, reference is made to the "levying of a general retail sales tax in North Carolina, imposed as a license tax on retail merchants for the privilege of doing business in the State"; and, in section 1 of the supplement reference is made to regulations "under which retail merchants shall collect from the consumers * * * the sales tax levied upon their business by the retail sales tax article * * *."

Inasmuch as under the above-quoted provisions of law the North Carolina sales tax is imposed upon the vendor, he may deduct the amount paid or accrued as a tax under section 23(c) of the Revenue Act of 1932 in determining his net income for Federal income tax purposes. Where the vendor collects the tax from the vendee, he must include the amount so collected in his gross income for Federal income tax purposes. The vendee may not deduct this amount as a tax notwithstanding it is passed on to him by the vendor. However, where an amount equal to the tax is paid by the vendee with respect to goods purchased for consumption or use in his trade or business, such amount may be deducted as a business expense, or it may be treated as a capital item where such costs are properly capitalized rather than deducted as expenses.

In the case of a vendor whose books are kept on an accrual basis, the amount of the tax actually accrued during the period covered by his Federal income tax return may be deducted in determining his net income. Where the vendor's books are kept on the cash receipts and disbursements basis, only the amount of the tax actually paid during the period covered by his Federal income tax return may be deducted in determining his net income.

ARTICLE 151: Taxes. XIII-6-6638
I. T. 2761

REVENUE ACT OF 1932.

The tax on retail sales of tangible personal property imposed by the State of New York is an excise tax levied by the State for the privilege of engaging in the business of making sales at retail and is deductible as a tax by the vendor for Federal income tax purposes.

Advice is requested whether the 1 per cent tax on retail sales of tangible personal property imposed by the State of New York is deductible by the vendor or the vendee for Federal income tax purposes.

The act under which the tax is imposed became effective April 19, 1933, and is entitled "An act to amend the tax law, by imposing a license tax upon receipts from the sale of tangible personal property at retail during the period commencing May 1, 1933, and ending June 30, 1934, for the privilege of selling such property at retail in this State, and making an appropriation for the department of taxation and finance." The tax is imposed under the provisions of article 17 of chapter 281, Laws of New York, 1933, and the law is cited as "Tax on retail sales of tangible personal property." Provions of the law, pertinent to the discussion of the question presented, ad as follows:

Sec. 390. *Definitions.*—When used in this article: (a) The word "person" cludes an individual, copartnership, society, association, joint stock company, rporation and any combination of individuals;

(b) The term "receipts" means the total amount of the sale price of tangible rsonal property sold at retail in this State, valued in money, whether received money or otherwise, including all receipts, cash, credits and property of any nd or nature, and also any amount for which credit is allowed by the seller to e purchaser, without any deduction therefrom on account of the cost of the operty sold, the cost of materials used, labor or service cost, interest or disunt paid, or any other expense whatsoever, from the sale of tangible personal operty at retail in this State, except receipts from the sale for human conmption of the food products hereinafter in Schedule A specified, receipts from e sale of motor fuels upon which a tax is imposed pursuant to article 12–a of is chapter, receipts from the sale of gas, steam and water when delivered to nsumers through mains and pipes, receipts from the sale of electricity, reipts from sales by or to the State, municipalities and any other political subvisions thereof and receipts upon which this State is, by virtue of the provions of the Constitution of the United States or otherwise, without power to ipose a tax.

* * * * * * *

(c) The word "sale" means any transfer, exchange or barter, conditional otherwise, in any manner or by any means whatsoever for a consideration;

(d) The term "tangible personal property" means corporeal personal property;

(e) A retail sale or sale at retail means a sale to a consumer or to any person r any purpose other than for resale in the form of tangible personal property.

Sec. 391. *Imposition of tax.*—For the privilege of selling tangible personal operty at retail in this State during the period commencing May 1, 1933, and ding June 30, 1934, every person shall pay a tax of 1 per centum upon the ceipts therefrom. The burden of proving that a sale of tangible personal operty was not a sale at retail shall be upon the person who made it, unless ich person shall have taken from the purchaser a certificate signed by and aring the name and address of the purchaser to the effect that the property as purchased for resale. For the purpose of the proper administration of this ticle and to prevent evasion of the tax hereby imposed it shall be presumed at all receipts are subject to the tax until the contrary is established. The x shall be paid at the time and in the manner hereinafter provided and iall be in addition to any and all other taxes. In any case where tangible ersonal property is sold at retail under a contract made prior to May 1, 1933, hich specifies and fixes the sale price and such sale is taxable under this ticle, the seller may add the tax imposed by this article to the sale price id collect it from the vendee. No person engaged in the business of selling ngible personal property at retail shall advertise or hold out to the public, any manner directly or indirectly, that the tax imposed by this article is not nsidered as an element in the price to the consumer. * * *

* * * * * * *

Sec. 396. *Licenses; suspension and restoration thereof.*—Every person who akes a sale of tangible personal property at retail in this State shall be deemed have procured from the tax commission a license so to do. The license to ll tangible personal property at retail provided for in this article shall be addition to any and all other licenses which may be required by law. * * * he tax commission shall have power to suspend the license of any person ho shall violate or fail to comply with any provision of this article or any ile or regulation adopted by it pursuant to this article and shall also have ower to restore licenses after such suspension.

The tax on retail sales of tangible personal property imposed y the State of New York is an excise tax levied by the State on the endor for the privilege of engaging in the business of making sales retail. As the tax is imposed upon the vendor, he may deduct ie amount paid or accrued as a tax under section 23(c) of the

Revenue Act of 1932 in determining his net income for Federal income tax purposes. Where the vendor collects the tax from the vendee, the vendor must include the amount so collected in his gross income for Federal income tax purposes. The vendee may not deduct this amount as a tax, notwithstanding it is passed on to him by the vendor. However, where an amount equal to the tax is paid by the vendee with respect to goods purchased for consumption or use in his trade or business, such amount may be deducted as a business expense, or it may be treated as a capital item where such costs are properly capitalized rather than deducted as expenses.

In the case of a vendor whose books are kept on an accrual basis, the amount of the tax actually accrued during the period covered by his Federal income tax return may be deducted in determining his net income. Where the vendor's books are kept on the cash receipts and disbursements basis, only the amount of the tax actually paid during the period covered by his Federal income tax return may be deducted in determining his net income.

ARTICLE 151: Taxes. XIII-9-6673
I. T. 2765

REVENUE ACT OF 1932.

The privilege tax imposed by the State of Arizona under the provisions of the emergency revenue act of 1933 is an excise tax levied by the State on the vendor for the privilege of engaging in the business of making sales at retail and is deductible as a tax by such vendor for Federal income tax purposes.

A ruling is requested whether the tax levied under the provisions of the emergency revenue act of 1933, enacted by the State of Arizona on June 28, 1933, is an allowable deduction in the Federal income tax return of the M Company, which is engaged in the business of selling goods at retail and at wholesale.

Section 2 of the act, which is cited as "The emergency revenue act of 1933," provides for the imposition of the tax in the following terms:

SEC. 2. *Imposition of the tax.*—From and after the 30th day of June, 1933, there is hereby levied and shall be collected * * * annual privilege taxes measured by the amount or volume of business done against the persons on account of their business activities and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the following schedule.

The schedule referred to provides for a tax at rates ranging from one-eighth of 1 per cent of the gross proceeds of sales or gross income on the manufacturing or processing of agricultural products and the sale of live stock, to 1½ per cent on sales of tangible personal property at retail, not including stocks and bonds.

Certain pertinent excerpts from the law read as follows:

SEC. 11. *Licenses.*—Any person after the 20th day of July, 1933, who shall have a gross income or gross proceeds of sales upon which a privilege tax is imposed by this article, as a condition precedent to engaging or continuing in such business, shall apply for and obtain from the tax commission upon payment of the sum of 50 cents, a license to engage in and to conduct such business for the current tax year, upon condition that he shall pay the tax accruing to the State of Arizona under the provisions of this article, and he shall thereby be duly licensed to engage in and conduct such business. Only one such license all be required of any one person. Said license shall be renewed annually ıd shall expire on the 30th day of June next succeeding the date of its issuance.

* * * * * * *

SEC. 20. *Is additional tax.*—The tax imposed by this article shall be in addi- ɔn to all other licenses and taxes levied by law, whether as a condition preced- .t to engaging in any business taxable hereunder or for any other purpose.

* * * * * * *

SEC. 28. *Unfair competition.*—No person engaged in any of the businesses assified in section 2 of this article, shall advertise or hold out to the public any manner, directly or indirectly, that the tax herein imposed is not con- dered as an element in the price to the consumer.

Under section 1, definitions of certain terms used in the law are ɜ follows:

(e) The word "taxpayer" means any person liable for any tax hereunder.

(f) The term "gross income" means the gross receipts of a taxpayer de- ved from trades, business, commerce or sales and the value proceeding or ːcruing from the sale of tangible personal property, or service, or both, and ithout any deduction on account of losses.

* * * * * * *

(h) The term "gross proceeds of sales" means the value proceeding or ːcruing from the sale of tangible personal property without any deduction on ːcount of the cost of property sold, expenses of any kind, or losses; * * *

Other sections of the law provide that suitable records shall be ept by the person engaging or continuing in the business for which privilege tax is imposed; that returns shall be made monthly howing the amount of tax, which is payable monthly; and that the ax shall be a lien upon the property of the taxpayer who sells out r quits business. Various penalties are provided for failure to bserve the law and provisions are made for the refund of any xcess tax paid over that properly due.

It is held that the privilege tax imposed by the State of Arizona nder the provisions of the emergency revenue act of 1933 is an excise ax levied by the State on the vendor for the privilege of engaging n the business of making sales at retail. As the tax is imposed upon he vendor, he may deduct the amount paid or accrued as a tax under ection 23(c) of the Revenue Act of 1932, in determining his net ncome for Federal income tax purposes. However, if the amount of he tax is added to or made a part of the business expense of the endor, or is otherwise used to reduce his net income, the tax is not leductible by him separately as a tax.

Where the vendor collects the tax from the vendee he must include he amount so collected in his gross income for Federal income tax urposes. The vendee may not deduct this amount as a tax notwith- tanding it is passed on to him by the vendor. However, where an mount equal to the tax is paid by the vendee with respect to goods urchased for consumption or use in his trade or business, such mount may be deducted as a business expense, or it may be treated s a capital item where such costs are properly capitalized rather han deducted as expenses.

In the case of a vendor whose books are kept on an accrual basis, he amount of the tax actually accrued during the period covered y his Federal income tax return may be deducted in determining is net income. Where the vendor's books are kept on the cash eceipts and disbursements basis, only the amount of the tax actually paid during the period covered by his Federal income tax return may be deducted in determining his net income.

ARTICLE 151: Taxes. XIII-12-6705
I. T. 2768

REVENUE ACT OF 1932.

The tax imposed upon the distiller or importer by section 600 of the Revenue Act of 1918, as amended by section 2 of the Liquor Taxing Act of 1934 (Public, No. 83, Seventy-third Congress), is not deductible for Federal income tax purposes by the stockholders of the M Company, although paid by them when whisky was withdrawn from bonded warehouses.

State and local taxes paid on distilled spirits are not deductible for Federal income tax purposes by persons withdrawing whisky from bonded warehouses unless the law imposes the taxes upon such persons.

In October, 1933, the M Company, a distiller, paid a dividend to its stockholders in whisky warehouse receipts. The stockholders in order to withdraw from bonded warehouses the whisky represented by such receipts were required to pay a Federal tax of $1.10 per gallon and certain State, county, city, and license taxes. Inquiry is made whether such taxes are deductible in returns of the stockholders for Federal income tax purposes.

The tax imposed by section 600 of the Revenue Act of 1918, as amended by section 2 of the liquor taxing Act approved January 11, 1934, is imposed upon the distiller or importer. It is not deductible for Federal income tax purposes by the stockholders of the M Company, although paid by them when whisky was withdrawn from bonded warehouses.

In regard to the deductibility for Federal income tax purposes of State and local taxes paid on distilled spirits by persons withdrawing whisky from bonded warehouses, such taxes are not deductible by them unless the law imposes the taxes upon such persons.

ARTICLE 151: Taxes. XIII-21-6805
I. T. 2783

REVENUE ACT OF 1932.

The tax imposed by the State of Illinois under the retailers' occupation tax act, effective July 1, 1933, is deductible for Federal income tax purposes by the vendor who sells tangible personal property at retail in that State. If, however, the tax is added to or made a part of the business expense of the vendor, or is otherwise used to reduce his net income, it is not deductible separately as a tax.

A ruling is requested relative to the deductibility for Federal income tax purposes of the tax imposed by the Illinois retailers' occupation tax act, approved June 28, 1933, effective July 1, 1933 (Laws of Illinois, Fifty-eighth General Assembly, 1933, page 924).

The provisions of the retailers' occupation tax act, in so far as pertinent to the discussion of the question presented, read as follows:

SEC. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of 2 per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this

t and prior to July 1, 1935. However, such tax is not imposed upon the privi-
ge of engaging in any business in interstate commerce or otherwise, which
siness may not, under the Constitution and statutes of the United States, be
ade the subject of taxation by this State.

Sec. 3. On or before the 15th day of August, 1933, and on or before the 15th
y of each calendar month thereafter, until, but not including August, 1935,
ery person engaged in the business of selling tangible personal property at
tail in this State during the preceding calendar month shall make a return
the department, stating:

* * * * * * *

Returns shall be made under oath or affirmation on forms prescribed and
rnished by the department.

The person making the return herein provided for shall, at the time of
aking such return, pay to the department the amount of tax herein
iposed * * *.

* * * * * * *

Sec. 6. If it shall appear that an amount of tax, penalty or interest has been
id which was not due under the provisions of this act, whether as the result
a mistake of fact or an error of law, then such amount shall be credited
ainst any tax due, or to become due, under this act from the person who
ade the erroneous payment, or such amount shall be refunded to such person
the department.

Article 1 of the general rules and regulations relating to the re-
ilers' occupation tax act issued by the Department of Finance of
e State of Illinois reads in part as follows:

The act imposes a tax upon persons engaged in the business of selling tangible
rsonal property at retail in this State measured by gross receipts from such
les * * *.

The following statement appears at the bottom of page 4 of the
eneral rules and regulations:

The tax imposed by this act is an occupation tax upon retailers and is not a
x upon consumers. In fixing the price of his products the retailer may con-
der the tax to be paid by him under this act as one of the elements of cost
the conduct of his business and may include the amount of such tax in fixing
ch price in the same manner as rent, general taxes and other general over-
ead expenses are taken into consideration. But he is neither required nor
uthorized to collect the tax as a tax from his customers * * *.

It is evident from the provisions of the Illinois law and the regu-
tions quoted above that the tax is imposed upon the vendor engaged
n the sale of tangible personal property at retail. The vendor may,
herefore, deduct the amount of such tax under section 23(c) of the
evenue Act of 1932 in determining his net income subject to Federal
ncome tax. The amount of the tax may not be deducted separately
s a tax if it is added to or made a part of the business expense of the
endor, or is otherwise used to reduce his net income. The vendee
ay not deduct this amount as a tax notwithstanding it is passed on
o him by the vendor.

In the case of a vendor whose books are kept on the accrual basis,
he amount of the tax accrued during the period covered by his
ederal income tax return may be deducted in determining his net
ncome. When the vendor's books are kept on the cash receipts and
isbursements basis, only the amount of the tax actually paid during
he period covered by his Federal income tax return may be deducted
n determining his net income. (Cf. I. T. 2708, C. B. XII-2, 40,
elating to the retail sales act enacted by the State of Illinois, effec-
ive April 1, 1933. That act was held unconstitutional in *Winter* v.
Barrett, 352 Ill., 441, 186 N. E., 113.)

ARTICLE 151: Taxes. XIII-23-6827
I. T. 2787

REVENUE ACTS OF 1928 AND 1932.

For Federal income tax purposes the cost of stamps affixed to cigarette packages in compliance with the law of Ohio, effective July 9, 1931, is an allowable deduction as a tax only in the return of the wholesale dealer or retail dealer upon whom the requirement to purchase the stamps is placed. The cost of the stamps, however, may not be deducted separately as a tax if it is included as a part of the business expense of the purchaser of the stamps, or is otherwise used to reduce his net income. The purchaser or consumer of the cigarettes may not deduct the cost of the stamps as a tax, notwithstanding it is passed on to him by the vendor.

ARTICLE 151: Taxes. XIII-23-6828
I. T. 2788

REVENUE ACT OF 1932.

For Federal income tax purposes, the cost of stamps required, under the law of Ohio, to be affixed to cosmetics and other toilet preparations sold on and after August 1, 1933, and including June 30, 1936, is an allowable deduction as a tax only in the return of the wholesale dealer or retail dealer upon whom the requirement to purchase the stamps is placed. The cost of the stamps, however, may not be deducted separately as a tax if it is included as a part of the business expense of the purchaser of the stamps, or is otherwise used to reduce his net income. The purchaser or consumer of the cosmetics or other toilet preparations may not deduct the cost of the stamps as a tax, notwithstanding it is passed on to him by the vendor.

ARTICLE 151: Taxes. XIII-24-6844
I. T. 2789

REVENUE ACT OF 1932.

The license tax imposed by the State of Oregon on the sale or distribution of motor vehicle fuel (Oregon Code, 1930, as amended by chapters 391 and 428, Oregon Laws, 1933) is deductible as a tax in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, the amount of the tax is added to or made a part of the business expense of such consumer, or otherwise used to reduce net income, it may not be deducted by him separately as a tax.

ARTICLE 151: Taxes. XIII-24-6845
I. T. 2790

REVENUE ACT OF 1932.

For Federal income tax purposes, the excise tax imposed by the State of Ohio on beverages is deductible as a tax only in the return of the manufacturer, wholesale dealer, or retail dealer who is required to pay the tax by the purchase of "stamps or crowns." The amount may not, however, be deducted separately as a tax if it is included as a part of the business expense of the taxpayer or otherwise used to reduce net income. The consumer may not deduct he cost of the stamps or crowns as a tax, notwithstanding it is 'assed on to him by the vendor.

SECTION 23(e).—DEDUCTIONS FROM GROSS INCOME: LOSSES BY INDIVIDUALS.

ARTICLE 171: Losses.

XIII-18-6772
I. T. 2777

REVENUE ACT OF 1932.

A conservator took charge of the M Bank in the year 1933. An assessment of 100 per cent was then levied on the stockholders. All the outstanding capital stock of the bank was canceled but new stock, nonassessable, was immediately delivered to the stockholders who paid the assessment. Those who did not pay the assessment lost their entire interest in the bank.

Held, no deductible loss was sustained in 1933 by the stockholders who paid the assessment and received new stock. The stockholders who failed to pay the assessment, with the result that when their stock was canceled they lost all interest in the bank, sustained a loss which is deductible for 1933.

A conservator took charge of the M Bank in the year 1933. The 'anking commissioner levied an assessment of 100 per cent on the tockholders. All the outstanding capital stock of the bank was anceled but new capital stock, nonassessable, was delivered to the tockholders who paid the assessment. The stockholders who did :ot pay the assessment lost their entire interest in the bank. The ld banking corporation continued in existence and is conducting ts regular banking business. Under these circumstances inquiry is nade whether the stockholders may deduct as a loss for the year 933 the cost or other basis of their stock.

Section 23 of the Revenue Act of 1932 provides as follows:

In computing net income there shall be allowed as deductions:

* * * * * * *

(e) LOSSES BY INDIVIDUALS.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during he taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not onnected with the trade or business; * * *

* * * * * * *

In the instant case the stockholders who paid the assessment received new shares of stock, which took the place of the old shares, nd thereby retained their interest in the bank. The assessment which was paid represents additional cost of the investment in the tock of the M Bank. (Article 282, Regulations 77.) Since the ank has continued in business the amount which may be realized y the stockholders who paid the assessment and retained their interest in the bank has not been determined. In the case of such tockholders no deductible loss was sustained during the year 1933.

The stockholders who failed to pay the 100 per cent assessment, with the result that when their stock was canceled they lost their ntire interest in the bank, may deduct as a loss for the year 1933 he cost or other basis of their stock.

SECTION 23(i).—DEDUCTIONS FROM GROSS INCOME: NET LOSSES.

ARTICLE 176: Sale of capital stock and capital assets.

REVENUE ACT OF 1932.

Amendment of article 176, Regulations 77. (See T. D. 4430, page 36.)

SECTION 23(k).—DEDUCTIONS FROM GROSS INCOME: DEPRECIATION.

ARTICLE 205: Method of computing depreciation allowance.

XIII–10–6692
T. D. 4422

Article 205 of Regulations 77 and 74 and article 165 of Regulations 69, 65, and 62, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Articles 205 of Regulations 77 and 74 are hereby amended to read as follows:

ART. 205. *Method of computing depreciation allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. Where the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation allowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed.

Articles 165 of Regulations 69, 65, and 62 are hereby amended to read as follows:

ART. 165. *Method of computing depreciation allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. Where the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably considered necessary to recover during the remaining useful life of the prop-ty the unrecovered cost or other basis. The burden of proof will rest upon e taxpayer to sustain the deduction claimed. Therefore, taxpayers must fur-sh full and complete information with respect to the cost or other basis of the sets in respect of which depreciation is claimed, their age, condition and maining useful life, the portion of their cost or other basis which has been covered through depreciation allowances for prior taxable years, and such her information as the Commissioner may require in substantiation of the duction claimed.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 28, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

RTICLE 205: Method of computing depreciation allowance. XIII-16-6754 Mim. 4170

Information necessary in support of depreciation deductions.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 4, 1934.

ollectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

Treasury Decision 4422 [page 58, this Bulletin], approved Feb-ary 28, 1924, provides that taxpayers claiming deductions from oss income for depreciation must furnish full and complete infor-ation regarding (1) the cost or other basis of assets for which preciation is claimed, (2) the age, condition, and remaining useful fe of the assets, (3) the portion of the cost or other basis which is been recovered through depreciation allowances for prior taxa-e years, and (4) such other information as may be required to tablish the correctness of the deduction claimed, or to determine e amount of the deduction properly allowable.

The deduction for depreciation in respect of any depreciable prop-ty for any taxable year is limited by Treasury Decision 4422 to ch ratable amount as may reasonably be considered necessary to cover during the remaining useful life of the property the unrecov-ed cost or other basis, under the applicable law and regulations. taxpayer is not permitted under the law to take advantage in later ars of his prior failure to take any depreciation allowance or of s action in taking an allowance plainly inadequate under the own facts in prior years.

The information above referred to has been required under pre-ous regulations but in many instances it has either not been fur-shed or has been prepared for the taxpayer by the examining officer. ne of the principal purposes of Treasury Decision 4422 is to place e burden of proof of the correctness of deductions claimed for preciation squarely upon the taxpayer, and to require that all hedules and other data deemed necessary shall be prepared by e taxpayer and not by the examining officer.

In cases where the required information has not been furnished the revenue agent or other examining officer should advise the taxpayer with respect to the schedule and supporting information which must be prepared. If upon the review of the return of any taxpayer it is apparent that the deduction claimed for depreciation is a very minor factor in determining net income, or the facts indicate conclusively that the deduction claimed in the return is not in excess of the correct amount, or where it is clearly evident that no taxable income will be developed, the schedules need not be furnished for such year. In all other cases the information required by Treasury Decision 4422 and by this mimeograph must be furnished and after verification by the examining officer should be made a part of his report.

Where it is claimed by a taxpayer that the information necessary for the proper determination of the allowable depreciation has been previously prepared and filed in connection with prior income tax returns, the examining officer must satisfy himself that the information on file is in accordance with the requirements of this mimeograph, and an affirmative statement to that effect must be made in his report.

DEPRECIATION SCHEDULE.

The accompanying form of schedule has been prepared for use in compiling the information required, and while it is believed applicable to most cases, any form that will clearly set forth the information required may be used in order to substantiate the cost or other basis of the property and the depreciation claimed. With respect to property acquired prior to March 1, 1913, property acquired by gift or transfer in trust, property transmitted at death, property acquired upon an exchange, property acquired in a reorganization after December 31, 1917, property acquired after December 31, 1920, by a corporation in exchange for its stock where immediately after the transfer the transferor of the property is in control of the corporation, property acquired by an involuntary conversion, and property acquired during affiliation, and certain other special cases, the statutes prescribe certain limitations with which compliance must be made. If in any case, therefore, depreciable assets have been included in the property account on any basis other than the actual cost of property acquired for cash, the taxpayer must furnish the information and evidence necessary to establish definitely the correctness of the basis claimed.

In preparing the schedules the original cost or other basis of the property and gross additions by years must be set forth separately. The schedule for each class of assets must likewise clearly reflect all adjustments to the property accounts which have been or should have been made in prior years as a result of the elimination of assets fully depreciated, the sale, abandonment or retirement of assets, or for any other reason. The adjusted property account as shown in the schedule should be reconciled with the property account as reflected on the books of the taxpayer.

If the segregation of property accounts in the past has not been sufficiently detailed to afford a reasonable basis for the determination of the depreciation deduction, the cost or other basis should be segregated into groups of accounts containing similar assets having

ıpproximately the same average lives, to serve as a basis for depre-
:iation deductions for current and future years. If, however, a
;axpayer for its own purpose keeps a record of each individual item,
›r classifies its accounts into a large number of different groups, the
lata required by this mimeograph should be summarized in such
:orm as will present an accurate statement of each distinctly differ-
:nt class of depreciable assets and of the reserve that has been
ıccrued against each class to date for income tax purposes. The
:xamining officer should verify the correctness of these summarized
chedules from the taxpayer's records, but the inclusion in the
:chedule of a voluminous mass of detail is not ordinarily necessary.

In computing the reserve for depreciation, credits to the reserve on
.ccount of depreciation shall be in the amount allowable for each
'ear except for such closed years for which a greater amount has
›een allowed, in which case the total amount allowed shall be credited
o the reserve. If for income tax accounting other credits such as
alvage value have been added to the reserve, these should be set
orth separately with an explanation of such credits. Charges to
he reserve that have not been recovered as expense or otherwise in
losing prior income tax returns should be set up separately in the
chedule. These charges, in addition to the cost of property retired,
nay be such items as repairs, renewals, fully depreciated assets, etc.,
ll of which should be identified with an explanation respecting any
.nusual charges.

DEPRECIATION DETERMINATION FOR YEAR UNDER CONSIDERATION.

If, upon examination and verification of the schedule, it is found
hat the cost or other basis of any depreciable property has been
ully recovered though the property is still in use or where the
eserve as provided is higher than is justified by the actual physical
ondition of the property, it will be presumed that the depreciation
ates allowed in the past have been excessive. After careful consider-
tion of the information filed in accordance with the requirements
f this mimeograph the examining officer should follow the provi-
ions of this mimeograph and of Treasury Decision 4422 in determin-
ıg rates of depreciation for the years under consideration.

RETIREMENT OF ASSETS.

Where an account contains more than one item it will be presumed
ıat the rate of depreciation is based upon the average lives of such
ssets. Losses claimed on the normal retirement of assets in such
n account are not allowable, inasmuch as the use of an average rate
ɔntemplates the normal retirement of assets both before and after
ıe average life has been reached and there is, therefore, no possi-
ility of ascertaining any actual loss under such circumstances until
ll assets contained in the account have been retired. In order to
ɔcount properly for such retirements the entire cost of assets re-
red, adjusted for salvage, will be charged to the depreciation re-
:rve account, which will enable the full cost or other basis of the
roperty to be recovered. Where the taxpayer by clear and convinc-
ıg evidence shows that assets are disposed of before the expiration
f the normal expected life thereof, as, for example, because of

casualty, obsolescence other than normal, or sale, losses on the retirement of such assets may be allowed, but only where it is clearly evident that such disposition was not contemplated in the rate of depreciation. In single item accounts or in classified accounts where it is the consistent practice of the taxpayer to base the rate of depreciation on the expected life of the longest-lived asset contained in the account, the loss upon the retirement of an asset is allowable.

RETROACTIVE PROVISION.

The procedure outlined in this mimeograph shall be followed in all cases and prior instructions to the contrary are hereby revoked.

GUY T. HELVERING,
Commissioner.

[Inclosure.]

[Inclosure to Mim. 4170.]

Account__________

Estimated useful life__________yrs. Rate__________

1	2	3	4	5		
Date acquired.	Original cost or other basis and subsequent additions by years.	Deductions for sales and retirements.	Cost remaining at the end of year.	Annual depreciation accrual.	Charges to accrued depreciation for sales and retirements.	Net depreciation reserve at end of year.

Do all costs reported in column 2 represent actual cash expenditures by the taxpayer? Answer ______.
(Yes or No.)

If any of the amounts do not represent cash expenditures by the taxpayer a supplemental statement should be prepared indicating the amount thereof, how it was determined with a description of the character and condition of the assets, and the basis used in allocating the amounts to depreciation accounts.

Charges to reserve for other than sales and retirements should be stated separately and be explained.

Credits to reserve for other than accrued depreciation should be stated separately and be explained.

SECTION 23(r).—DEDUCTIONS FROM GROSS INCOME: LIMITATION ON STOCK LOSSES.

ARTICLE 272: Limitations on deductions for losses from sales and exchanges of stocks and bonds.

XIII-15-6741
I. T. 2774

REVENUE ACT OF 1932.

Contracts for the future delivery of grain or other commodities do not come within the meaning of "stocks and bonds" as used in section 23(r) of the Revenue Act of 1932. The deduction for a loss sustained on the purchase and sale of such contracts is not subject to the limitation provided by that section.

The question is presented whether the deduction for losses arising from the purchase and sale of grain futures is subject to the limitation provided by section 23(r) of the Revenue Act of 1932. That section, as amended by section 218 (b) and (c) of the National Industrial Recovery Act (effective January 1, 1933), reads as follows:

(r) *Limitation on stock losses.*—

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

(2) [Repealed.]

(3) This subsection shall not apply to a dealer in securities (as to stocks and bonds acquired for resale to customers) in respect of transactions in the ordinary course of his business, nor to a bank or trust company incorporated under the laws of the United States or of any State or Territory, * * *.

In the sale for future delivery of grain or other commodities similarly dealt in the purchaser acquires a written contract whereby the seller obligates himself to make delivery at some future time of the grain or other commodity covered by the contract. The original purchaser does not necessarily hold the contract until the date specified for the delivery of the commodity. There may be successive purchases and sales of the contract with the result that the ultimate delivery of the commodity is made to a person other than the original purchaser. In the case of a loss sustained on the sale of such a contract, not held for a period of more than two years, the question is presented whether the deduction for such a loss is subject to the limitation provided by section 23(r) of the Revenue Act of 1932. The answer to the inquiry depends upon whether the contracts come within the meaning of the term "stocks and bonds" as used in that section. The definition of the term is contained in section 23(t), reading as follows:

Definition of stocks and bonds.—As used in subsections (r) and (s), the term "stocks and bonds" means (1) shares of stock in any corporation, or (2) rights to subscribe for or to receive such shares, or (3) bonds, debentures, notes, or certificates or other evidences of indebtedness, issued by any corporation (other than a government or political subdivision thereof), with interest coupons or in registered form, or (4) certificates of profit, or of interest in property or accumulations, in any investment trust or similar organization holding or dealing in any of the instruments mentioned or described in this subsection, regardless of whether or not such investment trust or similar organization constitutes a corporation within the meaning of this Act.

It is obvious that the contracts in question do not come within any one of the first three classes referred to in the definition of "stocks and bonds." The fourth class included within the definition is "certificates of profit, or of interest in property or accumulations, in any investment trust or similar organization holding or dealing in any of the instruments mentioned * * *" in section 23(t). Although the written contracts calling for the future delivery of grain or other commodities may be referred to in general as "certificates," they do not constitute certificates of profit or of interest in an investment trust or similar organization.

It is accordingly held that such contracts for the future delivery of grain or other commodities do not come with the meaning of "stocks and bonds" as used in section 23(r) of the Revenue Act of 1932. The deduction for a loss sustained on the purchase and sale of such contracts is not, therefore, subject to the limitation provided by that section. Such a loss is deductible in full as having resulted from a transaction entered into for profit under section 23(e)2 of the Revenue Act of 1932. It also follows that gains realized from the purchase and sale of such contracts may not, for income tax purposes, be reduced by losses sustained from the sale of stocks and bonds which are not capital assets.

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 291: Credits of individual against net income.

REVENUE ACT OF 1932.

Dividends on the stock of the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under the provisions of the Farm Credit Act of 1933 (48 Stat., 257). (See I. T. 2780, page 41.)

PART III.—CREDITS AGAINST TAX.

SECTION 31.—TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

(Also Section 131, Article 691.) XIII–6–6639
I. T. 2762

REVENUE ACT OF 1932.

United States shareholders of the M Company, an Argentine limited company, should report as gross income the amount of dividends received by them from that organization plus the amount of income tax the corporation, as collection agent, has paid or is liable to pay with respect to such dividends. Credit may then be claimed by such shareholders for the foreign income tax paid on the dividends to the extent provided in section 131 of the Revenue Act of 1932.

A ruling is requested relative to the Argentine income tax law (No. 11682, of December 27, 1932), which became effective January 1, 1933, under the provisions of which the M Company, an Argentine limited company, is required to withhold a tax at the rate of 5 per cent with respect to dividends paid on its stock.

It is stated that a dividend of x dollars per share, which was paid February —, 1933, was declared December —, 1932, without specifically mentioning income tax. This dividend was paid in full to the shareholders, and the company has paid or is about to pay from its own funds the tax required to be withheld. It is also stated that a dividend of x dollars per share paid August —, 1933, was specifically declared "free of income tax." The taxpayer requests to be advised as to the status of the Argentine tax under sections 31 and 131 of the Revenue Act of 1932.

Article 14 of law No. 11682 (an English translation of which accompanied the taxpayer's letter of October —, 1933), provides in part:

The incomes accruing from movable capital, such as interests, fixed or variable, on loans of money or valuables, dividends from securities or shares or other distributions of joint capital in limited liability or commandite companies, and the incomes from other similar taxable sources, such as the lease of movable things or of rights, royalties, annuities and periodic incomes or subsidies, excluding those having the nature of aliments, always provided that the capital, things or rights concerned are located or utilized in the Republic in charge of natural or juridical persons, domiciled or residing in this country, and without taking into account the source from which * * * the incomes of such persons accrue or the place in which the contract out of which the obligation arises was made, shall be subject to the tax, the following provisions being applied:

(*a*) Taxpayers shall pay the tax when receiving such incomes always provided that it has not already been retained, in so far as provision may have been made for the intervention of collection agents;

(*b*) As regards those debtors who may be traders, banks or other commercial or civil public or private entities, they shall be obliged as collection agents, to retain and pay to the treasury the amount of this tax, for account of the taxpayer at the time when payment is made of the interests which have become due on capital received as loan or on deposit or of the other incomes of this category, except in the case of interests and dividends on shares, securities, debentures or bonds in which case the issuing entities shall make the retention and payment at the time when they become due.

The same obligation applies also to private individuals, in those cases in which are concerned interests or other incomes accruing in favor of natural or juridical persons domiciled or resident outside the Republic who have no agent in the country empowered to receive money. * * *

In the opinion of this office the tax required to be withheld at the source from the dividends on the stock of the M Company is an income tax within the meaning of sections 31 and 131 of the Revenue Act of 1932.

Section 31 reads as follows:

The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax, to the extent provided in section 131.

Section 131 provides in part as follows:

(a) *Allowance of credit.*—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

(1) *Citizen and domestic corporation.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *.

It has been held that the payment of a tax by a person other than a taxpayer constitutes income to the taxpayer in whose behalf the tax is paid. Accordingly, in the instant case the stockholders are required to include in gross income the amount of the dividend plus the tax. In this connection attention is directed to General Counsel's Memorandum 12206 (C. B. XII-2, 395), and the decisions cited therein.

The United States shareholders should report as gross income the dividends received by them from the M Company plus the amount of income tax the corporation, as collection agent, has paid or is liable to pay with respect to such dividends. The United States shareholders of the company may then claim credit for the foreign income tax paid on the dividends to the extent provided in section 131 of the Revenue Act of 1932.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 321: Computation of net income. XIII–5–6634
I. T. 2758

REVENUE ACT OF 1932.

The following rates of exchange are accepted by the Bureau of Internal Revenue as the current or market rates of exchange prevailing as of December 31, 1933:

Country or city.	Monetary unit.	Value in terms of United States money.	Country or city.	Monetary unit.	Value in terms of United States money.
Austria	Schilling	$0.178250	Yugoslavia	Dinar	$0.021760
Belgium	Belga	.219769	Hong Kong	Dollar	.374062
Bulgaria	Lev	.013766	China (Shanghai)	Yuan dollar	.340156
Czechoslovakia	Koruna	.047050	India	Rupee	.386300
Denmark	Krone	.230183	Japan	Yen	.308250
England	Pound (sterling)	5.151750	Singapore	Dollar	.597500
Finland	Markka	.022920	Canada	Dollar	1.000781
France	Franc	.061991	Cuba	Peso	.999550
Germany	Reichsmark	.376923	Mexico	Silver peso	.277500
Greece	Drachma	.008900	Argentina	Peso (gold)	.766211
Hungary	Pengo	.278000	Argentina	Peso (paper)	.337133
Italy	Lira	.083016	Brazil	Milreis	.086062
Netherlands	Florin	.635057	Chile	Peso	.093750
Norway	Krone	.258950	Colombia	Peso	.640600
Poland	Zloty	.178500	Uruguay	Peso (gold)	.752250
Portugal	Escudo	.047031	Philippine Islands	Peso	.5000
Rumania	Leu	.009590	Australia	Pound (sterling)	4.115000
Spain	Peseta	.129950	New Zealand	Pound (sterling)	4.126666
Sweden	Krona	.265791	South Africa	Pound (sterling)	5.091875
Switzerland	Franc	.306058			

ARTICLE 321: Computation of net income. XIII–20–6793
I. T. 2781

REVENUE ACT OF 1932.

The following rates of exchange are accepted by the Bureau of Internal Revenue as the current or market rates of exchange prevailing as of December 31, 1933:

Country.	Monetary unit.	Value in terms of United States money.	Country.	Monetary unit.	Value in terms of United States money.
Costa Rica	Colon	$0.2325	Panama	Balboa	$1.0000
Ecuador	Sucre	.1666	Venezuela	Bolivar	.2530
Guatemala	Quetzal	1.0000			

ARTICLE 321: Computation of net income. XIII-25-6856
(Also Section 23(a), Article 121.) G. C. M. 13148

REVENUE ACTS OF 1918, 1921, 1924, 1926, 1928, AND 1932.

Where insurance premiums are deductible as business expenses and are paid in advance for a period of more than one year, only the pro rata part of such payment is allowable as a deduction each year, regardless of whether the income is reported on the cash receipts and disbursements basis or on the accrual basis.

Advice is requested relative to the proper treatment, for Federal income tax purposes, of insurance premiums paid in advance by a taxpayer who renders returns on the basis of cash receipts and disbursements, where such premiums are deductible as business expenses.

Section 41 of the Revenue Act of 1932 provides in part as follows:

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

Similar provisions are contained in the Revenue Acts of 1918 to 1928, inclusive.

In *Appeal of J. Alland & Bro., Inc.* (1 B. T. A., 631), the Board of Tax Appeals held that a taxpayer keeping its books of account upon the cash receipts and disbursements basis for 1921 is not entitled, under the provisions of section 234(a)1 of the Revenue Act of 1921, to deduct in its income tax return for 1921 any part of a bonus or advance rental paid by it under an agreement of lease upon premises which it was to occupy on and after January 1, 1922. In the course of its opinion, the Board commented as follows:

* * * The tax is an annual tax. The theory of the law is that the true gains of each year shall be subjected to the tax. Where, therefore, a taxpayer claims that it is entitled to deduct from gross income an amount which is not clearly an expense item properly chargeable against the gross income of the particular year, it is incumbent upon the taxpayer to show that it is at least within the letter of the provision of the law permitting the deduction.

(See also *J. Alland & Bro., Inc.*, v. *United States*, 28 Fed. (2d), 792.)

Commissions paid for the purpose of securing long-term leases have been consistently held to constitute capital expenditures deductible ratably over the term of the lease even though the taxpayer's accounts are kept on the cash basis. (*E. N. Webb* v. *Commissioner*, 20 B. T. A., 274; *Mary C. Young* v. *Commissioner*, 20 B. T. A., 692; *Evalena M. Howard* v. *Commissioner*, 19 B. T. A., 865; *S. M. Clawson* v. *Commissioner*, 19 B. T. A., 1253.)

In *Julia Stow Lovejoy* v. *Commissioner* (18 B. T. A., 1179), the taxpayer, whose returns were rendered on the cash basis, paid fees, commissions, and printing costs in securing a loan over a period of years. In disallowing the amounts so paid as a deduction in the year of payment, the Board said:

In its essence such a disbursement is not unlike bond discount, prepaid rent, cost of acquiring or disposing of a leasehold or term contract and many other transactions. They should be spread over the definite period of the loan, lease, or contract. (*Chicago, Rock Island & Pacific Railway Co.*, 13 B. T. A., 988; *J. Alland & Bro., Inc.*, 1 B. T. A., 631; *Alland* v. *United States*, 28 Fed. (2d), 792; *United States Playing Card Co.*, 15 B. T. A., 975; *Bonwit Teller & Co.*, 17 B. T. A., 1019.) This is on the theory that they result in property of a sort and its cost is being exhausted proportionately over a period of years and should be provided for on the basis of time, production, or otherwise. (Section 214(a)8.)

In *Higginbotham-Bailey-Logan Co.* v. *Commissioner* (8 B. T. A., 566), where the petitioner's accounts were kept on the accrual basis, the Board approved the Commissioner's adjustment of interest and insurance payments on the basis of prorating such payments over the period for which made. The Board stated in part that—

> * * * The payment in advance of premiums for insurance results in the creation of an asset, since the policy has a surrender value. The asset value is exhausted ratably over the term for which the premium is paid. In the balance sheet such items are often carried as assets under such terms as prepaid insurance, or prepaid expense. * * *

The payment in advance of insurance premiums by a taxpayer rendering returns on the cash receipts and disbursements basis likewise results in the creation of an asset. In order to reflect clearly the income of such taxpayer, only the amount applicable to carrying such insurance for the taxable year constitutes an ordinary and necessary expense in the earning of the income for that year.

It is, therefore, the opinion of this office that where insurance premiums are deductible as business expenses and are paid in advance for a period of more than one year, only the pro rata part of such payment should be allowed as a deduction each year, regardless of whether the income is reported on the cash receipts and disbursements basis or on the acrual basis.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 42.—PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

ARTICLE 331: When included in gross income.

REVENUE ACT OF 1932.

Distribution to a railroad company of "recapture" amounts, with interest, under the Emergency Railroad Transportation Act, 1933. (See I. T. 2759, page 33.)

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 51.—INDIVIDUAL RETURNS.

ARTICLE 381: Individual returns. XIII-4-6622
(Also Section 52, Article 391; Section 142, Article 741; Section 189, Article 941.) T. D. 4416

INCOME RETURNS.

Requirements applicable to returns under Title I, Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Every income return for the calendar year 1933 and succeeding taxable periods shall contain a statement by the taxpayer showing—

(1) Whether or not any person or persons were employed either to prepare or to advise in the preparation of the return;

(2) The name and address of the person or persons so employed (if any) and the extent to which assistance or advice was received.

If the taxpayer merely received *advice* from some other person or persons in the preparation of the return a statement showing the name and address of the advisor and the items with respect to which advice was received by the taxpayer will be sufficient.

If the return was *actually prepared* by any person or persons other than the taxpayer, there shall be attached to and made a part of such return a statement, sworn to by such person or persons, affirming that such person or persons prepared the return, that the information set out in the return and accompanying schedules, if any, correctly and truly represents the information furnished or discovered by such person or persons during the course of preparation of the return, and that such information is true to the best of his or their information and belief.

Printed forms in accordance with the foregoing are being forwarded to collectors of internal revenue for distribution and use in connection with return forms for the calendar year 1933. A typewritten form, if otherwise meeting the requirements herein prescribed, will be acceptable. The completed form, whether printed or typewritten, must be firmly attached to the return as a part thereof.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 15, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

NOTICE TO CORPORATIONS.

This form should be executed and filed as a part of Corporation Income Tax Form 1120 for the calendar year 1933. If the corporation merely received *advice* from some person or persons employed to assist in the preparation of the return, the name and address of the advisor, together with a statement showing the extent to which such advice was received, is sufficient. If the return was *actually prepared* by any such person or persons, this form must be signed and sworn to by such person or persons.

Did the corporation employ anyone especially to prepare or advise in the preparation of its income tax return for the calendar year 1933? (Answer "Yes" or "No") ________ If so, give name and address and state to what extent such assistance or advice was received________________________________

____

____

I/We, acting as ________________________ for the hereto subscribed taxpayer,
(Attorney or advisor.)
affirm that I/we prepared the return, that the information set out in the return

and accompanying schedules, if any, correctly and truly represents the information furnished or discovered by me/us during the course of preparation of the return, and that such information is true to the best of my/our information and belief.

(Attorney or Advisor.)

Sworn to and subscribed before me this ------ day of ---------------, 19--.

[NOTARIAL SEAL]

(Signature of officer administering oath.)

(Title.)

NOTICE TO INDIVIDUAL TAXPAYERS.

This form should be executed and filed as a part of Individual Income Tax Form 1040 for the calendar year 1933. If you merely received *advice* from some person or persons employed to assist in the preparation of the return, the name and address of your advisor, together with a statement showing the extent to which such assistance or advice was received, is sufficient. If your return was *actually prepared* by any such person or persons, this form must be signed and sworn to by such person or persons.

Did you employ anyone especially to prepare or advise in the preparation of your income return for the calendar year 1933? (Answer "Yes" or "No.") ---------. If so, give name and address of such person or persons and state to what extent such assistance or advice was received--------------------------

----

I/We, acting as--------------------- for the hereto subscribed taxpayer, af-
(Attorney or advisor.)
firm that I/we prepared the return, that the information set out in the return and accompanying schedules, if any, correctly and truly represents the information furnished or discovered by me/us during the course of preparation of the return, and that such information is true to the best of my/our information and belief.

(Attorney or Advisor.)

Sworn to and subscribed before me this ------ day of --------------, 19--.

[NOTARIAL SEAL]

-------------------------------,
(Signature of officer administering oath.)

(Title.)

ARTICLE 381: Individual returns.

XIII-9-6683
T. D. 4421

INCOME RETURNS.

Amending Treasury Decision 4416, approved January 15, 1934 [page 68, this Bulletin].—Requirements applicable to returns under Title I, Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4416, approved January 15, 1934, setting forth certain requirements applicable to income returns made under Title I of the Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods, is amended by adding the following paragraph:

These requirements shall not be applicable to individual income tax returns of net incomes of not more than $5,000 derived chiefly from salaries and wages and reported on income tax Form 1040A for the calendar year 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 21, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

SECTION 52.—CORPORATION RETURNS.

ARTICLE 391: Corporation returns.

REVENUE ACT OF 1932.

Requirements applicable to returns under Title I, Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods. (See T. D. 4416, page 68.)

SECTION 53.—TIME AND PLACE FOR FILING RETURNS.

ARTICLE 401: Time for filing returns. XIII-4-6611
I. T. 2752

REVENUE ACT OF 1932.

In those cases where an individual, estate or trust, or a corporation, prior to the issuance of the revised forms prescribed for use of such taxpayers in making amended returns under the provisions of Treasury Decision 4408 (C. B. XII-2, 426) for a fiscal year ended in 1933, has made a return on the old form for such fiscal year, which contains all the information necessary to determine the net income and the tax thereon under the provisions of the Revenue Act of 1932, as amended by section 218 of the National Industrial Recovery Act, and the tax liability which would be shown on the amended return would not be different from that shown on the original return, an amended return on a revised form for such fiscal year need not be made under Treasury Decision 4408, supra.

ARTICLE 402: Extensions of time for filing returns. XIII-8-6669
Mim. 4150

Instructions to collectors relative to extensions of time for making income tax returns.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington D. C., February 9, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

Reference is made to Mimeograph 3361, dated November 20, 1925 (C. B. IV-2, 69), Mimeograph 3759, dated October 9, 1929 (C. B. VIII-2, 123), and Mimeograph 3789, dated January 10, 1930 (C. B.

IX–1, 126), containing instructions to collectors relative to extensions of time for making income tax returns. The instructions issued in the above-mentioned mimeographs were intended primarily for the guidance of collectors in the consideration of applications for extensions of time where the taxpayers interested had failed to make every reasonable effort to file returns on time and to prevent the granting of extensions of time where it was reasonably possible for the taxpayers to avoid the need thereof.

It has come to the attention of this office that in some instances representatives of taxpayers have filed blanket requests for extensions of time instead of individual requests signed by the taxpayers.

Collectors should require that applications for extensions of time within which to make income tax returns be signed by the taxpayer except in cases where the taxpayer is unable to do so because of illness or extended absence for other reasons. In the cases coming within this exception an application signed by the taxpayer's duly authorized representative should be accepted if a showing is made by the representative that the taxpayer is unable to sign the application for the reasons stated.

Queries regarding this mimeograph will refer to the number of the mimeograph and the symbols IT: E: CTR.

GUY T. HELVERING,
Commissioner.

ARTICLE 402: Extensions of time for filing returns.

XIII–26–6865
I. T. 2794

REVENUE ACT OF 1932.

Mimeograph 4150 [page 71, this Bulletin] contemplates that a taxpayer's legal representative making request for an extension of time in which to file an income tax return be required to furnish power of attorney, unless he is known to be an officer or an authorized representative of the corporate or individual taxpayer.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1932.

Committee on the Judiciary of the House of Representatives authorized to investigate the conduct of equity and bankruptcy receiverships in Federal courts. (See T. D. 4436, page 304.)

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1932.

Special Committee Investigating the Munitions Industry, United States Senate. (See T. D. 4440, page 305.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 101.—CAPITAL NET GAINS AND LOSSES.

ARTICLE 501: Definition and illustration of capital net gain. XIII-16-6755 G. C. M. 12942

REVENUE ACTS OF 1921, 1924, 1926, 1928, AND 1932.

The period (more than two years) for which stock acquired through the exercise of stock rights must be held in order to constitute a "capital asset" begins to run from the date of acquisition of the stock so acquired, and not from the date of acquisition of the stock in respect of which the rights were issued.

General Counsel's Memorandum 11645 (C. B. XII-1, 117) is revoked in so far as inconsistent herewith, and General Counsel's Memorandum 10063 (C. B. X-2, 159) is reinstated.

The request has been made that General Counsel's Memorandum 11645, supra, be reconsidered.

The question involved is whether the gain derived or loss sustained upon the sale of stock acquired through the exercise of stock rights may be treated in whole or in part as a capital gain or capital loss where the stock sold was held for two years or less, but the original stock in respect of which the rights were issued was held for more than two years. The answer to the question depends on whether stock acquired through the exercise of rights, where the time element is as indicated above, may be treated in whole or in part as a capital asset.

In I. T. 1786 (C. B. II-2, 45) it was held that stock acquired upon the exercise of rights, where the stock in respect of which the rights were issued was held for more than two years, constituted a capital asset. In General Counsel's Memorandum 10063 (C. B. X-2, 159), revocation of I. T. 1786, supra, was recommended because of the decision of the Board of Tax Appeals in *Rodman E. Griscom* v. *Commissioner* (22 B. T. A., 979) to the effect that stock acquired through the exercise of rights must itself be held for more than two years in order to constitute a capital asset. I. T. 1786 was revoked by I. T. 2609 (C. B. X-2, 339). General Counsel's Memorandum 11645, supra, modified General Counsel's Memorandum 10063, supra, to the extent of holding that stock acquired through the exercise of rights, where the stock in respect of which the rights were issued had been held for more than two years, consisted in part of a capital element (the "right" element) and in part of a noncapital element (the subscription price). In General Counsel's Memorandum 11645, supra, it was held that the two elements should be determined by comparing the fair market value of the right at the time it was exercised with the subscription price.

The Revenue Act is explicit as to what constitutes a capital asset. Section 101(c)8 defines the term "capital assets" and provides for certain cases in which "tacking" of holding periods is permitted. That section reads as follows:

"Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112(g) of this Act or the Revenue Act of 1928, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(D) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

Article 501 of Regulations 77 interprets the foregoing section as follows:

* * * The specific property sold or exchanged must in general have been held for more than two years. However, in determining the period for which the taxpayer has held stock or securities received upon a distribution in connection with a reorganization where no gain is recognized to the distributee under the provisions of section 112(g) of the Revenue Act of 1928 and section 112(g) of the Revenue Act of 1932 (see article 576), there shall be included the period for which the taxpayer held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution. If the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets. If under the provisions of section 113 property received in an exchange has for the purpose of determining gain or loss the same basis in whole or in part in the taxpayer's hands as the property exchanged therefor, the property received in exchange is considered to be capital assets if the total period during which such property and the original property have been held is more than two years. If property is acquired from any person, and under the provisions of section 113 has the same basis in whole or in part for the purpose of determining gain or loss as it would have in the hands of the person from whom acquired, there shall be included in determining the period for which the taxpayer has held such property the period for which it was held by such person. For instance, in the case of property acquired after December 31, 1920, either by gift or by transfer in trust, the period for which the property was held by the donor shall be added to the period for which the property was held by the donee in determining whether the property was held for more than two years. (See articles 593 and 594.) In determining the period for which a taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of the Revenue Act of 1932 or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other

disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible. * * *

The theory underlying the statute and the regulations is that tacking of holding periods is justified in cases where new property is regarded as taking the place of property previously held in connection with transactions in which gain or loss is not recognized under certain sections of the Revenue Act. In all other cases, as the regulations state, *the specific property sold* must have been held for more than two years. Section 101(c)8, supra, does not provide for tacking to the period for which stock acquired through the exercise of rights was held the period for which the stock in respect of which the rights were issued was owned or held, and the regulations do not so provide. There is, therefore, no specific authority in the statute or in the regulations for adding to the period for which stock acquired through the exercise of rights was held any portion of the period for which the original stock (in respect of which the rights were issued) was held. In this connection it is pertinent to state that since the statute above quoted sets out specifically the several cases in which tacking of holding periods is permitted, and the situation here discussed is not mentioned, it is a fair inference that Congress did not intend to tack the holding periods in such cases. (See Lewis' Sutherland on Statutory Construction, second edition, Volume II, section 493, and cases cited.)

It is true that under *Miles* v. *Safe Deposit & Trust Co. of Baltimore* (259 U. S., 247, 42 S. Ct., 483, Ct. D. 29, C. B. I-1, 72) a stock right is properly regarded as representative of a portion of the stockholder's original investment in the corporate enterprise. This was recognized in that part of General Counsel's Memorandum 11645, supra, which provided that, where stock rights are sold, in determining the period for which the taxpayer held the property there shall be included the period for which he held the stock in respect of which the rights were issued. That position not only finds support in the theory underlying *Miles* v. *Safe Deposit & Trust Co. of Baltimore*, supra, but also in section 101(c)8(C), supra, as the issuance of stock rights may be said to effect (certainly in some, if not in all, cases) a recapitalization of a corporation, and thus the rights may be regarded as securities in the reorganized distributing corporation received without the surrender of the stock in respect of which distributed. In that event tacking is, of course, specifically authorized. However, while these considerations support the treatment of *rights* as capital assets, they do not justify such treatment of *stock* acquired through the exercise of rights, unless it is held for the period prescribed by statute. Stock so acquired is new stock obtained by virtue of an additional contribution of capital to the corporate enterprise. The right to subscribe for additional stock accrues to each old stockholder by virtue of, and in proportion to, his stock holdings, regardless of whether the financial condition of the corporation is such as to give the rights a market value. In many cases stock rights have no such value, and their exercise does not constitute an application or use of property of value to acquire new stock. Considerations other than a possible market value in the rights frequently lead stockholders to insist upon full recognition of their "* * * right to participate, in preference to strangers and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation * * *." (*Miles* v. *Safe Deposit & Trust Co. of Baltimore*, supra.)

Hence, the actual capital investment made by the subscribing stockholder may, and frequently does, consist entirely of new funds. In the great majority of cases the new investment constitutes the substantial portion of the cost of the new stock. From a practical aspect, therefore, the new stock represents a new or additional investment rather than a continuation of a portion of the original investment in another form. Moreover, there actually occurs a subscription (a purchase) of new stock in the course of which the right and cash or other property are converted into the new property (new stock). As the problem is whether the "*specific property sold*" has been held for more than two years, it is the opinion of this office in view of the foregoing that the new stock may not properly be treated as a capital asset, either wholly or in part.

The foregoing conclusion is in accord with the decision of the Board of Tax Appeals in the case of *Rodman E. Griscom* v. *Commissioner*, supra, and with the more recent decision of the Board in *Ellen Ayer Wood* v. *Commissioner* (29 B. T. A., No. 187, promulgated February 9, 1934). In the Wood case the Board, after discussing *Miles* v. *Safe Deposit & Trust Co.*, supra, stated that:

> Furthermore, while the stockholder receiving an ordinary proportionate stock dividend retains the same interest in the corporation that he had before the issuance of the stock dividend (the corporation merely transferring surplus to capital (*Eisner* v. *Macomber*, 225 U. S., 189)), whether or not the stockholder's interest will be the same after issuance of rights to subscribe depends upon whether or not such rights are exercised by the stockholder receiving the rights. When rights to subscribe to new stock are given, the stockholder retains his former interest in the corporation only upon condition that he exercise the right according to its terms and pay the price fixed in such right for such new stock. It is, therefore, analogous to, if not strictly in fact, a purchase of stock, not at the market price, if any, but at a price fixed by the corporation, the right to purchase being first extended to stockholders rather than to strangers.
>
> In view of the foregoing and after due consideration of all of the other authorities cited in petitioner's brief and of the argument of her counsel, we are of the opinion that the Griscom case should not be overruled; and that since the 82 shares of stock in question, having been purchased on December 30, 1927, and sold on April 16, 1929, were not "held" by the petitioner for "more than two years," the same were not "capital assets" within the meaning of section 101(c)8 of the Revenue Act of 1928.

The foregoing conclusion is likewise in harmony with I. T. 2447 (C. B. VIII–1, 70), wherein it was concluded that the period during which a taxpayer held an option could not be added to his period of ownership of the stock acquired under the option, in determining whether the stock was held for more than two years for capital gain or loss purposes. Since a stock right is similar in many respects to an option, that ruling lends support to the conclusion herein reached. To the same effect are cases of *D. C. Bothwell et. al.* v. *Commissioner* (27 B. T. A., 1351) and *M. Ernest Greenebaum, Jr.*, v. *Commissioner* (27 B. T. A., 889), wherein the Board held that ownership dates from a purchase under an option and not from the date of the option, in determining the required period for which property must be held in order to constitute a "capital asset" under the capital gain sections of the Revenue Act.

For the foregoing reasons General Counsel's Memorandum 11645, supra, is revoked in so far as it holds that the gain derived or loss sustained upon the sale of stock acquired through the exercise of stock rights may be treated in part as a capital gain or capital loss where the stock sold was held for two years or less, but the original stock in respect of which the rights were issued was held for more than two years. General Counsel's Memorandum 10063, supra, which holds that stock acquired through the exercise of stock rights must itself be held for a period of more than two years in order to constitute a capital asset, is reinstated.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 532: Farmers' cooperative marketing and purchasing associations, and corporations organized to finance crop operations.

XIII-24-6847
I. T. 2791

REVENUE ACT OF 1932.

Exemption of farmers' cooperative marketing organizations.

Section 103(12) of the Revenue Act of 1932 exempts from income taxation farmers' associations which are organized or operated on a cooperative basis for the purpose of marketing the products of members and other producers and turning back to such members and other producers the proceeds of sales, less the necessary marketing expenses, on the basis of the products furnished by them. The foundation of the exemption granted is the cooperative nature of the association, the fact that the association makes no profit on its own behalf but turns back to the producers all that it receives from the sale of farm products, less only the amounts necessary to cover the expenses of operation. In order to show its cooperative nature and to establish compliance with the requirement of the statute that the proceeds of sales, less necessary expenses, are turned back to all producers on the basis of the products furnished by them, it is, of course, necessary for such an association to keep records of the business done both with members and nonmembers. The statute does not require, however, that the association keep ledger accounts with each producer selling through the association. Any records which show that the association was operating during the taxable year on a cooperative basis in the distribution of patronage dividends to all producers will suffice.

While the statute requires that patronage dividends be paid to all producers on the same basis, this requirement is complied with if an association, instead of paying patronage dividends to nonmember producers in cash, keeps records from which the proportionate shares of the patronage dividends due to nonmember producers can be determined, and such shares are applicable toward the purchase price of a share of stock or of a membership in the association.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 112.—RECOGNITION OF GAIN OR LOSS.

ARTICLE 571: Recognition of gain or loss. XIII–14–6731
I. T. 2773

REVENUE ACT OF 1932.

In 1933 the taxpayer exchanged a real estate mortgage for bonds of the Home Owners' Loan Corporation. Held, gain or loss arising from the exchange must be recognized.

A ruling is requested relative to the taxability of an exchange by the taxpayer during the year 1933 of a first mortgage on real property for bonds of the Home Owners' Loan Corporation, issued under the Home Owners' Loan Act of 1933, approved June 13, 1933. (48 Stat., 128.)

Provision is made in the above-named statute for the formation of the Home Owners' Loan Corporation, herein referred to as the corporation, which was authorized to issue bonds in an aggregate amount not to exceed $2,000,000,000. For a period of three years from the date of enactment of the statute such bonds may be exchanged for home mortgages and other obligations or liens secured by real estate. In connection with any such exchange a cash payment, not to exceed $50, may be made in the adjustment of the difference between the face value of the bonds plus accrued interest and the purchase price of the mortgage, obligation, or lien.

The taxpayer was the owner of a first mortgage on real estate in the principal amount of, and which cost, 1,500x dollars, on which there had accrued interest in the amount of 250x dollars. The mortgage, including accrued interest, was exchanged by the taxpayer for bonds of the corporation in the principal amount of 1,750x dollars, in connection with which he received a cash payment of .33x dollars by way of adjustment. The market quotation of the bonds on the date of the exchange was 86¼. Based on that quotation the fair market value of the bonds as of the date of the exchange was 1,509.375x dollars. Adding thereto the amount of the cash payment the total consideration received by the taxpayer for the mortgage, including accrued interest, was 1,509.705x dollars. The taxpayer keeps his books and renders his returns on the cash receipts and disbursement basis. The question presented is whether this transaction resulted in taxable gain or deductible loss.

Section 112(a) of the Revenue Act of 1932 provides that upon the sale or exchange of property the entire amount of the gain or loss shall be recognized, except as thereinafter provided. One of the exceptions is contained in section 112(b)1, and reads as follows:

> No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

The mortgage involved in the instant case comes within the parenthetical portion of the quoted language, and the gain or loss arising from the exchange must therefore be recognized. The total amount of the consideration received was 1,509.705x dollars. Since the mortgage was acquired at a cost of 1,500x dollars, the amount of profit or income was 9.705x dollars.

The basis on which to compute gain or loss from the subsequent sale or other disposition of the bonds received in the exchange is the fair market value thereof as of the date of the exchange, namely, 1,509.375x dollars.

ARTICLE 571: Recognition of gain or loss. XIII–18–6773
(Also Section 118, Article 661.) I. T. 2778

REVENUE ACT OF 1932.

The "Series A" debentures of the M Corporation were issued in the amount of 8x dollars under an indenture dated in 1929. In 1930 an additional issue of 6x dollars, designated as "Series B," was made under a supplemental indenture. The only differences between the two issues are the dates of issue and the amounts to be redeemed annually.

Held, any gain from an exchange of "Series A" debentures for "Series B" debentures must be recognized under section 112 of the Revenue Act of 1932, but allowance of a loss is precluded by section 118 of that Act.

The question is presented relative to the result for income tax purposes of an exchange of "Series A" debentures of the M Corporation for "Series B" debentures of that corporation.

The "Series A" debentures were issued in the amount of 8x dollars under an indenture dated in 1929. In 1930 additional debentures in the amount of 6x dollars were issued in connection with a supplemental indenture, the latter issue being designated as "Series B." All the debentures mature on the same date and the interest rate and dates for the payment of interest are the same for both series. Of the "A" debentures the amount of .5x dollars was to be redeemed annually, and of the "B" debentures the amount of .38x dollars was to be redeemed annually. The question presented arises in connection with the exchange of debentures of one series for debentures of the other series.

Section 112 of the Revenue Act of 1932 provides in part as follows:

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) EXCHANGES SOLELY IN KIND.—

(1) PROPERTY HELD FOR PRODUCTIVE USE OR INVESTMENT.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

Section 112(a) provides in effect that every exchange of property results in a gain or loss for income tax purposes unless the transaction comes within one of the exceptions stated under the other subdivisions of section 112. The only exception under section 112 which could apply in the instant case is subdivision (b) (1) quoted above, but an exchange of securities is specifically excluded from that exception. It follows, therefore, under the provisions of the statute quoted, that any gain derived from the exchange must be recognized. For the purpose of determining the gain the amount of the consideration received for the debentures disposed of is the fair market value of the new debentures at the time of the exchange.

With reference to the deductibility of any loss resulting from such an exchange, section 118 of the Revenue Act of 1932 provides that a loss sustained from the disposition of stock or securities shall not be allowed as a deduction where the taxpayer, within a period of 30 days before or after the date of disposition, acquires "substantially identical stock or securities." In the instant case it should be noted that the securities exchanged had the same maturity date, the same interest dates, and the same rate of interest. By reason of the similarity of the two issues of debentures they are held to constitute substantially identical securities within the meaning of section 118. It follows that since this exchange resulted in a loss the allowance of the loss as a deduction is precluded by section 118 of the Revenue Act of 1932.

Where such an exchange results in a gain the fair market value at the time of the exchange of the debentures so acquired becomes the basis on which to compute the gain or loss from the subsequent sale or other disposition of the debentures acquired in the exchange. Where the exchange results in a loss the cost or other basis of the debentures exchanged constitutes the basis on which to compute the gain or loss from the subsequent sale or other disposition of the debentures acquired in the exchange.

ARTICLE 579: Involuntary conversion of property. XIII-4-6612 G. C. M. 12657

REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS.

The entire amount of an award received in connection with the condemnation of a portion of a taxpayer's land must be considered as compensation paid for the land condemned and gain or loss recognized upon that basis, unless the taxpayer can show that a portion of the award represents compensation as severance damages to his remaining land.

Recommended that I. T. 1787 (C. B. II-2, 78) be revoked.

The Income Tax Unit has requested advice relative to the proper method of determining gain or loss where a portion of the taxpayer's land is sold under threat or imminence of condemnation proceedings, but a separate allowance is not specified for severance damages to the remaining portion of the land.

In 1931 the M Company, under threat or imminence of condemnation proceedings, sold to the State of R certain parcels of land which were required for use in connection with highway improvements. The amount received was x dollars, but no allocation was made between the amount paid as compensation for the land taken over and the amount, if any, paid as severance damages to the remaining land. The Unit asks to be informed in particular whether the Bureau should continue to apply the principles of I. T. 1787 to such cases.

In I. T. 1787 it was held that where property was condemned for street-widening purposes, and the compensation paid included a sum which represented the fair market value of the portion condemned and an amount equal to the difference in value of the remaining portion before and after the completion of the improvements, the amount received by the taxpayer should be deducted from the basis of the entire property, and the remainder, if any, should be used as the basis in determining the gain or loss upon the disposition of the remaining portion of the property. In that case there was no allocation made between the amount paid as compensation for the land condemned and the amount paid as severance damages. The theory of I. T. 1787 is that where a lump sum is received covering both compensation for land condemned and compensation for severance damages to the remaining land, any estimate of the amount allowed as severance damages must be, to a great extent, conjectural and speculative, and that it is impracticable to determine the amount paid as compensation for the land condemned. Such a rule, of course, prevents an immediate determination of the gain or loss resulting from disposition of the land taken under such procedure.

On the other hand it was held in I. T. 2599 (C. B. X-2, 170) that where a stated amount is awarded as compensation for land condemned, and a separate amount as severance damages to the remaining land, gain or loss will result from the portion of the award which represents the amount paid for the land condemned, but the amount received as severance damages should be applied against the basis to be used in determining gain or loss resulting from the disposition of the remaining portion of the property.

The application of the rule laid down in I. T. 1787 postpones the determination of gain or loss in condemnation cases of the character to which it applies until the remaining land is sold. Furthermore, it often reduces to a small amount the basis to be used in determining gain or loss upon the disposition of the remaining property, and thus distorts income for the year in which such property is sold.

Section 112 of the Revenue Act of 1928, under which the instant case arose, provides that upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized except as otherwise provided in section 112. Section 112(f) provides that "If property (as a result of * * * an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition or control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized," but that "*If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.*" [Italics supplied.] It is clear, therefore, that in condemnation cases of the character here under consideration, unless the proceeds received from the award are converted into similar property, the gain or loss resulting from the transaction must be recognized.

It is the opinion of this office that the difficulty which may be experienced in establishing what portion of the award received represents compensation for the land condemned does not justify postponing the recognition of gain or loss until the disposition of the remaining portion of the property. This conclusion is supported by the case of *Burnet* v. *Houston* (283 U. S., 223, Ct. D. 328, C. B. X–1, 343). In that case the taxpayer claimed a deduction for a loss in connection with the disposition of certain property. Under section 202 of the Revenue Act of 1918 it was necessary, in order to establish the amount of the deductible loss, to show both the cost and the March 1, 1913, value of the property. The taxpayer pleaded inability to prove the March 1, 1913, value of the property. The Board of Tax Appeals held that the loss could not be allowed. (See *J. I. R. Henry, Ex.*, v. *Commissioner*, 13 B. T. A., 279, consolidated with the case of *Samuel F. Houston* v. *Commissioner* and two others.) The Supreme Court, in affirming the decision of the Board and reversing the decision of the Circuit Court of Appeals (39 Fed. (2d), 351), stated as follows:

The burden of proof to establish a deductible loss and the amount of it, clearly, was upon the respondent. (*Reinecke* v. *Spalding*, 280 U. S., 227, 233 [Ct. D. 154, C. B. IX–1, 305]; *United States* v. *Anderson*, 269 U. S., 442, 443 [T. D. 3839, C. B. V–1, 179].) It was just as necessary under the statute for the respondent to prove value as of March 1, 1913, as it was to prove cost in 1906 and the amount finally received by him in 1920. The court below, after a review of the facts, disposed of the matter by saying:

"To determine, in view of these variable factors, or lack of factors, its true or approximate value on a given date, as that of March 1, 1913, selected by the Commissioner as the basis of the tax calculation, was a sheer impossibility. The only fixed factors in the situation were those of cost in 1906 and return in 1920. It follows that the proper basis for measuring the petitioner's admitted loss—because the only possible basis—was that of cost and return."

We can not agree that the impossibility of establishing a specific fact, made essential by the statute as a prerequisite to the allowance of a loss, justifies a decision for the taxpayer based upon a consideration only of the remaining factors which the statute contemplates. The definite requirement of section 202(a)1 of the Act is not thus easily to be put aside. The impossibility of proving a material fact upon which the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforcible claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof. (Compare *Underwood* v. *Wing*, 4 De Gex., M. & G., 632, 660; *Newell* v. *Nichols*, 75 N. Y., 78, 90; *Estate of Ehle*, 73 Wis., 445, 459–460, 41 N. W., 627; 2 Chamberlayne, Modern Law of Evidence, section 970.)

It is the opinion of this office that the conclusion reached by the Supreme Court in that case is applicable to the facts involved in the instant case. Accordingly, if a taxpayer contends that the award received by him in connection with a condemnation of a portion of his land includes an amount paid as severance damages to his remaining land, which should be deducted from the amount of the award in determining the compensation paid for the land condemned, the burden is upon the taxpayer to show the amount of such severance damages; otherwise the entire amount received must be considered as compensation paid for the land condemned and gain or loss recognized upon that basis. The taxpayer's inability to show the portion of the award which represents compensation paid for damages to his remaining land does not justify treating a transaction which, under the statute, gives rise to recognizable gain or loss as one in which no gain or loss is recognized. It is not believed that the amount of damages, if any, to the remaining land in a case of this character ordinarily is impossible of proof. If the elements of damage to the remaining land can be shown, it should be possible to express such damage in dollars and cents; or the amount of such severance damages, if any, may be ascertained by a comparison of the value of the remaining land immediately before and immediately after the condemnation proceedings, or from a comparison of the total amount received to the value of the land actually condemned. (If the condemnation involves the destruction of buildings, the value of such buildings should, of course, be taken into consideration.) If the taxpayer can show the portion of the award which represents compensation for the land condemned and the amount representing compensation for severance damages, the Bureau, following the rule laid down in I. T. 2599, will determine the gain or loss resulting from the land condemned from the amount received as compensation for that land, and will apply the amount awarded as severance damages against the basis of the remaining land.

Although the conclusion reached in this memorandum is based on a consideration of the provisions of the Revenue Act of 1928, the same conclusion is applicable under the subsequent and prior Revenue Acts.

In view of the foregoing, this office is of the opinion that the Bureau, in the treatment of cases of this character, should adopt the position indicated in this memorandum and that I. T. 1787 should be revoked.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

Article 643: Compensation of State officers and employees. XIII–20–6794 I. T. 2782

REVENUE ACT OF 1932.

The activities of the Board of Transportation of the City of New York are proprietary and not governmental in character. Accordingly, the compensation of its officers and employees is subject to Federal income tax.

Advice is requested whether the compensation of the officers and employees of the Board of Transportation of the City of New York is subject to Federal income tax.

In 1891 the Legislature of the State of New York passed an act under which a rapid transit board was created for the city of New York to investigate the necessity for any new rapid transit construction, and to adopt the routes and general plan of construction; to obtain consent of the board of estimate for such construction; to adopt detailed plans for construction and operation; and to sell the right of construction and operation to a private corporation provided for under the terms of the act.

In 1894 the voters approved municipal construction and ownership of subways to be leased to, and operated by, private companies. The leases were to run for periods of from 35 to 50 years, but the city had the right to terminate them 10 years after the beginning of operation, and to take over the plant and property at a price not exceeding cost, plus 15 per cent. The price was to decrease each year, so that at the end of the full term of the lease no amount was to be paid except for equipment.

In 1924 the legislature passed an act which gave the city of New York the right not only to construct subways but to operate them. In accordance with the provisions of that act the board of transportation was created on July 1, 1924. In addition to the duties of the rapid transit board stated above, the board of transportation was given the following duties:

(1) Upon the adoption of any route and general plan of construction, it shall prepare and file in the office of the board of estimate a statement showing in detail the estimated cost of construction and equipment and the time required for completion, together with an estimate of the prospective results of the operation over a period of 10 years.

(2) The board of transportation may act as agent for the city to prepare and submit plans for the construction of tunnels under any waterway within or adjoining the city limits.

(3) As agent for the city it may proceed with the construction and equipment of all or part of such tunnels.

(4) It may rent such offices and employ such engineers, attorneys, and other persons as may be necessary.

(5) Subject to the approval of the board of estimate, it shall have full power to provide for maintenance, supervision, and operation of galleries, subways, and tunnels constructed at the expense of the city.

(6) It may sue or bring legal action in the name of and in behalf of the city in any case arising out of the construction or operation of any railroad under the 1924 act.

In order for the compensation received by an individual from a State or political subdivision thereof to be exempt from Federal income tax such compensation must be received by him as an officer or employee of the State or political subdivision for services rendered in the exercise of an essential governmental function. (Article 643 of Regulations 77.)

In the case of *In re Board of Rapid Transit R. Com'rs of the City of New York* (90 N. E., 456), decided by the Court of Appeals of New York, the court had under consideration the question whether the city of New York in building a subway could avoid liability for resulting injury to abutting property. In deciding that question the court was called upon to determine whether the building of a subway in connection with the construction, operation, or leasing of a railroad therein, under the rapid transit act (Laws of New York, 1891, page 3, ch. 4, as amended), was proprietary or governmental in character. In the course of its opinion the court said:

1. Was the action of the city in building the subway governmental or proprietary in character? The city owns the subway, and it is a railroad corporation so far as the construction, operation, and leasing thereof is concerned. It was not required but simply permitted, to build and operate the road. It is authorized to lease its railroad, either for "a specified sum of money or a specified proportion of income, earnings or profits," or it may operate the road itself, and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers. * * * In other

words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign. (*Maxmilian* v. *Mayor, etc., of New York*, 62 N. Y., 160, 20 Am. Rep., 468; *Missano* v. *Mayor, etc., of New York*, 160 N. Y., 123, 54 N. E., 744; *South Carolina* v. *United States*, 199 U. S., 437, 26 Sup. Ct., 110, 50 L. Ed., 261.)

In the case of *Flint* v. *Stone Tracy Co.* (220 U. S., 107), the United States Supreme Court stated in part as follows:

> It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, * * *. The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, *and which the State can only do itself*, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, * * * are not removed from the field of legitimate Federal taxation. [Italics supplied.]

See also *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514).

In view of the foregoing, it is held that the activities of the Board of Transportation of the City of New York are proprietary and not governmental in character. Accordingly, the compensation of its officers and employees is subject to Federal income tax.

SECTION 118.—LOSS FROM WASH SALES OF STOCK OR SECURITIES.

ARTICLE 661: Losses from wash sales of stock or securities.

REVENUE ACT OF 1932.

Exchange of two debentures identical except in dates of issue and amounts to be redeemed annually. (See I. T. 2778, page 79.)

SECTION 119.—INCOME FROM SOURCES WITHIN UNITED STATES.

ARTICLE 672: Interest. XIII-25-6857
(Also Section 232, Article 1111.) I. T. 2792

REVENUE ACT OF 1932.

> Taxability of interest received by a foreign corporation on its bank deposits and foreign bonds, and the deductibility of operating expenses from the interest income.

Advice is requested with respect to the taxable status of interest income received by the M Society, a foreign corporation, and the deductibility of expenses incident to its operation.

The M Society maintains a buying depot in the United States and acts as agent for the N Society. Both organizations are federations of retail cooperative societies in a foreign country, and the United States depot buys for both organizations. The United States buying depot functions solely as a purchasing organization for foreign cooperatives which have branches in many different countries. Each of the two societies mentioned holds a membership in the O Society, and its membership is made up of similar societies in various countries in Europe and other parts of the world. The commodities purchased, as well as the expenses and maintenance of the buying depot, are paid for out of remittances from the central office in a foreign country, except to the extent that there may be available interest received by the M Society on bank deposits in the United States and interest on foreign bonds purchased by the M Society abroad and held in this country. The activities of the organization are such as to constitute a trade or business carried on within the United States. (I. T. 1406, C. B. I-2, 151.) Furthermore, the society has an office or place of business in this country. It is, therefore, classified as a resident foreign corporation and is taxable only upon income from sources within the United States. (See section 231 of the Revenue Act of 1932.)

Section 119(a)1 of the Revenue Act of 1932 provides that there shall be treated as income from sources within the United States interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, not including—

(A) interest on deposits with persons carrying on the banking business paid to persons not engaged in business within the United States and not having an office or place of business therein, or

(B) interest received from * * * a resident foreign corporation, * * * when it is shown to the satisfaction of the Commissioner that less than 20 per centum of the gross income of such resident payor * * * has been derived from sources within the United States, as determined under the provisions of this section, for the 3-year period ending with the close of the taxable year of such payor preceding the payment of such interest, or for such part of such period as may be applicable, * * *.

As the M Society is engaged in business within the United States and has an office or place of business therein, interest received by it on bank deposits in the United States constitutes income from sources within the United States with respect to which the foreign corporation is subject to Federal income tax.

As to the taxability of the interest on foreign bonds, it is held, in accordance with section 119(a)1(B) of the Revenue Act of 1932, quoted above, that in the event the issuing corporation is a resident foreign corporation deriving 20 per cent or more of its gross income from sources within the United States within the meaning of that section, the interest constitutes income subject to tax.

With regard to the deductibility of the expenses of the operation of the buying depot from interest on the taxpayer's bank deposits or from interest on foreign bonds owned by it, section 232 of the Revenue Act of 1932 provides that in the case of a foreign corporation the deductions shall be allowed "only if and to the extent that they are connected with income from sources within the United States." To be allowable, therefore, the deduction must be "connected" with income from sources within the United States. The word "connected" means "joined or linked together by some tie, as of causality, relationship, or intimacy." The meaning at once suggested is that the requisite tie between the deduction and the income is that of causality, that is, that the expenditure for which the deduction is claimed must enter into, and be directly related to, the production of the income.

Generally speaking, the activities of the buying depot in this case are not so connected with the earning of the interest on bank deposits that all operating expenses of the depot are allowable as deductions against that interest. It may be, however, that certain items of the expenses are connected with the production of the interest on the bank deposits and, if so, to the extent that they are so connected, they are allowable as deductions against the interest income.

In regard to the deductibility of the operating expenses of the buying depot from the interest on the foreign bonds purchased abroad and held in this country, there appears to be no connection between the interest from that source and the operating expenses which would warrant the deduction of the expenses from such income.

SUPPLEMENT C.—CREDITS AGAINST TAX.

SECTION 131.—TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

ARTICLE 691: Analysis of credit for taxes.

REVENUE ACT OF 1932.

Dividends paid by an Argentine limited company with respect to which tax was withheld under the Argentine income tax law. (See I. T. 2762, page 64.)

ARTICLE 695: Countries which do or do not satisfy the similar credit requirement. XIII-8-6671
Mim. 4148
(Also Section 212, Article 1042.)

Similar credits requirement of section 131(a)3 of the Revenue Act of 1932.
Equivalent exemption requirement of sections 212(b) and 231(b) of the Revenue Act of 1932.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 7, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Officers and Employees of the Income Tax Unit, and Others Concerned:

Section 131(a) of the Revenue Act of 1932 provides in part:

Allowance of credit.—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

(1) *Citizen and domestic corporation.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * * * * *

(3) *Alien resident of United States.*—In the case of an alien resident of the United States, the amount of any such taxes paid or accrued during the

taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country * * *.

Section 212(b) of the Act provides:

Ships under foreign flag.—The income of a nonresident alien individual which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States, shall not be included in gross income and shall be exempt from taxation under this title.

Section 231(b) of the Act provides:

Ships under foreign flag.—The income of a foreign corporation, which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States, shall not be included in gross income and shall be exempt from taxation under this title.

Article 695 of Regulations 77 provides in part:

* * * A country does not satisfy the similar credit requirement of section 131(a)3 of the Revenue Act of 1932, if it does not allow any credit to citizens of the United States residing in such country for the amount of income taxes paid to the United States, or if such country does not impose any income taxes.

Article 1042 of Regulations 77 provides:

Exclusion of earnings of foreign ships from gross income.—So much of the income from sources within the United States of a nonresident alien individual as consists of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States nonresident in such foreign country and to corporations organized in the United States, shall not be included in gross income. Foreign countries which either impose no income tax, or in imposing such tax, exempt from taxation so much of the income of a citizen of the United States nonresident in such foreign country and of a corporation organized in the United States as consists of earnings derived from the operation of a ship or ships documented under the laws of the United States are considered as granting an equivalent exemption within the meaning of this article.

The following countries do not impose any income tax:

Andorra, Dominican Republic, Egypt, Guatemala, Honduras, Monaco, Morocco, Nicaragua, Switzerland, Uruguay, Venezuela.

These countries therefore do not satisfy the similar credits requirement of section 131(a)3 of the Revenue Act of 1932. Consequently citizens or subjects of these countries who are residents of the United States, in computing their Federal income tax liabilities under the Revenue Act of 1932 are not entitled to a credit on account of the payment of any income, war-profits or excess-profits tax made to any foreign country.

Such countries do, however, satisfy the equivalent exemption requirement of sections 212(b) and 231(b) of the Revenue Act of 1932. Consequently so much of the income from sources within the United States of a nonresident alien individual or a foreign corporation as consists of earnings derived from the operation of a ship or ships documented under the laws of any of these countries shall not be included in gross income under the provisions of the Revenue Act of 1932.

Correspondence and inquiries regarding this mimeograph should refer to the number and the symbols IT : E : CTR.

GUY T. HELVERING,
Commissioner.

ARTICLE 695: Countries which do or do not satisfy the similar credit requirement. XIII–22–6815
I. T. 2784

REVENUE ACT OF 1932.

Great Britain does not satisfy the similar credit requirement of section 131(a)3 of the Revenue Act of 1932.

ARTICLE 695: Countries which do or do not satisfy the similar credit requirement. XIII–25–6858
I. T. 2793

REVENUE ACT OF 1932.

Siam does not satisfy the similar credit requirement of section 131(a)3 of the Revenue Act of 1932.

ARTICLE 698: Limitations on credit for foreign taxes. XIII–12–6706
G. C. M. 12882

REVENUE ACTS OF 1921, 1924, 1926, 1928, AND 1932.

The formula set forth in that part of example (3) at the top of page 234, article 698, Regulations 77 (Revenue Act of 1932), for determining the tax paid by a foreign corporation "upon or with respect to the accumulated profits," in connection with the computation of the foreign tax credit, is to be applied under the earlier Revenue Acts.

Advice is requested whether the formula set forth in that part of example (3) appearing at the top of page 234, article 698, Regulations 77, for determining the tax paid by a foreign corporation "upon or with respect to the accumulated profits," in connection with the computation of the foreign tax credit under the provisions of section 131(f) of the Revenue Act of 1932, is equally applicable under the provisions of the Revenue Acts of 1921, 1924, 1926, and 1928.

The formula stated in words is this: The tax paid "upon or with respect to the accumulated profits" is not the whole tax, but that proportion only of the whole tax which the accumulated profits is of the total income.

In so far as the inquiry is concerned the provisions of section 131(f) of the Revenue Act of 1932 are substantially similar to those contained in section 238(e) of the Revenue Acts of 1921, 1924, and 1926 and section 131(f) of the Revenue Act of 1928.

Accordingly, it is held that the formula in question is to be applied under the Revenue Acts of 1921, 1924, 1926, and 1928.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 141.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 11, REGULATIONS 78: Consolidated returns for subsequent years. XIII-4-6613 I. T. 2753

REVENUE ACT OF 1932.

In the case of an affiliated group of corporations which made a consolidated income tax return for the taxable year 1932 after the promulgation of Regulations 78, and no corporation (other than a corporation created or organized, directly or indirectly, by a member of the affiliated group) has become a member of the affiliated group during the taxable year 1933, such affiliated group does not have an election to make a consolidated return or separate returns for the taxable year 1933, but is required to make a consolidated return for that year unless permission is obtained to make separate returns as provided in article 11(a) of Regulations 78.

Advice is requested whether an affiliated group of corporations which has exercised the privilege of making a consolidated income tax return for the taxable year 1932 is given a new election for the taxable year 1933, under the Revenue Act of 1932, because of the amendments made to that Act by section 218 of the National Industrial Recovery Act.

Section 141(a) of the Revenue Act of 1932 provides that the making of a consolidated return by an affiliated group of corporations shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations prescribed under section 141(b) of that Act, or in case such regulations were not promulgated prior to the making of the return, then the regulations promulgated under section 141(b) of the Revenue Act of 1928.

Article 11(a) of Regulations 78 promulgated under section 141(b) of the Revenue Act of 1932 provides as follows:

If a consolidated return is made under these regulations for the taxable year 1932 or any taxable year thereafter, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless (1) a corporation (other than a corporation created or organized, directly or indirectly, by a member of the affiliated group) has become a member of the group during such subsequent taxable year, or (2) one or more provisions of these regulations, which have previously been consented to, have been amended, or (3) the Commissioner, prior to the time of making the return, upon application made by the common parent corporation and for good cause shown, grants permission to change.

In the opinion of this office, the amendments made to the Revenue Act of 1932 by section 218 of the National Industrial Recovery Act do not require the amendment of Regulations 78 in so far as the provisions of those regulations apply to the taxable year 1933. Therefore, in the case of an affiliated group of corporations as defined by section 141(d) of the Revenue Act of 1932, which made a consolidated income tax return for the taxable year 1932 after the promulgation of Regulations 78, and no corporation (other than a corporation created or organized, directly or indirectly, by a member of the affiliated group) has become a member of the affiliated group during the taxable year

1933, such affiliated group does not have an election to make a consolidated return or separate returns for the taxable year 1933, but is required to make a consolidated return for that year unless permission is obtained to make separate returns as provided in article 11(a) of Regulations 78.

SECTION 142.—FIDUCIARY RETURNS.

ARTICLE 741: Fiduciary returns.

REVENUE ACT OF 1932.

Requirements applicable to returns under Title I, Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods. (See T. D. 4416, page 68.)

SECTION 149.—RETURNS OF BROKERS.

ARTICLE 841: Return of information by brokers. XIII–5–6632
Mim. 4139

Returns of information required to be filed by brokers and other agents.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 19, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

Section 149 of the Revenue Act of 1932 provides that every person doing business as a broker shall, when required by the Commissioner, render a correct return duly verified under oath, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, showing the names of customers for whom such person has transacted any business, with such details as to the profits, losses, or other information which the Commissioner may require, as to each of such customers, as will enable the Commissioner to determine whether all income tax due on profits or gains of such customers has been paid.

Article 841 of Regulations 77 provides that when directed by the Commissioner, either specially or by general regulation, every person doing business as a broker shall render a return on Form 1100, showing the names and addresses of customers to whom payments were made or for whom business was transacted during the calendar year or other specified period next preceding, and giving the other information called for by the form.

In accordance with the foregoing every person or organization acting as broker or other agent in stock, bond, or commodity transactions (including banks which handle orders for depositors or custodian accounts) is hereby directed to make an annual return of information on Form 1100 for each customer, depositor or account for whom or which the aggregate of either purchases or sales amounted to $25,000 or more during the calendar year 1933 and each subsequent calendar year, unless otherwise specifically directed, showing the name and address of the customer and the title of the account;

the total of the purchases and the total of the sales made for such customer; name and address of the broker or agent; and the names and addresses of the guarantor of the account and others with power to make withdrawals of cash, securities or commodities from the account. Form 1100 is printed on white paper and a duplicate thereof is printed on pink paper. In each case where the account is guaranteed or others have power to make withdrawals of cash, securities, or commodities from the account, a duplicate of the form as prepared on white paper will be made on the pink form for each name and address, other than the customer, required to be shown on Form 1100.

Form 1100A is provided for use as a letter of transmittal and affidavit to accompany Forms 1100. The Forms 1100 for each year accompanied by Form 1100A, properly filled out and executed, should be forwarded to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., not later than the 15th day of February following the close of the calendar year.

The forms (1100 and 1100A) for the calendar year 1933 and subsequent calendar years will be distributed through the collectors of internal revenue for the various collection districts.

Returns made by individuals must be sworn to by the individual or his duly authorized agent. Returns made by corporations, partnerships and other organizations must be signed and sworn to by an officer or member of the organization.

All existing regulations and instructions which are inconsistent with the foregoing are hereby revoked.

Inquiries and correspondence regarding this mimeograph should refer to the number and the symbols IT:E:CTR.

Guy T. Helvering,
Commissioner.

Article 841: Return of information by brokers. XIII-9-6674
Mim. 4153

Returns of information required to be filed by brokers and other agents.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., February 16, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Other Officers and Employees Concerned:

The provisions of Mimeograph 4139 [page 91, this Bulletin], insofar as they relate to banks, trust companies, and their security affiliates and to transactions in commodities, are hereby amended as follows:

(1) The making of Forms 1100 for the calendar year 1933 by banks, trust companies and their security affiliates may be confined to cases involving sales for customers aggregating $25,000 or more during that year, and the dollar totals may be omitted from the Forms 1100. It is to be understood, however, that such a form shall be made for each case involving sales aggregating $25,000 or more during that year.

(2) Form 1100 will not be required to cover purchases or sales made by banks, trust companies or their security affiliates when (*a*) acting for themselves or any affiliated corporation, or as executor, administrator, trustee, or in any other fiduciary capacity (not including custodian or safe-keeping accounts as fiduciary); (*b*) acting for other banks, trust companies, brokers, or other financial institutions doing business in the United States; and (*c*) when the bank, trust company, or its affiliate does not actually give orders to buy or sell securities.

(3) Brokers and other agents handling purchases and sales of commodities for customers may report on Form 1100 for the calendar year 1933 either the total profit or loss, if $500 or more, on commodity transactions of each customer during that year, or the total purchases or sales of $25,000 or more as required by the above mimeograph. Form 1100 should be prepared for each such customer whenever the amount of the total profit or loss of the customer from such transactions is $500 or more for the calendar year, and if the profit or loss is reported instead of the total purchases and sales Form 1100 should be noted accordingly. Persons or organizations having domestic correspondents will not report on Form 1100 for such domestic correspondents, inasmuch as each correspondent will report for his or its individual customers.

Any Forms 1100 which have already been prepared in accordance with the provisions of the above mimeograph may be filed, and it will not be necessary to make new forms or eliminate any of those already prepared in order to conform to the above amendments.

Inquiries and correspondence regarding this mimeograph should refer to the number and the symbols IT: E: CTR.

GUY T. HELVERING,
Commissioner.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 162.—NET INCOME.

ARTICLE 862: Method of computation of net income and tax. XIII–8–6670 Mim. 4146

Effect of decision of Supreme Court on treatment for Federal income tax purposes of amounts distributed by fiduciary to a widow from the income of an estate or trust in cases where the widow elects to take under the will of her deceased husband in lieu of her statutory rights.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 5, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

In its decision rendered December 11, 1933, in the cases entitled *Helvering, Commissioner of Internal Revenue*, v. *Julia Butterworth et al., Trustees under the Will of William B. Butterworth, Deceased,* No. 75; *Helvering, Commissioner of Internal Revenue*, v. *Fidelity-Philadelphia Trust Co., Trustee under the Will of William L. Du Bois, Deceased*, No. 76; *Helvering, Commissioner of Internal Revenue*, v. *Frank Pardee et al., Trustees under the Will of Calvin Pardee*, No. 77; and *Helvering, Commissioner of Internal Revenue*, v. *Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Wodward*, No. 78 [Ct. D. 769, page 151, this Bulletin,] the Supreme Court said:

These causes demand construction and application of the provisions of section 219, Revenue Act of 1924 (ch. 234, 43 Stat., 253, 275 (U. S. C., Title 26, section 960)) * * * which lay a tax upon "the income of estates or of any kind of property held in trust," and direct that (b) (2) "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not * * *." Also, the identical provisions of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 32, 33); and the substantially similar ones of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 838, sections 161 and 162).

* * * * * * *

Causes Nos. 75, 76 and 78 involve the same point of law. The undisputed facts are similar and it will suffice to state those of No. 75. The record in No. 77 presents another question and the facts there will be set out.

The facts in the Butterworth case, No. 75, as set forth in the decision, are substantially as follows: William B. Butterworth, a resident of Pennsylvania, died October 5, 1921. After certain bequests, his will gave the residue of the estate to named individuals, as trustees, with directions to pay the net income to the widow. She accepted under the will and surrendered the rights granted her by the State laws. During 1924 and 1925 the trustees paid her the income from the trust. The aggregate of these and antecedent payments was less than the estimated value of her statutory rights in the estate. In order to ascertain the taxable income of the trust, the trustees claimed the right to deduct from gross income the amount of the payments made to the widow. In No. 75 the court held, in effect, that when a widow elects to take under her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights, she is a beneficiary within the ambit of section 219 (a) (2) and (b) (2) of the Revenue Acts of 1924 and 1926 and sections 161 and 162 of the Revenue Act of 1928, and that in no proper sense does she purchase an annuity. The court also held that the trustees in Nos. 75, 76, and 78 were entitled to the deductions claimed.

In the Pardee case, No. 77, supra, the facts as set forth in the decision are substantially as follows: Calvin Pardee, a resident of Pennsylvania, died March 18, 1923. His will provided:

I also give unto my said wife an annuity of fifty thousand dollars ($50,000), to be computed from the date of my decease and to be paid in advance in quarterly payments.

The total amount paid by the trustees to the widow under the will during the taxable years 1924 and 1925 and prior thereto did not aggregate the value of the interest to which she would have been entitled had she declined to take under the will. In computing the taxable income of the estate the trustees claimed the amounts paid to the widow, as deductions under section 219 of the Revenue Acts of 1924 and 1926. In No. 77 the court held, in effect, that the annuity provided by the will for the widow was payable at all events and did not depend upon income from the trust; that when she elected to accept the annuity in lieu of her statutory rights, she chose to assume the position of an ordinary legatee; that section 213(b)3, Revenue Act of 1924, exempts bequests from the income tax there laid; that payments to Mrs. Pardee by the fiduciary were not necessarily made from income; that the charge was upon the estate as a whole; that her claim was payable without regard to income received by the fiduciary; that the payments made to her were not distribution of income, but were in discharge of a gift or legacy: and that the principle applied in *Burnet* v. *Whitehouse* (283 U. S., 148, C. B. X-1, 366) is applicable. The court held, among other things, in the Whitehouse case that where a testator bequeaths an annuity which is not dependent upon income of the estate but is a charge upon the whole estate during the life of the legatee, the amounts received by the legatee during the taxable year, though in fact paid from income of the estate, are exempt from tax under section 213(b)3 of the Revenue Act of 1921 which exempts the "value of property acquired by gift, bequest, devise or descent," from the tax. The court also held in No. 77 that in making the returns for the trust, the trustees were not entitled to deduct from gross income the amounts paid to the widow.

The principles applied by the court in Nos. 75, 76, 77, and 78 are also applicable to similar cases arising under the Revenue Act of 1932.

The audit of all returns involving the question of the proper treatment for Federal income tax purposes of amounts distributed by a fiduciary to a widow from the income of the estate or trust in cases where the widow elects to take under the will of her husband in lieu of her statutory rights in his estate, will be completed as expeditiously as possible, effect being given to the decision rendered by the Supreme Court in Nos. 75, 76, 77, and 78. Accordingly in cases coming within the purview of Nos. 75, 76, and 78 the amount of the income of the estate or trust which "is to be distributed currently" or which "is properly paid or credited" (within the meaning of section 162 (b) and (c), Revenue Act of 1932, and corresponding sections of the earlier Acts) to the widow, will be allowed as a deduction from gross income of the estate or trust and the amount of such income will be included in gross income of the widow. In cases coming within the purview of No. 77, the amounts paid to the widow will not be allowed as a deduction from gross income of the estate or trust and such amounts will not be included in gross income of the widow.

Inquiries in regard to this mimeograph should refer to the number thereof and the symbols IT:E:CTR.

GUY T. HELVERING,
Commissioner.

SUPPLEMENT F.—PARTNERSHIPS.

SECTION 189.—PARTNERSHIP RETURNS.

ARTICLE 941: Partnership returns.

REVENUE ACT OF 1932.

Coowners of oil and gas leases. (See I. T. 2749, page 99.)

ARTICLE 941: Partnership returns.

REVENUE ACT OF 1932.

Requirements applicable to returns under Title I, Revenue Act of 1932, as amended, for the calendar year 1933 and succeeding taxable periods. (See T. D. 4416, page 68.)

ARTICLE 941: Partnership returns. XIII-22-6816
I. T. 2785

REVENUE ACT OF 1932.

In the case of coownership of oil and gas lands and leases it will be considered sufficient compliance with I. T. 2749 [page 99, this Bulletin] if, in the class of cases governed by that ruling, a return on Form 1065, containing information in accordance with the form described herein, is filed by the operating coowner under the operating coowner's name immediately following the initial production, and for each taxable year thereafter.

Reference is made to the ruling in I. T. 2749, supra, holding that the coownership of oil and gas lands and leases and the development of the property either by individuals or corporations, or both, constitute partnerships within the meaning of section 1111(a)3 of the Revenue Act of 1932; and that such coownerships must file partnership returns.

It will be considered sufficient compliance with I. T. 2749, supra, if, in the class of cases governed by that ruling, a return on Form 1065 is filed by the operating coowner under the operating coowner's name for the fiscal or calendar year, as the case may be, immediately following the initial production, and for each taxable year thereafter, showing the following information:

In lieu of filling in the several items and schedules on the partnership return (Form 1065) there should be attached to the return a schedule showing the total working interest, names and addresses of the coowners, the percentage of each coowner's interest in the coownership, total costs and expenses billed each coowner with respect to drilling for and producing the oil and gas, and the total revenue credited in those cases where the operating coowner distributed revenue to the other coowners (by way of credit or cash) from the sale or other disposition of the coowners' oil and gas. This schedule should be substantially in the following form:

OPERATORS REPORT FOR COOWNED OIL AND GAS PROPERTIES.

For calendar or fiscal year ending ________________.

Name of property ____________________.
Location-description ____________________.
County ____________________.
State____________________.

Coowners.	Per cent of interest.	Working interest.		Total costs billed.	Total revenue credited.
		Barrels.	M cubic feet.		
Name________________________ (Operating coowner.)	--------	--------	--------	--------	--------
Address______________________					
Name________________________	--------	--------	--------	--------	--------
Address______________________					

If the information contained in the schedule is insufficient in the case of any particular coowner, the Bureau will request such additional data as is deemed necessary.

SUPPLEMENT H.—NONRESIDENT ALIEN INDIVIDUALS.

SECTION 212.—GROSS INCOME.

ARTICLE 1042: Exclusion of earnings of foreign ships from gross income. XIII-4-6614 I. T. 2754

REVENUE ACT OF 1932.

Canada meets the equivalent exemption provisions of section 212(b) and 231(b) of the Revenue Act of 1932.

ARTICLE 1042: Exclusion of earnings of foreign ships from gross income. XIII-4-6615 I. T. 2755

REVENUE ACT OF 1932.

The Irish Free State meets the reciprocal exemption provisions of sections 212(b) and 231(b) of the Revenue Act of 1932. The exemption accorded became effective April 6, 1932, the beginning of the first income tax taxable year to which section 10 of the finance act of 1932 of the Irish Free State is applicable.

ARTICLE 1042: Exclusion of earnings of foreign ships from gross income.

REVENUE ACT OF 1932.

Exemption from taxation of earnings derived from the operation of ships documented under the laws of certain countries that do not impose an income tax. (See Mim. 4148, page 87.)

SUPPLEMENT I.—FOREIGN CORPORATIONS.

SECTION 232.—DEDUCTIONS.

ARTICLE 1111: Deductions allowed foreign corporations.

REVENUE ACT OF 1932.

Expenses in connection with interest on bank deposits and foreign bonds. (See I. T. 2792, page 85.)

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 276.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION—EXCEPTIONS.

ARTICLE 1201: Period of limitation upon assessment of tax. XIII–6–6640
Mim. 4134

Instructions governing the execution of consent agreements.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 16, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Other Officers and Employees Concerned:

Effective December 31, 1933, Mimeograph 3857 (C. B. X–1, 179) is hereby revoked.

Beginning December 31, 1933, consents or waivers under section 278(c), Revenue Act of 1926, section 276(b), Revenue Act of 1928, and/or section 276(b), Revenue Act of 1932, extending or further extending the statute of limitations on assessment of deficiencies in income or profits tax, will be executed under the following conditions:

(1) At the written request of the taxpayer where it appears that, although the taxpayer has used ordinary diligence, the case can not be adequately presented and considered within the statutory period of limitation properly applicable thereto.

(2) In any case where in the judgment of the responsible officer concerned the status of the case is such that the immediate issuance

of a 60-day letter will undoubtedly result in litigation which may be avoided if ample time is afforded the taxpayer and the Government to give thorough consideration to the questions involved.

Queries regarding this mimeograph should refer to the number thereof and to the symbols IT: E: CTR.

GUY T. HELVERING,
Commissioner.

TITLE IX.—ADMINISTRATIVE AND GENERAL PROVISIONS.

SECTION 1111.—DEFINITIONS.

ARTICLE 1313: Association distinguished from partnership. XIII-1-6583
(Also Section 189, Article 941.) I. T. 2749

REVENUE ACT OF 1932.

Coownerships of certain oil and gas leases and development of the property by the coowners constitute partnerships within the meaning of section 1111(a)3 of the Revenue Act of 1932.

Advice is requested whether the coownerships of certain oil and gas leases and the development of the property covered by the leases result in partnerships within the meaning of section 1111(a)3 of the Revenue Act of 1932.

The inquiry arises by reason of the fact that the following article appearing in Regulations 74 was omitted from Regulations 77:

ART. 1317. *Joint ownership.*—Joint investment in and ownership of real and personal property not used in the operation of any trade or business and not covered by any partnership agreement does not constitute a partnership. Coowners of oil lands engaged in developing the property through a common agent are not necessarily partners.

The subsidiaries of the taxpayer corporation are coowners of a large number of oil and gas leases. In some cases the title was acquired by direct cash purchase of a part interest in a lease, and in other cases a part interest was acquired in consideration of drilling a well on an undeveloped leasehold. In either case the purchaser was entitled to a share of the proceeds from the property.

The gross revenue from such properties is paid to and accounted for by the coowners monthly. Expenditures in the development and operation of the properties are paid by the coowners monthly in proportion to their interests. The plan of operation provides for monthly settlements with respect to both gross and net income. The accounting method adopted results in a complete periodical accounting for revenue and expense in the same manner as in the case of a separate piece of property.

Section 1111(a)3 of the Revenue Act of 1932 reads as follows:

(3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

In the instant case the coownerships of the oil and gas leases and the operations thereunder may be fairly considered as falling within the broad scope of the term "joint venture." While the term "joint venture" is usually, but not necessarily, limited to a single transaction, it has been held that the business of conducting such a venture to a successful termination may continue for a number of years (*Hobart-Lee Tire Co.* v. *Goodsky*, 46 S. W. (2d), 859). It is true that ordinarily joint or coownership of property does not of itself constitute a partnership but it is also true that when the coowners or joint owners agree to employ such property in the carrying on of a trade or business they become partners (47 C. J., 702).

It is held in the instant case that the coownerships of the leases and the development of the property constitute partnerships within the meaning of section 1111(a)3 of the Revenue Act of 1932.

The omission of the provisions of article 1317 of Regulations 74 from Regulations 77, especially the sentence, "Coowners of oil lands engaged in developing the property through a common agent are not necessarily partners," was occasioned by the definition of a partnership contained in section 1111(a)3 of the Revenue Act of 1932, supra, which definition did not appear in the Revenue Act of 1928.

INCOME TAX RULINGS—PART II.

REVENUE ACT OF 1928.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

SECTION 22(a).—GROSS INCOME: GENERAL DEFINITION.

ARTICLE 51: What included in gross income. XIII-8-6661
Ct. D. 791

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

1. TESTIMONY—ADMISSIBILITY.

Where a defendant is on trial for violation of the income tax laws and it is necessary and material for the Government, in seeking to establish the violation charged, to introduce testimony tending to show the commission of other and separate crimes, such evidence is admissible, with explicit instructions to the jury that the defendant is on trial only for the crime charged in the indictment and not for the other incidental violations of law which may be comprehended by the testimony.

2. INCOME—MONEY ILLEGALLY OBTAINED.

Money obtained by defendant, an attorney, from his client for settlement of certain damage claims and misapplied by him, is income for the year in which it was received, and he may not set up his own wrongful professional conduct in obtaining income as a lawful reason for escaping tax thereon.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

United States of America v. *T. Morris Wampler.*

[December 14, 1933.]

OPINION.

CHESTNUT, District Judge: I have carefully considered the motions offered on behalf of the defendant to strike out certain testimony in this case. As to most of the testimony referred to, the motions are based on two contentions: (1) That the testimony tends to show the commission of crimes separate and independent from that charged in the indictment and (2) that the testimony does not tend to show the receipt of moneys by the defendant which may properly be regarded as income.

The first contention is, I think, untenable because it has been clearly decided by the Supreme Court of the United States that income derived from the proceeds of criminal transactions must nevertheless be reported by the taxpayer and is subject to taxation. It was so held in *United States* v. *Sullivan* (274 U. S., 259 [T. D. 4028, C. B. VI-2, 177]), affirming on this point the decision of the United States Circuit Court of Appeals for the Fourth Circuit where the opinion was by Judge Soper, reported in 15 Fed. (2d), 809. It is clear that the defendant is not being tried in this case for any criminal transaction other than the alleged violation of the income tax laws but when it becomes necessary and material for the Government, by testimony to establish the violation charged, to show the sources from which the income was derived and this necessarily involves evidence tending to show the commission of other and separate crimes, it can not be said that the evidence is inadmissible although of course the jury should be instructed very explicitly that the defendant is on trial for the crime charged in the indictment and not for the other incidental violations of law which may be comprehended by the testimony. An examination of a number of reported income tax cases where the source of income resulted from criminal activities will show that the testimony is not inadmissible for the reason suggested in the motion. See for illustration *Oliver* v. *United States* (C. C. A. 7) (54 Fed. (2d), 48); *United States* v. *Commerford* (C. C. A. 2) (64 Fed. (2d), 28); *O'Brien* v. *United States* (C. C. A. 7) (51 Fed. (2d), 193). And I do not think the cases support the distinction, contended for by defendant's counsel, that income obtained by malum in se, as contrasted with conduct malum prohibitum, is to be excluded from taxable income.

A possibly close question of law is raised by the defendant's second contention, that is that the moneys received and alleged to have been retained by the defendant did not constitute reportable or taxable income. It is said by defendant's counsel that the income referred to, if the Government's allegations are to be sustained, result from a conspiracy to defraud the witness Dean, participated in by the defendant and, therefore, the money was obtained by fraud and may of course be recovered from the defendant and therefore can not constitute income. As an original proposition for judicial consideration the point undoubtedly has some substance although there are important considerations adverse to it. It may be thought beneath the dignity of the Government to assess and collect taxes on such illegally gotten gains, but the other point of view is certainly equally important for consideration in that there is no just reason why a taxpayer should escape his fair proportion of the burden of taxation because his gains are illegally gotten and thus increase the burden of taxation upon other citizens. It is not sound to consider the Government itself as a partial beneficiary of the defendant's alleged fraud because taxation is a power exercised for the benefit of the Nation as a whole. But whatever might have been considered the wiser public policy in dealing with this question as an ordinary one, I reach the conclusion, after study of the important and controlling authorities, that it has been decided adversely to the defendant's contention. In the Sullivan case the court was dealing with the taxability of a bootlegger's profits from the extensive violation of the National Prohibition Act. The considerations pro and con and the authorities decided up to that time are very fully reviewed in the opinion of Judge Soper for the Circuit Court of Appeals in 15 Fed. (2d), 809, and, as I have said, the opinion on this point was affirmed by the Supreme Court in an opinion written by Mr. Justice Holmes. A similar conclusion was reached by the Judicial Committee of the Privy Council in England on appeal from the Supreme Court of the Dominion of Canada in a case dealing with the same subject matter under the Canadian income tax law. The opinion of the Supreme Court of Canada is to be found in Dominion Law Reports (1925), volume 2, page 1137, the title of the case being *Smith* v. *Minister of Finance;* and on appeal to the Privy Council the opinion of the court was delivered by Viscount Haldane reported in Law Reports Appeal Cases (1927), page 193. Cases decided by other courts of appeal show that moneys received as bribes have been held subject to income tax and various cases disposed of in this court heretofore have held that money obtained by proprietors of gambling houses are taxable. In this very case the taxpayer himself has reported for taxation moneys obtained in games of chance.

It may be suggested that there is a technical distinction as to the nature of the title of the taxpayer to retain and hold as against adverse claims moneys secured from illegal transactions in liquor and gambling and from bribes on the one hand and money obtained by a conspiracy to defraud on the other hand, it being contended that the present case falls in the latter category. The distinction is, however, I think, too narrow and technical to accomplish a difference in result in view of the very comprehensive definition of income contained in the sixteenth amendment and in the law itself which includes gains or profits from any source whatever, and as I read the cases the principle announced is broad enough to cover the particular case. The consideration that the money involved in this case may be recoverable at suit of the witness Dean is not conclusive. Under the operation of the income tax law the money, if recovered, would presumably be a taxable loss in the year when recovered but this does not destroy the taxability to the taxpayer of the gain or profit for the year in which it was received and held by him, income taxation being on an annual basis. And as a matter of judicial authority it is noteworthy that the Canadian liquor law under consideration in the case above mentioned provided in section 57 as follows:

"Any payment or compensation for liquor furnished in contravention of this act or otherwise, in violation of law, whether made in money or securities for money or in labor or property of any kind, shall be held to have been received without any consideration and against justice and good conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same." (D. L. R. (1925), volume 2, page 1139.)

And in discussing the subject matter Justice Mignault said:

"It is argued that the language of this definition is broad enough to include income derived from a business the carrying on of which is expressly prohibited by law. So would it be wide enough to comprise gains resulting from the commission of crimes, such as burglary or highway robbery, if such crimes, as often happens, be resorted to habitually as a means of making a gain or profit."

Despite these considerations the bootlegger's income in that case was held taxable by the Judicial Committee of the Privy Council and the latter's decision was cited with approval by Justice Holmes in his opinion in the Sullivan case.

The exact technical nature of the defendant's acquisition and retention of the moneys involved in the motion to strike out testimony is not certainly and definitely clear. Defendant's counsel argued that the money must be considered to have been embezzled or stolen. As a matter of technical law as the money was delivered by Dean to the defendant to be applied to a particular purpose, it could not be embezzlement, as a matter of common or statutory law in Maryland, and presumably the same is true as to the District of Columbia. The tendency of the testimony is to show that when the money was actually delivered by Dean to the defendant the amount required to be paid for the settlement of the damage claims involved in the respective cases was still uncertain and therefore unless the defendant was a party to the original conspiracy to defraud it could not be said that the money was obtained by means of either embezzlement, larceny or false pretenses. The defendant denies any fraudulent or criminal participation in the transaction. It seems to me that the most that can be said in support of the defendant's contention on this motion is that the money received by the defendant as attorney for Dean to be delivered to a particular person was misapplied and thus his offense was that of a breach of trust between attorney and client. For the purpose of ruling on the motion, therefore, I do not think it can be said that the defendant is justified in assuming that the testimony shows that the money was either embezzled or stolen or even obtained by false pretenses in the technical sense. The defendant is a lawyer. Alleged income came through the general practice of his profession. It does not become him and I think is not admissible for him to set up his own wrongful professional conduct in obtaining income as a lawful reason for escaping the tax thereon. I have noted that Circuit Judge Manton in *Rowe* v. *United States* (260 Fed., 136), decided in 1913, in passing on an incidental and not the main point in a case, said that money obtained by embezzlement or through the commission of a larceny would not be subject to taxation under the income tax law and in *Steinberg* v. *United States* (14 Fed. (2d), 564), there was a similar situation. Judge Manton in his concurring opinion, at page 569, said:

"In *Emmich* v. *United States* (C. C. A.) (298 F., 5), an embezzler was convicted, and in *Levin* v. *United States* (C. C. A.) (5 F. (2d), 598 [T. D. 3726, C. B. IV–2, 224]), a bootlegger was convicted, of making false returns by evading the proper income tax upon their incomes. In neither case does it appear that the question presented here was considered."

These two expressions, so far as I have been able to find, are the only judicial support that can be cited for the proposition that the income involved in this case is not taxable.

For these reasons I conclude that the testimony should not be stricken out and the defendant's motion to strike out is overruled and exception noted.

Defendant has also moved to strike out all testimony relating to the check for $4,550 said by the Government to have been received by the defendant as part of his income for 1930, and not returned as taxable. The check if received by the defendant was in payment to him of a bill for miscellaneous fees including some part of professional compensation for services in relation to the four special damage claims embraced in the testimony. Defendant's contention is that the whole of the amount of the check must be rejected as income because it includes in part a bill for services in connection with the damage claims and is therefore tainted with the same imperfection as income which relates to any and all moneys received by the defendant from that source. I am unable to adopt this view of the matter not only for the general reasons heretofore announced but because it seems to me that on other and obvious grounds the item was taxable income if in fact received by the defendant.

ARTICLE 51: What included in gross income. (Also Section 112, Article 579.) XIII-11-6694 G. C. M. 12632

REVENUE ACT OF 1928.

Treatment for income tax purposes of a transaction in which real property was condemned in part by a city, a price awarded for the portion taken, severance damages awarded for the remainder on which a special assessment was levied, and a part of the proceeds used in the purchase of property similar or related in service or use to the property condemned.

An opinion is requested relative to the proper treatment, for income tax purposes, of the transaction described herein.

The M Company was the owner of unimproved real property in the city of R which was acquired in 1921 at a cost of 126*x* dollars. Subsequently improvement assessments were paid in the amount of 3.7*x* dollars, making the total cost of the property 129.7*x* dollars. The city of R condemned 54 per cent of this property for the purpose of opening and extending a street, and in October, 1930, awarded the taxpayer the amount of 707*x* dollars, which included 523*x* dollars for the land condemned and 184*x* dollars severance damages to the remaining land. At the same time a special assessment amounting to 88.6*x* dollars was levied by the city of R against the remaining property, which amount was offset against the award to the taxpayer. In December, 1930, the taxpayer purchased for a consideration of 205*x* dollars certain unimproved property which was located in the same neighborhood as the property condemned and was similar or related in service or use to that property.

The taxpayer contends that the special assessment levied against its remaining property should be considered in the determination of the profit realized from the award of severance damages. It further contends that the purchase of the unimproved land with a portion of the money received under the condemnation award comes within the purview of section 112(f) of the Revenue Act of 1928, which places a limitation on the amount of gain to be recognized when money realized from a condemnation of property is forthwith expended, in whole or in part, in the acquisition of other property similar or related in service or use to the property condemned.

In I. T. 2599 (C. B. X-2, 170) it was held that where, in connection with condemnation proceedings, the sum awarded consists of a sum paid for the acquisition of the land actually condemned and a separate sum as severance damages to the remaining land, gain or loss results from the portion of the award paid for the acquisition of the land. It was also held that no taxable gain is recognized with respect to that portion of the award which represents the severance damages, but the amount thereof reduces the basis to be used in determining gain or loss upon the subsequent disposition of the remaining portion of the property, unless the amount of the severance damages exceeds the basis of the remaining portion of the property, in which case such excess is taxable gain. (See also G. C. M. 12657 [page 80, this Bulletin].)

The instant case falls within the purview of I. T. 2599, supra. Accordingly, gain was realized from the condemnation of 54 per cent of the taxpayer's land, the gain being computed as follows:

	Dollars.
Award made for the land condemned	$523x$
Basis of the land condemned (54 per cent of $129.7x$ dollars)	$70x$
Profit realized	$453x$

The basis of the remaining 46 per cent of the land was $59.7x$ dollars. The question arises whether in determining the profit realized from the award of severance damages in the amount of $184x$ dollars the assessment of $88.6x$ dollars which was levied against the remaining property should be added to the basis of $59.7x$ dollars applicable to such property.

It is apparent, in the opinion of this office, that when the city of R offset against the award of damages made to the taxpayer the amount of the special assessment ($88.6x$ dollars), it in effect paid to the taxpayer the full amount of the damages awarded and received from the taxpayer payment of the special assessment. Since the full amount of the damages was constructively received by the taxpayer, it is held that in determining the taxable income derived from the award of severance damages the taxpayer must be charged with the gross amount awarded. As the basis of the remaining land was $59.7x$ dollars and the award for severance damages was $184x$ dollars, the profit realized in 1930 from the award of severance damages was $124.3x$ dollars. (I. T. 2599, supra.)

The provisions of section 112(f) of the Revenue Act of 1928, which limit the amount of profit recognized upon the condemnation of property when the amount received from the condemnation is forthwith expended in whole or in part in the acquisition of other property similar or related in service or use to the property condemned, apply to the award for the property condemned but do not apply to the award for severance damages. As the sum of $205x$ dollars of the award of $523x$ dollars received from the condemnation of 54 per cent of the taxpayer's property was immediately reinvested by the taxpayer in property similar or related in service or use, it is held, under section 112(f), supra, that the gain of $453x$ dollars realized from the condemnation of this portion of the taxpayer's property should be recognized in 1930 only to the extent of $318x$ dollars, that is, the difference between $523x$ dollars and $205x$

dollars. As indicated above, gain was also realized in 1930 from the award of severance damages in the amount of 124.3*x* dollars.

The total gain taxable in 1930 is, therefore, 442.3*x* dollars.

The basis for determining gain or loss from a subsequent sale or other disposition of the remaining property is 88.6*x* dollars.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

Article 58: Sale of stock and rights.

XIII-15-6742
Ct. D. 811

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

1. Gain or Loss—Sale of Stock Rights by Administrator Pendente Lite.

Where an administrator pendente lite acquires the right to subscribe to new stock, and, due to lack of available funds, obtains leave of the court to sell some of the stock rights in order to procure sufficient funds to exercise the remaining rights, the profit on the sale of the rights is taxable to the estate.

2. Decision Affirmed.

Decision of the Board of Tax Appeals (26 B. T. A., 132) affirmed.

United States Circuit Court of Appeals for the Third Circuit.

Leighton M. Ford, Administrator of the Estate of Albert E. Ford, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition for review from the United States Board of Tax Appeals.

Before Buffington, Davis, and Thompson, Circuit Judges.

[September 15, 1933.]

OPINION.

Thompson, Circuit Judge: This is a petition for review of a decision of the Board of Tax Appeals. The estate of Albert E. Ford, deceased, held 2,128 shares of common stock of the Franklin Trust Co. That company authorized an issue of additional shares of common stock, and gave its stockholders the right to subscribe to such new shares at $400 each at the rate of one-half a share of new stock for each 1 share of stock held. The administrators, pendente lite, therefore had the right to subscribe to 1,064 new shares but were unable to exercise these rights because of lack of available funds with which to purchase the new shares. They petitioned and obtained leave of the Orphans' Court of Philadelphia County to subscribe to as many new shares of common stock of the Franklin Trust Co. as could be taken up with funds realized from the sale of the balance of the rights to which the estate was entitled. The administrators thereupon sold 1,548 half rights for $116,046. With the proceeds of this sale, they purchased 290 new shares at $400 each, using the unsold 580 half rights.

The Commissioner of Internal Revenue asserted that the sale of the rights to subscribe resulted in taxable gain and assessed a deficiency. The Board of Tax Appeals found that a profit was realized on the sale of the rights and affirmed the ruling of the Commissioner. We find no error in the reasons and conclusion of the Board of Tax Appeals.

The decision is sustained, and the petition for review is dismissed.

Article 66: Sale by corporation of its capital stock.

REVENUE ACT OF 1928.

Amendment of article 66, Regulations 74. (See T. D. 4430, page 36.)

Article 66: Sale by corporation of its capital stock. XIII–20–6800 G. C. M. 12955

REVENUE ACT OF 1928.

The gain derived by the M Corporation from dealing in its own stock for the purpose of profit in the ordinary course of business is subject to Federal income tax.

The opinion of this office is requested whether the M Corporation realized a taxable gain from the sale of its own capital stock in the year 1929.

The balance sheets of the M Corporation show that a substantial part of its surplus was, during the year involved, employed in trafficking in its own stock. For several years the taxpayer has been engaged in such transactions. Its income tax return for the year 1929 reflects a profit from dealing in its own stock of $50x$ dollars. On the books and records of the corporation the purchases and sales of its own stock were treated in the same manner as other security investments. All the purchases and sales in question were made on the open market and were recorded in the investment account of the corporation. Gains and losses on such transactions were duly reflected in its profit and loss account and in its surplus account. The stock thus purchased was not retired, nor was there any intention to retire it. Likewise, upon the sales of the stock there was no new issuance of stock and no intention to issue new stock. Preemptive rights were obviously nonexistent (*Borg* v. *International Silver Co.*, 11 Fed. (2d), 147), and there is no suggestion in the accounting books and records of the taxpayer of any attempt to give them effect. None of these transactions was reflected in the capital stock account of the taxpayer, and the conclusion is inevitable that the capital stock of the taxpayer was bought and sold in the open market for the express purpose of deriving a profit. Throughout both years the M Corporation was indisputably solvent.

With reference to the question whether a corporation realizes a gain or suffers a loss from dealing in its own stock the Circuit Court of Appeals for the First Circuit in the case of *S. A. Woods Machine Co.* v. *Commissioner* (57 Fed. (2d), 635, certiorari denied 53 S. Ct., 15, Ct. D. 666, C. B. XII–1, 275), in reversing the Board of Tax Appeals, used the following language:

> Whether the acquisition or sale by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction involved. (*Walville Lumber Co.* v. *Com. of Internal Revenue*, 35 Fed. (2d), 445; *Spear & Co.* v. *Heiner*, 54 Fed. (2d), 134.) If it was in fact a capital transaction, i. e., if the shares were acquired or parted with in connection with a readjustment of the capital structure of the corporation, the Board rule applies. (*Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 184; *Eisner* v. *Macomber*, 252 U. S., 189 [T. D. 3010, C. B. 3, 25].) But where the transaction is not of that character, and a corporation has legally dealt in its own stock as it might in the shares of another corporation, and in so doing has made a gain

or suffered a loss, we perceive no sufficient reason why the gain or loss should not be taken into account in computing the taxable income. The view taken by the Board of Tax Appeals (see *Houston Bros. Co.*, 21 B. T. A., 804) presses accounting theory too far in disregard of plain facts. It is not supported by any decision which has come to our attention except those of the Board. In *Knickerbocker Imp. Co.* v. *Board of Assessors* (74 N. J. L., 583, 585), the plaintiff corporation was held liable for the franchise tax on its own stock which it had bought and held in its treasury. The court said: "Stock once issued is and remains outstanding until retired and canceled by the method provided by statute for the retirement and cancellation of capital stock." (Dill, J.) In *United States* v. *Kirby Lumber Co.* (284 U. S., 1 [Ct. D. 420, C. B. X–2, 356]), dealing with a question somewhat similar to the present one, the court said: "We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain, popular meaning, as they should be taken here." (Holmes, J.) (See, too, *Maryland Casualty Co.* v. *United States*, 251 U. S., 342.) As has often been said, taxes are practical things and should be dealt with on a practical basis.

In *Commissioner* v. *Boca Ceiga Develop. Co.* (66 Fed. (2d), 1004 [Ct. D. 802, page 263, this Bulletin], the Circuit Court of Appeals for the Third Circuit stated as follows:

The Board's decision that a corporation realizes neither a gain nor loss from the purchase of its stock was in keeping with its position at the time when it determined this case. (*Houston Bros. Co.*, 21 B. T. A., 804; *S. A. Woods Machine Co.*, 21 B. T. A., 818; *Schiller Piano Co.*, 23 B. T. A., 376), although its earlier decisions were to the contrary. (*Behlow Estate Co.*, 12 B. T. A., 1365; *New Jersey Porcelain Co.*, 15 B. T. A., 1059.) Meanwhile, the courts have held that a corporation acquiring its own stock may recognize a gain or loss provided the purpose of the transaction was not merely a capital readjustment (*Johnson* v. *Commissioner*, 56 Fed. (2d), 58, certiorari denied 286 U. S., 551), but a sale of property. (*Walville Lumber Co.* v. *Commissioner*, 35 Fed. (2d), 445 (C. C. A. 1); *Spear & Co.* v. *Heiner*, 54 Fed. (2d), 134 (W. D. Pa.); *Commissioner* v. *S. A. Woods Machine Co.* (57 Fed. (2d), 635 (C. C. A. 1) [Ct. D. 666, C. B. XII–1, 275].) Since these decisions, the Board has adopted the rule laid down by the courts. (*Houghton & Dutton Co.*, 26 B. T. A., 52.)

There has been much discussion as to the correct generic name to apply to a corporation's own stock during the period it is held as an investment, but as the Circuit Court of Appeals for the Second Circuit has demonstrated in *Borg* v. *International Silver Co.*, supra, names can make little difference, since the essential fact is that the corporation in its ownership of the stock owns and possesses a group of legal rights and powers which is but another name for legal property, and from the trafficking in this legal property there can result the "gains, profits, and income derived from * * * trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever" (section 22, Revenue Act of 1928), which are subjected to Federal income tax.

In Montgomery's Auditing, Theory and Practice, volume 1, page 292, it is stated:

* * * When stock is purchased in the open market and resold, the profit or loss, if any, should appear in the *income account*. There is, in such a case, virtually no difference between dealing in its own stock and in the stocks or securities of other corporations. It has been urged that when a corporation purchases part of its stock, it is a capital transaction because its outstanding stock is reduced and its surplus increased or decreased; if stock is purchased below par surplus is increased; if stock is purchased above par surplus is reduced. When stock is purchased or acquired for permanent holding or for

formal reduction of outstanding issues, it is proper to treat it as a capital transaction; *but when a corporation buys 100 shares of its own stock at $80 a share and immediately sells it for $90 a share, the gain of $1,000 is no more a capital gain than if the purchase and resale were of any other security or commodity.* [Italics supplied.]

In Montgomery's Income Tax Procedure, 1924, page 511, the author says:

If a corporation were to resell treasury stock at a profit, as is frequently done, there would be no real difference between this transaction and one involving the purchase and sale of the shares of another corporation. When stock is donated or sold to a corporation at a nominal price to enable the corporation to secure working capital the resale of the treasury stock may in fact represent capital and if so the proceeds of the sale are not properly taxable. *But if the stock is purchased as an investment any resale at a profit should be held to be a taxable transaction.* [Italics supplied.]

The diverging accounting methods in this field appear to be fully explained and harmonized with the law in *Borg* v. *International Silver Co.*, supra.

In view of the foregoing, it is held that the gain derived by the M Corporation from dealing in its own stock for the purpose of making a gain in the ordinary course of business is subject to Federal income tax. (See T. D. 4430, page 36, this Bulletin.)

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 22(b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME.

ARTICLE 84: Interest upon State obligations. XIII-2-6590
G. C. M. 12420

REVENUE ACT OF 1928.

Where a municipality purchases property subject to a mortgage executed to secure an issue of bonds, there being no provision in the bonds which releases the original debtor corporation from liability, the interest on such bonds is not exempt from Federal income tax.

An opinion is requested whether the interest on tax-free covenant bonds issued by the M Company is exempt from Federal income tax.

The city of R entered into a contract with the M Company for the purchase of a railway system within the city of R. At the time of the contract the railway system owned by the M Company was subject to various mortgages and provision was made in the contract whereby the M Company would reduce the mortgages. This was accomplished and the city of R railway system was relieved of the lien of certain bond issues and the interurban system was relieved of the lien of the bond issue of the city system, resulting in the formation of two separate railway units secured by two separate bond issues. The M Company went into a Federal receivership and in 1928 the assets of the M Company were offered for sale, including the equity in the aforementioned contract. The city of R purchased the equity and received a deed to all the city property subject to the provisions of the bonds, the city of R assuming the payment of the principal and interest on the bonds issued by the

M Company. There was no exchange of the bonds of the M Company for bonds of the city of R.

Section 22(b)4 of the Revenue Act of 1928 exempts from Federal income tax the "Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof * * *."

In the instant case there is no provision in the bonds which releases the original debtor corporation from liability so as to change the character of the bonds from obligations of a private corporation to those of a municipal corporation. The situation in the instant case is that of a municipality purchasing property subject to a mortgage executed to secure an issue of bonds which remained the obligations of a private corporation. As the bonds are not obligations of a character designated in section 22(b)4 of the Revenue Act of 1928, the interest is not exempt from Federal income tax. (Cf. S. M. 2670, C. B. III-2, 80, and T. D. 2090.)

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 23(a).—DEDUCTIONS FROM GROSS INCOME: EXPENSES.

Article 121: Business expenses.

REVENUE ACT OF 1928.

Expenses paid or incurred with respect to the management, protection, and conservation of properties producing taxable income. (See I. T. 2751, page 43.)

Article 121: Business expenses.

REVENUE ACT OF 1928.

Insurance premiums paid in advance for period of more than one year. (See G. C. M. 13148, page 67.)

SECTION 23(b).—DEDUCTIONS FROM GROSS INCOME: INTEREST.

Article 141: Interest.

XIII-23-6830
G. C. M. 13162

REVENUE ACT OF 1928.

A taxpayer engaged in business in Massachusetts is entitled to deduct from gross income the interest paid to his wife on money borrowed from her and represented by his interest-bearing note. General Counsel's Memorandum 9094 (C. B. X-1, 107) is revoked.

This office has again considered the question passed upon in General Counsel's Memorandum 9094.

The question involved is whether a taxpayer, engaged in business in Massachusetts, is entitled to deduct from gross income the amount of interest paid to his wife on money borrowed from her in good faith for use in carrying on his business, and represented by an interest-bearing note.

In view of the acquiescence of the Commissioner in the decision of the Board of Tax Appeals in the case of *Samuel Shapiro* v. *Commissioner* (29 B. T. A., 1012, page 14, this Bulletin), holding that the petitioner in that case was entitled to such a deduction, General Counsel's Memorandum 9094, supra, is revoked.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 23(c).—DEDUCTIONS FROM GROSS INCOME: TAXES GENERALLY.

ARTICLE 151: Taxes. XIII–13–6717
I. T. 2770

REVENUE ACT OF 1928.

A corporation filing its return on the accrual basis for the calendar year 1931 is entitled to deduct for that year the amount of the California franchise tax imposed by the act of March 1, 1929 (as amended by chapters 64 and 65, California Statutes, 1931), which tax accrued on January 1, 1931, and was measured by the net income for the calendar year 1930.

Chapter 13, California Statutes, 1929, approved March 1, 1929, imposes on every business corporation a franchise tax according to or measured by its net income. Section 4 of that act provides that every business corporation shall annually pay to the State, for the privilege of exercising its corporate franchise, a tax measured by its net income, "to be computed, in the manner * * * provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year." Taxes under that section accrue, for State taxation purposes, on the first day after the close of the taxable year as defined in section 11 of the act. That section provides:

The term "taxable year," as herein used, means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. * * *

A corporation's liability for the California franchise tax imposed by the act of March 1, 1929 (as amended by chapters 64 and 65, California Statutes, 1931), accrues concurrently with the year for which it is paid. The tax which is assessed in the year 1931 is for that year. Accordingly, a taxpayer filing its return on the accrual basis for the calendar year 1931 is entitled to deduct for that year the amount of the franchise tax which accrued on January 1, 1931, the tax being measured by the net income for the calendar year 1930. (Cf. *Petaluma & Santa Rosa Railroad Co.* v. *Commissioner*, 11 B. T. A., 541.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Ohio cigarette tax. (See I. T. 2787, page 56.)

ARTICLE 151: Taxes.

XIII-14-6732
G. C. M. 12596

REVENUE ACTS OF 1926 AND 1928.

The taxpayer, a national bank in Massachusetts, should accrue as of December 31, 1927, the amount of Massachusetts excise tax payable in October, 1928, and should accrue as of December 31, 1928, the amount of such tax payable in October, 1929. The taxpayer may not be allowed as deductions for the calendar year 1928 accrued taxes for two years, as was permitted in the case of domestic business corporations. (G. C. M. 8553, C. B. IX-2, 109, distinguished.)

The case of the M National Bank involves the question of the deductibility of the corporation excise tax imposed by Massachusetts for the years 1927 and 1928.

The taxpayer files its returns on the calendar year basis and uses the accrual method of accounting. The Income Tax Unit has proposed to allow as a deduction for 1928 the corporation excise tax in the amount of 15.93*x* dollars which was levied under section 2, chapter 63, of the General Laws of Massachusetts, and measured by 1928 income. It has also proposed to allow as a deduction for 1927 8.27*x* dollars, representing such tax paid during 1928, measured by 1927 income, which the Unit has held accruable as of December 31, 1927. The corporation excise tax for 1928 was disallowed by the revenue agent upon the theory that General Counsel's Memorandum 8553 (C. B. IX-2, 109) was not applicable in the case of the taxpayer, a national bank, because the rate of corporation excise tax for 1928 with respect to banks was not determined by the Massachusetts Commissioner of Corporations and Taxation until after December 31, 1928, it being the practice to notify the various national banks of the State as to the rate of tax in the month of June following each taxable year.

The taxpayer contends that under the principle set forth in General Counsel's Memorandum 8553 it should be allowed as deductions for 1928 accrued taxes for two years.

General Counsel's Memorandum 8553, supra, relates to the accrual date of the corporation excise tax imposed upon domestic business corporations. The Bureau had previously held in General Counsel's Memorandum 6616 (C. B. IX-2, 335) that such tax accrued on April 1 of the succeeding taxable year. (To the same effect was *H. H. Brown Co.* v. *Commissioner*, 8 B. T. A., 112, C. B. X-2, 10.) The specific question considered in the later opinion was the effect for income tax purposes of a change in the State law by the Act of April 15, 1927. (See section 32, chapter 63, General Laws of Massachusetts, as amended by section 3 of an act approved April 15, 1927, effective January 1, 1928, contained in chapter 258, Laws of Massachusetts, 1927.) It was held that the change in the State law had the effect of fixing the accrual date of the corporation excise tax at December 31, 1928, in the case of a corporation which filed its return on the calendar year basis. That conclusion was based on the theory that inasmuch as the date for ascertaining the *corporate excess* (the "event" which determined the excise tax liability under the rule laid down in *United States* v. *Anderson*, 269 U. S., 422) was by the act of April 15, 1927, moved back from April 1 to the end of the preceding taxable year, the accrual date of the excise tax was correspondingly shifted. In this connection it was stated:

* * * Its taxable year having closed, the corporation could compute its net income as required by the statute, as well as ascertain its corporate excess. Thus, on December 31, 1928, it could determine to a reasonable degree of certainty the amount of excise tax which would be payable to the State of Massachusetts in October, 1929, for the date for determining the corporate excess and the limitation of the tax was moved back from April 1, 1929, to the end of its taxable year. * * *

It was also held that inasmuch as the act of April 15, 1927, was not effective until January 1, 1928, a corporation which filed its return on the calendar year basis could accrue as of January 1, 1928, the excise tax payable in October, 1928, and accrue as of December 31, 1928, the excise tax payable in October, 1929. (See *National Casket Co., Inc.*, v. *Commissioner*, 29 B. T. A., 139 [pages 11 and 26, this Bulletin].)

As indicated above, General Counsel's Memorandum 8553 relates to a domestic business corporation. The instant case involves the taxation of a national bank. Domestic business corporations are taxed under section 32 of chapter 63 of the General Laws of Massachusetts, whereas banks are taxed under other sections of that chapter. Both classes of taxpayers pay a tax measured by net income, and General Counsel's Memorandum 8553 is applicable to both classes of taxpayers in so far as it holds that the excise tax for Federal income tax purposes accrues at the end of the taxable year. A domestic business corporation's tax is limited by its *corporate excess*. A bank's tax is not so limited. Thus, although the change in the State law by the act of April 15, 1927, resulted in excise taxes for two years being allowed as deductions for the calendar year 1928 in the case of a domestic business corporation, the same result does not follow in the case of a bank, whose taxes are not limited by its *corporate excess*. The definition of a "bank" is contained in sections 1 and 2, chapter 63, of the Laws of Massachusetts. (See Massachusetts General Laws Relating to Taxation and Special Assessments, in effect January 1, 1921, and revised to include 1931 legislation, pages 180 and 181.) The material provisions of the State law relating to banks are as follows:

TAXATION OF BANKS AND TRUST COMPANIES.

SECTION 1. When used in this section, and in sections 2 to 7, inclusive, the following terms shall have the following meanings:

"Bank." Any bank, banking association or trust company doing business within the Commonwealth, whether of issue or not, existing by authority of the United States or of a foreign country, or of any law of the Commonwealth not contained in chapters 168 to 171, inclusive, and chapters 173 and 174.

"Net income." The net income for the taxable year as required to be returned by the bank to the Federal Government under the Federal Revenue Act applicable for the period, * * *.

"Taxable year." The fiscal or calendar year for which the bank was required to make its last return to the Federal Government due prior to April 1 of the year in which the tax is to be assessed or, if such return was for a fractional period, a full year, including and ending with such fractional period.

SEC. 2. Every bank shall pay annually a tax measured by its net income, as defined in section 1, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile and business corporations doing business in the Commonwealth. The commissioner shall determine the rate on or before July 1 of each year, * * *.

From a reading of the foregoing provisions of law, it is obvious that the reason for permitting the accrual in one year of deductions of Massachusetts taxes for two years does not exist in the case of banks which are taxed under section 2, chapter 63, of the Laws of Massachusetts. That section was not directly affected by the amendment of April 15, 1927, referred to in General Counsel's Memorandum 8553, but that memorandum governs in so far as it holds that the Massachusetts tax accrued at the end of the taxable year. In the instant case the bank knew on December 31, 1928, that it would have to pay "a tax measured by its net income," although the exact rate of tax could not be ascertained. But for the purpose of accrual the rate of tax is not a prerequisite. (See I. T. 2675, C. B. XII-1, 105, relating to income tax imposed by Canada where the rate was changed after the close of the taxable year, and *Fawcus Machine Co.* v. *United States*, 282 U. S., 375, Ct. D. 278, C. B. X-1, 424.)

That it is not necessary for the exact amount of taxes to be computed or ascertained prior to the accrual thereof for income tax purposes is sustained by other precedents. In *The Pictorial Review Co.* v. *Commissioner* (26 B. T. A., 472, C. B. XI-2, 8) it was specifically stated that the fact that the exact amount of the liability was not determined until after the close of the taxable period is not controlling. To the same effect is the case of *H. H. Brown Co.* v. *Commissioner*, supra, wherein the Board held that it was not necessary that the amount of an incurred liability be accurately ascertained in order to accrue it. (Cf. *Ernest M. Bull, exc.*, v. *Commissioner*, 7 B. T. A., 993, C. B. X-2, 10.) Furthermore, this office has consistently held with respect to the accrual of property taxes under the various State laws that it is not necessary that the exact amount of such taxes be ascertained at the time of accrual. (See G. C. M. 6273, C. B. VIII-1, 168, relating to the accrual of property taxes in Illinois and other published decisions relating to the accrual of property taxes.)

In view of the foregoing, the taxpayer should accrue as of December 31, 1927, the amount of Massachusetts excise tax payable in October, 1928, and should accrue as of December 31, 1928, the amount of such tax payable in October, 1929. It follows that the taxpayer may not be allowed as deductions for the calendar year 1928 accrued taxes for two years as was permitted in the case of domestic business corporations under General Counsel's Memorandum 8553, supra.

SECTION 23(e).—DEDUCTIONS FROM GROSS INCOME: LOSSES BY INDIVIDUALS.

ARTICLE 171: Losses. XIII-5-6625
G. C. M. 12570

REVENUE ACT OF 1928.

Where a contract to sell stock on a stock exchange was entered into on December 31, 1930, and delivery of the stock was made in the regular way on January 2, 1931, the loss, if any, was incurred in the year 1931 and constitutes a proper deduction for that year.

An opinion is requested whether a loss on the sale of stock under the following circumstances is deductible for the calendar year 1930 or 1931.

On December 31, 1930, the taxpayer directed his broker to sell for him *y* shares of stock. The stock at the time was pledged as collateral security with the M Bank. On the above-mentioned date the taxpayer ordered the bank to deliver the stock certificate to his broker, and substituted other collateral in its stead. A letter from the taxpayer contains, among other things, the following statement:

My brokerage firm * * * handled the transaction of sale. In the ordinary course of business they were notified by me by telephone on December 31, 1930, to sell. They advised me over the phone that they had sold and stated to me the price they had sold for, and the transaction, so far as I was concerned, was closed. However, they did not confirm the sale to me in writing until January 2, 1931. Presumably they had not been called upon for the actual delivery of the securities until January 2, 1931.

The revenue agent reports that the taxpayer made his return of income on the cash receipts and disbursement basis, and that the records of the broker show that the taxpayer's account was credited, the stock delivered to the purchaser, and the transaction cleared through the broker's records, on January 2, 1931. This is in accordance with the then uniform custom of the New York Stock Exchange, and the Bank Stock Dealers Association, that in "cash" sales the securities were delivered the same day, while in "regular" sales delivery was made on the next full business day before 2.15 p. m.

Losses must usually be evidenced by closed and completed transactions. (Article 171, Regulations 74.) A sale of shares of stock is a completed and closed transaction when title to the shares passes to the vendee. (Compare Williston on Sales, volume 1, section 2.) The personal property law of the State of New York, being part of the uniform stock transfer law, in so far as applicable, reads as follows:

SEC. 162. *How title to certificates and shares may be transferred.*—Title to a certificate and to the shares represented thereby can be transferred only,

(*a*) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(*b*) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

It follows from the above-quoted provisions of the New York personal property law that title to the shares passed when the stock certificate was delivered to the vendee, or to the broker for the vendee. The taxpayer's statement as set forth above corroborates the revenue agent's report that the certificate was not delivered until January 2, 1931.

In *Charles W. Dahlinger* v. *Commissioner* (20 B. T. A., 176), the Board of Tax Appeals commented as follows:

* * * Although a contract to sell is consummated when the parties execute it, a sale, even where the subject of a contract, is incomplete and imperfect until title passes. But a sale is complete when title passes. * * *

The opinion of the Board in that case was affirmed by the Circuit Court of Appeals, Third Circuit. (*Dahlinger* v. *Commissioner*, 51 Fed. (2d), 662, Ct. D. 414, C. B. X-2, 337, certiorari denied, 284 U. S., 673.) The court quoted with approval the following from Williston on Sales (volume 1, section 2):

Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, * * *.

In the instant case it is apparent that the transaction on December 31, 1930, was in effect an agreement to sell *y* shares of stock. Delivery of the shares was not made, title did not pass, and the consideration was not paid until January 2, 1931. The sale was, therefore, consummated and became a closed and completed transaction on that date.

The taxpayer contends that if the sale was closed and completed on January 2, 1931, he would have profited by the higher quotation for the stock on that date. He overlooks the fact that the completion of the sale was the consummation of a contract to sell at a given price which he entered into on December 31, 1930. He would remain unaffected by any change in the quotation for the stock after his contract to sell at that price had been made.

For the foregoing reasons this office is of the opinion that the loss, if any, on the sale of the stock in question was incurred in the year 1931, and constitutes a proper deduction for that year.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 23(i).—DEDUCTIONS FROM GROSS INCOME: NET LOSSES.

Article 176: Sale of capital stock, bonds, and capital assets.

REVENUE ACT OF 1928.

Amendment of article 176, Regulations 74. (See T. D. 4430, page 36.)

SECTION 23(j).—DEDUCTIONS FROM GROSS INCOME: BAD DEBTS.

Article 191: Bad debts.

XIII-22-6817
G. C. M. 13114

REVENUE ACTS OF 1921, 1924, 1926, AND 1928.

In order for a taxpayer to have the benefit of a deduction for debts ascertained to be *partially* worthless there must have been an ascertainment by the taxpayer of partial worthlessness *within the taxable year*. The charge-off in such a case being a technical requirement may be made after the taxable year. The allowability of the deduction is, of course, subject to the discretion of the Commissioner.

Advice is requested whether the decision of the Circuit Court of Appeals (Sixth Circuit) in *Liberty Bank & Trust Co.* v. *Commis-*

sioner (59 Fed. (2d), 320) should be followed generally in determining the deductibility of *partially* worthless debts under the Revenue Acts of 1921, 1924, 1926, and 1928.

Section 234(a)5 of the Revenue Act of 1921 provides for the allowance as a deduction of—

> Debts ascertained to be worthless and charged off within the taxable year (or in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.

The Revenue Acts of 1924, 1926, and 1928 contain identical language.

In the Liberty Bank & Trust Co. case the court held that under the Revenue Act of 1921 a taxpayer was under no duty to charge off debts which were *partially* worthless in order to have the benefit of the deduction from gross income, until the Commissioner was satisfied of the worthlessness of that part of the debts for which the taxpayer sought the deduction.

It is the opinion of this office that in order to have the benefit of such a deduction there must have been an ascertainment by the taxpayer of partial worthlessness *within the taxable year.* The charge-off in such a case, being a technical requirement, may be made after the taxable year. The allowability of the deduction is, of course, subject to the discretion of the Commissioner. This conclusion is applicable to all cases involving the deductibility of *partially* worthless debts under the Revenue Acts of 1921, 1924, 1926, and 1928. (As to such cases arising under the Revenue Act of 1918 see *Spring City Foundry Co.* v. *Commissioner*, decided by the United States Supreme Court April 30, 1934 [Ct. D. 829, page 281, this Bulletin].)

In view of the change in language of the corresponding provisions of the Revenue Act of 1932, the decision is not applicable to cases arising under that Act.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 23(k).—DEDUCTIONS FROM GROSS INCOME: DEPRECIATION.

ARTICLE 205: Method of computing depreciation allowance.

REVENUE ACT OF 1928.

Amendment of article 205, Regulations 74. (See T. D. 4422, page 58.)

ARTICLE 205: Method of computing depreciation allowance.

REVENUE ACT OF 1928.

Information necessary in support of depreciation deductions. (See Mim. 4170, page 59.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 321: Computation of net income.

REVENUE ACT OF 1928.

Treatment of insurance premiums paid in advance for period of more than one year. (See G. C. M. 13148, page 67.)

SECTION 42.—PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

ARTICLE 333: Examples of constructive receipt. XIII–2–6591
Ct. D. 770

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

1. INCOME—DIVIDEND—CONSTRUCTIVE RECEIPT.

Dividends declared in 1928 and payable on December 31 of that year to stockholders of record at the close of business on that day, checks in payment of which are mailed on that date and received in due course on January 2, 1929, by a stockholder, whose books are kept on the basis of cash receipts and disbursements, are required to be included in gross income in 1928, when they were unqualifiedly subject to the demand of the stockholder.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (26 B. T. A., 716) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Effie B. Shearman, petitioner, v. Commissioner of Internal Revenue, respondent.

Petition to review a decision of the Board of Tax Appeals. Affirmed.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[July 5, 1933.]

OPINION.

Income taxes assessed on stock dividends under the Revenue Act of 1928 are involved.

The petitioner, a resident of Manhasset, N. Y., owned both common and preferred stock in a corporation called W. R. Grace & Co. By resolutions of the board of directors of that corporation dividends on both classes of stock became payable on December 31, 1928, to stockholders of record at the close of business on that day. Dividend checks were mailed to the petitioner on December 31, 1928, but not actually received by her until January 2, 1929. On the last mentioned day, the checks were credited to her account in her bank and were paid in due course. The petitioner reported her income on the basis of cash receipts and disbursements. She did not include these dividends in her return for 1928. The Commissioner included them in redetermining her income taxes for 1928 and the Board of Tax Appeals sustained his action.

The Act of 1928, section 42 (45 Stat., 791), provided that income shall be reported by the taxpayer in the taxable year in which it was received unless under permitted methods of accounting it was accounted for as of another taxable period. No such methods of accounting were employed and the sole issue is whether the dividends were in law, though not in fact, received in 1928.

Section 62 of the 1928 Act authorized the Commissioner to prescribe and publish all needful rules and regulations, subject to the approval of the Secretary of the Treasury. Regulations so prescribed and published provided that dividends on corporate stock were constructively received by a taxpayer "when unqualifiedly made subject to the demand of the shareholder" (article 333 of Treasury Regulations 74) and should be "included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands" (article 621, ibid.). The result in this case depends upon the validity of these regulations.

CHASE, Circuit Judge: Of course, when a statute speaks in language which leaves no doubt of the intent of Congress contemporaneous administrative construction, if contrary to the terms of the statute, is merely erroneous and has no effect except to call for correction. It can not be relied upon as an accepted interpretation of the law. (*The Swift and Courtney and Beecher Company* v. *United States*, 105 U. S., 691; *Iselin* v. *United States*, 270 U. S., 245 [T. D. 3846, C. B. V-1, 365].) The petitioner argues with force that is recognized that when Congress used the words "for the taxable year in which received by the taxpayer" actual and not constructive receipt was meant. The Revenue Act of 1921, under which the Bingham case hereafter referred to was decided, provided in section 201(e) that such dividends as these should be included in gross income by the distributees "as of the date when the cash or other property is unqualifiedly made subject to their demands." Under that statute such regulations as are relied upon now would clearly have reflected the intent of the lawmakers. In the 1924 Act, the language became, and it remained in the 1926 Act, substantially the same as that used in the 1928 Act. The regulations requiring the inclusion of such dividends as these in the taxable period in which they were unqualifiedly made subject to the demands of the person entitled to receive them were included in every series of regulations promulgated from 1918 to the passage of the 1928 Act. Indeed, they have been so included ever since though the period subsequent to the 1928 Act is now of no moment. (T. R. 45, article 54; T. R. 62, article 53; T. R. 65 and 69, article 52; T. R. 77, article 333.) In deciding whether Congress meant after the 1924 Act that only dividends actually received were to be included in any taxable period or whether it was intended that the theory of constructive receipt was thereafter to prevail, the retention in subsequent Acts without material change of the provision construed by the administrative department to mean constructive receipt persuasively indicates that Congress approved the interpretation. (*Brewster* v. *Gage*, 280 U. S., 327, 337 [Ct. D. 148, C. B. IX-1, 274]; *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S., 301, 307–308 [Ct. D. 331, C. B. X-1, 390]; *Murphy Oil Co.* v. *Burnet*, 287 U. S., 299, 307 [Ct. D. 619, C. B. XII-1, 231]; *Burnet* v. *Brooks*, 288 U. S., 378, 392–393 [Ct. D. 648, C. B. XII-1, 362]; *United States* v. *Dakota Montana Oil Co.*, 288 U. S., 459, 466 [Ct. D. 655, C. B. XII-1, 243].) Added assurance that Congress did not intend to change the requirement that dividends unqualifiedly made subject to the taxpayer's demands were to be included in the return for the period within which they were made so is found in the reports of the committees when section 201(e) of the Act of 1921 was omitted from the Act of 1924. (H. Rept. 179, Sixty-eighth Congress, first session, pages 12, 20–21; S. Rept. 398, Sixty-eighth Congress, first session, page 23; House Conference Report 844, Sixty-eighth Congress, first session, pages 16–17.) These reports clearly show that the administrative practice was considered to be well settled and to be in accord with the statute as reenacted. With such persuasive evidence of the intent of Congress, we hold that Treasury Regulations 74, articles 333 and 621, are valid.

These dividends should, therefore, have been included in the petitioner's 1928 return if they were unqualifiedly made subject to her demands during that year. They were not payable by checks to be mailed as were the dividends considered in *Commissioner* v. *Adams* (54 Fed. (2d), 288) and perhaps that case differs from this in that the taxpayer was there entitled to receive the dividends only at such time as checks mailed were delivered. Here the time when the taxpayer was entitled to receive the dividends was definitely fixed by the resolution to be at the close of business on a day within the 1928 taxable period. The moment when the taxpayer was entitled to the use and benefit of them without qualification was not, as in the Adams case, only after the time necessary for transmission of checks by mail had expired. This being so, the

taxpayer was bound to return them as income in her return for 1928. (*Commissioner* v. *Bingham*, 35 Fed. (2d), 503 [Ct. D. 207, C. B. IX-2, 289].)
Affirmed.

ARTICLE 333: Examples of constructive receipt.

REVENUE ACT OF 1928.

Custom that no stockholder should receive dividend check before the first business day of month following month in which dividend was payable. (See Ct. D. 828, page 131.)

SECTION 43.—PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

ARTICLE 342: When charges deductible. XIII-9-6675
(Also Section 117, Article 651.) G. C. M. 12737

REVENUE ACTS OF 1926 AND 1928.

The losses of a taxpayer, a resident of California, through foreclosure sales in 1927 and 1928 of real property held for more than two years, were sustained at the time of the sheriff's sales in the foreclosure proceedings. The losses constituted "capital losses" which may be recognized in computing a statutory net loss only to the extent of the capital gains in each taxable year.

An opinion is requested relative to the losses incurred by the taxpayer through foreclosure of mortgages on certain real property, that is, in what year the losses were incurred and whether they were "capital losses."

The taxpayer was the owner of a ranch property purchased in March, 1920. Thereafter she borrowed money and mortgaged this property as security for the loan. The mortgage was foreclosed in 1927. The property was sold at a sheriff's sale in 1927, and the certificate of sale was recorded in December, 1927. The purchaser at the sale was not the mortgagee. The taxpayer remained in possession during the statutory period of 12 months allowed for redemption, and for several months thereafter, during which she was actively seeking to arrange for the redemption of the property. The purchaser did not secure the sheriff's deed to the property until March, 1929, when possession was surrendered. The taxpayer was also the owner of another ranch property, subject to two mortgages on separate parcels thereof. The property was sold in two parcels at a sheriff's sale in January, 1928, to satisfy the two mortgages. The taxpayer made no effort to redeem this property and it appears that the sheriff's deeds were executed in January, 1929, whereupon the two mortgages were canceled.

Under section 700 of the California Code of Civil Procedure "Upon a sale of real property, * * * if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; * * *." Section 700a provides that "Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, * * *."

Under section 702, "The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within 12 months after the sale on paying the purchaser the amount of his purchase, with 1 per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. * * *" If no redemption be made within 12 months after the sale, under section 703, "the purchaser, or his assignee, is entitled to a conveyance, * * *" but "If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate," and "the person to whom payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

Under section 706 of the code, the mortgagor may remain in possession of the property during the period allowed for redemption. However, under section 707, "The purchaser from the time of the sale until a redemption, * * * is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof," but if any rents or profits have been received by the judgment creditor or purchaser from the property thus sold preceding such redemption, "the amounts of such rents and profits shall be a credit upon the redemption-money to be paid; * * *."

The California courts have held that under the foregoing provisions of law there is a complete transfer of all of the mortgagor's right, title, interest, and claim upon the property at the time of the sheriff's sale in foreclosure proceedings, and that the execution of the sheriff's deed on expiration of the redemption period of 12 months gives to the purchaser at the sale no new title to the property purchased by him, notwithstanding the fact that there remains in the debtor the statutory right to redeem within the period indicated and the right to remain in possession until the execution of the sheriff's deed. (*Robinson* v. *Thornton et al.* (1893), 102 Cal., 675, 34 Pac., 120; *Duff et al.* v. *Randall et al.* (1897), 116 Cal., 226, 48 Pac., 66; and *Breedlove* v. *Norwich Union Fire Ins. Soc.* (1899), 124 Cal., 164, 56 Pac., 770.) In *Pollard* v. *Harlow, Commissioner* (1903) (138 Cal., 390, 71 Pac., 454), the Supreme Court of California referred to the fact that in the earlier cases the title during the period of redemption of the purchaser at the sheriff's sale is sometimes referred to as "equitable" and said:

* * * The language of section 700, Code Civil Procedure, is that upon the sale of the property "the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," which is to say

unequivocally that he acquires the legal as well as the equitable title. The only qualifications are that (when not a leasehold of less than two years' unexpired term) the property shall be "subject to redemption," that a deed shall be subsequently given (Code Civ. Proc., section 703), and that pending the time for redemption the possession shall remain with the defendant (Code Civ. Proc., section 706). But no one of these qualifications is inconsistent with the vesting of the legal title in the purchaser. With regard to the first, the case is simply the familiar one of a legal title defeasible upon the happening of a condition subsequent; and, as to the second, the deed gives "to the purchaser no new title to the land purchased by him but, [is] merely evidence that the title has become absolute." (*Robinson* v. *Thornton*, supra.) Nor is the continued possession of the land by the judgment debtor any more incompatible with the existence of the legal title in another than in the ordinary case of a tenant and his landlord.

With respect to the time of the extinguishment of the mortgage debt, the court in *Reynolds* v. *London & Lancashire Fire Ins. Co. et al.* (1900) (128 Cal., 16, 60 Pac., 467), held that "by the foreclosure proceedings, and the purchase of the mortgaged premises by the plaintiff [mortgagee] for the full amount of the debt and judgment, the debt was fully extinguished, and plaintiff was no longer a creditor or mortgagee * * *"; and that the mortgagor "had the mere statutory right of redemption, which could be exercised within the statutory period, not by paying the former and extinct debt, but by paying the purchase price bid for the property, together with certain statutory percentages and costs." The court stated that:

> Respondent cites *National Bank of D. O. Mills & Co.* v. *Union Ins. Co.* (88 Cal., 497, 26 Pac., 509). * * * it is founded upon notions of the effect of a judicial sale which are inconsistent with those declared in the later cases of *Robinson* v. *Thornton*, *Duff* v. *Randall*, and *Breedlove* v. *Society*, above cited. Of course, a foreclosure in the sense of a perfect extinguishment of the mortgagor's equity of redemption, may be said not to be complete until after the expiration of the statutory period for redemption, but that consideration has no bearing upon the proposition that the sale extinguishes the debt. As before stated, redemption is effected, not by the payment of the former debt, which no longer exists, but by payment of the purchase price at the judicial sale, which may be much less or much more than the former debt. * * *

(See also *Leet* v. *Ambruster*, 77 Pac., 653; *McNutt et al.* v. *Neuvo Land Co.*, 140 Pac., 6; *Wagenheim* v. *Garner et al.*, 183 Pac., 670; *Leaver* v. *Smith et al.*, 190 Pac., 1050; *Bateman* v. *Kellogg et al.*, 211 Pac., 46; and *Huntington et al.* v. *Perrin et al.*, 223 Pac., 94.)

Accordingly, irrespective of the right of redemption and the right to remain in possession of the property during the period for redemption, a foreclosure sale in California has the effect of transferring immediately the legal and equitable ownership of the property from the mortgagor to the purchaser at such sale. It follows that the mortgagor's investment in the property is thereupon closed out.

This office is, therefore, of the opinion that the mortgagor's losses from the foreclosure of the mortgages were, under the circumstances herein set out, sustained at the time of the sheriff's sales in the foreclosure proceedings. (Compare I. T. 1780, C. B. II–2, 121.)

Each of the properties involved in this case was held by the taxpayer for more than two years prior to the sheriff's sales on foreclosure. It does not appear that the properties were held by the taxpayer primarily for sale in the course of her trade or business. Accordingly, the properties were "capital assets" within the meaning of section 208(a)8 of the Revenue Act of 1926 and section 101(c)8 of the Revenue Act of 1928. It follows that the taxpayer's losses from the disposition of her properties through the foreclosure sales represented "capital losses" within the meaning of the Revenue Acts of 1926 and 1928. In the computation of the statutory net loss claimed by the taxpayer recognition of such capital losses is limited to the amount of capital gains in each taxable year involved. (Section 117(a)2, Revenue Act of 1928, and section 206(a)2, Revenue Act of 1926.)

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

Article 342: When charges deductible. XIII-13-6718
G. C. M. 12860

REVENUE ACT OF 1928.

In the State of Illinois, the date of the foreclosure of a mortgage on real property is the identifiable event which fixes the taxpayer's deductible loss for income tax purposes, regardless of the time of passage of the technical legal title.

An opinion is requested whether the taxpayer sustained a deductible loss in 1929 or 1930 due to foreclosure proceedings and sale of certain real property in the earlier year.

In 1926 the taxpayer purchased *z* acres of land located in the State of Illinois. Upon the taxpayer's failure to make the requisite payments on the first and second mortgages, executed at the time of purchase, foreclosure proceedings were instituted in 1929. The master found that the amount of 3.02*x* dollars was then due on the first mortgage, 4.85*x* dollars on the second mortgage, and .03*x* dollars as master's fees, a total of 7.9*x* dollars. On August —, 1929, the land was sold at a master's sale for 7.7*x* dollars and the master's certificate issued to A. No redemption was effected prior to the statutory 12-month period and the taxpayer's right of redemption was lost on August —, 1930. A master's deed was issued to A on November —, 1930.

The taxpayer contends that under the law of Illinois only when his right of redemption was lost in 1930 did he sustain a loss of his investment, and that he is entitled to a deduction for that year in the amount of *x* dollars.

Chapter 77, section 16, of the Illinois Revised Statutes (1925) provides that upon a sale following foreclosure, the officer, instead of executing a deed for the premises sold, shall give to the purchaser a certificate describing the property purchased, showing the amount paid therefor, and the time when the purchaser will be entitled to a deed unless the premises shall be redeemed. Section 18 gives to the defendant a 12-month period within which to redeem from the purchaser. Section 20 grants to other creditors a 3-month period following the defendant's 12-month period in which to redeem.

The courts of Illinois have held that the master's certificate of sale does not convey title to the purchaser, but that title remains in the mortgagor until a deed is issued. (*Williams* v. *Williston et al.*, 315 Ill., 178, 146 N. E., 143; *Sutherland* v. *Long et al.*, 273 Ill., 309, 112

N. E., 660; *Hack* v. *Snow et al.*, 338 Ill., 28, 169 N. E., 819; *Twyman* v. *Baldwin et al.*, 261 Ill., 67, 103 N. E., 605.) Despite the fact that the Illinois courts have held that after the foreclosure sale and until a deed is issued the "legal title" is vested in the mortgagor, his right of redemption is not such an interest as is considered realty; nor is it a legal or equitable interest upon which a judgment can become a lien. (*People for the Use of Fortune Bros. Brewing Co.* v. *Barrett*, 165 Ill. App., 94; *Hill* v. *Blackwilder*, 113 Ill., 283; 2 Reeves, "Illinois Law of Mortgages and Foreclosures," page 823.) Furthermore, after the foreclosure sale the mortgagor's ownership is not such as will support even a mechanic's lien. (*Stone* v. *Tyler*, 173 Ill., 147, 50 N. E., 688.) On the other hand, the certificate holder's interest in the premises is such that he may recover for damages to the property inflicted prior to the receipt of the master's deed. (*Nixon* v. *Chicago*, 212 Ill. App., 365.) It is apparent that, although the mortgagor may be invested with the technical legal title until the master's deed is issued, his interest lacks many, if not all, of the legal relations incident to what is generally considered "legal title." Nevertheless, the taxpayer contends that the loss was sustained only when "title" to the property passed upon issuance of the master's deed, which event, in Illinois, may occur at any time within six years of the foreclosure sale.

The United States Supreme Court has held that "the general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test" (*Lucas* v. *American Code Co.*, 280 U. S., 445), and such losses may usually be fixed by "identifiable events." (*United States* v. *S. S. White Dental Manufacturing Co.*, 274 U. S., 398, T. D. 4059, C. B. VI–2, 198.)

It has been held that where stock became worthless in a certain year it was a deductible loss only for that year even though the taxpayer retained the title to the stock and the company did not liquidate until it had completed an outstanding contract (*C. E. Conover* v. *Commissioner*, 7 B. T. A., 1234, acq. C. B. VII–1, 7), or a reorganization was effected which postponed the eventual liquidation by a receivership (*Floyd E. Poston et al.* v. *Commissioner*, 17 B. T. A., 921, acq. C. B. IX–1, 44), or, in that year, the possibility of reorganizing and refinancing the corporation had not been entirely dissipated (*John Crosby Brown* v. *Commissioner*, 27 B. T. A., 176). Likewise, it has been held that a taxpayer sustained a deductible loss in the year in which his property in Germany was seized by the Alien Property Custodian during the World War, even though there was a possibility of compensation either by the German Government or the United States Government according to the terms of the treaty eventually reached between them. (Appeals of *Emil Stern et al.*, 5 B. T. A., 89, C. B. X–1, 62.) Furthermore, article 194 of Regulations 74 provides that, where nothing is realized for the bondholders upon foreclosure of the mortgage, the bonds are regarded as worthless and are deductible "not later than the year of the foreclosure sale." The Bureau held in I. T. 1697 (C. B. II–1, 95) that, where a corporation became bankrupt and its property was sold under foreclosure in 1918, the stockholders' loss occurred in that year rather than in 1919 when the corporation's right of redemption expired. (See also I. T. 1780, C. B. II-2, 121, permitting a loss to be deducted in the year of foreclosure.)

It is hardly conceivable in the instant case that the taxpayer, who was unable to meet payments accruing over a period of years, would be able to redeem from the purchaser within the statutory period. From a practical point of view it has been stated by one Illinois master in chancery (Ellis) "that in his 20 years as a master, it has been his observation that in not more than one in several thousand cases was there a redemption." (Cary, Brabner-Smith and Sullivan, "Studies in Foreclosures in Cook County; II Foreclosure Methods and Redemption," 27 Ill. L. Rev., 595, 599.)

In view of the foregoing, it is the opinion of this office that, regardless of the time of passage of the technical legal title, the foreclosure sale was the *identifiable event* fixing the taxpayer's loss which was deductible only from his 1929 income.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1928.

Committee on the Judiciary of the House of Representatives authorized to investigate the conduct of equity and bankruptcy receiverships in Federal courts. (See T. D. 4436, page 304.)

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1928.

Special Committee Investigating the Munitions Industry, United States Senate. (See T. D. 4440, page 305.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 101.—CAPITAL NET GAINS AND LOSSES.

ARTICLE 501: Definition and illustration of capital net gain.

REVENUE ACT OF 1928.

Stock acquired through exercise of stock rights. (See G. C. M. 12942, page 73.)

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 528: Business leagues, chambers of commerce, real estate boards, and boards of trade. XIII–22–6818 Ct. D. 831

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

CORPORATION—EXEMPTION—BUSINESS LEAGUE.

A credit men's adjustment bureau whose articles of incorporation are those of an ordinary business corporation with capital stock, which under its charter is entitled to dividends, which does not charge dues, and whose activities, engaged in at a profit, include collecting delinquent accounts, administering insolvent estates, filing and attending to bankruptcy claims and such other business as is generally conducted by its individual and corporate competitors, and which by trust agreement reserves to any stockholder the right to sell his stock with the option to his associates to buy it at book value, and provides that at the termination of the agreement all the assets of the bureau shall be turned over to a credit men's association, is not entitled to exemption from income tax under section 231(7) of the Revenue Act of 1926 and section 103(7) of the Revenue Act of 1928, even though by amendment its by-laws provide that it shall not operate for the profit of stockholders and that no dividends shall be paid to them. Such by-laws make no change in the legal character of the corporation nor in its authority to conduct its business for profit. The term "private individual" as used in the above sections includes private corporations as well as natural persons.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

Louisville Credit Men's Adjustment Bureau, plaintiff, v. *United States of America, defendant.*

[February 13, 1934.]

OPINION.

DAWSON, J.: This is a suit for the refund of Federal income taxes exacted of the plaintiff for each of the taxpayer's fiscal years ended April 30, 1926, to April 30, 1929, both inclusive. A somewhat detailed statement of the pertinent facts is deemed essential to a proper understanding and correct decision of the case.

The plaintiff, which will be called the bureau, was incorporated in 1907 with an authorized capital stock of 400 shares of the par value of $10 per share. Prior to 1922 only 180 shares had been issued, and in that year and prior to April 30, 20 additional shares were issued. Since that date no additional shares have been issued.

The articles of incorporation provide that no stockholder may own more than 30 shares, and that all stockholders must be members of or persons connected with the Louisville Credit Men's Association, which is a nonprofit Kentucky corporation without capital stock, organized in 1902, and whose membership is composed of wholesalers, jobbers, manufacturers and factories located in Louisville, Ky., and in its vicinity. The articles of incorporation of this association declare:

"The corporation will not carry on any business, but the objects or purposes to be transacted shall be all lawful and honorable measures for protecting manufacturers and wholesale dealers who sell on credit against needless losses, either by the dishonesty of their debtors or by unjust laws or practices."

Since its organization, in strict compliance with its articles of incorporation, it has not conducted any business, but has operated as a clearing house for credit information for its members and for the members of the National Association of Credit Men, with which it is affiliated, and for the members of other local credit men's associations affiliated with the national association, and for the purpose of improving credit conditions generally. The only revenues the association receives, other than contributions from the bureau, are from the annual dues of members, and no dividends or other payments have ever been paid by the association to its members, and by the terms of its articles of incorporation no such dividends can be paid. On the other hand, the articles of incorporation of the bureau are frankly those of an ordinary business corporation. The articles, in part, declare:

"The nature and objects of the business will be the investigating or causing to be investigated, the financial condition of mercantile or other establishments, whether conducted by individuals, copartnerships or corporations; to prevent loss on accounts against failing, insolvent or fraudulent debtors, as far as may be possible; to arrange for taking over stocks of merchandise and other property of debtors, whether real, personal or mixed by bill of sale, deed or otherwise, or acquiring a lien thereon, and the holding and disposing of the same for the benefit of creditors when the same may be deemed advisable; to secure concerted action in the nomination and election of efficient and trustworthy assignees, receivers, trustees in bankruptcy and other fiduciaries; to effect collections and transact such other business as may be germane to its objects and purposes; and to exercise such corporate powers as are usual and incident to business corporations."

From the date of its organization the bureau has engaged in all of the activities authorized by its charter, including the collection of delinquent accounts, administering insolvent estates, filing and attending to bankruptcy claims, and such other business as is generally conducted by its individual and corporate competitors. These services are rendered to its stockholders, to members of the Louisville Credit Men's Association, to members of the National Association of Credit Men, and of its affiliates, and to nonmembers of these organizations. With some exceptions, not necessary here to mention, the bureau makes such charges for these services as to yield a profit, and it has always operated at a profit, and prior to 1925 contributed part of this profit to the support of the Louisville Credit Men's Association, which, prior to that date, was not self-sustaining.

The gross income of the bureau for the fiscal year ended April 30, 1918, was $11,172, and its net income $2,092, and at the end of that fiscal year it had a surplus of $3,244. For its fiscal year ended April 30, 1926, its gross income was $28,351, its net income $7,383, and its surplus $12,529. For the fiscal year ended April 30, 1927, its gross income was $40,767, its net income $16,373, and its surplus $25,951. For its fiscal year ended April 30, 1928, its gross income was $43,202, its net income $12,256, and its surplus $38,207. For its fiscal year ended April 30, 1929, its gross income was $52,872, its net income $15,071, and its accumulated surplus $48,164; while for its fiscal year ended April 30, 1930, its gross income was $59,916, its net income $18,502, and its accumulated surplus $66,796. The accumulated surplus represented, in large part, the net earnings of the bureau from its business activities authorized by its charter, after deducting a 10 per cent dividend for each of the fiscal years ended April 30, 1918, to April 30, 1922, both inclusive, 175 per cent dividend on February 1, 1923, donations to the Louisville Credit Men's Association of over $17,000 between 1918 and 1925, and taxes, including those sought to be recovered in this action.

The relations between the bureau and the Louisville Credit Men's Association from the beginning have been very intimate. They operate in the same suite of offices, many of the employees of the two companies being the same, each contributing on an agreed basis to the payment of their salaries. They have the same general manager, and the president of the association is always a member of the board of directors of the bureau. The business transacted by the plaintiff has, in large part, come to it from its stockholders, from the members of the Louisville Credit Men's Association, from members of the National Association of Credit Men and of its affiliated credit associations, and largely, if not solely, by reason of its connection with these credit associations.

Shortly prior to January 10, 1923, the officials of the National Association of Credit Men notified the bureau that if it wished to continue its close affiliation with the national association and its affiliates it must discontinue its policy of paying dividends to its stockholders. To meet this demand of the association, the board of directors of the bureau on January 10, 1923, amended the by-laws of the corporation. One of these amendments provided:

"The corporation shall not operate for the profit of stockholders and no dividends shall be paid to stockholders under any circumstances; and any profits or earnings of the bureau, not necessary for its successful operation, shall go to the Louisville Credit Men's Association."

Other amendments to the by-laws vest in the board of directors of the bureau power to determine the amount of surplus to be retained by the corporation for the operation of its business, and make provision for an annual audit and for furnishing a copy of such audit to the National Association of Credit Men. The board went on record at this meeting as desiring to meet all the requirements of the national association, and approved the form of an agreement to be executed by the stockholders of the bureau, by which such stockholders agreed to place their stock in the hands of three trustees—

"* * * for the sole benefit of the Louisville Credit Men's Association, to be voted and possessed by said trustees for and during the period of 10 years from and after January 1, 1923, and at the expiration of said voting trust all assets of the bureau to be turned over to the Louisville Credit Men's Association."

The proposed trust agreement recited that it was executed to meet the policy of the National Association of Credit Men and of the Louisville Credit Men's Association not to cooperate with any adjustment bureau which paid dividends. Provision is made in the agreement for the president of the Louisville Credit Men's Association to fill any vacancies occurring in the trustee membership, and that the agreement may be terminated at any time by the unanimous consent of the signers. Two other very pertinent provisions of the trust agreement are as follows:

"(3) Each of the parties hereby agree that if during said period of 10 years either desires to sell or dispose of his shares of stock he will give notice in writing of such desire to each of the trustees, whereupon said trustees shall jointly have the option and right to purchase the same within 10 days after receipt of such notice for a price equal to the book value thereof at the time said notice is given, to wit; that the proportionate value of the net assets of said corporation which the number of shares proposed to be sold bears to the entire issue of capital stock of said corporation but in determining the value nothing shall be included for good will and the property of the corporation shall be valued at its true value in money.

"(4) Any and all stock purchased under the provision of this agreement by the trustees shall be offered by them to the subscribers hereto at the purchase price thereof, it being the intent of this agreement to permit the signers hereto to acquire and hold by the trustees aforesaid the stock of any certificate holder who might insist on selling his stock."

This agreement was duly signed by the owners of all outstanding stock of the bureau, except by the holder of 1 share, and since its execution no dividends have been paid to the stockholders.

Under these facts the plaintiff contends that it was and is a business league within the meaning of the applicable provisions of the Revenue Acts of 1926 and 1928, and exempt from income taxation under these statutes. The pertinent provisions of the two Acts follow:

REVENUE ACT OF 1926.

"SEC. 231. The following organizations shall be exempt from taxation under this title (Title II, Income Tax)—

* * * * * * *

"(7) Business leagues, chambers of commerce, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

REVENUE ACT OF 1928.

"SEC. 103. The following organizations shall be exempt from taxation under this title (Title I, Income Tax)—

* * * * * * *

"(7) Business leagues, chambers of commerce, real estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Admittedly, plaintiff is neither a chamber of commerce, a real estate board nor a board of trade, as these organizations are commonly understood and as these terms are used in the Acts; but it is earnestly insisted that it is a "business league not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual," within the meaning of the two Acts.

I can not agree with this contention. It is quite clear that Congress, in addition to exempting from taxation the familiar chambers of commerce, boards of trade and real estate boards, felt that there were other semipublic trade organizations performing a similar service which should be exempted, and, in searching for an all-embracing term by which such organizations might be designated, selected the words "business leagues" as a description of this class of organization, and in order to determine if a particular organization or corporation is embraced within this description it would seem to be a safe guide to see if such concern performs substantially the same functions as are customarily performed by boards of trade, chambers of commerce or real estate boards. Chambers of commerce, boards of trade and real estate boards in their respective fields all perform a function well known to the modern business world. They are not business concerns, in the sense that they operate for profit or render that individual paid service to the public, or even to their own members, that is customarily performed by individuals or organizations for the purpose of making money. Their function is a semicivic one, having to do in large part with the general welfare of the business or businesses represented by their membership. In no sense are they individual business organizations operating for profit. Any surplus revenue realized over and above the actual cost of operation is the incidental, not the intended and planned, result of their operations. The revenues of such organizations are ordinarily obtained from membership dues—not from fixed charges for services rendered.

The plaintiff in this case meets none of these tests. Its charter is that of the ordinary private commercial corporation. It has capital stock. This stock has a par value. Under its charter the stock is entitled to dividends, if earned, and prior to 1923 dividends were earned and paid, and have been regularly earned since that date, but not distributed. It does not depend upon its dues for its revenue. No dues are charged. The business in which it is engaged is that quite extensively engaged in by others for profit, and its earnings are acquired in exactly the same way as are the earnings of its competitors. To hold that Congress intended to exempt such an organization from taxation while taxing its individual and corporate competitors would convict the legislative department of deliberate and unjust discrimination.

If we disregard the test of analogous activities, and measure the rights of the plaintiff by the plain language of the Acts, it seems to me we must reject plaintiff's claim. To entitle a business league to exemption two conjunctive requirements must be met; first, it must not be organized for profit; and, second, no part of its net earnings must inure to the benefit of any private shareholder or individual. If it fails to meet both of these tests, it is not exempt. It was undoubtedly organized for profit, and it has continuously operated for profit, and has actually realized a profit every year of its operation. Its charges for services have always been fixed with the idea of realizing a profit. This alone would seem, under the language of the two statutes, to require the rejection of plaintiff's claim. Admittedly, prior to 1923 the net profits inured to the benefit of its stockholders, both in the form of dividends distributed and in the increase of their equity in the mounting surplus. Indeed, the corporate charter puts this fact beyond question.

It may well be doubted if, under the two Revenue Acts in question, a corporation possessing the corporate powers of the plaintiff, and conducting its business as has plaintiff, may, by a mere by-law eschewing profits and a contract of its stockholders among themselves, designed to carry such a by-law into effect, without a corresponding change in the corporate charter, transform a taxable corporation into an exempt one; but in any event it seems clear to me that no such result was attained by the plaintiff through the amended by-laws of January 10, 1923, and the trust agreement of the stockholders heretofore referred to.

As heretofore noted, one of the necessary requirements for exemption is that the corporation or business league be one not organized for profit. The statutes do not exempt a corporation merely because it is not organized or operated for the profit of its stockholders. If it is organized for profit, it is not exempt even though the profits are not for the stockholders, but solely for the corporation as such, or for some other person or organization. The by-laws of 1923 merely declare that the corporation shall not be operated *for the profit of the stockholders, and that no dividends shall be paid to the stockholders.* There is no change in the legal character of the corporation, nor in its authority to conduct its business for profit. As a matter of fact, it continued to operate for profit and continued to make even greater profits than formerly and to pile up a fast growing surplus. Furthermore, the trust agreement is careful not to waive the rights of the stockholders to their equity in the surplus and other assets of the bureau, during the life of the agreement. On the eve of the execution of the trust agreement they distributed to themselves, through a dividend of 175 per cent, practically all the corporate assets then on hand, and by the terms of the agreement any stockholder was given the right to sell his stock, with the option to his associates to buy it for its book value, and the trust agreement at any time could be annulled by the unanimous consent of its signers. With these rights reserved to the stockholders, there can be no doubt that the net earnings of the bureau which found their way into surplus inured to the benefit of the stockholders, during the life of the trust agreement, which, so far as the record discloses, was in full force during each of the years here involved. This fact, it seems to me, prevents the plaintiff from meeting the second requirement of the statute that no part of the net earnings shall inure to the benefit of private stockholders.

The trust agreement provides that at its termination all assets of the bureau shall be turned over to the Louisville Credit Men's Association, but this was certainly not binding on the nonsigning member. If binding on the others, it did not prevent them from selling their stock before the expiration of the trust agreement and thus getting the benefit of the net earnings which had at that time been carried to surplus. Furthermore, assuming that any of the net earnings not necessary for the business of the bureau were, as the amended by-laws of 1923 authorized, turned over to the Louisville Credit Men's Association (and between 1923 and 1925 some of the net earnings were so turned over), to this extent the net earnings of the bureau would seem to inure to the benefit of a private individual. I think it fair and reasonable to construe the words "private individual," as used in the two statutes, as broad enough to embrace private corporations, as well as natural persons. By the same token, to the extent that any net earnings were on hand as surplus at the expiration of the trust agreement and turned over to the association, as the agreement undertakes to provide, such net earnings would inure to the benefit of a private individual.

In view of all these considerations, I feel constrained to hold that plaintiff was not exempt under the statutes relied upon. I am fortified in the conclusion here reached by the uniform definition given by the Commissioner to the words "business league" and by the cases of *Uniform Printing & Supply Co.* v. *Commissioner* (33 Fed. (2d), 445 (8th Cir.) [Ct. D. 70, C. B. VIII-1, 264], affirming the Board of Tax Appeals); *Northwestern Jobbers' Credit Bureau* v. *Commissioner* (37 Fed. (2d), 880 (8th Cir.) [Ct. D. 206, C. B. IX-2, 228], affirming the Board of Tax Appeals); and by the decision of the Board of Tax Appeals in the appeal of *Adjustment Bureau of St. Louis Association of Credit Men* v. *Commissioner* (21 B. T. A., 232).

A finding of facts and judgment conforming to the views herein expressed may be prepared by counsel for the United States, and, after submitting same to counsel for the plaintiff, tendered for entry.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 112.—RECOGNITION OF GAIN OR LOSS.

ARTICLE 579: Involuntary conversion of property.

REVENUE ACT OF 1928.

Condemnation of real property, award of severance damages, and use of part of proceeds of condemnation award in the purchase of property similar or related in service or use to the property condemned. (See G. C. M. 12632, page 104.)

ARTICLE 579: Involuntary conversion of property.

REVENUE ACT OF 1928.

Land sold under condemnation proceedings with no separate allowance for severance damages to remaining land. (See G. C. M. 12657, page 80.)

SECTION 114.—BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 611: Basis for allowance of depreciation and depletion.

REVENUE ACT OF 1928.

Assets received by parent company upon liquidation of subsidiary. (See G. C. M. 12581, page 142.)

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 621: Dividends. XIII-21-6806
(Also Section 42, Article 333.) Ct. D. 828

INCOME TAX—REVENUE ACTS OF 1924 AND 1928—DECISION OF SUPREME COURT.

INCOME—DIVIDEND—IN WHAT YEAR TAXABLE.

Dividends declared by a company in 1924 and in 1929, payable on or before December 31 of those years and received on January 2, 1925 and 1930, by a stockholder and officer who kept his accounts on the cash receipts and disbursements and calendar year basis are not taxable in 1924 and 1929, assuming that the Treasury regulation that dividends are taxable when unqualifiedly made subject to the stockholder's demand was incorporated into the Revenue Acts of 1924 and 1928, where the company paid all dividends by check and it was the practice without exception that no stockholder, whether employee or officer, should receive his dividend check before the first business day of the month following the month in which the dividend was made payable. Under such circumstances the checks did not constitute payments prior to their actual receipt.

SUPREME COURT OF THE UNITED STATES.

791. *Sewell Lee Avery, petitioner,* v. *Commissioner of Internal Revenue.*

792. *Sewell L. Avery, petitioner,* v. *Commissioner Internal Revenue.*

On writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 30, 1934.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the court.

The petitioner was a large stockholder and president of the United States Gypsum Co. In November, 1924, the company declared a dividend payable on or before the 31st day of December following. Its check, dated December 31 for the amount attributable to his stock, payable to him, was received by petitioner January 2, 1925. In November, 1929, another dividend was declared, payable on or before the following December 31 and the company's check for petitioner's portion was received by him January 2, 1930.

Annually dividend checks, signed by the proper corporate officers, and dated December 31 were on that day mailed out to all stockholders except those who were officers and employees, including the petitioner. Checks for the latter were held in the treasurer's office until the first business day of the next month and then distributed through the office mail.

The company declared dividends quarterly; and in every instance they were made payable on or before the last day of some month. The dividend checks never left the treasurer's office or went to the mailing department until the afternoon of the last day of the month. They were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, should receive his check before the first business day of the month following the month in which the dividend was made payable.

Petitioner kept his accounts on the cash receipts and disbursements and calendar year basis.

The Commissioner assessed the dividends above described as part of the petitioner's income for the years 1924 and 1929. The Board of Tax Appeals approved; and the court below affirmed this action. The facts are not in dispute. The only question for our determination is when, within intendment of the statutes, the dividends were "received" by petitioner.

He maintains that under the plain language of the Revenue Acts of 1924 and 1928 the dividends—like other assessable items—should be treated as income for the taxable years during which they were actually received—1925 and 1930. The Commissioner claims that under Treasury regulations promulgated in 1921 and in effect ever since, the dividends constituted income for the years in which they were declared and made payable.[1] The regulation specially important here (No. 65, article 1541) follows:

"Dividends. * * * A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands."

The Revenue Act of 1924 (ch. 234, 43 Stat., 253), provides—

"Sec. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

"Sec. 213. For the purposes of this title, * * *

"(a) The term 'gross income' includes gains, profits, and income * * *. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

"Sec. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act."

Sections 41, 42, and 62, Revenue Act of 1928 (ch. 852, 45 Stat., 791), are substantially like corresponding ones quoted from the 1924 Act. Similar provisions appear in the Revenue Act of 1918 and all subsequent ones.

The Revenue Act of 1921 (ch. 136, 42 Stat., 227, 229) is peculiar in that it makes distinction between dividends and other income items by the following provision which does not appear in subsequent Acts:

"Sec. 201. (e) For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income

[1] See Treasury Regulations No. 62 (1921), articles 53 and 1541; No. 65 (1924), articles 52 and 1541; No. 69 (1926), articles 52 and 1541; Nos. 74 and 77 (1928–1932), articles 333 and 621.

of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

If we give the words of the statutes their ordinary meaning, clearly the dividends under consideration were not actually received by the taxpayer during 1924 and 1929. Certainly, they were not received when declared. They did not come into the taxpayer's hands on December 31 simply because payable on that day. And unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation.

The petitioner insists that the word "receive" is free from ambiguity and admits of no interpretation; the statute furnishes the sole measure as to when dividends are to be reported.

In behalf of the Commissioner it is said—

The Revenue Act directs that the amount of all such (specified) items shall be included in the gross income for the taxable year in which received by the taxpayer. The word "received," as applied to dividends, is not entirely clear since there are different times at which it reasonably may be claimed the taxpayer receives them. To meet this situation the Commissioner promulgated the regulation that dividends are taxable when unqualifiedly made subject to the stockholder's demand. This provision has been included in all Treasury regulations since 1918 and has been approved and accepted by Congress through subsequent reenactments of the statute. When a dividend unqualifiedly becomes subject to a taxpayer's demand is essentially a question of fact. Here, the Board of Tax Appeals and the Circuit Court of Appeals agree that the dividends were subject to the taxpayer's demand on December 31.

It is unnecessary for us to determine how far the quoted Treasury regulation was incorporated into the Acts of 1924 and 1928. If we assume that the regulation, in effect, became part of those enactments, nevertheless we think the Commissioner's action was erroneous. In the disclosed circumstances the dividends can not properly be considered as cash or other property unqualifiedly subject to the petitioner's demand on December 31. It was the practice of the company to pay all dividends by checks not intended to reach stockholders until the first business day of January; there is nothing to show that petitioner could have obtained payment on December 31, he did not expect this and the practice shows the company had no intention to make actual payment on that day. Nothing indicates that it recognized an unrestricted right of stockholders to demand payment except through checks sent out in the usual way. The checks did not constitute payments prior to their actual receipt. The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand "cash or other property"; and none of the parties understood that it was.

This subject has been considered with varying results in *Commissioner* v. *Bingham* (35 F. (2d), 503) (1929) [Ct. D. 207, C. B. IX-2, 289]; *Hadley* v. *Commissioner* (36 F. (2d), 543) (1929) [Ct. D. 153, C. B. IX-1, 266]; *Commissioner* v. *Adams* (54 F. (2d), 228, 230) (1931); *Shearman* v. *Commissioner* (66 F. (2d), 256) (1933). The facts here disclose a situation substantially like that in Adams case; and we agree with the conclusion of the court therein, stated as follows: "We are also of the opinion that, on the facts found, the dividends were 'not unqualifiedly made subject to the demand of the stockholder,' in the year 1924, if article 52 of the departmental regulations can be said to be valid and not in conflict with the express language of section 213(a)."

Reversed.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 643: Compensation of State officers and employees. XIII-12-6707 I. T. 2769

REVENUE ACT OF 1928.

The compensation received for services rendered as receiver of an insurance company, under the authority contained in section 9 of chapter 177 of the General Laws of Massachusetts, 1921, is subject to

Federal income tax. (Article 643, Regulations 74; *Fleming* v. *Bowers*, 11 Fed. (2d), 789, T. D. 3833, C. B. V-1, 201; *Edward H. Wright* v. *Commissioner*, 29 B. T. A., 1267.)

SECTION 117.—NET LOSSES.

ARTICLE 651: Net losses, definition and computation.

REVENUE ACT OF 1928.

Losses on sales under foreclosure in California. (See G. C. M. 12737, page 120.)

ARTICLE 651: Net losses, definition and computation. XIII-24-6846 G. C. M. 13073

REVENUE ACT OF 1928.

The M Company was organized as a Delaware corporation in 1921. At all times since organization it has operated in Pennsylvania, where its principal office was located and under the law of which it was registered. In 1930 it was domesticated as a Pennsylvania corporation and thereafter acted only as such. There was no change in corporate structure, stockholders, officers, directors, assets, or liabilities.

The net losses of the Delaware corporation for 1928 and 1929 may not be carried forward by the Pennsylvania corporation as a deduction in its returns for 1930 and 1931.

An opinion is requested whether the net losses for the years 1928 and 1929 of the M Company, a Delaware corporation, may be allowed as deductions in computing the net income of the M Company of Pennsylvania for the years 1930 and 1931.

The M Company (hereinafter referred to as the Delaware company) was organized as a Delaware corporation in 1921. It was at all times since its organization engaged in business in Pennsylvania, where its principal office was maintained. It was registered under Pennsylvania law—act of June 8, 1911 (P. L. 710). Subsequently, it was determined to domesticate the company as a Pennsylvania corporation under the name of the M Company of Pennsylvania, Inc. (hereinafter referred to as the Pennsylvania company). Accordingly, it followed the provisions of the act of June 9, 1881 (P. L. 89), providing for domestication of foreign corporations. It received the necessary approval for domestication in 1930. Thereafter, the corporation did not function as a Delaware corporation, nor were any taxes paid or reports filed in that State. There was no change in corporate structure, stockholders, officers, directors, assets, or liabilities.

For the years 1928 and 1929 the Delaware company had net losses. The Pennsylvania company contends that such losses are allowable as deductions in computing its net income for the years 1930 and 1931. Briefly, its position is based on the ground that the corporation merely moved its residence from Delaware to Pennsylvania and that it is in substance the same entity.

Section 117(b) of the Revenue Act of 1928 provides in part as follows:

(b) *Net loss as a deduction.*—If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year * * * and * * * for the next succeeding taxable year * * *.

The question to be decided is whether the Pennsylvania company is the *taxpayer* within the meaning of the aforesaid provision of law so as to be entitled to deduct from its income for 1930 and 1931 the net losses sustained in 1928 and 1929 by the Delaware company.

In the appeal of *The Maytag Co.* v. *Commissioner* (17 B. T. A., 182), it appears that on December 31, 1921, an Iowa corporation by the same name conveyed all of its assets, subject to its liabilities, to the petitioner, a Maine corporation, for all of the latter's preferred stock, 13,400 shares of its class A stock, and 40,000 shares of its class B common stock. The stock thus acquired by the Iowa corporation was thereupon distributed among its stockholders by an exchange of the old for the new stock. Thereafter, the Iowa corporation dissolved. There remained in the treasury of the petitioner after the exchange had been completed 26,600 shares of its class A common stock, all of which was sold to the public in the year 1922. The Board held that the net loss of the Iowa corporation for 1921 was not deductible from the net income of the Maine corporation for 1922. The Board took the position that the facts were "conclusive against the claim that the new corporation is the same taxable entity as the old." In the course of its decision the Board said:

There are cases in which a proper regard for "matters of substance and not mere form" in construing taxing statutes, has impelled courts to disregard a change of legal entities. (See *Weiss* v. *Stearn*, 265 U. S., 242; *Western Maryland Railway Co.* v. *Commissioner*, 33 Fed. (2d), 695.) On the other hand, it has been found necessary in many cases in order to give effect to tax laws, to regard a change in corporate identity as something more than a matter of form, as in *Marr* v. *United States* (268 U. S., 536), where a new corporation, organized to continue the business of the old, was created under the laws of another State and with a different capital structure. *Weiss* v. *Stearn* and *Marr* v. *United States* are distinguished in the latter case in these words:

In *Weiss* v. *Stearn* a new corporation had, in fact, been organized to take over the assets and business of the old. Technically there was a new entity; but the corporate entity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State, with presumably the same powers as the old. There was also no change in the character of securities issued.

* * * * * * *

In the case at bar, the new corporation is essentially different from the old. A corporation organized under the laws of Delaware does not have the same rights and powers as one organized under the laws of New Jersey. Because of these inherent differences in rights and powers, both the preferred and common stock of the old corporation is an essentially different thing from stock of the same general kind in the new. But there are also adventitious differences, substantial in character. A 6 per cent, nonvoting preferred stock is an essentially different thing from a 7 per cent, voting preferred stock. A common stock subject to the priority of $20,000,000 preferred and a $1,200,000 annual dividend charge is an essentially different thing from a common stock subject to $15,000,000 preferred and a $1,050,000 annual dividend charge.

For other cases to the same effect see *Appeal of White House Milk Co.* (2 B. T. A., 860); *West Point Marion Coal Co.* v. *Commissioner* (19 B. T. A., 945); *Standard Silica Co.* v. *Commissioner* (22 B. T. A., 97); *Clark Dredging Co.* v. *Commissioner* (23 B. T. A., 503, C. B. X-2, 14); *Overbrook National Bank of Philadelphia* v. *Commissioner* (23 B. T. A., 1390); *New Colonial Ice Co., Inc.*, v. *Commissioner* (66

Fed. (2d), 480, affirmed by United States Supreme Court on May 28, 1934); *Hartford-Empire Co.* v. *Commissioner* (26 B. T. A., 134); *Elliott-Granite Linen Corporation* v. *Commissioner* (26 B. T. A., 936); *Athol Manufacturing Co.* v. *Commissioner* (54 Fed. (2d), 230, Ct. D. 513, C. B. XI-2, 252).

The facts in *Plumber's Supply Co.* v. *Commissioner* (20 B. T. A., 459) are similar to those in the present case. In that case it was argued that there was no change in stockholders, relative stock holdings, nature of the business, or accounting system. The Board said:

* * * Even if all these things are true, it does not follow that the two corporations can be regarded as identical. The petitioner is chartered under the laws of Oklahoma; its predecessor was a Missouri corporation. The real question here is whether the Missouri corporation, which is certainly a different legal entity, may be regarded as identical with the petitioner for tax purposes. * * *

In that case the Board held that the net losses of the Missouri corporation sustained in 1921 and 1922 could not be applied to reduce the taxable income of the Oklahoma corporation for the years 1923 and 1924.

In connection with a continuing business in an affiliated group, the United States Supreme Court has approved the general rule that the deduction for a prior net loss is limited to the particular corporate taxpayer sustaining it (*Woolford Realty Co., Inc.*, v. *Rose*, 286 U. S., 319, Ct. D. 493, C. B. XI-1, 154), even when the same person owns the shares of the affiliated corporations. (*Planters Cotton Oil Co., Inc., et al.*, v. *Hopkins*, 286 U. S., 332, Ct. D. 492, C. B. XI-1, 153.)

The petitioner relies strongly upon the cases of *Western Maryland Railway Co.* v. *Commissioner of Internal Revenue* (33 Fed. (2d), 695) and *Weiss* v. *Stearn* (265 U. S., 242, T. D. 3609, C. B. III-2, 51). Reliance was also placed upon those cases in *Athol Manufacturing Co.* v. *Commissioner* (22 B. T. A., 105), involving a question analogous to the one here in issue. The Board said:

* * * These are both cases in which the courts found it necessary to disregard a change of legal entities. Neither of the cases, however, involved the section of the statute here under consideration. In *Western Maryland Railway Co.* v. *Commissioner of Internal Revenue*, supra, the question was whether the new company was entitled to deduct an amortized portion of the discount on bonds issued by the old company. The new company was a consolidated company which had taken over by agreement all the assets and liabilities of the old company. The court held, reversing the decision of the Board, that the new company stood in the place of the old with respect to the bonds and was entitled to the deduction.

In *Weiss* v. *Stern*, supra, the question was whether upon a reincorporation in the same State the stockholders received a gain upon the exchange of shares of the old company for shares of the new. The court held that there was no gain meeting the definition of "income" as given in *Eisner* v. *Macomber* (252 U. S., 189 [T. D. 3010, C. B. 3, 25]), *Towne* v. *Eisner* (245 U. S., 418), and others.

In the instant case, the question is more limited. The quoted section of the statute clearly restricts those entitled to the benefit of the net loss provisions to "any taxpayer" who sustained a net loss. It is undeniable that the petitioner here is a separate legal entity and is a different taxpayer from its predecessor company. (Cf. *Standard Silica Co.*, 22 B. T. A., 97.) There is no question here of the rights of other parties and we see no requirement under the circumstances of this case for invocation of the rule pronounced in *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minneapolis Civic and Commerce Association* (247 U. S., 490), that "courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

The Circuit Court of Appeals for the First Circuit affirmed the decision of the Board, stating that "We fail to see how we can add anything to what was stated by the Board of Tax Appeals in its opinion." (54 Fed. (2d), 230.)

It may be admitted that the facts in the above-cited cases are not on all fours with those in the present one. The cases cited warrant the conclusion, however, that the net loss of one taxpayer may not be carried forward as a deduction against the net income of another taxpayer. The net loss deduction does not follow the business but is limited to the taxpayer. Is the Pennsylvania company in the instant case the same taxable entity (taxpayer) as the Delaware company?

In Pennsylvania a "foreign corporation" ordinarily signifies a corporate body created by a governmental power other than the said Commonwealth, without regard to the residence of the incorporators or the location of the corporate business. (*Harley* v. *Charleston Steam-Packet Co.* (1838), 2 Miles, 249; *Pembina Mining Co.* v. *Comm.* (1883), 13 W. N. Cas., 521.)

A corporation, as it has been expressed, "can not migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place." (*Railroad Co.* v. *Harris*, 12 Wall., 65.) A corporation is a person within the constitutional provision that "no State shall deny to any person within its jurisdiction the equal protection of its laws." (*Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S., 181; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S., 114.) But a corporation is not within the jurisdiction of a State until it has been granted permission to do business within its limits; consequently, the prohibition does not prevent a State from imposing conditions upon allowing a foreign corporation to do business (*Pembina, etc., Mining & Milling Co.*, supra). "Although permitted to come into the local jurisdiction, and there exercise its powers, for the accomplishment of the purposes of its creation, it remains essentially a foreign corporation. It derives its vitality, its corporation capacity, its very life, from the law of its origin." (See *Republican Mountain Silver Mines, Ltd., et al.*, v. *Brown*, 58 Fed., 644.) It does not follow, even when a corporation is recognized in another State, that it may exercise all the powers that are conferred upon it by its charter. Its powers also depend upon the law of the State in which they are exercised. (*Fowler* v. *Bell et al.*, 90 Tex., 150, 37 S. W., 1058; *State* v. *Cook*, 171 Mo., 348, 71 S. W., 829.)

While the Delaware company in the present case transacted all of its business in Pennsylvania since the time of its organization, it was, nevertheless, not a Pennsylvania corporation, but a Delaware corporation prior to its domestication in 1930.

With respect to the domestication of foreign corporations in Pennsylvania, section 1 of the act of June 9, 1881 (P. L. 89), provides what foreign corporations may become domestic, and prescribes the kind of application to be filed by a foreign corporation applying for a domestic charter. That section provides further:

Said certificate shall be accompanied by a certificate, under the seal of the corporation, showing the consent of a majority in interest of such corporation to such application for a charter, and to a renunciation of its original charter, and of all privileges not enjoyed by corporations of its class under the laws of this Commonwealth. (Section 11077, Pennsylvania Statutes, 1920.)

The application must be filed with the secretary of the State of Pennsylvania and advertised the same as an application for a charter by a domestic corporation. At the termination of the advertisement it is presented to the governor. If he finds that all requirements have been complied with, he directs letters patent to issue.

Section 3 of the act of June 9, 1881, provides in part as follows:

From the date of said letters patent said corporation shall be and exist as a corporation of this Commonwealth, under the provisions of law regulating corporations of its class and of its charter * * *. (Section 11079, Pennsylvania Statutes, 1920.)

The Pennsylvania courts have held that when a foreign corporation applies, under the act of June 9, 1881, for a Pennsylvania charter and expressly renounces its original charter, the application must be advertised and a bonus paid to the Commonwealth before letters patent can be issued, the same as is required for the incorporation of a domestic corporation.

Letters patent were issued to the Pennsylvania company in 1930, reading in part as follows:

THEREFORE, KNOW YE, That under authority of the constitution and laws of said Commonwealth in such case made and provided I DO BY THESE PRESENTS, which I have caused to be made PATENT and sealed with the great seal of the State, create, erect and incorporate the stockholders of said corporation, their associates and successors, and also those who may thereafter become subscribers or holders of the stock of the said corporation, into a body politic and corporate in deed and in law by the name chosen and hereinbefore specified, who shall have succession perpetually and shall be invested with and have and enjoy all the powers, privileges and franchises incident to a corporation and be subject to all the duties, requirements and restrictions specified and enjoined in and by the said acts of the General Assembly and all other laws of this Commonwealth.

In view of the foregoing, this office is of the opinion that the Pennsylvania company is not the same entity (taxpayer) as the Delaware company and that the net losses of the Delaware company for 1928 and 1929 may not be carried forward by the Pennsylvania corporation as a deduction in its returns for 1930 and 1931.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SUPPLEMENT C.—CREDITS AGAINST TAX.

SECTION 131.—TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

ARTICLE 696: Limitation of credit for taxes.

REVENUE ACT OF 1928.

Formula for determining tax paid by foreign corporation "upon or with respect to the accumulated profits." (See G. C. M. 12882, page 89.)

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 141.—CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

ARTICLE 37(a), REGULATIONS 75: Dissolutions—Recognition of gain or loss.

XIII–18–6774
Ct. D. 819

INCOME TAX—REVENUE ACT OF 1928—DECISION OF SUPREME COURT.

1. CONSOLIDATED RETURNS—LIQUIDATION OF SUBSIDIARIES—LOSSES—DOUBLE DEDUCTION.

Where a parent corporation purchased all the capital stock of one corporation in 1917 and another in 1920, made advances to them, filed consolidated returns which took into account the gains and losses of the subsidiaries whose net operating losses exceeded the amount invested in them (stock plus advances), and in 1929 liquidated the subsidiaries after selling all their property to outside interests and receiving the balance remaining after their debts had been satisfied, the parent corporation may not deduct from its income for 1929 any part of the losses resulting from its investments in the subsidiaries, since these were intercompany transactions and the making of a consolidated return for 1929 constituted acceptance by the taxpayer and its subsidiaries of the provisions of articles 37(a) and 40(a) of Regulations 75, promulgated under the Revenue Act of 1928, prohibiting deduction of losses or bad debts resulting from intercompany transactions. The allowance claimed, which would permit the parent corporation twice to use the subsidiaries' losses for the reduction of its taxable income, is the practical equivalent of a double deduction not authorized by law or regulation.

2. DECISION DISTINGUISHED.

Remington Rand, Inc., v. *Commissioner* (33 Fed. (2d), 77 [Ct. D. 149, C. B. IX–1, 268]) distinguished.

SUPREME COURT OF THE UNITED STATES.

Charles Ilfeld Co., petitioner, v. *B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico.*

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 2, 1934.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the court.

In 1917 petitioner purchased all the capital stock of the Springer Trading Co. for $40,000 and in 1920 all that of the Roy Trading Co. for $50,000. It held these shares until late in 1929 when both companies were dissolved. In that period it advanced the Springer company sums amounting to $69,030.27, and the Roy company $9,782.22. Nothing having been paid it on account of these advances, petitioner had an investment in the former of $109,030.27 and in the latter of $59,782.22. It made consolidated returns which took into account the gains and losses of each subsidiary. Operations of the Springer company resulted in losses in all but two of the years and those of the Roy company in all but four. The losses of the former exceeded its gains by $118,510.53, and those of the latter by $57,127.85. In 1929, before the end of November, the subsidiaries sold all their property to outside interests. After paying debts to others, each had a balance—the Springer company, $22,914.22, and the Roy company, $15,106.16—which it paid petitioner on December 23. Both subsidiaries were dissolved December 30 in that year.

Petitioner made a consolidated return for 1929 based on the results of operation and the liquidation of each subsidiary but made no deduction of losses resulting to itself from the liquidations. The return showed a tax of $20,836.20 which was duly paid. In May, 1931, petitioner filed an amended return and claimed a refund of $14,406.43. This return does not take into account profits or losses of subsidiaries in that year but deducts the losses above shown to have resulted to petitioner from its investments in them.[1] The Commissioner rejected the claim. Petitioner brought this action in the Federal District Court for New Mexico against the collector to recover the amount of its claim. A jury was waived, the court made special findings of fact, stated its conclusions of law and gave petitioner judgment as prayed. The Circuit Court of Appeals reversed. (66 F. (2d), 236; 67 F. (2d), 236.)

The question is whether petitioner is entitled to deduct from its 1929 income any part of the losses resulting from its investments in the subsidiaries.

The Revenue Act of 1928 and Regulations 75 made under section 141(b) govern. Section 141(a) gives to groups of affiliated corporations the privilege of making consolidated returns, in lieu of separate ones, for 1929 or in subsequent years upon condition that all members consent to the regulations prescribed prior to the return. And, in view of the many difficult problems arising in the administration of earlier provisions authorizing consolidated returns, the Congress deemed it desirable to delegate by section 141(b) the power "to prescribe regulations legislative in character." (Senate Report No. 960, Seventieth Congress, first session, page 15.) That subsection authorizes the Commissioner, with the approval of the Secretary, to make such regulations as he may deem necessary in order that the tax liability of an affiliated group and of each member "may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability."

The making of the consolidated return constituted acceptance by petitioner and its subsidiaries of the regulations that had been prescribed. No question as to validity is raised. The brief substance of the regulations here involved follows:

Article 37(a) provides: Gains or losses shall not be recognized upon a distribution *during* a consolidated return period by one member to another in cancellation or redemption of its stock; "and any such distribution shall be considered an intercompany transaction." And subdivision (b) requires that any such distribution *after* a consolidated return period shall be treated as a sale, and directs adjustments to be made in accordance with articles 34, 35 and 36.

Article 34(a) prescribes the basis for determination of gain or loss upon a sale by a member of stock issued by another member and "during any part of the consolidated return period" held by the seller. Subdivision (c) applies to sales which break affiliation and which are made during the period that the selling corporation is a member of the affiliated group.

Article 40(a) directs that intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not "during a consolidated return period" be deducted as bad debts. Subdivision (c) governs deductions after the consolidated return period on account of such transactions during the period.

1. In the absence of a provision in the Act or regulations that fairly may be read to authorize it, the deduction claimed is not allowable. (*Brown* v. *Helvering*, 291 U. S., 193; *Burnet* v. *Houston*, 283 U. S., 223, 227 [Ct. D. 328, C. B. X-1, 343]. Cf. *Woolford Realty Co.* v. *Rose*, 286 U. S., 319, 326 [Ct. D. 493, C. B. XI-1, 154].) Petitioner contends that articles 37(b) and 34(c) cover the case. We are unable so to construe them. Article 37 relates to dissolutions. Subdivision (b) deals with distributions made after a consolidated return period. The record conclusively shows that each subsidiary handed over the balance before the dissolution was consummated and during the consolidated

[1] See the following table:

	Springer Co.	Roy Co.	Combined.
Operating losses claimed and deducted prior to 1929	$131,424.41	$59,007.25	$190,431.66
Investment loss claimed for 1929	86,116.05	44,676.06	130,792.11
Total losses claimed	217,540.46	103,683.31	321,223.77
Investment (stock plus advances)	109,030.27	59,782.22	168,812.49

return period. Article 34 relates exclusively to the sale of stock. No sale of stock was involved. The parent and subsidiary corporations were the only parties. Neither subsidiary acquired stock of the other or that issued by itself. The petitioner retained all the shares of each and at the end voted dissolutions that operated to cancel them.

2. Respondent, relying on articles 37(a) and 40(a), maintains that the losses petitioner seeks to deduct arose from intercompany transactions during the consolidated return period and therefore may not be allowed.

Article 37(a) forbids the recognition of losses upon distribution during the consolidated return period and declares that such distributions shall be considered intercompany transactions. Article 40(a) forbids during that period the deduction as bad debts of obligations which are the result of intercompany transactions. The payment of the liquidating dividends was made during the return period and was the last step leading up to the action of directors and stockholders for the dissolution of the subsidiaries. The amount handed over by the Springer company was less than petitioner's advances to it, but the amount paid by the Roy company was greater than the advances to it. Undoubtedly the obligation of the subsidiaries in respect to the advances would be held to be intercompany accounts receivable quite independently of the regulations.

But a word is necessary as to the subsidiaries' obligations to the petitioner as stockholder. The record does not disclose whether the latter obtained the stock directly from the issuing corporations or purchased from others. Without regard to the manner of acquisition, the amount paid constituted investment in the subsidiaries. And, as it was the owner of all the shares of the subsidiaries, petitioner will be deemed to have directed all their activities in the unitary business and as well the steps taken for their liquidation and dissolution. They were liable to it alone for the balances remaining after payment of the amounts owed others, and it was equally entitled whether claiming as lender or shareholder. Under the circumstances, it reasonably may be held that their obligation in respect to petitioner's stock ownership resulted from intercompany transactions within the meaning of article 40(a). Petitioner rightly says, as does respondent, that the amounts paid for the stock and the advances later made to the subsidiaries stand on the same footing. But its contention that the transactions out of which the claimed losses arose did not occur during the consolidated return period can not be sustained. Petitioner is therefore not entitled to deduct them from its 1929 income.

3. The allowance claimed would permit petitioner twice to use the subsidiaries' losses for the reduction of its taxable income. By means of the consolidated returns in earlier years it was enabled to deduct them. And now it claims for 1929 deductions for diminution of assets resulting from the same losses. If allowed, this would be the practical equivalent of double deduction. In the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers. (Cf. *Burnet* v. *Aluminum Goods Co.*, 287 U. S., 544, 551 [Ct. D. 631, C. B. XII-1, 283]; *United States* v. *Ludey*, 274 U. S., 295, 301 [T. D. 4046, C. B. VI-2, 157].) There is nothing in the Act that purports to authorize double deduction of losses or in the regulations to suggest that the Commissioner construed any of its provisions to empower him to prescribe a regulation that would permit consolidated returns to be made on the basis now claimed by petitioner.

In *Remington Rand, Inc.*, v. *Commissioner* (33 F. (2d), 77 [Ct. D. 149, C. B. IX-1, 268]) the Circuit Court of Appeals for the Second Circuit held a subsidiary company's accumulated earnings on stock sold to a parent company could not be added to the cost of the stock in determining taxable gain arising on the latter's sale to outsiders. In *United Publishers' Corporation* v. *Anderson* (42 F. (2d), 781), a district court in the same circuit, deeming the Remington Rand case applicable, held that a parent corporation filing consolidated returns showing losses of a subsidiary during earlier years could nevertheless deduct loss on the sale of the subsidiary's stock. Petitioner insists that same principle governs both decisions and that therefore the deduction should be allowed. But the analogy is not good. Where all the members gain, total taxable income is the same on a consolidated return as upon separate ones. But where as in the case before us the subsidiaries lose and the parent gains, the losses of the former go in reduction of the taxable income of the latter. Considerations that justify inclusion of the profits made by all the members do not support the double deduction claimed.

The weight of authority is against petitioner's contention. (*Burnet* v. *Riggs National Bank*, 57 F. (2d), 980; *Commissioner* v. *Apartment Corporation*, 67 F. (2d), 3; *Summerfield Co.* v. *Commissioner*, 29 B. T. A., 77; *National Casket Co.* v. *Commissioner*, 29 B. T. A., 139.) No decision other than that of the district court in *United Publishers' Corporation* v. *Anderson*, supra, gives any support to its claim. (Cf. *Burnet* v. *Imperial Elevator Co.*, 66 F. (2d), 643; *McLaughlin* v. *Pacific Lumber Co.*, 66 F. (2d), 895.)

Affirmed.

SECTION 142.—CONSOLIDATED RETURNS OF CORPORATIONS—TAXABLE YEAR 1928.

ARTICLE 734: Consolidated net income of affiliated corporations for 1928. XIII–1–6584
(Also Section 114, Article 611.) G. C. M. 12581

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

Where the stock of a subsidiary corporation was acquired for cash, the mere liquidation of the subsidiary and the taking over of its properties by the parent company does not constitute a reorganization. Accordingly, in all such cases, except the case of the liquidation of a subsidiary during a consolidated return period which comes within the purview of Regulations 75 and 78 (article 37(*a*)), gains resulting from the transaction should be taxed and losses sustained should be allowed as deductions from gross income, subject to adjustment on account of the subsidiary's losses used in consolidated returns to offset the parent company's income as indicated in General Counsel's Memorandum 11676 (C. B. XII–1, 75). The basis of the assets received by the parent company, for purposes of depletion and depreciation, is the fair market value of such assets on the date received by the parent company.

Reference is made to General Counsel's Memorandum 11676 (C. B. XII–1, 75), which was issued after the decision of the Supreme Court of the United States in *Burnet* v. *Aluminum Goods Manufacturing Co.* (287 U. S., 544, Ct. D. 631, C. B. XII–1, 283). Therein the Income Tax Unit was advised that for taxable years prior to 1929 the liquidation of a subsidiary is not to be treated as an intercompany transaction for consolidated returns purposes. It was also pointed out that under Regulations 75 and 78, which govern the filing of consolidated returns for 1929 and subsequent years, it is expressly provided by article 37(*a*) that any such liquidation which occurs during a consolidated return period is to be considered as an intercompany transaction on which neither gain nor loss is to be recognized.

In *Prairie Oil & Gas Co.* v. *Motter* (D. C. Kans.) (1 Fed. Suppl., 464), it was held that under section 203(h)1(A) of the Revenue Act of 1926, which provides in part that the term "reorganization" means "a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation)," the acquisition by a parent company of all the properties of a subsidiary company, in complete liquidation of the subsidiary, constitutes a reorganization, and under section 204(a)7 of the Revenue Act of 1926 the basis to the parent company of the assets so received, for depletion and depreciation purposes, thereafter is the same as it would have been in the hands of the subsidiary company. Language identical with that quoted above appears in the definition of the term "reorganization" in section 203(h)1(A) of the Revenue Act of 1924 and in sections 112(i)1(A) of the Revenue Acts of 1928 and 1932. The Board of Tax Appeals in a case very similar to Prairie Oil & Gas Co., supra, held that the liquidation of a subsidiary is not a reorganization within the meaning of the Revenue Act of 1926. (See *Warner Co.* v. *Commissioner*, 26 B. T. A., 1225, nonacquiescence C. B. XII-1, 24; acquiescence C. B. XII-2, 14.)

On July 13, 1933, the Circuit Court of Appeals for the Tenth Circuit rendered its decision in *Prairie Oil & Gas Co.* v. *Motter* (66 Fed. (2d), 309, Ct. D. 767, page 183, this Bulletin), in which the action of the district court was reversed. Petition for writ of certiorari will not be filed.

The principal facts in the case of *Prairie Oil & Gas Co.* v. *Motter*, supra, were that a contract was entered into on March 8, 1926, between the Prairie company as buyer and the Olean Petroleum Co. and its stockholders as sellers, by which the sellers proposed to transfer to the Prairie company all of the oil and gas leases owned by the Olean company for $3,350,000 in cash. The delivery of the leasehold properties was to be considered effective as of March 3, 1926. The Prairie company paid the consideration mentioned to the authorized agents of the Olean company and its stockholders and immediately went into possession. Alternative methods were provided for effecting the transfer of title of such properties, i. e., either by direct transfer of title to the properties, or by a transfer within 25 days of the stock of the Olean company (the current assets of the latter company to be withdrawn by the old stockholders in the meantime). The purpose of the contract of sale was accomplished by the transfer to the Prairie company of the stock of the Olean company on April 1, 1926. On the next day, April 2, the Prairie company liquidated the Olean company, causing the leasehold properties to be conveyed to itself, and on the same day the latter company was dissolved. Since the acquisition of the stock was followed by an immediate taking over of the title to the properties, and inasmuch as the Prairie company had taken actual possession of the properties on March 8, 1926, the case presented, in the opinion of the Circuit Court of Appeals, a clear instance of the purchase of properties for cash. After quoting from *Pinellas Ice & Cold Storage Co.* v. *Commissioner* (287 U. S., 462) and *Cortland Specialty Co. et al.* v. *Commissioner* (60 Fed. (2d), 937), certiorari denied (288 U. S., 599), the court said:

> These authorities leave no doubt that a purchase for cash of all the properties of one corporation by another can not be considered as a reorganization, merger or consolidation of the two companies.

Considering the case as presenting a single transaction, the court refused to permit its separation into its component parts for the purpose of segregating the liquidation of the Olean company, and said that even if that were done the Government would still be forced to a strained construction of the statute to arrive at the conclusion that the liquidation of the Olean company constituted a "reorganization." The court cited with approval the decision of the Board of

Tax Appeals in *Warner Co.* v. *Commissioner*, supra, in which the Board stated:

* * * The Cortland Specialty Co. case, supra, holds that, in order for a transaction to come within the intended meaning of "reorganization," "there must be some continuity of interest on the part of the transferor corporation or its stockholders." While it may be argued that there was a continuity of interest, inasmuch as the taxpayer owned all the stock of the two companies and after liquidation it owned all the assets, we think that the statute, as construed in the cited cases, was not intended to apply to cases of *mere liquidation*, but was meant rather to comprehend those situations where there is a merger or consolidation and the stockholders of the old corporation receive for their holdings a substantially similar interest in the new or merged corporation. * * * [Italics supplied.]

(See also *Simms Petroleum Co.* v. *Commissioner*, 28 B. T. A., 1106.)

After careful consideration this office is of the opinion that the Bureau should proceed upon the ground that where the stock of a subsidiary corporation was acquired for cash, the mere liquidation of the subsidiary and the taking over of its properties by the parent company does not constitute a reorganization. Accordingly, in all such cases, except the case of the liquidation of a subsidiary during a consolidated return period which comes within the purview of Regulations 75 and 78 (article 37(*a*)), gains resulting from the transaction should be taxed and losses sustained should be allowed as deductions from gross income, subject to adjustment on account of the subsidiary's losses used in consolidated returns to offset the parent company's income as indicated in General Counsel's Memorandum 11676, supra. The basis of the assets received by the parent company, for purposes of depletion and depreciation, is the fair market value of such assets on the date received by the parent company.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 146.—PENALTIES.

Article 791: Penalties. XIII–2–6592
Ct. D. 771

FEDERAL TAXES—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

Witness—Refusal to Testify—Self-Incrimination—Prosecution for Willful Failure to Supply Information.

Where a taxpayer was prosecuted under the provisions of section 1114(a) of the Revenue Act of 1926 and section 146(a) of the Revenue Act of 1928 for willful failure to supply information as to certain payments made by him and the name of the payee of the sums claimed by him as deductions for 1927 and 1928, and his refusal to testify was based upon fear of self-incrimination and possible prosecution for violation of a State statute, the trial court erred in refusing to give the jury the instruction requested by the taxpayer, that if they believed that the reasons given in his refusal to answer were given in good faith and based upon his actual belief, they should consider that in determining whether or not his refusal to answer was willful. While the refusal to testify was intentional and without legal justification, the jury might nevertheless find that it was not willful in the sense that it was not prompted by bad faith or evil intent.

SUPREME COURT OF THE UNITED STATES.

The United States of America, petitioner, v. *Harry Murdock.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 11, 1933.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the court.

This case is here for the second time.

The respondent was indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 income tax returns for moneys paid to others. By a special plea he averred that he ought not to be prosecuted under the indictment because if he had answered the questions put to him he would have given information tending to incriminate him, in contravention of the fifth amendment. The United States demurred on the grounds that the plea failed to show that the information demanded would have incriminated or subjected the defendant to prosecution under Federal law and that the defendant waived his privilege under the fifth amendment. The demurrer was overruled. Upon appeal this court reversed the judgment for the reason that at the hearing before the Federal revenue agent the defendant had not invoked the protection of the fifth amendment against possible prosecution under Federal legislation but solely under State laws. The cause was remanded to the district court for further proceedings. (*United States* v. *Murdock,* 284 U. S., 141 [Ct. D. 424, C. B. X-2, 192].)

The petitioner pleaded not guilty, was put upon trial and convicted. He appealed to the circuit court of appeals, which reversed the judgment,[1] and the case was brought here by writ of certiorari.[2] The question presented is whether the trial court correctly instructed the jury as to what constitutes a violation of the sections of the Revenue Acts of 1926 and 1928 upon which the indictment was based.

Section 256 of the Revenue Act of 1926, and section 148 of the Revenue Act of 1928, in identical words, require all persons making payment to another to make a true and accurate return to the Commissioner of Internal Revenue, under such regulations as he shall prescribe, setting forth the amount paid and the name and address of the recipient.[3] Section 1104 of the Act of 1926 and section 618 of the Act of 1928 authorize the Commissioner, for the purpose of ascertaining the correctness of any return, or of making a return where none has been made, through officers or employees of the Bureau of Internal Revenue, to examine books, papers, records and memoranda bearing upon the matters required to be included in the return, and to compel the attendance of the taxpayer or anyone having knowledge of the premises, and to take testimony with reference to the matter directed by law to be included in the return, with power to administer oaths to the persons to be interrogated.[4]

Section 1114(a) of the Revenue Act of 1926 declares:[5]

"Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution." [Italics supplied.]

Section 146(a) of the Revenue Act of 1928 is identical with the quoted section of the 1926 Act.[6] The indictment in two counts charged violation of the provisions of the two sections last mentioned.

[1] 62 F. (2d.), 926.
[2] 290 U. S., 389.
[3] U. S. C., Title 26, sections 1023, 2148.
[4] U. S. C., Title 26, section 1247; U. S. C. A., Title 26, section 1247, note.
[5] 44 Stat., 116: U. S. C., Title 26, section 1265.
[6] Except that it substitutes the word "title" for the word "Act" (45 Stat., 835; U. S. C., Title 26, section 1265).

Upon the trial the Government proved the respondent had been duly summoned to appear before a revenue agent for examination; questions had been put to him; he refused to answer, stating he feared self-incrimination; and upon further inquiry disclosed that his fear was based upon possible prosecutions under State statutes. The Government also offered evidence that on a prior occasion at a meeting with certain revenue agents the respondent had refused to disclose the name of the payee of the sums deducted by him in his returns for 1927 and 1928. To this counsel for the respondent objected, on the ground that it was irrelevant to the issue, which was the respondent's refusal to answer when summoned, sworn and interrogated. The prosecuting attorney replied that the willfulness of the respondent's refusal to answer was in issue, and that the proposed evidence bore upon that matter. The court overruled the objection and admitted the testimony. The respondent offered no evidence. In the course of his charge the trial judge said:

"So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts, is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

The respondent's request for an instruction in the following words was refused:

"If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was willful."

In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A Federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. (*Patton* v. *United States*, 281 U. S., 276, 288; *Quercia* v. *United States*, 289 U. S., 466.) Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. (*Horning* v. *District of Columbia*, 254 U. S., 135.) The present, however, is not such a case, unless the word "willfully," used in the sections upon which the indictment was founded, means no more than voluntarily.

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton* v. *United States*, 96 U. S., 699; *Potter* v. *United States*, 155 U. S., 438; *Spurr* v. *United States*, 174 U. S., 728); without justifiable excuse (*Felton* v. *United States*, supra; *Williams* v. *People*, 26 Colo., 272; *People* v. *Jewell*, 138 Mich., 620; *St. Louis, Iron Mountain & S. Ry. Co.* v. *Batesville & W. Tel. Co.*, 80 Ark., 499; *Clay* v. *State*, 52 Tex. Cr. R., 555); stubbornly, obstinately, perversely (*Wales* v. *Miner*, 89 Ind., 118, 127; *Lynch* v. *Commonwealth*, 131 Va., 762; *Claus* v. *Chicago Gt. W. Ry. Co.*, 136 Iowa, 7; *State* v. *Harwell*, 129 N. C., 550). The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby* v. *Newton*, 121 Ga., 679), or conduct marked by careless disregard whether or not one has the right so to act (*United States* v. *Philadelphia & R. Ry. Co.*, 223 Fed., 207, 210; *State* v. *Savre*, 129 Iowa, 122; *State* v. *Morgan*, 136 N. C., 628).

This court has held that where directions as to the method of conducting a business are embodied in a Revenue Act to prevent loss of taxes, and the Act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. In *Felton* v. *United States*, supra, the court considered a statute which required distillers to maintain certain apparatus to prevent the abstraction of spirits during the process of distillation, and declared that if any distiller should "knowingly and willfully" omit, neglect, or refuse to do anything required by law in conducting his business he should be liable to a penalty. It appeared that in defendant's plant defective appliances caused an overflow and wastage of low wines, and to save these it became necessary, in disregard of the method prescribed by the Act, to catch the spirits and pour them into vats. This was done despite instructions to the contrary by the Government officers who were consulted as to what procedure should be followed. It was admitted that the action was innocent in purpose, saved loss of the product to the owner and taxes to the United States. In an action for the statutory penalty the conduct of the distiller was held not to be willful within the meaning of the law.

Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed., 556, 562), and, we think in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who "*willfully*" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person who by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.

It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until this court pronounced judgment in *United States* v. *Murdock* (284 U. S., 141) had it been definitely settled that one under examination in a Federal tribunal could not refuse to answer on account of probable incrimination under State law. The question was involved but not decided in *Ballman* v. *Fagin* (200 U. S., 186, 195) and specifically reserved in *Vajtauer* v. *Commissioner of Immigration* (273 U. S., 103, 113). The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing. This was the effect of the instructions given. We think the circuit court of appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose.

The Government relies on *Sinclair* v. *United States* (279 U. S., 263). That case, however, construed an altogether different statutory provision. Sinclair was indicted for refusal to answer a question pertinent to a matter under investigation by a committee of the Senate. The Act upon which the indictment was based declared "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor * * *."[7] Two distinct offenses are described in the disjunctive, and in only one of them is willfulness an element. Sinclair having been summoned attended the hearing. He was therefore guilty of no willful default in obeying a summons. He refused to answer certain questions not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty. Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury

[7] U. S. C., Title 2, section 192.

might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

The judgment is affirmed.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 162.—NET INCOME.

ARTICLE 861: Estates and trusts. XIII–21–6812
G. C. M. 12771

REVENUE ACT OF 1928.

A, who was a legal resident of the State of Pennsylvania, died in the year 1912, leaving a will which contained an unconditional direction or order that after the death of his wife and son his real estate should be sold and the proceeds distributed to his brothers and sisters "or their legal representatives." The gain realized from the sale of the realty was income taxable to the testator's estate.

The question is presented whether gain realized from the sale of Pennsylvania real estate by the administrator of A's estate is taxable to the estate or to the beneficiaries.

The testator died in the year 1912, survived by his wife and son. Concerning the realty the will contained the following directions:

> * * * my real estate * * * is NOT to be sold but to remain intact during the lifetime of my wife and my son * * *, and my * * * executors to pay all taxes and insurance and keep said real estate in good condition and repair. * * *
>
> I give and bequeath unto my wife * * * $6x$ dollars * * * per month * * * out of the income, for and during the term of her natural life and if she desires she may occupy the house we are now living in so long as she may live, free of any rent. In the event she does not desire to occupy our home then my executors are to rent the same.

The balance of the income was given to the son during his life, and on his death, leaving no issue, the testator's wife was to have the entire income for the duration of her life, after payment of expenses, taxes, insurance, and repairs. Should the wife predecease the son, the entire income, less like deductions therefrom, was given to the son for his lifetime. The will also provided as follows:

> After the death of both my wife * * * and my said son * * * then I direct all my real estate to be sold at private or public sale * * * and a good and sufficient deed or deeds to be executed and delivered to the purchaser or purchasers thereof and out of the proceeds I direct a monument costing not less than * * * x dollars * * * to be erected on my burial lot * * * and the balance I give and bequeath unto my brothers and sisters or their legal representatives share and share alike, deducting however from the balance before distribution is made, * * * $40x$ dollars * * * the interest of which is to be used in keeping my burial lot * * * in good condition and repair.

The executors were given authority to do any and all things necessary to be done that the testator might or could have done if living.

The son died in 1925 and the wife died in 1927. In the latter year the orphans' court granted letters of administration to B as administrator d. b. n., c. t. a., who, by the law of Pennsylvania, was vested with the right and duty of making the sale or sales of the realty as directed in the testator's will (section 8536, Pennsylvania Statutes, 1920). One parcel of the real estate was sold by the administrator in 1928 and the entire sale price was received by him in that year. The sale resulted in a taxable profit of 19.02x dollars.

On June —, 1928, the administrator filed his first and partial account in the orphans' court showing 23.67x dollars available for distribution. The auditor appointed by the court found the account correct and so reported. His report was filed in the orphans' court in 1929, and distribution of the proceeds from the sale of the real estate was made in that year.

The profit derived from the sale has been held by the Income Tax Unit to be taxable income to the testator's estate. The question has now arisen whether the profit should be taxed to the estate or to the beneficiaries. In this connection it becomes important to determine whether, under the terms of the will, the land or the money proceeds were given to the testator's brothers and sisters or their legal representatives.

In *Dunda's Appeal* (64 Pa. St., 325), the court, in referring to the mandatory direction to sell contained in the will there under consideration, stated that "It broke the descent * * * and vested the estate in the executors, leaving to the legatees but an interest in the proceeds." In *Fahnestock* v. *Fahnestock et al.* (152 Pa. St., 56, 25 Atl., 313), it was stated that "A mere naked power to sell real estate does not operate as a conversion of it into personalty, but such power, coupled with a direction or command to sell, will have that effect." In *McClure's Appeal* (72 Pa. St., 414), the testator gave his real estate to his wife for life, or during her widowhood, and directed its sale on her death and distribution of the proceeds to his nephews and nieces. There it was held that "it is no exception to the rule that land directed to be sold and turned into money is to be considered as money, from the death of the testator, for all the purposes of his will, because the period of sale is remote, and the conversion can not be made until the time arrives." To like effect is *In re Thomman's Estate* (161 Pa. St., 444, 29 Atl., 84). In each of the last two cited cases it was held that the legacies payable out of the proceeds of the sale vested in his nephews and nieces immediately on the death of the testator.

As indicative of the absoluteness of the change from land into money, which results from a positive direction to sell, it has been held, where a creditor obtained a judgment against one to whom was bequeathed the proceeds of such a sale, the judgment having been obtained between the death of the testator and the sale, no judgment lien attached to the land since the legatee took no interest therein. (*Jones* v. *Caldwell*, 97 Pa. St., 42.) It has also been held, where a testator died owning realty in another State, that the direction to sell worked, in contemplation of the law, a conversion into money which was subject to Pennsylvania inheritance tax. (*In re Rambo's Estate*, 266 Pa., 520, 109 Atl., 671.)

The terms of the will in the case of *In re Dull's Estate* (222 Pa., 208, 71 Atl., 9) were much the same as those in the will now under consideration. In that case the court stated in part as follows:

> * * * The right of a testator to make land money, to effect his own purpose, is unquestionable; and it follows from this right that persons claiming property under a will directing its sale must take it in the character which the will imposes on it. This results not from the application of any artificial rule,

or any equitable doctrine, but solely because it is the testator's expressed desire. How could a testator make it more certain and conclusive that he did not intend his beneficiary to take his real estate, than by directing its sale? In such case it is not the law that works the conversion, but the will that directs it. * * *

The United States Supreme Court has decided a tax case involving a conversion of realty into personalty under the laws of the State of New York. The case (*Anderson, Collector*, v. *Wilson et al.*, 289 U. S., 20, Ct. D. 650, C. B. XII-1, 253) presented the question whether the difference between the value of real estate at the date of death of the testator and the proceeds realized upon a sale by the testamentary trustees was deductible as a loss by the trust beneficiaries. The will contained a direction to sell the real estate and distribute the proceeds. The taxpayer contended that the fiduciaries had no title, but only a power in trust, and that subject to the execution of that power, the trust beneficiaries were the owners. The court stated in part as follows:

> * * * Under reiterated judgments of the highest court of New York they [the fiduciaries] are more than the donees of a power. They are the repositories of title. * * *
>
> Under the law of New York what passed to these executors [held to be trustees] was the title to the fee. By the will of this testator all his property real and personal * * * was to be converted into money. The five sons and daughters among whom the money was to be divided had no interest in the land, aside from a right in equity to compel the performance of the trust. * * * What was given to them was the money forthcoming from a sale. * * * Their interest in the corpus was that and nothing more.
>
> Our answer to the inquiry as to the meaning of the will comes close to being an answer to the inquiry as to the incidence of the loss. The taxpayer has received the only legacy bequeathed to him, and received it as it was given without the abatement of a dollar. What was bequeathed was an interest in a fund * * *. This alone was given, and that has been received. There has been no loss by the taxpayer of anything that belonged to him before the hour of the sale, for nothing was ever his until the sale had been made and the fund thereby created. A shrinkage of values between the creation of the power of sale and its discretionary exercise [meaning discretionary as to time of exercise] is a loss to the trust, which may be allowable as a deduction upon a return by the trustees. It is not a loss to a legatee who has received his legacy in full. * * *
>
> We hold that the trust, and not the taxpayer, has suffered the loss resulting from the sale of the Commercial Building, and it follows that where loss has not been suffered, there is none to be allowed. * * * His [the taxpayer's] capital was in the proceeds * * * and never in the land.

That case dealt with a loss, whereas here there was a gain. The governing principle, however, is the same.

In *Helvering, Commissioner*, v. *Pardee et al., Trustees* (290 U. S., 365 [Ct. D. 769, page 151, this Bulletin]), the testator gave to his wife an annuity, payable at all events, and so not dependent upon income of the trust estate. The action of the Commissioner in refusing to allow as a deduction for Federal income tax purposes the annuity payments made to the wife was sustained. The court held that she was an ordinary legatee and stated that "Payments to her were not distribution of income; but in discharge of a gift or legacy."

In the present case the will of the testator contained an unconditional direction or order that the real estate be sold and the proceeds distributed to his brothers and sisters or their legal representatives. What he gave them was the money proceeds derived from the sale of the land. The realty was converted into personalty at the time of the testator's death and the money proceeds received by the beneficiaries were paid to them as money bequests, which are not subject to Federal income tax. Accordingly, no taxable gain was realized by the beneficiaries.

In view of the foregoing, it is held that the gain realized from the sale of the realty was properly taxed to the testator's estate.

ARTICLE 862: Method of computation of net income and tax. XIII-1-6585 Ct. D. 769

INCOME TAX—REVENUE ACTS OF 1924, 1926, AND 1928—DECISION OF SUPREME COURT.

1. NET INCOME—TRUST OR ESTATE—DEDUCTION—AMOUNT DISTRIBUTED TO WIDOW—BENEFICIARY DISTINGUISHED FROM PURCHASER OF ANNUITY.

Where a widow accepts the provisions of her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights, she does not become the purchaser of an annuity, but is a beneficiary of the trust within the meaning of section 219 (a)(2) and (b)(2) of the Revenue Acts of 1924 and 1926 and sections 161 and 162 of the Revenue Act of 1928, and the trustees are entitled to deduct the income distributed.

2. SAME—LEGATEE DISTINGUISHED FROM BENEFICIARY OR PURCHASER OF ANNUITY.

Where a widow elects to accept, in lieu of her statutory rights, an annuity provided by her husband's will, which is payable at all events and does not depend upon income from the trust estate, she becomes an ordinary legatee, and the trustees are not entitled to deduct the amounts so paid.

3. CASES REVERSED IN PRINCIPLE.

Warner v. *Walsh* (15 Fed. (2d), 367 [T. D. 4257, C. B. VIII-1, 245]), *United States* v. *Bolster* (26 Fed. (2d), 760 [T. D. 4258, C. B. VIII-1, 247]), and *Allen* v. *Brandeis* (29 Fed. (2d), 363 [T. D. 4256, C. B. VIII-1, 243]) reversed in principle.

SUPREME COURT OF THE UNITED STATES.—NOS. 75, 76, 77, AND 78.—OCTOBER TERM, 1933.

75. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Julia Butterworth et al., Trustees Under the Will of William B. Butterworth, Deceased.*

76. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Fidelity-Philadelphia Trust Co., Trustee Under the Will of William L. DuBois, Deceased.*

77. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Frank Pardee et al., Trustees Under the Will of Calvin Pardee.*

On writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

78. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Woodward.*

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 11, 1933.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the court.

These causes demand construction and application of the provisions of section 219, Revenue Act of 1924 (ch. 234, 43 Stat., 253, 275 (U. S. C., Title 26, section 960) (copied in the margin[1]), which lay a tax upon "the income of estates or of any kind of property held in trust," and direct that (b)(2) "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *" Also, the identical provisions of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 32, 33); and the substantially similar ones of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 838, sections 161 and 162).

In each cause the Commissioner of Internal Revenue assessed the portion of the income from the trust created by the husband's will which had been paid to the widow. The trustees claimed credit therefor. The Board of Tax Appeals approved the assessments. The Circuit Courts of Appeals held otherwise.

Causes Nos. 75, 76, and 78 involve the same point of law. The undisputed facts are similar and it will suffice to state those of No. 75. The record in No. 77 presents another question and the facts there will be set out.

No. 75.

William B. Butterworth, resident of Pennsylvania, died October 5, 1921. After certain bequests, his will gave the residue of the estate to respondents as trustees, with directions to pay the net income to the widow. She accepted under the will and surrendered the rights granted her by the State laws. During 1924 and 1925 the trustees paid her the income from the trust. The aggregate of these and antecedent payments was less than the estimated value of her statutory rights in the estate. In order to ascertain the taxable income of the trust, the respondents claimed the right to deduct from the gross amount payments made to the widow. The Commissioner denied this and the Board of Tax Appeals approved his action. The court below reversed the judgment.

Prior to *Warner* v. *Walsh* (15 F. (2d), 367), *United States* v. *Bolster* (26 F. (2d), 760), and *Allen* v. *Brandeis* (29 F. (2d), 363), the Commissioner ruled that distributions from the income of a trust estate to the widow who elected to take under her husband's will in lieu of her statutory interest were taxable to her. These cases held that by relinquishment of her rights, she came to occupy the position of the purchaser of an annuity. They decided that payments to her were not subject to taxation until her total receipts from the trust estate amounted to the value of what she relinquished—her alleged capital. Thereafter, in similar cases, the Commissioner refused to give credit to the trustee for such payments and thus the present causes arose.

We can not accept the reasoning advanced to support the three cases just cited. The evident general purpose of the statute was to tax in some way the whole income of all trust estates. If nothing was payable to beneficiaries, the income without deduction was assessable to the fiduciary. But he was entitled to credit for any sum paid to a beneficiary within the intendment of that word, and this amount then became taxable to the beneficiary. Certainly, Congress did not intend any income from a trust should escape taxation unless definitely exempted.

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[1] Revenue Act of 1924 (ch. 234, 43 Stat., 253, 275):

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; * * *.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year.

Is a widow who accepts the provisions of her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights a beneficiary within the ambit of the statute? We think she is. It is unnecessary to discuss her rights or position under other circumstances. We are dealing with a tax statute and seeking to determine the will of Congress.

When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity. For reasons satisfactory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated.

The trustees in Nos. 75, 76, and 78 were entitled to the credits claimed and the judgments of the courts below therein must be affirmed.

No. 77.

Calvin Pardee, a resident of Pennsylvania, died March 18, 1923. His will provided—"I also give unto my said wife an annuity of fifty thousand dollars ($50,000), to be computed from the date of my decease and to be paid in advance in quarterly payments." The total amount paid by the trustees to the widow under the will during the tax years 1924 and 1925 and prior thereto did not aggregate the value of the interest to which she would have been entitled had she declined to take under the will. When computing the taxable income of the estate the trustees deducted the amounts paid to the widow, claiming credit therefor under section 219. The Commissioner's refusal to allow this was sustained by the Board of Tax Appeals. The court below ruled otherwise.

The annuity provided by the will for Mrs. Pardee was payable at all events. It did not depend upon income from the trust estate. She elected to accept this in lieu of her statutory rights. She chose to assume the position of an ordinary legatee. Section 213(b)3, Revenue Act of 1924 (ch. 234, 43 Stat., 253, 267, 268), exempts bequests from the income tax there laid. Payments to Mrs. Pardee by the fiduciary were not necessarily made from income. The charge was upon the estate as a whole; her claim was payable without regard to income received by the fiduciary. Payments to her were not distribution of income; but in discharge of a gift or legacy. The principle applied in *Burnet v. Whitehouse* (283 U. S., 148 [Ct. D. 327, C. B. X-1, 366]) is applicable.

The Commissioner rightly refused to allow the credits claimed by the trustee and the judgment of the court below must be reversed.

ARTICLE 862: Method of computation of net income and tax.

REVENUE ACT OF 1928.

Widow electing to take under husband's will. (See Mim. 4146, page 93.)

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 203.—NET INCOME OF LIFE INSURANCE COMPANIES.

ARTICLE 975: Other deductions. XIII-24-6848
Ct. D. 837

INCOME TAX—REVENUE ACT OF 1928—DECISION OF SUPREME COURT.

1. GROSS INCOME—DEDUCTIONS—LIFE INSURANCE COMPANY—CONSTITUTIONALITY.

Section 203(b) of the Revenue Act of 1928 is constitutional and does not lay a direct tax upon property nor upon its rental value.

2. DEDUCTION—DEPRECIATION—LIFE INSURANCE COMPANY.

A life insurance company, under section 203(a)7 of the Revenue Act of 1928, is not entitled to deduct depreciation on all furniture and fixtures, but only on such as are used in connection with its investment business.

SUPREME COURT OF THE UNITED STATES.

Rockford Life Insurance Co., petitioner, v. *Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 21, 1934.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the court.

This case involves the validity of a deficiency assessment of 1929 income taxes made under the Revenue Act of 1928. Section 202 defines gross income to be that received from interest, dividends and rents. Section 203(a) defines net income to be the gross less specified deductions including (5) "Investment expenses," (6) "Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company * * *," and (7) "A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence." Subsection (b) provides no deduction shall be made under (a) (6) and (7) "on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied." (45 Stat., 842–844.)

During 1929 petitioner owned a building all of which it used. It received $15 rent for use of the premises and in its return included that amount as a part of gross income. It did not add any sum on account of rental value of the building. Nevertheless, it deducted expenses chargeable to the building, amounting to $4,033.05. The Commissioner disallowed the deduction. Petitioner also deducted from gross $1,783.02 to cover depreciation on all furniture and fixtures. The Commissioner held the deduction allowable only in respect of such as were used in connection with the company's "investment business." That phrase may be taken to include activities relating to interest, dividends and rents constituting the income taxed as distinguished from its "underwriting business" which embraces its other activities. There being no allocation, the Commissioner apportioned depreciation on the ratio of investment income, $123,248.44, to total income, $751,147.77. This reduced the deduction to $292.56. These adjustments resulted in a finding of deficiency of $607.53. Following its earlier decisions, the Board of Tax Appeals held petitioner entitled to deduct expenses chargeable to the building and depreciation of all its furniture and fixtures. On that basis it found an overpayment of $750.05. The Circuit Court of Appeals reversed. (67 F. (2d), 213.)

The ruling of the lower court disallowing deduction of expenses chargeable to the building is sustained on the authority of *Helvering* v. *Independent Life Insurance Co.*, decided this day [Ct. D. 839, page 302, this Bulletin].

The other question presented for decision is whether petitioner is entitled to deduct depreciation on all furniture and fixtures or only such part as fairly may be attributed to the income taxed. Petitioner raises no question as to the method employed for making the apportionment, but insists that the "reasonable allowance" granted by section 203(a)7 extends to all property and includes depreciation of all furniture and fixtures. It refers to the language of the corresponding provision in the Revenue Act of 1916 which permits deduction of "a reasonable allowance for the exhaustion, wear and tear of property *arising out of its use or employment in the business or trade*" and to similar language in the Revenue Act of 1918.[1] It emphasizes absence from the Act of 1921 and later ones of the words above italicized. It argues that the change of language, made applicable to life insurance companies, shows that Congress intended to permit them to deduct depreciation of all property without regard to its use. The constructions put upon provisions in measures that did not limit income to be taxed, as did later Acts, are of no value as guides to the meaning of the clause under consideration. In reason the cost of depreciation, like other items of expense to be deducted, ought to be limited to that related to the income taxed. Allowance of deduction of expenses incurred for the collection of premiums or in respect of other income not taxed would be hard to justify. In absence of specific declaration of that purpose, Congress may not reasonably be held to have intended by that means further to reduce taxable income of life insurance companies.

There is adequate evidence that Congress intended to limit deductions of expenses to those related to the taxed income. (*Helvering* v. *Independent Life Insurance Co.*, supra.) In the reports of committees having in charge the Act of 1921 in which first appeared the language under consideration, section 203(a)7, it is said: "The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income."[2] Section 203(a)5, by restricting deductions to investment expenses, indicates purpose to exclude those not related to investment income. Section 203(b), by condition imposed, similarly restricts deductions of real estate expenses. The language under consideration opposes deduction of unrelated expenses and is in harmony with the construction for which the Commissioner contends. The significance of the word "reasonable" qualifying allowance need not be limited to the amount to be ascertained. But having regard to the context and probable purpose of the provision it rightly may be construed to limit the ascertainment of depreciation to the property that is used in connection with the company's investment business. The construction put upon the statute by the Commissioner and Circuit Court of Appeals is sustained.

Affirmed.

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 272.—PROCEDURE IN GENERAL.

ARTICLE 1171: Assessment of a deficiency. XIII-3-6601 Ct. D. 773

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

BOARD OF TAX APPEALS—JURISDICTION.

A letter stating that a deficiency in tax for 1928 is due but that assessment thereof is barred by the statute of limitations and requesting payment of an amount which had been erroneously refunded, does not constitute the determination of a deficiency from which the taxpayer may appeal to the Board of Tax Appeals. In dismissing the appeal it was not necessary for the Board to hear evidence on respondent's motion to dismiss, to make findings of fact, or to hand down an opinion.

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[1] The Revenue Act of 1916, section 12(a) (39 Stat., 768); 1917, section 4 (40 Stat., 302); Revenue Act of 1918, section 234(a)7 (40 Stat., 1078).

[2] Sixty-seventh Congress, first session, Senate Report No. 275, page 20. See also House Report No. 350, page 14.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Russell Tyson, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of order of the United States Board of Tax Appeals.

Before ALSCHULER, EVANS, and SPARKS, Circuit Judges.

[June 29, 1933.]

OPINION.

EVANS, Circuit Judge: This appeal is from an order of the United States Board of Tax Appeals dismissing, for want of jurisdiction, petitioner's petition for review of the Commissioner's (so-called) assessment of his 1928 income tax.

The facts: Petitioner's income tax for the calendar year 1928 was fixed by the Commissioner at $22,933.32. This amount petitioner promptly paid. Subsequently, a claim for a refund was filed and allowed. The amount thereof, to wit, $2,063.29 and interest thereon, was paid to petitioner by respondent. Thereafter, Commissioner became convinced that petitioner's tax was greater than the amount assessed against him. As the time fixed by statute in which a deficiency tax might be assessed against the petitioner had expired, the Commissioner wrote him a letter demanding the payment of the amount of the refund above mentioned. The taxpayer made reply thereto which brought forth a letter from the deputy commissioner, dated June 11, 1931, which is set forth in full in the margin.[1]

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[1] TREASURY DEPARTMENT,
Washington, June 11, 1931.

MR. RUSSELL TYSON,
53 West Jackson Boulevard,
Chicago, Ill.

SIR: Reference is made to your letter dated May 23, 1931, addressed to the collector of internal revenue, Chicago, Ill., in reply to a letter from that office dated May 19, 1931, in which you were requested to forward your certified check for $2,210.43 to cover an erroneous refund of income taxes allowed you for the year 1928, in the amount of $2,063.20, plus accrued interest thereon of $147.14.

In reply to your statement that you can not comply with the collector's request, inasmuch as no reason or figures were furnished relative to the erroneous refund, you are advised as follows:

Your return for the year 1928 was audited by this office on the basis of a report of the internal revenue agent in charge, Chicago, Ill., and the overassessment of $2,063.29 was allowed, resulting principally from the elimination of income received from the estate of Sarah B. Tyson, in accordance with Treasury Decision 4258 (C. B. VIII–1, page 247).

Subsequent information indicates that you received dividends of $35,000 from the Minneapolis Leasehold Trust, of which amount 80.15 per cent, or $28,052.50, constituted taxable income. The adjustment of this income discloses a deficiency in tax of $5,301.50, computed as follows:

Ordinary net income as adjusted by revenue agent	$113, 058. 92	
Add: Income received from Minneapolis Leasehold Trust	28, 052. 50	
Ordinary net income revised by this office	141, 111. 42	
Brought forward		$141, 111. 42
Less:		
Dividends	70, 204. 45	
Personal exemption	1, 500. 00	
		71, 704.45
Net income subject to normal tax		69, 406. 97
Normal tax at 1½ per cent on $4,000		60. 00
Normal tax at 3 per cent on $4,000		120. 00
Normal tax at 5 per cent on $61,406.97		3, 070. 35
Surtax on $141,111.42		19, 882. 28
Tax at 12½ per cent on $28,860.74		3, 607. 60
Total		26, 740. 23
Less:		
Earned income credit	521. 25	
Tax paid at source	47. 45	
		568. 70
Tax liability		26, 171. 53
Tax assessed	22, 933. 32	
Allowed schedule No. 41155	2, 063. 29	
		20, 870. 03
Deficiency in tax		5, 301. 50

Taxpayer then petitioned the Board of Tax Appeals to review the action of the Commissioner evidenced by such letter (which action taxpayer described as the assessment of a deficiency tax). Respondent moved to dismiss the petition on the ground that the Board was without jurisdiction for the reason that no reviewable order had been entered by the Commissioner. The motion to dismiss was granted by a divided vote.

Petitioner raises two questions:

(1) Did the deputy commissioner's letter of June 11, 1931, constitute a determination of a deficiency tax from which the aggrieved taxpayer was privileged to appeal to the Board of Tax Appeals?

(2) Was the order of dismissal properly entered without any evidence to support respondent's motion to dismiss and without findings of fact or an opinion?

We are fully in accord with petitioner's counsel and the dissenting opinion when they assert that the form of the letter or the language of the Commissioner used therein should not control over the substance or the plain effect of its language. In other words, a form may be prescribed by the Commissioner to be used upon the assessment of a deficiency tax; nevertheless, an assessment may be made even though the prescribed form be not used. We likewise agree with petitioner's counsel that the sending of the notice of assessment in a letter, which was not registered, is of no significance in determining the effect of the contents of the inclosed letter. The use of registered mail merely starts the running of the 60-day statute of limitations, within which the aggrieved taxpayer may seek review of his grievance before the Board of Tax Appeals. But registration or failure to register in no way affects the character of the act of the Commissioner.

However, we can not agree with petitioner in his contention that the letter constituted an assessment of a deficiency tax. The last two paragraphs leave no legitimate room for argument. Instead of assessing a deficiency tax, the deputy commissioner said:

"The assessment of a deficiency tax is barred by the statute of limitations * * *."

Then the reason for the previous letter, which had produced the inquiry from the taxpayer, is given:

"* * * but inasmuch as the overassessment of $2,063.29 represents an erroneous refund, you are requested to forward to the collector your certified check, * * *."

That the Commissioner was not assessing a deficiency tax but was making a claim of an amount erroneously refunded is made certain by the succeeding paragraph:

"If check is not received in a reasonable length of time, the case will be referred to the General Counsel * * * for the institution of suit for recovery of the amount involved, *as provided by section 610 of the Revenue Act of 1928*."

Section 610 is entitled "Recovery of amounts erroneously refunded." It deals with the recovery of internal revenue taxes which have been erroneously refunded.

There is no merit to petitioner's contention that the Board of Tax Appeals should have heard evidence on respondent's motion to dismiss the taxpayer's petition for want of jurisdiction or have made findings of fact. The taxpayer's petition set forth the letter which he claimed was the assessment of a deficiency tax. That letter spoke for itself. Either it was an assessment of a deficiency tax or it was a statement of the Government's position respecting a claim it asserted under section 610. A determination of this—the only question presented—required no finding of fact.

The assessment of the deficiency in tax is barred by the statute of limitations but inasmuch as the overassessment of $2,063.29 represents an erroneous refund, you are requested to forward to the collector your certified check, drawn to the order of the Treasurer of the United States, in the amount of $2,210.43 which includes the erroneous interest of $147.14.

If check is not received in a reasonable length of time the case will be referred to the General Counsel, Bureau of Internal Revenue, for the institution of suit for recovery of the amount involved, as provided by section 610 of the Revenue Act of 1928.

Respectfully,

[Signed] J. C. WILMER,
Deputy Commissioner.

Likewise, we think petitioner's contention that the action of the Board should be reversed because no opinion was filed by the Board is rather hypercritical. The issue was a narrow one. One member, Goodrich, filed a dissenting opinion and fully stated his position. In his first sentence he said:

"It is my opinion that respondent's motion to dismiss should not be granted and therefore I dissent from the *opinion* of the majority of the Board which permits this order of dismissal to be entered."

Evidently he considered the order of dismissal to be an opinion in and of itself.

In approving the action of the Board in dismissing the petition it is hardly necessary to observe that we are not approving of the merits of the Government's claim under section 610. The merits of that controversy will be determined when and if the respondent makes good its threat to sue. We are merely holding that the Board of Tax Appeals is an administrative body with limited jurisdiction; that its powers are prescribed by congressional enactment; that before its jurisdiction may be invoked, the Commissioner must have made an assessment of a deficiency tax. In other words, unless the Commissioner makes a reviewable order (in this case an assessment), no review from the order of the Board of Tax Appeals lies.

The order of dismissal is affirmed.

SECTION 275.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

ARTICLE 1201: Period of limitation upon assessment of tax. XIII–11–6695 G. C. M. 12742

REVENUE ACT OF 1928.

> A request for prompt assessment under the provisions of section 275(b) of the Revenue Act of 1928, filed before the income tax return of the decedent was made by the administrator, does not shorten the statutory period of limitation upon assessment and collection of the tax.

Inquiry is made whether a request for prompt assessment of income tax under the provisions of section 275(b) of the Revenue Act of 1928, filed before the return for a deceased taxpayer was made, shortens the period of limitation upon assessment and collection of the tax.

Under date of September 4, 1931, the administrator of the decedent's estate made a written request to the Commissioner for a determination and prompt assessment, under section 275(b) of the Revenue Act of 1928, of the tax liability of the deceased taxpayer for the year 1931. The request was received in the Bureau on September 8, 1931. The return of the decedent reporting income for the period January 1 to January 16, 1931, the date of death, was sworn to by the administrator of the estate on September 18, 1931, and was received in the collector's office on October 15, 1931. It will be noted that the administrator's request for determination and prompt assessment of the tax liability under the provisions of section 275(b) of the Revenue Act of 1928 was filed with the Bureau before the tax return for the period January 1 to January 16, 1931, was made by the administrator.

Section 275(b) provides that "In the case of income received during the lifetime of a decedent, * * * the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (*filed after the return is made*) by the executor, administrator, or other fiduciary representing the estate of such decedent, * * * but not after the expiration of two years after the return was filed." [Italics supplied.]

The positive requirement that the request be "*filed after the return is made*" is specifically imposed by law, not by a regulation, or by implication from the statute. Such a requirement must be given full force and effect and can not be waived by the Commissioner or any other officer. (See *Lucas* v. *The Pilliod Lumber Co.*, 281 U. S., 245, Ct. D. 266, C. B. IX-2, 396, and *Florsheim Bros. Dry Goods Co., Ltd.*, v. *United States*, 280 U. S., 453, Ct. D. 167, C. B. IX-1, 260.)

It is therefore held that the request for determination and prompt assessment of the decedent's tax liability for the period January 1 to January 16, 1931, filed before the return was made by the administrator, does not shorten the statutory period of limitation upon assessment and collection of the tax.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 276.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION—EXCEPTIONS.

Article 1201: Period of limitation upon assessment of tax.

REVENUE ACT OF 1928.

Instructions governing the execution of consent agreements. (See Mim. 4134, page 98.)

TITLE III.—AMENDMENTS TO 1926 INCOME TAX.

SECTION 507.—OVERPAYMENTS FOUND BY BOARD OF TAX APPEALS.

Section 507. XIII-5-6626
Ct. D. 778

INCOME AND PROFITS TAXES—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

Statute of Limitations—Waiver—Overpayment found by Board of Tax Appeals.

The refunding of an overpayment of 1920 income and profits taxes determined by the Board of Tax Appeals is barred under the limitation provisions of section 284(e) of the Revenue Act of 1926 as amended by section 507 of the Revenue Act of 1928, where neither the appeal to the Board nor claims for refund were filed by the taxpayer within four years from the date of the last installment payment of the tax. A petition filed with the Board is not such a waiver of the limitation period as to entitle the taxpayer to the benefits of section 284(g) of the Revenue Act of 1926.

DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Western Wheeled Scraper Co., a Corporation, plaintiff, v. *The United States of America.*

[September 9, 1933.]

OPINION.

BARNES, J.: This is an action by Western Wheeled Scraper Co. to recover $57,894.07, determined by the Board of Tax Appeals, by an order of redetermination promulgated November 28, 1928, to be an overpayment of tax by the plaintiff for the year 1920, which amount the Commissioner of Internal Revenue has refused to refund to plaintiff on the ground that no timely claim for refund was filed.

Plaintiff's declaration alleges that on March 15, 1921, it filed its income and profits tax return for the calendar year 1920, thereby disclosing an income and profits tax due from it in the sum of $160,970.73 for the calendar year 1920, which sum it paid to the United States collector of internal revenue at Chicago during the year 1921; that subsequent to the filing of its income and profits tax return, the Commissioner of Internal Revenue caused an examination of said return and an audit of plaintiff's books to be made, and as a result thereof said Commissioner determined and decided that plaintiff had underpaid its income and profits tax for the year 1920 in the sum of $5,437.61, and issued to the plaintiff on December 23, 1925, by registered mail, a notice of his final determination, which said notice stated that plaintiff was allowed 60 days from said date to appeal to the United States Board of Tax Appeals; that on February 13, 1926, plaintiff filed its petition with the United States Board of Tax Appeals; that a hearing was had on said petition by the United States Board of Tax Appeals, and as a result of said hearing the said United States Board of Tax Appeals, on January 29, 1929, determined and decided that plaintiff had overpaid its income and profits tax for the year 1920 in the sum of $57,894.03; that the United States of America, through its Commissioner of Internal Revenue, took no appeal to the United States Circuit Court of Appeals, as provided by law, from the said decision of the United States Board of Tax Appeals, and the said decision thereby became and was final; that by the filing of its said petition with the United States Board of Tax Appeals on February 13, 1926, it thereby, under the provisions of section 277(b) of the Revenue Act of 1924, waived the right to have the income and profits taxes due from it for its calendar year 1920 determined and assessed within five years from the date its income and profits tax return for said calendar year 1920 was due and was made, and that, under the provisions of section 507 of the Revenue Act of 1928, it became entitled to the refund of the said overpayment of $57.894.07; that on September 10, 1931, it filed with the Commissioner of Internal Revenue a claim for the refund of said overpayment of $57,894.07, and that on October 23, 1931, the Commissioner of Internal Revenue rejected said claim. A copy of the rejection of said claim is annexed to the declaration. The body of the letter of rejection is as follows:

"Your claim for refund of $57,894.07, income and excess profits taxes for the taxable year 1920, has been examined and will be rejected for the following reason:

"The claim is based upon the statements that 'The United States Board of Tax Appeals in its decision in this case, reported in 14 B. T. A., 496, held that taxpayer had made an overpayment of tax for the year 1920 of $57,894.07. This decision has now become final and taxpayer demands the refund under the provisions of section 507 of the Revenue Act of 1928. Taxpayer's petition was filed with the Board of Tax Appeals on February 13, 1926, within five years of the filing of the petitioner's 1920 income tax return.'

"You are advised that section 284(e) of the Revenue Act of 1926 amended by section 507 of the Revenue Act of 1928 reads as follows:

"'* * * Unless claim for credit or refund, or the petition, was filed within the time prescribed in subdivision (g) for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years (or, in the case of a tax imposed by this title, more than three years) before the filing of the claim, or the filing of the petition, whichever is earlier.'

"An examination discloses that your taxes for the year 1920 were paid in four installments, namely, on March 14, June 15, September 15, and December 15, 1921. No waiver for 1920 was filed prior to June 16, 1926, thereby excluding you from the benefits of the provisions of section 284(g) of the Revenue Act of 1926. Claims for refund were filed March 26, 1927, and May 16, 1928. Neither of these claims was filed within the applicable period of limitation. The petition in connection with your appeal to the United States Board of Tax Appeals was filed February 13, 1926, which was not within four years from the payment of the last installment of tax for the year 1920 as required by the provisions of section 284(e) of the Revenue Act of 1926 as amended by section 507 of the Revenue Act of 1928.

"Accordingly, your claim for refund will be rejected in full.

"The rejection of the claim will officially appear on a schedule to be approved by the Commissioner."

The defendant filed the general issue and the statute of limitations. The statute of limitations is pleaded in the following language:

"* * * The defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because the defendant says the supposed cause of action mentioned in the declaration is barred under the limitation provisions of section 284(e) of the Revenue Act of 1926, as amended by section 507 of the Revenue Act of 1928; the supposed cause of action is for the recovery of an overpayment of income and profits taxes for the year 1920, found or determined by the Board of Tax Appeals; that the taxes of the plaintiff for the year 1920 were paid in installments, the last installment having been paid on December 15, 1921; that the petition of the plaintiff in the proceeding before the Board of Tax Appeals, in regard to its 1920 taxes, was filed on, to wit, February 13, 1926; that under section 284(e) of the Revenue Act of 1926, as amended by section 507 of the Revenue Act of 1928, an overpayment of tax determined by the Board of Tax Appeals is refundable if claim for refund, or if the petition to the Board, was filed within four years after the payment of the tax, or within the time allowed by subdivision (g) of section 284 of the Revenue Act of 1926; that under subdivision (g) of the Revenue Act of 1926, a taxpayer was allowed until April 1, 1927, or until four years from the time the tax was paid, to file a claim for refund of taxes for the year 1920, if the taxpayer on or before June 15, 1926, filed a waiver of the statutory limitation period upon the determination and assessment of the 1920 taxes; that no such waiver was filed by the plaintiff in this cause, and, accordingly, the applicable limitation period upon the filing of his claim for refund, or his petition with the Board of Tax Appeals, was four years from the date of the payment of the taxes; that the petition with the Board was filed on February 13, 1926, and the only claims for refund were filed after four years from the time the taxes were paid; and that, accordingly, this action is barred."

The court has examined and considered the briefs of counsel, and is of the opinion that the foregoing special plea of the statute of limitations is well founded in law and that it is supported by the evidence in the record.

Accordingly, there should and will be a finding and judgment for the defendant.

Counsel may present drafts of findings of fact and conclusions of law and judgment order, upon notice.

TITLE IV.—ADMINISTRATIVE PROVISIONS.

SECTION 606.—CLOSING AGREEMENTS.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. XIII-9-6679 Mim. 4149

Closing agreements relating to tax liability under section 606 of the Revenue Act of 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 9, 1934.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Other Officers and Employees Concerned:

Reference is made to section 606 (a) and (b) of the Revenue Act of 1928 which provides:

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) *Finality of agreements.*—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Effective immediately, no final closing agreement (Form 866) or final closing agreement as to specific matters (Form 906) in respect of any internal-revenue tax will be executed and submitted for the approval of the Secretary or the Under Secretary under the provisions of section 606, except where there appears to be advantage in having the case permanently and conclusively closed. This will usually occur in cases where in the settlement of disputed issues the taxpayer has made certain concessions because of others made by the Government, thereby making a final closing agreement necessary in order to bar further action by either party with respect to the concessions made. Where, however, the taxpayer is able to show sound business or policy reasons for desiring a closing agreement and it is shown that the Government will sustain no disadvantage through the acceptance of the agreement, an application for a closing agreement will not be rejected solely because no advantage to the Government is apparent. Examples of cases of this class are: Estates, where the fiduciary desires a final closing agreement in order that he may be discharged by the court; corporations which are in dissolution and desire a final closing agreement in order to wind up their affairs; cases where in connection with the taxpayer's financial affairs creditors demand evidence of the final closing of the taxpayer's tax liability; and cases where taxpayers desire to follow the consistent practice of closing their returns from year to year.

In each case where a closing agreement is recommended for approval, a memorandum will be prepared setting forth all the issues involved, the adjustments made through agreement with the taxpayer or otherwise in respect of each of such issues, and citing or stating the authority (law, regulation, decisions, etc.), or other reasons for the adjustments, and the reason or reasons why the agreement should be executed under the policy stated in the preceding paragraph of this mimeograph. Any other relevant facts or circumstances, or general information which may aid the Secretary in his exercise of independent judgment in the matter, should be stated.

In each case where a taxpayer requests a final closing agreement in connection with negotiations for the adjustment and settlement of his tax liability, it should be made clear to him that such an agreement is subject to the approval of the Secretary or the Under Secretary.

Where a final closing agreement is recommended for approval, the administrative file, the agreement, and the memorandum relating to it will be routed to the appropriate persons for review. After the agreement and the memorandum are approved within the Unit or office in which they are prepared and such approval has been indicated by the head of the Unit or office, the entire file will be forwarded to the proving section of the Income Tax Unit for recording and other necessary action. The agreement and the original and one copy of the memorandum will then be forwarded to the office of the special deputy commissioner. After signature of the agreement it will be transmitted to the Secretary of the Treasury for approval.

GUY T. HELVERING,
Commissioner.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. XIII-15-6743 Ct. D. 812

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

1. SUIT—CLOSING AGREEMENT—VALIDITY—ABSENCE OF CONSIDERATION.

A "closing agreement" under section 606 of the Revenue Act of 1928 constitutes a statutory bar to an action at law to recover any part of the taxes covered by the agreement (where there is no showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment made), even though there was no consideration for the agreement.

2. CLOSING AGREEMENT—VALIDITY—APPROVAL BY ACTING SECRETARY.

Approval of a "closing agreement" by the Acting Secretary of the Treasury constitutes an approval by the Secretary of the Treasury within the meaning of section 606 of the Revenue Act of 1928.

3. DECISION AFFIRMED.

Decision of the District Court, District of Rhode Island (3 Fed. Supp., 161, Ct. D. 705, C. B. XII-2, 143) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

William F. Perry et al., Trustees, plaintiffs, appellants, v. *Frank A. Page, Collector, defendant, appellee.*

Appeal from the District Court of the United States for the District of Rhode Island.

Before WILSON, MORTON, and ANDERSON, Judges.

[November 10, 1933.]

OPINION.

WILSON, J.: This is an appeal from judgment of the District Court of Rhode Island in a suit by the plaintiffs as trustees of the estate of the late Frank B. Hazard to recover a sum alleged to have been erroneously assessed and collected of the plaintiffs as income taxes for the year 1927. Jury trial was waived.

The district court found that the tax was erroneously assessed and collected as the income of the estate was, by the will of the deceased, to be used exclusively for charitable purposes. The defense was that a closing agreement, so called, under section 606 of the Revenue Act of 1928, which it sets forth in its plea, was duly approved by the Secretary of the Treasury.

The plaintiffs in reply set up in avoidance of the effect of the agreement that (1) since the Government was without right to assess and collect the tax, there was no consideration on its part for the agreement of the taxpayers that they would not claim any refund; and (2) the agreement was never approved by the Secretary of the Treasury or the Undersecretary, as required by section 606; and (3) that it was entered into through malfeasance and misrepresentation of the Commissioner of Internal Revenue.

The district court made a special finding that there was no malfeasance or misrepresentation on the part of the Commissioner. The only issues left were whether there was consideration for the agreement, and, if so, or none was required, whether the agreement was approved by the Secretary of the Treasury or some one duly authorized to act for him. It appears that it was approved by Henry Herrick Bond, Acting Secretary.

We think the district court correctly found that since the Government had no right to collect the tax, it gave up nothing by entering the agreement and there was no consideration on its part, if the agreement is to be treated as a contract.

The Government can not be sued without its consent. It may extend or shorten the period within which a suit may be brought. The former may be done by agreement. The right of a taxpayer to sue to recover an alleged overpayment, under section 606 of the Revenue Act of 1928, may be ended by a closing agreement. As to the finality of such agreements, section 606 provides:

"(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

"(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

If entered into between the taxpayer and the Commissioner voluntarily, and approved by the Secretary of the Treasury or Undersecretary, its effect is regulated by statute and takes on legal consequences by virtue of the statute, and not under the law of contracts, but under well-settled principles of law which permit a sovereign State to control and designate when and under what conditions it may be sued. The legislative determination of these conditions is final, and is not dependent upon a consideration as in case of a release of claims under the law of contracts. (*Aetna Life Insurance Co.* v. *Eaton*, 43 Fed. (2d), 711 [Ct. D. 225, C. B. IX–2, 263]; *Bankers' Reserve Life Co.* v. *United States*, 42 Fed. (2d), 313, 316 [Ct. D. 209, C. B. IX–2, 257].) In the former case the court said:

"We are clear that by the closing agreement the parties in fact intended to settle all questions relating to the validity of the assessments for 1923 and 1924, and that, irrespective of this, the Revenue Act made the agreement a statutory bar."

And in the latter:

"Congress thus expressly authorized the parties by agreement to shorten the period of limitation for the determination, assessment and collection of a tax and for the filing of claims for refund, abatement, credit, and the institution of suit for the recovery of the amount paid."

The statute, section 606, is, we think, conclusive as to the effect of such agreements.

The only question left for consideration is whether such an agreement approved by an Acting Secretary is valid when the statute requires such agreement to be approved by the Secretary or Undersecretary.

The taxpayers contend that since the statute expressly provides that only the Secretary and Undersecretary may sign, it was the intent of Congress that no other official could sign or act for the officials named. It is argued that because the Act when originally proposed in the House of Representatives contained only the name of the Secretary as an official who could approve such agreements, and the Senate amended by inserting the name of the Undersecretary, or an Assistant Secretary, but before the final passage the provision for the approval of an Assistant Secretary was stricken out, therefore only the officials left in, namely, the Secretary or Undersecretary, could approve such agreements.

The agreement was not approved by an Assistant Secretary acting as such; but by Henry Herrick Bond, Acting Secretary of the Treasury. The case is settled by determining whether an Assistant Secretary may act as Secretary.

Section 4 of Title 5, U. S. C. A., provides:

"In case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease."

In *John Shillito Co.* v. *McClung* (51 Fed., 868, 871) the court said:

"It having been found impossible for the heads of departments to perform, in person, all the duties imposed on them by law, the office of assistant secretary was created for all the departments. In the Treasury Department, two of such assistant secretaries are required to be appointed by the President, by and with the advice and consent of the Senate. 'The Assistant Secretaries of the Treasury shall examine letters, contracts, and warrants prepared for the signature of the Secretary of the Treasury, and perform such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law.' (Section 245, Rev. St.) By section 161, Id., 'the head of each department is authorized to prescribe regulations, not inconsistent with the law, for the distribution and performance of its business;' and 'in case of the death, resignation, absence, or sickness of the head of any department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section 179, perform the duties of such head until a successor is appointed or such absence or sickness shall cease.' (Section 177, Id. * * *.) It admits of no question that under the foregoing provisions the Secretary of the Treasury could have assigned to the Assistant Secretary or Secretaries of the Treasury Department the duty of deciding appeals from assessments made by collectors of customs duties; nor can it be doubted that, in the absence or sickness of the head of that Department, such assistant secretaries could have lawfully performed his duties in respect to such matters which have to be determined, settled, and adjusted in that Department. The reply does not negative the fact that the Assistant Secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal, nor that there was no absence or sickness of the head of the Department which devolved the duty upon the Assistant Secretary. Under such circumstances, is the want of authority to be assumed, or will the law raise a presumption to the contrary in support of the official act? We are clearly of the opinion that the latter is the rule to be applied." (*United States* v. *Peralta*, 19 How., 347; *Parish* v. *United States*, 100 U. S., 500; *Chadwick* v. *United States*, 3 Fed. Rep., 756; *United States* v. *Adams*, 24 Fed. Rep., 348.)

(Also see: *Keyser* v. *Hitz*, 133 U. S., 138; *Bowling* v. *United States*, 299 Fed., 438; *Ex Parte Tsuie Shee et al.*, 218 Fed., 256; *In re Jem Yuen*, 188 Fed., 350; *Marsh* v. *Nichols et al.*, 128 U. S., 605; *Norris* v. *United States*, 257 U. S., 77.)

In *United States* v. *Adams* (24 Fed., 348), it was held that where authority is given for the head of a department to prescribe the duties to be performed by an assistant, or where the law provides that in case of certain conditions arising, such as death, resignation, absence, or sickness, an assistant shall, unless otherwise directed by the President, perform the duties of the head of the department until the disability of the head ceases, and it appears that if an assistant has to perform such duties as Acting Secretary, the presumption is, unless the contrary is made to appear, that the conditions named in the statute had arisen, or that the head of the department had prescribed the duties to be performed by the assistant, who was acting according to the directions and with the authority of the head of his department. (R. S., sections 245, 161, and 177.)

In *Chadwick* v. *United States* (3 Fed., 750, 756) the court said:

"Assistant Secretaries in the Treasury Department are appointed under the authority of an Act of Congress, with power to perform such duties in the office of the head of the Department as he may prescribe, or as the law directs. (Rev. St., section 245.) Extensive duties are assigned to such, and in case of the death, resignation, absence, or sickness of the Secretary, the proper assistant is required by law, unless otherwise directed by the President, to perform all the duties of the Department until a successor is appointed, or such absence or sickness shall cease. (Rev. St., section 177.) Nothing appearing to the contrary, the legal presumption is that the certificate was made in pursuance of a lawful authority, and, being under the seal of the Department, it is sufficient to show that the ruling of the court is correct."

We think the rule must be applied here and the presumption is that when Henry Herrick Bond approved the settlement agreement in this case as Acting Secretary, the Secretary of the Treasury was either absent from Washington or was ill, or had specifically assigned this duty to him, in which case the first Assistant Secretary was authorized to act for him, and could approve the agreement as Acting Secretary.

The agreement, therefore, must be held to be binding on both parties and by force of section 606 prevents the plaintiffs from recovering against the collector in this case.

The judgment of district court is affirmed.

SECTION 612.—REPEAL OF SECTION 1106(a) OF 1926 ACT.

SECTION 612.

REVENUE ACT OF 1928.

Effect of repeal of section 1106(a) of the Revenue Act of 1926. (See Ct. D. 804, page 318.)

TITLE V.—GENERAL PROVISIONS.

SECTION 701.—DEFINITIONS.

ARTICLE 1312: Association. XIII-10-6686
G. C. M. 12605

REVENUE ACT OF 1928.

Where a syndicate does business in an organized capacity, the net income is distributable among the members on the basis of the proportionate share which each has invested in the business, the manager has similar or greater powers than the directors in a corporation, and the activities are carried on as a business enterprise, the syndicate is an association for income tax purposes.

An opinion is requested relative to the taxable status for Federal income tax purposes, under the Revenue Act of 1928, of a syndicate operating under a written agreement, the essential provisions of which are in substance as follows:

The M Company was named as the manager of the syndicate, the purpose of which was the buying and selling of securities. The interest of each member of the syndicate was represented by the amount in dollars subscribed by him. The manager was authorized to buy and sell securities from time to time and to open up a syndicate account on its books. The members were to participate in the purchases and sales in proportion to their interest in the syndicate. The manager had the "sole discretion, management, and entire control of the business and transactions of the syndicate" and had full authority to buy and sell securities in its "uncontrolled discretion." The manager could become a member of the syndicate and deal and contract with itself for the syndicate account. It had exclusive custody of the funds of the syndicate and could use them as it saw fit in the operation thereof. The life of the syndicate was for a period of one year, but the manager could discontinue the operations at any time. At the expiration of the syndicate the manager was to be paid an amount of — per cent of the net profits and the balance was to be distributed pro rata among the members. The manager was not liable for any error in judgment or for any mistake of law or fact but only for gross negligence or willful default. The agreement specifically states that nothing in it shall constitute the members attorneys with, or agents for, one another or for the manager, and in no event were the members to contribute more than the interest subscribed for by them. The agreement was made binding upon the heirs, executors, administrators, successors, and assigns of the parties signing it.

The syndicate agreement contains the following provision:

Nothing herein contained or otherwise arising shall constitute the subscribers partners with or agents for one another or for the managers, or render them, or any of them, liable to contribute in any event more than the interest in the syndicate subscribed for by him. * * *

The syndicate did not have a name, office, or letterhead, and was not listed in the telephone or city directories. Organization meetings were not held, shares of stock or certificates of interest were not issued, and the agreement did not contain any provision for the transfer of the beneficial interests, although the agreement did not prohibit such transfer. The stock purchased by the manager was not held in the syndicate name but was left in a "street" name.

The question presented is the proper classification of the syndicate for income tax purposes. There are four possible classifications, namely, an association, a trust, a partnership, or a joint venture.

In *Wild* v. *Commissioner* (62 Fed. (2d), 777 (C. C. A. 2)), the court had under consideration an organization very similar to the instant syndicate. The court held that it was neither a partnership nor a joint venture. Among other things the court said:

* * * An arrangement by which a number of persons put their property into the hands of one for its entire management, is certainly nearer to an *association, or an associate trust*. The line may be hard to draw, but the extremes are patently different. * * * [Italics supplied.]

In *Glenmore Securities Corporation* v. *Commissioner* (62 Fed. (2d), 780), which was a companion case to *Wild* v. *Commissioner*, supra, the same court held that the syndicate was *either an association or a trust.* These decisions eliminate two of the possible classifications, namely, partnerships and joint ventures. Accordingly, the real issue is whether the syndicate is a trust or an association.

It is contended by the syndicate that it is neither a trust nor an association and in substantiation of this contention the following excerpt is quoted from *Hecht et al., Trustees,* v. *Malley* (265 U. S., 144, T. D. 3595, C. B. III-1, 489):

The word "association" appears to be used in the Act in its ordinary meaning. It has been defined as a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." * * * Other definitions are: "In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation." * * *

The court, in quoting these definitions of an association, clearly did not mean to lay down the rule that in order for an organization to be classified as an association it must be an *exact replica* of a corporation with the single exception of not having a charter. The court makes this clear in the first sentence of the excerpt quoted above: "The word 'association' appears to be used in the Act in its ordinary meaning." One of the "ordinary" meanings of the term "association" is as follows: "a body of persons invested with some, yet not full, corporate rights and powers." (Anderson, L. D., quoting *State* v. *Taylor*, 7 S. D., 533, 64 N. W., 548.) Another definition is: "a word of vague meaning, used to indicate a collection of persons who have joined together for a certain object." (*People* v. *Brander*, 244 Ill., 26, 91 N. E., 59.) Furthermore, in *Hecht* v. *Malley*, supra, the court quotes the following definition: "An organized but unchartered body *analogous to but distinguished from a corporation.*" [Italics supplied.]

According to the last definition approved by the court there must be *distinguishing* characteristics as well as those which make it analogous to a corporation. At any rate, the plain inference to be drawn from the decision, taken as a whole, is that an organization should be classified as an association when it possesses the *essential* characteristics of a corporation.

In *Burke-Waggoner Oil Ass'n* v. *Hopkins* (296 Fed., 492, T. D. 3582, C. B. III-1, 1) the court stated:

* * * It is difficult to build an entity, so far as organizations for carrying on the business of the world is concerned, without there being some similarity between such organizations, but general similarities do not determine, either the character or the name thereof, both being dependent upon the *distinguishing characteristics* for definition and classification. [Italics supplied.]

In *Sears, Roebuck & Co. Employees' Savings and Profit-Sharing Pension Fund* v. *Commissioner* (C. C. A. 7) (45 Fed. (2d), 506) the court stated the *distinguishing characteristics* of a corporation as follows:

There are certain basic things that enter into the formation of all corporations: (1) A charter; (2) by-laws or rules; (3) members, who associate themselves together; (4) a governing board.

The court stated in simple language the essential and basic characteristics of a corporation. Did the syndicate here under consideration have these characteristics? A charter in an association is, of course, not required; the syndicate agreement constituted the by-laws and rules; the syndicate subscribers were its members and they were associated together; and the syndicate manager was its governing board. Thus the essential characteristics of a corporation were possessed by this syndicate with the single exception of a charter. Not only did it possess the essential characteristics mentioned in the above decision (except the charter), but in addition thereto it was an entity separate and distinct from the members composing it, and had a fund similar to the capital stock of a corporation. The manager's liability for its torts was similar to that of an officer of a corporation. The liability of the members was limited to the number of shares subscribed for by them, corresponding to the liability of stockholders in a corporation. In case of death, resignation, or incapacity of the manager, his successor was named by the subscribers of a majority in amount of outstanding shares, and the members were banded together in a business enterprise for the purpose of financial gain.

When the decision in *Hecht* v. *Malley*, supra, is read as a whole it will be found that another test was laid down by the court for determining the status of a trust for Federal income tax purposes, namely, *whether it was engaged in the carrying on of a business enterprise.* The court said:

We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation *for the purpose of carrying on business enterprises*, the trusts are to be deemed associations within the meaning of the Act of 1918; * * *. [Italics supplied.]

It is apparent from the decisions referred to above that judicial emphasis has been placed upon this test; in fact, it may be said that the question of whether the trust had a quasi corporate form, or whether the directors were associated together like the directors in a corporation, has been subordinated by the courts to the consideration of *whether the trustees were engaged in a business enterprise.*

In *Willis et al.* v. *Commissioner* (58 Fed. (2d), 121 (C. C. A. 9), Ct. D. 575, C. B. XI-2, 163) the court said:

* * * Simply stated, the question is, *did the trustees manage and operate the property in their charge as a business, with the purpose to accumulate a profit by the use of it*, or was their sole purpose, intended and pursued, to dispose of it as rapidly as possible, market conditions considered, and divide the proceeds among the beneficiaries? * * * [Italics supplied.]

In *White* v. *Hornblower et al.* (27 Fed. (2d), 777 (C. C. A. 1)), the court used the following language:

* * * The measure of control over the trust vested in the beneficiaries does not seem to be the determining factor, *but rather whether the trustees are conducting a business for profit or gain.* * * * [Italics supplied.]

In this case the court held that the trust was not an association *because its function was not to carry on a business enterprise* but merely to bring about its liquidation.

The case of *United States* v. *Neal* (28 Fed. (2d), 1022, certiorari denied, 278 U. S., 659), decided by the Circuit Court of Appeals for the First Circuit, can be explained only on the "business enterprise" theory. In that case the district court held that the trust there involved was not an association because it was an express trust and not an association under the Massachusetts law, the beneficiaries of the trust having no control over the activities of the trustees. The court of appeals reversed the decision of the lower court on the authority of *White* v. *Hornblower*, supra. The opinion of the court in that case definitely stated that the measure of control vested in the beneficiaries was not the determining factor, but *whether the trustees were conducting a business for profit or gain.* (See also *Little Four Oil & Gas Co.* v. *Lewellyn*, 35 Fed. (2d), 149, Ct. D. 118, C. B. VIII-2, 264; *Trust No. 5833, Security-First National Bank of Los Angeles*, v. *Welch*, 54 Fed. (2d), 323, Ct. D. 490, C. B. XI-1, 138; *Tulsa Mortgage Investment Co. et al.* v. *Commissioner*, 21 B. T. A., 735; *Mary L. Dutton et al.* v. *Commissioner*, 18 B. T. A., 1151; *Rochester Theatre Trust Estate* v. *Commissioner*, 16 B. T. A., 1275; *E. A. Landreth Co.* v. *Commissioner*, 11 B. T. A., 1, C. B. IX-1, 31; *Anderson Steam Vulcanizer Co.* v. *Commissioner*, 6 B. T. A., 737.)

In the instant case it is not disputed that the syndicate was engaged in the carrying on of a business enterprise. Therefore, under the "business enterprise" test it was clearly an association.

In the appeal of *Investment Trust of Mutual Investment Co. et al.* (27 B. T. A., 1322), the Board of Tax Appeals held that where a trust holds legal title to securities belonging to many beneficiaries, makes purchases and sales upon the order of a "managing company," and distributes income and profits to the beneficiaries upon the order of the "managing company," the trust is an association within the contemplation of the Revenue Act of 1928.

Under the regulations of the Bureau the syndicate must also be classified as an association. The decision in *Hecht* v. *Malley*, supra, was rendered in May, 1924. In October, 1924, Regulations 65, under the Revenue Act of 1924, were promulgated. Article 1504 of Regulations 65, which distinguishes between trusts and associations, provides in part as follows:

> * * * Operating trusts, whether or not of the Massachusetts type, in which the trustees are not restricted to the mere collection of funds and their payments to the beneficiaries, *but are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise*, are to be deemed associations within the meaning of the Act, regardless of the control exercised by the beneficiaries. [Italics supplied.]

On August 31, 1925, the article above quoted was amended and amplified by Treasury Decision 3748 (C. B. IV-2, 7), providing—

> * * * Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together *with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise*, the trust is an association within the meaning of the statute. [Italics supplied.]

The above matter was incorporated as a part of article 1504, Regulations 69, under the Revenue Act of 1926, article 1314, Regulations 74, under the Revenue Act of 1928, and in substantially the same language in article 1314, Regulations 77, under the Revenue Act of 1932.

Article 1312, Regulations 74, under the Revenue Act of 1928, which defines associations, provides:

Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, *which act or do business in an organized capacity*, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, *or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization.* * * * [Italics supplied.]

These regulations, which were specifically approved in *Trust No. 5833, Security-First National Bank of Los Angeles*, v. *Welch*, supra, and *Sloan et al.* v. *Commissioner* (63 Fed. (2d), 666 (Ninth Circuit)), prescribe three tests for associations, as follows:

(1) They must act or do business in an organized capacity;

(2) The net income must be distributed or distributable among the members on the basis of the proportionate share which each has invested in the business; and

(3) The trustee or trustees must have similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise.

Applying these tests to the facts in the instant case, this office is of the opinion that the syndicate is an association for income tax purposes.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SECTION 704.—TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

Section 704. XIII-8-6662
Ct. D. 787

INCOME TAX—REVENUE ACT OF 1928—DECISION OF COURT.

1. Trust—Association—Revocation of Specific Ruling by Treasury Decision and Regulations.

Where the Commissioner made a specific ruling in 1920 that the taxpayer was a trust rather than an association, and in 1924 published Bureau rulings and promulgated a Treasury decision and regulations which were inconsistent therewith, the latter amount to a revocation of the specific ruling within the meaning of section 704(a) of the Revenue Act of 1928, where the taxpayer had notice of the inconsistent provisions of the decision and regulations. Under the facts in the case, the taxpayer must be deemed to have had such knowledge prior to the filing of its return for 1924, and it is therefore subject to tax as an association for that year, even though the ruling of 1920 was not specifically revoked until 1927.

2. Decision Reversed.

Decision of the Board of Tax Appeals (26 B. T. A., 551) reversed.

3. Certiorari Denied.

Petition for certiorari denied October 16, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Commissioner of Internal Revenue, petitioner for review, v. *J. Henry Neal et al., Trustees of the First Peoples Trust.*

Appeal from Board of Tax Appeals.

Before BINGHAM, WILSON, and MORTON, JJ.

[June 5, 1933.]

OPINION.

BINGHAM, J.: This is a petition by the Commissioner of Internal Revenue to review a decision of the Board of Tax Appeals holding that there was no deficiency in the income tax of the respondents, trustees of the First Peoples Trust, for the year 1924.

The First Peoples Trust was formed October 28, 1919, by a declaration of trust. It began business on January 1, 1920, and, before the time came for it to file an income tax return, submitted to the Commissioner of Internal Revenue the question of its taxable status. December 2, 1920, the Commissioner wrote a letter to William Harold Hitchcock, secretary of the Peoples Trust, in which the following appears:

"In distinguishing a trust from an association for the purpose of taxation, this office has held that the fact of actual control by the beneficiaries must in each case govern. It appears from the affidavit of William Harold Hitchcock, secretary, that of a total issue of 19,411 first preferred, 19,411 second preferred, and 29,411 common shares that the trustees as individuals owned on September 8, 1920, an aggregate total of 96 first preferred, 96 second preferred, and 10,056 common shares. It is the opinion of this office that the ownership of such an amount of shares by the trustees is not sufficient to vest in them the actual control as beneficiaries. It is accordingly held that the First Peoples Trust is to be considered a trust for the purpose of Federal taxation."

Each year thereafter, including 1924, the respondents made out and filed an income tax return as a trust; and it was not until 1924 that they were notified that their organization was an association and subject to a capital stock tax, both the Commissioner and the respondents having until then considered the organization to be a trust and not an association.

On June 7, 1924, following the decision of the Supreme Court in *Hecht* v. *Malley* (265 U. S., 144 [T. D. 3595, C. B. III-1, 489]), of May 12, 1924, the Secretary of the Treasury approved and promulgated the following Treasury decision (3598), which was first published June 16, 1924:

"*To Collectors of Internal Revenue and Others Concerned:*

"In order to give effect to the decision of May 12, 1924, by the United States Supreme Court in the case of *Hecht* v. *Malley* and in the other cases named therein (Nos. 99, 100, 101, and 119—October term, 1923), article 7 of Regulations 50 (revised edition, approved June 21, 1920) and article 8 of Regulations 64 are amended so as to read as follows:

"*Trusts.*—Two distinct classes of trusts are recognized by the Department, namely, holding trusts and operating trusts.

"Holding trusts are those in which the trustees are merely holding property for the collection of the income and distributing it among the beneficiaries and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. Such trusts are not associations within the meaning of the law and are not subject to the tax.

"Operating trusts are those in which the trustees are not restricted to the mere collection of funds and paying them over to the beneficiaries but are associated together in much the same manner as directors in a corporation for the purpose of, and are actually engaged in, carrying on some business enterprise. These trusts, whether of the Massachusetts type or otherwise, are to be deemed associations within the meaning of the Act, independently of any control exercised by the beneficiaries, and subject to the tax.

"D. H. BLAIR,
"*Commissioner of Internal Revenue.*

"Approved June 7, 1924.

"A. W. MELLON,
"*Secretary of the Treasury.*"

On August 11, 1924, the Commissioner of Internal Revenue promulgated Income Tax Ruling No. 2061 [C. B. III–2, 5], which reads as follows:

"The general rule in regard to holding trusts and operating trusts which is announced in the decision of the Supreme Court of the United States in the case of *Hecht* v. *Malley* and in Treasury Decision 3598 (C. B. III–1, 489) is applicable under all titles of the Revenue Acts of 1918 and 1920."

On July 9, 1924, the Solicitor of Internal Revenue by Solicitor's Memorandum 2291 [C. B. III–2, 6] ruled that the decision in *Hecht* v. *Malley*, supra, was applicable to the income tax provisions of the Revenue Acts of 1921 and 1924. This ruling was first published August 18, 1924.

Regulations 65 relating to income tax under the Act of 1924 was signed by D. H. Blair, Commissioner of Internal Revenue, and approved and promulgated by A. W. Mellon, Secretary of the Treasury, on October 6, 1924. Article 1504 of said regulations reads as follows:

"ART. 1504. *Association distinguished from trust.*—Holding trusts, in which the trustees are merely holding property for the collection of the income and its distribution among the beneficiaries, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, are not associations within the meaning of the law. The trust and the beneficiaries thereof will be subject to tax as provided in articles 341–347. Operating trusts, whether or not of the Massachusetts type, in which the trustees are not restricted to the mere collection of funds and their payments to the beneficiaries, but are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise, are to be deemed associations within the meaning of the Act, regardless of the control exercised by the beneficiaries."

And article 1700 of the same regulations and promulgated at the same time reads as follows:

"ART. 1700. *Promulgation of regulations.*—In pursuance of the statute the foregoing regulations are hereby made and promulgated. All rulings inconsistent herewith are hereby revoked."

Under date of December 5, 1924, R. M. Estes, Deputy Commissioner of Internal Revenue, sent to the respondents a letter which reads in part as follows:

"The report of a field investigation made of your association by Internal Revenue Agent G. K. Benson, in connection with capital stock tax, has been received in this office. It is noted therefrom that your association does not agree that it is an association liable for capital stock tax.

"The word 'association' is used in the Revenue Act of 1918 in its ordinary meaning, and includes 'Massachusetts trusts' having quasi corporate organizations under which they are engaged in carrying on business enterprises, irrespective of the measure of control vested and exercised by the beneficiaries, as beneficial certificate holders.

"In a comparatively recent decision on this question in the case of *Hecht et al., Trustees*, v. *Malley*, the Supreme Court of the United States stated that the Revenue Act of 1918, levying a capital stock tax upon corporations, associations, joint stock companies and insurance companies, extends to 'organizations exercising the privilege of doing business as associations at the common law.'

"An examination of the declaration of trust of your association discloses that it is strictly a business enterprise and, as such, it is an association within the meaning of the Revenue Act of 1918, and liable for capital stock tax.

"In a letter dated November 5 from Mr. William H. Hitchcock, addressed to Joseph F. Timilty, Supervisor of Accounts and Collections, Boston, Mass., which has been forwarded to this office, it is contended that your organization is not an association within the meaning of any statute in force since January 1, 1920, and that, therefore, it is not required to make capital stock tax returns or to pay capital stock tax. Accordingly, request is made for a hearing before final action is taken by this office.

"In view of the decision referred to above, there appears to be no question relative to the liability of your organization or reason why it should not file capital stock tax returns. A conference under the circumstances in so far as the liability of your organization to the tax is concerned, is not believed necessary. However, it is not the desire of this office to be arbitrary in the matter.

and if a hearing is still desired, it will be granted if you will advise the approximate date which will be agreeable. * * *"

The respondents at once objected to the assessment of capital stock taxes as proposed in the letter mentioned, and requested a conference. Such a conference was held with the representatives of the Capital Stock Tax Division in Washington on December 17, 1924. At this conference, the respondents furnished certain information requested, but contended that they were not subject to a capital stock tax.

Under date of January 15, 1925, a tabulation of the computation of capital stock liability was sent to the respondents. March 25, 1925, notices were received by respondents from the collector of internal revenue in Boston of the assessment of the taxes listed in the above tabulation, with a demand for payment. These taxes were paid by the respondents on April 4, 1924, under protest on the ground that the Peoples Trust was a trust and not an association. On September 29, 1927, the respondents filed a claim for refund of such taxes. Their claim for refund being rejected, they brought suit to recover these payments in the District Court for Massachusetts. It was there held that the First Peoples Trust was a trust, not an association, and judgment was entered for the plaintiffs (respondents here). On appeal to this court the judgment below was reversed. We held that the First Peoples Trust was an association within the meaning of the revenue laws. (*United States* v. *Neal*, 28 Fed. (2d), 1022.) Petition for certiorari was denied by the Supreme Court. (278 U. S., 659.)

On August 23, 1927, the Commissioner wrote to the Massachusetts collector a letter, a copy of which was forwarded to these respondents. It reviewed the status of the Peoples Trust; stated that it was an association, not a trust, as such was taxable on its income as a corporation; and expressly revoked the ruling of December 2, 1920. July 9, 1929, the respondents were notified of the determination of a deficiency in their tax liability for 1924 of $24,593.19. From this determination an appeal was taken to the Board of Tax Appeals, which held that there was no deficiency on the ground that the ruling of the Commissioner in 1920 that the organization was a trust was not revoked until August 23, 1927. This is the decision here under review.

The respondents admit that if they are taxable as an association or corporation on their 1924 income, the determination of the deficiency was correct, but assert that the ruling of the Commissioner of December 2, 1920—that they were a trust and not an association—was not revoked until August 23, 1927, long after the time their return for 1924 was made. They seek relief from this determination of a deficiency by reason of the provisions of section 704(a) of the Revenue Act of 1928 (45 Stat., 880), which reads as follows:

"SEC. 704. *Taxability of trusts as corporations—Retroactive.*

"(a) If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, * * *."

That there was no letter or notice in terms revoking the ruling of December 2, 1920, until August 23, 1927, is admitted. But this is not controlling. The Commissioner may revoke a ruling affecting a taxpayer as to a specific matter if he makes a later ruling which places the taxpayer in a different position in relation to that matter.

Under section 704(a) as applied to this case two questions arise: (1) Did the rulings or regulations of the Bureau of Internal Revenue promulgated in 1924 apply to these respondents and affect the status of their organization in a different way than the ruling of December 2, 1920; and (2) were they so promulgated that the respondents knew or should have known of them prior to March 7, 1925, the time their tax return was filed?

In the letter of December 2, 1920, the Commissioner ruled that "in distinguishing a trust from an association for the purpose of taxation, * * * the fact of actual control by the beneficiaries must in each case govern," and, finding that the First Peoples Trust was not in actual control of the beneficiaries, he considered it a trust for the purpose of Federal taxation. In the decision promulgated June 7, 1924, published June 16, 1924, relating to taxes on capital stock, and in Regulations 65, article 1504, promulgated October 6, 1924, relating to taxes on income and presumably based upon the decision, the distinction drawn between a trust and an association for the purposes of taxation was that an organization is a trust if the trustees are "merely holding property for the collection of income and its distribution among the beneficiaries and are not engaged * * * in the carrying on of any business," while an association is where the trustees are not so restricted "but are associated together in much the same manner as directors in a corporation for the purpose of, and are actually engaged in, carrying on some business enterprise, * * * independently of any control exercised by the beneficiaries." And article 1700 of Treasury Regulations 65 explicitly gave notice that "all rulings inconsistent herewith are hereby revoked." The above decision and the regulations are plainly inconsistent with the ruling of December 2, 1920—that "the fact of actual control by the beneficiaries must in each case govern"—and amount to a revocation of it if the taxpayer had notice of the inconsistent provisions of the decision and regulations.

These were regulations of a department of government and, in so far as they were not in conflict with statutory provisions or the meaning of them as construed by the courts, had the force and effect of law. (*Maryland Casualty Co.* v. *United States*, 251 U. S., 342, 349.) The substance of the decision and regulations was undoubtedly known to the respondents before March 7, 1925. As stated above, the deputy commissioner, in his letter of December 5, 1924, to these respondents, said that, "The word 'association' is used in the Revenue Act of 1918 in its ordinary meaning, and includes 'Massachusetts trusts' having quasi corporate organizations under which they are engaged in carrying on business enterprises, irrespective of the measure of control vested and exercised by the beneficiaries, as beneficial certificate holders." He then called their attention to the recent decision of *Hecht* v. *Malley* and further stated: "An examination of the declaration of trust of your association discloses that it is strictly a business enterprise and, as such, it is an association within the meaning of the Revenue Act of 1918, and liable for capital stock tax." This was followed on December 17, 1924, by a conference at which the matter was discussed. It is unbelievable that during this conference and the later negotiations up to March 7, 1925, this decision and the new regulations were not specifically brought to their attention. It is clear that their substance was. They, therefore, must be deemed to have known prior to March 7, 1925, that the test or ruling under which they had been held to be a trust had been revoked; that a new test had been established which, as applied to them, put them in the category of an association instead of a trust.

The decision of the Board of Tax Appeals is reversed and the case is remanded to that Board with directions to affirm the determination of the Commissioner in finding a deficiency tax.

Morton, J. (concurring): I concur in the result, for the reason that the deputy commissioner's letter of 5 December, 1924, constituted in my opinion an express revocation of the ruling (in the Commissioner's letter of 2 December, 1920) relied on by the appellees, respondents on review. I doubt whether a specific ruling can be said to be "reversed" or "revoked" under section 704(a) (which is quoted in the majority opinion) by a change in the general practice or views of the Department, even though such change be known to the person in whose favor the ruling was made.

INCOME TAX RULINGS.—PART III.

REVENUE ACT OF 1926 AND PRIOR ACTS.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 201.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 1541: Dividends.

REVENUE ACT OF 1924.

Custom that no stockholder should receive dividend check before the first business day of month following month in which dividend was payable. (See Ct. D. 828, page 131.)

ARTICLE 1542: Source of distribution.

REVENUE ACTS OF 1918 AND 1921.

Dividends received by trustee in 1919, pursuant to court order terminating suit brought in 1916 to compel distribution. (See Ct. D. 800, page 353.)

ARTICLE 1543: Distributions out of earnings or profits accumulated prior to March 1, 1913. XIII–7–6650 Ct. D. 783

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

DIVIDEND—PROFITS ACCUMULATED PRIOR TO MARCH 1, 1913—EFFECT OF SUBSEQUENT LOSSES.

Where a corporation having a surplus on March 1, 1913, suffered losses in 1915 and 1916, and in 1914 and later years earned profits, the amount of profits distributable exempt from tax in 1923, when a dividend was paid, is the surplus of March 1, 1913, reduced by the excess of the losses incurred in 1915 and 1916 over the profit in 1914 within the meaning of paragraphs (a) and (b) of section 201 of the Revenue Act of 1921.

SUPREME COURT OF THE UNITED STATES.

No. 158. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Charles J. Canfield.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

No. 212. *William R. Thorsen, petitioner,* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 15, 1934.]

OPINION.

Mr. Chief Justice HUGHES delivered the opinion of the court.

These cases present the question of the construction of the following provisions of section 201 of the Revenue Act of 1921 (42 Stat., 228):

"SEC. 201. (a) That the term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913, * * *.

"(b) For the purposes of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; but any earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, may be distributed exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed. * * *"

The respondent in No. 158 and the petitioner in No. 212 are stockholders of the West Side Lumber Co., a California corporation. The question is as to the amount properly taxable against them as their respective shares of a dividend of $5,100,000 paid by that company on April 14, 1923.

The findings of fact state that in addition to its original capital of $1,500,000, the company had a surplus on March 1, 1913, of $4,332,684.78. Its profits and losses in the following years—ending on February 28 in each year—were as follows: 1914, a profit of $4,594.62; 1915, a loss of $193,139.67; 1916, a loss of $211,707.32; 1917 to 1923, inclusive, and from February 28, 1923, to April 14, 1923, profits aggregating $2,450,688.30. Prior to the dividend here involved, and for the years 1918 to 1923, the company had paid dividends amounting to $1,290,000.

The question is as to the proper treatment of the losses of 1915 and 1916. If these losses, over the profits of 1914, are not treated as reducing the surplus of March 1, 1913, but are charged against the subsequent profits, the entire amount of that surplus, or $4,332,684.78 was distributable exempt from the tax after the profits subsequent to February 28, 1913, had been distributed. On this basis, for which the taxpayers contend, the profits accumulated after February 28, 1913, would be deemed to amount to $2,050,435.93, leaving subject to the tax, after deducting prior dividends, the sum of $760,435.93.

If the losses of 1915 and 1916, over the profits of 1914, are treated as reducing the surplus of March 1, 1913, there remained of that surplus, on February 28, 1916, the sum of $3,932,432.41, which was distributable exempt from the tax after the subsequent profits had been distributed. With this application of the losses of 1915 and 1916, the subsequent profits subject to tax, after deducting prior dividends, amounted to $1,160,688.30.

The Board of Tax Appeals adopted the latter view and directed the determination of deficiencies accordingly. (24 B. T. A., 480.) That decision was overruled by the Circuit Court of Appeals for the Seventh Circuit as to the respondent Canfield in No. 158 (62 F. (2d), 751), and was sustained by the Circuit Court of Appeals for the Ninth Circuit as to the petitioner Thorsen in No. 212 (65 F. (2d), 234). The cases come here on certiorari.

In deciding between these conflicting views, the outstanding, and we think the controlling, fact is that on February 28, 1916, the surplus of March 1, 1913, had actually been diminished by losses. The company continued in business after March 1, 1913, and exposed its accumulated profits to the hazard of that business. On February 28, 1914, the company still had those profits and an additional profit of $4,594.62. But in the next two years the company lost $404,846.99, so that the surplus of March 1, 1913, was invaded. It is inaccurate to say that this was merely a matter of bookkeeping. Under the findings of fact the losses must be deemed to have been actual losses, not mere bookkeeping entries. Hence, the decrease of the preexisting surplus was actual—as real as the preexisting surplus itself, as real as the subsequent profits. The surplus of March 1, 1913, was the amount of net assets over liabilities including capital stock.[1] When the losses of 1915 and 1916 were suffered, the net assets of March 1, 1913, shrunk accordingly.

In the presence of that inescapable fact, the question is not whether the company could distribute, as being surplus of March 1, 1913, what no longer remained of that surplus—a manifest impossibility—but whether the statute entitled the company to treat subsequent profits as restoring what had been lost of the surplus of March 1, 1913, so that, to the extent of that replacement, the subsequent profits could be distributed to stockholders free of tax. That the question is one of such a replacement would be strikingly evident if the

[1] *Edwards* v. *Douglas* (269 U. S., 204, 214 [T. D. 3797, C. B. V-1, 158]); *Willcuts* v. *Milton Dairy Co.* (275 U. S., 215, 218 [T. D. 4148 C. B. VII-1, 283]).

whole of the surplus of March 1, 1913, had been lost and an attempt had been made to treat later profits as restoring it. The fact that only a part of the surplus was lost does not alter the question as related to that part.

The argument that the surplus of March 1, 1913, constituted capital is unavailing. We are not here concerned with capital in the sense of fixed or paid-in capital, which is not to be impaired, or with the restoration of such capital where there has been impairment.[2] No case of impairment of capital is presented. We are dealing with a distribution of accumulated profits. Nor is it important that the accumulated profits as they stood on March 1, 1913, constituted capital of the company as distinguished from the gains or income which the company subsequently realized.[3] When a corporation continued in business after March 1, 1913, the dividends it later declared and paid to its stockholders, whether out of current earnings or from profits accumulated prior to that date, constituted income to the stockholders, and not capital, and were taxable as income if the Congress saw fit to impose the tax. (*Lynch* v. *Hornby*, 247 U. S., 339 [T. D. 2731].) The provision of the Act of Congress under consideration was a "concession to the equity of stockholders" with respect to receipts as to which they had no constitutional immunity. There is no question here of the receipt of "capital."

The fundamental contention of the taxpayers is that the statute created two distinct periods for tax purposes; that the accumulations for each period constituted "a fixed and static amount, not to be changed by happenings after the end of the period." That the statute does relate to two periods, the dividing line being March 1, 1913, and that the periods are distinct, is obvious. But it does not follow because there are two distinct periods that the accumulations for each period constitute "a fixed and static amount" and are to remain unaffected despite the vicissitudes of business. To attribute to the accumulated profits or surplus of March 1, 1913, embarked in a continued business, such a static condition is to ignore the course of business and to impute to the Congress an intention to consider, for tax purposes, the existence of that surplus as still continued notwithstanding its actual diminution or exhaustion. Such an intention to disregard realities so as to afford immunity from a tax is not lightly to be ascribed to the taxing authority. The "equity of stockholders," which we said in *Lynch* v. *Hornby*, supra, the Congress probably had in view, might reasonably require freedom from taxation on receiving a distribution of the accumulated profits of March 1, 1913, where those profits remained intact, but that equity is not apparent when those profits had been lost in whole or in part and immunity is sought from the taxation of an equivalent amount of profits subsequently earned.

Paragraphs (a) and (b) of section 201 disclose a single purpose and are to be construed in harmony with each other. They show that the Congress was careful to arrange its plan so that the right to receive, free of tax, a distribution of surplus accumulated prior to March 1, 1913, should not be exercised in such a fashion as to permit profits accumulated after that date to escape taxation. To that end the Congress provided that "every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913." Then follows the exemption which is strictly limited to a distribution of profits accumulated prior to March 1, 1913. Nothing is said as to a restoration of those profits out of subsequent earnings if the former have been lost.

The argument for the stockholders stresses the word "accumulated." We think that the expression is made to carry too heavy a burden. The argument is substantially the same as that which is based on what seems to us to be an artificial conception of the two periods. What had been "accumulated" prior to March 1, 1913, was obviously not immune from the risk of loss. It is urged that the same rule should be applied whether the losses in the subsequent years preceded or succeeded the making of profits. But the actual course of events is not to be ignored. If there had been profits immediately after March 1, 1913, sufficient in amount to absorb later losses incurred before the time of distribution, it is manifest that the profits accumulated prior to March 1, 1913, would have remained intact. The case is different where, in the absence of such

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[2] Compare *Hadden* v. *Commissioner* (49 F. (2d), 709).

[3] *Southern Pacific Co.* v. *Lowe* (247 U. S., 330); *Gulf Oil Corporation* v. *Lewellyn* (248 U. S., 71); *Lucas* v. *Alexander* (279 U. S., 573 [Ct. D. 76, C. B. VIII-2, 273]); *Old Colony Railroad Co.* v. *Commissioner* (284 U. S., 552 [Ct. D. 456, C. B. XI-1, 274]).

profits, losses necessarily diminish the prior accumulations. Thus, in the instant case there were no profits accumulated after March 1, 1913, and prior to February 28, 1916, except the small amount in 1914 which was wiped out by the losses of the two succeeding years. The profits from February 28, 1916, to February 28, 1919, amounted to $327,134.45. If there had been a distribution of these profits on February 28, 1919, it could not have been maintained that they constituted part of the surplus existing on March 1, 1913, or that they should escape taxation on the theory that they made good prior losses which had actually reduced that surplus. And the same is true of the profits subsequently made. Administrative practice appears to have been in accord with this view. (See A. R. M. 82, C. B. 3, 36 (1920).)

Our conclusion is that the judgment of the Circuit Court of Appeals for the Seventh Circuit in No. 158 should be reversed and that of the Circuit Court of Appeals for the Ninth Circuit in No. 212 should be affirmed.

It is so ordered.

Article 1544: Distributions other than those out of earnings or profits. XIII–10–6687 Ct. D. 795

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. Gain or Loss—Basis—Sale of Preferred Stock—Distribution of Dividends out of Capital.

Where the owner of common and preferred stock of a corporation in 1926 bought additional preferred shares, from which he regularly received dividends paid out of capital, the gain derived upon sale of the additional preferred shares to the corporation in 1927 is properly determined by reducing the basis of the cost of the preferred stock by the amount of dividends received, in accordance with section 201(d) of the Revenue Act of 1926 and article 1544 of Regulations 69.

2. Decision Affirmed.

Decision of the Board of Tax Appeals (27 B. T. A., 39) affirmed.

United States Circuit Court of Appeals for the Second Circuit.

DeVer C. Warner, petitioner, v. Commissioner of Internal Revenue, respondent.

Before L. Hand, A. N. Hand, and Chase, Circuit Judges.

Petition to review a decision of the Board of Tax Appeals. Affirmed.

[July 25, 1933.]

OPINION.

Chase, Circuit Judge: The petitioner, a resident of Bridgeport, Conn., is the owner of both preferred and common stock in the Warner Bros. Co., a corporation having its principal place of business at Bridgeport. It is a corporation whose common stock is closely held within the Warner family. Its preferred stockholders include employees of the corporation and others not members of the Warner family. In 1926, it was decided to change its capital structure. The details of this change are unimportant. Part of the result was a so-called surplus set up on the books by replacing the old common stock, which was of the par value of $100 a share, with twice the number of shares of common stock having no par value and carrying the new stock in the capital account at $35 per share. The petitioner and others, on March 31, 1926, subscribed for additional preferred shares at $100 par. The petitioner took and paid for 500 such shares. The corporation had no net earnings and paid no dividends on its common stock after February 8, 1923, but did pay regularly out of capital the dividends on its preferred stock. This was done with the consent and approval of all the common stockholders for personal and business reasons which are not of moment now. It is clear that the common stockholders intended to deplete only the assets available, upon liquidation, to common stockholders and that at all times the corporation had assets more than sufficient to liquidate all its preferred stock at par after all debts were paid.

On October 1, 1927, after he had received all the dividends regularly declared and paid on the shares since he subscribed for them in 1926, the petitioner sold and delivered the 500 preferred shares to the corporation and received from it in payment the full par value. In determining whether the petitioner derived a profit in 1927 in the sale of the stock to the corporation, the respondent reduced the basis of the cost of the stock by the amount of the dividends the petitioner had received. The sole question here presented is whether this was lawful.

The applicable statute is section 201(d) of the Revenue Act of 1926. It provides that:

"If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of distribution shall be applied against and reduce the basis of the stock provided in section 204, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property * * *."

Treasury Regulations 69, article 1544, construed this statute to mean that any such distribution should be applied against and reduce the cost or other basis "of the stock upon which the distribution was made" in determining gain or loss on a subsequent sale of the stock.

The petitioner argues that this regulation in attempting to apply the adjustment to the particular stock on which dividends were declared and paid goes beyond the statute and is void; that the statute itself does not specifically cover the situation of a corporation which has more than one class of stock and which makes such a distribution as this corporation made; and that, as specific warrant can not be found in the law for the action of the Commissioner, there should be a reversal.

We accept the facts, of course, as they appear. That means that none of the dividends in question when paid affected either the ability or the liability of the corporation to pay to the preferred stockholders, upon liquidation, the par value of their stock. It is equally true that the dividends were paid neither out of increase in value of property accrued before March 1, 1913, nor out of earnings or profits. At least there is no such proof and the petitioner does not claim that they were. In trying to make the test of the correctness of the Commissioner's action whether or not the payment of the dividends decreased the assets of the corporation, carried on its books primarily for the benefit of preferred stockholders, to the extent that a liquidating dividend would not have paid preferred stockholders the full par value of their shares, and reaching the conclusion that because the assets were not so impaired the statute is inapplicable, the petitioner is confronted with the fact that such a test neither falls within the language of the law nor within any permitted construction of it. It is certainly not to be presumed that Congress meant to legislate only in respect to corporations having but one class of stock and discriminate between such corporations and the large number which, to common knowledge, have more than one class. When the statute clearly states that the distribution "shall be applied against and reduce the basis of the stock" can there be any serious question but that the stock meant is the stock on which the distribution is made? It seems to us that there is no other reasonable meaning. The regulation contained the words "upon which declared" but recognized the plain import of the statute and is accordingly valid. If more were needed to establish its validity, reference might be had to the fact that Congress reenacted the statute while the regulations in this respect were substantially the same. (See Regulations 65, article 1544, under the Revenue Act of 1924. Also Regulations 74, article 624, under the Act of 1928, and Regulations 77, article 624, under the Act of 1932. Compare *Shearman* v. *Commissioner*, 66 Fed (2d), 256 (decided July 5); *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S., 488, 492–493 [Ct. D. 345, C. B. X-1, 444]; *United States* v. *Kirby Lumber Co.*, 284 U. S., 1 [Ct. D. 420, C. B. X-2, 356].)

The validity of the statute is unquestioned and, as the action of the Commissioner was in accordance with a valid regulation, the decision of the Board of Tax Appeals was right.

Affirmed.

Article 1545: Distributions in liquidation. XIII–8–6663
Ct. D. 788

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. Gain or Loss—Liquidating Dividend—Parent and Subsidiary.

Where a subsidiary banking corporation on June 24 and December 23, 1920, declared semiannual dividends payable July 1 and December 31, respectively, on December 30 declared an additional dividend equal to its entire surplus, and on the next day voted that it be placed in voluntary liquidation, the parent corporation at the same time authorizing the purchase of the assets and assumption of the liabilities of its subsidiary, the additional dividend is properly considered an amount distributed in liquidation within the meaning of section 201(c) of the Revenue Act of 1918, and is required thereby to be treated as paid in exchange for the shares of stock.

2. Decision Affirmed.

Decision of the Board of Tax Appeals (22 B. T. A., 541) affirmed.

3. Certiorari Denied.

Petition for certiorari denied October 9, 1933.

United States Circuit Court of Appeals for the Fifth Circuit.

Canal-Commercial Trust & Savings Bank, petitioner, v. Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals (District of Louisiana).

Before Bryan, Foster, and Sibley, Circuit Judges.

[February 21, 1933.]

OPINION.

Sibley, Circuit Judge: In this review of a redetermination by the Board of Tax Appeals of a deficiency for the year 1920 in income taxes, the controlling question is whether $1,000,000 paid by Canal-Commercial National Bank to Canal-Commercial Trust & Savings Bank ostensibly as a dividend was an ordinary dividend or an amount paid in liquidation under Revenue Act of 1918, section 201.

The facts are that the latter company, to be called the Trust Bank, held from 1914 until December 31, 1920, 95 per cent or more of the stock of the former, to be called the National Bank, and on December 31, 1920, bought the remaining stock from its directors and stockholders who had owned it. The whole investment in the stock was $1,293,900. There were interlocking directorates. Consolidated tax returns were made for all years through 1920. On June 24, 1920, the directors of the National Bank declared a dividend of 5 per cent payable July 1, and paid out of undivided profits. On September 9 they passed $250,000 from undivided profits to surplus, making the surplus $1,000,000. On December 23 they declared a dividend of 10 per cent payable December 31, and paid out of undivided profits. On December 21 the directors of the Trust Bank had approved a proposition to liquidate the National Bank and take over its assets and assume its liabilities, and authorized its trustee holding its stock in the National Bank to waive legal delays and vote in a shareholders meeting for the liquidation on such terms as he thought proper. On December 30 the directors of the Trust Bank authorized a purchase from the National Bank of all the latter's assets for $618,461.69, and an assumption of its liabilities. At the same place and hour, with the same secretary and being largely the same persons, the directors of the National Bank met and declared a dividend of $200 per share, i. e., $1,000,000, payable that day. Checks therefor were drawn at once in favor of the Trust Bank, and the next day were paid through the clearing house and charged $900,000 to surplus and $100,000 to undivided profits, leaving surplus $100,000 and undivided profits $18,461.69. On the morning of December 31 the directors of the National Bank voted that it was their sense that the bank be placed in voluntary liquidation under sections 5220 and 5221 of United States Revised Statutes, and authorized the liquidating agent named by them to transfer, set over and deliver to the Trust Bank all the National Bank's assets for

$618,461.69 and the assumption of its liabilities. Various other details of the liquidation were voted and the board "adjourned *sine die*." The stockholders met that afternoon, unanimously waiving notice, and through a single proxy unanimously voted liquidation and authorized the transfer of assets to the Trust Bank. The liquidating agent executed a transfer, and was given a check for $618,461.69, and appropriate book entries were made. On the same day, December 31, the liquidating agent gave his check for $618,461.69 to the Trust Bank, which surrendered to him the certificates for all the capital stock of the National Bank.

The transaction on its face was a sale of the stock which had cost the Trust Bank $1,293,900 for $618,461.69. If the swapped checks be disregarded, the stock was exchanged for the assets remaining after the payment of the $1,000,000 cash dividend declared the day before, but since there is no proof to the contrary these assets must be assumed worth the value at which they were taken. The apparent difference between cost and sale price of the stock is claimed as a deductible loss. But if the $1,000,000 collected in cash the same day is to be considered the loss is converted into a large gain. That sum, though declared as a dividend from surplus and profits, we think was rightly held by the Board to be "an amount distributed in the liquidation of the corporation" within the meaning of Revenue Act of 1918, section 201(c), and is required thereby to be treated as paid in exchange for the shares of stock. Treasury Regulations 45, articles 1541 and 1548, in force in 1920 define the dividends which are not subject to normal tax as those "paid in the ordinary course of business though extraordinary in amount," and define a distribution in liquidation as a return to the stockholder for a surrender of his stock as distinguished from "a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by directors in their discretion, which is in the nature of a recurrent return upon the stock." These regulations were sustained in *Hellmich* v. *Hellman* (276 U. S., 233 [T. D. 4217, C. B. VII-2, 238]), and their meaning thus summarized: "The Treasury regulations correctly interpreted the Act as making section 201(a) applicable to a distribution made by a going corporation to its stockholders in the ordinary course of business, and section 201(c) applicable to a distribution made to stockholders in liquidation of the corporation." The determining element therefore is whether the distribution was in the ordinary course of business and with intent to maintain the corporation as a going concern, or after deciding to quit with intent to liquidate the business. Proceedings actually begun to dissolve the corporation or formal action taken to liquidate it are but evidentiary and not indispensable. (*Tootle* v. *Commissioner*, 58 Fed. (2d), 576 [Ct. D. 574, C. B. XI-2, 170].) The fact that the distribution is wholly from surplus and not from capital, and therefore lawful as a dividend is only evidence. In *Hellmich* v. *Hellman* and *Tootle* v. *Commissioner*, supra, the distribution was wholly from profits yet held to be one in liquidation. In the present case a regular semiannual dividend of 5 per cent was declared in June, and one of 10 per cent in December, both from undivided profits. The surplus had been raised to $1,000,000 on September 9. It is not likely that the directors of a bank would pay out an additional dividend of 200 per cent and equal to its entire surplus if it was intended to continue business. In fact at the very hour and place the dividend was declared the owner of 95 per cent of the stock, having previously instructed its stock to be voted for a liquidation and waived legal delay in calling the stockholders' meeting, was authorizing the purchase of the entire assets and the assumption of the debts of the National Bank, which would not only put it out of business but would automatically liquidate it. That the entire program was punctually and unanimously carried out the following day leaves no doubt that it had been determined fully in advance, and that the $1,000,000 authorized to be turned over on December 30 was but a step in the final liquidation accomplished on December 31. The 250 shares of stock not owned by the Trust Bank could not be an obstacle, because it was but 5 per cent of the stock while 66⅔ per cent could vote the liquidation; and that checks for the entire $1,000,000 were on December 30 given to the Trust Bank with nothing to this outstanding stock proves that its purchase had already been arranged for. There is no escape from the conclusion that the amount was paid in liquidation. The possible hardship of a double normal tax on such part of the surplus as was earned by the National Bank since the Trust Bank bought its stock was considered unavoidable in *Hellmich* v. *Hellman*. We conclude that a profit and not a loss was realized on the disposition of this stock in 1920. The petition for review is denied, and the decision of the Board of Tax Appeals is affirmed.

SECTION 202.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 1561: Determination of the amount of gain or loss.

REVENUE ACT OF 1926.

Fair market value of purchase money mortgage. (See Ct. D. 817, page 210.)

SECTION 203.—RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES.

ARTICLE 1577: Definitions.

REVENUE ACT OF 1926.

Contract of sale of its physical properties for cash consummated by delivery of all outstanding stock of corporation which then makes conveyance and is dissolved. (See Ct. D. 767, below.)

ARTICLE 1579: Involuntary conversion of property. XIII-4-6616 I. T. 2756
(Also Section 204, Article 1591.)

REVENUE ACT OF 1921.

I. T. 1787 (C. B. II-2, 78), relative to the determination of gain or loss resulting from the condemnation of a portion of a taxpayer's property for street-widening purposes, is revoked, in view of General Counsel's Memorandum 12657 (see on page 80).

ARTICLE 1579: Involuntary conversion of property.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Land sold under condemnation proceedings with no separate allowance for severance damages to remaining land. (See G. C. M. 12657, page 80.)

SECTION 204.—BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

ARTICLE 1591: Basis for determining gain or loss from sale. XIII-1-6586 Ct. D. 767
(Also Section 203, Article 1577.)

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

DEDUCTION—DEPLETION—BASIS—SALE OR REORGANIZATION.

Where the taxpayer on March 8, 1926, contracted with another company and its stockholders to buy the company's oil-producing properties for cash, the contract providing that the "delivery of said physical properties" should be made as of March 3, and where the outstanding stock of the company was delivered to the taxpayer, and, subsequent thereto, the said properties of the company were conveyed to the taxpayer and the company dissolved, the transaction constituted a sale rather than a reorganization and the taxpayer is entitled to compute depletion upon the basis of the cost to it of acquiring the properties as provided in section 204 (a) and (c) of the Revenue Act of 1926 rather than upon the basis of the original cost to the transferor.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

The Prairie Oil & Gas Co. (*name changed to The Commonwealth Oil & Gas Co.*), *appellant*, v. *Motter*, *Collector of Internal Revenue*, *appellee*.

Appeal from the District Court of the United States for the District of Kansas.

[July 13, 1933.]

OPINION.

McDERMOTT, Circuit Judge, delivered the opinion of the court.

Some time prior to 1926 the Olean Petroleum Co. acquired producing oil properties at a cost of about $300,000. In 1926 the Prairie Oil & Gas Co. acquired these properties for a cash outlay of $3,350,000. The question in this case is whether depletion of such properties should be calculated on their cost to the Prairie of $3,350,000, or their original cost to the Olean of $300,000. The facts are not in dispute.

On March 8, 1926, a contract was entered into between the Prarie as buyer and the Olean and its stockholders as sellers which recites that its purpose is to transfer the leases owned by the Olean which were producing or in the process of development, together with appurtenant equipment, for the sum of $3,350,000 cash. The contract provided that the "delivery of said physical properties" should be made as of March 3, five days before the contract was signed. Alternative methods of effecting the transfer of such physical properties were provided for—one by the transfer of the properties themselves, the other by a transfer of the corporate stock within 25 days. In either event, the Olean, or its stockholders, retained the intangible assets of the Olean, amounting to over $700,000 in cash and accounts; the Prairie acquired only the described physical property for the price agreed upon.

The Prairie went into possession and paid the $3,350,000 to Larkin and Quigley, the authorized agents of the Olean and its stockholders. For reasons not disclosed by the record, the sellers availed themselves of the right to accomplish the purpose of the contract—the sale of the leases—by stripping the corporation of all its assets except the leases and transferring its outstanding shares to the Prairie on April 1; on April 2 the Olean company conveyed such leases and equipment to the Prairie and was on that day dissolved.

The right to an allowance for depletion is a matter of grace on the part of the taxing power, and one claiming it must establish its right thereto. (*Darby-Lynde* v. *Alexander* (C. C. A. 10), 51 F. (2d), 32 [Ct. D. 395, C. B. X-2, 224].) Section 204(c), Revenue Act of 1926, provides that the basis for the depletion allowance shall be the same as is provided in subdivision (a) for the purpose of determining gain or loss upon the sale of property. Turning to subdivision 204(a) we find that basis to be "the cost of such property," which in the case at bar is concededly $3,350,000. Unless the case is brought within one of the exceptions noted in 204(a), then, the Prairie is clearly entitled to compute its depletion on the amount actually expended by it in acquiring the properties.

The collector maintains that the case falls within 204(a)7, which excepts from the cost basis properties acquired by a corporation "in connection with a reorganization." Counsel for the collector contends that Congress can ascribe any definition to any word, and that such definition becomes the meaning of that word for the purposes of that Act; and that, however incongruous it may appear on its face, Congress has so defined "reorganization" as to include this transaction. He refers to section 203(h)1 which defines "reorganization" as follows:

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."

The argument is that a "reorganization" results from any transaction by which one corporation acquires substantially all the stock or properties of another, even for cash. If the words in parentheses may be separated from the principal words "merger or consolidation" which precede them, the conclusion follows, for the Prairie did acquire substantially all of the properties of the Olean as well as its stock. The cost to the Government of such a literal interpretation would be staggering, for the statute contemplates that neither gain nor loss shall be recognized in a transfer of properties to effect a reorganization; and if reorganization includes sales for cash, the tax on corporate capital gains would be easily avoided.

While the words in parentheses must be considered, the words outside may not be disregarded. While the parenthetical words must be construed as specifying certain transactions which should be held to be within the general meaning of "merger or consolidation," they can not be construed to so extend the ordinary meaning of merger and consolidation as to include outright purchases of property for cash. Reading all the sections exempting from tax transfers made to accomplish reorganizations, the congressional intent is plain. Where a merger or consolidation takes place, and the stockholders retain their interest in the corporate properties, there is no realized gain; there is but a substitution of their certificates of participation. Such transfers were exempted from tax so that such reorganizations should not needlessly be impeded. The congressional intent appears from the report of the Finance Committee to the Senate, which reads in part:

"Congress has heretofore adopted a policy of exempting from tax the gain from exchanges made in connection with a reorganization, in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation."

That the statutory definition of "reorganization" can not be stretched to exempt from taxation gains resulting from a sale of properties for cash, is settled by the decision of the Supreme Court of the United States in *Pinellas Ice Co. v. Commissioner* (287 U. S., 462 [Ct. D. 630, C. B. XII-1, 161]), wherein the court said:

"But the mere purchase for money of the assets of one company by another, is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short term purchase money notes. This general view is adopted and well sustained in *Cortland Specialty Co. v. Commissioner of Internal Revenue* (60 F. (2d), 937, 939, 940). It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed."

In *Cortland Specialty Co. v. Commissioner* (C. C. A. 2) (60 F. (2d), 937), cited with approval in the above quotation, the taxpayer made the same contention as is made here by the collector; the Commissioner there took the position here taken by the taxpayer. The Second Circuit Court of Appeals held that the term "reorganization" could not have included "mere purchases by one company of the assets of another." It held that mergers and consolidations contemplate that the interests of the stockholders are retained in the surviving or newly created company, and said that "a sale of the assets of one corporation to another for cash without the retention of any interest by the seller in the purchaser is quite outside the objects of merger and consolidation statutes." Certiorari was denied (288 U. S., 599). See "Definition of Reorganization," Homer Hendricks (45 Harv. Law Rev., 648).

These authorities leave no doubt that a purchase for cash of all the properties of one corporation by another can not be considered as a reorganization, merger or consolidation of the two companies.

To avoid this conclusion the collector then undertakes to separate the component parts of this single transaction. He ignores the fact that the contract declares the purpose of the transaction to be the acquisition of the leases; that possession of the leases was delivered as of a date prior to the contract; that the Olean had $700,000 of other assets not bargained for or acquired; that the stock was delivered under an optional arrangement to accomplish the transfer of the leases; and that the charter was surrendered the day after the stock was delivered. His position is that the court should close its eyes to the events prior to April 1, and consider only the fact that the Prairie owned all the Olean stock on that day; that it then transferred to the Prairie all its properties in consideration of a cancellation of its stock. If a taxpayer sought to avoid a tax on the profits of such a sale as this by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern. A similar effort to treat two steps in a single transaction as two separate transactions was rejected by this court in *Tulsa Tribune Co.* v. *Commissioner* (58 F. (2d), 937, 940), wherein we said:

"As it seems to us, the attempt to break this transaction up into two elements by saying that Jones bought the property and then transferred it to the corporation in exchange for its capital stock is not only unfair, but untrue."

In *Carter Publications* v. *Commissioner* (28 B. T. A., 160) (decided May 23, 1933), the sale of properties was accomplished by the two steps of a transfer of stock followed by a dissolution. The Board of Tax Appeals held:

"In the circumstances herein some of petitioner's stockholders took legal title to the stock of the Fort Worth Record Co., but only for the purposes of carrying out the agreement with Hearst. * * * The whole series of acts, corporate and otherwise, constituted only a single transaction in which the petitioner purchased certain tangible assets for cash."

But even if the transaction of April 1 be separated from its origin, and the case turn on the events of that day, the collector is still forced to a strained construction of the statutes to arrive at the conclusion that the liquidation of the Olean company is a "reorganization" of that company within the meaning of the exemption. That point need not be pursued in view of our disposition to treat the transaction as an entire one.

Since the decision in the court below the Board of Tax Appeals has been presented with the precise question here involved. In *Warner Co.* v. *Commissioner* (26 B. T. A., 1225), the buyer, in July, acquired all of the stock of a corporation for cash and preferred stock of the buyer. In the fall of that year the preferred stock was repurchased, and in December the buyer dissolved the subsidiary and took title to the properties. It was held that the basis for depletion was the price paid for the stock. The Board said:

"It appears from the contract under which the taxpayer acquired the stock that the primary purpose of the transaction was to insure to the taxpayer an adequate supply of sand and gravel. Obviously, the most direct method of accomplishing this end would be to purchase sand and gravel deposits. Presumably this direct method was not feasible and so it adopted the plan set forth at the outset of this opinion. That plan, as carried out, was in substance and effect a purchase of stock for cash, followed by a cancellation of the stock and liquidation and dissolution of the companies owning the properties that the taxpayer wanted. * * * This, in our opinion, was not a reorganization within the purview of the statute, but rather is analogous to the situations present in the Pinellas Ice and Cortland Specialty Co. cases, supra, which were held to be sales rather than nontaxable reorganizations. * * * We conclude that the transactions in 1924 whereby the taxpayer acquired the assets of the Penn and Manor companies did not constitute a reorganization, but that the liquidation of the companies following the acquisition of their stock was a transaction on which gain or loss is recognized by the statute, and the taxpayer is entitled to use cost of the assets to it as a basis for depreciation and depletion."

We arrive at the same result if we take a long view of the case. The clear intent of the statute is to allow depletion based on actual cost to the taxpayer. The purpose of the "reorganization" exception is to prevent that base from being increased by transactions which are not actual purchases but merely transfers to effect a rearrangement of ownership. Here the actual cost of these leases was $3,350,000 paid in cash. Congress intended that such cost should be the depletion base. The contention of the collector that the cost to the Olean should be the depletion base can only be sustained if it be true that the Olean merged or consolidated with the Prairie. It did not; it sold out to the Prairie. It is suggested that by taking two steps, the Olean company avoided the payment of a tax on the profits of the sale. But its stockholders were taxable on the profit realized from the sale of their stock; so the Government has had its tax on the profits on the sale. It may be it could have collected two taxes if the Olean company had sold the properties and then liquidated; or the double tax may have been avoided by conveying its properties to its stockholders and they in turn conveying to the Prairie.

But these considerations are not sufficient to justify a court in calling an outright sale a reorganization.

The plaintiff, on the admitted facts, is entitled to judgment. The cause is reversed for further proceedings in accordance with this opinion.

Reversed.

ARTICLE 1591: Basis for determining gain or loss from sale.

REVENUE ACT OF 1921.

Revocation of I. T. 1787 (C. B. II–2, 78), relative to determination of gain or loss upon the sale or other disposition of property, a portion of which has been condemned for street-widening purposes. (See I. T. 2756, page 183.)

ARTICLE 1591: Basis for determining gain or loss from sale.

REVENUE ACT OF 1926.

Purchase money mortgage satisfied for less than face amount thereof. I. T. 2406 (C. B. VII–1, 68) revoked. (See I. T. 2772, page 212.)

ARTICLE 1593: Property acquired by gift after December 31, 1920.

XIII–13–6719
Ct. D. 805

INCOME TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

1. GAIN OR LOSS—BASIS—PROPERTY ACQUIRED BY GIFT AFTER DECEMBER 31, 1920.

Where the majority stockholder of a corporation transfers to it valuable property after December 31, 1920, and receives no money, stock, or other consideration therefor, but the corporation agrees, as a part of the consideration for such transfer, to set up the value of such property on its books as "paid-in surplus," such transfer constitutes a gift within the meaning of section 204(a)2 of the Revenue Acts of 1924 and 1926, and the basis for computing gain upon the subsequent sale of the property by the corporation is the cost to the donor.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (24 B. T. A., 763) reversed.

3. CERTIORARI DENIED.

Petition for certiorari denied November 13, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Rosenbloom Finance Corporation, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

[August 17, 1933.]

OPINION.

BUFFINGTON, J.: The underlying question in this tax case is whether whisky warehouse certificates owned by the Rosenbloom Finance Corporation, the taxpayer, were acquired by gift from its majority shareholder, Sol Rosenbloom. If acquired by gift, their value for ascertaining profit was their cost to the donor, $51,538.26. If not so acquired, their cost to the taxpayer was $269,494.97. The Board of Tax Appeals held the transaction was not a gift and the Commissioner took this appeal. There is no dispute as to facts and the question is wholly one of law. The facts, a full discussion thereof, and citations of authorities bearing on the case are set forth at full length in the findings and opinion of the Tax Board and by reference thereto we avoid useless restatement.

The taxpayer paid Rosenbloom no money, stock, or other consideration therefor. It was a voluntary transfer of property without consideration or compensation therefor and the form it took involved no ownership by any third party, and whatever form or semblance it took, in substance and reality it was a transfer with the aim of avoiding tax. In our judgment it was a gift. The decree of the Tax Board will therefore be set aside and the record remanded for due procedure in accord herewith.

ARTICLE 1595: Property acquired by transfer in trust after December 31, 1920. (Also Section 208, Article 1651.) XIII-25-6859 Ct. D. 840

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. GAIN OR LOSS—BASIS—GIFT IN TRUST—SALE BY TRUSTEE.

Where shares of stock acquired in 1906 were transferred by a gift irrevocably in trust in 1921, the income to be accumulated for future distribution to the son of the trustor, and were sold by the trustee in 1922, the trustee may be regarded as the taxpayer and, for the purpose of calculating the gain, as having assumed the place of the trustor, and the taxable gain resulting from the sale is the difference between the cost of the stock to the trustor in 1906, the March 1, 1913, value being less than cost, and the amount for which the trustee sold in 1922, in accordance with the provisions of sections 2(9), 202(a)2, and 219 (a)3, (b), and (c) of the Revenue Act of 1921.

2. CAPITAL GAIN—CAPITAL ASSETS—COMPUTATION OF TAX—RATE.

Where the sale of shares of stock by a trustee occurred more than two years after their acquisition by the trustor, but less than two years after their acquisition by the trustee, the shares are properly regarded as "capital assets" within the meaning of section 206(a)6 of the Revenue Act of 1921, and the gain on the sale is capital gain, ascertained by putting together the periods in which the shares were held by the trustor and trustee, respectively, and computed at the 12½ per cent rate applicable to capital assets.

SUPREME COURT OF THE UNITED STATES.

873. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *New York Trust Co., as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Co.*

899. *New York Trust Co., as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Co., petitioner,* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 28, 1934.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the court.

This controversy arises out of the calculation of an income tax on the gain realized on the sale of property by a trustee in 1922. April 27, 1906, one Matthiessen acquired 6,000 shares of stock at a cost of $141,375. Its value on March 1, 1913, was less than cost. December 4, 1921, desiring to make provision for his son, Erard, he transferred the stock to the New York Trust

Co. in trust for him with remainder over in case of his death. When the trust was created the market value of the stock was $577,500. The trustee sold it in 1922 for $603,385. In the tax return for that year the trustee included $87,385 as the gain resulting from the sale. That figure was reached by subtracting the cost of the shares to the trustor, then claimed to be $516,000, from the amount the trustee received for them. But the trustee then, as it always has, insisted that the gain should be calculated on the basis of the value at the time of the creation of the trust. And it applied the rate of 12½ per cent, applicable to capital gains. The Commissioner ascertained gain on the principle adopted in the return but found the cost to trustor to be $141,375. He applied the normal and sur tax rates that ordinarily are laid upon the incomes of individuals and by the use of these factors arrived at an additional assessment of $238,275.95.[1] The Board of Tax Appeals sustained the determination. (27 B. T. A., 1127.) The lower court held that the gain had been correctly ascertained but that it was taxable at 12½ per cent. (68 F. (2d), 19.) These writs were granted on petition of the Commissioner and cross-petition of the trustee. (292 U. S., 455.)

The questions are: (1) Whether the gain resulting from the trustee's sale is the difference between price paid by trustor and that received by trustee, and (2) if so, whether the 12½ per cent rate is applicable.

The Revenue Act of 1921 (42 Stat., 227) governs. Section 2(9) defines taxpayer to include any person, trust or estate subject to a tax imposed by the Act. Section 202(a) provides: "That the basis for ascertaining the gain derived * * * from a sale * * * of property * * * shall be the cost of such property; except that * * *. (2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor." Section 206(a)6 defines capital assets to be "property acquired and held by the taxpayer for profit or investment for more than two years" and (b) provides that the net gain from the sale of capital assets may be taxed at the rate of 12½ per cent instead of at the ordinary rates. Section 219(a) declares that the normal and sur tax on net incomes of individuals shall apply to the income of property held in trust, including (3) income held for future distribution; (b) the fiduciary is required to make the return of income for the trust. And subsection (c) provides that in cases under (a)(3) the tax shall be imposed upon the net income of the trust and shall be paid by the fiduciary.

By the trust indenture, which recites mutual covenants and agreements and the payment of $10 by each to the other as the consideration, the trustor did "sell, assign, transfer, and convey" the 6,000 shares "in trust, nevertheless, for the benefit of" his son, Erard, "to be administered by the trustee" under specified terms and conditions among which are these: The trustee was required to hold the shares and any property purchased out of the avails, to collect and retain income until the 21st birthday of Erard, then to pay him the accumulated income, thereafter to pay him current income until he attained the age of 25 years, and at that time to deliver to him the principal and undistributed income. During the life of the trustor, the trustee was not to sell or reinvest without the written consent and approval of the trustor. In case of Erard's death before the age of 25, the entire estate was to go to other sons of the trustor.

The trustor irrevocably disposed of the shares. He did not sell but made a gift. (*Burnet* v. *Guggenheim*, 288 U. S., 280 [Ct. D. 636, C. B. XII–1, 374].) He gave the trustee legal title temporarily to be held to enable it to conserve, administer and transfer the property for the use and benefit of his son to whom he gave the beneficial interest. It may rightly be said that the trustee and beneficiary "acquired by gift" as meant by section 202(a).[2] If the broad definition in section 2(9) stood alone, either might be regarded as the taxpayer but it is qualified by the rule that the trustee must pay the tax. It follows that the trustee properly may be regarded as the taxpayer and, for the purpose of calculating the gain, as having assumed the place of the trustor. Section 202(a)2 was enacted to prevent evasion of taxes on capital gains. (*Taft* v. *Bowers*, 278 U. S., 470, 479, 482 [Ct. D. 49, C. B. VIII–1, 226].) And see

[1] On the basis of the return made the tax was $14,391.71. On the construction of section 202(a)2 for which trustee contends the tax would be $7,714.

[2] *Executors of McDonogh* v. *Murdoch* (15 How., 367, 400, 404); *Maguire* v. *Trefry* (253 U. S., 12, 16); *Neilson* v. *Lagow* (12 How., 98, 106–107, 110); *Croxall* v. *Shererd* (5 Wall., 268, 281); *Doe, Lessee of Poor,* v. *Considine* (6 Wall., 458, 471); *Bowen* v. *Chase* (94 U. S., 812, 817, 818–819); *Young* v. *Bradley* (101 U. S., 782, 787); *Anderson* v. *Wilson* (289 U. S., 20, 24–25 [Ct. D. 650, C. B. XII–1, 253]).

Cooper v. *United States* (280 U. S., 409 [Ct. D. 163, C. B. IX-1, 272]). Transfers to trustees for the benefit of others are clearly within the reason for the enactment. They may be used to avoid burdens intended to be imposed, quite as effectively as may gifts that are directly made. The difference between the cost to the trustor in 1906 and the amount for which the trustee sold in 1922 was rightly taken as taxable income of the trust.

We come to the question whether the gain derived from the trustee's sale is taxable at 12½ per cent. That rate is not applicable unless the shares were "capital assets" defined by section 206(a)6 to be "property acquired and held by the taxpayer for profit or investment for more than two years." The time between the creation of the trust and the sale was less than the specified period and, if the words alone are to be looked to, the shares were not by the taxpayer "held * * * for more than two years." Soon after the passage of the Act the Income Tax Unit of the Bureau of Internal Revenue ruled that property transferred to a trustee, for purposes and upon terms and conditions analogous to those expressed in the indenture before us, which remained in his hands less than two years was not "capital assets" and that the resulting gain was not taxable at the 12½ per cent rate. That construction was followed by the Board of Tax Appeals, the Circuit Court of Appeals for the Third Circuit and the Court of Appeals of the District of Columbia.[8] The Commissioner says that the words of the definition are free from ambiguity and that the statute contains no exception. From an opinion of this court he invokes these statements: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." (*United States* v. *Hartwell*, 6 Wall., 385, 396.) He suggests that his construction was approved by the Revenue Act of 1924, section 208(a)8 (43 Stat., 263), which retained the definition, and that the provision in the Revenue Act of 1926, section 208(a)8 (44 Stat., 19), which conforms to the construction for which the trustee here contends, operated to make a change in the law.

The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. (*Commr. of Immigration* v. *Gottlieb*, 265 U. S., 310, 313; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 1, 37.) But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne* (19 How., 183), this court said (page 194): "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." Quite recently in *Ozawa* v. *United States* (260 U. S., 178) we said (page 194): "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." And in *Barrett* v. *Van Pelt* (268 U. S., 85, 90), we applied the rule laid down in *The People* v. *Utica Ins. Co.* (15 Johns., 358, 381), that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

The part of the definition under consideration is this: "held * * * for more than two years." Although on superficial inspection the words appear to be entirely clear, the Treasury Department deemed construction necessary to disclose the meaning that, upon consideration of the actual transactions of the

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[8] I. T. 1379, C. B. I-2 (July-December, 1922), 41; I. T. 1660, C. B. II-1 (January-June, 1923), 36; I. T. 1889, C. B. III-1 (January-June, 1924), 70; *McKinney* v. *Commissioner* (1929) (16 B. T. A., 804, 808); *Johnson* v. *Commissioner* (1929) (17 B. T. A., 611, 614, affirmed (C. C. A. 3) (1931), 52 F. (2d), 727); *Shoenberg* v. *Commissioner* (1930) (19 B. T. A., 399, 400, affirmed (Ct. App. D. C. (1931), 55 F. (2d), 543); *Stegall* v. *Commissioner* (1931) (24 B. T. A., 1231, 1235); *McCrory, Trustee,* v *Commissioner* (1932) (25 B. T. A., 994, 1011).

taxpayers, it found Congress to have intended. Regulations 62, article 1651, declares: "The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property * * * the prescribed period applies to the property exchanged and the property received in exchange considered as a unit." Construed strictly according to the letter, the provision would not include shares received as a dividend less than two years before the sale of property taken in exchange within that period. The need of this regulation illustrates how ambiguities requiring construction often exist where upon first reading the words seem clear. Generally, questions as to the meaning intended do not arise until the language used is compared with the facts or transactions in respect of which the intent and purpose are to be ascertained. (*Bradley* v. *The Washington, Alexandria & Georgetown Steam Packet Co.*, 13 Pet., 89, 97; *Deery* v. *Cray*, 10 Wall., 263, 270; *Patch* v. *White*, 117 U. S., 210, 217; *Gilmer* v. *Stone*, 120 U. S., 586, 590; *American Net & Twine Co.* v. *Worthington*, 141 U. S., 468, 474.)

Legislative reasons for applying the lower rate to capital gains give support to the construction for which the trustee contends. The report of the Committee on Ways and Means states: "The sale of * * * capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increase of the tax revenue, have been blocked by this feature of the present law. In order to permit such transactions to go forward without fear of a prohibitive tax, the proposed bill, in section 206, adds a new section * * * to the income tax, providing that where the net gain derived from the sale or other disposition of capital assets would, under the ordinary procedure, be subjected to an income tax in excess of 15 per cent (afterwards changed to 12½ per cent) the tax upon capital net gain shall be limited to that rate. It is believed that the passage of this provision would materially increase the revenue, not only because it would stimulate profit-taking transactions but because the limitation of 15 per cent is also applied to capital losses. Under present conditions there are likely to be more losses than gains." (Sixty-seventh Congress, first session, House Report No. 350, page 10.) See also Senate Report No. 275, page 12. In respect of the legislative purpose to lessen hindrance caused by high normal and sur taxes, there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period.

Here the taxable gain was ascertained by putting together the periods in which the shares were held by trustor and trustee respectively. The taxable gain was the same as if the former held continuously from the time of purchase in 1906 until the sale in 1922. But to ascertain the applicable rate the Commissioner broke the continuity. If the trustor had held until the sale, the 12½ per cent rate would have been applicable and the tax would have been substantially less than one-fourth of the amount assessed against the trustee who, for the purpose of calculating the gain, was substituted for the trustor.[4]

Sections 202(a)2 and 206(a)6 are included in the same Act and are applicable respectively to different elements of the same or like transactions and are not to be regarded as wholly unrelated. While undoubtedly legally possible and within the power of Congress, the methods adopted and results attained by the Commissioner are so lacking in harmony as to suggest that the continuity required to be used to get the base was also intended for use in finding the rate. No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort.

The Commissioner's suggestion that, by retaining the same definition in the 1924 Act, Congress approved the construction for which he contends is without merit. The definition had not been construed in any Treasury decision, by the Board of Tax Appeals or by any court prior to that enactment.

[4] The deficiency assessed, $238,275.91, plus original assessment, $14,391.71, makes the total $252,667.66. The taxpayer's calculation indicates that if the 12½ per cent rate were applied the total tax would be $58,921.51.

The dates of all constructions of the definition to which our attention has been called are shown in the margin.[5] The regulation above referred to was approved February 15, 1922. In respect of the question here involved, it puts no construction upon the definition. The rulings, I. T. 1379, 1660, and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they "have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law." (See cautionary notice published in the Bulletins containing these rulings.) It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it.

The Revenue Act of 1926, section 208(a)8[6] contains substantially the same language as that used in the 1921 Act to define capital assets. That part of the subdivision is followed by rules for determining the period for which the taxpayer has held the property. Among them is one applicable to facts such as those presented in the case before us. It is substantially the same as the construction for which the trustee contends. Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law. In view of the inclusion of the same definition in the Acts of 1921, 1924, and 1926 and the legislative purpose underlying it, the contention that the new words were added to change the meaning of "capital assets" as defined in the earlier Acts is without force. The definition so clarified was not new law but "a more explicit expression of the purpose of the prior law." (*Jordan* v. *Roche*, 228 U. S., 436, 445; *Merle-Smith* v. *Commissioner*, 42 F. (2d), 837, 842; *McCauley* v. *Commissioner*, 44 F. (2d), 919, 920.)

Affirmed.

Article 1602: Basis for allowance of depletion and depreciation.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Assets received by parent company upon liquidation of subsidiary. (See G. C. M. 12581, page 142.)

Article 1603: Readjustment of partnership interests.

XIII–22–6819
Ct. D. 832

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. Income—Partnership—Amount Taxable to Surviving Member.

Where upon the death of one member of a partnership the surviving member carries on the business for several months until the liquidation of the partnership, and the heirs of the deceased partner elect, as allowed by State statute and pursuant to an agreement between them and the surviving partner, to take a designated sum in lieu of the profits attributable to the use of one-half of the property of the partnership from the date of death to the date of settlement, the surviving partner is liable for income tax upon the entire profits of the business accruing during the period of settlement, less the agreed amount paid to the heirs of the deceased partner.

2. Decision Affirmed.

Decision of the Board of Tax Appeals (24 B. T. A., 488) affirmed.

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[5] See note 3.

[6] The term "capital assets" means property held by the taxpayer for more than two years. * * * In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 (corresponding to section 202(a)2 of the 1921 Act) such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. (44 Stat., 19.)

3. CERTIORARI DENIED.

Petition for certiorari denied April 30, 1934.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Lillie C. Pomeroy, George S. Pomeroy, Jr., Robert G. Bushong, Executors of the Estate of George S. Pomeroy, petitioners, v. Guy T. Helvering, Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

[December 4, 1933.]

OPINION.

ROBB, Associate Justice: Petition for review of a decision of the Board of Tax Appeals (24 B. T. A., 488).

For many years Josiah Dives and George S. Pomeroy, as partners, under the name of Dives, Pomeroy & Stewart, owned and operated department stores in the cities of Reading, Harrisburg, Pottsville, and the borough of Pottstown, Pa. Profits were divided equally one-half to each, although Dives' interest ($522,046.94) was in excess of that of Pomeroy ($444.552.99). On March 30, 1903, the partners executed an agreement under seal, "the primary object of which" was "to give to the survivor a controlling interest in the business" in the event either should die or become incapacitated during the continuance of the partnership then existing.

Josiah Dives died September 21, 1922, leaving a will by which, after various specific bequests, he left one-third of his estate to his wife for life and two-thirds in equal shares to his sons, Edward J. and Arthur M. Dives, together with a reversionary interest in the one-third bequeathed to their mother for life.

Clause 8 of the will recognized that the partnership business would "be subject to settlement and adjustment under the terms of the partnership agreement existing between my partner and myself," yet, to enable the executors to take all necessary action, they were empowered to sell, transfer, and convey all his property.

From the day of Dives' death until June 30, 1923, Pomeroy carried on the partnership business, the net income of which was as follows:

September 20 to December 31, 1922	$361,447.54
January 1 to June 30, 1923	191,223.93
Total	552,671.47

On April 23, 1923, the two sons of Dives, as executors of his will, entered into a contract with Pomeroy providing for a complete division of the partnership property, the date of settlement being June 30, 1923. (On that date all of the assets of the partnership, with certain exceptions immaterial here, were taken over by a corporation.) With respect to the profits derived from the operation of the business subsequent to the death of Dives, paragraph 8 of the contract provided for the payment to the executors of an amount of money "to be ascertained by taking 6 per cent of $3,750,000[1] from the date of the death of Josiah Dives on September 21, 1922, to the date of settlement (June 30, 1923), less the sum of $40,000 which the executors agree to pay the survivor (Pomeroy) as compensation as liquidating trustee and as salary for conducting the partnership business from September 21, 1922, to the date of settlement, which said amount shall be paid to the executors in full settlement of any claim they may have for profits accrued on the partnership business from the date of the death of the said Josiah Dives."

On March 15, 1923, Pomeroy filed a partnership return covering the period September 20, 1922, to December 31, 1922, and on September 15, 1923, filed a return covering the period January 1, 1923, to June 30, 1923. In these returns he divided the income of the business equally between the Dives estate and himself.

The Commissioner in his determination charged Pomeroy with the entire net profit of the business, adding thereto $40,000 stipulated for his services, and

[1] Apparently $3,750,000 had been agreed upon as the value of the interest of Dives in the partnership property and business at the date of his death.

allowed him a deduction of $176,250, the amount of the interest of the deceased partner's share which actually was paid to the heirs. It thus appears that while Pomeroy in fact received the difference between the net profits accruing during the period in question and $176,250 paid the Dives executors, he claims that he should have been assessed on only one-half of such net profits.

It is argued that on the death of Dives there was a continuance of the original partnership on the same terms, or at least that after the death of Dives the business was conducted as a joint venture. On the other hand, the Government contends that upon the death of Dives, Pomeroy became a liquidating trustee, accountable to the heirs of Dives for the corpus of the property, plus either the profits attributable to the use of the deceased partner's share of the partnership property or interest upon the value thereof, whichever the heirs should elect to take; that when election was made and Pomeroy became accountable only to the extent of the interest, the difference between the amount of such interest and the profits attributable to the use of the property constituted income to Pomeroy.

The agreement of 1903 made no provision for the continuation of the partnership in the event of the death or the incapacity of one of the partners. Therefore, upon the death of Dives, it became the duty of Pomeroy as surviving partner to take possession of the partnership estate pending final settlement. (*Froess, Admx.*, v. *Froess*, 284 Pa., 369.) He thereby assumed the position of trustee of the firm's assets, accountable to the heirs of Dives. (*Leary* v. *Kelley*, 277 Pa., 217, 219.) There is no doubt that Pomeroy, as trustee, was accountable to the Dives' heirs for the use of Dives' portion of the partnership property and business. Under the statutes of Pennsylvania the heirs were entitled, in addition to Dives' interest in the partnership property, to take either interest on the value of the deceased partner's share in the partnership on the date of his death, or, at their option, in lieu of such interest, the profits attributable to the use of one-half of the property of the dissolved partnership. (*Underdown, Exrs.*, v. *Underdown*, 279 Pa., 482, 486; *Froess, Admx.*, v. *Froess*, 284 Pa., 369, 374.) The heirs elected, as was their right, to take 6 per cent of the value of the share of Dives in the partnership property.

While the agreement (of April, 1923) was made later than at the close of the first accounting period, it was made before the close of the second period, "when," as stated in petitioners' reply brief, "it could not be known whether there would be profits or not." This may have been the reason why the heirs were willing to accept 6 per cent interest instead of sharing prospective profits. At all events, the good faith of the parties in entering into the contract is not impugned in any way. As it turned out, Pomeroy (who died September 13, 1925) made a good bargain. His estate should pay taxes on what he actually received.

The decision is affirmed.

SECTION 206.—NET LOSSES.

Article 1621: Net losses, definition and computation. XIII–25–6860
Ct. D. 841

(Also Section 208, Article 1651.)

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

DEDUCTION—NET LOSS—SUCCESSOR CORPORATION—SEPARATE ENTITY.

A corporation organized in April, 1922, for the purpose of taking over the business, assets, and liabilities of another corporation after retirement of the stock of the old corporation and issuance to its stockholders of stock in the new corporation equal to the old in class, par value, and number of shares, is not entitled, under section 204(b) of the Revenue Act of 1921, to deduct from its net income for the portion of the year 1922 succeeding the transfer and for 1923, the net losses sustained by the predecessor corporation in 1921 and the portion of 1922 preceding the transfer. In law and in fact the two corporations were not identical but distinct, even though their stockholders were substantially the same, and the case does not present any exceptional situation requiring that separate entities be disregarded.

SUPREME COURT OF THE UNITED STATES.

New Colonial Ice Co., Inc., petitioner, v. Guy T. Helvering, Commissioner of Internal Revenue.

Certiorari to the Circuit Court of Appeals for the Second Circuit.

[May 28, 1934.]

OPINION.

Mr. Justice VAN DEVANTER delivered the opinion of the court.

This is a controversy respecting deficiencies in the petitioner's income taxes for 1922 and 1923.

The question presented is—where all the assets and business of an older corporation are taken over by a new corporation, specially organized for the purpose and having substantially the same capital structure, in exchange for a portion of its stock, which is distributed by the older corporation among the latter's stockholders share for share, thereby retiring the old shares, is the new corporation entitled, notwithstanding the change in corporate identity and ownership, to have its taxable income for the succeeding period computed and determined by deducting from its net income for that period the net losses sustained by the older corporation in the preceding period? The answer involves a construction of section 204(b) of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 231), which declares:

"If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The material facts out of which the controversy arises are as follows:

Both corporations were organized under the laws of New York for the purpose of producing and selling ice—the older in 1920, with an authorized capital of $750,000, and the new on April 13, 1922, with an authorized capital of $700,000. The older one had proceeded to issue and sell stock, acquire a site for its plant and supply necessary equipment. When the equipment was only partly installed, and the plant was being operated at 40 per cent of its intended capacity, the company became financially embarrassed and unable to meet its indebtedness or supply additional equipment needed to render the business profitable.

A creditors' committee was organized, and likewise a stockholders' committee. Investigation disclosed that much stock had been issued of which there was no record and for which no consideration was received. Negotiations resulted in the restoration and cancellation of the spurious stock and in an agreement to organize a new company to take over the assets and liabilities, proceed with the completion of the equipment and continue the operation of the business. The agreement included provisions for the issue of stock by the new company to the old equal in class, par value and number of shares, to the outstanding stock so that the old company could make an exchange share for share with its stockholders and thereby retire its outstanding stock; for obtaining new funds with which to complete the equipment; for an extension of time by existing creditors; and for investing creditors with a supervising management through a stock-voting trust until their claims were paid.

Accordingly the new corporation—petitioner here—was organized and took over the assets, liabilities and business of the old corporation on April 13, 1922. Other provisions of the agreement were carried out in the manner contemplated, save in minor particulars not material here. The corporate existence of the old corporation continued (so it is stipulated) during the remainder of 1922 and all of 1923, but after the transfer it transacted no business and had no assets or income.

The old corporation sustained statutory net losses in the sum of $36,093.19 during 1921 and in the further sum of $10,338.90 during the part of 1922 preceding the transfer. The new corporation realized a net income of $48,763.43 during the part of 1922 succeeding the transfer and of $56,242.55 during the year 1923. In this proceeding the new corporation asserts a right under section 204(b) to a deduction from its income so realized of the losses so sustained by the old corporation.

The petitioner insists that the continuity of the business was not broken by the transfer from the old company to the new; and this may be conceded. But it should be observed that this continuity was accomplished by deliberate elimination of the old company and substitution of the new one. Besides, the matter of importance here, as will be shown presently, is not continuity of business alone but of ownership and tax liability as well. Had the transfer from one company to the other been effected by an unconditional sale for cash there would have been continuity of business, but not of ownership or tax liability.

Petitioner also insists that the ultimate parties in interest—stockholders and creditors—were substantially the same after the transfer as before; and this may be conceded. But there is here no effort to tax either creditors or stockholders. Other statutes, as also constitutional provisions, have an important bearing on the taxation of gains by stockholders through corporate reorganizations, and the cited decisions relating to that subject[1] are not presently apposite. What is being taxed in this instance is the income realized by the new company in conducting the business after the transfer; and the sole matter for decision is whether, under section 204(b), there shall be deducted from that income the losses suffered by the old company in its conduct of the same business before the transfer.

The Board of Tax Appeals (24 B. T. A., 886), and the Circuit Court of Appeals (66 Fed. (2d), 480) both ruled that the deduction is not admissible under the statute.

The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

The statutes pertaining to the determination of taxable income have proceeded generally on the principle that there shall be a computation of gains and losses on the basis of a distinct accounting for each taxable year; and only in exceptional situations, clearly defined, has there been provision for an allowance for losses suffered in an earlier year. Not only so, but the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, i. e., to treat them as personal to him and not transferable to or usable by another.

Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.

These views, often reflected in decisions of this court, have been recently reaffirmed and applied in *Woolford Realty Co.* v. *Rose* (286 U. S., 319, 326 et seq. [Ct. D. 493, C. B. XI-1, 154]); *Planters Oil Co.* v. *Hopkins* (286 U. S., 332 [Ct. D. 492, C. B. XI-1, 153]); and *Helvering* v. *Independent Life Insurance Co.* (decided May 21, 1934 [Ct. D. 839, page 302, this Bulletin]).

When section 204(b) is read with the general policy of the statutes in mind, as it should be, we think it can not be regarded as giving any support to the deduction here claimed. It brings into the statutes an exceptional provision declaring that where for one year "any taxpayer has sustained a net loss" the same shall be deducted from the net income of "the taxpayer" for the succeeding taxable year; and, if such loss be in excess of the income for that year, the excess shall be deducted from the net income for the next succeeding taxable year. Its words are plain and free from ambiguity. Taken according to their natural import they mean that the taxpayer who sustained the loss is the one to whom the deduction shall be allowed. Had there been a purpose to depart from the general policy in that regard, and to make the right to the deduction transferable or available to others than the taxpayer who sustained the loss, it is but reasonable to believe that purpose would have been clearly expressed. And, as the section contains nothing which even approaches such an expression, it must be taken as not intended to make such a departure.

[1] *United States* v. *Phellis* (257 U. S., 156 [T. D. 3270, C. B. 5, 37]); *Rockefeller* v. *United States* (257 U. S., 176 [T. D. 3271, C. B. 5, 34]); *Cullinan* v. *Walker* (262 U. S., 134 [T. D. 3508, C. B. II-2, 55]); *Weiss* v. *Stearn* (265 U. S., 242 [T. D. 3609, C. B. III-2, 51]); *Marr* v. *United States* (268 U. S., 536 [T. D. 3755, C. B. IV-2, 116]).

We come then to an alternative contention that, even though the section be not as broad as claimed, the deduction should be allowed, because "for all practical purposes the new corporation was the same entity as the old one and therefore the same taxpayer." This is not in accord with the view on which the stockholders and creditors proceeded when the new company was brought into being. They deserted the old company and turned to the new one because they regarded it as a distinct corporate entity and therefore free from difficulties attending the old one. Having sought and reaped the advantages incident to the change, it well may be that they would encounter some embarrassment in now objecting to an incidental and remote disadvantage such as is here in question. But, be this as it may, we are of opinion that in law and in fact the two corporations were not identical but distinct. This was plainly implied in the transfer of the assets and business from one to the other. That transaction was voluntary and contractual, not by operation of law. Thereafter neither corporation had any control over the other;[2] the old corporation had no interest in the assets or business, and the chance of gain and the risk of loss were wholly with the new one. Thus the contention that the two corporations were practically the same entity and therefore the same taxpayer has no basis, unless, as the petitioner insists, the fact that the stockholders of the two corporations were substantially the same constitutes such a basis.

As a general rule a corporation and its stockholders are deemed separate entities[3] and this is true in respect of tax problems.[4] Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.[5] But in this case we find no such exceptional situation—nothing taking it out of the general rule. On the contrary, we think it a typical case for the application of that rule.

The petitioner relies on *Pioneer Pole & Shaft Co.* v. *Commissioner* (55 Fed. (2d), 861); *Industrial Cotton Mills* v. *Commissioner* (61 Fed. (2d), 291); and *H. H. Miller Industries Co.* v. *Commissioner* (61 Fed. (2d), 412). The decisions in these cases are not wholly in point but contain language giving color to the petitioner's claim, and are to that extent in conflict with other Federal decisions, notably *Athol Manufacturing Co.* v. *Commissioner* (54 Fed. (2d), 230 [Ct. D. 513, C. B. XI-2, 252]); *Turner-Farber-Love Co.* v. *Helvering* (68 Fed. (2d), 416 [Ct. D. 827, page 279, this Bulletin]); and the decision now under review. In so far as they are not in harmony with the views expressed in this opinion they are disapproved.

Judgment affirmed.

Article 1622: Claim for allowance of net loss. XIII–12–6708 Ct. D. 801

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. Deduction—Net Loss—Affiliated Corporations.

Where one of a group of affiliated corporations filing consolidated returns for the years 1922 and 1923 sustained a net loss in 1922 which exceeded its income for 1923, and others of the group suffered losses in both 1922 and 1923, the 1922 losses of the affiliates may not be brought into hotchpot with the current losses in ascertaining the net income of the group for the year 1923. Section 204(b) of the Revenue Act of 1921 forbids the assimilation by the group of the carried-over loss with the current loss.

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[2] See *Southern Pacific Co.* v. *Lowe* (247 U. S., 330, 337); *Peabody* v. *Eisner* (247 U. S., 347, 349); *Gulf Oil Corporation* v. *Lewellyn* (248 U. S., 71).

[3] *Pullman Car Co.*, v. *Missouri Pacific Co.*, (115 U. S., 587, 596–597); *Donnell* v. *Herring-Hall-Marvin Safe Co.* (208 U. S., 267, 273); *United States* v. *Delaware, etc., Co.* (238 U. S., 516, 527–529); *Cannon Manufacturing Co.* v. *Cudahy Co.* (267 U. S., 333); *Klein* v. *Board of Supervisors* (282 U. S., 19, 24).

[4] *Klein* v. *Board of Supervisors* (282 U. S., 19, 24); *Dalton* v. *Bowers* (287 U. S., 404, 410); *Burnet* v. *Clark* (287 U. S., 410, 415 [Ct. D. 620, C. B. XII–1, 175]); *Burnet* v. *Commonwealth Improvement Co.* (287 U. S., 415, 418–420 [Ct. D. 622, C. B. XII–1, 277]).

[5] *United States* v. *Lehigh Valley R. R. Co.* (220 U. S., 257, 272–274); *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic Assn.* (247 U. S., 490, 500–501); *Southern Pacific Co.* v. *Lowe* (247 U. S., 330, 337–338); *Gulf Oil Corporation* v. *Lewellyn* (248 U. S., 71).

2. Decision Affirmed.

Decision of the Board of Tax Appeals (26 B. T. A., 520) affirmed.

3. Certiorari Denied.

Petition for certiorari denied October 16, 1933.

United States Circuit Court of Appeals for the Second Circuit.

The Delaware & Hudson Co. v. *The Commissioner of Internal Revenue.*

The Delaware & Hudson Co. et al., petitioners, v. *Commissioner of Internal Revenue, respondent.*

Appeal from an order of the Board of Tax Appeals fixing a deficiency of the taxpayer for income taxes for the year 1923.

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges.

[June 5, 1933.]

OPINION.

L. Hand, Circuit Judge: The question presented by this appeal, stripped of confusing details, is as follows: During the years 1922 and 1923, a number of companies were affiliated under section 240(b) of the Act of 1921. Most of the affiliates had net losses in their incomes for 1922, which they were entitled to carry over to the year 1923 under section 204(b). The carried-over loss in one instance was more than enough to cancel the income of that affiliate for the year 1923, thus leaving a minus quantity which under section 204(b) the affiliate, had it stood alone, would have been obliged to carry over to the year 1924. Others suffered losses in both years. The affiliated group sought to use as a deduction in the group return for 1923, the combined losses of those who had lost in both years, and the excess of the loss in 1922 over the income for 1923 of that affiliate which had had an income for 1923. The Commissioner found the income of the group by allowing only the losses suffered in 1923, refusing to allow any of the carried-over losses, though he allowed that affiliate which had had a loss in 1922 to deduct it from its income in 1923 so far as it could be so absorbed. The group, which for the purposes of this case is to be treated as the taxpayer, insists that the losses for 1922 shall be brought into hotchpot, along with the losses for 1923. The Board affirmed the Commissioner; this appeal followed.

The case is ruled by *Woolford Realty Co.* v. *Rose* (286 U. S., 319 [Ct. D. 493, C. B. XI-1, 154]), unless it be a critical difference that the loss there sought to be carried over happened in a year preceding affiliation. The ratio decidendi of that decision forbids such a distinction. It was that section 206(b), 1926 (the identical successor of section 204(b) of 1921), did not allow the summation of a carried-over loss with a loss in the succeeding year. There is no such thing as a "minus income," and the carried-over loss must be deducted from "income." This would cover such of the affiliates at bar as had suffered losses in both years. Apparently it would not cover that which had an income in 1923. Yet it is hard to suppose that there is a difference depending upon the existence of any income, however small, in the later year. However that may be, the rest of the reasoning applies to the affiliate which had an income in 1923. Section 206(b) declared that any excess of the carried-over loss which was not absorbed by the income for the second year should be applied to the third year; and, since there was no suggestion that it could be used otherwise, it must be so used or not at all. This prohibited its use as an item in the consolidated return of the group. Again the section allowed the deduction only to a taxpayer, and the group is not a taxpayer; the fixed policy of Congress being to assess separately the income of each year, anyone who seeks to mingle the income of two years must show express warrant. Finally, though the affiliate is allowed to deduct a loss for a past year, as an item in computing its income for the current year, and under section 234 this item might be regarded like any other loss, nevertheless section 206(b) forbade the assimilation of the carried-over loss with the current loss by prescribing how the carried-over loss should be used.

So far it is apparent that the reasoning applies pari passu to a case where the carried-over loss is from a year when the companies were affiliated. In either case section 206(b) directs the use to be made of any excess, and the carried-over loss is as much and as little an item in the taxable income of the affiliate as a loss suffered in the second year. There seems therefore to be no ground for distinguishing between the two situations, and if the reasoning is to be taken as general at all, the case at bar falls within it. There is added reason for this conclusion in the approval of *Swift* v. *United States* (38 Fed. (2d), 365) (Ct. Cl.), which concerned the carrying back of a loss from one affiliated year to an earlier.

However, the last ground of the opinion was the practical one that an opposite construction would permit of easy abuse, an abuse prevented by the regulations under the Act of 1928 (Regulations 75, article 41). A company might buy up a derelict company merely to use its losses. No doubt courts will often construe language with an eye to the result; we do not wish to minimize the importance of that canon of interpretation. Moreover, the evil here in question could not arise in the case of losses carried over from an affiliated year. But this ground of the decision was rather a makeweight than its foundation. The earlier reasoning we must assume to have been seriously intended in its general terms, a deduction from the expressed intent of the statute; we do not feel free to discard it and make the decision depend only upon the possibility of abuse. The deliberate construction put upon the language we must take as it reads, until we are advised that it was not broadly intended. It is indeed possible to look at the situation differently; to say that Congress meant the group to be taken as an entity for all purposes, including the privilege of pooling its losses for three years. In that view, section 204(b) of 1921 would be read as no more than a provision for computing income; when the "taxpayer" for computing purposes is the group, as under section 240(b) it is, the section would not be understood verbally, but through its purpose. The provision that the excess is to be carried over to the third year would also be understood in the same sense. While, therefore, it is possible so to construe the language, it has not been so construed. If, as we are admonished, there must be imperative language to avoid the underlying policy that each year's income shall be assessed separately, such language is absent. A taxing system so detailed and particular as ours does not admit of the same flexibility of interpretation as one in more general terms. Perhaps its very refinement may defeat its purposes; elaboration often does. But the more articulate the expression, the less room remains for intendment beyond the words used. This is the penalty inherent in a progressive specification of any general meaning; what is left out is not to be supplied. We recognize the force of the departmental construction which prevailed before *Swift* v. *United States*, supra (38 Fed. (2d), 365), but again that is not final. It seems to us that without disregarding the necessary implications, indeed the express declarations, of the Supreme Court, we can not hold that such losses may be brought into hotchpot.

Order affirmed.

ARTICLE 1622: Claim for allowance of net loss. XIII-13-6720
G. C. M. 12905

REVENUE ACT OF 1921.

General Counsel's Memorandum 8132 (C. B. IX-1, 287), which holds in part that "the portion of the consolidated net loss for the year properly attributable to each affiliated corporation may be applied against the consolidated net income allocable to such corporation for the first succeeding taxable year," is revoked in so far as inconsistent with the decision of the Board of Tax Appeals in *Delaware & Hudson Co.* v. *Commissioner* (26 B. T. A., 520, C. B. XII-1, 4, affirmed 65 Fed. (2d), 292) and the decision of the Board of Tax Appeals in *Wilson Furs, Inc.*, v. *Commissioner*, and *Selbert, Ltd.*, v. *Commissioner* (29 B. T. A., 319 [page 14, this Bulletin]).

SECTION 208.—CAPITAL GAINS AND LOSSES.

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACTS OF 1921, 1924, AND 1926.

Stock acquired through exercise of stock rights. (See G. C. M. 12942, page 73.)

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1921.

Two-year period from date of acquisition by trustor to date of disposition by trustee. (See Ct. D. 840, page 188.)

PART II.—INDIVIDUALS.

SECTION 212.—NET INCOME OF INDIVIDUALS DEFINED.

ARTICLE 22: Computation of net income.

REVENUE ACTS OF 1918, 1921, 1924, AND 1926.

Treatment of insurance premiums paid in advance for period of more than one year. (See G. C. M. 13148, page 67.)

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income. XIII–13–6721
I. T. 2771

REVENUE ACTS OF 1917, 1918, 1921, AND 1924.

In view of the Commissioner's nonacquiescence in the decisions of the Board of Tax Appeals in *Des Moines Improvement Co.* v. *Commissioner* (7. B. T. A., 279 [page 21, this Bulletin]) and *American Seating Co.* v. *Commissioner* (14 B. T. A., 328 [page 18, this Bulletin]) and the decision of the Board of Tax Appeals in *B. F. Avery & Sons, Inc.*, v. *Commissioner* (26 B. T. A., 1393), I. T. 2195 (C. B. IV–2, 36) is revoked.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1926.

Accrued interest as part of bid price of property bought on foreclosure by mortgage. (See Ct. D. 810, page 290.)

Article 31: What included in gross income. (Also Section 213(b), Article 87.)

XIII-15-6744
Ct. D. 813

INCOME TAX—REVENUE ACTS OF 1916, 1917, 1918, 1921, 1924, AND 1926—DECISION OF COURT.

1. Income—Earnings of Condemnation Award Held in Trust.

Where the life tenant of property condemned by the city of New York elected to take his portion of the condemnation award in a lump sum in lieu of income for life, and the court ordered that the remainder of the award be placed in the custody of the chamberlain of the city to be invested and held in trust for the remainderman (then neither ascertained nor ascertainable). the accumulations earned by the trust fund each year fall within the definition of "income" contained in the applicable Revenue Acts.

2. Same—Constitutionality.

A tax upon the earnings of a condemnation award held by the chamberlain of the city of New York as trustee is not unconstitutional as a tax on the exercise of the city's right to condemn land.

3. Same—City Official as Taxable Person.

The chamberlain of the city of New York, selected by the court to act as the custodian of a fund representing only a private interest, is a taxable person, and the earnings of the fund in his custody are returnable by him for Federal taxation.

4. Decision Affirmed.

Decision of the Board of Tax Appeals (21 B. T. A., 1329) affirmed.

5. Certiorari Denied.

Petition for certiorari denied December 4, 1933.

United States Circuit Court of Appeals for the Second Circuit.

Charles A. Buckley, as Chamberlain of the City of New York, Proposed to be Assessed by the Federal Income Tax Bureau under the Fictitious name of "City Chamberlain Acting in Capacity of Trustee for the Remainderman u/w Robert Swift Livingston, Room 860, Municipal Building, New York, N. Y.," petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review a decision of the Board of Tax Appeals. Affirmed.

Before Manton, Swan, and Chase, Circuit Judges.

[July 17, 1933.]

OPINION.

Income taxes for the years 1917 to 1925, inclusive, are involved. For the opinion of the Board of Tax Appeals see 21 B. T. A., 1329.

In 1876, the city of New York condemned for a park certain land which had previously been devised by Robert Swift Livingston to his son for life with remainder in fee to his issue living at the time of his son's death. In accordance with the New York law, the life tenant of the property elected to take a portion of the award in lieu of the income for his life, and that was paid to him in 1877, less a portion which he assigned to his sister. The remainder of the award. $51,002.17, was placed in the custody of the chamberlain of the city of New York, pursuant to an order of the New York Supreme Court, to be invested by him and held with accumulations for the benefit of whomsoever should be entitled to receive it on the death of the life tenant. This fund with the accumulations was held by the petitioner when the life tenant died in 1928 and when the Board of Tax Appeals rendered its decision. Petitioner never reported for taxation as income any receipts on account of the fund. Its existence was discovered by an internal revenue field agent who called the attention of the petitioner to his failure to make any income tax returns. Upon the petitioner's refusal to return as income what he received after 1913, the Commissioner of Internal Revenue made returns for the years subsequent and assessed the taxes here in controversy. The Board dismissed an appeal for want of jurisdiction as to the years 1913 and 1914 and the petitioner acquiesced. It sustained the Commissioner as to the remaining assessments.

CHASE, Circuit Judge: The petitioner claims that what has been called income and taxed is only a restoration of the principal of the award which would have been received by the remainderman had there been no election by the life tenant to take a lump sum in lieu of income. No doubt this is the theory designed to be worked out by the operation of the law under which the payment was made to the life tenant and the remainder invested and held. It was so recognized in respect to this very fund in *Matter of Tucker* (187 A. D. (N. Y.), 502; affirmed 228 N. Y., 505). But whether the accumulations were income taxable by the Federal Government after its income tax became effective presents a broader question. This fund, whatever the purpose to be achieved by holding it and adding the accumulations to it, was held in trust by the petitioner during the years in question. He did receive what it earned each year. These receipts fall within the definition of income contained in every applicable Revenue Act. (Section 2(a) of the Act of 1916; section 1200 of the 1917 Act; section 213(a) of the Acts of 1918, 1921, 1924, and 1926.) So, too, are they covered by the general and accepted definition of income for taxation purposes which the Supreme Court has held to be "the gain derived from capital, from labor, or from both combined." (*Eisner* v. *Macomber*, 252 U. S., 189 [T. D. 3010, C. B. 3, 25]; *Merchants' Loan & Trust Co. Tr.* v. *Smietanka*, 255 U. S., 509, 517 [Ct. D. 6, C. B. 4, 34].) Do they then have a different character because of the theory that they were received to rebuild a capital fund depleted in 1877? Such a contention, first presupposes that the remainderman had an absolute right after the action of the New York court when it divided the award to receive the same amount in money which would have been held for him had the New York law permitted no such division; and, second, that Congress has seen fit to make a distinction between such a trust fund as this and trust funds whose income generally is taxable. (Section 2(b) of the Revenue Act of 1916; section 219(a) of the Revenue Acts of 1918, 1921, 1924, and 1926.)

After the court order of 1877, the ultimate taker, who will for convenience be referred to as though he were one person at all times known, although he was then neither ascertained nor ascertainable, was clearly entitled only to the part set aside for him as the then present worth of his interest in the award. That and not the original award became the principal sum of the trust created for his benefit. Instead of having a principal sum held in trust without accumulations he was given its then computed equivalent, viz, a principal sum plus accumulations. Instead of being entitled to a sum certain at the death of the life tenant, the remainderman became entitled to his then present interest in the award plus whatever this interest would earn during the duration of the trust. As the trust was to terminate at the death of the life tenant, if the present worth in 1877 of the remainderman's interest happened to be computed in exact accordance with every contingency which arose, he would receive the amount of the original award. But obviously no one did or could know in 1877 how long the life tenant would live; nor how much the fund would earn; nor what the expenses of its administration would be; nor what losses might be sustained; nor what taxes might be imposed either upon it, or upon the income derived from it. The remainderman was not entitled, perforce, to more than his interest as the beneficiary of the trust actually created. As the uncertainties inherent in computing the principal of this fund were made certain by subsequent events he might gain or lose. So far as we are informed the principal of that trust has never been depleted. Indeed, it has been increased by the accumulations, and all the time the trust was in existence the remainderman was entitled to receive upon its termination not the amount of the original award for the land, but the amount of the trust, whether it were more or less than the original award. *Matter of Tucker*, supra, and *Livingston* v. *Tucker* (107 N. Y., 549) bear no further on the present issue than that. The value in terms of the original award which the trust fund set up in 1877 was thought to represent is now immaterial. Of course, it is true that had there been no division of the award and that sum been made the principal, the remainderman would have received it free of income tax, but that is only indicating what might have been and losing sight of realities. In the one instance there would have been no production of income which created a taxable shifting of economic interests that brought about any change in the principal; while what actually happened brought about such changes in every taxable period here involved. As these changes were due to the addition of what is defined by the law to be income, this income is prima facie taxable. To be otherwise, it must be shown that Congress has placed such income on a nontaxable basis by differentiating it from the income of trust funds generally. This has not been done.

It is argued that this is a tax upon the exercise of the right of the city of New York to condemn land and so unconstitutional; but such a contention, if sound, means that whatever is earned by whatever is paid as an award in condemnation proceedings by a State or its political subdivision would be Federal tax-exempt to the recipient of such income. The mere stating of the effect refutes the argument. Clearly no tax assessed here has the slightest effect to curtail the power of the city of New York to condemn land or to decrease the amount of any award made in such a proceeding. After a government's property becomes that of a private individual, the fact of former governmental ownership does not impart exemption from taxation to it or to what is earned by it. (Compare *Group No. 1 Oil Corporation* v. *Bass*, 283 U. S., 279 [Ct. D. 330, C. B. X–1, 153]; *Fox Film Corporation* v. *Doyal et al.*, 286 U. S., 123.)

Finally, it is argued that the city chamberlain is not a taxable person and that this fund in his custody by order of the State court can not earn income returnable by him for Federal taxation. It should be observed that there has been no attempt to interfere with the fund itself or with the control of it by the city chamberlain; nor is it a fund held by him for public use. He is an officer of the State court, so far as we are now concerned, holding a fund for investment, accumulation, and distribution subject to the orders of the court and entirely for the benefit of the remainderman. He holds it in no other capacity. What other duties the custodian may perform by virtue of other powers and what he may or may not do as chamberlain of the city of New York seem to be beside the point. It can hardly be thought that, because the court selected the chamberlain of the city of New York to act as the custodian of a fund representing only a private interest, the taxability of the income earned by that fund can stand any differently than it would if a private individual had been empowered to administer the fund. In the latter event it would have had no immunity from taxation. (*Central Trust Co.* v. *New York City and N. R. R. Co.*, 110 N. Y., 250; *Stephens* v. *N. Y. & O. M. R. Co.*, 13 Blatchf., 104, 23 Fed. Cas. No. 13405.) Moreover, neither property held by a trustee in bankruptcy is exempt from taxation (*Swarts* v. *Hammer*, 194 U. S., 441), nor is that in the hands of a receiver appointed by the court. (*In re Tyler*, 149 U. S., 164.) The imposition of these taxes cut down no revenue of the city of New York, interfered in no way with the official duties of the city chamberlain as such, and impaired no State function. There has been no direct burden laid upon any instrumentality of government. (Compare *Willcuts* v. *Bunn*, 282 U. S., 216.) Only the income of a fund held for the benefit of a private person has been taxed in accordance with the law relating to the taxation of income from funds held by fiduciaries under orders of court. The suggestion that the city chamberlain can not pay the taxes imposed without leave from the State court need not now be discussed. We are unwilling to believe that when the validity of the taxes has been established, any difficulty will be encountered in their collection either through action or inaction on the part of the State court. Nor does the contention that because section 143(a) of the Revenue Act of 1928 provided that a receiver appointed by authority of law and in possession of only a part of the property of an individual need not make a return of income require a different result. That provision relates to receivers as there defined and was to do away with partial returns, not to exempt income from taxation. (Compare *North American Oil Consolidated* v. *Burnet*, 286 U. S., 417 [Ct. D. 499, C. B. XI–1, 293].) This petitioner has not been shown to be such a receiver.

Affirmed.

ARTICLE 32: Compensation for personal services. XIII-18-6775 Ct. D. 820

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. INCOME—COMPENSATION FOR PERSONAL SERVICES.

Where the taxpayer and his brother, as partners, in the years 1906 to 1910 organized syndicates composed of other persons for the purpose of acquiring and selling certain timberlands, and entered into employment contracts with the syndicates whereby it was agreed that they should receive as compensation for their services one-fourth of the net profits from sales whenever the various tracts were sold, the amount received as compensation in 1922, 1923, and 1924, when the first sales of lands purchased prior to March 1, 1913, were made, constitute taxable income for those years, without deduction of any amount representing the estimated March 1, 1913, value of the partners' rights under the contracts.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (22 B. T. A., 196) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

George L. McPherson, appellant, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[November 13, 1933.]

OPINION.

MARTIN, Chief Justice: This appeal involves income taxes for the calendar years 1922, 1923, and 1924, which were assessed against appellant under the Revenue Act of 1921 (ch. 136, 42 Stat., 227, section 213(a)) and the Revenue Act of 1924 (ch. 234, 43 Stat., 253, section 213(a)).

Section 213(a) of each Act reads as follows:

"SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

"(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal services * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *."

The material facts as found by the Board of Tax Appeals are substantially as follows:

Appellant and his brother, John A. McPherson, were the sole members of the partnership of George L. & John A. McPherson, hereinafter called the partners, organized in 1906. In the years 1906 to 1910 the partners, being experienced timber operators, organized certain syndicates, composed of other persons, for the purpose of acquiring timberlands in the State of Oregon, with the expectation of selling them at a profit. When such a syndicate was organized a contract was executed between the syndicate members as parties of the first part and the partners as parties of the second part, whereby the syndicate agreed to furnish sums of money to the partners to be invested in such lands; the partners were to purchase the lands with the money provided by the syndicate members, and to use their best judgment in making the purchases; the title to the lands when purchased was to be taken in the name of the Detroit Trust Co., as trustee, to be held in trust for the syndicate members in proportion to the respective amounts contributed by them to the purchase price; the partners were to receive for their expenses 50 cents per acre for certain parts of the land purchased and $1 per acre for other parts; the partners were to do all the work reasonably necessary for the care and protection of the lands and for the prevention of trespass, and were to advise the syndicate when to sell particular tracts of land, and were to attend to the selling of the same; when the lands or parts thereof were sold the total amounts invested in the purchase thereof, and all sums paid for taxes and other necessary expenses, were to be deducted from the selling prices, and the difference was to be considered as net profit; the partners were to receive one-fourth of such net profit "if, when, and as fast as" the various tracts were sold; and the residue was to be distributed by the trustee to the syndicate members in proportion to their respective contributions.

Various tracts of land were purchased under these contracts prior to March 1, 1913, but no part was sold prior to that date. However, the lands had appreciated in value prior thereto, to an extent which would have produced for the partners an estimated sum of $300,000 if the land then had been put to sale.

Afterwards, certain tracts were sold in the years 1922, 1923, and 1924, for sums which entitled the partners to participate in the profits. In determining their income for the sales for income-tax purposes, the partners deducted from the gross amounts actually received by them a proportionate amount of the March 1, 1913, value of their rights as estimated under the agreement. The Commissioner of Internal Revenue disallowed such deductions, increased the taxable income of each partner for the years in question, from which action the present appeal was taken.

The partners kept their books and filed their tax returns on the cash receipts and disbursements basis.

On the basis of these findings the Board of Tax Appeals sustained the determination of the Commissioner and held that the amounts received during the taxable years under the employment contracts were taxable in their entirety, when received, without any allowance for a proportionate part of the estimated value of March 1, 1913, of the rights of the partners under the contracts. The Board accordingly entered an order redetermining the deficiencies for the years in question, and from the order so entered appellant took this appeal.

The contention of the appellant is to the effect that on March 1, 1913, he owned capital assets under the contract equal to the sum which he would have received had the lands then been sold at their estimated value of that date; that when his income taxes for the years 1922, 1923, and 1924, came to be assessed they should have been assessed only upon so much of the income then received by him as was in excess of the value of such capital assets on March 1, 1913.

We can not sustain this contention. There is no term in the contract which fixed March 1, 1913, as a point of settlement between the parties regardless of whether the lands had been sold by that time or not. On the contrary, no profits had accrued to appellant under the contracts in any present or specific sum on that date. Payment of profits to the appellant was to be made only when and as fast as the lands were sold. On March 1, 1913, no part of the lands had been sold and consequently no right to any profit from the transaction had accrued to appellant. Nor was it then certain that any income would accrue to him, for the selling price of the lands might decline to such an extent as to permit of no profit upon the transaction taken as an entirety. The payments to be made to the appellant were for services and were to be made when the services were completely performed, and were to be determined by and paid from the proceeds actually received by the trustee for the syndicate members.

This view is consistent with established authorities. In *Edwards* v. *Keith* (231 Fed., 110), the plaintiff, an insurance agent, prior to March 1, 1913, wrote policies of insurance under agreements with the insurance company entitling him as compensation for his services to a certain commission on the first premium paid by the assured and a percentage on any future premiums. The contracts contained a provision that "commissions shall accrue only as the premiums are paid in cash." The court held that under the Income Tax Act of 1913 the commissions paid to the plaintiff after March 1, 1913, on business solicited prior thereto were taxable income in the years when received, stating further—

"The statute does not provide that the 'personal services,' compensation for which is to be considered income, must be rendered in the same year in which the compensation is received. (See also *Jackson* v. *Smietanka*, 272 Fed., 970 [Ct. D. 5, C. B. 4, 96].)"

In *Lynch* v. *Hornby* (247 U. S., 339 [T. D. 2731]), the court held that, under the Income Tax Act of 1913, dividends declared and paid in the ordinary course by a corporation to its shareholders after March 1, 1913, whether from current earnings or from a surplus accumulated before March 1, 1913, were taxable to the individual shareholders as income, under the surtax provision. This case reversed the decision in *Lynch, Collector*, v. *Hornby* (236 Fed., 661), wherein it was held that dividends received by a stockholder from the conversion into money and the distribution in a subsequent year of property owned by the corporation on March 1, 1913, and which was on that date worth the amount subsequently received therefor, was not "income" accruing during the year of distribution and was not taxable under the Act. (Cf. *Woods* v. *Lewellyn*, 252 Fed., 106; *Workman* v. *Commissioner*, 41 F. (2d), 139; *E. S. Jones' case*, 6 B. T. A., 1048; *J. Noble Hayes' case*, 7 B. T. A., 936.) The fact that the contract rights in the present case had a determinable value on March 1, 1913, does not alter the rule, as may be seen from a reading of the cited cases.

The decision in the case of *Eldredge* v. *United States* (31 F. (2d), 924) upon which the appellant relies is not applicable to the present case. It relates rather to deductions for depreciation of an ore property from the annual royalties received by the lessees thereof.

The decision of the Board of Tax Appeals is affirmed.

ARTICLE 35: Gross income from business.

REVENUE ACT OF 1918.

Sales on open account to buyer bankrupt within year. (See Ct. D. 829, page 281.)

ARTICLE 44: Sale of real property involving deferred payments.

XIII-17-6765
G. C. M. 12987

REVENUE ACT OF 1926.

The "initial payments" from the sale of real estate, under section 212(d) of the Revenue Act of 1926, do not include amounts received by the vendor in the year of sale from the disposition to a third person of notes given by the vendee as part of the purchase price which are due and payable in subsequent years.

Recommended that I. T. 2339 (C. B. VI-1, 42) be revoked.

Advice is requested whether the "initial payments" from the sale of real estate, under section 212(d) of the Revenue Act of 1926, include amounts received by the vendor in the year of sale from the disposition to a third person of notes given by the vendee as part of the purchase price which are due and payable in subsequent years.

Under date of May —, 1926, the M Company sold certain real estate for a consideration of $12x$ dollars, receiving x dollars in cash and the balance in 11 interest-bearing notes of x dollars each maturing at 1-year intervals over a period of 11 consecutive years. In the year 1926 the M Company sold four of the notes at their aggregate face value of $4x$ dollars. Question has arisen whether the amount of $4x$ dollars must be included as a part of the "initial payments."

Section 212(d) of the Revenue Act of 1926 gives taxpayers the privilege of reporting income realized upon the sale or other disposition of real estate on the installment plan if the "initial payments" do not exceed one-fourth of the purchase price. "Initial payments" are defined by section 212(d) as "the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

In the case of *Duram Building Corporation* v. *Commissioner* (66 Fed. (2d), 253, Ct. D. 758, C. B. XII-2. 174), the corporation sold certain real estate in February, 1926. It received less than 25 per cent of the purchase price in cash, and the balance in the purchaser's notes secured by mortgages. In August, 1926, the Duram Building Corporation liquidated and the notes and mortgages were distributed to its sole stockholder. The sole stockholder was indebted to the corporation at the date of dissolution in the amount of $41,758.71, and a portion of the distributed notes was credited in 1926 against this indebtedness. The Commissioner contended that in determining the "initial payments" the amount of the debt so paid must be added to the cash payments made by the purchaser, with the result that the "initial payments" exceeded 25 per cent of the purchase price, and precluded the use of the installment basis in reporting the profit derived from the sales. The court held that the "initial payments" referred to in section 212(d) of the Revenue Act of 1926 were payments received in the year of sale by the vendor from the vendee, and did not include amounts received in the year of sale by the vendor from the discount or sale of the vendee's "evidences of indebtedness" to third parties. The court stated in part that:

> * * * When the purchaser's notes are sold or otherwise disposed of to a third party, they are not paid, nor does the vendor then receive "payment" for the land in the ordinary sense of the word. In speaking of "payments received," we think the statute refers to payments received from the purchaser of the land * * *.

It is the opinion of this office that the decision of the court in the Duram Building Corporation case correctly interprets the provisions of section 212(d) of the Revenue Act of 1926 as to the meaning of the term "initial payments." Accordingly, in the case of the M Company, the "initial payments" do not include the amount realized upon disposition of notes of the purchaser to a third party.

In view of the foregoing, it is recommended that I. T. 2339 (C. B. VI-1, 42) be revoked.

Robert H. Jackson,
General Counsel, Bureau of Internal Revenue.

Article 44: Sale of real property involving deferred payments.

XIII-17-6766
I. T. 2776

REVENUE ACT OF 1926.

In view of General Counsel's Memorandum 12987 (page 206, this Bulletin), I. T. 2339 (C. B. VI-1, 42), which holds that "For the purpose of determining the classification under which a sale of real property involving deferred payments falls, amounts received by the vendor during the taxable year in which the sale is made through disposition of the purchaser's obligations are considered a part of the 'initial payments,'" is revoked.

ARTICLE 45: Sale of real property on installment plan.

REVENUE ACTS OF 1921 AND 1924.

Estoppel, taxpayer reporting on installment basis claiming income should have been reported on basis of completed sale. (See Ct. D. 781, page 213.

ARTICLE 45: Sale of real property on installment plan. XIII-14-6733 Ct. D. 808

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. NET INCOME—INSTALLMENT SALE—NOTES DISCOUNTED OR SOLD IN SUBSEQUENT YEARS.

Where a corporation sold its assets in 1926, receiving less than one-fourth of the total purchase price in cash and the balance in notes, and in the following year discounted or sold the notes to a bank, being contingently liable as indorser, the transaction was closed in 1927 and the profit reflected in the notes discounted or sold constitutes income in that year, and the corporation is not entitled to report the income in the subsequent years in which the notes were actually paid to the bank.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (25 B. T. A., 140) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Alworth-Washburn Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

Petition for review of decision of United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[November 6, 1933.]

OPINION.

GRONER, J.: Petitioner is a Minnesota corporation. It was in process of liquidation and in 1926 sold all of its remaining assets for a little less than $600,000. The cash received did not exceed one-fourth of the total purchase price. It therefore elected to report the income from the transaction on the installment basis, and this was accepted by the Commissioner.

The applicable statute is section 212(d) of the Revenue Act of 1926 (44 Stat., 23; T. 26, U. S. C. A., section 953). Under the provisions of this section a taxpayer who sells real property, where the initial payment does not exceed one-fourth of the purchase price, may return proportionately the taxable profit in the succeeding years in which the installment payments are actually received.

In this case there is no dispute as to the total amount of profit derived from the sale, nor did the Commissioner question petitioner's right to spread this profit over the years of actual payment, but in the year following the sale petitioner indorsed in blank the notes for the remainder of the sale price and discounted or sold the same to a bank for cash, receiving the face amount thereof with interest.

The question which we have to decide is whether the profit reflected in the notes discounted or sold was income to petitioner in 1927 (the year in which the transaction with the bank was had) or in the subsequent years in which the notes were actually paid to the bank.

The Commissioner insists that when petitioner discounted the notes and received full payment therefor, the transaction was closed and the entire gain was then realized and was therefore taxable. Petitioner, on the other hand, insists that, because of its indorsement of the notes, it incurred a continuing liability to the bank which deferred its realization of gain until the liability was extinguished by the payment of the notes. It says that its relation to the bank was that of borrower, that the cash received was a loan, and that it did not and could not know the amount of profit it would realize on the notes until they were finally paid.

The main question, in circumstances nearly identical with those we have here, was passed on by the Court of Appeals of the Second Circuit (*Elmer* v. *Commissioner*, 65 F. (2d), 568). In that case the taxpayer was the selling agent for Ford cars. The terms of sale contemplated a partial payment in cash and a series of weekly or monthly notes, which were in turn secured by a contract of conditional sale reserving title. The taxpayer sold and assigned the contracts to a finance corporation and indorsed the customer's notes and in that way received in cash the total purchase price of the car. The agreement between the finance company and himself contemplated that if there should be a default in any of the notes he would stand between the finance company and loss. In these circumstances, Judge Learned Hand, speaking for the court, held that the entire profit accrued in the year in which the sale and assignment of the contracts occurred, and to the proposition whether the transfer of the notes was a loan or a sale, said: "If a merchant discounts his customer's note at a bank, indorsing it, but getting immediate credit for its discount value, it would be a most unnatural thing to consider it a loan from the bank. He remains liable if the customer defaults, but the collection is in the bank's hands, and the transaction is closed in the absence of a default."

It is undoubtedly a fact that the terms "loan," "discount," and "sale," as applied to a transaction such as is involved in this case, are frequently so used by courts as to result in a rather vague and inexact distinction between them. The question arises mostly in cases involving usury statutes, and it is often said that it is the one or the other according to the nature of the transaction and the facts attending it. In some cases it is held that a discount of an existing chose in action, when not used as a cover for usury, even though the rate of discount agreed upon is more than is permissible under the usury statutes, is not a loan within the meaning of those statutes but a sale, and this though the seller indorses and guarantees the paper upon the transfer to the purchaser. (See *Niagara County Bank* v. *Baker*, 15 Ohio St., 68, at page 85. See also *Cram* v. *Hendricks*, 7 Wend. (N. Y.), 569; *Cobb* v. *Titus*, 10 N. Y., 198; *Rapelye* v. *Anderson*, 4 Hill (N. Y.), 472.)

On the other hand, there is a strong intimation to the contrary in *National Bank* v. *Johnson* (104 U. S., 271, 278). In that case a national bank in New York discounted promissory notes of the holder, who was not the maker, at the rate of 12 per cent, which was in excess of the legal rate. The payee indorsed the notes, and, after their payment by the maker, he sued the bank and recovered double the excess interest charges. The Supreme Court, speaking of the nature of the transaction, said: "Unquestionably, the transfer of the notes, which forms the basis of this controversy, if not a loan, was a discount."

But in the view we take of this case, it is not necessary we should be at pains to find a subtle distinction between the words we have discussed. It is enough to say that in its ordinary signification and in the language of the banking world, the word "loan" implies an advance of money upon an absolute promise to repay; the word "discount," a deduction or drawback upon an advance of money upon an evidence of debt payable at a future date; and a "sale," an absolute transfer of property or something of value from one person to another for a valuable consideration. Whether the transfer of the notes received by petitioner as part of the purchase price for its property be denominated a loan, a sale, a discount, or a sale by way of discount, is not determinative of the rights of this case. The question rather is whether the tax statutes, fairly construed, make the money received by petitioner in the year 1927 gain or profits within the purview of section 213 of the Revenue Act of 1926 (44 Stat., 23, T. 26, U. S. C. A., section 954).

It is conceded by petitioner that in 1927 by the transfer in question it received from the bank in cash the total face value of the notes which it had received the previous year in the sale of its property. It is likewise conceded that the transfer effected a complete change in title to the notes. Thereafter the bank held them as its own property, though it also held petitioner as indorser. Petitioner, on the other hand, received the money and thereupon distributed all but an insignificant part of it to its stockholders, though the distribution was called an advance, presumably in order that it might be recalled if its liability as indorser was thereafter enforced. It is therefore apparent that petitioner had received in cash the whole balance of the purchase price of the property. The transaction in its original form was thereby changed. Petitioner no longer had any title or right to the annual installments of the purchase price. It had got all its money and, except for its contingent liability as indorser, the transaction was closed and the installment feature abandoned.

To say that under these circumstances petitioner is entitled to the benefits of the installment provision would be to extend that provision beyond its plain intendment. As the Supreme Court said in *Weiss* v. *Stearn* (265 U. S., 242, 254 [T. D. 3609, C. B. III-2, 51]), "Questions of taxation must be determined by viewing what was actually done." As we have seen, what was done here was the receipt and distribution by petitioner in 1927 of its remaining profits from the transaction in question. The Act specifically makes such profits taxable in the year in which received and the contingent liability which petitioner assumed as indorser does not extend the time or make the provision referred to less effective. This in principle, was decided by the Supreme Court in *Burnet* v. *Sanford & Brooks Co.* (282 U. S., 359 [Ct. D. 277, C. B. X-1, 363]); *Burnet* v. *Thompson Gas & Oil Co.* (283 U. S., 301 [Ct. D. 331, C. B. X-1, 390]); and *North American Oil Co.* v. *Burnet* (286 U. S., 417 [Ct. D. 499, C. B. XI-1, 293]). In those cases it was held that a taxpayer should return income in the year in which it is received without regard to the fact that there may be claims against it not determinable until a subsequent year.

Affirmed.

ARTICLE 45: Sale of real property on installment plan. XIII-17-6767 Ct. D. 817
(Also Section 202, Article 1561.)

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INSTALLMENT SALE—"INITIAL PAYMENT"—PROCEEDS OF SECOND MORTGAGE.

Where a corporation sold its business in 1927 for $95,000, the consideration being composed of a $50,000 first mortgage secured by the property and $45,000 in cash received at the time of the sale, $30,000 of which represented the proceeds of a loan secured by a second mortgage to a third party upon which the corporation assumed a secondary liability, the proceeds of the loan are a part of the "initial payment," and as that exceeds 25 per cent of the purchase price the transaction is not an installment sale within the meaning of section 212(d) of the Revenue Act of 1926.

2. GAIN OR LOSS—FAIR MARKET VALUE—PURCHASE MONEY MORTGAGE.

In determining the gain derived by a corporation from the sale of its business, under the provisions of section 202(c) of the Revenue Act of 1926, the fair market value of a purchase money mortgage on the property is equal to its face value, in the absence of reliable evidence to the contrary.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (25 B. T. A., 792) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied February 5, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Max B. Shubin and Sara C. Shubin, on Behalf of Reliable Coal Co. (a Dissolved Corporation), petitioners, v. *Commissioner of Internal Revenue, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

[September 19, 1933.]

OPINION.

DAVIS, Circuit Judge: This is a petition to review an order of redetermination of the Board of Tax Appeals, sustaining the determination of the Commissioner of Internal Revenue that there is a deficiency in the income tax for 1927 of the Reliable Coal Co., a dissolved corporation, for whose obligations the petitioners, Max Shubin and his wife, Sara, are responsible.

In 1921, Max Shubin purchased approximately 2⅓ acres of land for $21,000. He formed a corporation called the Reliable Coal Co., for the purpose of engaging in the business of selling coal. He transferred the land to the company in consideration of $1 and the assumption of a $20,000 mortgage then existing on the property. The coal company sold about 80 per cent of the land for $19,000, and retained the rest upon which it constructed an office building and garage, and made other improvements, at the cost of $23,834.72.

The coal company did an active business with annual profits of from $10,000 to $12,000. In 1927, it had approximately 5,000 customers.

In April, 1927, the corporation sold its business to one Silverman for $95,000, payable as follows: $5,000 in cash upon signing the agreement; $10,000 at its settlement; a first mortgage for $50,000 on the business and property for five years; a second mortgage for $30,000 to a third party to be secured by the seller.

The cash payments of $5,000 and $10,000 were made, and the first mortgage was executed by Silverman. Shubin arranged with a building and loan association for the second mortgage, which Silverman gave to the association. At the time the cash payments were made, the coal company received $30,000 representing the proceeds of the loan secured by the second mortgage.

Apparently, the building and loan association would not loan $30,000 to Silverman on a second mortgage without substantial collateral. It required both the coal company and Shubin to give bonds in the sum of $30,000 as collateral for the mortgage. It also obtained securities from Shubin of a value of $12,000 and a letter of guarantee for $10,000 from Silverman's father.

After the sale to Silverman, the coal company was dissolved and Shubin assumed all of its liabilities. The building and loan association released the coal company's bond retaining Shubin's bond for $30,000.

Silverman proved unable to conduct the coal business successfully and on January 1, 1929, he turned it over to his father, who subsequently became a bankrupt.

In computing the tax liability of the coal company for the year 1927, the Commissioner of Internal Revenue determined that it realized a profit of $63,875.55 from the sale of the business to Silverman. This was arrived at by deducting from the selling price of $95,000 the cost of the assets and the expenses of the sale, the sums of $24,870.45 and $6,254, respectively. The Commissioner also determined that the transaction was not an installment sale within the meaning of section 212(d) of the Revenue Act of 1926, since the amount of cash received as initial payments upon the sale of the property was in excess of 25 per cent of the selling price. The Board of Tax Appeals agreed with the Commissioner.

The petitioners contend that the proceeds of the second mortgage obtained from the building and loan association were not a payment in cash of part of the purchase price of the property but a loan made on the basis of the security furnished by the coal company. They say that the only initial payments were the two payments of $15,000 in cash that Silverman paid to the coal company.

Section 212(d) of the Revenue Act of 1926 provides that, in the case of a casual sale of personal property for more than $1,000 or of a sale of real property, "if in either case the initial payments do not exceed one-fourth of the purchase price, the income may, under regulations * * * be returned on the basis and in the manner above prescribed (that is, the installment plan) * * *. As used in this subdivision the term 'initial payment' means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

The record does not contain a copy of the bond but the facts show that the liability of the coal company was secondary and subordinate to that of Silverman, the mortgagor. The Board considered the transaction to be similar to one in which a seller receives promissory notes from the buyer in payment for property and thereafter the seller indorses and sells them. (*Grace T. Mytinger*, 4 B. T. A., 896; *Packard Cleveland Motor Co.*, 14 B. T. A., 118.) However true that may be, the result that the Board reached is correct. The coal company received cash, to be used as it saw fit, in exchange for its property. It was obligated to repay the money only if Silverman failed primarily. The building and loan association took the mortgage from Silverman and the coal company the money for which the mortgage was given.

The petitioners also contend that the Board erred in determining that the fair market value of the first mortgage on the property was $50,000 or its face value.

Section 202 of the 1926 Act provides that, in the case of an ordinary sale, the sum realized therefrom shall be the sum in cash plus the fair market value of any property received. The Commissioner decided that the fair market value of the mortgage was equal to its face value. His decision was approved by the Board on the ground that the petitioners' evidence was not sufficient to overcome the prima facie correctness of the Commissioner's finding.

The record does not show any substantial evidence that the value was arbitrary. The mortgage was part of the purchase price for a profitable and growing business. But Shubin was of the opinion that the property was worth only $30,000, although he had refused offers of that amount and stated that it was worth $60,000 and "that was the figure he wanted for it." A real estate agent gave an opinion based on the offers that he obtained, taking it for granted that the prospective purchasers had looked into the value themselves. Finally, Shubin testified that some time, whether in 1927 or not he could not say, he unsuccessfully tried to dispose of the mortgage at a discount and attempted to use it as collateral for a loan. He was unable to dispose of it or obtain a loan for more than $20,000.

The Board of Tax Appeals is not bound by such unreliable evidence. The burden is on the petitioners to show the incorrectness of the determination. The valuation placed on the mortgage by the Commissioner was that assigned to it by the parties in an apparently bona fide sale of a valuable business.

The petition is denied, and the order of redetermination of the Board is affirmed.

ARTICLE 49: Forgiveness of indebtedness. XIII-13-6722
(Also Section 204, Article 1591.) I. T. 2772

REVENUE ACT OF 1926.

In view of the Commissioner's nonacquiescence in the decisions of the Board of Tax Appeals in *Des Moines Improvement Co.* v. *Commissioner* (7 B. T. A., 279 [page 21, this Bulletin]) and *American Seating Co.* v. *Commissioner* (14 B. T. A., 328 [page 18, this Bulletin]) and the decision of the Board of Tax Appeals in *B. F. Avery & Sons, Inc.*, v. *Commissioner* (26 B. T. A. 1393), I. T. 2406 (C. B. VII-1, 68) is revoked.

Article 50: When included in gross income. (Also Section 213(a), Article 45; Section 214(a)9, Article 201.) XIII-6-6641 Ct. D. 781

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. Gross Income—Cash Receipts and Disbursements Basis.

Where the taxpayer and others by agreement with opposing claimants of title to certain gas and oil lands sell their royalty interest for a consideration of $200,000 to be paid to them from an escrow account in an amount not to exceed 25 per cent thereof in each of the years 1921, 1922, 1923, and 1924, and where the entire amount was actually deposited in escrow during the years 1921 and 1922 and disbursed in accordance with the terms of the contract, the taxpayer who reports income on the cash receipts and disbursements basis is required to include in gross income for each year the amount he receives annually, in accordance with sections 212(b) and 213(a) of the Revenue Acts of 1921 and 1924.

2. Estoppel—Statute of Limitations.

Where the taxpayer elects to report income on the installment basis, he is estopped to claim for the first time in 1930 that the income should have been reported on the basis of a completed sale either in 1921 or 1922, as the collection of a deficiency for either of those years was then barred by the statute of limitation.

3. Deduction—Depletion.

Where the total amount of the sale price under the contract had been deposited in escrow by the end of the year 1922, the taxpayer thereafter had no interest in the oil in place in the leased land and is not entitled to deduction for depletion for the years 1923 and 1924.

4. Decision Affirmed.

Decision of the Board of Tax Appeals (23 B. T. A., 1) affirmed.

5. Certiorari Denied.

Petition for certiorari denied October 9, 1933.

United States Circuit Court of Appeals for the Fifth Circuit.

H. C. Walker, Jr., petitioner, v. Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals (District of Louisiana).

Before Bryan, Hutcheson, and Walker, Circuit Judges.

[February 15, 1933.]

OPINION.

Walker, Circuit Judge: The petitioner, H. C. Walker, Jr., appealed to the Board of Tax Appeals from a determination, made in November, 1927, of the Commissioner of Internal Revenue assessing additional taxes against him for the years 1923 and 1924. In his original petition petitioner complained of the action of the Commissioner principally on the ground that that official disallowed a claim of the petitioner that he was entitled to a depletion allowance against the sum received by petitioner from royalty under an oil and gas lease pursuant to an agreement hereinafter mentioned. By an amended petition filed in April, 1930, petitioner challenged that determination on the additional ground that the moneys received by him under the above-mentioned agreement during the years 1923 and 1924 did not constitute taxable income of petitioner for those years, and that petitioner owed no income tax whatever thereon. Petitioner's above-mentioned contentions were rejected by the Board of Tax Appeals.

Prior to June 23, 1920, H. C. Walker, Jr., the petitioner, Elias Goldstein and George West claimed certain royalty interests in Louisiana oil lands under one title, and the firm of Foster, Looney & Wilkinson claimed royalty interests in the same lands arising under an adverse title; the opposing claimants of title then being engaged in litigation. The above-named claimants of inconsistent royalty rights compromised their dispute by an agreement evidenced by a written instrument dated June 23, 1920, in which Walker, Goldstein and West were called vendors, and Foster, Looney and Wilkinson were called vendees, that instrument being in form a sale without warranty by Walker, Goldstein and West to Foster, Looney and Wilkinson of a one-sixteenth (1/16) royalty interest in said land for a consideration of $200,000, if produced from that royalty interest, and to be paid as stated below. Under that agreement the vendees were entitled to receive and retain all sums accruing to the credit of said royalty interest up to June 1, 1920; all sums thereafter accruing to the credit of that interest to be paid to the City Savings Bank & Trust Co. of Shreveport, La., designated "Agent of all parties hereto for the purpose of receiving such royalty, acknowledging receipt thereof, and holding and distributing the sums in accordance with the provisions of the contract"; those sums to be by that bank deposited to the credit of an account entitled "Escrow account, George West, H. C. Walker, Jr., and Elias Goldstein"; and that bank, on the 2d day of January in each of the years 1921, 1922, 1923, and 1924, there being sufficient funds to the credit of said account, to transfer $50,000 from that account to the credit of the vendors in the proportion of one-third each. In any event the vendors were to receive in the way stated the sum of $200,000 and no more if the amount to the credit of the described account should reach that sum. That instrument contained the following provisions: "During the term of this contract, and as long as money shall be deposited with it hereunder, the said City Savings Bank & Trust Co. shall pay interest on the daily balances to the credit of the aforesaid escrow account at the rate of 4 per cent (4%) per annum, such interest payments to be added to and to form a portion of the funds to the credit of the aforesaid account, and to be credited by the said bank quarterly until the said sum of two hundred thousand ($200,000) dollars shall have been credited to said account, when and thereafter such interest payments on the sums remaining on deposit in said bank under the terms hereof shall be paid to the vendees. * * * When the said vendors shall have received the full sum of two hundred thousand ($200,000) dollars, as herein provided, the said bank shall pay over to the said vendees any and all sums yet remaining to the credit of the aforesaid escrow account; and from and after such date all moneys accruing to the credit of the aforesaid one-sixteenth (1/16) interest shall be paid direct to these vendees and these vendors shall have no interest whatsoever therein." Sums accruing to the credit of that royalty interest after June 1, 1920, amounting in the aggregate to $200,000.01, were paid in to the bank for said account during the years 1921 and 1922. Out of that account the bank paid to Walker and Goldstein $50,000 in each of the years 1921, 1922, 1923, and 1924, after Walker and Goldstein had purchased from West his interest under the agreement. In his income tax returns for the taxable years 1921 to 1924, inclusive, the petitioner, who used a cash basis of accounting, included in his gross income sums paid to him under the above-mentioned agreement; in each of those years reporting the sum of $12,500 received from the fund mentioned. His wife filed separate returns under the community property laws of Louisiana, reporting the same amounts of income from the same source. Goldstein and his wife made like returns in the four years mentioned. The Commissioner accepted each of those returns as a basis for computing the taxpayer's tax liability.

The above-mentioned contract has been before this court in the cases of *United States* v. *Looney* (29 Fed. (2d), 884) and *Barnette* v. *Commissioner of Internal Revenue* (49 Fed. (2d), 265), which concerned income taxes for 1921 of members of the firm of Foster, Looney & Wilkinson. Neither of those cases involved a question as to the tax liability of other parties to that contract resulting from compliance with its provisions with reference to payments to be made to them. An effect of that contract was that Walker, Goldstein and West parted with whatever right they had or claimed in or to the one-sixteenth (1/16) royalty interest, except the rights to have all sums, up to a total of $200,000, accruing to the credit of that royalty interest after June 1, 1920, paid to a designated bank, to be deposited to the credit of a described account, and to have that bank, on a stated date in each of four succeeding years, or as soon thereafter as the amount to the credit of the account should be sufficient for that purpose, withdraw from that account the sum of fifty thousand ($50,000) dollars and credit that sum to Walker, Goldstein and West in stated proportions. However soon after June 1, 1920, sums accruing to the credit of the royalty interest might reach a total of two hundred thousand ($200,000) dollars, under the contract Walker, Goldstein and West were not entitled to receive the whole or a part of the consideration receivable by them except in accordance with the provision for installment payments by the bank out of the fund deposited with it. The other parties to the contract, Foster, Looney & Wilkinson, had a substantial interest in the provision as to installment payments being complied with, resulting from the provisions with reference to interest, under which required payments of interest were to be added to and form a part of the fund out of which the stipulated installments were to be paid to Walker, Goldstein and West, and any balance remaining in that fund after the payment of the last of the stipulated installments was to be paid to Foster, Looney & Wilkinson. The petitioner's right to share in the fund deposited in bank was fixed by the contract. During the years 1921 and 1922 he did not receive, and under the contract was not entitled to receive, from that fund more than he reported in his income tax returns for those years. What was returnable by him for each of those years as an item of gross income from that source was the sum he received during that year, that sum being the income from that source which was required to be included in gross income by the provision to the effect that the amount of items of gross income (with an exception not here material) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under permitted methods of accounting, any such amounts are to be properly accounted for as of a different period. (Revenue Act of 1921, sections 212(b), 213(a), 42 Stat., 227; 26 U. S. C. A., sections 953, 954; *Maryland Casualty Co.* v. *United States*, 251 U. S., 342.) If the above-mentioned written instrument properly may be regarded as evidencing a sale or other disposition by petitioner of property on the installment plan, in which the initial payment did not exceed one-fourth of the purchase price, under applicable statutes and regulations it was permissible for petitioner and his wife together to return for each of the years 1921 and 1922 one-fourth, and no more, of his share of the amount of that price. (Revenue Act of 1921, section 212(b), 42 Stat., 227; Revenue Act of 1926, sections 212(d), 1208; Treasury Regulations 62, article 42; Treasury Regulations 65, article 42; *Commissioner of Internal Revenue* v. *Moore*, 48 Fed. (2d), 526 [Ct. D. 407, C. B. X-2, 233].) Whether the transaction in question was or was not a sale or other disposition of property by the petitioner, under the contract he was without right to receive in any year from the fund provided for more than his share of $50,000. It not appearing that petitioner at any time used the accrual basis of accounting, it was permissible for him in his return for each of the years in which he received payments from the fund mentioned to include in his gross income the amount, and no more than the amount, of his share of the $50,000 actually received during that year. Even if he had the election to include in his gross income for the years 1921 and 1922 both the amounts actually received by him from the fund mentioned during those years and amounts thereafter payable from that fund, his right to which accrued in those years as a result of the fund then reaching the total of $200,000, when by his amended petition filed in April, 1930, he first claimed the right to exclude from his gross income as reported for the years 1923 and 1924 the amounts received by him from the fund during those years, it no longer was open to him to do so, particularly as a result of such exclusion would be that collection of taxes based on petitioner's receipt of, or the accrual of his right to receive, the excluded sums would be barred by limitation. (*Commissioner of Internal Revenue* v. *Moore*, supra.)

Petitioner's claim that he was entitled to deductions for depletion allowances for the years 1923 and 1924 had not been urged in argument in his behalf. The total of the $200,000 fund from which petitioner was to be paid his part of the consideration receivable by him under the contract having been deposited in the bank before the end of the year 1922, in the years 1923 and 1924 petitioner had no interest in the oil in place in the leased land. This being so, he was not entitled to the depletion allowances claimed.

No error appearing in the record, the petition is denied.

ARTICLE 50: When included in gross income.

REVENUE ACT OF 1918.

Collection of debts alleged to be worthless, improperly deducted in prior years. (See Ct. D. 806, page 229.)

ARTICLE 50: When included in gross income.

REVENUE ACT OF 1921.

Stock received pursuant to agreement whereby stock was issued to trustee periodically, taxpayer having agreed to remain in corporation's employ for certain period. (See Ct. D. 825, page 350.)

ARTICLE 50: When included in gross income.

REVENUE ACT OF 1921.

Agreement by lessee to pay taxes. (See Ct. D. 838, page 295.)

ARTICLE 52: Examples of constructive receipt. XIII-23-6831
(Also Sections 1003 and 1004.) Ct. D. 834

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. INCOME—INSURANCE COMMISSIONS—ASSIGNMENT—PAYMENT OF ASSIGNOR'S DEBTS.

Where a taxpayer assigns to his wife a partial interest for a limited period in a contract for life insurance commissions, in consideration of her renunciation of certain interests in his property and her agreement to pay certain of his debts, the amounts paid by the wife to the husband's creditors, being the money consideration for the assignment, constitute taxable income to the husband, even though the assignment by him was of property, not income.

2. BOARD OF TAX APPEALS—CASE REMANDED—AUTHORITY TO CONSIDER QUESTION PREVIOUSLY RAISED BUT NOT DECIDED.

Where the court reverses a decision of the Board of Tax Appeals and the case is remanded for further proceedings for the purpose of determining the taxpayer's liability upon the basis of the court's holding, the Board in such further proceedings may consider and decide an alternative claim made by the Commissioner at the original hearing but not then considered or decided by the Board or the court.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Arthur F. Hall, appellant, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[December 4, 1933.]

OPINION.

HITZ, Associate Justice: These cases involve income taxes for the years 1921 and 1923, amounting to $12,253.63 and $8,622.09, decided by the Board of Tax Appeals to be due by orders of redetermination of July 12, 1932.

They are here for review under stipulation as provided by the Revenue Act of 1926. They were here before, when an earlier decision of the Board was reversed and the cases remanded for further proceedings. Further proceedings were had, and this appeal is from the decision of the Board rendered therein.

The exact question now presented was not decided on the former appeal, nor was it then suggested by either side, though it seems from the present record that it had been discussed below. By contract executed September 23, 1905, the appellant entered the employ of the Lincoln National Life Insurance Co., with a yearly salary and commissions on all renewal premiums paid the company from year to year on life insurance written and issued by the company during the continuance of his contract. Such annual commissions grew to considerable amounts, and in time were assigned by the taxpayer in part to his second wife, under a contract whereby she renounced certain interest in his property in favor of his children by a first marriage, and agreed to pay off certain debts of the taxpayer. Under this contract, and another supplementary thereto, the insurance company paid to Mrs. Hall the commissions as provided, which she included in her income-tax return.

The question then arose between the appellant and the Commissioner as to whether the assignment to Mrs. Hall constituted a transfer of future income on which her husband should be taxed, or whether it was an assignment of property.

The Board of Tax Appeals decided it was the former; this court decided it was the latter, reversed the ruling, and sent the case back for further proceedings. (54 Fed. (2d), 443, 60 App. D. C., 332.)

In the further proceedings before the Board, the Commissioner contended that, if the sums received by the wife were not income taxable to the husband, nevertheless the amount she paid out of these sums to discharge the debts of the husband was taxable to the husband.

Whereupon the Board decided that the sums paid by the wife to the creditors of the husband constituted taxable income of the husband, and the fact that it reached his creditors by the hand of his wife acting under a contract with him did not change its character for purposes of taxation.

From that decision this appeal was taken.

When the question arose as to whether there was a deficiency in petitioner's taxes, he appealed to the Board, and thereby stopped the running of the statute of limitations until final determination of that question, but when the case was here before this court did not decide, nor was it asked to decide whether there was a deficiency in petitioner's income tax.

We decided only that what passed from the husband to the wife under their contract was property, not income; and remanded the case for the further proceedings.

Such further proceedings could only mean to fix the taxpayer's liability, if any, on that basis; which in turn could only mean that the consideration for the assignment should be taken into account; and the laws determining what is gain or loss from the sale of property should be applied to arrive at the tax due.

Unless some mistake appears in the application of those statutes, we are not concerned with the question of fact as to how much of the agreed consideration was actually paid.

That is a question for the Board; but whether the amount so found by the Board to have been paid was gain for purposes of taxation is a question of law, as to which we arrive at the same conclusion as the Board, though by a somewhat different road.

The Board holds that, since the contract between the insurance company was acquired prior to March 1, 1913, with no definite price paid and no market price available, when the husband assigned a portion thereof to his wife in 1920 the amount received from her was all gain, and consequently was all taxable.

We need not discuss whether that would be true had the entire contract been assigned, because that was not done.

But the property that was assigned was a partial interest in the contract for a definite and limited period—five years in all.

In this respect the assignment much resembles a lease for years on a valuable consideration, and, like a lease, the market value of the property of which it transferred a part was immaterial.

And as the usual deductions for taxes and other necessary expenditures available to a lessor did not occur in this case, the petitioner was taxable on the entire money consideration for his assignment, as held by the Board, that is to say, on $56,925 for 1921, and on $34,978.27 for 1923.

Consequently the orders appealed from will be affirmed. (*Mutual Life Co.* v. *Hill*, 193 U. S., 553; *Southern Railway Co.* v. *Kentucky*, 284 U. S., 341; *Wolff Packing Co.* v. *Industrial Court*, 267 U. S., 562; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 729 [Ct. D. 80, C. B. VIII-2, 222]; *Taenzer & Co.* v. *Chicago, R. I. & P. R. R. Co.*, 191 Fed., 547; *Patillo* v. *Allen-West Commission Co.*, 108 Fed., 728; *Hawkins* v. *Cleveland, C. C. & St. L. Ry. Co.*, 99 Fed., 322; *Blair* v. *Curran*, 24 Fed. (2d), 390; *Christopher* v. *Burnet*, 55 Fed. (2d), 529 [Ct. D. 530, C. B. XI-2, 167]; *Cement Gun Co.* v. *Commissioner*, 36 Fed. (2d), 107; U. S. C. Supp. V, title 26, section 1057; U. S. C. App., title 26, sections 1048, 1049(a), 1051, 1057, 1224, 1225, 1226, 1248.)

Affirmed.

ARTICLE 52: Examples of constructive receipt. XIII-26-6866
G. C. M. 13193

REVENUE ACTS OF 1924 AND 1926.

Dividends declared by the M Company in the years 1924 and 1925 on its preferred stock were credited to the account of the taxpayer, who was president, director, and dominant stockholder, but were not withdrawn by him. The minority stockholders of the corporation withdrew their dividends immediately upon declaration, and the taxpayer could likewise have made such withdrawals. At the close of the year 1925 the taxpayer's account contained a large credit balance. The board of directors of the corporation later agreed that the dividends credited to the directors' accounts should be canceled and transferred to the surplus account of the corporation.

Held, the dividends declared and credited to the taxpayer's account in the years 1924 and 1925 were constructively received by him in those years, and were properly included in his income tax returns.

An opinion is requested whether dividends declared by the M Company in 1924 and 1925 constituted income to the taxpayer in those years. The dividends in question, which were credited to the taxpayer's account on the corporation's books, were not withdrawn by him and were later canceled and credited to the surplus account of the corporation.

The taxpayer was president of the M Company and owned all of the outstanding common stock. Of the 5.3x shares of preferred stock he owned 3.2x shares, two sons of the taxpayer owned .5x shares each, two granddaughters (for whom the taxpayer was trustee) owned .25x shares each, and the remaining .6x shares were owned by employees and customers of the firm. During the years 1924 and 1925, although the dividends declared on the preferred stock were withdrawn immediately by the minority stockholders, the taxpayer's share of the dividends was merely credited to his account on the company's books, so that at the close of the year 1925 the taxpayer's account showed a large credit balance. The board of directors of the corporation later agreed that the unpaid dividends standing to the directors' accounts should be canceled and the total amount thereof transferred to the surplus account of the corporation. The dividends credited to the taxpayer were reported in his income tax returns for the years 1924 and 1925. He has now filed a claim for refund based on the ground that since the corporation never had sufficient cash on hand at any time during the years in question to pay the dividends credited to his account, he did not receive income in that amount either actually or constructively. The Income Tax

Unit has taken the position that there was constructive receipt of the dividends within the meaning of article 51, Regulations 65 and 69, which provides in part as follows:

ART. 51. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made. A book entry, if made, should indicate an absolute transfer from one account to another. If the income is not credited, but is set apart, such income must be unqualifiedly subject to the demand of the taxpayer. * * *

Article 52 of Regulations 65 states that "Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder." To the same effect is article 52 of Regulations 69. The ultimate requirement for determining the constructive receipt of income is the *availability* of such income, i. e., whether a taxpayer, though not in possession of the income, may demand and be entitled to receive the items alleged to be income to him.

Where compensation is credited to a taxpayer without substantial limitation or restriction as to time, manner, or condition upon which payment is to be made, and might have been withdrawn by him at any time during the year in which it was credited, the fact that it was not withdrawn in whole or in part is of no importance in considering the incidence of the tax. (See *Burns et al.* v. *Commissioner*, 31 Fed. (2d), 399, cert. denied, 280 U. S., 564; cf. *Appeal of Roshek Bros. Co., etc.*, 2 B. T. A., 260, acquiescence C. B. IV-2, 4; and *Weed & Bro.* v. *United States*, 38 Fed. (2d), 935, cert. denied, 282 U. S., 846, where the converse situation arose in that funds credited to stockholders without any limitation as to the manner or time of payment were regarded as borrowed rather than invested capital of the corporation.) Similarly, where a taxpayer was credited with, but did not withdraw, an authorized salary of $1,000 per month, and upon the formation of a new corporation to take over the old the taxpayer instructed the bookkeeper to consider the accumulated salary as property of the new corporation, it was held that since the corporation was completely under the control of the taxpayer the available credits on the corporate books constituted payment within the meaning of the statute. (*Schoenheit et al.* v. *Lucas*, 44 Fed. (2d), 476.) Therefore, the fact that in the instant case the taxpayer was in complete control of the corporation, that the dividends were declared and credited to his personal account on the corporation's books without any qualification as to the time or mode of payment, and that the minority stockholders regularly withdrew their share of the declared dividends tend to establish a constructive receipt of income in the amount credited.

The taxpayer contends, however, that the criterion of "availability" is the further requirement that there must be sufficient cash on hand with which to pay the income which is credited; and that in the light of the supplemental financial statements submitted by the taxpayer the corporation's fiscal condition warranted neither the declaration nor the payment of the dividends. In the opinion of this office, the taxpayer's supplemental statements, rather than establishing an unfavorable balance on the corporate accounts, merely show that the corporation lacked ready cash with which to pay the total dividends credited to the taxpayer. It was a matter of internal corporate management whether a dividend should or should not be declared. The taxpayer, who was in complete control of the corporation, authorized the declaration of the dividends in question and the minority stockholders thereupon withdrew their dividends. Although the taxpayer elected to let his dividends remain with the corporation, the Government should not be asked to speculate with the taxpayer on a possible loss due to either fluctuations of the market or mismanagement. (*Fawsett* v. *Commissioner*, 63 Fed. (2d), 445.)

In the corporate return for 1924, which was sworn to by the taxpayer as president, it was stated that the "surplus and undivided profits as shown by the balance sheet at the close of the preceding taxable year" (1923) were 200*x* dollars; and the "surplus and undivided profits as shown by the balance sheet at the close of the taxable year" (1924) were 100*x* dollars. That same return also indicated that there were "dividends paid during the taxable year" on March 31 in the sum of 20*x* dollars; and on September 30 in the sum of 20*x* dollars. In the corporate return for 1925, also sworn to by the taxpayer as president, the "surplus and undivided profits as shown by the balance sheet at the close of the taxable year" were 100*x* dollars; and the "dividends paid during the taxable year" on March 1 were 15*x* dollars, and on September 1, 15*x* dollars.

In *John I. Chipley* v. *Commissioner* (25 B. T. A., 1103), the petitioner owned all the stock of a corporation and was credited with a monthly salary at $1,000, a part of which he did not withdraw, although the corporation was solvent at all times, had a surplus, and paid other salaries in full. In the corporation's income tax returns, which were sworn to by the taxpayer as president, there was deducted from income the salary credited to the taxpayer. With respect to the taxpayer's failure to include that salary in his own return, the Board commented as follows:

> This petitioner owned all of the stock of Chipley's Universal Motor Co., Inc., during all of the year 1923. His control of the actions of that corporation during the year could not have been challenged. The corporation each month accrued on its books a liability of $1,000 representing one-twelfth of the yearly salary due its president, the petitioner. The latter knew and must have approved of this. On the income-tax returns of the corporation deductions were claimed for the full amount of this salary. The petitioner signed and swore to these returns. The corporation was allowed the benefit of these deductions by the Commissioner. The corporation credited the salary to the account of the petitioner on its books. During the year the petitioner withdrew a small part of his salary. He could have withdrawn it all if he had so desired. For his own purposes he chose not to withdraw all of it. Under such circumstances it is obvious that he had received the salary of $12,000, constructively or otherwise, for income tax purposes. * * *

It is true in the instant case that the dividends were not deductible from the corporation's gross income. But the allowance of the salary as a corporate deduction is only one basis for the Board's decision in the Chipley case. The taxpayer's control of the corporation in that case, the crediting of the salary on the corporate books with the knowledge of the taxpayer, the inclusion of the item on the corporate returns which were signed and sworn to by the taxpayer were also compelling reasons for the Board's conclusion.

A case analogous in many respects is the *Appeal of John A. Brander* (3 B. T. A., 231), where the petitioner was entitled to a certain salary from the corporation of which he and another were the sole owners. In that case the petitioner did not withdraw the entire salary which was credited to him, although there were adequate corporate earnings for the year in question. The corporation paid for its purchases within 10 to 30 days, while it extended credit to its customers of from 60 to 90 days. All of its assets were pledged with banks for loans. The petitioner contended that he was not taxable on the amounts credited to him, but not withdrawn, because of the lack of financial liquidity on the part of the corporation. The Board, with respect to that contention, commented as follows:

> * * * there are clear cases of constructive receipt, such, for example, as that of the bond owner who chooses not to cash his coupon but to permit it to remain uncut in the possession of another. He will not be heard to say that the amount of the coupon is not his income because he did not in fact receive it. The receipt is entirely within his own control and disposition. So, from the evidence, it seems to be in the present appeal. Brander and Curry were the sole owners of the business and all its assets. Brander, as president, could at any moment have elected to take the $2,904.49 as he did the $112,661.51, and no one else could have prevented him. *The corporation had sufficient assets to pay him and there was no one to dispute his right to it.* He contends that, as a practical matter, the assets were pledged, and hence beyond his disposition. *But the pledge itself was his voluntary act.* During the year he permitted the corporation to change its investments, and he could just as freely have permitted it to pay its salary debt to him. It was not that the corporation would not pay, but rather that he would not receive. *This election to give the corporation the temporary use of the amount is an exercise by him of its enjoyment, and this is one of the primary attributes of income.* The Commissioner therefore correctly determined that the taxpayer's income from salary and commission was $115,166. [Italics supplied.]

Similarly, in the instant case the earnings of the corporation were sufficient to pay the corporate dividends as declared, but the extension of credit by the corporation to its customers and the necessity for obtaining loans to carry on the normal cash requirements of the business induced the taxpayer (who was practically the owner of the business) to decide against the withdrawal of his own dividends.

In *Brooks* v. *Commissioner* (35 Fed. (2d), 178), the taxpayer owned 75 per cent of the stock in the corporation and the taxpayer's daughter and certain employees of the company owned the remaining 25 per cent. In that case a dividend was declared but it was agreed among the stockholders that the dividend should not be paid until the corporation had funds which it could spare for that purpose. All of the stockholders in that case except the taxpayer were paid the dividend in 1919. A like agreement was entered into in 1920 and 1921, and in those years the minority stockholders were paid their dividends in full while the taxpayer's dividends were merely credited to him on the corporate books. The Commissioner in holding that these dividends were income to the taxpayer showed that the corporation's surplus for 1918, 1919, 1920, and 1921 was sufficient to have paid the taxpayer's dividends in full. The Circuit Court of Appeals for the Fourth Circuit in affirming the decision of the Board of Tax Appeals, which upheld the Commissioner's position, stated in part as follows:

The Sanford & Brooks Corporation is what may be called a 1-man corporation. The petitioner owned the majority of the stock. The minority stockholders were employees of the company and the petitioner's daughter. In his evidence before the Board, the petitioner testified that directors of the corporation were employees of the company, and included his two sons, and that there was always a quorum of directors in the office. The inference is clear that, *with respect to action as to the dividends declared, the petitioner was the controlling influence.* The respondent in its answer alleged that the surplus of the corporation had increased from $67,000 in 1918 to $252,000 in 1921. All the dividends were paid to all the other stockholders in each of the years in question, while the dividends of the petitioner remained unpaid; that is to say, though petitioner's 1919 dividends remained unpaid, the other stockholders received their dividends, without abatement or delay, for that year and also for the subsequent years.

The entry on the books of the company giving petitioner credit for the dividends for each succeeding year, thereby making him, instead of a stockholder with a dividend due him conditionally, a creditor of the corporation, while not conclusive as to the character of the transaction, is certainly strong evidence supporting the conclusion that petitioner left the dividends with the company more in the character of loans than that of contingent dividends. [Italics supplied.]

It may be pointed out in the instant case, "with respect to action as to the dividends declared," that the taxpayer was the "controlling influence," that the surplus for those years was sufficient to cover the dividends, that current dividends were paid to the minority stockholders while the controlling stockholder allowed his dividends to remain unpaid, and that the entry on the company's books crediting the taxpayer with dividends for each year made him a creditor of the corporation.

In cases where corporations are closely controlled, as in the instant case, it has even been held that a formal or express declaration of dividends by the corporation is not necessary for the amounts credited to an individual stockholder to be considered income to him, where it appears that the stockholder had the authority to draw indiscriminately against the sum to his credit, and the whole sum was unqualifiedly subject to his demand. (*Hadley* v. *Commissioner*, 36 Fed. (2d), 543, Ct. D. 153, C. B. IX-1, 266; *George E. Towle* v. *Commissioner*, 19 B. T. A., 208, acquiescence C. B. IX-2, 60.)

In view of the foregoing, it is the opinion of this office that the dividends declared by the M Company in the years 1924 and 1925, which were credited to the taxpayer's account on the corporation's books, were constructively received by him in those years, and were properly included in his income tax returns.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

ARTICLE 52: Examples of constructive receipt.

REVENUE ACT OF 1924.

Dividends declared and not withdrawn. (See G. C. M. 13193, page 218.)

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 87: Income of States.

REVENUE ACTS OF 1916, 1917, 1918, 1921, 1924, AND 1926.

Earnings of fund representing only a private interest in custody of city official. (See Ct. D. 813, page 201.)

ARTICLE 89: Additional exclusions from gross income.

REVENUE ACT OF 1921.

Revocation of I. T. 1307 (C. B. I–1, 110) in so far as it is in conflict with I. T. 2760 (page 35.)

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 101: Business expenses.

REVENUE ACTS OF 1918, 1921, 1924, AND 1926.

Expenses paid or incurred with respect to the management, protection, and conservation of properties producing taxable income. (See I. T. 2751, page 43.)

ARTICLE 101: Business expenses.

REVENUE ACTS OF 1918, 1921, 1924, AND 1926.

Insurance premiums paid in advance for period of more than one year. (See G. C. M. 13148, page 67.)

ARTICLE 112: When charges deductible. XIII–7–6651
Ct. D. 786

INCOME TAX—REVENUE ACTS OF 1921 AND 1926—DECISION OF SUPREME COURT.

1. INCOME—"OVERRIDING COMMISSIONS"—DEDUCTION—"RETURN COMMISSION" ACCOUNT.

A general insurance agent, accounting on the accrual basis, who receives "overriding commissions" on net premiums during the year in which the business is written, is required to report as income the gross amount of such commissions without deducting therefrom the amount of a "return commission" account voluntarily set up to cover return of commissions in future years due to reinsurance or cancellations. Such a reserve does not come within the allowable deductions specified in section 214 of the Revenue Acts of 1921 and 1926.

2. INCOME—"OVERRIDING COMMISSIONS"—ALLOCATION TO FUTURE YEARS.

Where the Commissioner believes that the taxpayer's income has, in prior years, been accurately reflected by treating overriding commissions as income of the year in which the business is written, the method may not be changed by allocating the commissions over the lives of the policies, in the absence of proof that such commissions contain any element of compensation for services to be rendered in future years.

SUPREME COURT OF THE UNITED STATES.

Arthur M. Brown, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 15, 1934.]

OPINION.

Mr. Justice BRANDEIS delivered the opinion of the court.

An unincorporated concern known as Edward Brown & Sons, of San Francisco, has since 1896 acted as Pacific coast general agent for fire insurance companies.[1] In 1923, Arthur M. Brown conducted the concern alone. In 1925 and 1926, he and his son Arthur M. Brown, Jr., conducted it as partners. The general agent receives as compensation from its principals, among other things, a so-called "overriding commission" on the net premiums derived from business written through the local agents. The question for decision is, how the income of the petitioner, Arthur M. Brown, derived from overriding commissions during the years 1923, 1925 and 1926 should be calculated for purposes of the Federal income tax. The Commissioner of Internal Revenue held that in determining income, the gross overriding commissions on business written during the year should not be subjected to any deduction on account of cancellations expected to occur in later years. The taxpayer contends that either the gross overriding commissions should be subjected to such a deduction or that parts of the gross overriding commissions should be allocated as earnings of future years.

The term net premium as used in providing for overriding commissions, means the gross premium on the business written less the return premium and the net cost of any reinsurance. Fire insurance policies are written for periods of one, three or five years, with the right of cancellation by either party at stipulated rates of premium return. Premiums being payable in advance (subject to the 60-day grace period), a return premium is paid to the policyholder in case of cancellation; and the general agent, who receives the premium pays the return premium. The company writing a policy frequently reinsures in another company a part of its contingent liability; and the general agent, who makes the payments for reinsurance receives, in case of cancellation, a return of a proportionate part of the cost of the canceled reinsurance. The general agent makes to each principal remittances on monthly balances, crediting itself among other things, with the overriding commissions on premiums receivable, with the return premiums paid and with the net amount paid for reinsurance; and charging itself, among other things, with a proportionate part of any overriding commissions previously credited in respect of

[1] The duties required of and performed by the general agent are described by the Board of Tax Appeals as follows: The firm appointed and removed local agents; accepted service of process; adjusted losses under policies; received and acknowledged service of proof of loss; issued, countersigned and canceled policies; received and receipted for premiums, surveyed all risks offered and accepted or rejected the same; represented its principals on the Pacific Board of Underwriters; computed and paid commissions due local agents; ceded or reinsured certain lines of business with treaty or other companies; computed and paid return premiums on canceled policies; secured return of premium on canceled reinsurance; rendered all reports required of its principals by the authorities of political subdivisions in the territory in which it operated; attended to the payment of all license fees and taxes; furnished all necessary printed matter, except policy blanks, to local agents; transferred insurance by indorsement, determined whether its principals should participate in special pools; and generally attended to all the affairs of its principals in the territory in which it operated.

any business which has been canceled during the month. Thus, whenever there is a cancellation and a return or credit of a portion of the premium and of the cost of any reinsurance, the general agent returns to the company or charges itself with a corresponding portion of the overriding commission.

Prior to 1923, overriding commissions on new business were accounted income of the year in which the business was written; and refunds of overriding commissions on account of cancellations were accounted expenses of the year of cancellation. The books of the general agent have at all times been kept on the accrual basis. Although no change was made in the method of accounting between the general agent and its principals, there was set up on the books of the concern at the close of 1923, for the first time, a liability account entitled "Return commission." In it was recorded an estimate of the liability expected to arise out of the general agent's obligations to refund to the companies a proportionate part of the overriding commission received because of cancellations which it was expected would occur in future years. The estimate was based on the experience of the preceding five years. Thus, on the books, the year's income from overriding commissions was reduced by the amount of refunds which, it was estimated, would have to be made in future years. This changed method of accounting has been followed ever since; and the difference in the method of calculating the general agent's income has been reflected in the returns made by Brown of his taxable income.

The ratio of cancellations to premiums receivable having been 22.38 per cent for the five years ending in 1923, the gross income from overriding commissions on business written in 1923, amounting to $236,693.31, was subjected on the books to a deduction of $52,971.96; and this amount was credited to the "return commission" account. Similarly, at the close of each of the years 1924, 1925 and 1926 the credit balance in the "return commission" account was adjusted so that it bore the same relation to the overriding commissions on business written during the year as the total fire insurance premiums canceled in the preceding 5-year period bore to the gross premiums on business written during those years. The ratio of cancellations for the five years ending in 1925 having been 21.55 per cent, and the total overriding commissions $244,597.88, a deduction of $3,292.98 was made, representing the net addition to the "return commission" account in 1925. The ratio of cancellations to premiums for the 5-year period ending in 1926 having been 21.13 per cent, and the total overriding commissions $258,677.57, a deduction was made of $1,947.77 representing the net addition to the "return commission" account in 1926.[2]

In making his Federal income tax return for the years 1923, 1925 and 1926, Brown claimed as deductions the benefit of the credits so made to the "return commission" account. The Commissioner of Internal Revenue disallowed these deductions; and accordingly assessed to Brown for 1923 a deficiency of $17,923.03; for 1925 a deficiency of $1,520.19; and for 1926 a deficiency of $944.30.[3] The Commissioner's determinations were sustained by the Board of Tax Appeals (22 B. T. A., 678); and its order was affirmed by the Circuit Court of Appeals. (63 F. (2d), 66.) Certiorari was granted by this court (291 U. S., 193) because of alleged conflict with the decision of Circuit Court of Appeals for the Fourth Circuit in *Virginia-Lincoln Furniture Corporation* v. *Commissioner of Internal Revenue* (56 F. (2d), 1028) and other cases.

First. The Commissioner properly disallowed the deductions on account of the credits to the "return commission" account. Under the Revenue Acts taxable income is computed for annual periods. If the accounts are kept on the accrual basis the income is to be accounted for in the year in which it is realized even if not then actually received; and the deductions are to be taken in the year in which the deductible items are incurred. What is taxable as income is

[2] For the year 1923, the deduction of $52,971.96, the entire amount set up as a reserve, is in dispute. Similar figures were set up for the years 1924, 1925, and 1926; but actual cancellations for each of these later years were charged not against overriding commissions, but against the return commission account as set up and carried over from the preceding year. Thus the amount in dispute for each of the years 1925 and 1926 is not the entire deduction from overriding commissions as made by the general agent, but the difference between that figure and the amounts charged to the "return commission" account; or, in other words, the net adjustment or addition to the account. (There was no addition for 1924.)

Judge Wilbur concurred specially below taking the ground, among others, that the result of this method was a claim in 1923 for deductions both of the entire reserve and of actual cancellations during the year.

[3] The amount of the deficiency for each year was affected by an additional claim as a deduction of $3,000 which was disallowed. It is not here in question.

provided by the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 237, 239).[4] Section 212(a) declares "That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214." Section 214(a) declares "That in computing net income there shall be allowed as deductions: (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." The only relevant deductions allowable by law are those provided for in section 214; and the burden rests upon the taxpayer to show that he was entitled to the deduction claimed. (*Reinecke* v. *Spalding*, 280 U. S., 227, 232 [Ct. D. 154, C. B. IX-1, 305].)

The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income. (Compare *American National Co.* v. *United States*, 274 U. S., 99.) When received, the general agent's right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment. (Compare *North American Oil Consolidated* v. *Burnet*, 286 U. S., 417, 424 [Ct. D. 499, C. B. XI-1, 293].)[5] The refunds during the tax year of those portions of the overriding commissions which represented cancellations during the tax year had, prior to the tax return for 1923, always been claimed as deductions; and they were apparently allowed as "necessary expenses paid or incurred during the taxable year." The right to such deductions is not now questioned. Those which the taxpayer claims now are of a very different character. They are obviously not "expenses paid during the taxable year." They are bookkeeping charges representing credits to a reserve account.

These charges on account of credits to the "return commission" reserve account are claimed as deductions on the ground that they are expenses "incurred," "during the taxable year." It is true that where a liability has "accrued during the taxable year" it may be treated as an expense incurred; and hence as the basis for a deduction, although payment is not presently due (*United States* v. *Anderson*, 269 U. S., 422, 440, 441 [T. D. 3839, C. B. V-1, 179]; *American National Co.* v. *United States*, 274 U. S., 99 [T. D. 4099, C. B. V-2, 193]; *Aluminum Castings Co.* v. *Routzahn*, 282 U. S., 92 [Ct. D. 270, C. B. X-1, 352]); and although the amount of the liability has not been definitely ascertained. (*United States* v. *Anderson*, supra.[6] Compare *Continental Tie & Lumber Co.* v. *United States*, 286 U. S., 290, 296 [Ct. D. 494, C. B. X-1, 260].) But no liability accrues during the taxable year on account of cancellations which it is expected may occur in future years, since the events necessary to create the liability do not occur during the taxable year. Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent. (*Weiss* v. *Wiener*, 279 U. S., 333, 335 [Ct. D. 60, C. B. VIII-1, 257]; *Lucas* v. *American Code Co.*, 280 U. S., 445, 450, 452 [Ct. D. 168, C. B. IX-1, 314]; compare *New York Life Insurance Co.* v. *Edwards*, 271 U. S., 109, 116 [T. D. 3872, C. B. V-1, 305]; *Ewing Thomas Co.* v. *McCaughn*, 43 F. (2d), 503; *Highland Milk Condensing Co.* v. *Phillips*, 34 F. (2d), 777 [Ct. D. 117, C. B. VIII-2, 301].)

The liability of Edward Brown & Sons arising from expected future cancellations was not deductible from gross income because it was not fixed and absolute. In respect to no particular policy written within the year could it be known that it would be canceled in a future year. Nor could it be known that a definite percentage of all the policies will be canceled in the future years. Experience taught that there is a strong probability that many of the policies written during the taxable year will be so canceled. But experience taught also that we are not dealing here with certainties. This is shown by

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[4] Sections 212, 213, and 214 of the Revenue Act of 1924 (ch. 234, 43 Stat., 253, 267–270) and the corresponding sections of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 23–27) contain provisions identical with those quoted above, except that section 206 of those Acts is also referred to as defining deductions.

[5] See also *Vang* v. *Lewellyn* (35 F. (2d), 283 [Ct. D. 134, C. B. VIII-2, 283]).

[6] See also *Uncasville Manufacturing Co.* v. *Commissioner of Internal Revenue* (55 F. (2d), 893, 895), *Ocean Accident & Guarantee Corporation* v. *Commissioner of Internal Revenue* (47 F. (2d), 582). Compare *Commissioner of Internal Revenue* v. *Old Dominion S. S. Co.* (47 F. (2d), 148).

the variations in the percentages in the several 5-year periods of the aggregate of refunds to the aggregate of overriding commissions.[7]

Brown argues that since insurance companies are allowed to deduct reserves for unearned premiums which may have to be refunded, he should be allowed to make the deductions claimed as being similar in character. The simple answer is that the general agent is not an insurance company; and that the deductions allowed for additions to the reserves of insurance companies are technical in character and are specifically provided for in the Revenue Acts. These technical reserves are required to be made by the insurance laws of the several States. (See *Maryland Casualty Co.* v. *United States*, 251 U. S., 342, 350; *United States* v. *Boston Insurance Co.*, 269 U. S., 197 [T. D. 3792, C. B. V-1, 300]; *New York Life Insurance Co.* v. *Edwards*, 271 U. S., 109.) The "return commission" reserve here in question was voluntarily established. Only a few reserves voluntarily established as a matter of conservative accounting are authorized by the Revenue Acts. Section 214 mentions only the reserve for bad debts (in the discretion of the Commissioner), provided for in paragraph 7; those for depreciation and depletion, provided for in paragraphs 8 and 10; and the special provision concerning future expenses in connection with casual sales of real property, provided for in paragraph 11 of section 214 as amended by the Revenue Act of 1926. (26 U. S. C., section 955.) Many reserves set up by prudent business men are not allowable as deductions. (See *Lucas* v. *American Code Co.*, 280 U. S., 445, 452.[8])

Brown argues also that the Revenue Acts required him to make his return "in accordance with the method of accounting regularly employed in keeping the books";[9] and that in making the deductions based on the credits to "return commission" account, he complied with this requirement. The Commissioner's oft-quoted[10] instruction of January 8, 1917 (No. 2433, 19 Treasury Decisions, 5) is relied upon:

"In cases wherein, pursuant to the consistent practice of accounting of the corporation * * * corporations set up and maintain reserves to meet liabilities, the amount of which and the date of payment or maturity of which is not definitely determined or determinable at the time the liability is incurred, it will be permissible for the corporations to deduct from their gross income the amounts credited to such reserves each year, provided that the amounts deductible on account of the reserve shall approximate as nearly as can be determined the actual amounts which experience has demonstrated would be necessary to discharge the liabilities incurred during the year and for the payment of which additions to the reserves were made."

The accrual method of accounting had been regularly employed by Edward Brown & Sons before 1923, but no "return commission" account had been set up. Moreover, the method employed by the taxpayer is never conclusive. If in the opinion of the Commissioner it does not clearly reflect the income, "the computation shall be made upon such basis and in such manner," as will, in his opinion, do so. (*United States* v. *Anderson*, 269 U. S., 422, 439; *Lucas* v. *American Code Co.*, 280 U. S., 445, 449; *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S., 115, 120 [Ct. D. 265, C. B. IX-2, 384]; compare *Williamsport Wire Rope Co.* v. *United States*, 277 U. S., 551 [T. D. 4172, C. B. VII-2, 323]; *Lucas* v. *Structural Steel Co.*, 281 U. S., 264.[11]) In assessing the deficiencies, the Commissioner required in effect that the taxpayer continue to follow the method of accounting which had been in use prior to the change made in 1923. To so require was within his administrative discretion (compare *Bent* v. *Commissioner of Internal Revenue*, 56 F. (2d), 99).

[7] The taxpayer testified: From my experience in the insurance business, I would say that approximately the general ratio of cancellations to business written, depending on the year, runs between 20 per cent and 25 per cent.

[8] Compare *Barde Steel Products Corporation* v. *Commissioner of Internal Revenue* (40 F. (2d), 412, 416); *Spring Canyon Coal Co.* v. *Commissioner of Internal Revenue* (43 F. (2d), 78).

[9] SEC. 212. (b) The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if * * * the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income.

[10] *United States* v. *Anderson* (269 U. S., 422); *American National Co.* v. *United States* (274 U. S., 99, 101); *Niles Bement Pond Co.* v. *United States* (281 U. S., 357, 359); *Aluminum Castings Co.* v. *Routzahn* (282 U. S., 92, 98).

[11] See also *Industrial Lumber Co.* v. *Commissioner of Internal Revenue* (58 F. (2d), 123); *Jennings* v. *Commissioner of Internal Revenue* (59 F. (2d), 32).

Second. The Board of Tax Appeals did not err in refusing to allocate to future years part of the overriding commissions on business written during the taxable year. Brown urges that the overriding commission is compensation for services rendered throughout the life of the policy; that the compensation to be rendered in later years can not be considered as earned until the required services have been performed; and that the Revenue Acts contemplate that where books are kept on the accrual basis, the income shall be accounted for as it is earned. He suggests, therefore, as an alternative method of ascertaining the income, that the commissions on each year's writing be prorated over the life of the policies.

Under this alternative proposal, the practice of making deductions prevailing prior to 1923 would remain unchanged; but the method of ascertaining the gross income of the taxable year would be subjected to a far-reaching change. The proposal is that all policies be deemed to have been written on July 1; that of the overriding commission on 1-year policies, one half should be returned as income of the year in which the policy was written, the other half as income of the next year; that of the commissions on 3-year policies, one-sixth should be returned as income of the year in which the policy was written, one-third as the income of each of the next two years and one-sixth as income of the fourth year; and that the commission on 5-year policies, one-tenth should be returned as income of the first year, one-fifth as income of each of the next four years, and one-tenth as income of the sixth year.

This proposed alternative method of computing the income from overriding commissions was not employed by Edward Brown & Sons either before or after 1923. Moreover, the Board concluded that there "is no proof that the overriding commissions contain any element of compensation for services to be rendered in future years." The whole of the overriding commissions has at all times been treated as income of the year in which the policy was written. The Commissioner was of opinion that the method of accounting consistently applied prior to 1923 accurately reflected the income. He was vested with a wide discretion in deciding whether to permit or to forbid a change. (Compare *Bent* v. *Commissioner of Internal Revenue*, 56 F. (2d), 99.) It is not the province of the court to weigh and determine the relative merits of systems of accounting. (*Lucas* v. *American Code Co.*, 280 U. S., 445, 449.)

The deductions here claimed, not being authorized specifically either by the Revenue Acts, or by any regulations applying them, were properly disallowed. So far as the decision in *Virginia-Lincoln Furniture Corporation* v. *Commissioner of Internal Revenue* (56 F. (2d), 1028) may be inconsistent with this opinion, it is disapproved.

Affirmed.

ARTICLE 112: When charges deductible.

REVENUE ACT OF 1926.

Losses on sales under foreclosure in California. (See G. C. M. 12737, page 120.)

SECTION 214(a)3.—DEDUCTIONS ALLOWED INDIVIDUALS: TAXES.

ARTICLE 131: Taxes.

REVENUE ACT OF 1926.

Accrual of Massachusetts excise tax by a national bank. (See G. C. M. 12596, page 112.)

SECTION 214(a)7.—DEDUCTIONS ALLOWED INDIVIDUALS: BAD DEBTS.

ARTICLE 151: Bad debts. XIII–13–6723
(Also Section 213(a), Article 50.) Ct. D. 806

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—BAD DEBTS—EFFECT OF ALLOWING DEDUCTIONS FOR PRIOR YEARS.

A corporation selling goods on credit is not entitled to deduct as bad debts for the year 1920, in addition to accounts from its delinquent file, accounts from its active file in the amount of the difference between its sales for the year and the amounts actually collected. The fact that it took such deductions in prior years without objection by the Commissioner gives the corporation no right to have its taxes for 1920 assessed on any different basis than required by statute.

2. GROSS INCOME—COLLECTION OF DEBTS ALLEGED TO BE WORTHLESS—INVESTED CAPITAL—ESTOPPEL.

A corporation which has received the benefit of deductions improperly claimed and allowed during years prior to 1920 for debts represented to be worthless and charged off is estopped to assert that amounts collected in 1920 on such debts should not be included in gross income for that year. It is also estopped to claim that accounts receivable erroneously charged off in 1919 should be added to invested capital for 1920.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 409) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Askin & Marine Co., petitioner, v. Commissioner of Internal Revenue, respondent.

Petition to review a decision of the Board of Tax Appeals involving income and profits taxes for 1920. Affirmed.

Before MANTON, SWAN, and CHASE, Circuit Judges.

[August 29, 1933.]

OPINION.

CHASE, Circuit Judge: The petitioner, a New York corporation, having its principal office in New York City, operated a chain of retail clothing stores. Its merchandise was sold on credit. The purchaser was required to make a payment at the time of sale and to agree to pay the remainder of the purchase price in weekly installments. A card was kept at the principal office for each customer on which a record of sales and payments were made from daily reports from the various stores. These cards from 70,000 to 75,000 in number, were kept in files designated respectively as active and delinquent. The delinquent file contained the cards of customers who had made no payment for 60 days and had for that reason been transferred from the active file. It was the regular practice of the petitioner from 1917 through 1920 to charge off as bad debts and deduct from its gross income all accounts in the delinquent file at the end of each year. In addition to this, it charged off of the total of the accounts in the active file a sum approximating the difference between its sales for the year and the amounts actually collected. It is now admitted that there was no ascertainment of the worthlessness of accounts charged off the active file and no attempt made to do that. The effect of this method was to permit the petitioner to keep its books on the accrual basis and account for purposes of taxation on an arbitrary adjustment which put it as close to a cash receipt and disbursement basis as it desired.

On December 27, 1919, the petitioner charged off as bad debts and deducted from its gross income for 1919 in all $621,176.47. Of this $310,083.62 was charged off the active file. At the end of 1920, the petitioner charged off as bad debts and deducted from its gross income for that year $655,800.32. Of this $280,876.48 was from the active file. During 1920 the petitioner collected $5,459.24 from accounts it had charged off in 1917; $13,354.89 from those it had charged off in 1918; and $289,690.22 from accounts charged off in 1919. Of the total of $308,504.35 so collected $276,728.40 was from accounts charged off the active file. Until the 1920 return the petitioner's practice in this regard was not questioned. An investigation led to a refusal by the Commissioner to allow as a deduction for that year (other years are not in issue on this appeal) the amounts charged off the active file in 1920; to exclude from gross income collections in 1920 on accounts previously charged off; and to adjust invested capital accordingly.

The petitioner had included in gross income in previous years the collections it made on accounts charged off, but upon its acquiescence in the position that the charging off of accounts before it ascertained them to be worthless had been erroneous it claimed that collections from such accounts could not be income in the year collected and further that accounts receivable erroneously charged off at the end of 1919 should be added to invested capital for 1920.

The petitioner bears heavily upon the fact that its practice in charging off these accounts was uniform in the years up to and including 1920 and that it "raised no question here and desired only to continue." It appears to believe that such a practice so continued created a right to be taxed only on the same basis in 1920 because the Commissioner had made no objection before. Once let it appear that the return for 1920 was not in accordance with the law, and the petitioner admits this when it agrees that it had no right to take the deductions based on charge-offs from the active files, and it seems quite inadequate, in attempting to show that this decision of the Board of Tax Appeals was wrong to point to similar errors in former years. Grant that it may have considered itself entitled to the deductions it took in previous years and was confirmed in that belief as to 1920 by the fact that it had been allowed such deductions before and there is still no basis for the claim that repeated error in taking deductions for debts charged off as worthless before they were ascertained to be worthless gave the petitioner any right to have its taxes assessed in 1920 on any different basis than the applicable statute required. The 1920 charge-off from the active file was on account of debts not ascertained to be worthless and was properly disallowed and we do not understand that the petitioner now claims the contrary. Instead, it does claim that, as this deduction was improperly taken and like deductions in previous years also improperly taken, the amounts collected in 1920 on accounts previously charged off should not be included in its gross income for that year.

Section 213(a) of the Revenue Act of 1918 applies. It provided that gross income "includes gains, profits, and income derived from * * * the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *" Treasury Regulations 42, article 52, promulgated under the 1918 Act, provided, as previous regulations on the same subject had provided, that bad debts ascertained to be worthless and charged off which were subsequently recovered were income for the year in which recovered regardless of the date when charged off. The reenactment of the statute in substantially the same form while regulations like these were in effect is a persuasive indication that Congress approved them. (*Brewster* v. *Gage*, 280 U. S., 327, 337 [Ct. D. 148, C. B. IX-1, 274]; *Shearman* v. *Commissioner*, 66 F. (2d), 256, and cases there cited.) Where a charge-off is proper and the deduction accordingly allowed, it is well settled that any later collection on the debt is to be returned as income in the year of its receipt. (*Putnam National Bank* v. *Commissioner*, 50 Fed. (2d), 158 [Ct. D. 415, C. B. X-2, 249] and cases there cited.)

We need in this case to concern ourselves with the theory advanced that when debts not ascertained to be worthless have been charged off and a deduction has improperly been claimed and allowed no part of such deduction when collected can be included in income. It is obvious that if this is so a taxpayer who gets an unlawful deduction in this way not only cuts down his taxable income in the year the deduction is taken but gets immunity from income taxation on the account receivable which was deducted whenever it, or any part of it, is received. A result so unjust is not to be reached unless plainly required by law. Having represented that it had ascertained these accounts charged off its active file to be worthless and having received the benefit of the deduction it claimed when the Commissioner took its representation of the ascertainment of worthlessness at its face value, we think the petitioner is now clearly estopped from denying, to the prejudice of the Government, the truth of the representations upon which it has succeeded in former years in obtaining deductions from its gross income. While the Commissioner must investigate returns to satisfy himself of their correctness in fact and law, a taxpayer may not benefit at the expense of the Government by misrepresenting facts under oath; by succeeding in having the Commissioner accept its representations as the truth; and by claiming later that what it represented to be true might have been found false had the Commissioner refused to have faith in the sworn return. (*Commissioner* v. *Liberty Bank & Trust Co.*, 59 Fed. (2d), 320.)

For the same reason, the taxpayer's contention that accounts erroneously charged off previous to 1920 should be added to invested capital for that year was properly denied. It was likewise estopped on that score. *Isbell-Porter Co.* v. *Commissioner* (40 Fed. (2d), 432), upon which the petitioner relies, involved merely the correction of an error where no question of estoppel was raised.

Affirmed.

ARTICLE 151: Bad debts.

REVENUE ACT OF 1921.

Burden of proof. (See Ct. D. 822, page 336.)

ARTICLE 151: Bad debts.

REVENUE ACTS OF 1921, 1924, AND 1926.

Debts ascertained to be partially worthless but not charged off during taxable year. (See G. C. M. 13114, page 116.)

SECTION 214(a)8.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPRECIATION.

ARTICLE 161: Depreciation.

REVENUE ACT OF 1921.

Deduction by lessor where lessee under contract to replace at end of 999-year lease. (See Ct. D. 838, page 295.)

ARTICLE 165: Method of computing depreciation allowance.

REVENUE ACTS OF 1921, 1924, AND 1926.

Amendment of article 165, Regulations 69, 65, and 62. (See T. D. 4422, page 58.)

ARTICLE 165: Method of computing depreciation allowance.

REVENUE ACTS OF 1921, 1924, AND 1926.

Information necessary in support of depreciation deductions. (See Mim. 4170, page 59.)

SECTION 214(a)9.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPLETION.

ARTICLE 201: Depletion of mines, oil and gas wells; depreciation of improvements.

REVENUE ACTS OF 1921 AND 1924.

Period after sale price deposited in escrow. (See Ct. D. 781, page 213.)

ARTICLE 204: Amount returnable through depletion and depreciation deductions in the case of lessor.

REVENUE ACTS OF 1921, 1924, AND 1926.

Depletion of iron mine where royalties therefrom constituting income of trust, less expenses, are distributable to the beneficiaries. (See Ct. D. 784, page 247.)

ARTICLE 204: Amount returnable through depletion and depreciation deductions in the case of lessor.

REVENUE ACTS OF 1921, 1924, AND 1926.

Depletion of oil and gas lands where the entire proceeds of royalties therefrom, constituting in part the income of a trust, are distributable to the beneficiaries. (See Ct. D. 785, page 250.)

ARTICLE 223: Charges to capital and to expense in the case of oil and gas wells.

XIII-11-6696
Ct. D. 798

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. DEDUCTION—DEVELOPMENT EXPENSES—CAPITAL EXPENDITURE—ELECTION.

The owner of oil leases, who exercised the option allowed by article 223 of Regulations 62 and 69 and article 225 of Regulations 65 and deducted as development expenses irrecoverable costs of drilling wells, may not later retroactively elect to treat them as capital expenditures in determining the gain realized upon the sale of the property.

2. REGULATIONS—VALIDITY.

Article 223 of Regulations 62 and similar articles of subsequent regulations are valid.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 277) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied October 16, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

W. R. Ramsey, petitioner, v. Commissioner of Internal Revenue, respondent.

On petition to review the decision of the United States Board of Tax Appeals.

Before PHILLIPS and McDERMOTT, Circuit Judges, and KENNEDY, District Judge.

[July 26, 1933.]

OPINION.

McDERMOTT, Circuit Judge, delivered the opinion of the court.

From 1922 until 1926 the petitioner was engaged in developing oil leases. Wells were drilled by a contractor upon a footage basis, the petitioner furnishing the equipment and supervision. The amounts paid the contractor for drilling, plus certain items for labor, trucking, cementing, fuel, repairs, management, depreciation, and taxes (exclusive of derricks, boilers, casing and equipment) were deducted each year from his income, as development expense, in accordance with the option given him by Regulations 69, article 223, set out in the margin.[1] Recoverable items of development costs, such as the derrick, casing and boilers, are not herein involved. In 1926 he sold the properties and in returning the profit from that sale, he added the expenditures theretofore deducted as expenses of operation, to the cost of the leases sold. The Commissioner declined to permit this double deduction for the same costs, holding that since the petitioner had exercised his option to treat these items as expenses and taken credit therefor, he could not later retroactively elect to treat them as capital expenditures. The Board of Tax Appeals affirmed and we are asked to review that determination.

Counsel for petitioner very fairly says in his brief that if the regulation is construed as covering these expenditures and is valid as so construed, the decision should be affirmed. There being no question of the constitutional power of Congress to permit of a deduction of such drilling costs from current income, we have only a question of statutory construction. The underlying provision for deduction from income is section 215 of the Revenue Acts of 1921, 1924, and 1926, which runs in part:

"That in computing net income no deduction shall in any case be allowed in respect of * * *

"(b) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."

Regulations 62, article 293, is the companion of this statute, and the first sentence is—

"Amounts paid for increasing the capital value or for restoring the depreciated value of property are not deductible from gross income."

The position of petitioner is that the regulation quoted in the margin, if construed to cover these expenses, flies directly in the face of this statutory prohibition and is therefore invalid; that there was therefore no legal authority for the petitioner deducting these sums as development expenses during the years, and no legal impediment to his now charging them to capital account.

The office of an administrative regulation has been many times defined. A revenue law may not be altered or amended by regulation (*Morrill* v. *Jones*, 106 U. S., 466), nor go beyond what Congress has authorized (*Utah Power & Light Co.* v. *United States*, 243 U. S., 389). A regulation may make explicit what is general and clear up uncertainty. (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S., 459 [Ct. D. 655, C. B. XII–1, 243].)

[1] "Such incidental expenses as are paid for wages, fuel, repairs, hauling, etc., in connection with the exploration of the property, drilling of wells, building of pipe lines, and development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. If in exercising this option the taxpayer charges these incidental expenses to capital account, in so far as such expense is represented by physical property it may be taken into account in determining a reasonable allowance for depreciation. The cost of drilling nonproductive wells may at the option of the operator be deducted from gross income as a development expense or charged to capital account returnable through depletion and depreciation as in the case of productive wells. An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years."

A similar regulation was promulgated under statutes of other years. (See article 223, Regulations 45 (1918), article 223. Regulations 62 (1921), article 225. Regulations 65 (1924), article 243, Regulations 74 (1928).) These were restated and amplified in Treasury Decision 4333, in June, 1932 [C. B. XI–1, 31].

The first question for determination is, Does the quoted regulation purport to cover those expenses, which it has been noted, do not include the cost of the derrick, casing, boilers, or other recoverable equipment? Of this we have no doubt. While the regulation uses the word "incidental" it is followed by the explanatory words "wages, fuel, repairs, hauling, etc., in connection with the exploration of the property, drilling of wells, building of pipe lines, and development of the property"; this language includes the very items here sought to be capitalized, and doubtless are intended to cover all drilling costs except derricks, casing, boilers and other equipment with salvage value. Treasury Decision 4333, promulgated to restate the administrative practice of long standing without changing administrative policy, specifically provides that costs incurred by contracts for drilling on a footage basis are within the regulation. The sentence "An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years," is unambiguous; it is conceded that petitioner once elected to treat these costs as operating expenses. It would require a distortion of unequivocal language to hold that the regulation does not cover this case. The question is squarely presented therefore of whether the regulation may permit the irrecoverable costs of drilling oil wells to be classed as an expense of operation rather than as a "permanent improvement or betterment."

Whether an oil well is a permanent improvement is at least a debatable question. The incidental costs here involved are irretrievably gone when the well is finished, whether it be a dry hole or a producer. A dry hole is neither an improvement nor a betterment; neither is a producer after the oil is exhausted. The truth is that the hole upon which the money is expended is simply a means of reaching the oil sands, and it is the oil which increases the value of the property; the hole is of value only if oil is found, and then only as long as the sands will produce. A producing field is of more value than a nonproducing one, partly because the expenses of reaching the sands have been incurred, but largely because the presence of oil has been proven. While dictionary definitions are helpful, they do not exclude an examination of the context to ascertain the purpose of the statute, nor forbid an inquiry into administrative interpretation as an aid in construction of doubtful words or passages. A priori, therefore, we are of the opinion that the holes through which the oil is recovered are not so conclusively "permanent improvements or betterments" as to preclude a regulation permitting the deduction of irrecoverable expenses of drilling them as ordinary expenses incurred in carrying on a trade or business, allowed by section 214(a) of the Acts in question.

This conclusion is strongly fortified by the fact that this regulation has been in existence for many years; Congress has repeatedly amended the revenue laws while this regulation was in full force and effect, and no effort has been made to do away with it. This is almost conclusive proof that Congress was satisfied with the construction put upon its language in the earlier Acts; by repeated reenactments, Congress has ratified and approved this interpretation. For many years the oil industry has availed itself of this regulation; the Commissioner has acted under it; the Board of Tax Appeals and the courts have recognized its existence and validity. Under such circumstances, its invalidity must be clear before courts would be justified in holding that taxes have been illegally assessed and collected throughout the years, particularly when the regulation accomplishes a result that is essentially fair to both the taxpayer and the Government.

That a regulation may resolve a doubt as to the proper classification of drilling costs, and that the administrative construction embodied in the regulation must be deemed to have received legislative approval by reenactment of the statute, see *United States* v. *Dakota-Montana Oil Co.* (288 U. S., 459); *Murphy Oil Co.* v. *Burnet* (287 U. S., 299 [Ct. D. 619, C. B. XII-1, 231]). And cf. *Massachusetts Mut. Life Ins. Co.* v. *United States* (288 U. S., 269 [Ct. D. 638, C. B. XII-1, 286]). In *Brewster* v. *Gage* (280 U. S., 327, 336 [Ct. D. 148, C. B. IX-1, 274]), the court said:

"These regulations were prepared by the Department charged with the duty of enforcing the Acts. The rule so established is reasonable and does no violence to the letter or spirit of the provisions construed. A reversal of that construction would be likely to produce inconvenience and result in inequality. It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. (*Logan v. Davis*, 233 U. S., 613, 627; *Maryland Casualty Co.* v. *United States*, 251 U. S., 342, 349; *Swendig* v. *Washington Water Power Co.*, 265 U. S., 322, 331.)"

Many cases are cited by counsel in which this particular regulation was involved. Only one deals with the validity of the regulation, *Sterling Oil & Gas Co.* v. *Lucas* (D. C. Ky.) (51 F. (2d), 413), in which Judge Dawson held it to be valid, and the Circuit Court of Appeals affirmed (Id., 62 F. (2d), 951), assuming, without deciding, its validity. In *Bliss* v. *Commissioner* (C. C. A. 5) (57 F. (2d), 984), the cost of drilling dry holes was held deductible as a business expense, the court holding that dry holes did not enrich anybody. In *Island Petroleum Co.* v. *Commissioner* (C. C. A. 4) (57 F. (2d), 992), the court held the regulation not applicable, but its validity was recognized. Other cases involve "turnkey" contracts, that is, where a contractor erects the derrick, drills and cases the well, and turns it over fully equipped. (*Hughes Oil Co.* v. *Bass* (C. C. A. 5), 62 F. (2d), 176 [Ct. D. 690, C. B. XII-1, 247]; *Old Farmers Oil Co.* v. *Commissioner*, 12 B. T. A., 203.) The contract price of such a job, including recoverable equipment, was held not to be within the incidental costs covered by the regulation. These cases do not hold the regulation invalid; they hold the taxpayer's proof did not call for its application. It is not a question of whether the well is drilled under contract; it is a question of whether the labor costs have been segregated from the equipment expense. Other cases present the question, not present here, of whether if such costs are capitalized, return thereof should be had through depreciation or depletion. (*A. T. Jergins Trust*, 22 B. T. A., 551; Id., 288 U. S., 508 [Ct. D. 653, C. B. XII-1, 214]; *Zeigler* v. *Commissioner*, 23 B. T. A., 1091; *P-M-K Petroleum Co.* v. *Commissioner*, 24 B. T. A., 360; *United States* v. *Dakota-Montana Oil Co.*, supra; *Petroleum Exploration* v. *Commissioner*, 288 U. S., 467 [Ct. D. 612, C. B. XI-2, 262].) In *Robertson* v. *Commissioner* (28 B. T. A., 635) (decided July 11, 1933) the Board of Tax Appeals enforced this regulation at the instance of a taxpayer. While none of these cases bears directly upon the point, they have this significance: This regulation has been before the courts repeatedly and has uniformly been treated as an integral part of our taxing laws.

The industry, the Commissioner, the Board of Tax Appeals, and the courts for years have acted upon the assumption that this regulation is valid. It is a fair solution of a debatable question. If it is to be changed at this late day, it should be done by Congress and not the courts.

The decision of the Board of Tax Appeals is affirmed.

SECTION 218.—PARTNERSHIPS.

ARTICLE 335: Partnerships. XIII-3-6602
Ct. D. 774

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—PARTNERSHIP.

Where an oral agreement was made between the petitioners and their son to form a partnership on the basis of their sharing equally the profits and losses of the business, but the wife never made application necessary under Texas law to be declared a femme sole for trading purposes, and the son had no right to withdraw the profits which nominally were to be his and received no share of the profits when the business was later taken over by a corporation, the alleged partnership did not exist, and the profits from the business are taxable to petitioners as community income.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (25 B. T. A., 284) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied on October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Ed Kasch and Theodora Kasch, petitioners, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals (District of Texas).

Before BRYAN, HUTCHESON, and WALKER, Circuit Judges.

[February 18, 1933.]

OPINION.

WALKER, Circuit Judge: The Board of Tax Appeals approved deficiencies in income tax for the fiscal year ended May 31, 1925, assessed against the petitioners, Ed Kasch and his wife, Theodora Kasch. The assessment of the deficiencies resulted from the conclusion that the gross income of each of the petitioners as reported should be increased by an amount which the petitioners claimed was income of Milton Kasch as a member of a partnership composed of the petitioners and said Milton Kasch. The claim that such partnership existed was rejected by the Board of Tax Appeals, which determined that the amount which petitioners contended was income of Milton Kasch belonged to the petitioners as community income.

Prior to the time of Ed Kasch, his wife, Theodora Kasch, and Milton Kasch, the son of Ed Kasch by a former wife, entering into an agreement hereinafter mentioned, Ed Kasch, who lived at San Marcos, Tex., was the sole owner of a cottonseed selling business which was conducted under his name. At various times during the period of about six months ending May 31, 1924, Ed Kasch and his wife had oral conversations with Milton Kasch in regard to the latter being taken into the business as a partner, and during that time the three orally agreed to form a partnership on the basis of their sharing equally the profits and losses of the business, that nothing be withdrawn from the business, and that Milton Kasch devote his time and attention to the business except when he was attending school. At that time Milton was 16 years old. From the time that agreement was entered into Milton devoted all his time and attention to the seed business except when he was attending school. For the period of the school vacation in 1924 he was paid a salary of $75 per month, and was given a small allowance while attending school. The books kept for the seed business during the fiscal year ended May 31, 1925, showed a profit from the business of $124,808.94. By an entry in the journal that entire profit was credited to Ed Kasch, the entry being accompanied by the statement: "To close net profits for year into proprietorship account." By later entries Ed Kasch proprietorship account was charged with two-thirds of the $124,808.94, or $83,205.96, and credits were entered in favor of Theodora Kasch and Milton Kasch, each in the sum of $41,602.98, accompanied by the statement: "To set up partnership accounts for Mrs. Theodora Kasch and Milton Kasch, as they were taken in as partners May 31, 1924, to share in profits of business. This entry to distribute profits equally among them, as per profit and loss statement, and income tax return May 31, 1925." In May, 1930, a corporation was organized under the name "Ed Kasch, Inc.," and took over the business. Sixteen thousand six hundred dollars of the $50,000 capital stock of that corporation was subscribed for and issued in the name of Milton Kasch, the certificate for which remained in the possession of Ed Kasch. A written instrument, dated September 27, 1930, and acknowledged before a notary public on November 15, 1930, was executed by Ed Kasch and Milton Kasch, the latter then being 23 years old and married. That instrument, after reciting that during the life of the partnership from June 1, 1924, to June 1, 1930, the net earnings to which Milton Kasch became entitled under the agreement between him and his father amounted to $83,378.46 and that of that amount Milton Kasch had withdrawn and expended $3,460, provided that the balance, $79,918.46, should constitute a trust fund, to remain in the possession and control of Ed Kasch as trustee, with power to handle, control and invest the sum, including principal and income, in such manner as he may deem best, until Milton Kasch should reach the age of 40 years; that if Milton should die prior to the termination of the trust leaving a child or children surviving, the trust should enure to the benefit of the surviving child or children, and should continue for them until Milton would have reached the age of 40 years had he lived, and that if Milton should die without issue during the life of the trust, then the father was to pay the surviving wife the sum of $1,000 a year for 10 years, and the remainder should revert to the father. It appeared from recitals contained in that instrument that part of the fund covered by the agreement previously had been invested by Ed Kasch in land, the title to which was taken in his own name. So far as appeared, Theodora Kasch never made the application provided for by statute (Revised Civil Statutes of Texas, 1925, article 4626) for the removal of her disabilities of coverture, and that she be declared a *femme sole* for mercantile and trading purposes.

For two or more persons to be partners they must expressly or impliedly agree to be associated in a relationship which has the legal effect of making them partners. (*White* v. *McNeil*, 294 S. W., 928; 20 R. C. L., 802.) Under the Texas law a married woman can not be a partner in a mercantile business, unless her disabilities of coverture are removed by compliance with a statutory requirement. (*Purdom* v. *Boyd*, 82 Texas, 130; *Miller* v. *Marx & Kempner*, 65 Texas, 131; Revised Civil Statutes of Texas, 1925, article 4626.) The only evidence as to an agreement on the subject of a partnership was as to an oral agreement between Ed Kasch, his wife, and Milton Kasch with reference to a partnership of which each of the three was to be a member. It seems that such a partnership did not come into existence because of the incapacity of the wife to become a partner. No evidence indicated that prior to or during the year beginning June 1, 1924, either Ed Kasch or Milton Kasch consented to a partnership of which no one but themselves was a member. But, without determining whether the just-mentioned circumstance did or did not keep the oral agreement from having the effect of creating a partnership of which Milton was a member, we are of opinion that the evidence adduced disclosed another ground supporting the conclusion that during the taxable year in question Milton's relation to the seed business was not such as to make him a partner, having a right to a share of the profits. One is not a member of a business partnership unless he has a proprietary interest in the profits as profits. (*Sugg* v. *Hopkins*, 11 Fed. (2d), 517.) In determining whether the parties to the oral agreement did or did not intend Milton Kasch to be the real owner during the taxable year in question of a third or other fractional share of the profits of the business, the terms of the agreement, and also attending circumstances, and what parties to the agreement did with reference to the profits are to be considered. (*Southern Surety Co.* v. *Texas Employers' Ins. Ass'n*, 2 S. W. (2d), 310; *Brown* v. *Watson*, 72 Texas, 216, 221.) By the terms of the agreement Milton was to have no right to withdraw the whole or any part of the share of the profits which nominally was to be his. No provision was made for his ever having the right to withdraw any of the profits. When the oral agreement was made Ed Kasch was the sole owner of the business and had control of its profits. What was done after the agreement was entered into indicated that a relinquishment of his control of any part of the profits was not intended by the family arrangement. In the conduct of the business as disclosed by its books of account, the profits continued to be treated as his, the entire profits for the year in question being credited to him, the share credited to Milton being shown to come, not directly from the business, but from his father. While Milton did not have or exercise any right to withdraw profits credited to him, his father withdrew profits credited to Milton and invested them in land, the title to which was taken in his own name. Nothing indicated that his doing so was not in accordance with what all parties to the oral agreement intended from the beginning. When the seed business was taken over by a corporation in 1930, Milton then being of full age and married, there was no distribution of profits in which he shared, and, so far as appears, his right to treat as his own any part of the profits was not asserted or recognized. The father's control and domination of the profits nominally credited to the son were continued by an arrangement which could not be changed without the father's consent. It appeared that from the time the oral agreement was made, and with the consent or acquiescence of Milton after he became of full age, Ed Kasch continued to have such control of the profits nominally credited to Milton as was inconsistent with the latter being the real owner or proprietor of them. Evidence adduced fairly tended to prove that the oral agreement relied on did not have, and was not intended to have, the effect of making Milton Kasch the real owner or proprietor of a share of the profits of the seed business carried on in his father's name. The conclusion that the alleged partnership did not exist, being supported by evidence, is not subject to be set aside. It follows that the above mentioned ruling was not erroneous.

The petition is denied.

ARTICLE 336: Distributive shares of partners. XIII–16–6756 Ct. D. 814

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. INCOME—PARTNERSHIP—CALENDAR AND FISCAL YEAR BASIS—PRORATION OF INCOME OF DECEASED PARTNER.

Where decedent, a member of a partnership, reported income for the calendar year on the cash receipts and disbursements basis and the partnership reported on the basis of a fiscal year ending August 31, the partnership agreement providing that in case of the death of any partner his interest should be continued until the expiration of the current fiscal year, the decedent's undistributed share of partnership income for the period from January 1, 1924, to June 11, 1924, the date of his death, computed by prorating over that period the amount of the partnership net income for its entire fiscal year, in the absence of proof to the contrary is taxable under section 218(a) of the Revenue Act of 1924 as income for that portion of the calendar year although not paid until March, 1925, and even though included as a part of the corpus of the decedent's estate in computing the Federal estate tax.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 841) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied January 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

James S. Darcy et al., Executors of the Estate of James Temple Gwathmey, Deceased, appellants, v. *Commissioner of Internal Revenue, appellee.*

Petition to review a decision of the Board of Tax Appeals involving income taxes of a decedent from January 1, 1924, to June 11 in the same year. Affirmed.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[August 24, 1933.]

OPINION.

CHASE, Circuit Judge: The facts are not in dispute and were found by the Board of Tax Appeals as follows:

"FINDINGS OF FACT.

"The petitioners, residents of New York State, are the executors of the estate of James Temple Gwathmey who died June 11, 1924. The decedent, prior to his death, was a member of the partnership of George H. McFadden & Bro., commission cotton factors, having its principal office in Philadelphia, Pa., and an office in New York City. He was the resident partner in charge of the New York City office. The partnership agreement, in effect at the time of the decedent's death, contained the following material provisions:

"ARTICLE III.

* * * * * * *

"The interest of J. Temple Gwathmey shall be limited solely to participation in the profits of the New York office of George H. McFadden & Bro., to the extent of fifty per cent (50%) thereof. Said Gwathmey, as between the partners of George H. McFadden & Bro., shall be liable only for the losses of the New York office of George H. McFadden & Bro., in the same proportion as he is entitled to share in said profits. Said Gwathmey shall have no interest or participation in the profits other than the above recited share of profits of the New York office, nor in the assets, firm name or good will of the firm of George H. McFadden & Bro. The amount of profits and losses and the amount of business of the New York office of George H. McFadden & Bro. shall be determined from time to time by the partners of George H. McFadden & Bro., other than said Gwathmey, and such determination shall be final and conclusive on the said Gwathmey.

"ARTICLE VIII.

"In case of the death of one of the partners during the currency of any business year, his interest shall be continued until the expiration of said year, being credited with profits less withdrawals, or charged with losses plus withdrawals. At the expiration of said year the estate of said partner shall be credited with the amount which was to his credit at the last periodical ascertainment of values plus said profits less withdrawals, or minus said losses plus withdrawals.

"If the business of the partnership be continued by some or all of the remaining partners by a firm composed of some or all of the remaining partners, either alone or in connection with others, the new firm shall put to the credit of the estate of the dead partner the amount thus ascertained, together with any interest upon his capital accruing since the last ascertainment of his contribution. The estate shall be a creditor of the new partnership and shall be entitled to be paid one-fifth in cash at the end of the business year and the residue in four equal annual installments, with interest at the rate of eight per centum (8%) per annum, payable quarterly.

* * * * * * *

"It shall be optional with the new firm to anticipate the payment of the whole or any part of the principal due to the deceased partners upon the expiration of thirty (30) days' notice to the personal representative of such deceased partners.

"The books of account of the New York office, prior to the year 1924 had been closed as of July 31, but in 1924 this branch changed its practice to conform to that of the Philadelphia office and, for the year 1924, said books were closed as of August 31. The Federal income tax returns of the partnership which included the operations of the New York office for the year 1924 and the prior year, were filed on the basis of a fiscal year ended August 31. The decedent used the calendar year in reporting his income on the basis of cash receipts and disbursements. The executors continued the same manner and method used by the decedent.

"The surviving partners continued the business until the end of the partnership's fiscal year, August 31, 1924, and determined the decedent's share of the partnership's profits in accordance with the partnership agreement to be $157,694.90 as of the closing date. The decedent had withdrawn $1,322.81 during the period January 1, 1924, to June 11, 1924, leaving a balance of $156,372.09. This latter amount was included in the total amount to which the estate became entitled under the partnership agreement as the result of an accounting and a distribution in liquidation of the partnership interests of the deceased. Said total amount was credited to the estate on the partnership books on March 9, 1925, and paid on the same date. An agreement was also entered into on the same date between the executors and the surviving partners whereby the former released the latter from further liability beyond the total amount to which the estate was entitled. The partnership books were not closed as of the date of the decedent's death nor at any time other than at the end of its fiscal year August 31, 1924.

"The decedent reported his share of the partnership profits of the New York office for its fiscal year ended July 31, 1923, in his return for the calendar year 1923.

"The executors filed a return for the decedent covering the period January 1, 1924, to June 11, 1924, showing his withdrawals of $1,322.81 as income from the partnership. The respondent, upon an audit of this return, determined that the amount of $157,694.90 representing the decedent's distributive share of the partnership income as of August 31, 1924, covered the 13 months' period from August 1, 1923, to August 31, 1924. He computed the 13 months' period as 407 days and the period from August 1, 1923, to June 11, 1924, as 328 days and determined 328/407 of $157,694.90 or $125,520.27 as the amount taxable on the return for the period January 1, 1924, to June 11, 1924. Inasmuch as $1,322.81 had been returned as income, he increased said amount by adding $124,197.56 and computed the tax partly at 1923 and partly at 1924 rates. Thereupon by a notice dated and mailed December 27, 1929, the respondent notified the petitioners of a deficiency in the decedent's income tax for the period January 1, 1924, to June 11, 1924, amounting to $39,587.43.

"The return covering the period January 1, 1924, to June 11, 1924, was filed in the collector's office in New York City on March 16, 1925. This return was signed 'James S. Darcy, Executor.' On January 26, 1929, a waiver covering this same period was filed in the office of the revenue agent in charge in New York City. This waiver reads as follows:

"JANUARY 25, 1929.

"In pursuance of the provisions of existing internal revenue laws James Temple Gwathmey, deceased, a taxpayer of New York, N. Y., and the Commissioner of Internal Revenue hereby consent and agree as follows:

"That the amount of any income, excess-profits, or war-profits, taxes due under any return made by or on behalf of the above named taxpayer for the year January 1, 1924, to June 11, 1924, under existing Acts, or under prior Revenue Acts, may be assessed at any time on or before December 31, 1929, except that, if a notice of a deficiency in tax is sent to said taxpayer by registered mail on or before said date then the time for making assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for 60 days thereafter.

JAMES TEMPLE GWATHMEY,
Deceased Taxpayer.
(Signed) By JAMES S. DARCY,
Executor of Estate of J. T. Gwathmey.
D. H. BLAIR,
Commissioner.
(Signed) By R. MILES,
Revenue Agent in Charge.

"The three other executors had knowledge of Darcy's execution of the waiver. James S. Darcy is an attorney who supervised the affairs of the estate relating to taxes.

"None of the executors have at any time since acting in that capacity, given formal notice to the respondent that they were acting in a fiduciary capacity for the decedent or his estate under section 281, Revenue Act of 1926, or section 312, Revenue Act of 1928. A certificate of the clerk of the surrogate court dated July 6, 1927, was filed with the Bureau of Internal Revenue on January 28, 1929, certifying that letters testamentary had been issued to the executors who are the petitioners herein. This certificate was filed accompanying a power of attorney given by the executors to their accountant authorizing him to represent them when appearing before officials of the Bureau and was required to be filed under the Bureau's regulations. Another similar certificate was filed in March, 1929, accompanying a power of attorney in connection with another Federal tax case involving a deficiency separate and distinct from the deficiency involved herein.

"In a sworn protest dated January 23, 1929, filed in the Bureau of Internal Revenue, the petitioners herein stated that they were the executors of the estate here involved.

"The decedent's share of the partnership's profits for its fiscal year ended August 31, 1924, stated hereinbefore, $156,732.09, was included in the Federal estate tax return filed by the estate as a part of the decedent's gross estate and the proper amount of estate tax was paid thereon."

When Mr. Gwathmey died, the partnership of which he was a member ceased to exist. (Penn. Uniform Partnership Act, P. L. 18, Part VI, section 31(4); New York Partnership Law, sections 60, 62.) His share in the partnership income up to the date of his death was by agreement to be computed by giving effect to events subsequent to his decease. That agreement, however, did not and could not keep the partnership in existence with a dead man as a partner. The effect of this agreement was but to provide a method for determining what portion of the net income of the partnership was the share of the deceased at the time he died. It is true that because the fiscal year of the partnership which existed on June 11, 1924, ended on August 31 in that year and that period was, under the partnership agreement, to be taken as the accounting period for the determination of the deceased partner's interest his share may have been more or less than it would have been if computed as of the time he died without giving effect to business transactions thereafter but this need touch no more than the division of partnership net income as of the time of his death and it has not been shown that it does. Whether the result of the agreed method gave as the share of deceased more or less depends upon whether the subsequent business by itself showed a profit or a loss. No one can tell from the record before us. The decedent could himself have no income after he died and likewise could sustain no loss but his distributive share of partnership net income as of the time he died could be determined in whatever way the partnership agreement provided, and, in the absence of proof to that effect, we can not say that the old partnership did not have net income as of the date of the decedent's death at least equal to what the Commissioner has found on computation to have been his distributive share. The partnership books were not closed as of that date though the partnership then ceased to exist. The Commissioner could but take the net income for the accounting period reflected by the books and prorate it. (*Commissioner* v. *James*, 49 Fed. (2d), 707, 708.) The burden is upon the petitioners to show the correct amount of the tax in order to show that the Commissioner's determination was wrong. (Compare *Burnet* v. *Houston*, 283 U. S., 223, 228 [Ct. D. 328, C. B. X-1, 343]; *Reinecke* v. *Spaulding*, 280 U. S., 227, 232-233 [Ct. D. 154, C. B. IX-1, 305].) In a situation like this, that requires proof that the amount of the deficiency is erroneous, for it is that fact, and not the method of computation, which controls. (*Hughes* v. *Commissioner*, 38 Fed. (2d), 755, 757.) Obviously, the petitioners could not show that the amount of the deficiency was incorrect, providing there was no error in arithmetic, without proving either that the partnership had no net income out of which the deceased was entitled to his distributive share when he died or that its net income then was less than the deficiency found. It has shown neither.

In *Davidson* v. *Commissioner* (54 Fed. (2d), 1077) we affirmed a decision of the Board of Tax Appeals in a case which differed from this one only in that the partnership and the deceased partner both kept their books and filed returns on the calendar year basis. The death of a partner occurred within the accounting period of the partnership and his distributive interest at the time he died was computed by taking into consideration the results of business transactions after he died. It can not be perceived that the difference in the manner of accounting mentioned shows a difference in principle between this case and the Davidson case. (See also *First Trust Co. of Omaha* v. *United States*, 1 Fed. Supp., 900.)

Section 218(a) of the Revenue Act of 1924 is the applicable statute. It provides so far as material that, "* * * There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

It is suggested that, as the deceased partner did not receive the partnership income made the subject of the deficiency assessment it was not income to him and so a statute which taxes it as his income is unconstitutional. We agree that what is not income in fact can not be made income by legislative fiat and so brought within the income tax laws. (*Hoeper* v. *Tax Commission*, 284 U. S., 206, 215.) But this actually was the decedent's income. For all we know he could have had it as such before he died. He did draw a comparatively small amount between January 1, 1924, and the date of his death. No one can say from this record that he drew all he could. Nor is there any substance to the claim that because this income became a part of the decedent's estate and was taxed under the estate tax it could not also be taxed as income to the decedent. It was his income before it became a part of his estate and the Constitution does not prohibit levying a tax, at least one that does not confiscate, both on the income of a person and upon the same property as a part or the whole of the corpus of his estate if the turn of events makes it such. (See *Perthur Holding Corporation* v. *Commissioner*, 61 Fed. (2d), 785 [Ct. D. 680, C. B. XII-1, 173].)

As the petitioners no longer claim that the waiver was invalid we have not considered that.

Affirmed.

SECTION 219.—ESTATES AND TRUSTS.

Article 342: Method of computation of net income and tax.

REVENUE ACTS OF 1924 AND 1926.

Widow electing to take under husband's will. (See Ct. D. 769, page 151.)

Article 342: Method of computation of net income and tax.

XIII-6-6642
Ct. D. 782

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. Deduction—Depreciation—Trust Income—Income Distributable to Beneficiaries.

Where decedent's will contained no direction for the computation of trust income, for the keeping of the trustee's accounts, nor for any allowance representing depreciation, and where the trustee in filing a fiduciary return for 1921 deducted from gross income an amount representing depreciation upon trust assets, but failed to withhold from life beneficiaries the amounts deducted, the entire income received by the life beneficiaries was not taxable to them under the provisions of section 219 of the Revenue Act of 1921 as distributable income, but only that part of the income ascertained by allowing an appropriate deduction for depreciation. The test of taxability to the beneficiary under that section is not receipt of income but the present right to receive it.

2. Same—Effect of Ruling of Probate Court.

Where on application by the trustee for approval of his account the State court, in the absence of direction in the will and of any provision in the State statutes as to depreciation of trust assets, rules that the trustee should have maintained a reserve for depreciation, refuses to surcharge the trustee, and orders the life beneficiaries to repay to the trustee their proportionate shares of the depreciation which should have been withheld, the court's decree is the "order" governing the distribution of income within the meaning of section 219(d) of the Revenue Act of 1921, and is conclusive as to what was income distributable to the beneficiaries under the trust, regardless of the fact that the order is made subsequent to the actual distribution, or that the repayment to the trustee took the form of notes without interest, some of which were jointly executed by those who would take in remainder.

Supreme Court of the United States.

No. 129. *John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Deceased, petitioner,* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 8, 1934.]

OPINION.

Mr. Justice Roberts delivered the opinion of the court.

A. C. Whitcomb, a resident of California, died in 1889, and by his will, probated in that State, gave the residue of his estate in trust, one-third of the income to be paid to his widow for life, with limitations in remainder. The petitioner is the administrator of the estate of Mrs. Whitcomb, who died in 1921. The will of A. C. Whitcomb contained no direction for the computation of trust income, none for the keeping of the trustee's accounts and none for any allowance or deduction representing depreciation. Beginning about 1906 the trustee converted trust assets into real estate and other forms of investment subject to depreciation. In fiduciary income tax returns for 1921 and subsequent years, the trustee deducted from gross income an amount representing depreciation, but failed to withhold from the beneficiaries, to whom he paid income, the amount of the depreciation deduction, so that each beneficiary was paid his or her full ratable share of income for the taxable year. As Mrs. Whitcomb died in 1921 a portion of the year's income was paid to her and a portion to the petitioner as her administrator. Neither the petitioner, as administrator of Mrs. Whitcomb, nor any of the other beneficiaries, included in their returns, as income received, that proportion of the income represented by the depreciation deduction shown on the trustee's fiduciary return.

The applicable sections of the Revenue Act of 1921 [1] are:

"219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or any kind of property held in trust, including * * * (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

"(d) In cases under paragraph (4) of subdivision (a) * * * the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *."

In the belief that these provisions warranted his action, the Commissioner of Internal Revenue increased the income shown on the petitioner's return by so much of the amount received as reflected the proportionate share of the depreciation deducted by the trustee in his fiduciary return, and determined a deficiency accordingly. The petitioner appealed to the Board of Tax Appeals.[2]

In 1928, while the case was pending before the Board, the trustee, who had annually rendered income statements to the beneficiaries, but had filed no accounts as trustee, lodged in a California court having jurisdiction of the trust, an account for the period 1903–1928 and prayed its approval. Due notice of the proceeding was given the parties in interest. Certain remaindermen objected to the account, on the ground that the trustee had paid the entire income to beneficiaries without deducting and reserving proper amounts for depreciation and for capital losses sustained. The matter coming on for hearing the court sustained the objection concerning depreciation and overruled that as to capital losses; found the amounts which should have been reserved for depreciation; refused to surcharge the trustee, but decreed that the life beneficiaries (including the estate of Louise P. V. Whitcomb) repay to the trustee the amounts which he should have withheld annually for depreciation. The sum fixed for the year 1921 was $43,003.16, which the Board of Tax Appeals has found was the correct amount, a pro rata share of which the petitioner had deducted from the reported income of Louise P. V. Whitcomb. Pursuant to this decree the petitioner repaid $10,700 to the trustee, which was more than petitioner's share of the required repayment for the year 1921. Since, however, Mrs. Whitcomb's estate owed additional amounts for each of the years 1913–1928 the balance was adjusted by a promissory note of her next of kin. Other beneficiaries also gave notes in settlement of amounts due the trustee.

The Board of Tax Appeals reversed the Commissioner.[3] The State court's judgment was held conclusive of the fact that no part of the sums paid to the beneficiaries out of the amount required to be deducted by the trustee for depreciation belonged to them; and the conclusion was, therefore, that the amount distributable to the petitioner's decedent for 1921 was the income of the

[1] Revenue Act of 1921 (ch. 136, section 219; 42 Stat., 246).

[2] The propriety of taxing the full amount of the annual distributions of income in this estate in the years 1918–1920 was tested by certain of the beneficiaries. (*Whitcomb v. Blair*, 25 F. (2d), 528; *Appeal of Louise P. V. Whitcomb*, 4 B. T. A., 80.) It was held in those cases that the beneficiaries must return what they in fact received and that depreciation, as it affected only capital assets, and not income, could not be deducted by the life beneficiaries.

[3] 22 B. T. A., 118.

trust due her, less her proportionate share of the sum representing depreciation of the trust property.

The Commissioner petitioned the Circuit Court of Appeals to review the decision, and, after hearing, the court reversed the Board and sustained the Commissioner's ruling.[4] The case is here on writ of certiorari.[5]

The petitioner insists the plain meaning of section 219 is that an income beneficiary of a trust shall pay tax, not on so much of the income as he actually receives, but on the amount he should properly have received in any tax year. His position is that if the amount of income properly "distributable" to him is in excess of the amount paid, he must return and pay tax on the larger amount, irrespective of when in the future he may actually receive the balance due him for the year in question. In this view the respondent concurs. But conversely, says the petitioner, if in any year the beneficiary is actually paid more than is properly distributable to him, he should not return and pay tax on the excess to which he was not entitled. The respondent disagrees with this proposition. If the question be decided in favor of the respondent we need go no further; but if in favor of the petitioner, we must inquire what are the criteria for determining whether the sum actually paid was in fact distributable. On this matter also the parties are in disagreement.

1. Section 219(a) declares that the income of estates and property held in trust is to bear the same tax as the income of individuals. The tax is measured by the gross income received by the fiduciary, less certain allowable deductions, as in the case of an individual. To clarify and emphasize this purpose it is stated that income received by a decedent's estate in course of administration, income to be accumulated for unborn or unascertained persons, income to be held for future distribution, income to be distributed periodically to beneficiaries, and income received by a guardian, to be held or distributed as the court may direct, is included in the taxable income of the estate or trust. (Paragraphs (1) to (4).)

Subsection (b) puts upon the fiduciary the duty of making a return and directs what it shall contain. As respects income which is to be distributed periodically to beneficiaries the return is to include "a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made."

Subsection (c) requires the fiduciary to pay the tax on all net income of the estate or trust, save that which is distributable periodically, but subsection (d) directs, as respects the sort of income last mentioned, "the tax shall not be paid by the fiduciary," but in computing the income of each beneficiary there shall be included "that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not," * * *.

Subsection (e) covers a case where the total income to be returned by a fiduciary is made up of two classes, as e. g. a portion to be held and accumulated and a portion to be distributed periodically to beneficiaries. The fiduciary must then prepare his return as if he were required to pay the tax on the whole and enter "as an additional deduction" (in addition, that is, to the usual deductions allowed all taxpayers by the other sections of the Act) that part of the estate or trust income "which, pursuant to the instrument or order governing the distribution, is distributable during its (the fiduciary's) taxable year to the beneficiaries." To remove all doubt of the intent of the Act a sentence is added to the effect that in such case each beneficiary's personal income shall include the portion of the trust's income which "pursuant to the instrument or order governing the distribution, is distributable" to him.

Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. This the fiduciary may be required to accumulate, or, on the other

[4] 62 F. (2d), 733.

[5] Other beneficiaries prosecuted like appeals to the Board with like result. The Circuit Court of Appeals for the Ninth Circuit reversed the Board and the taxpayers were granted certiorari in Nos. 130 and 131. The Court of Appeals of the District of Columbia reversed the Board in the cases of six beneficiaries. (65 F. (2d), 803, 809.) These cases are also here on certiorari as Nos. 139–144, inclusive. By a stipulation filed in this court November 15, 1933, if the judgment of the Circuit Court of Appeals be affirmed in this case, the like judgment shall be entered in the other cases enumerated, and if the judgment in this case be reversed, the like judgment shall be entered in the others.

hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the Act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's. But as the tax on the entire net income of the trust is to be paid by the fiduciary or the beneficiaries or partly by each, the beneficiary's share of the income is considered his property from the moment of its receipt by the estate. This treatment of the beneficiary's income is necessary to prevent the possibility of postponement of the tax to a year subsequent to that in which the income was received by the trustee. If it were not for this provision the trustee might pay on part of the income in one year and the beneficiary on the remainder in a later year. For the purpose of imposing the tax the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. The test of taxability to the beneficiary is not receipt of income, but the present right to receive it. Clearly an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, not on the amount paid, but on that payable. If the trustee should have deducted a sum for depreciation from the year's gross income before ascertaining the amount distributable to Mrs. Whitcomb and the other beneficiaries, but failed to do so, he paid her more than was properly distributable for the taxable year. Both the language used and its aptness to effect the obvious scheme for the division of tax between the estate and the beneficiary seem so plain as not to require construction. The administrative interpretation has been in accord with the meaning we ascribe to the section;[6] and no decision to the contrary has been brought to our attention.

The respondent suggests that income distributable within the meaning of the section is income which was reasonably regarded by the parties as distributable at the time it was distributed. We think such a construction would do violence to the plain import of the words used.

The respondent relies on *North American Oil Consolidated* v. *Burnet* (286 U. S., 417 [Ct. D. 499, C. B. XI-1, 293]). That case, however, involved the receipt of income in 1917 through a money award of a court. An appeal was taken and the award was not confirmed by the appellate court until 1922. The taxpayer's claim that the possibility of reversal shifted the receipt of the income to the later year was overruled. Section 219 had no bearing upon the question presented.

2. The will of A. C. Whitcomb contains no direction and the statutes of California make no provision as to depreciation of trust assets. In the absence of either, the Circuit Court of Appeals thought the decision of the State court inconclusive in the administration of the Federal Revenue Act, and interpreted the will according to the general law of trusts, which was held to forbid deductions from distributable income on account of depreciation, and to place upon the remaindermen the burden of any shrinkage of capital value of that nature. The petitioner challenges the ruling, insisting upon the binding force of the State court's decree. Obviously that decree had not the effect of *res judicata*, and could not furnish the basis for invocation of the full faith and credit clause of the Federal Constitution in the present case. The petitioner, however, says that it furnishes the standard for the application of section 219, since the section plainly so declares; but even if this be not true, the decision settles the property rights of the beneficiaries which section 219 intended should be observed in distributing the burden of the tax.

The first position is supported by citation of the language of subsection (d) that "there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not" * * *. The decree of the State court is said to be the order governing distribution of this estate. The respondent reads the language as making the terms of the trust instrument controlling where there is one, and resorting to an order only where there is no instrument governing payments of income; and he adverts to the language of subsection (a)(4) exempting the fiduciary from returning "income collected by a guardian of an infant to be held or distributed as the court may direct," as explaining the use of the word "order" in subsection (d) and rendering it applicable only to income collected by a guardian. But a moment's reflection will show this is an error. The whole of a minor's income received by his guardian is taxable to the minor irrespec-

[6] Treasury Regulations 62 (1922 edition), articles 345 and 347

tive of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. This is the reason that a fiduciary in receipt of such income is not bound to return it as trust income. Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust.[7]

The word "order" must be given some meaning as applied to trust income which is to be distributed periodically; and we think it clear that the section intended that the order of the court having jurisdiction of the trust should be determinative as to what is distributable income for the purpose of division of the tax between the trust and the beneficiary. We understand the respondent to concede the binding force of a State statute, or a settled rule of property, followed by State courts, and, as well, an antecedent order of the court having jurisdiction of the trust, pursuant to which payments were made. But, if the order of the State court does in fact govern the distribution, it is difficult to see why, whether it antedated actual payment or was subsequent to that event, it should not be effective to fix the amount of the taxable income of the beneficiaries. We think the order of the State court was the order governing the distribution within the meaning of the Act.

Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying section 219 of the Act of 1921.

The respondent suggests that the proceeding in the State court was a collusive one—collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax. We can not so hold, in view of the record in the State court which is made a part of the record here. The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. The court ruled against the remaindermen on one point, and in their favor on another—that here involved—but refused to surcharge the trustee, for reasons stated, and ordered repayment by the life tenants of overpayments of income consequent on the trustee's failure to withhold sums for a depreciation reserve.

But, it is said, the life beneficiaries gave their notes for the indebtedness due by them to the trust, as determined by the State court, some of which were jointly executed by those who would take in remainder, and therefore these beneficiaries are permitted to retain and enjoy the full amounts distributed to them without reference to proper deductions for depreciation, and are therefore taxable thereon as income distributed.

After the decree had been entered two of the life beneficiaries delivered their own notes to the trustee. One life beneficiary, who may become possessed of an interest in remainder, gave her note. Louise P. V. Whitcomb's daughter, a life beneficiary, executed her note, in which her two children, who are possible takers in remainder, joined. The notes were without interest, and were payable to the order of those who should be entitled in remainder at the termination of the trust. The persons so entitled are the descendants of the two children of the testator, per stirpes. What persons if any may fill this description is of course unknown. In the event of the failure of issue the ultimate remainder is to Harvard College.

The parties evidently proceeded upon the theory that if the fund were restored to the trust it would be invested and the life beneficiaries would receive the income from it, and that a satisfactory settlement of the matter would be to have the life beneficiaries give their notes payable at the termination of the trust. At most this form of settlement amounted to a concession or gift on the part of the remaindermen to the life beneficiaries. Any advantage obtained by the latter through the adjustment was obviously not effected by the State court's decree, but by the voluntary action of the remaindermen. The decree was a judgment which fixed the rights of the remaindermen and

[7] See Regulations 62 (1922 edition), articles 347, 403, 422.

the obligations of the life tenants. If the parties in interest chose to adjust these obligations in some manner other than by present payment of cash, their action in no wise altered the quality of the trustee's overpayments of income. We can not seize on the form of the settlement made between the parties either to impugn the good faith and judicial character of the State court's decree, or to ignore the decree and its conclusiveness as to what was in fact and in law income distributable to the beneficiaries under the trust.

The judgment of the Court of Appeals is reversed.

SUPREME COURT OF THE UNITED STATES.

No. 145. *Louise A. Whitcomb, petitioner, v. Guy T. Helvering, Commissioner of Internal Revenue.*

On writ of certiorari to the Court of Appeals of the District of Columbia.

[January 8, 1934.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the court.

This case was brought here by writ of certiorari.[1] The petitioner is a beneficiary of the trust created by the will of A. C. Whitcomb, and her status[2] differs from that of the petitioner in No. 129 (ante, page 13) only in the respect that she has a vested remainder, subject, in certain events, to be divested in favor of Harvard College. The Court of Appeals did not make that circumstance the basis of any distinction between her case and that of Freuler (No. 129). The petitioner therefore makes the same contentions which are there considered; but claims also if her interest in the trust corpus by way of remainder is given effect, it does not follow that an affirmance in No. 129 requires the like result in her case. As we reverse the judgment in No. 129 and the reasons given in our opinion apply in this case, we have no occasion to pass upon the added feature presented by the remainder interest of the petitioner.

For the reasons set forth in the opinion in No. 129 the judgment must be reversed.

So ordered.

Mr. Justice BRANDEIS, Mr. Justice STONE, and Mr. Justice CARDOZO dissent.

ARTICLE 342: Method of computation of net income and tax. (Also Section 214(a)9, Article 204.)

XIII-7-6652
Ct. D. 784

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF SUPREME COURT.

DEDUCTION—DEPLETION—TRUST PROPERTY—ALLOWANCE TO BENEFICIARIES.

Where a trust created by the lessor of an iron mine provides that after deducting taxes, expenses, etc., the proceeds from the mine, conveyed to trustees subject to the lease, shall be distributed to beneficiaries, and where the trustees after deducting expenses distribute the proceeds consisting of royalties collected from the lessee, the beneficiaries, being the beneficial owners of the economic interest in the mine, are not taxable under section 219 of the Revenue Acts of 1921, 1924, and 1926 on the entire proceeds distributed to them, but are entitled to deduct their proportionate share of depletion, under the provisions of section 214 of those Acts.

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[1] See 22 B. T. A., 118; 65 F. (2d), 803, 809.

[2] Companion cases in the Board of Tax Appeals and the Court of Appeals of the District of Columbia, which involves the tax liability of other beneficiaries of the same trust, under like circumstances, were brought up by certiorari. They are Nos. 146 to 150, inclusive. By stipulation filed in this court, the parties agree that if the judgment in No. 145 is reversed a like judgment shall be entered in the other cases; and if that judgment is affirmed a like judgment shall be entered in the others.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Otto H. Falk et al., Executors of the Estate of Charles F. Pfister, Deceased.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 15, 1934.]

OPINION.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The Bristol iron ore mine in Michigan, while subject to a 14-year lease providing for royalties of 19 cents per ton, was conveyed to three trustees to hold during two lives and 21 years with power to manage, sell, lease, mortgage or otherwise dispose thereof. After providing for payment of taxes, expenses, etc., the deed directed:

"Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as the same shall from time to time appear as hereinafter provided."

Respondents are the beneficiaries under the deed and owners of the entire economic interest in the mine. Its life was estimated as nine years. Proper depletion allowance would be 13.255 cents per ton of ore extracted.

During the years 1922 to 1926 the trustees collected large sums as royalties. After deducting expenses they distributed what remained among the beneficiaries. Claims for depletion made by the trustees in their tax returns were disallowed.

Each beneficiary claimed the right to deduct from the total received his proportionate share of the depletion. This, he maintained, was not subject to taxation under the statute. The Commissioner demanded payment reckoned upon the whole amount; and the Board of Tax Appeals accepted his view. The court below thought otherwise and sustained the taxpayers.

There is no substantial dispute concerning the facts. Our decision must turn upon construction of the statute.

The Revenue Act of 1921 (ch. 136, 42 Stat., 227, 239, 242, 246, 247) imposes a tax upon the net income of property held in trust (sections 210, 211, 219), and directs that in order to determine this there shall be deducted from gross "in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case." (Section 214(a)10.)

Also it requires the fiduciary to make return of the income of the trust (section 219(b)), and provides that whenever income must be distributed to beneficiaries periodically the amounts paid out shall be allowed as an additional deduction in computing the net income of the trusts. In the latter event there shall be included in computing the net income of each beneficiary so much of the income of the trust as he has received. (Section 219(e).)[1]

The relevant provisions of the Revenue Acts of 1924 (ch. 234, 43 Stat., 253, 269, 272, 275) and 1926 (ch. 27, 44 Stat., 9, 26, 28, 32) are substantially the same as those in the Act of 1921.

The argument for the Commissioner is this—The entire proceeds from the working of a mine constitute income within the constitutional provision and

[1] Revenue Act of 1921 (ch. 136, 42 Stat., 227, 247).

SEC. 219. (e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

may be subjected to taxation without regard to depletion. Here the beneficiary claims deduction for an item subject to taxation as gross income; but no provision in the statute allows him to subtract anything because of depletion.

Moreover, section 219 expressly requires every beneficiary to include in his return the portion of the income of a trust distributed to him. Thus in terms he is subjected to taxation upon the whole of this.

Whatever may be said concerning the power of Congress to treat the entire proceeds of a mine as income, obviously this statute has not undertaken so to do. The plain purpose, we think, was to tax only that portion of the proceeds remaining after proper allowance for depletion. This allowance represents property consumed, is treated as if capital assets, and no tax is laid upon it. The statute must be so applied in practice as to carry out this purpose. The intention was that owners of beneficial interests should not be unduly burdened.

Since 1913 all Revenue Acts have left untaxed the proceeds of a mine so far as these represent actual depletion. And this court has often recognized that this immunity inures to the beneficial owners of the economic interest.

Lynch v. *Alworth-Stephens Co.* (267 U. S., 364, 370 [T. D. 3690, C. B. IV-1, 162]): "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein has been depleted by the extraction and disposition 'of the product thereof which has been mined and sold during the year for which the return and computation are made.'"

United States v. *Ludey* (274 U. S., 295, 302 [T. D. 4046, C. B. VI-2, 157]): "The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed."

Murphy Oil Co. v. *Burnet* (287 U. S., 299, 302 [Ct. D. 619, C. B. XII-1, 231]): "We think it no longer open to doubt that when the execution of an oil and gas lease is followed by production of oil, the bonus and royalties paid to the lessor both involve at least some return of his capital investment in oil in the ground, for which a depletion allowance must be made."

Palmer v. *Bender, Administratrix* (287 U. S., 551, 557 [Ct. D. 641, C. B. XII-1, 235]): "That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this court in *Lynch* v. *Alworth-Stephens Co.* (267 U. S., 364). * * * But this court held that regardless of the technical ownership of the ore before severance, the taxpayer, by his lease, had acquired legal control of a valuable economic interest in the ore capable of realization as gross income by the exercise of his mining rights under the lease. Depletion was, therefore, allowed. Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if, by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production."

Freuler, Adm., v. *Helvering, Commissioner* (January 8, 1934) [Ct. D. 782, page 242, this Bulletin], construed section 219. We there said—"Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. * * * But as the tax on the entire net income of the trust is to be paid by the fiduciary or the beneficiaries or partly by each, the beneficiary's share of the income is considered his property from the moment of its receipt by the estate. * * * For the purpose of imposing the tax the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. * * *"

True it is that section 219(b) directs that in cases of "income which is to be distributed to the beneficiaries periodically," * * * "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary." But we can not accept the view that this was intended to impose a tax upon that part of the proceeds which represents the return of capital assets, whenever this has been paid over to the beneficiary. In cases like the one before us so to hold would in practice result in taxing allowances for depletion, contrary to what we regard as the plain intent of the statute.

The petitioner relies upon *Anderson, Collector*, v. *Wilson* (289 U. S., 20, 26 [Ct. D. 650, C. B. XII-1, 253]). The conclusion there rests upon the construction of the will. Under it the beneficiaries became entitled to no income until the executors in their discretion should sell the corpus. "What was given to them was the money forthcoming from a sale. * * * Their interest in the corpus was that and nothing more. * * * A shrinkage of values between the execution of the power of sales and its discretionary exercise is a loss to the trust, which may be allowable as a deduction upon a return by the trustees. It is not a loss to a legatee who has received his legacy in full."

Here the governing instrument directed payment to the beneficiaries of the entire proceeds, less expenditures, etc., and the trustees must be regarded as a mere conduit for passing them to the beneficial owners. Part only of the proceeds was subjected to taxation. The other part was left untaxed and remained so in the hands of the beneficiaries.

Affirmed.

ARTICLE 342: Method of computation of net income and tax. (Also Section 214(a)9, Article 204.)

XIII-7-6653
Ct. D. 785

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF SUPREME COURT.

1. DEDUCTION—DEPLETION—TRUST PROPERTY—ALLOWANCE TO BENEFICIARIES.

Where the lessor of oil and gas lands by his will created a trust the corpus of which consisted in part of royalty interests under the lease and directed the trustees to convert the royalty interests into cash at their discretion and distribute the proceeds to the beneficiaries, the latter, being the only persons having a beneficial interest in the royalties, are not taxable under section 219 of the Revenue Acts of 1921, 1924, and 1926 on the entire proceeds distributed to them, but are entitled to deduct their proportionate share of depletion, under the provisions of section 214 of those Acts.

2. DECISION FOLLOWED.

Helvering v. *Falk* (291 U. S., 183), decided January 15, 1934. [Ct. D. 784, page 247, this Bulletin], followed.

SUPREME COURT OF THE UNITED STATES.

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, petitioner, v. *Richard F. Cooper.*

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, petitioner, v. *Barbara V. Cooper.*

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, petitioner, v. *Richard F. Cooper and Barbara V. Cooper.*

On writs of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 15, 1934.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the court.

In each of these causes a beneficiary received from trustees royalties arising from a lease of oil and gas lands in Wyoming. Taxes were exacted upon the full amounts so received. Separate suits were brought to recover proper allowances for depletion. The respondents prevailed in both of the courts below. Here the causes were heard together.

The Solicitor General says: "The question is identical with that raised in *Helvering* v. *Falk*, No. 225, October Term, 1933 [Ct. D. 784, 247, this Bulletin] and the argument made in the Government's brief in that case is likewise applicable here. * * * There is therefore substantially no difference between the position of the beneficiaries in this case and the Falk case."

The judgments below are affirmed upon authority of *Helvering* v. *Falk*, decided this day.

Mr. Justice BRANDEIS, Mr. Justice STONE, and Mr. Justice CARDOZO think that these cases are to be distinguished from No. 225, *Helvering* v. *Falk*, just decided, because of the nature of the duties imposed upon the trustees, and of the remainder interest granted to the beneficiaries by the trust instrument presently involved, and accordingly concur in the result.

ARTICLE 342: Method of computation of net income and tax.

REVENUE ACTS OF 1924 AND 1926.

Widow electing to take under husband's will. (See Mim. 4146, page 93.)

ARTICLE 342: Method of computation of net income and tax. XIII-18-6776 Ct. D. 821

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTIONS—ANNUITIES PAYABLE FROM INCOME OR CORPUS.

Where a residuary estate was bequeathed in trust for the payment of specific annuities and expenses connected with the trust and the remainder to charitable and educational organizations, the annuities and expenses to be a charge upon the entire corpus if the income should be insufficient, the amounts distributed to the annuitants during the years 1926 and 1927, being in the nature of bequests and payable in any event, are not deductible from gross income of the trust under the provisions of section 219(b)2 of the Revenue Act of 1926.

2. DEDUCTIONS—INCOME PERMANENTLY SET ASIDE OR TO BE USED EXCLUSIVELY FOR CHARITABLE OR EDUCATIONAL PURPOSES.

Where a trust instrument directs that, if there be sufficient funds remaining after the death of certain annuitants, a portion of the trust fund be paid to charitable and educational organizations, remaindermen under the will, no part of the trust fund or any surplus income for any year remaining after such payments is deductible from gross income as being permanently set aside without limitation or to be used exclusively for charitable or educational purposes within the meaning of section 219(b)1 of the Revenue Act of 1926.

3. RES ADJUDICATA.

A determination by the Board of Tax Appeals, in an estate tax case, of the present worth of bequests to charitable organizations, remaindermen under the will, is not res adjudicata, in an income tax case involving the same estate, of the question whether that sum had been permanently set aside for charitable purposes within the meaning of section 219(b)1 of the Revenue Act of 1926.

4. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 486) affirmed.

5. CERTIORARI DENIED.

Petition for certiorari denied December 11, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Boston Safe Deposit & Trust Co. et al., petitioners for review, v. *Commissioner of Internal Revenue.*

Appeal from Board of Tax Appeals.

Before BINGHAM, WILSON, and MORTON, JJ.

[June 15, 1933.]

OPINION.

WILSON, J. This is a petition for review of a decision of the Board of Tax Appeals reported in 26 B. T. A., 486. It involves deficiencies in income taxes for the years 1926 and 1927 in the respective amounts of $3,578.15 and $3,792.53. The appeals from the decision of the Commissioner for each year were consolidated by order of the Board of Tax Appeals as the same questions are involved in each deficiency assessment.

Herbert A. Wilder of Newton, Mass., died October 12, 1923, leaving a will which was duly probated. The petitioners, the Boston Safe Deposit & Trust Co., a Massachusetts corporation, and Everett E. Kent, are the surviving executors of the will and trustees named thereunder, and during the years in question were administering the trust created by the will.

The parts of the will material to the determination of the case are as follows:

"Fifth item.—I direct that all the bequests and devises in this my will be made free from all legacy and inheritance taxes and Government dues of every kind, and that my executors pay all such taxes and dues attaching at the time of the probate of my will to the various legacies and provisions, from the remaining portion of my estate, so that all the legacies and provisions in the foregoing and the next following items may be undiminished save as the ultimate residue may be affected by having to bear such payments.

"Sixth item.—I give, bequeath and devise to my trustees hereinafter named, their survivors, survivor, successors or successor, but in trust nevertheless, all the rest, residue and remainder of my property and estate, personal or real, wherever found or situated, including the reversions or remainders established or contemplated in the foregoing items of this my will, and any income or benefits which may result to my estate from any transactions I may effect in my lifetime, the same to be invested and held by said trustees in safe and suitable securities and properties, save as hereinafter provided, *and from the income and so much of the principal of the trust fund as may be needed or required from time to time.* [Italics supplied.]

"(a) To pay and keep down all taxes, assessments, insurance, repairs and improvement charges or expenses of any kind, * * *

"(b) To pay all charges, taxes and expenses upon or connected with the trust or trust property, so long as the trust continues, * * *

"(c) To pay annuities, or total net sums in every year, to the persons and in the installments next below named, or stated, giving to each person named so long as he or she may live, same as hereinafter qualified, respectively, a total annual amount as follows, to wit:

"To my daughter Constance Perley Wilder $5,000 payable in monthly installments.

"To my daughter Margaret Guild Wilder $5,000 payable in monthly installments.

"To my daughter Mary Clement Kent $6,000 payable in monthly installments."

(Then follow 12 or more other annuities.)

"(d) To each of my grandchildren, whether born before or after my death, I give an annuity or total net sum of $300 annually, until each such grandchild shall attain the age of 21 years, the same to be deposited in savings banks, in the successive years, and each grandchild to be allowed to withdraw the income upon such deposits for his or her benefit respectively, in each year after the said age of 21 years is attained, but the principal not to be withdrawn by the respective grandchild until the age of 28 years be reached.

* * * * * * *

"I direct that out of the trust fund created by this item of my will, any portion of a total of $25,000 may be used in the successive years, from time to time, by my trustees, to amplify any of the benefits provided for my daughters or their families, under this item of my will, in cases of sickness or physical distresses of any of them; such awards from such $25,000 fund, however, to be only in cases of such sickness or necessitous circumstance as in the discretion and judgment of my trustees would constitute special occasion for the enhanced assistance; this sickness benefit fund to be applicable to my children and grandchildren as well as to the other family annuitants mentioned in this connection.

"*If there be any insufficiency or shortage of funds wherewith to meet all the provisions of my will, I direct that the legacies, annuities, and other benefits in favor of my daughters shall be met and paid in full, without any deductions, in any event,* the same to have priority over any other benefits in the event of any such deficiency. [Italics supplied.]

"(e) If at the death of my first daughter who shall decease, it shall appear to my then surviving trustees or trustee, or to the trustees at such times acting under this my will, *that there is a sufficient trust fund or estate abundantly to pay and supply all the annuities provided for in this item of my will,* then said trustees or trustee, at the death of such first daughter to decease, may pay over to the final or ultimate residuary beneficiaries of my estate, later mentioned in this item of my will, one-third of the then existing trust fund; and upon the death of my daughter who shall be the second to decease, said trustees or trustee, *if assured of the sufficiency of my estate,* may pay over to said ultimate beneficiaries, another equal portion of the then remaining trust fund, that is to say, substantially one-half of such trust estate as may be in the hands of the trustees or trustee at the death of such second decedent. [Italics supplied.]

"(f) At the death of my last surviving daughter all the annuities given or established by this my will, shall terminate and cease, notwithstanding any language, terms or provisions hereinabove connected with any particular annuity; all and every annuity provision hereinbefore made or stated being subject and subordinated to this limitation, so that after the death of my last surviving daughter the distribution and settlement of the entire trust may be in a short time accomplished.

"(g) After the death of my last surviving daughter I give, bequeath and devise all the trust funds and estate then remaining or existing to the final beneficiaries hereinbelow named, in the shares or proportions below stated, to be theirs absolutely and in fee. I authorize my then surviving or acting trustees or trustee to convert into money such portion of the then existing trust estate as they or he may deem expedient, or to pay over and distribute either in money or securities to the said final beneficiaries as at the time may be found expedient and judicious. Such final beneficiaries being the following, to wit:"

(Here follow the names of 14 charitable or educational beneficiaries and their respective proportionate shares of the residual estate.)

The decedent, Herbert A. Wilder, was survived by his three daughters, all of whom were living in 1926 and 1927, and by three grandchildren, all children of Everett E. and Mary Clement Kent. No children have been born to any of his daughters since his death.

The value of the estate of the decedent, Herbert A. Wilder, on January 1, 1926, and on January 1, 1927, was not less than $1,000,000. The executors have paid all bepuests and annuities and have paid all expenses of the administration and operation of the estate up to and including the years under consideration.

The 14 institutions named in item sixth (g) of the will are corporations organized and operated exclusively for religious, charitable, literary or educational purposes, as contemplated by section 403(a)3 of the Revenue Act of 1921, and section 219(b)1 of the Revenue Act of 1924 and 1926.

In determining the estate tax and for the purpose of closing the estate, the Board of Tax Appeals in 20 B. T. A., 1159, found the present worth of the remainder to the charitable and educational institutions was at least $345,000, and allowed that as a deduction from the gross estate in order to arrive at the estate tax, and the facts found by the Board of Tax Appeals in that case it agreed by stipulation, shall be incorporated as a part of the facts in these proceedings by reference.

On behalf of the Wilder estate, the petitioners filed income tax returns for the years 1926 and 1927, showing no taxable income for such years. The respondent computed net incomes of $53,406.82 and $55,030.88 for 1926 and 1927, respectively. He denied deductions of $35,082.82 (exclusive of income from non-taxables) for the year 1926, and $33,862.88 for the year 1927, as income received by the trustees under the will of the said Wilder, and by them paid to the annuitants. He also denied deductions of $18,324 for 1926, and of $12,992.36 for 1927 (exclusive of income from nontaxable securities) claimed by the petitioners to have been received by the trustees and by them accumulated for the benefit of the charitable and educational institutions named in the will. The respondent further increased the petitioners' income for the year 1927 by the sum of $8,175.64, representing profit from the sale of securities. This sum likewise was omitted from the petitioners' return, because it was treated as capital gain accumulated for the benefit of charities.

The questions presented for decision are:

(1) Were the petitioners, in computing their tax liability for the years 1926 and 1927, entitled to deduct, from the gross income received the year 1926, the sum of $35,082.82 (exclusive of income from nontaxables) and $33,862.88 for the year 1927, as distributions of income by the fiduciaries under the will of said Wilder to the annuitants therein named; (2) whether the petitioners were entitled to deduct in addition the surplus income of $18,324 and $12,992.36 for the years 1926 and 1927, respectively (exclusive of income from nontaxable securities accumulated); (3) whether in the year 1927 the petitioners were entitled to deduct the sum of $8,175.64 as representing profit or capital gain on the sale of securities alleged to have been permanently set aside or to be used pursuant to the terms of the will exclusively for the benefit of the charitable and educational institutions named? (4) Was the finding by the Board of Tax Appeals in the case reported in 20 B. T. A., 1159, that $345,000 was the estimated minimum value in 1923 of the sum that would eventually go to the charitable and educational institutions named, and was thereby, in effect, permanently set aside for charitable and educational institutions within the meaning of section 219(b)1, and is the finding *res adjudicata?*

The statutes involved are sections 219(b) (1), (2) and (3), 214(a)10 of the Revenue Act of 1926 (ch. 27, 44 Stat., 9). The income taxes of the estate and trust were computed under section 212 of the 1926 Act; but under section 219(b)1 there shall be allowed as a deduction from the gross income (in lieu of the deduction authorized by paragraph (10) of subdivision (a) of section 214), "any part of the gross income, without limitation, which, pursuant to the terms of the will or deed creating the trust, is, during the taxable year, paid or permanently set aside for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214, or is to be used exclusively for religious, charitable, scientific, literary or educational purposes."

The answers to the questions involved depend on whether the testator intended by the terms of his will that the corpus of the trust funds should be held intact in order to insure the payment of the annuities; whether any part of the income thereof can be considered as set aside permanently, for the purposes and in the manner specified in section 214(a)10, or is to be used exclusively for religious, charitable, scientific, literary or educational purposes; whether the payment of the annuities is conditioned upon there being sufficient income to pay them, or whether they constituted a definite fixed sum to be paid in any event so long as there was any of the corpus of the trust fund left, as was held in *Commissioner* v. *Whitehouse* (38 Fed. (2d), 162); *Burnet, Commissioner,* v. *Whitehouse* (283 U. S., 148 [Ct. D. 327, C. B. X-1, 366]); *Charles P. Moorman Home for Women et al.* v. *United States* (42 Fed. (2d), 257 [Ct. D. 214, C. B. IX-2, 275]); and whether the securities sold in 1927, or the gain therefrom, had been permanently set aside for the uses described in section 219(b)1 or were by the terms of the will to be used exclusively for charitable or educational purposes.

While at the time of the testator's death there was sufficient income from the trust fund to pay all the annuities, and during the years here involved the annuities were in fact paid out of the income, the income fell off appreciably, even in 1927. It is clear, however, from the provisions of the will that the testator anticipated that in a period of deflation, such as occurred in 1929–1933, or occurring at any time before the termination of the trust, the trust fund might fail to produce the necessary income out of which the several annuities could be paid, together with other expenses—which he also made a charge upon the trust fund—and directed that the trustees, "from the income and so much of the principal of the trust fund as may be needed or required from time to time, to pay the annuities, or total net sums in every year, to the persons and in the installments next below named, or stated, giving to each person named so long as he or she may live, save as hereinafter qualified, respectively, a total annual amount as follows:" Following the name of each annuitant is the specific amount each is to receive.

In subdivision (d) of item sixth he made the further specific provision:

"*If there be any insufficiency or shortage of funds, wherewith to meet all the provisions of my will, I direct that the legacies, annuities, and other benefits in favor of my daughters, shall be met and paid in full, without any deductions, in any event, the same to have priority over any other benefits in the event of any such deficiency.*"

In subdivision (e) of item sixth he further provided that if there should be a sufficient trust fund or estate—he does not limit it to income—to pay and supply all the annuities, on the death of one of his daughters, the trustees may then distribute one-third of the corpus to charitable institutions named; "and upon the death of my daughter who shall be the second to decease, the trustees or trustee, *if assured of the sufficiency of my estate*, may pay over to said ultimate beneficiaries, another equal portion of the then remaining trust fund, that is to say, substantially one-half of such trust estate as may be in the hands of the trustees."

Under such provisions we think that no part of the trust fund or any surplus income for any year, after the payment of the annuities, can be held to be permanently set aside "without limitation" for any charitable, religious, or educational institutions within the meaning of paragraph (1) of subdivision (b) of section 219 of the 1926 Act, or can be said to be certain "to be used exclusively" for religious, charitable or educational purposes.

It is perfectly clear from the provisions of the will that the testator made the specific annuities and expenses a charge upon the entire trust fund, and not alone on the income thereof. He made the payment of the annuities certain, especially to his daughters, as long as there was anything left of the corpus of the trust. No distribution to the charitable or educational institutions named, notwithstanding the Board's decision in 20 B. T. A., 1159, could be made unless there was a sufficient amount left to provide for all the annuities, and especially those to his daughters.

The case differs from *Irwin* v. *Gavit* (268 U. S., 161 [T. D. 3710, C. B. IV-1, 123]), in which the annuities or bequests were payable out of income, and if no income, there could be no payment to the beneficiary named.

The petitioners, therefore, were not entitled to the deductions claimed, viz, the sum of $35,082.82 in 1926, and $33,862.88 in 1927, as distributions to the annuitants in those years, since such fixed annuities are in the nature of bequests and not taxable income (*Burnet, Commissioner*, v. *Whitehouse*, supra); nor were they entitled to deductions of $18,324 and $12,992.36, being surplus income for the years 1926 and 1927, respectively, and claimed by the petitioners to be accumulated by the trustees for the charitable and educational institutions named, as such accumulations have become a part of the corpus of the trust, charged first with the payment of the annuities and expenses.

The case of *Hartford-Connecticut Trust Co.* v. *Eaton* (29 Fed. (2d), 840 [T. D. 4237, C. B. VII-2, 300], affirmed in 36 Fed. (2d), 710) is cited by the petitioners as supporting their contention; but in that case there was but one beneficiary, a widow, who was entitled during her life to the net income on an estate valued at $1,000,000, the residue at her death to be distributed among certain charitable and educational institutions. The trustee was given power to pay over to her any part of the principal it might deem necessary for her comfortable maintenance and support. The district court, however, found as a fact that there was no reasonable possibility, considering the income of the trust fund, her mode of living, and her own personal estate, that she would ever require, or the trustee be warranted in paying over to her, any part of the principal for her comfortable maintenance and support, and that all of the principal of the trust found was certain to be used for charitable and educational purposes, and therefore any income which became a part of the corpus of the trust was exempt under section 219(b)1. The petition contained an allegation that the income which was derived from the sale of certain securities formed a part of the principal of the trust fund, and the sale was a mere transformation of a part of the corpus of the trust fund. The issue arose on a demurrer, which admitted the allegations of the petition and the district court held that inasmuch as there was no possibility that any part of the principal would ever be necessary to insure her comfortable maintenance and support, it was to be used "for exempt purposes," and the gain from the sale of securities was not taxable. It was affirmed substantially on this ground in 36 Fed. (2d), 710.

In the case at bar there is not 1 annuitant, but may be at least 25, and the sums to be paid were definite and fixed, and in each of the years 1926 and 1927 totaled approximately $35,000. The income over and above this sum in 1926 was $18,324, while in 1927 it was only $12,902.36. It can not be said, we think—and the testator was evidently of the same opinion—that there was no possibility that in periods of depression, such as occurred in 1929–1933, it might not be necessary to use a part of the principal, together with any accumulated income, to meet all the fixed amounts to be paid "pursuant to the terms of the will."

It is not quite clear what Congress meant by the words, "without limitation," used in section 219(b)1. We think the phrase must be held to mean that any sum permanently set aside must be without limitation, that is, absolutely. A sum which may be used to pay the annuities can not be deemed set aside permanently "without limitation" for the benefit of the exempt institutions; and there is no evidence that the trustees have taken any action to set aside, without limitation, any sums for the remainderman, either permanently or otherwise, and under section 219(b)1 it must be pursuant to the terms of the will.

We think the words "or to be used" have no such significance as was given them in *Hartford-Connecticut Trust Co.* v. *Eaton*, supra, but should be construed with what precedes them, and in this particular paragraph (1) of subdivision (b) should be construed as if reading as follows: "There shall be allowed as a deduction * * * any part of the gross income, without limitation, which, pursuant to the terms of the will * * * creating the trust, is to be used exclusively for religious," etc.

Under a will which limits the use of a trust fund to the payment of fixed annuities provided for the testator's daughters, and which may be paid from the corpus of the trust fund before it can be applied to any other use, it can not be said that "pursuant to the terms of the will" any part of the gross income "is to be used exclusively" for charitable and educational uses.

It is urged that since the Board of Tax Appeals in 20 B. T. A., 1159, determined that $345,000 of the trust fund was the minimum amount under the will that would go to the charitable and educational institutions named as remaindermen, therefore the sum had been permanently set aside for charitable or educational purposes, and the finding of the Board on this point was *res adjudicata*. But the construction of section 219 of the Act of 1926 was not the issue in that case. Some sum had to be determined as the value of the present worth of the remainder to the institutions named, in order that the estate tax might be assessed and the estate closed so far as the executors were concerned; but the Board did not decide that this sum might not be used, if the items of the will and conditions required it, to pay the annuities and fixed charges.

The Board in that case based its finding on the theory that the principal would not be used to pay the annuities, and found the present worth of the residuary bequests for the purpose of fixing the estate taxes. In view of the testator's clear intent that the annuities were a charge upon the entire corpus of the trust, it can not be said that the finding of the present worth of the residuum by the Board, in order to determine the estate tax, is a permanent setting aside of the amount for charitable and educational uses, or a finding on the facts before the Board in these proceedings, that the sum named "is to be used" exclusively for such purposes. It may be probable, depending on the security market, that some part or all of the principal sum will go to the remaindermen, but it can not be said to be so, "pursuant to the terms of the will."

The Board found as facts: That the testator anticipated that the income might be insufficient to pay all the charges and that the possibility that a part of the principal might be so used was not too remote; that no specific fund of $345,000 had been designated or segregated or set aside by the trustees as an amount certain to go to charities; and that no income or gain from the sale of securities was or could be identified as resulting from securities set aside for the remaindermen. An appeal from the Board of Tax Appeals raises only questions of law. Findings of fact by the Board are conclusive, unless shown to be without any evidence to support them. (*Phillips et al.* v. *Commissioner*, 283 U. S., 589, 600 [Ct. D. 350, C. B. X-1, 264].)

The decision of the Board of Tax Appeals is affirmed.

SECTION 220.—EVASION OF SURTAXES BY INCORPORATION.

ARTICLE 352: Purpose to escape surtax.

XIII-2-6593
Ct. D. 772

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. EVASION OF SURTAXES BY INCORPORATION—CONSTITUTIONALITY.

Section 220 of the Revenue Act of 1921, which provides an additional tax if any corporation is formed or availed of for the purpose of preventing the imposition of the surtax upon its stockholders or members through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, is constitutional. It applies even though the accumulation of profits is reasonable.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 809) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

United Business Corporation of America, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review an order of the Board of Tax Appeals fixing a deficiency upon the petitioner's income tax for 1921.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

[January 16, 1933.]

OPINION.

L. HAND, Circuit Judge: The petitioner is a corporation organized on April 1, 1920, to take over real property in Seattle, conveyed to it by one Smith, its sole shareholder, except for a few shares to qualify directors. During the year Smith also transferred to it a large number of shares of stock, which he had held for some time before; and still more in 1921. The Board found in view of the business of the company and of the manner of acquisition of the shares, that during the second year the income from them was allowed to accumulate in order to avoid payment by Smith of surtaxes upon the dividends which he would otherwise have received upon them. It was not sure that this had also been his purpose in the first year, and therefore declined to make a like finding for that period. It held that the case fell within section 220 of the Revenue Act of 1921 and assessed the taxpayer a deficiency of 25 per cent of its income tax as computed for that year. We have not the evidence before us, but the findings disclose a situation which justifies the conclusion, for Smith paid taxes upon a substantial income in 1918 and 1920, and borrowed largely from the petitioner in 1920 and 1921. These loans are incompatible with a purpose to strengthen the financial position of the petitioner, but entirely accord with a desire to get the equivalent of his dividends under another guise. While the Board has not so found, it may be assumed that the company's income, including that derived from the shares, was no more than reasonable for its business needs. The objections to the order in this court are substantially as follows: That section 220 applies only when the accumulation is unreasonable for the corporate purposes; that it was applied retroactively, and, since it imposed a penalty, could not be constitutionally enforced before it was passed; that it is too uncertain in its terms to be valid; that it offends the tenth amendment; and that the interpretation adopted by the Board violated settled administrative construction.

The section declares that when a company is formed or used "for the purpose of preventing the imposition of the surtax upon its stockholders" by allowing "its gains and profits to accumulate instead of being divided or distributed," it shall pay 25 per cent more than its proper tax. It is presumptive evidence of such a purpose that it is "a mere holding company, or that its gains and profits are permitted to accumulate beyond the reasonable needs of the business," provided that the Commissioner shall so certify. Ordinarily it will indeed be difficult to prove the forbidden purpose, unless the accumulations are too large for the fair needs of the business. But it may not be impossible to do so, even though the profits arise out of normal business, as they did not here. The management may for example be shown to have always been sanguine, and to have withheld only small reserves, though prudence justified more. A sudden change of policy, coincident with large increases in the surtax rates, might in that situation betray a purpose to accumulate against a season more propitious for distribution. Or the officers might unguardedly disclose a scheme to avoid surtaxes, though the other evidence was not enough. A statute which stands on the footing of the participants' state of mind may need the support of presumption, indeed be practically unenforceable without it, but the test remains the state of mind itself, and the presumption does no more than make the taxpayer show his hand. (*Pariso* v. *Towse*, 45 Fed. (2d), 962 (C. C. A. 2); *Alpine Forwarding Co.* v. *Pennsylvania R. R. Co.*, 60 Fed. (2d), 734 (C. C. A. 2).)

Here the purpose appears to us, if not transparent, at least plain enough to leave no doubt. The company was in its origin no more than a convenience for Smith's real property holdings. While its charter allowed other activity, unless it were to buttress its financial position, it was discordant with the main design to fill it with nearly nine hundred thousand dollars of shares of stock. Smith was patently in control; when he turned over his personal holdings to exempt himself from taxation, he was using the company for that purpose, and the company, his creature, by its complaisance incurred the added tax. It answers that the Treasury has itself ruled that the unnecessary accumulation of income is a condition upon the tax, and that we should defer to this interpretation. It is true that the regulations construing the same section of the Act of 1918, coupled the presumption with the test itself, as though both were necessary (article 352, Regulations 45), and the same notion appeared in an advisory tax memorandum (C. B. No. 1, page 181); but in 1921 (article 352, Regulations 62), this was changed, and the correct interpretation adopted. We should not, we think, have yielded even to an unbroken interpretation in so plain a case, but the change in the regulations avoids our declaring ourselves positively.

The intent being plain, the only question is whether Congress expressed its will certainly enough to be enforced, and whether any other constitutional obstacle is in the way. The argument is that the standard set is too vague for execution; that it is impossible definitely to say when the purpose of those who use the corporation to accumulate its profits is to exonerate its shareholders. Purpose is indeed not often a factor in legal transactions, though at times it is; but intent is often material, and whatever the difficulties of proof, the issue is concrete enough. Nothing is more frequent in human relations than the effort to learn what goes on in others' minds. The presumption is indeed less definite, and it is this especially that the petitioner attacks, relying upon the decisions which upset the efforts of Congress to control prices during the Great War. (*United States* v. *Cohen Grocery Co.*, 255 U. S., 81.) The argument misconceives the scope of those decisions. Standards of conduct, fixed no more definitely, are common in the law; the whole of torts is pervaded by them; much of its commands are that a man must act as the occasion demands, the standard being available to all. The view of fixing maximum prices is that it requires recourse to standards beyond ascertainment by sellers, by which therefore they can not in practice regulate their dealings. That is not true of the reasonable needs of a business, which is immediately within the ken of the managers, the supposititious standard, though indeed objective, being as accessible as those for example of the prudent driving of a motor car, or of the diligence required in making a ship seaworthy, or of the extent of proper inquiry into the solvency of a debtor. Moreover, since the result of the presumption is at most no more than to compel the taxpayer to disclose the facts, and since the tax itself is definitely enough determined, the whole issue is irrelevant.

A more plausible objection is that the tax imposed on the company bears no relation to the surtaxes on the shareholders. This was not true before 1921, until when the shareholders were themselves taxed as though members of a personal service company. Doubts apparently arose as to the validity of taxing income which the taxpayers had never received, and in 1921 it was thought safer to tax the company itself in an amount not based upon that lost. We can see no objection. While the forbidden purpose is of those who use the company, that purpose may be imputed to the company itself, since they can not use it unless they are in control, and it can have no other than an imputed purpose anyway. Nor does this trench upon the reserved powers of the States; companies may accumulate what profits they please so long as they do not do so to defeat the fiscal policies of the United States. Their business, whose regulation is wholly for the States, does not include the manipulation of dividends to avoid taxes; by definition that has nothing to do with the normal management of their affairs. Congress in raising revenue has incidental power to defeat obstructions to that incidence of taxes which it chooses to impose.

Finally as to the retroactive feature of the law. The section went into effect as of January 1, 1921, though not passed until November 21 of that year. Except for the fact that the added tax may be thought to be a penalty, the power is undoubted to make ordinary taxes retroactive so far. (*Cooper* v. *United States*, 280 U. S., 409 [Ct. D. 163, C. B. IX-1, 272]; *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S., 1.) Perhaps the doctrine ought not to apply to such a tax as this, if the taxpayer had no locus penetentiae. It had. When the Act of 1921 was passed, all companies still had six weeks in which to distribute their profits. If they did so they would comply with the statute and avoid the penalty, if it be a penalty. Whatever the original purpose, the accumulations had to last through the year, or the shareholders would pay the surtaxes. The period was long enough for distribution, and indeed companies had been advised since 1918 that the practice was regarded as an evasion. The only change was in the consequences. Thus, even though we take the added tax as a penalty, stricti juris, which we need not, the statute was not retroactive.

Order affirmed.

SECTION 222.—CREDIT FOR TAXES IN CASE OF INDIVIDUALS.

ARTICLE 386: Limitation of credit for taxes.

REVENUE ACTS OF 1921, 1924, AND 1926.

Formula for determining tax paid by foreign corporation "upon or with respect to the accumulated profits." (See G. C. M. 12882, page 89.)

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 518: Business leagues, chambers of commerce, and boards of trade.

REVENUE ACT OF 1926.

Credit men's adjustment bureau. (See Ct. D. 831, page 126.)

SECTION 233.—GROSS INCOME OF CORPORATIONS DEFINED.

ARTICLE 541: Gross income. XIII-19-6783
(Also Section 234, Article 561.) Ct. D. 824

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. GROSS INCOME—INTEREST ON BONDS FROM FUNDS ADVANCED BY CREDITOR.

Where the taxpayer, a corporation on the accrual basis, advances money to a corporation which it had formed and whose business was declining, and the debtor corporation uses such advances to pay operating expenses and interest on its bonds held by the creditor corporation and others, the interest accruing on the bonds and received from the debtor during the years 1918 to 1921 constitutes income to the creditor, notwithstanding the fact that such interest was paid from funds it had advanced.

2. DEDUCTIONS—BAD DEBTS.

Where the taxpayer makes advances to a debtor corporation in which it is a large stockholder and takes interest-bearing notes in return, believing that the loans will never be repaid and that the notes taken are uncollectible, such advances are contributions to capital and are not deductible as bad debts. Further, the taxpayer, not having ascertained the debt to be worthless, charged it off the books and claimed deduction therefor all within the same taxable year, has not met the requirements of section 234(a)5 of the Revenue Acts of 1918 and 1921, and on that ground is not entitled to the deduction.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (21 B. T. A., 464) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied December 4, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

American Cigar Co., petitioner, v. Commissioner of Internal Revenue, respondent.

Appeal from the United States Board of Tax Appeals.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[July 25, 1933.]

OPINION.

Petition by the American Cigar Co. to review an order of the Board of Tax Appeals affirming the Commissioner's inclusion of certain items in, and refusing the deduction of other items from, the petitioner's gross income for the years 1918 to 1921, inclusive. Affirmed.

AUGUSTUS N. HAND, Circuit Judge: The petitioner was incorporated under the laws of New Jersey in 1901. Soon after its incorporation, it acquired the stock of several Cuban tobacco companies, including all the stock of a corporation known as H. de Cabanas y Carbajal. In 1902 the petitioner and others formed a new corporation in New Jersey called the Havana Tobacco Co. The petitioner then transferred to the Havana company all its stock in H. de Cabanas y Carbajal, and received in return $3,500,000 in bonds of the Havana company, as well as a large fraction of its common stock and a small amount of cash. The total outstanding bond issue of the Havana company amounted to $7,500,000.

The Havana company immediately started to manufacture and sell Cuban cigars, and for a time its operations were successful. Subsequently, however, its business declined severely, and by 1909 it was in very poor financial condition. Its only income consisted of dividends on the stock of its subsidiary companies, and these dividends were not sufficient to pay the interest on its bonds.

The petitioner and other companies allied in interest apparently were very reluctant to allow the Havana company to go into receivership, and accordingly the petitioner from time to time advanced money to the Havana company to enable the latter to meet its operating expenses and pay the interest on its bonds. The petitioner accepted interest-bearing notes of the Havana company covering these loans. By January 1, 1918, the net advances totaled $11,640,123.20. From this date, through 1921, the following additional sums were advanced:

1918	$2,048,000.00
1919	787,000.00
1920	2,723,500.00
1921	3,129,000.00
Total	8,687,500.00

During the same years repayments were made in the following amounts:

1918	$1,169,500.00
1919	1,135,000.00
1920	2,056,000.00
1921	2,495,500.00
Total	6,856,000.00

Thus, during the taxable years in question, the net advances made by the petitioner to the Havana company totaled $1,831,500, and on December 31, 1921, the total balance due was $13,471,623.20. Out of these advances, from 1908 to July, 1921, the Havana company paid the interest on the $3,500,000 of bonds held by the petitioner. During the years 1918 to 1921 interest accrued on these bonds as follows:

1918	$222,645.83
1919	222,250.00
1920	227,066.67
1921	214,387.50

All of the interest accruing in 1918, 1919, and 1920 was paid out of the funds advanced by the petitioner, and installments coming due during the first part of 1921 amounting to $95,937.50 were similarly paid. In December, 1921, the petitioner refused to make further advances to the Havana company, and interest on the bonds in the amount of $118,450 falling due in that month was not paid.

The petitioner never returned as part of its gross income the interest received on these bonds. In auditing the returns for the years 1918, through 1921, the Commissioner determined that all interest accruing on the bonds during these years, including the installment accruing in December, 1921, which was not paid, should be included in the gross income. The Commissioner allowed the unpaid installment for 1921 to be deducted from the gross income as a bad debt. The Board of Tax Appeals sustained the action of the Commissioner, except that they held that the unpaid installment for December, 1921, should not have been included in the gross income. This change in the theory of computation did not affect the net result.

The contention of the petitioner on this appeal is that none of the interest received from the Havana company during the years in question should be included in the gross income, because all of this interest was paid out of funds advanced by the petitioner itself. In the alternative, the petitioner seeks permission to deduct, as debts ascertained to be worthless and charged off within the taxable year (Revenue Acts of 1918 and 1921, section 234(a)5, 26 U. S. C., section 986(a)5) the advances made to the Havana company, to the extent to which these advances were used to pay interest on the bonds held by the petitioner.

We think that the petitioner's first contention is clearly without merit. The petitioner kept its books on the accrual basis. The coupons representing interest payable on the bonds matured during the taxable years in question. If the coupons had not been paid, that fact alone would not justify a failure to return their face amount in the gross income, as long as the accrual basis was used. It may be that an obligation which is worthless and uncollectible when it matures need not be returned as income, even where the obligee's books are kept on the accrual basis. (*Corn Exchange Bank* v. *United States*, 37 Fed. (2d), 34; *Turners Falls Power & Electric Co.* v. *Commissioner of Internal Revenue*, 15 B. T. A., 983; *Northwestern Improvement Co.* v. *Commissioner of Internal Revenue*, 14 B. T. A., 79; *Great Northern Railway Co.* v. *Commissioner of Internal Revenue*, 8 B. T. A., 225.) But these decisions are of no help to the petitioner, for the coupons, far from being uncollectible, were paid in full. The fact that the coupons were paid out of advances made by the petitioner can not alter the result. (*Duke Power Co.* v. *Commissioner of Internal Revenue*, 44 Fed. (2d), 543, affirming *Southern Power Co.* v. *Commissioner of Internal Revenue*, 17 B. T. A., 962.) Perhaps the petitioner might have escaped taxation had it loaned the Havana company only enough money to meet its operating expenses and pay interest on the bonds held by others than the petitioner. Had this been the case, the coupons held by the petitioner would not have been paid, and if, as the Board found, the obligation they represented was worthless and uncollectible, the face of the coupons might not have been returnable in the gross income. But, for its own reasons, the petitioner deliberately put it within the power of the Havana company to pay the coupons. What it might have done can not alter the legal effect of what it did do. (Cf. *Nixon* v. *Lucas*, 42 Fed. (2d), 834.) Thus there were two distinct obligations: One arose when the petitioner *acquired the bonds* of the Havana company, the other when it *made the advances* out of which interest on the bonds was paid. The interest payments were part of a loan transaction arising out of the purchase of bonds which preceded and was entirely distinct from the subsequent loans for which notes were taken. The source from which the Havana company obtained funds with which to pay the coupons can not alter the character of the interest payments as income to the petitioner. To hold that the interest payments were deductible merely because made out of loans from the petitioner would be in effect to hold the loans *pro tanto* deductible. Whether the loans were properly deductible is a distinct question which we shall now consider.

The Commissioner contests the deductibility of the advances made by the petitioner to the Havana company during the taxable years in question on several grounds. It will not be necessary to discuss all of these contentions, for we are satisfied that, for the following reasons at least, the Board properly refused to allow the deductions.

The taxpayer takes the position that the notes taken on account of the advances were ascertained to be worthless at the very time the advances were made. The Board has found as a fact that the petitioner made the advances fully believing that the obligations they created were worthless and uncollectible, and there is evidence to support such a finding. Therefore, according to the petitioner's own contention and the finding of the Board, these sums were advanced in the belief that they would never be repaid, and the notes which the petitioner took were believed to be uncollectible. Such advances, made with the belief they would not be repaid, are in the nature of gifts, and are not deductible as bad debts. (*Hayes* v. *Commissioner of Internal Revenue*, 17 B. T. A., 86; see *Shiman* v. *Commissioner of Internal Revenue*, 60 Fed. (2d), 65, at 66.) The advances were in reality contributions to the capital of the Havana company, in which the petitioner was a stockholder. Contributions to capital can not be deducted as debts ascertained to be worthless. (*Olds* v. *Commissioner of Internal Revenue*, 18 B. T. A., 1215; *Floyd* v. *Commissioner of Internal Revenue*, 11 B. T. A., 903; cf. *Burns* v. *Commissioner of Internal Revenue*, 31 Fed. (2d), 399; *United States* v. *Oregon-Washington R. & Nav. Co.*, 251 Fed., 211.)

But there is a further reason for not allowing the deduction. In order to secure a deduction of a debt as worthless, a taxpayer must ascertain its worthlessness, charge it off on his books, and take his deduction all during the same taxable year. (*Ludlow Valve Mfg. Co.* v. *Durey*, 62 Fed. (2d), 508; *Continental Pipe Mfg. Co.* v. *Poe*, 59 Fed. (2d), 694; *Cross* v. *Commissioner of*

Internal Revenue, 54 Fed. (2d), 781; *American Sav. Bank & Trust Co.* v. *Burnet*, 45 Fed. (2d), 548.) There is no satisfactory proof that the taxpayer did this. The credits on the books of the items of interest received to the account "Interest in suspense" were entries of uncertain meaning, indicating rather *doubtful* items than debts charged off after having been ascertained to be worthless, and accordingly did not satisfy the requirement of section 234(a)5 of the Revenue Act of 1918. (*Shiman* v. *Commissioner*, 60 Fed. (2d), 65.) The entries showed no intent to treat the items as worthless debts.

Therefore, whether the Board's finding that the advances were made in the belief that they gave rise to no valuable or collectible obligation is sustained by the evidence or not, the petitioner is in the same position. The petitioner claims these debts were known to be worthless when they arose. If so, as we have held, they were nondeductible. If not, there is no evidence when they were ascertained to be worthless, and there would be no way to determine the years in which the deductions might be allowable, nor is there satisfactory proof that they were ever charged off.

Order affirmed.

L. Hand, J., concurs in a separate opinion.

L. Hand, Circuit Judge (concurring): I find it impossible to say that money given by a creditor to his debtor for the purpose of paying the debt to him, is income of the creditor. This must certainly be true when the creditor's books are on a cash basis. When they are on an accrual basis, I should be prepared to say that the debtor's recognized necessity of getting a gift, not a loan, to discharge his debt was evidence of its worthlessness and charge off. In substance the transaction is a cancellation of the debt. But I do not think that the petitioner's loan to the Havana Cigar Co. was a gift. To be sure it did not expect to be paid, but it did expect to have a corresponding legal claim against the borrower, which apparently it used in a later reorganization. This precludes the notion of a gift and it is irrelevant I think that as things stood the lender knew that the loan could never be repaid in full. I agree that in these circumstances the coupons falling due were income, the petitioner's books being on an accrual basis. They had not been charged off during the year; I also agree that to put items in a "suspense account" is not to charge them off as worthless. The purpose is to leave them ambiguous for a season; when their disposition is eventually decided, they will appear in their proper place, probably as worthless; but the present meaning is to delay that determination for the time being.

I find it rather hard to reconcile *Corn Exchange Bank* v. *United States* (37 Fed. (2d), 34) (C. C. A. 2) with this conclusion. However, the majority of the court appears to have there regarded the coupons as worthless. Here they were not; neither were the notes which raised the money to pay them. Indeed, in form, anyway, the coupons were paid. In substance, the transaction may be regarded as this; the petitioner did not think the coupons wholly worthless and reserved the question of their value for the future. It could secure the counter charge only when it definitely valued them as partially, or wholly, worthless. Till then its power was suspended.

Article 543: Sale of capital stock. XIII-12-6709 Ct. D. 802

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. Installment Sale—Initial Payment—Receipt by Corporation of Its Own Capital Stock.

Where a real estate corporation makes an installment sale of realty to one of its stockholders, that proportion of the initial payment received representing profit is taxable even though it consists of its own capital stock.

2. Decision Reversed.

Decision of the Board of Tax Appeals (25 B. T. A., 941) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Boca Ceiga Development Co., respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

[August 28, 1933.]

OPINION.

DAVIS, Circuit Judge: This petition involves income taxes for the fiscal year ending February 28, 1926.

On October 30, 1925, the respondent, the Boca Ceiga Development Co., a Florida real estate corporation, sold a tract of land to one of its stockholders for a gross consideration of $504,000, and received from the purchaser 480 shares of its capital stock, valued $48,000, as the initial payment. For income tax purposes, the Commissioner of Internal Revenue computed the realized profit upon the installment sale basis as follows:

Sale price:	
Mortgage	$384,000.00
Mortgage assumed by vendee	42,000.00
Stock of taxpayer corporation at par value also fair market value	48,000.00
Notes receivable ($30,000, no market value)	----------
Total sales price exclusive of notes	474,000.00
Cost	199,448.29
Profit	274,551.71
Sales price	474,000.00
Less mortgage assumed by vendee	42,000.00
Amount to be paid by vendee	432,000.00
Percentage of profit, $274,551.71÷$432,000=	0.63553
Initial payment	$48,000.00
Profit realized	$30,505.44

The question involved in this case is whether or not the respondent realized any taxable gain on the initial payment made to it with its own stock.

The Commissioner determined that the proportion of the initial payment, which represented profit, was taxable regardless of the fact that the respondent's stock was the medium by which the payment was made. The Board of Tax Appeals was of the opinion that the respondent realized no gain from the transaction during the taxable year since it had received therein shares of its stock only. The Commissioner brought this petition to review the Board's order of redetermination.

The Board's decision that a corporation realizes neither a gain nor loss from the purchase of its stock was in keeping with its position at the time when it determined this case (*Houston Bros. Co.*, 21 B. T. A., 804; *S. A. Woods Machine Co.*, 21 B. T. A., 818; *Schiller Piano Co.*, 23 B. T. A., 376), although its earlier decisions were to the contrary (*Behlow Estate Co.*, 12 B. T. A., 1365; *New Jersey Porcelain Co.*, 15 B. T. A., 1059). Meanwhile, the courts have held that a corporation acquiring its own stock may recognize a gain or loss provided the purpose of the transaction was not merely a capital readjustment (*Johnson* v. *Commissioner*, 56 Fed. (2d), 58, certiorari denied 286 U. S., 551), but a sale of property (*Walville Lumber Co.* v. *Commissioner*, 35 Fed. (2d), 445 (C. C. A. 1); *Spear & Co.* v. *Heiner*, 54 Fed. (2d), 134 (W. D. Pa.); *Commissioner* v. *S. A. Woods Machine Co.* (57 Fed. (2d), 635 (C. C. A. 1) [Ct. D. 666, C. B. XII-1, 275]). Since these decisions, the Board has adopted the rule laid down by the courts. (*Houghton & Dutton Co.*, 26 B. T. A., 52.)

The question here is disposed of by the following quotation from the Woods case, supra.

"The transaction involved in this case was equivalent to the payment of the debt in cash and the investment of the proceeds by the corporation in its own stock. If that had been done clearly the cash received would have been taxable income. The transaction was not changed in its essential character by the fact that, as the debtor happened also to own the stock, the money payment and the purchase of the stock were by-passed, and the stock was directly transferred in payment of the debt. The stock was the medium in which the debt was paid. The wide door to evasion of taxes opened by the decision of the Board is an additional reason, and a weighty one, against it."

The determination of the Commissioner is approved and the order of the Board of Tax Appeals reversed.

ARTICLE 543: Sale of capital stock.

REVENUE ACTS OF 1924 AND 1926.

Amendment of article 543, Regulations 65 and 69. (See T. D. 4430, page 36.)

ARTICLE 545: Sale and retirement of corporate bonds.

XIII-14-6734
Ct. D. 809

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF SUPREME COURT.

1. INCOME—SALE AND RETIREMENT OF CORPORATE BONDS.

Where the taxpayer, which kept its books on the accrual basis, in 1914 bought all the assets of another company and assumed all its outstanding liabilities, including an issue of bonds, and in 1922, 1924, and 1925 purchased in the market at less than their face value certain of these bonds for retirement, the difference between the face value and the purchase price constitutes income to the taxpayer.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (23 B. T. A., 221) reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. American Chicle Co.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 5, 1934.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the court.

Assessments by petitioner which treated as realized income the difference between the face value of certain bonds assumed by respondent in 1914 and the amount at which it purchased them in 1922, 1924, and 1925, were disapproved by the Board of Tax Appeals. The court below affirmed this action, and the matter is here by certiorari. The meager stipulated facts present only a narrow point; and to that our decision must be limited.

Respondent is a New Jersey corporation the nature of whose business is undisclosed. Its books are kept on the accrual basis.

The Sen Sen Chiclet Co., incorporated under the laws of Maine, also carried on an undisclosed business. In 1909 it issued a series of 20-year bonds—whether secured by a lien, or otherwise, does not appear. The indenture under which they issued required that $50,000 be supplied each year which the trustee should use for purchasing outstanding bonds.

In 1914 respondent bought all assets of the Sen Sen company. In part payment it assumed all outstanding liabilities of the seller—among them $2,425,000 of the 1909 bonds. There is nothing in the record to show the nature of these assets, or what became of them, or the outcome of the transaction.

Respondent purchased in 1922 $82,000 of the Sen Sen bonds for $55,650.94—$26,349.06 less than their face. During 1924 it and the trustee under the indenture purchased $59,000 of the same bonds for $47,602.10—$11,397.90 below their par value. Likewise, during 1925 they purchased $201,500 for $186,146.31—$15,353.69 less than their face.

The Commissioner treated these differences—$26,349.06, $11,397.90 and $15,353.69—as income realized by respondent. The Board of Tax Appeals ruled otherwise and said—

"The payments involved in the transactions under consideration were payments on the purchase price of the Sen Sen Chiclet Co.'s assets, paid, under the conditions of the agreement, to the holders of that company's bonds. When all of the bonds have been retired by the petitioner its obligations to the Sen Sen Chiclet Co. will have been satisfied in full, and whatever the total amount paid to retire the bonds, it will constitute a part of the cost to petitioner of the Sen Sen Chiclet Co. assets."

In support of the same view, the circuit court of appeals said—

"When a taxpayer gets money by issuing an obligation which he later discharges for less than its face, the transaction is completed, because money need not be sold or exchanged to be 'realized.' So we read *United States* v. *Kirby Lumber Co.*, supra (284 U. S., 1, 52 S. Ct., 4, 76 L. Ed., 131). But if he buys property by an obligation in the form of a bond, note, or the like, and if it remains in kind after the debt is paid, there can be no 'gain.' The cost has indeed been definitely settled, but that is only one term of the equation; as long as the other remains at large, there is no 'realized' gain."

We know nothing concerning the nature of the assets acquired from the Sen Sen company, have no means of ascertaining what has become of them, or whether any of them still exist. Nothing indicates whether respondent lost or gained by the transaction.

The case before us is this:

In connection with the purchase of the assets of another company, in 1914, respondent assumed—promised to pay—more than $2,000,000 of the seller's outstanding bonds. During 1922, 1924, and 1925 it purchased a considerable number of these bonds in the market at less than their face. The Commissioner assessed the difference between these two amounts as income.

We find nothing to distinguish this cause in principle from *United States* v. *Kirby Lumber Co.* (284 U. S., 1 [Ct. D. 420, C. B. X-2, 356]). The doctrine there announced is controlling here. *Bowers* v. *Kerbaugh-Empire Co.* (271 U. S., 170 [T. D. 3881, C. B. V-1, 199]) is not applicable. The final outcome of the dealings was revealed—the taxpayer suffered a loss. Here, for aught we know, there was substantial profit—certainly, the record does not show the contrary. Doubtless, respondent's books indicated a decrease of liabilities with corresponding increase of net assets.

Reversed.

Article 546: Sale of capital assets.

XIII-21-6807
Ct. D. 830

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. Income—Sale of Corporate Real Estate—Whether Taxable to Corporation or Stockholders.

Where the three stockholders and directors of a corporation, who owned its entire outstanding stock, authorized the sale of corporate real estate to its president, a director and majority stockholder, who in turn sold to a third party and, pursuant to a prior understanding among the stockholders and a declaration of trust executed by him, distributed to himself and the other two stockholders in proportion to their holdings the profit realized upon the sale, the transaction was in substance a sale by the corporation through the agency of its president, and the profit is properly taxed to the corporation at corporate rates.

2. Decision Affirmed.

Decision of the Board of Tax Appeals (26 B. T. A., 1337) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

S. A. MacQueen Co., petitioner, v. Commissioner of Internal Revenue, respondent.

Upon petition for review from the United States Board of Tax Appeals.

Before WOOLLEY, DAVIS, and THOMPSON, Circuit Judges.

[December 12, 1933.]

OPINION.

THOMPSON, Circuit Judge: This is a petition for review of a decision of the Board of Tax Appeals pursuant to the Revenue Act of 1926 (ch. 27, sections 1001–1003; 26 U. S. C., 1224–1226). The petitioner was a Pennsylvania corporation. On February 1, 1927, at a meeting of the three stockholders who owned the entire outstanding stock of the petitioner and who were also its directors, a resolution was passed authorizing the board of directors to sell real estate owned by the petitioner to S. A. MacQueen, its president, director, and majority stockholder, for the sum of $85,000. Following this meeting and on the same day, a resolution was adopted by the board of directors accepting an offer by MacQueen of $85,000 for the real estate. The following day MacQueen entered into an agreement with Henry Reed Hatfield to convey the real estate to the latter for a consideration of $150,000. On February 11, 1927, in conformity with a prior understanding among the three stockholders, MacQueen executed a declaration of trust in which he recited the agreement of the petitioner to convey the real estate to him for $85,000, his agreement to convey the same to Hatfield for $150,000, and his intention to distribute the profits to the stockholders in proportion to their holdings. On March 1, 1927, the petitioner conveyed title to MacQueen and on the same day MacQueen conveyed title to Hatfield. Subsequently MacQueen, in accordance with his declaration of trust, distributed $65,324.30, representing the profits of the sale and interest thereon, to himself and the other two stockholders. Each of the stockholders included the amount so received by him in his income tax return. The petitioner, in its income tax return, reported as income a sum representing the difference between the purchase price of the real estate and the $85,000 which it received from MacQueen. The petitioner was at all times solvent and all creditors were paid in full. On August 3, 1927, the petitioner was dissolved.

The Commissioner held that the sale to MacQueen was not bona fide and added $65,000 to the petitioner's income as unreported profit. The Board of Tax Appeals held that the sale was not an arm's length transaction and that, looking through form to substance, the sale to Hatfield was actually made by the petitioner, and the profits from the sale were therefore taxable to the petitioner. It sustained the action of the Commissioner.

The principle that substance and not form should control in the application of income tax laws (*United States* v. *Phellis*, 257 U. S., 156 [Ct. D. 19, C. B. 5, 37]; *Labrot* v. *Burnet*, 57 F. (2d), 413 [Ct. D. 543, C. B. XI–2, 182]; *Reed* v. *United States*, 51 F. (2d), 941) may be invoked in the instant case. Although in form there were two sales of the corporate real estate, first the purported sale by the petitioner to MacQueen, and, second, the sale by MacQueen to Hatfield, in substance the transaction was a sale by the petitioner to Hatfield through the agency of MacQueen. So also, although in form MacQueen was a trustee for the distribution of the profits earned by the sale of his own real estate to Hatfield, in substance he was the agent of the petitioner for the distribution of the profits from the sale of the corporation's real estate among its stockholders.

The corporate tax rate imposed by the applicable taxing statutes is higher than the individual rate. The obvious purpose of the procedure followed by the petitioner, its directors, and stockholders, was to take advantage of the lower tax rate permitted individuals and thereby avoid the corporate tax rate on the profits of the ultimate sale of the real estate. Such anticipatory arrangements and contracts, intended to circumvent the taxing statutes, are not looked upon with favor. (*Lucas* v. *Earl*, 281 U. S., 111; *Phelps* v. *Commissioner*, 54 F. (2d), 289, certiorari denied, 285 U. S., 558 [Ct. D. 478, C. B. XI–1, 242].)

We conclude that the profit, representing the difference between the price of the real estate upon its purchase by the corporation and the price paid by Hatfield, should be taxed to the petitioner at corporate rates. The decision of the Board of Tax Appeals is affirmed.

Article 548: Gross income of corporation in liquidation. XIII-4-6617 Ct. D. 776

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. Gross Income—Capital Gain—Sale of Assets by Corporation in Liquidation.

Where the stockholders of a corporation adopt a resolution authorizing the dissolution and liquidation of the corporation and the conveyance of all of its assets to trustees, with full power in the trustees to dispose of the property and after final liquidation to distribute the proceeds pro rata to the stockholders, and where on the same day an agreement is executed for the sale by the trustees to another corporation of all the assets to which they had received title from the liquidating corporation, such resolution, carrying out negotiations previously conducted by officers of the corporation, only constitutes an agreement between the stockholders upon the procedure by which the corporation might sell its property. The transactions in substance constitute a sale by the corporation, resulting in gain within the meaning of sections 213 and 233 of the Revenue Act of 1926 and article 548 of Regulations 69, and not a distribution of the assets in kind to the stockholders and a sale thereof by them.

2. Decision Affirmed.

The decision of the Board of Tax Appeals (24 B. T. A., 660) affirmed.

United States Circuit Court of Appeals, Sixth Circuit.

F. A. Hellebush, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before Moorman, Hicks, and Simons, Circuit Judges.

[June 29, 1933.]

OPINION.

Hicks, Circuit Judge: Petition by F. A. Hellebush to review the decision of the Board of Tax Appeals (24 B. T. A., 660) affirming the action of the Commissioner of Internal Revenue in assessing on redetermination against him as the transferee of the Blackburn Varnish Co. deficiencies in income and profits taxes in the sum of $12,303.42 for the period from January 1, 1927, to April 19, 1927.

The case is before us upon the findings of fact by the Board. The Blackburn Varnish Co., an Ohio corporation, had for many years prior to the taxable year 1927 conducted a successful business. In the spring of that year its stockholders decided that they would quit business and liquidate the corporation. The nephew of one of its stockholders was an official of the Cook Paint & Varnish Co., a Missouri corporation. Through this nephew negotiations were opened for its sale to the Cook company, which negotiations were thereafter carried on on behalf of the Blackburn company by its president, Hellebush, and its secretary-treasurer, Lippleman. The negotiations finally resulted in Cook, president of the Cook company, coming to Cincinnati, the home office of the Blackburn company, where the deal was closed on April 20, 1927, and on that date the following steps were taken to consummate it:

First, there was a special meeting of all the stockholders of the Blackburn company in person or by proxy at which a resolution was unanimously adopted authorizing the dissolution and liquidation of the company and the conveyance of its assets to Hellebush and Lippleman as trustees for the stockholders with full powers to dispose of the company's property. The resolution further directed these trustees after "final liquidation" and deduction of expenses to distribute all remaining property or proceeds in kind pro rata to the stockholders and contained an instruction to the officers of the company to take the necessary steps to procure its dissolution and the conveyance of its property to the trustees.

Second, following the stockholders' meeting on the same day, the officers of the Blackburn company "in consideration of the sum of one dollar ($1) and other good and valuable considerations" executed a bill of sale of all the personal property of the Blackburn company to the above-named trustees for the stockholders, and the corporation by its proper officers likewise on the same day executed and delivered to these trustees, designating them as trustees for the stockholders, its deed conveying to them its real estate in fee simple.

Third, on the same day an agreement was executed for the sale to the Cook company of all the assets to which Hellebush and Lippleman, as trustees for the stockholders, had received title from the Blackburn Varnish Co. It was signed by the trustees and by Cook, president of the Cook company, and by the Southern Ohio Savings Bank & Trust Co., escrow agent. The instrument recited that the trustees agreed to convey all property of whatever kind or nature which they had received from the Blackburn company except cash and accounts and bills receivable and further recited the concurrent delivery of a deed to the real estate and of an instrument of conveyance of all other property to the escrow agent for which a deposit of the sum of $100,000 on the purchase price was made. The Cook company agreed to use reasonable diligence to collect the outstanding accounts and bills receivable and to account weekly therefor to the trustees.

The entire consideration paid by the Cook company was $269,175.82. Existing liabilities against the Blackburn company, amounting to $9,000, were paid by the trustees prior to the dissolution of the Blackburn company which took place on June 2, 1927.

Respondent fixed the capital gain accruing to the seller on these transactions at $85,530.86, being the difference between the selling price of $269,175.82 and the book value of the assets sold, $183,644.96. The tax on the capital gain was ascertained to be $12,303.42 and is the amount in dispute. Petitioner concedes that if the Blackburn company is liable for the tax he is liable as a transferee.

Sections 213 and 233 of the Revenue Act of 1926 (44 Stat., 9, ch. 27) provide that the gross income of corporations shall include gains derived from sales of, or dealings in, property. The applicable Treasury ruling is article 548 of Regulations 69, printed in the margin.[1] The provisions of this regulation have been incorporated in the regulations for all of the Revenue Acts since the Act of 1918. Congress has not seen fit to change it and we think it should now be given effect. (*Heiner* v. *Colonial Trust Co.*, 275 U. S., 232 [T. D. 4112, C. B. VII-1, 207].) *Universal Battery Co.* v. *United States*, 281 U. S., 580 [Ct. D. 220, C. B. IX-2, 422].) It has been specifically upheld in *Taylor Oil & Gas Co.* v. *Commissioner* (47 Fed. (2d), 108 (C. C. A. 5)).

So the question here is, whether under this regulation when applied to the facts above set forth, there was a distribution of the assets of the Blackburn company in kind to its stockholders upon dissolution and a sale of the assets by the stockholders through the trustees to the Cook company, or whether the sale should be treated as a sale by the corporation.

We think it is clear that there was no distribution in kind, in the sense of a *division*, of the assets of the Blackburn company to its stockholders on April 20, 1927, the date of the resolution appointing the trustees for the stockholders. Neither was there any distribution in kind to the stockholders "upon dissolution" which took place on June 2, 1927, by the filing of a certificate of abandonment or dissolution with the secretary of state of Ohio as provided by section 8741 of the Ohio General Code. Moreover the stockholders did not have power to appoint trustees to settle the affairs of the Blackburn company and divide its property among the stockholders until after the formal dissolution on June 2, 1927. See section 8742, Ohio General Code, supra. Until that date the Blackburn company like corporations generally, had exclusive power to act for itself. The stockholders' resolution of April 20, 1927, seemed to recognize this for it undertook to authorize and direct the officers of the Blackburn company to take such legal steps as were necessary and proper to procure its dissolution. The utmost that can be said for this resolu-

[1] ART. 548. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See section 282 and articles 1293 and 1294.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind upon dissolution, however they may have appreciated or depreciated in value since their acquisition.

tion is that it constituted an agreement between the stockholders upon a procedure with which they were themselves contented and through which the Blackburn company could sell its property. However satisfactory and unobjectionable this arrangement may have been as between themselves (*Chatta. Savings Bank* v. *Brewer*, 9 Fed. (2d), 982, 989 (D. C.) [T. D. 3796, C. B. V-1, 153]), it could not impair the right of the Commissioner to challenge its validity for purposes of taxation. The law will look through forms to substance (*United States* v. *Phellis*, 257 U. S., 156 [T. D. 3270, C. B. 5, 37]; *Board* v. *Commissioner*, 51 Fed. (2d), 73, 75 (C. C. A. 6)) and will recognize the outstanding fact, that the Cook company had thereby acquired the property and assets of the Blackburn company just as was contemplated before the stockholders' meeting on April 20. We think that this was a sale by one company to the other upon the profits of which the Government was entitled to its taxes.

The order of the Board of Tax Appeals is therefore affirmed.

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions. XIII-3-6603 Ct. D. 775

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTIONS—LOSSES.

Where taxpayer purchased land in 1918 solely as an oil prospect or because of its supposed oil content and in 1921 determined that the land was nonoil bearing and offered it for sale as grazing land, but no sale was made until 1923, no deductible loss was sustained in 1921 within the meaning of section 234(a)4 of the Revenue Act of 1921, that section applying only when the transaction in respect of which the loss is claimed is closed and completed by some identifiable event, which event occurs generally only when the property is sold or otherwise disposed of.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (25 B. T. A., 261) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Coalinga-Mohawk Oil Co., a Corporation, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition to review a decision of the United States Board of Tax Appeals.

Before WILBUR, SAWTELLE, and MACK, Circuit Judges.

[April 3, 1933.]

OPINION.

SAWTELLE, Circuit Judge: This petition involves an asserted deficiency of $10,673 in petitioner's income tax return for the year 1921. The deficiency arose by reason of a deduction of $78,000 from petitioner's income, which amount was claimed to be deductible as a loss sustained in that year, under the provisions of section 234(a)4 of the Revenue Act of 1921 (42 Stat., 227).

The facts are not in dispute and are substantially as follows: The petitioner is a California corporation, with its principal office in San Francisco.

During the years from 1918 to 1922, inclusive, and prior thereto, petitioner was engaged in the business of producing and selling oil. In 1918 it purchased a tract of land containing 200 acres, situated in the Lost Hills district of California, and paid therefor the sum of $80,000 in cash. The land was purchased by petitioner solely as an oil prospect or because of its supposed oil content. Because of its proximity to a proven oil field, it was regarded by petitioner as "semiproven" at the time of purchase. Petitioner did not contemplate immediate drilling when the land was purchased but contemplated drilling when the proven area approached its land.

There was no drilling on the land in question prior to 1922 and prior to that year no test well was drilled closer than 1⅞ miles to said land. The nearest oil production prior to 1922 was in the extreme south end of the Lost Hills field, 2⅛ miles west of the southwest corner of said land.

At the time of purchase in 1918 the value of petitioner's land as an oil prospect depended upon two possibilities: (1) that the geological structure of the Lost Hills field might extend to its tract, and (2) that a parallel structure to the Lost Hills field would be discovered and that its tract would be found to be embraced in such parallel structure.

The Lost Hills field was an old oil field, in which the southerly and easterly limits, which were nearest to petitioner's 200-acre tract, had been determined in 1914, 1915 or 1916 within the drilling depths to which it was practicable to drill at that time. There was no drilling on the southeasterly border of the Lost Hills field known to petitioner between 1918 and 1921.

During the period from 1918 to 1921, information gradually obtained by petitioner's officers indicated that its tract of land was "off structure" and that the prospect of discovering oil on it was remote. In 1921 the petitioner finally determined that its land was nonoil bearing and offered it for sale at $10 per acre or $2,000 for the entire tract, which was its value as grazing land, exclusive of any value as an oil prospect. Petitioner was unable to sell its tract of land at said price in 1921. At the beginning of 1922 petitioner leased its land for 15 cents per acre, or $30 for the tract, per annum.

In 1923 petitioner disposed of the said land, along with its other properties, to the Mohawk Oil Co. at its book value of $2,000. In 1926 the Mohawk Oil Co. transferred its properties, including said 200 acres of land, at a price of $2,000, to the California Petroleum Co., and in 1928 the latter company sold the land to the Texas Corporation at the same price.

In its tax return for the year 1921, petitioner deducted from income the amount of $78,000 claimed as a loss in the value of its land in said year. The Commissioner refused to allow the deduction, and restored said amount of $78,000 to petitioner's income in computing the deficiency. The Board of Tax Appeals sustained the Commissioner's ruling (25 B. T. A., 261): followed by this petition to review.

Section 234(a)4 of the Revenue Act of 1921 provides that in computing net income there shall be allowed as deductions losses sustained during the taxable year and not compensated for by insurance or otherwise. Petitioner contends that this case is brought within the ambit of section 234 by virtue of article 143 of Regulations 62, which provides, in part, as follows:

"When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the cost * * * and its salvage value remaining. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded * * *."

We do not believe that the benefits or deductions allowed by this article are applicable to the case at bar. The realization that the land did not contain oil was not, for instance, an "unforeseen cause by reason of which the property has been prematurely discarded," because petitioner bought the property as potential oil land with knowledge, of course, that it might prove nonproductive.

This case is distinguishable from one in which the taxpayer owned merely a right to explore for oil; petitioner owned the land itself.

In any event, it is well settled that a loss is sustained within the meaning of the statute in question only when the transaction in respect of which the loss is claimed is closed and completed by some identifiable event which makes the loss deductible, which event occurs generally only when the property in question is sold or otherwise disposed of. (*New York Ins. Co.* v. *Edwards*, 271 U. S., 109, 116 [T. D. 3872, C. B. V-1, 305]; *United States* v. *White Dental Co.*, 274 U. S., 398, 401 [T. D. 4059, C. B. VI-2, 198]; *Haviland* v. *Edwards* (C. C. A. 2), 20 F. (2d), 905 [T. D. 4094, C. B. VI-2, 204]; *Mastin* v. *Commissioner* (C. C. A. 8), 28 F. (2d), 748, 752; *Deeds* v. *Commissioner* (C. C. A. 6), 47 F. (2d), 695; *Esperson* v. *Commissioner* (C. C. A. 5), 49 F. (2d), 259.) The property here in question was sold, not during the taxable year but in 1923. The deduction claimed was therefore properly disallowed for the year 1921.

Decision affirmed.

ARTICLE 561: Allowable deductions. XIII-4-6618
Ct. D. 777

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTION—CAPITAL EXPENDITURE—COST OF INCREASING CIRCULATION OF A MAGAZINE.

Money expended by a publishing company in increasing the circulation of a magazine is a capital expenditure and not deductible from gross income as an ordinary and necessary business expense within the meaning of section 234(a)1 of the Revenue Act of 1921.

2. SAME—AMORTIZATION—COST OF OBTAINING NEW SUBSCRIPTIONS TO A MAGAZINE.

The cost of obtaining new subscriptions to a magazine may not be amortized over the lives of the subscription contracts under section 234(a)7 of the Revenue Act of 1921, especially where deduction is allowed for the cost of replacement subscriptions, such deduction being in the nature of allowances for depreciation or amortization.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (23 B. T. A., 150) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Meredith Publishing Co., Successor to Successful Farming Publishing Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review decision of United States Board of Tax Appeals.

Before STONE, VAN VALKENBURGH, and BOOTH, Circuit Judges.

[April 17, 1933.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

This is an appeal from an order of redetermination of the Board of Tax Appeals affirming a determination of the Commissioner of Internal Revenue and adjudging against petitioner deficiencies in income taxes for 1922 and 1923 in the respective amounts of $12,694.43 and $9,213.31.

The petitioner is a corporation engaged in the publication of magazines, to wit, "Successful Farming," "Fruit, Garden and Home"—later named "Better Homes and Gardens," and "The Dairy Farmer." In 1922 it purchased the periodical called "The Dairy Farmer," and established another then known as "Fruit, Garden and Home." The Dairy Farmer had at that time a subscription list or circulation structure, of approximately 58,000. As stated by the Board of Tax Appeals, and in this both parties agree, a campaign was forthwith started to build up circulation for "The Dairy Farmer" and to establish a circulation for "Fruit, Garden and Home." In 1922 petitioner expended $15,060.10 and in 1923, $49,729.13, in securing subscriptions for "The Dairy Farmer." Of the latter amount $5,338.77 represented expenses incurred in securing renewal subscriptions. In 1922 it expended $92,828.74 in building up the circulation of "Fruit, Garden and Home," of which amount $72.75 was for renewals. In 1923, for the latter magazine, it spent $104,454.28 in securing new subscriptions, and $13,899.91 for renewal subscriptions. In general the Commissioner allowed deductions for all expenditures incurred in securing renewal subscriptions, and disallowed those in acquiring new subscriptions. He allowed the amount of $15,060.10 expended in 1922 upon the circulation of "The Dairy Farmer," because the circulation structure of that magazine was not increased during that year. For 1923 he allowed $47,339.19 of the amount expended in securing new subscriptions to "Fruit, Garden and Home," "as the proper portion applicable to maintenance of the established circulation structure." He disallowed $92,755.99 expended in building up the circulation of "Fruit, Garden and Home" in 1922, "since it represents an expenditure to acquire new subscriptions, that magazine having no circulation at the beginning of the period."

As has been said, these rulings of the Commissioner were sustained by the Board of Tax Appeals. The questions presented are thus succinctly stated by counsel for the Government:

"1. Whether the cost of increasing circulation of a magazine is a capital expenditure or merely an expense in the nature of upkeep and therefore deductible from gross income under section 234(a)1 of the Revenue Act of 1921.

"2. If circulation is a capital asset, whether it is subject to periodic exhaustion with the expiration of subscriptions so as to entitle the owner to a deduction therefor from gross income under section 234(a)7 of the Revenue Act of 1921."

The contention of the petitioner is thus stated in argument and brief:

"The expenses of a publisher in building up a clientele for a magazine are in the same category essentially as expenses of a mercantile or other enterprise to attract new customers. The good will so acquired is in neither case a capital asset."

That the circulation of a magazine or newspaper is an intangible capital asset does not admit of doubt. The Commissioner of Internal Revenue has consistently so held from his first consideration of the question, and his holding has been upheld and approved by the courts. (*Danville Press, Inc.*, 1 B. T. A., 1171; *Gardner Printing Co.*, 4 B. T. A., 37; *Herald-Despatch Co.*, 4 B. T. A., 1096; *Walter S. Dickey*, 14 B. T. A., 1295; *Tulsa Tribune Co.*, 21 B. T. A., 1405; *Public Opinion Publishing Co.*, 6 B. T. A., 1255; *Commercial Nat'l Ins. Co.*, 12 B. T. A., 655, 657; *News Publishing Co.* v. *Blair* (C. A. D. C.), 29 F. (2d), 955; *Strong Publishing Co.* v. *Commissioner* (C. C. A. 7), 56 F. (2d), 550 [Ct. D. 514, C. B. XI-2, 389].)

And it must follow that money expended in building up this circulation structure is a capital expenditure, and not the ordinary and necessary expense incurred in carrying on a trade or business, under the provisions of section 234(a)1 of the Revenue Act of 1921. Such expenditure under said section 234, to be deductible must be in the nature of upkeep—not of investment (*Duffy* v. *Central R. R. Co. of New Jersey*, 268 U. S., 55, 63 [T. D. 3704, C. B. IV-1, 143]); and must be both ordinary and necessary in the conduct of a business or trade. (*Robinson* v. *Commissioner* (C. C. A. 8), 53 F. (2d), 810; *Lloyd* v. *Commissioner* (C. C. A. 7), 55 F. (2d), 843 [Ct. D. 542, C. B. XI-2, 268].)

In *Herald-Despatch Co.* (4 B. T. A., 1096) the Board of Tax Appeals well said:

"Circulation, in reality, is the very foundation upon which a newspaper publishing business is built. It is always a matter of first importance in the purchase and sale of a newspaper publication."

And, again, in *Gardner Printing Co.* (4 B. T. A., 37, 39, 40):

"Perhaps the most important asset of a news publishing business is its reading and advertising clientele. The advertising clientele is built up on the basis of an approved subscription list, and, therefore, in the parlance of the publisher's business, this asset is known as the circulation structure. When a publishing business is started a considerable portion of its capital goes into the development and upbuilding of this circulation structure, in much the same manner that a manufacturing business puts its capital into factory buildings and machinery which constitute its plant. So the circulation structure of a news publishing plant represents a considerable portion of the capital investment. This circulation structure is evidenced by subscription lists and book accounts which, in a well-regulated publishing business, are periodically verified and audited in a manner not unlike the periodical inventorying of plant and equipment of other business. And to the same extent that an inventory of buildings and machinery represents capital for a manufacturing business, so a verified and audited circulation structure must represent capital of a publishing business."

It was stated in argument before us that a magazine, having a subscription list, or circulation, of from 100,000 to 200,000 subscribers, has a sale value of at least $1,000,000, while its tangible assets in the way of building, printing presses, etc., may be worth less than $50,000 or $100,000. Its sale value is governed largely by the amount it can earn through its advertising, the rates for which are based upon circulation. Examination of the circulation and advertising data disclosed by the exhibits contained in the record confirms this statement. In 1922, "Successful Farming," an established publication, had an income from advertising of $1,225,406.50. With "The Dairy Farmer," and "Better Homes and Gardens," the increased revenue from advertising for years kept pace with the increases in circulation. In these, as in publications generally, the circulation structure, once substantially established, becomes comparatively stable, and does not fluctuate in strict ratio to the number of subscriptions. This, however, is convincing proof that such a structure is a positive capital asset, irrespective of incidental fluctuations in circulation, due to temporary influences, such as economic depression, causing withdrawals, and failure of renewals. In general, it may be said that the circulation of a magazine which carries advertisements is the main basis of its commercial value. This is practically conceded by representatives of petitioner. The witness Corbin, director of sales and promotion for the Meredith Publishing Co., said:

"Obviously for advertising purposes the circulation structure has value. People are going to pay more for advertising in a magazine having a large circulation than a small circulation; our rate is in proportion to the value of our circulation and the quality of it."

Honnicutt, circulation director of petitioner, testified thus:

"There is an increase in advertising rate. You get more advertising when you get more circulation. That is the measure by which it is gauged, an intangible measure."

It is urged by petitioner that the system of income tax laws does not contemplate capitalization of intangibles, such as good will; that a magazine circulation partakes of the nature of good will, and that the expenses of a publisher in building up the circulation of a magazine "are in the same category essentially as expenses of a mercantile or other enterprise to attract new customers"; that the good will so acquired is in neither case a capital asset. None of these positions are so far tenable in law as to condition the disposition of this case. As has been pointed out, the circulation of a newspaper or magazine is an intangible capital asset. The circulation structure is the most important capital asset of a news-publishing or magazine business. (*Appeal of Gardner Printing Co.*, 4 B. T. A., 37; *News Publishing Co.* v. *Blair* (C. A. D. C.), 29 F. (2d), 955, 958.) It is true that circulation has some of the qualities of good will. It is rather a manifestation of the existence of good will, but is an item distinct from it. (*Strong Publishing Co.* v. *Commissioner*, supra, l. c., 551.) However, it is well settled that payments made for the purchase of good will, as an incident to the passing of property, may constitute part of invested capital. (*Three-In-One Oil Co.* v. *United States* (Ct. Cls.), 35 F. (2d), 987.) There is nothing in *Red Wing Malting Co.* v. *Willcuts* (C. C. A. 8) (15 F. (2d), 626 [T. D. 3980, C. B. VI-1, 225]) in conflict with this view. But in the case before us the subscriptions were procured as a part of the circulation structure, the main item of invested capital, with its incident, merely, as a manifestation of good will.

There is an essential difference between the expenses of a publisher in building up a circulation and the advertisements of a mercantile or business enterprise, designed to attract new customers. Advertising, in ordinary business, does not generally, if at all, increase the price of the commodity advertised and sold, while, in the case of a magazine, the increased circulation does directly affect the rate charged for advertising in the periodical—the main commodity which the magazine has for sale. In this way the money expended to increase circulation augments the capital structure of the publication, and becomes a capital expenditure.

It is also suggested that this circulation structure, being somewhat of the nature of good will, and an intangible, is not subject to the wear and tear of tangible property which forms the basis of depreciation, and is, therefore, improperly classed as a capital asset. A sufficient answer to this suggestion is that circulation is an item distinct from good will, and that susceptibility to depreciation is not an essential element of a capital asset.

Petitioner's final and alternative contention is that the cost of new subscriptions should be amortized over the lives of the subscription contracts, some of which are for longer periods than one year. In our judgment this contention is based upon a misconception of the inherent nature of the circulation structure. That structure, once established, is not a mere aggregation of disconnected individual subscriptions, but rather a combination of such units with a measurable degree of permanency. In the Herald-Despatch case (4 B. T. A. (l. c., 1105, 1106)) the Board of Tax Appeals said:

"The term circulation, as used in newspaper publishing businesses, comprehends something much broader than what may be characterized as mere subscription lists. * * * It comprehends, on the one hand, a body of subscribers whom experience has demonstrated may be relied upon with some degree of certainty to continue to take and renew their subscriptions to the paper in the future. On the other hand, it includes within its scope an established advertising clientele who use the paper as a medium by which to reach the purchasing public."

With this statement we agree. However, we feel that this contention of petitioner, if in any degree meritorious, is substantially satisfied by the practice of allowing deductions for the expense of securing the number of subscriptions required to replace expirations and cancellations during the year. In the case at bar the Board stated the practice thus:

"Circulation structure is an asset which must be continually supported by bringing in new subscriptions to replace those which are continually expiring. (*Gardner Printing Co.*, supra.) The cost of so supporting the circulation structure is an ordinary and necessary business expense but the cost of building up or establishing a circulation structure must be charged to capital."

In this manner the integrity of the circulation structure in each year is maintained. The deductions permitted partake of the nature of allowances for depreciation or amortization, for which petitioner contends, and take care of the matter in a practical way and with least complexity and confusion. The decision of the Board of Tax Appeals is affirmed, and the petition for review is dismissed.

ARTICLE 561: Allowable deductions.

XIII-9-6676
Ct. D. 792

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—LOSS—BONA FIDE SALE—BURDEN OF PROOF.

Where by unanimous resolution of the directors of a family corporation organized under the laws of California certain assets were transferred to individuals who at that time were a majority of its directors, an oral agreement then being made that, in case of a subsequent assessment against certain stock included in the transfer, payment of the promissory notes given as consideration therefor would not be required, and where such assessments were later made and the notes canceled, the burden is upon the corporation to establish the good faith of the transaction. In the absence of such proof and of sufficient evidence as to the value of the assets transferred, and in view of section 2235 of the Civil Code of California, the transaction can not be regarded as an actual bona fide sale giving rise to a deductible loss.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (25 B. T. A., 321) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Wishon-Watson Co., a Corporation, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition to review an order of the United States Board of Tax Appeals.

Before WILBUR, MACK, and GARRECHT, Circuit Judges.

[June 14, 1933.]

OPINION.

GARRECHT, Circuit Judge: This is an appeal from a decision of the United States Board of Tax Appeals holding that petitioner is not entitled to deductions for losses claimed as a result of an alleged sale of certain of its assets to two members (a majority) of its board of directors, for the reason that petitioner has failed to show that the transfer was an actual bona fide sale.

The material facts found by the Board of Tax Appeals are as follows:

Petitioner, a California corporation with its principal place of business at Fresno, for a number of years prior to December 26, 1925, was the owner of the following property: 1,000 shares Swan Oil Co. stock, par value $1 per share; 1,000 shares Andy Fitz Mining & Milling Co. stock, par value $1 per share; 439.30 shares La Hacienda Co. stock, par value $100 per share; three-fourths interest in the San Joaquin Marble Quarry placer mining claim; one-half interest in land known as Black Mountain oil land.

On December 26, 1925, by unanimous consent a special meeting of the board of directors of the Wishon-Watson Co. was held. At said meeting the following persons were present: Director A. Emory Wishon, Director R. W. Watson, Director A. G. Wishon, who were all the members of said board of directors. President A. Emory Wishon presided as the chairman of the meeting.

Mr. A. G. Wishon presented to the board an offer made to the corporation by A. E. Wishon and R. W. Watson, who at the time were a majority of the board of directors, to buy for the price of $6,000 the above described assets of the corporation.

Upon motion duly made and seconded, it was unanimously resolved that it appeared to be to the best interest of the corporation that it accept the offer made by A. E. Wishon and R. W. Watson and sell to them said assets for the price of six thousand dollars ($6,000).

The resolution further directed the officers of the corporation to prepare and execute proper assignments and conveyances of the above assets to A. E. Wishon and R. W. Watson upon receiving payment of the amount named above.

Thereafter in 1925, pursuant to the resolution above noted, the petitioner transferred the assets in question to the said A. Emory Wishon and R. W. Watson, receiving therefor in that year the promissory note of each of the parties for $3,000.

At the time of the adoption of the resolution referred to, authorizing the transfer of the assets, it was orally agreed that in the event an assessment should be made on the stock of La Hacienda Co., the petitioner would cancel the notes and not require the payment thereof. Subsequently an assessment of $10 per share was made on the stock of La Hacienda Co. Pursuant to the oral agreement, petitioner waived payment of the notes, canceled them, and returned them to the makers, who destroyed them. The total of the two notes, or $6,000, was deducted as a bad debt by the petitioner in its income tax return for 1926.

Upon the transfer of the above described assets, A. Emory Wishon and R. W. Watson each received one-half thereof. When R. W. Watson received notice of the assessment on the stock of the La Hacienda Co., he informed A. Emory Wishon that he did not intend to pay it and that if he, Wishon, cared to pay it, he could have his, Watson's, stock. Wishon paid the assessment and Watson gave his La Hacienda stock to him. Watson retained, however, the other stocks and interests theretofore transferred to him by petitioner.

Prior to the transfer by the petitioner in 1925 of the stock of La Hacienda Co., six assessments had been made on it; five of them were assessments of 10 per cent, or $4,393 each, and one was an assessment of 5 per cent, or $2,196.50.

Since 1925 three further assessments have been made on this stock and these have been paid by A. Emory Wishon.

The stockholders of the petitioner and the holdings of each at the time of the transfer of the assets to A. Emory Wishon and R. W. Watson were as follows: A. G. Wishon, 250 shares; Henriette E. Wishon, 250 shares; A. Emory Wishon, 250 shares; Jennie Wishon Watson, 240 shares; R. W. Watson, 10 shares. A. G. Wishon and Henriette E. Wishon were husband and wife. A. Emory Wishon was their son. Jennie Wishon Watson was their daughter and the wife of R. W. Watson. At the time of the transfer, the board of directors consisted of A. G. Wishon, A. Emory Wishon and R. W. Watson.

In its income tax return for 1925, petitioner took a deduction as a loss sustained on the transfer of the assets in the amount of $53,959.28, representing the difference between the cost of such assets, $59,959.28, and the amount of the two notes of $6,000. In determining the deficiency here involved the respondent disallowed the deduction taken by the petitioner.

Appeal from this action was taken to the United States Board of Tax Appeals, which Board decided adversely to petitioner, which decision petitioner now asks this court to review.

Since the evidence has not been certified with the record, the findings of fact of the Board of Tax Appeals are binding on this court. (*Kendrick Coal & Dock Co.* v. *Commissioner* (C. C. A. 8), 29 F. (2d), 559; *Conrad & Co.* v. *Commissioner* (C. C. A. 1), 50 F. (2d), 576.)

The holding of the Board that the transfer of title by the petitioner to certain of its directors was insufficient to avoid the tax must stand unless as a matter of law that decision was clearly erroneous.

Petitioner argues that the admission of the Board that title to the assets were actually transferred by the corporation precludes a finding that the transaction was not bona fide. This statement is not correct. This family corporation could pass the title to all of its assets to its constituent shareholders without consideration or even in bad faith and the transfer of title be valid, at least until called in question, but the matter having been raised in this case it is our opinion that the record in this regard sustains a finding of want of good faith.

It is admitted by petitioner that the "principle of corporate entity can not be used to cloak a transaction which is essentially a fraud upon the public revenue"; but petitioner contends that the opinion of the board of directors of a corporation has always been considered determinative of the corporate acts unless evidence has been produced to show the contrary, and it is insisted that the burden of establishing mala fides is upon the Commissioner in this case. In support of this contention petitioner cites the case of *Budd* v. *Commissioner* (C. C. A. 3) (43 F. (2d), 509). This case turned upon the application and construction of the Revenue Act of 1928 (section 601, 45 Stat., 872) (26 U. S. C. A., section 1219), as follows:

"In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect to such issue shall be upon the Commissioner."

We do not consider this case as sustaining the position of the petitioner here. As pointed out by the court in that case the statute was simply declaratory of what the law was and has been and the purpose of the enactment was to correct certain rules of practice or procedure theretofore prevailing in trials before the Board of Tax Appeals. It was not intended to be authority for obviating the well established principle of law that where a transaction is shown to have been consummated by those in a fiduciary relationship with themselves as individuals, affirmative proof of good faith is required.

The transaction at best was a mere transfer of assets by the petitioner to certain of its shareholders without any real consideration. The facts disclosed by the record warranted the Board of Tax Appeals in finding that the transfer in question was not an actual bona fide sale giving rise to a deductible loss. In the case of *Rasmusson* v. *Eddy's Steam Bakery* (C. C. A. 9) (57 F. (2d), 27), where the facts were somewhat similar to those here presented, this court held that there was no actual bona fide sale by the corporation of its assets.

The facts and the record show that a majority of the board of directors as representing the petitioner dealt with themselves as individuals.

"A director who is disqualified by reason of personal interest in the matter before a director's meeting loses pro hac vice his character as a director and he can not be counted for the purpose of making out a quorum."

"Nor can the vote of a director who is so disqualified be counted for the purpose of determining whether a resolution has been passed by a majority vote." (Fletcher Cyc. Corporations, volume 3, section 1889, pages 3075, 3076.)

Furthermore the petitioner is a California corporation and under the law of California in a transaction of this kind, insufficient consideration and undue influence are presumed. Civil Code of California, section 2235, reads as follows:

"Presumption against trustees. All transactions between a trustee and his beneficiary during the existence of a trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

It is undoubtedly the rule in California that under certain facts and circumstances, where an officer of a corporation attempts to deal with the corporation the courts will not permit any investigation into the fairness or unfairness of the transaction, nor allow the officer to show that the dealing was for the best interest of the corporation. The facts established by the Board of Tax Appeals bring this case within the rule relating to the conduct of corporate officers, as laid down in *Western States Life Insurance Co.* v. *Lockwood* (166 Cal., 185, 135 Pac., 496, 500):

"It matters not that the officer is entirely free from any intent to injure the corporation in the slightest degree, acting in fact in the highest good faith throughout, or that his actions really advantaged the corporation. No inquiry may be made into such matter. The inquiry in this regard is stopped when the relation is disclosed."

When the transfer of the assets of the petitioner to the directors was called in question and the facts disclosed, as found by the Board, that a fiduciary relationship existed between the petitioner and a majority of the Board dealing with themselves as individuals, the presumption of bad faith and undue influence attached to the transaction and it then became incumbent upon the petitioner to establish not only an actual sale, but its good faith as well. This it failed to do.

While the Board did not question the transfer of title of the assets, it held that the facts and circumstances surrounding the transaction were such as did not constitute a bona fide sale giving rise to the deductible loss claimed. The findings of fact well sustain the conclusions expressed by the Board in its opinion as follows:

"When we consider the relationship of the parties, the fact that they were all members of the Wishon family, except Watson who was a son-in-law, and that all of them together owned all the stock of the petitioner, it may well be, so far as the record discloses, that the corporation intended to transfer the assets without any expectation of any consideration in money or money's worth being paid. [Considering that] The two notes for $3,000 [were] surrounded with the conditions of cancellation, [and] the past record of the La Hacienda Co. [and] the reasonable probability that an assessment would be made against that stock in some amount, it might fairly be gathered from all the circumstances that the parties did not intend to pay any money whatever for the assets received from the petitioner and that the petitioner did not intend or expect to receive any. The notes were not negotiable with these uncertainties and conditions attached to them. They simply amounted to a promise to pay if and in the event that certain circumstances would not occur when it might reasonably have been anticipated at the time that they would occur.

"Under the circumstances of this case we do not think that the petitioner has shown that an actual bona fide sale of its assets was made. The element of valuable consideration, which distinguishes a sale from a gift or other transfer without consideration is not sufficiently shown."

It follows therefore, that unless the evidence shows that the assets in question in 1925 did not exceed in value $6,000 petitioner was not entitled to the deduction claimed. In this connection we concur in the conclusions of the Board that the evidence of value introduced by petitioner was not sufficient. The Board in its opinion said:

"The only evidence as to the actual value of the assets transferred is the testimony of one of the individuals who received the assets to the effect that the directors did not consider them to be worth more than $6,000. * * * There is nothing to indicate that all of the assets would have been worthless, if some assessment, however small, was made against that particular stock." (Cf. *First Sav. Bank of Ogden* v. *Burnet* (C. App. D. C.), 53 F. (2d), 919 [Ct. D. 451, C. B. XI-1, 280].)

Petitioner having failed to establish a bona fide sale, or that the assets in question were worth but $6,000 in 1925, the decision of the Board of Tax Appeals must be affirmed.

ARTICLE 561: Allowable deductions.

REVENUE ACTS OF 1918 AND 1921.

Advances to subsidiary on notes believed to be uncollectible. (See Ct. D. 824, page 260.)

ARTICLE 561: Allowable deductions.

XIII-20-6795
Ct. D. 827

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—AMORTIZATION OF BOND DISCOUNT—SEPARATE ENTITY OF VENDOR AND VENDEE CORPORATIONS.

Where petitioner corporation, which was organized in 1922 for the purpose of consolidating into a single enterprise businesses theretofore carried on by three separate corporations, acquired the assets and assumed the liabilities of such corporations in exchange for agreed proportions of its own capital stock, it may not claim, in its income tax return for 1926, deduction of an amount representing amortization for that year of the discount upon certain 10-year bonds which had been sold in 1919 by one of the vendor corporations, since the statute confines the use of a loss to the taxpayer who sustains it, and, there being an outright sale of the assets of one corporation to another, petitioner is an entity distinct and separate from the vendor and does not succeed to its right to amortize the bond discount.

2. CASE DISTINGUISHED.

Western Maryland Ry. Co. v. *Commissioner* (33 Fed. (2d), 695) distinguished.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Turner-Farber-Love Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

[December 11, 1933.]

OPINION.

GRONER, Associate Justice: This is a tax case in which the stipulated facts follow:

"The petitioner is a domestic corporation organized under the laws of the State of Delaware, with its principal office at Memphis, Tenn., its charter being issued on January 10, 1922. It is engaged in the business of the manufacture and sale of lumber.

"On or about January 10, 1922, pursuant to resolutions adopted by the stockholders of the petitioner and to resolutions adopted by the stockholders of Darnell-Love Lumber Co., Leland Stave & Lumber Co., and Russe & Burgess, Inc., the petitioner, in exchange for its own stock, acquired all the assets and assumed all the liabilities of Darnell-Love Lumber Co., Leland Stave & Lumber Co., and Russe & Burgess, Inc., the stockholders of the three last-named corporations receiving all of the stock in the petitioner corporation in proportion to the value of their respective stock holdings in said last three named corporations.

"The organization of the petitioner was for the purpose of consolidating into a single enterprise of the three businesses theretofore separately carried on by Darnell-Love Lumber Co., Leland Stave & Lumber Co., and Russe & Burgess, Inc. The stockholders of Darnell-Love Lumber Co. received directly from the petitioner an agreed proportion of the petitioner's capital stock in exchange for the transfer to the petitioner of all the assets and liabilities of said Darnell-Love Lumber Co.

"Under date of December 1, 1919, Darnell-Love Lumber Co. sold its bonds maturing December 1, 1929, and having an aggregate par value of $300,000, at a discount of $30,000. In its income-tax return for 1926 the petitioner claimed as a deduction from gross income the sum of $3,000 as amortization for that year of said discount of $30,000."

The Commissioner disallowed the deduction, and the Board sustained his action.

Petitioner's contention is that by acquiring the assets and assuming the liabilities including the liability on the outstanding bonds of the Darnell-Love Co., it is entitled to the claimed deduction. It rests its case on *Western Maryland Ry. Co.* v. *Commissioner* (33 F. (2d), 695). That was a tax case, and, like this, involved the question whether, where bonds are sold at a discount, such discount may be amortized for income-tax purposes over the life of the bonds by deducting the annual proportion thereof from gross income for each year (33 F. (2d), 696). The case was one in which the right to make the deduction was sustained on behalf of a reorganized corporation which had taken over the assets and assumed the liabilities of another. But we think there are differences between the controlling facts there and here. In the Western Maryland case the practical result of the things done was no more than the reorganization of a going concern. As the Court of Appeals there said, "the facts with regard to the reorganization are that the corporation which held the railroad property at that time, *The* Western Maryland Railway Co., owned all of the stock in seven subsidiary corporations whose property it operated in all respects as its own, keeping but one set of books and making reports to the Interstate Commerce Commission just as though all of the properties of all of the corporations were owned and operated by it as a single system." In the instant case there was not, as in the Western Maryland case, a mere absorption under a single corporate form of the assets of corporations subsidiary to the corporation absorbed. Here, on the contrary, "the stockholders of Darnell-Love Lumber Co. received directly from the petitioner an agreed proportion of the petitioner's capital stock in exchange for the transfer to the petitioner of all the assets and liabilities of said Darnell-Love Lumber Co." There was obviously no merger or consolidation of the two companies but an outright sale of the assets of the one to the other. The vendor until dissolved continued to be a corporation. The sale of its assets did not destroy its identity, and it might have continued legally thereafter to do any business its corporate charter authorized. It might have filed a tax return and claimed a loss on the sale of its bonds or on the sale of its other assets. Granted it had the right to amortize its bond discount, petitioner, in purchasing its assets, did not succeed to this right any more than it would have succeeded to the right to set up its losses occurring prior to the purchase. (*Athol Mfg. Co.* v. *Commissioner*, 54 F. (2d), 230 [Ct. D. 513, C. B. XI-2, 252].)

What we have just said is true because the tax laws treat separate corporations as separate taxpayers. Here petitioner is a distinct and separate corporation from the Darnell company. In that aspect it is not contested that its deductions are limited to its own expenses and losses, but petitioner's position is that, though a separate legal entity, substance rather than form should control and that, since it was organized for the express purpose of taking over the assets of the old companies, when this was done, it stepped into the place of those companies and succeeded to all of their rights. That was the theory on which the Western Maryland case turned, but we are unable to find a justification in the statutes for applying it here, and this because, to repeat, we are faced with the fact of two distinct corporations, each with distinct rights and liabilities. (The new company took over the assets of three companies but only one of the old companies is involved here.) The statute confines the use of a loss to the taxpayer who sustains it. (*New Colonial Ice Co.* v. *Commissioner*, 66 F. (2d), 480.) Nor is the situation in this respect changed because in the transfer of assets from the one company to the other a continuing business is involved. The fact of separate identity still remains, and the rule that courts will look beyond the shadow to the substance, which petitioner invokes, is here no more applicable than it was in *New York R. Co.* v. *Burnet* (64 F. (2d), 152, 154), where we said it is applied only in cases in which to refuse to apply it would be to countenance fraud.

Affirmed.

ARTICLE 561: Allowable deductions. XIII-21-6808
(Also Section 213(a), Article 35.) Ct. D. 829

INCOME TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

1. GROSS INCOME—ACCRUAL BASIS—BAD DEBT INCURRED IN TAXABLE YEAR.

Where a taxpayer on the accrual basis sold goods on open account in 1920 to a company which later went into bankruptcy, the debt to the extent that it was ascertained to be worthless within the taxable year is nevertheless, apart from any question of deduction, returnable as 1920 income. When accounts are kept and returns made on the accrual basis, the right to receive rather than the actual receipt determines the inclusion of an amount in gross income.

2. DEDUCTION—BAD DEBT—LOSS.

Where a debt is ascertained to be partially but not entirely worthless during the year 1920, no deduction is allowed therefor under section 234(a)5 of the Revenue Act of 1918 as a debt ascertained to be worthless and charged off within the taxable year, or under section 234(a)4 as a loss sustained during the taxable year. Subdivisions (4) and (5) are mutually exclusive, and what is excluded from deduction under subdivision (5) can not be regarded as allowed under subdivision (4).

SUPREME COURT OF THE UNITED STATES.

727. *Spring City Foundry Co., petitioner,* v. *Commissioner of Internal Revenue.*

728. *Spring City Foundry Co., petitioner,* v. *Commissioner of Internal Revenue.*

On writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 30, 1934.]

OPINION.

Mr. Chief Justice HUGHES delivered the opinion of the court.

Petitions for writs of certiorari were granted, "limited to the question whether a debt ascertained to be partially worthless in 1920 was deductible in that year under either section 234(a)4 or section 234(a)5 [of the Revenue Act of 1918] and to the question whether the debt was returnable as taxable income in that year to the extent that it was then ascertained to be worthless."

Petitioner kept its books during the year 1920 and filed its income tax return for that year on the accrual basis. From March, 1920, to September, 1920, petitioner sold goods to the Cotta Transmission Co. for which the latter became indebted in the amount of $39,983.27, represented by open account and unsecured notes. In the latter part of 1920 the Cotta company found itself in financial straits. Efforts at settlement having failed, a petition in bankruptcy was filed against the company on December 23, 1920, and a receiver was appointed. In the spring of 1922 the receiver paid to creditors, including petitioner, a dividend of 15 per cent, and, in 1923, a second and final dividend of 12½ per cent.

Petitioner charged off on its books the entire debt on December 28, 1920, and claimed this amount as a deduction in its income tax return for that year. It included as income in its returns for 1922 and 1923 the dividends received in those years. The Commissioner disallowed the amount claimed as a deduction in 1920 but allowed a deduction in 1923 of $28,715.76, the difference between the full amount of the debt and the two dividends.

On review of the deficiency assessed by the Commissioner for 1920, the Board of Tax Appeals found that the debt was not entirely worthless at the time it was charged off. An offer had been made in November, 1920, to purchase the assets of the debtor at 33⅓ per cent of the creditors' claims and the offer had been declined. The Board concluded that in view of all the circumstances, including the probable expense of the receivership, the debt could be regarded as uncollectible, at the time of the charge-off, to the extent of $28,715.76, and allowed a deduction for 1920 of that amount. (25 B. T. A., 822.) This ruling, contested by both the Commissioner and the taxpayer, was reversed by the Circuit Court of Appeals upon the ground that "there was in 1920 no authority for a debt deduction unless the debt were worthless." (67 F. (2d), 385, 387.) In view of the conflict of decisions upon this point,[1] this court granted writs of certiorari limited as above stated.

1. Petitioner first contends that the debt, to the extent that it was ascertained in 1920 to be worthless was not returnable as gross income in that year, that is, apart from any question of deductions, it was not to be regarded as taxable income at all. We see no merit in this contention. Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues. When a merchandising concern makes sales, its inventory is reduced and a claim for the purchase price arises. Article 35 of Regulations 45 under the Revenue Act of 1918 provided: "In the case of a manufacturing, merchandising, or mining business 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources."[2]

On an accrual basis, the "total sales," to which the regulation refers, are manifestly the accounts receivable arising from the sales, and these accounts receivable, less the cost of goods sold, figure in the statement of gross income. If such accounts receivable become uncollectible, in whole or part, the question is one of the deduction which may be taken according to the applicable statute. (See *United States* v. *Anderson*, 269 U. S., 422, 440, 441 [T. D. 3839, C. B. V–1, 179]; *American National Co.* v. *United States*, 274 U. S., 99, 102, 103 [T. D. 4099, C. B. VI–2, 193]; *Brown* v. *Helvering*, 291 U. S., 193, 199 [Ct. D. 786, page 223, this Bulletin], *Rouss* v. *Bowers*, 30 F. (2d), 628, 629.) That is the question here. It is not altered by the fact that the claim of loss relates to an item of gross income which had accrued in the same year.

2. Section 234(a)5 of the Revenue Act of 1918 provided for the deduction of worthless debts, in computing net income, as follows: "Debts ascertained to be worthless and charged off within the taxable year." Under this provision, the taxpayer could not establish a right to the deduction simply by charging off the debt. It must be ascertained to be worthless within the taxable year. In this instance, in 1920, the debt was in suspense by reason of the bankruptcy of the debtor but it was not a total loss. What eventually might be recovered upon it was uncertain, but recovery to some extent was reasonably to be ex-

[1] See *Sherman & Bryan, Inc.* v. *Commissioner* (C. C. A. 2) (35 F. (2d), 713, 716); *Davidson Grocery Co.* v. *Lucas* (Ct. App. D. C.) (37 F. (2d), 806); *Murchison National Bank* v. *Grissom* (C. C. A. 4) (50 F. (2d), 1056). Compare *Minnehaha National Bank* v. *Commissioner* (C. C. A. 8) (28 F. (2d), 763); *Collins County National Bank* v. *Commissioner* (C. C. A. 5) (48 F. (2d), 207, 208) [Ct. D. 390, C. B. X–2, 362].

[2] This provision has been carried forward in the regulations under the later Revenue Acts. (See Regulations 77, article 55.)

pected. The receiver continued the business and substantial amounts were subsequently realized for the creditors. In this view, the Board of Tax Appeals decided that the petitioner did not sustain a loss in 1920 "equal to the total amount of the debt" and hence that the entire debt was not deductible in that year.

The question, then, is whether petitioner was entitled to a deduction in 1920 for the portion of the debt which ultimately—on the winding up in bankruptcy—proved to be uncollectible. Such a deduction of a part of the debt, the Government contends and the Circuit Court of Appeals held, the Act of 1918 did not authorize. The Government points to the literal meaning of the words of the statute, to the established administrative construction, and to the action of the Congress in recognition of that construction. "Worthless," says the Government, means destitute of worth, of no value or use. This was the interpretation of the statute by the Treasury Department. Article 151 of Regulations 45 (made applicable to corporations by article 561) provided that "An account merely written down" is not deductible.[3] To the same effect was the corresponding provision of the regulations under the Revenue Act of 1916.[4]

The right to charge off and deduct a *portion* of a debt where during the taxable year the debt was found to be recoverable only in part, was granted by the Act of 1921. By that Act, section 234(a)5 was changed so as to read: "Debts ascertained to be worthless and charged off within the taxable year (or in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part." We think that the fair import of this provision, as contrasted with the earlier one, is that the Congress, recognizing the significance of the existing provision and its appropriate construction by the Treasury Department, deliberately intended a change in the law. (*Shwab* v. *Doyle*, 258 U. S., 529, 536 [T. D. 3339, C. B. I–2, 312]; *Russell* v. *United States*, 278 U. S., 181, 188 [T. D. 4260, C. B. VIII–1, 206].)

This intent is shown clearly by the statement in the report of the Committee on Ways and Means of the House of Representatives in relation to the new provision. The committee said explicitly—"Under the present law worthless debts are deductible in full or not at all."[5] While the change was struck out by the Finance Committee of the Senate, the provision was restored on the floor of the Senate and became a law as proposed by the House.[6] Regulations 62 issued by the Treasury Department under the Act of 1921 made a corresponding change in article 151. The Treasury Department consistently adhered to the former rule in dealing with deductions sought under the Act of 1918.[7]

In numerous decisions the Board of Tax Appeals has taken the same view of the provision of the Act of 1918.[8] (See e. g., *Appeal of Steel Cotton Mill Co.*,

[3] Article 151 of Regulations 45 provided: "*Bad debts.*—An account merely written down or a debt recognized as worthless prior to the beginning of the taxable year is not deductible. Where all the surrounding and attendant circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction. Bankruptcy may or may not be an indication of the worthlessness of a debt, and actual determination of worthlessness in such a case is sometimes possible before and at other times only when a settlement in bankruptcy shall have been had. * * *"

See, also, article 151 of Regulations 45 (revised) promulgated January 28, 1921.

[4] Regulations 33 (revised), article 151.

[5] House Report No. 350, Sixty-seventh Congress, first session, page 11. The statement of the committee is: "Under the present law worthless debts are deductible in full or not at all, but section 214 would authorize the Commissioner to permit a deduction for debts recoverable only in part, or in his discretion to recognize a reserve for bad debts—a method of providing for bad debts much less subject to abuse than the method of writing off bad debts required by the present law." Section 214 related to deductions by individuals and contained the same new provision as that inserted in section 234(a)5, quoted in the text, with respect to deductions by corporations.

[6] Senate Report No. 275, Sixty-seventh Congress, first session, page 14; Congressional Record, volume 61, part 6, pages 5814, 5939–5941, 6109, 6110; part 7, page 6727.

[7] In Treasury Decision 3262 (C. B. I–1, January–June, 1922, pages 152, 153), it was said: "No deduction shall be allowed for the part of a debt ascertained to be worthless and charged off prior to January 1, 1921, unless and until the debt is ascertained to be totally worthless and is finally charged off or charged down to a nominal amount, or the loss is determined in some other manner by a closed and completed transaction." (See, also, A. R. R. 7895, C. B. III–2, July–December, 1924, pages 114, 115; A. R. R. 8226, C. B. III–2, pages 116, 119–121.)

[8] The members of the Board of Tax Appeals who dissented in the instant case pointed out that the Board had "consistently held in at least 23 cases that under the Revenue Act of 1918 no deduction may be taken where a taxpayer ascertains that a debt is recoverable only in part." (25 B. T. A., 834.)

1 B. T. A., 299, 302; *Western Casket Co.* v. *Commissioner*, 12 B. T. A., 792, 797; *Toccoa Furniture Co.* v. *Commissioner*, 12 B. T. A., 804, 805.) The contrary result in the instant case was reached in deference to the opinions expressed by the Circuit Court of Appeals of the Second Circuit in *Sherman & Bryan, Inc.*, v. *Commissioner* (35 F. (2d), 713, 716) and by the Court of Appeals of the District of Columbia in *Davidson Grocery Co.* v. *Lucas* (37 F. (2d), 806, 808)—views which are opposed to those of the Circuit Courts of Appeals of the Eighth Circuit in *Minnehaha National Bank* v. *Commissioner* (28 F. (2d), 763, 764) and of the Fifth Circuit in *Collin County National Bank* v. *Commissioner* (48 F. (2d), 207, 208).

We are of opinion that section 234(a)5 of the Act of 1918 authorized only the deduction of a debt ascertained to be worthless and charged off within the taxable year; that it did not authorize the deduction of a debt which was not then ascertained to be worthless but was recoverable in part, the amount that was not recoverable being still uncertain. Here, in 1923, on the winding up, the debt that then remained unpaid, after deducting the dividends received, was ascertained to be worthless and the Commissioner allowed deduction accordingly in that year.

3. Petitioner also claims the right of deduction under section 234(a)4 of the Act of 1918 providing for the deduction of "Losses sustained during the taxable year and not compensated for by insurance or otherwise." We agree with the decision below that this subdivision and the following subdivision (5) relating to debts are mutually exclusive. We so assumed, without deciding the point, in *Lewellyn* v. *Electric Reduction Co.* (275 U. S., 243, 246). The making of the specific provision as to debts indicates that these were to be considered as a special class and that losses on debts were not to be regarded as falling under the preceding general provision. What was excluded from deduction under subdivision (5) can not be regarded as allowed under subdivision (4). If subdivision (4) could be considered as ambiguous in this respect, the administrative construction which has been followed from the enactment of the statute—that subdivision (4) did not refer to debts—would be entitled to great weight.[9] We see no reason for disturbing that construction.

Petitioner insists that "good business practice" forbade the inclusion in the taxpayer's assets of the account receivable in question or at least the part of it which was subsequently found to be uncollectible. But that is not the question here. Questions relating to allowable deductions under the income tax Act are quite distinct from matters which pertain to an appropriate showing upon which credit is sought. It would have been proper for the taxpayer to carry the debt in question in a suspense account awaiting the ultimate determination of the amount that could be realized upon it, and thus to indicate the status of the debt in financial statements of the taxpayer's condition. But that proper practice, in order to advise those from whom credit might be sought of uncertainties in the realization of assets, does not affect the construction of the statute, or make the debt deductible in 1920, when the entire debt was not worthless, when the amount which would prove uncollectible was not yet ascertained, rather than in 1923 when that amount was ascertained and its deduction allowed.

We conclude that the ruling of the Circuit Court of Appeals was correct.

Judgment affirmed.

ARTICLE 563: Sale of capital stock, bonds, and capital assets.

REVENUE ACTS OF 1924 AND 1926.

Amendment of article 563, Regulations 65 and 69. (See T. D. 4430, page 36.)

[9] See Regulations 45, articles 141 to 145; compare articles 151 to 154.

Article 564: Interest. XIII-9-6677
Ct. D. 794

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. Deduction—Interest—"Passbook" and "Full-Paid Stock."
Payments made by a building and loan association organized under the laws of California to holders of its "passbook" and "full-paid" stock are dividends rather than interest, and are not deductible under the provisions of section 234(a) of the Revenue Acts of 1921, 1924, and 1926.

2. Decision Affirmed.
Decision of the Board of Tax Appeals (23 B. T. A., 1059) affirmed.

3. Certiorari Denied.
Petition for certiorari denied October 9, 1933.

Court of Appeals of the District of Columbia.

Fidelity Savings & Loan Association, appellant, v. *David Burnet, Commissioner of Internal Revenue, appellee.*

Appeal from the Board of Tax Appeals.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

[April 24, 1933.]

OPINION.

Groner, Associate Justice: Appellant is a building and loan association organized under the laws of California. In its income-tax returns it deducted as a part of its expenses sums paid to its stockholders semiannually for the years 1921 to 1926, inclusive. The Board decided against the claim, and the question we have to decide is whether amounts paid by appellant to the holders of its "passbook stock" and/or its "full-paid capital stock" were nondeductible dividend distributions or were interest payments.

The applicable statute is section 234(a) of the Revenue Act of 1921 (42 Stat., 227). (The provisions of the Act in the subsequent years are identical.) The section provides:

"That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions * * * (2) All interest paid or accrued within the taxable year on its indebtedness, * * *."

Appellant was authorized to issue 250,000 shares of capital stock with a par value of $100 each, or a total authorized capital of $25,000,000. Its capital stock structure was divided into classes, including installment stock, of which there were three classes, A, B, and C; full-paid stock, known as class D; permanent stock, known as class E; passbook stock, known as class F; and permanent reserve stock, known as class G. The two classes of stock involved here are full-paid stock and passbook stock. The full-paid stock was issued at $100 on full payment in advance. The passbook stock was payable both in time and amount of installment at the option of the subscriber. At the expense of space, but in the interest of clarity, it is thought desirable to insert as a footnote a sample form of each of these two classes of stock.[1] The by-laws of the corporation provide as to the full-paid stock that the corporation would pay cash dividends at a rate not exceeding 7 per cent per annum. As a matter of fact the stock was issued on a 6 per cent basis, without further participation in earnings or profits. It was redeemable by the association at the expiration of five years on six months' advance notice, and it might be surrendered by the holder at face and interest at any time upon three months' notice. The by-laws of the association provide as to the passbook stock that dividends will be declared out of the earnings semiannually at a rate fixed by the board of directors not to exceed 5 per cent. The stock was retirable by the board of directors at any time on 30 days' notice and the holder was given the right to withdraw the amount paid in by him at any time on reasonable notice.

Appellant's position is that the payments made semiannually from time to time by the association to the holders of these two issues of stock constituted interest which under section 234 is deductible. The Commissioner insists that the payments were dividends and likens the holders to preferred stockholders in an ordinary corporation. The difference in position between appellant and the Commissioner involves the determination whether the subscribers of appellant's shares of the classes named were stockholders or were creditors.

The answer is not as simple as the statement of facts just made would indicate. The difficulty grows out of the fundamental differences between an ordinary corporation and a building and loan association. Both, of course, are controlled by charter, by-law provisions, and by statutes of the State of incorporation, but in the case of an ordinary corporation there are certain basic rules of construction which are of universal or nearly universal application, so that well-understood definitions of stockholder and creditor and of interest and dividends apply, but the structure of a building association is in many important respects different from commercial corporations, and equally as different in different States. It is, therefore, in a marked degree essential

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[1] (Full-paid stock.)

This certifies that ____________________ is the owner of one share of the capital stock of the Fidelity Savings and Loan Association amounting to one hundred dollars, which has been fully paid.

This certificate is issued to and accepted by the owner hereof upon the following terms and conditions:

First: That the amount for which this certificate is issued shall bear interest at the rate of six per cent (6%) per annum, payable semiannually at the office of the association in the city of Los Angeles, on presentation and surrender of the annexed coupons as they severally become due.

Second: The Fidelity Savings and Loan Association reserves the right, on or after the expiration of five years from the date hereof, to pay this certificate on any interest payment date, upon mailing, to its recorded owner, written notice, six months prior thereto, and thereupon said principal sum shall become due and shall be paid upon the presentation and surrender of this certificate and all unpaid coupons to the association at its office in the city of Los Angeles, and it may be surrendered, after one year, upon three months' notice, for a sum which with interest previously paid shall equal its face value with interest from the date hereof, to date of withdrawal.

Third: In consideration of the rate of dividend paid hereon, it is agreed that this certificate shall not further participate in any surplus or earnings or profits.

This certificate may be transferred by indorsement and record thereof on the association's books acknowledged hereon.

(Coupon attached to full-paid certificate.)

$3.00.

The Fidelity Savings and Loan Association will pay the bearer three dollars at its office in the city of Los Angeles, Calif., interest on certificate.

(Pass-book shares.)

This certifies that ____________________, a member of the Fidelity Savings and Loan Association, has subscribed for and is the owner of certificate for one hundred savings pass-book shares of the par value of one hundred dollars each, on which dues payments may be made at any time and in any amount not less than one dollar, at his option, until the full par value of the shares has been paid, unless sooner withdrawn. Dividends from the earnings of the association will be credited semiannually, computed on the minimum monthly balance, at the rate of 5 per cent per annum, on the second Monday of July and January of each year.

All payments, together with the dividends credited and accrued, may be withdrawn on demand, excepting that the association reserves the right to require reasonable notice of intention to withdraw not in conflict with its by-laws.

This certificate is issued subject to the articles, by-laws and rules of the Fidelity Savings and Loan Association and is nonnegotiable and is transferable only on the books of the association, and no payment will be received and no withdrawal paid without the presentation of this certificate.

in answering the question to look to the language of the stock certificate, the by-laws of the corporation, and the laws of the State under which the charter was granted. Speaking generally, building associations are either the "mutual" or the "guaranty-stock" type. In case of the former, the basic characteristic is that the association is conducted on the cooperative plan with mutual advantages and benefits to its members who share alike in the profits and losses. In the case of the latter, the stock is permanent, in the sense that it remains as a part of the capital in all respects like the stock of business corporations, and the theory of mutual benefit, namely, the lending of money exclusively to its members to enable them through cooperation to buy or build homes of their own, is not the capstone, but money making, as in the case of an ordinary corporation, is the real objective. Appellant is neither the one nor the other. It is not a purely mutual company because it lends money to whoever is able to borrow without regard to membership in the association. It is not a purely guaranty-stock corporation because in addition to guaranty stock it issues a half dozen other classes as well. In the case of a mutual association there is no doubt, we think, that the money, whether it be called dividends or interest, which is paid by the association to the holders of shares of stock annually or semiannually on account of their stock holdings is a dividend, and this is true because in such associations all classes of stockholders vote at stockholders' meetings, share in the earnings, are eligible to office in the corporation, and, in the event of the insolvency of the corporation and the winding up of its affairs, are entitled only to share in the residue of the assets after the payment of debts. So also in the case of guaranty-stock corporations issuing only that class of stock, which, as we have seen, is permanent and nonwithdrawable; and therefore, a part of the capital of the business, the payments by the association, whether called interest or dividends, are obviously the latter.

But it is contended on behalf of appellant that the rule applicable to mutual and guaranty companies does not apply to it, but that, in view of the different classes of stock issued by it, each class should stand on its own bottom and be judged by the terms and conditions of its issue; that as to its permanent stock which shares last in the profits, money paid by the association on its account is a dividend, but that as to the two classes here involved, the agreement of the association to pay a fixed sum annually coupled with the right of the holder to withdraw and obtain a return of his investment puts these issues in a different class, and that the holders are creditors and the semiannual return is interest.

Appellant relies in large measure on a decision of the District Court of Southern California in *In re Western States Building-Loan Association* (50 F. (2d), 632). The question involved there was the right of shareholders of a building association to file claims as creditors in a bankruptcy proceeding. The stock holdings of the petitioning creditors were like that involved here and the insolvent in that case was an association issuing both redeemable and nonredeemable shares. Referring to the California law, Judge James says that it is there provided that the guaranty stock shall protect not only creditors but other nonpermanent stock as well. He, therefore, concludes from this that as to passbook and full-paid stock the California law, in the event of insolvency, makes the corporation a debtor. But it should be borne in mind that the question decided in that case related to the status of a nonpermanent shareholder of the corporation as of the time of insolvency. There the association was admittedly bankrupt and unable to function and had been placed in the hands of an equity receiver, and the question was whether the holder of withdrawable stock was a creditor who could file a petition in bankruptcy. That the relationship of debtor and creditor in such a case exists is not decisive of the question here. Undoubtedly under the provisions of the California law the withdrawable stockholder of a guaranty company, when the association becomes insolvent, is entitled to share in the assets of the corporation ahead of the holder of guaranty stock; in other words, as between these two classes, the guaranty stock, by reason of the statute, protects the other class of stockholders, and the remaining assets, after the payment of debts at the time of the insolvency, become impressed with a trust for the benefit of this class.

But that case is easily distinguishable from this, for here we have a going company which by the laws of California is permitted to issue shares of stock the holders of which may, if the company should so declare in its by-laws, withdraw part or all of their investment upon terms there prescribed. But the California law also declares that the amount contributed by the stockholders either in the purchase of paid-up shares or installment shares shall be capital in the hands of the corporation (sections 633 and 634, Civil Code of 1923).[2] Appellant's theory on the contrary is that only the amounts of money paid for permanent or guaranty stock becomes capital of the corporation, and this, as we have seen, is directly contrary to the statute.

Nor do we think there is any validity to appellant's contention that because the full-paid and passbook stock dividends were agreed to be paid at a definite rate, a different result obtains. The by-laws and the California law both provide for the payment of the same out of earnings, and admittedly in this case they were paid out of earnings, because in all the years in question the guaranty stock received much larger dividends than the classes bearing a fixed and definite return, and from this we may safely assume that the association's earnings were amply sufficient to meet and were in fact used for the agreed payments to full-paid and passbook stockholders. The mere fact that a corporation agrees to pay a definite, fixed sum to a certain class of stockholders does not change the status of such stockholders to that of creditors.

In the case at bar the stock certificate issued in the case of passbook stock provides that dividends are payable out of earnings, and in the case of full-paid stock the language of the certificate is: "In consideration of the rate of dividend paid hereon, it is agreed that this certificate shall not further participate in any surplus or earnings or profits."

Neither of these provisions is inconsistent with the well-known custom of preferred stock issues in commercial corporations, but appellant says that notwithstanding these provisions, the company in fact regarded its obligation as a guaranty and actually paid dividends to these two classes of stock without regard to its earnings, and from this it is argued that the intent of the parties may be ascertained and that this intent is controlling. We think not. Without discussing this subject further, we think it enough to say, as we have already said, that in all the years in question the earnings were used to pay the dividends, and any other course than this would have been violative of the association's by-laws as well as violative of the California law.

We are likewise of opinion that the difference in the rights and privileges of the different classes of stock is not material. This is true also of most commercial corporations where more than one class of stock is issued. Here the full-paid shares, in consideration of an agreed rate of dividend and in consideration of a definite contract of redemption at a definite time, received in prosperous times less of the earnings of the corporation than the guaranty stock. So also in the event of dissolution or insolvency the holders are entitled to share in the assets after the payment of the debts of the corporation ahead of the holders of the permanent stock. As against these advantages the permanent stock has the chance of larger returns if the profits justify, but the owner of both types continues to occupy the status of shareholder, at least until misfortune overtakes the association.

[2] Sec. 633. *Powers of building and loan associations.*—Building and loan associations as hereinafter in this title defined, shall have power to receive money and accumulate funds to be loaned. * * * to permit shareholders and investors to withdraw part or all of their payments, investments, or stock deposits, and to prescribe the terms and conditions of such withdrawal; to cancel shares of stock, the payments on which have been withdrawn; to receive money and to execute certificates therefor, which must specify the date, amount, rate of interest, and when the principal and interest are payable, and also the withdrawal value thereof at the end of each year; * * * and shall have such further powers as may be specifically set forth under this title; * * *.

Sec. 634. *Capital.*—The capital of every such corporation shall be divided into shares of the matured or par value of one hundred or two hundred dollars each, as provided by the articles of incorporation, and shall be paid in by the subscribers in the manner provided by the by-laws. All such payments shall be called dues. Certificates shall be issued to each shareholder on the first payment of dues by him. Shares pledged as security for the payment of a loan shall be called pledged shares, and all others free shares. All shares matured and surrendered or canceled shall become the property of the corporation and may be reissued. The capital shall consist of the accumulated dues, together with the apportioned profits of the corporation, and shall be accumulated by the issuance of shares in any one or more of the following forms, viz: "Installment shares," "full-paid shares," "passbook shares," and "guarantee stock."

In *Pacific Coast Co.* v. *Sturdevant* (165 Cal., 687), a building association had become insolvent. Certain of its stockholders who had the right of withdrawal had given notice of their intention to withdraw. The question was, did they, by virtue of this notice, change their position from stockholders to creditors, or, as stated by the Supreme Court of California, did they by this fact cease to be stockholders and become creditors. The court answered this question in the negative. It is quite true in that case no guaranty stock had been sold and issued, and therefore the provisions of the law subordinating that stock to the other stock did not apply, but the principle decided was conclusive of the legal relation of such shareholders to the association, that is to say, that they did not occupy to the association the same aspect as a depositor to a savings bank. And this, it seems to us, is necessarily correct, for if it were held that the fact of the issue by the association of permanent stock itself made all other classes of stock debts, and all other stockholders creditors, it might, by the issuance of a negligible amount of guaranty stock relieve practically all of its assets from liability to general creditors except upon an equality with shareholders participating in the conduct of the association's affairs. Hence it would seem to us that the fact of the issue by the company of guaranty stock has no such significance as is claimed.

Nor do we think, as has been already intimated, that the right of withdrawal affects the question. The passbook and full-paid stock was issued as stock and was issued pursuant to by-laws and State laws permitting it to participate in the earnings of the corporation. Its holders, as long as their investment remains, have all of the characteristics of stockholders of an ordinary corporation, though by virtue of the peculiar construction of building associations under the law, they may have privileges and rights which do not generally apply.

In many cases it has been decided that a shareholder of a building association who has the right of withdrawal and who has also become a borrower of the company is a debtor as to the loan made and a stockholder as to the stock subscribed, so that in the event of the association's insolvency the payments made on the latter account may not be set off against the debt. (*Coltrane* v. *Blake*, 113 Fed., 785, and cases cited; *Henry* v. *Continental Bldg. Assn.*, 156 Cal., 667; *Groover* v. *Pacific Coast Society*, 164 Cal., 67.)

In the view we take of this case there is, we think, neither in the certificates of stock, nor in the by-laws, nor in the local law, anything which would justify us in saying that a member of the association holding these shares was, during any of the time involved in this dispute, in the position of creditor of the association. He received his agreed share of the earnings, and if misfortune overtook the association his investment was subject to the payment of its debts. He could participate in the management of the corporate affairs. He had, it is true, the advantages of withdrawal which the holder of permanent stock did not have, but this advantage accrued only during the solvency of the corporation. He did not withdraw, and had the company become insolvent, he could neither have set off the amount of his subscriptions against his indebtedness to the company nor could he have shared in the assets on an equality with creditors. His position, though still superior to that of the permanent stockholder, was subordinate to that of the creditor, and therefore until insolvency the character of stockholder continued to exist and the rights of creditor, which in a case of insolvency may be said to arise, applied only to the assets remaining after the payment of the claims of the creditors generally.

From this it follows that the money which was received from the association from time to time was not interest as that term is used in the Federal taxing statutes, and appellant was, therefore, not entitled to deduct it as an expense of the business.

It follows, therefore, that the decision of the Board of Tax Appeals is right and should be affirmed.

Affirmed.

The chief justice took no part in the consideration and decision of this case.

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

Article 632: Consolidated returns. XIII–14–6735
(Also Section 213(a), Article 31.) Ct. D. 810

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. Consolidated Returns—Life Insurance Company and Ordinary Business Corporation.

A life insurance company, whose taxable income is determined in accordance with special provisions enacted in the Revenue Act of 1921 and subsequent Acts, may not file a consolidated return with an ordinary business corporation taxable under the provisions of the Acts applicable to corporations generally.

2. Gross Income—Accrued Interest—Purchase by Mortgagee at Foreclosure Sale.

Where a mortgagee bids in mortgaged property at foreclosure sale for the amount of the unpaid principal plus accrued interest to the date of sale, transfers the amount of its "mortgage loan account" to "real estate owned account," credits the mortgagor with payment in full of the mortgage debt including interest, includes the amount of the accrued interest in its income account as interest received during the year and reports it as income in its annual statements to the insurance departments of the various States, such accrued interest constitutes taxable income to the mortgagee.

3. Certiorari Denied.

Petition for certiorari denied March 19, 1934.

Court of Claims of the United States.

National Life Insurance Co. v. *The United States.*

[November 6, 1933.]

OPINION.

Littleton, Judge, delivered the opinion of the court.

The first question relates to the right of plaintiff, an insurance company, and the National Life Building Co., an ordinary corporation, to file consolidated returns for each of the years 1923 to 1926, inclusive, and have the tax for such years computed upon such consolidated net income. We think the Commissioner correctly held that a life insurance company, either life or other than life or mutual, was not entitled under the Revenue Act of 1921 and subsequent Acts to file consolidated returns with an ordinary corporation taxable under the provisions of the Acts applicable to corporations generally, or to have its tax determined on the basis of such consolidation. This action of the Commissioner has been approved in *Fire Companies Building Corporation* (23 B. T. A., 550, 553, affirmed 54 Fed. (2d), 448 [Ct. D. 458, C. B. XI–1, 177]), and *Cincinnati Underwriters Agency Co.* v. *Commissioner* (63 Fed. (2d), 309 [Ct. D. 722, C. B. XII–2, 217]). With these decisions we entirely agree. They both dealt with the year 1926, in which the tax rate of the two corporations was different; but we think the fundamental and underlying reason for denying affiliation between an insurance company and an ordinary corporation existed for 1921 and subsequent years because of special treatment and classification by Congress of insurance corporations.

In the *Fire Companies Building Corporation* case, supra, the court said:

"Obviously logic must not stifle understanding, and some *modus vivendi* must be found. In such cases courts choose that alternative which most nearly conforms to the general purpose, so far as they can glean it. (*United States* v. *Katz*, 271 U. S., 354, * * *; *Hellmich* v. *Hellman*, 276 U. S., 233 [T. D. 4217, C. B. VII–2, 238], * * *.) It appears to us rather that the general language of the section 240(a) was subject to an exception in this case, than that the amorphous consolidated income should be taxed at either rate. It is idle to protest against such liberties; courts have taken them from time immemorial, and must do so if the business at hand is to go on."

In the *Cincinnati Underwriters Agency Co.* case, supra, the court pointed out that "There would be much force in the petitioner's contention were it possible to give it effect without defeating the legislative intent of other provisions of the Act. One of such purposes, as appears from provisions made exclusively applicable to insurance companies, was to segregate such companies from other corporations for tax purposes." The court further held, in connection with the company's contention that the Revenue Department had permitted affiliation between insurance corporations and other corporations under the Acts prior to 1926, that there were provisions even in the earlier Acts which made it impracticable to permit affiliation and that there was no justification for the Department's practice under those Acts.

A short statement with reference to the consolidated returns provision and the treatment of insurance corporations under the 1921 and subsequent Acts will, we think, serve further to support the above-mentioned conclusions of the court that the earlier Acts, as well as the 1926 Act, did not permit the consolidation of insurance corporations with ordinary corporations. In *Brewer's Lessee* v. *Blougher* (14 Pet., 178, at page 198), it was pointed out by the court that "It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace it." The consolidated returns section, 240 of the Revenue Act of 1918, was enacted at a time when insurance corporations were treated for tax purposes under the revenue statutes the same as ordinary domestic corporations; however, in the Revenue Act of 1921, approved November 23, 1921, a material change was made by Congress in the basis of computing the net income of life insurance corporations. At the urgent request of such corporations special provisions were enacted for the determination of taxable income of such corporations consisting solely of investment income, that is, income from interest, dividends, and rents. Underwriting income, that is, premium receipts, was no longer included in gross income under the Revenue Act of 1921 and subsequent Acts, and the deductions allowed life insurance companies, as well as those allowed insurance companies, other than life or mutual, differed materially from those allowed ordinary corporations. Thus, under the Revenue Act of 1921 and subsequent Acts, deductions for losses on sale of capital assets were not allowed to life insurance companies and companies other than life or mutual. This material change in the basis of computing the net income of life insurance companies was considered by this court at length in *Massachusetts Mutual Life Insurance Co.* v. *United States* (56 Fed. (2d), 897, 900–901 [Ct. D. 502, C. B. XI-1, 296]), wherein we recognized the peculiar plan or system, complete in itself and differing in many material respects from that relating to the taxation of ordinary domestic corporations, for the taxation of insurance companies. This special treatment of insurance companies so effectively placed them outside the class of ordinary domestic corporations entitled to file consolidated returns under the statute that it was no longer practicable to compute the tax payable by an insurance corporation on the basis of consolidation thereof with that of an ordinary corporation, other than an insurance company, and we think this special treatment manifests a purpose on the part of Congress to exclude insurance companies from the class of ordinary business corporations entitled to file consolidated returns as effectively as if a statement to that effect had been inserted in the Act. Although the language of section 240 was not changed so as specifically to exclude insurance companies, neither was the language of other sections, equally broad, changed. In many sections of the 1921 and subsequent Acts can be found language which, under the general definitions. is broad enough to include insurance companies, but, inasmuch as insurance companies were given special treatment as to income and deductions, no one would claim that they were included in these sections relating to corporations generally. When insurance companies were given special treatment in the Revenue Act of 1921 and subsequent Acts, and their income and deductions specifically defined in a manner materially different from the income and deductions of ordinary domestic corporations, the definitions of the term "corporation" and the term "domestic" and the language of section 240, that "for the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, * * *" contained in the Revenue Act of 1918, were not changed but were carried forward into the Act of 1921 and subsequent Acts. But because of a different system for the taxation of insurance companies provided in the Act of 1921 and subsequent Acts, these definitions and the quoted provision of the consolidated returns section no longer had the same application to insurance companies they previously had and do not require the liberal application contended for by plaintiff. (*Massachusetts Mutual Life Insurance Co.*, supra.)

The foregoing conclusion on the question of consolidation disposes of the plaintiff's claim for a reduction from gross income of amounts paid by it to the National Life Building Co. as rentals for space occupied by plaintiff in a building owned by the Building company. Plaintiff did not own the building. It was owned by the Building company, a separate and distinct corporation to which plaintiff paid rent and no amount was included in the income of plaintiff under the provisions of section 245(b) of the Revenue Act of 1926 as rental value of space occupied. The question involved in *Independent Life Insurance Co. of America* (17 B. T. A., 757) is therefore not present in this case. The rental paid by plaintiff to the Building company was not deductible from plaintiff's gross income under the statute and the Commissioner correctly denied such deduction.

Plaintiff's net income as determined without consolidation with the Building company was taxed by the Commissioner at the rates imposed upon insurance companies and, in view of our conclusion that the Commissioner correctly denied affiliation, the question of the rate of tax is no longer in the case.

The next question is whether plaintiff and the Commissioner correctly included in gross income for 1923 to 1926, inclusive, accrued interest on mortgage loans, which mortgages were foreclosed and the properties purchased by plaintiff at foreclosure sales during the respective years for the amount of the mortgage indebtedness plus the accrued interest.

Plaintiff had outstanding a large number of mortgage loans on which there had been default in the payment of either principal or interest, or both. In those cases where the mortgagor did not voluntarily surrender the mortgaged premises plaintiff brought foreclosure proceedings in the courts, obtained decrees of foreclosure and judgments for the principal of its loans and accrued interest, and caused the mortgaged premises to be sold at public sale. At these sales plaintiff was the only bidder and bid for the mortgaged premises merely a nominal bid, except in those States where, under the State law, the mortgaged property might be redeemed by the mortgagor or junior lien holders. In such cases plaintiff, at such public sales, bid for the mortgaged premises the full amount of the unpaid principal and accrued interest due to the date of sale, together with court costs and other charges.

On each and every sale, under the decree of foreclosure, the sheriff in making his return to the court showed the sale by him of the mortgaged property in an amount equal to the full amount of the judgment entered by the court in the respective mortgage foreclosure suits. Before acquiring title by deed of the property purchased at the foreclosure sale, each of said mortgages was carried by plaintiff on its books of account styled "mortgage loan account" showing the exact amount of indebtedness of each mortgagor, including the unpaid principal and accrued interest to date of sale of the mortgaged property. Upon the sale under the decree of the court and upon receipt of a deed from the sheriff the plaintiff stamped the mortgage loan account "paid, National Life Insurance Company of the United States of America," and thereupon transferred the "mortgage loan account" to an account styled "real estate owned account," therein charging itself with real estate purchased in an equal amount. It also in an income account set up on its books, included as interest received during the year the accrued interest to date of receipt by it of the deed from the sheriff for the respective properties purchased, and also included this accrued interest as income in its annual statements, "Convention Edition," to the insurance departments of the various States for 1923 to 1926, inclusive, and also included in gross income in its income-tax returns for 1923 to 1926, inclusive, as interest received, accrued interest which it had included in its bids for the properties to date of receipt by it of the sheriff's deed for the respective mortgaged properties, together with accrued interest to date of deed on property voluntarily surrendered, the amount of accrued interest so included being $94,761.64 for 1923, $26,360.16 for 1924, $56,135.34 for 1925, and $48,010.78 for 1926.

As a result of his final audit for 1925, the Commissioner found additional accrued mortgage interest of $15,760.07, not included by plaintiff in its return for that year, making the total amount of accrued interest $71,895.41 for 1925. Thereafter plaintiff filed claims for refund for the years 1923 to 1926, inclusive, on the ground that this accrued interest had never been actually received by it and that it did not constitute taxable income under the provisions of the Revenue Act of 1921 and subsequent Acts. The Commissioner, after consideration of these claims for refund, held that in those cases where foreclosure proceedings had not been instituted no judgment obtained and the mortgaged property was not bought in by plaintiff at foreclosure sale, but where the property had been voluntarily deeded to plaintiff by mortgagors, accrued interest on the mortgages had not been actually received within the meaning of the taxing Acts and was not therefore taxable income to plaintiff. This interest was, therefore, excluded from income and is not in question here. But the Commissioner further held that where the mortgaged property was purchased by plaintiff at public sale under judgment of foreclosure and bid in by plaintiff for the amount of the unpaid principal plus accrued interest to the date of sale, such interest constituted taxable net income received by plaintiff during the respective taxable years.

The amounts of interest due under the mortgages and unpaid to the date of sale of the properties and the purchase thereof by plaintiff in controversy are $70,545.58 for 1923, $20,703.69 for 1924, $70,533.61 for 1925, and $21,547.71 for 1926.

The income of a life insurance company is computed on the basis of actual receipts and disbursements and the question here involved is whether plaintiff received the interest in the amounts last above mentioned within the meaning of the statutes defining income of the insurance companies to be interest, dividends, and rents received during the year.

Plaintiff contends that under the plain language of the statute and the regulations the interest in controversy did not constitute gross income because none of it was received during the years involved or has ever been received; that instead of having received it, which implies a profit on money loaned, the plaintiff was facing a condition of its business which indicated large losses on account of these very loans. This contention is based upon the fact that the properties could have been acquired by plaintiff at the foreclosure sales for amounts less than its bid prices at which such properties were sold to it. But it does not appear that if plaintiff had bid in the properties for $70,545.58, $20,703.69, $70,533.61 and $21,547.71, respectively, less than it bid and paid therefor, such properties, or some of them, would not have been redeemed for the price paid or further annoyance caused to plaintiff on account thereof.

Throughout consideration of this question it should be kept in mind that we are here dealing with a purchase and sale transaction and not with an exchange of property, and, although insurance companies are specially taxed under the statute and are not allowed deductions for losses sustained, if any should be sustained, upon a subsequent sale of property purchased at the foreclosure sales, this fact does not require that the real nature of the transaction be ignored or necessitate that it be viewed differently from that which its real nature requires. In its essence the transaction consisted of a judgment in favor of plaintiff and against the mortgagor for the principal indebtedness plus the accrued interest and a decree of foreclosure and sale of the properties given as security for such indebtedness and interest. The properties were duly advertised and sold at public sale to satisfy the judgment or so much of it as might be derived from such sales. At these public sales plaintiff offered for the properties the full amount of the unpaid principal and accrued interest due it to the date of the sale, and the properties were duly sold to plaintiff by the officer designated by the court to make the sale. This, in our opinion, established the market for these particular properties for the purposes of this case and is determinative of whether plaintiff received the interest in question.

Plaintiff had a judgment of the court against the debtor for the amount of the principal and interest and, instead of bidding a lesser amount than its claim for the properties and collecting the balance by other means, it paid the full amount of the unpaid principal and accrued interest, thereby completely satisfying the judgment and leaving no claim for any portion of the principal or accrued interest outstanding against the debtor. In effect there was a payment in the court by plaintiff of the amounts which it bid for the properties and the payment by the court to plaintiff of a like amount. Viewed in this light plaintiff actually received the interest due it. Inasmuch, however, as plaintiff was the purchaser of the properties under the sales there was no payment of money but the properties were deeded to plaintiff. There must have been, and doubtless were, circumstances which led plaintiff to believe that the acquisition of a complete and clear title to the properties was worth the amount of the unpaid principal and accrued interest to it. There was a consideration moving to plaintiff for its bid for the amount of the unpaid principal and accrued interest; such bid foreclosed the equity of redemption of the mortgagor or junior lien holder and precluded all further controversies that might have arisen had the property been bid in for a lesser sum and judgment taken against the mortgagor for the balance.

It is not open to question that when mortgaged property is sold to the successful bidder at a sale under a mortgage foreclosure a valid, binding, and enforcible liability for the bid price is created. And, in this case, plaintiff by its bid incurred an enforcible liability equal to the price which it bid when these respective mortgaged properties were struck off to it by the sheriff at the respective foreclosure sales. As a general rule an officer selling property under a decree of foreclosure has no authority to sell on credit, or to accept as payment of the bid price anything other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law governing the sale. And where the return of the officer making the sale, as in this case, shows the sale of the property in an amount equal to the full amount of the judgment entered by the court, it must be presumed that the money was paid in cash or its equivalent. Where the creditor becomes the purchaser of the mortgaged property it is usually considered a sufficient compliance with the requirements of a sale for cash that the amount of the bid be credited on the mortgaged debt, but the judgment for the indebtedness is fully satisfied to the extent of the amount bid by the creditor, either wholly or pro tanto.

When plaintiff bid in these mortgaged properties it became a purchaser and its title to and rights in the properties were the same as if it had been a stranger to the mortgagee. The fact that it was not only the purchaser but also the mortgagee is without legal significance. The mortgagee acquired the same right and interest in the sale as a third person would, no more, no less. The only advantage he has is that to the amount of the judgment in his favor he is not obligated to pay over the purchase price, to that extent, his bid being a payment of his debt. (*Ledyard* v. *Phillips*, 47 Mich., 305, 11 N. W., 170.)

Upon the acquisition of these properties plaintiff entered into possession thereof not as a mortgagee but as a purchaser. When a mortgagee bids in property at a foreclosure sale he pays therefor either cash or the equivalent of cash by crediting the amount of his bid, which is the purchase price, against the mortgagor's indebtedness to him, thereby releasing and extinguishing the mortgagor's liability to the extent of the proceeds of the foreclosure sale applicable to the mortgaged debt. The transaction is no different than if the bidder paid to the officer making the sale the full amount of his bid and such officer thereafter paid to the mortgagee the unpaid principal and accrued interest to the date of sale. In legal effect, this is the result of the transaction by which plaintiff acquired title to the mortgaged properties and to the extent of accrued interest to the date of the sales, and plaintiff, by its bid, established the market, which we must recognize, for these particular properties and by such bid realized cash, or its equivalent. To that extent it realized taxable income with respect to the interest due it and included in the price paid for the property.

Whether a mortgagee, who becomes the purchaser of the mortgaged property, through bidding it in for the amount of the principal of the indebtedness plus accrued interest, may sustain a loss on a future disposition of the property is of no controlling importance in determining whether he received the interest due by including the same in the price at which the property was purchased. That would be another and an entirely different transaction. If the property after being purchased by the mortgagee should be sold for more than cost, the excess is a *profit* on the sale of property and can in no sense be treated as the receipt of *interest* on a loan. And the same is true whatever basis is used, whether cost or market value. Plaintiff seems to rely to some extent upon article 153 of Regulations 69, but this regulation relates entirely to the gain and loss section of the statute which is not applicable to insurance companies and has for its purpose the determination under such section of the statute of loss or gain on the acquisition and sale of property. The Board of Tax Appeals has uniformly held that a mortgagee who bids in mortgaged property for the amount of the unpaid principal and accrued interest due to date of sale realizes taxable gain to the extent of the amount of accrued interest included in the bid. (*Manomet Cranberry Co.*, 1 B. T. A., 706, 709; *Reserve Loan Life Insurance Co.*, 18 B. T. A., 359, 369; *Ewen MacLennan*, 20 B. T. A., 900.)

The case of *John Hancock Mutual Life Insurance Co.* (10 B. T. A., 736), upon which plaintiff relies, is distinguishable in that the total proceeds of the sale in that case were found by the Board to be no more than sufficient to pay the principal of the debt. In *Reserve Loan Life Insurance Co.*, supra, the Board said with reference to the case of the *John Hancock Mutual Life Insurance Co.*, supra, that "We there held that, since the net proceeds of the foreclosure were less than the principal, the taxpayer had suffered a loss of part of its principal and that no part of the accrued and unpaid interest constituted income to the taxpayer."

In the present case plaintiff not only credited the respective mortgagors with payments in full of their mortgage debt, including interest, but also charged the amounts thus paid to "real estate purchased" and included the accrued interest in its reports to the insurance departments of the various States and also included it in gross income in its tax returns filed for the years 1923 to 1926, inclusive.

Plaintiff contends, however, that it has established that the market value of these properties at the time they were bid in by it was less than the amounts for which they were purchased; that plaintiff could have acquired such properties at the foreclosure sales for much less than it bid therefor; and that this definitely established that it received nothing on account of the interest in question. It is our opinion, however, that such claimed general market value or price at which plaintiff might have bid the properties in, subject to redemption, must give way to the cash or actual market value of the properties to it which plaintiff placed thereon when it bid them in at the foreclosure sales. It is, therefore, immaterial what the properties might have brought on the general market. (*Henry Heldt*, 16 B. T. A., 1035, 1037.) In these circumstances plaintiff is not entitled to recover. This conclusion makes it unnecessary to discuss the other point made by the defendant, that plaintiff has received a refund of all the taxes paid by it on account of its income for the years 1924 and 1926, and that in none of the years from 1923 to 1926, inclusive, is plaintiff entitled to recover any of the taxes of the National Life Building Co. paid by the Building company or by plaintiff on its behalf.

The petition is dismissed. It is so ordered.

ARTICLE 633: When corporations are affiliated. (Also Section 213(a), Article 50; Section 214(a)8, Article 161.) XIII-24-6849 Ct. D. 838

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. AFFILIATION.

Where the entire common stock of the taxpayer corporation was owned by the parent corporation, but only 18.16 per cent of its preferred stock was owned by stockholders of the parent, and preferred stockholders of the taxpayer, representing 24.56 per cent of such stock, owned no stock of the parent but owned 49.86 per cent of the preferred stock of a cosubsidiary whose common stock was completely owned by the parent, but neither subsidiary owned any stock of the parent, all stock of the subsidiaries holding equal voting privileges, the taxpayer and the parent were not affiliated within the meaning of section 240 of the Revenue Act of 1921, even though the property of the taxpayer was leased to the parent for 999 years and they were operated as an economic unit.

2. Deduction—Depreciation.

Where a corporation leased all of its property for a period of 999 years, the terms of the lease providing for an appraisal of the property at the beginning and the termination of the lease and that the lessee should renew, repair, and replace the property in as good condition as when the lease was executed, the lessor is not entitled to a deduction for depreciation of the property.

3. Income—When Realized—Agreement by Lessee to Pay Taxes.

Where a lessee agreed to pay all taxes upon leased property, with the understanding that if it should desire to resist by legal proceedings the payment of any tax and should so notify the lessor it should not be obliged to pay such tax until 30 days after final adjudication thereupon, additional taxes due for the years 1922 and 1923, occasioned by rejection of an asserted deduction for depreciation, constitute taxable income to the lessor in those years even though the lessee be permitted to postpone payment until conclusion of the litigation. The obligation of the lessee to pay constituted income to the lessor in the year the tax obligation arose.

4. Decision Affirmed in Part and Reversed in Part.

Decision of the Board of Tax Appeals (24 B. T. A., 197) affirmed as to above items 1 and 2, and reversed as to item 3.

5. Certiorari Denied.

Petition for certiorari denied April 2, 1934.

United States Circuit Court of Appeals for the Seventh Circuit.

No. 4973. *Commissioner of Internal Revenue, petitioner*, v. *Terre Haute Electric Co., Inc. (previously Terre Haute Traction & Light Co.), respondent.*

No. 4975. *Terre Haute Electric Co., Inc. (previously Terre Haute Traction & Light Co.), petitioner*, v. *Commissioner of Internal Revenue, respondent.*

Petitions for review of decision of the United States Board of Tax Appeals.

Before Evans, Sparks, and Fitzhenry, Circuit Judges.

[November 16, 1933.]

OPINION.

Both sides appeal from an order of the Board of Tax Appeals which determined the taxpayer's income taxes for the years 1922 and 1923.

Three questions are presented. The Commissioner, through his appeal, asks us to determine in which of two years certain income was realized. The taxpayer, on its appeal, raises two questions: (*a*) Were the taxpayer and its parent company affiliated? (*b*) Was the taxpayer entitled to a deduction for depreciation where a 999-year lease of all its assets provided for lessee's repair of all property and the return to lessor of property of equal value?

Evans, Circuit Judge: Were the taxpayer, the Terre Haute Electric Co., and its parent company, the Terre Haute, Indianapolis & Eastern Traction Co., affiliated within the meaning of that word as used in the Revenue Act?

The taxpayer is an Indiana corporation having 20,000 shares of common and 10,000 shares of preferred stock. During the years 1922 and 1923, all of its common stock was owned by the parent company. In 1922, 18.16 per cent of taxpayer's preferred stock was held by stockholders of the parent company. During 1922, 65 preferred stockholders of taxpayer (representing 24.56 per cent of the preferred stock) owned no stock in the parent company, but owned 49.96 per cent of the stock of a cosubsidiary, whose common stock was also completely owned by the parent company. The subsidiary owned no stock of the parent company. All stock of the subsidiaries held equal voting privileges.

Section 240 of the Revenue Act of 1921, permitting the filing of consolidated returns by affiliated companies, reads as follows:

"(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, * * *."

In addition to showing stock ownership, it appears that the taxpayer leased its property to the parent company for 999 years. The officers of the two companies were the same, and the parent company selected the officers of the subsidiary company. Both companies were operated as an economic unit. The terms of the long lease gave control of the lessor's property to the lessee and reduced the former's function to nominal activity.

In *Handy & Harman* v. *Burnet* (284 U. S., 136 [Ct. D. 425, C. B. X-2, 370]), the court said:

"* * * The section requires control of substantially all of the stock; control of the corporations is not enough. The carrying on of a business unit by two or more corporations does not in itself constitute affiliation. * * * We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel 'actual' to distinguish it from a legally enforceable control.

"* * * It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute."

In *Atlantic City Electric Co.* v. *Commissioner* (288 U. S., 152 [Ct. D. 637, C. B. XII-1, 281]), the court said:

"With respect to control of stock, as creating the affiliation which affords a basis for a consolidated return * * *. The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considerations without binding force. There must be a control that is legally enforceable. * * * And it must be control of 'substantially all the stock.' * * *.

"* * * In establishing ownership or control of substantially all the stock as the criterion of a business unit, the statute made no distinction between preferred and common stock. It referred simply to 'stock' and we perceive no ground upon which stock with voting right can be treated as excepted. * * *

"* * * The statute is not concerned with a failure to exercise existing rights, * * *."

In the light of these decisions, we conclude that the Commissioner and the Board correctly found that the taxpayer and the parent company were not affiliated within the meaning of section 240 of the Revenue Act of 1921.

Deduction for depreciation. The question may be stated thus: May a lessor who has leased all its property for a period of 999 years under a lease, the terms of which provided that the lessee will "during said term renew, repair and replace the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now and in their present state of efficiency," make deductions for depreciation of its property? The lease also provided that there should be an appraisal at the beginning, as well as at the termination of the lease, and the value of the lessor's property at the time the lease was executed should be restored to it at the time the lease expired. Sums in excess thereof went to the lessee.

Upon the authority of *Weiss* v. *Wiener* (279 U. S., 333 [Ct. D. 60, C. B. VIII-1, 257]), we hold that there can be no deduction for depreciation in this case for the reason that, because of the lease, the taxpayer has failed to show a present loss to it.

When was the disputed item of income received? Article 10 of the lease provided:

"The lessee covenants that it will during the continuance of this lease pay, satisfy and discharge as the same shall accrue all taxes * * * general and special, ordinary and extraordinary, of every nature and description which have been or may be lawfully imposed or assessed during the continuance of this lease * * *; said payments to be made as the same become due to the officer * * * entitled by law to receive the same; * * * it being understood and agreed, however, that if the lessee shall desire to resist by legal proceedings the payment of any tax or assessment, and shall so notify the lessor the lessor shall not pay nor shall the lessee be obliged to pay any such tax or assessment until 30 days after final adjudication thereupon by the court having jurisdiction in such cases * * *."

The court in *Old Colony Trust Co.* v. *Commissioner* (279 U. S., 716 [Ct. D. 80, C. B. VIII-2, 222]) and *United States* v. *Boston & M. R. Co.* (279 U. S., 732 [Ct. D. 73, C. B. VIII-2, 315]), held that the lessor realizes income in the nature of rent through the payment by the lessee of the lessor's income taxes pursuant to the terms of a lease.

The taxpayer admits that the amount of additional taxes for the years 1922 and 1923, occasioned by the rejection of its asserted deduction for depreciation, is taxable income upon which it must pay a tax. It denies, however, that such sums were rightly included in its 1922 and 1923 income. Its reliance is upon that part of the lease which gives to the lessee the right to postpone payment in case it desires to resist by legal proceedings the payment of any tax "until 30 days after final adjudication thereupon by the court having jurisdiction in such cases." In other words, the taxpayer contends that the additional taxes did not constitute income for either 1922 or 1923 and, in fact, will not become income until final adjudication of the question by this court or by the Supreme Court.

Under the ruling of the court in *United States* v. *Anderson* (269 U. S., 422 [T. D. 3839, C. B. V-1, 179] and *Uncasville Mfg. Co.* v. *Commissioner* (55 F. (2d), 893), we are constrained to hold otherwise. The amount of the taxes may be clouded in doubt. Some time may be required to determine their correct amount. The lessee was permitted to postpone the date of payment until any tax litigation over the amount was concluded. The obligation, however, became fixed by the terms of the lease.

The lessee's obligation was twofold. It was to pay a certain sum in cash and to pay all taxes which might be assessed or imposed upon the lessor. This obligation represented income to the lessor. Payment by lessee need not be all on one date. The amount may not be definitely known in advance of the Government's tax levy. Nevertheless, the obligation of lessee to pay constituted income of lessor in the year the tax obligation arose. This is the theory of the above-cited decisions.

There is stronger reason, it seems to us, for holding that the income tax on taxpayer's income, which the lessee was required to pay, became part of the taxpayer's income the year after the income accrued; that is, when the tax thereon became payable, rather than 30 days after the court has decided the disputed question of amount. The above-cited cases, however, seem to settle the question adversely to the taxpayer.

The order of the Board of Tax Appeals is reversed with directions to enter an order in accordance with the views here expressed.

Article 635: Consolidated net income of affiliated corporations.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Taxability of gains and allowance of losses upon liquidation of subsidiary by parent company. (See G. C. M. 12581, page 142.)

ARTICLE 635: Consolidated net income of affiliated corporations. XIII-11-6697 Ct. D. 799

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. NET INCOME—CONSOLIDATED RETURNS—AFFILIATED CORPORATIONS—INTERCOMPANY TRANSACTIONS.

Where, under a change in the law, affiliated corporations were required to file consolidated income tax returns for the year 1918 and to determine net income on the basis of original cost or inventory value, and where during 1917 there had been intercompany transactions resulting in profit to certain of the selling affiliations upon which income tax had been paid under separate returns required for that year, the profit taxable to the group upon the sale to the public in 1918 of the same merchandise, which remained in the inventories of the purchasing units at the beginning of 1918, is properly computed upon the basis of original cost to the first selling unit of the group, eliminating the profits resulting from the intercompany transactions, even though such method results in double taxation upon the intercompany profits made in 1917.

2. CERTIORARI DENIED.

Petition for certiorari denied February 5, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Aluminum Company of America, a Corporation, appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the Western District of Pennsylvania.

[September 29, 1933.]

OPINION.

WOOLLEY, Circuit Judge: Under the law as it stood in 1917, affiliated corporations were required to file consolidated returns for excess-profits taxes and separate returns for income taxes. In consonance with the law, Aluminum Company of America and its 27 affiliated corporations made returns of both kinds for that year. During the year various units of this group of corporations had intercompany transactions of sale and purchase of commodities in which, pursuant to a recognized business policy of the group, profits were allowed and made. They were excluded from the consolidated return for excess-profits tax purposes and included in the separate returns of the trading companies for income tax purposes. These profits, though actual between the trading companies, were merely book profits with respect to the entire group for, obviously, nothing coming in and nothing going out, they involved no gains to the enterprise as a whole. The plaintiff paid the excess-profits taxes and the several affiliated corporations paid the income taxes (including taxes on these profits) for 1917 as they were required to do. But when they came to prepare their returns for the tax year 1918, there having been a change in the taxing Acts, they were confronted by a statute which compelled affiliated corporations to file consolidated returns for *both* excess-profits taxes and income taxes and—what is here critically important—required that the net income for taxes of both kinds should be determined upon the same basis, which for the purposes of this case was cost or inventory value. (Sections 230, 240, 320. 40 Stat., 1075, 1081, 1091.) The plaintiff and its affiliated corporations in preparing a consolidated return for income taxes for 1918 found certain merchandise sold in 1917 by some of the corporations and purchased by others still in the inventories of the latter as of the 1st day of 1918. Accordingly, in making their consolidated or group income tax return for 1918, they eliminated the intercompany profits thereon and calculated cost to the group upon the figures at which the intercompany purchases had been made in 1917 (which included profits), not upon original cost to the intercompany sellers.

As these intercompany profits had not been included in the 1917 consolidated return for excess-profits taxes, the group of course did not include them in its 1918 consolidated return for such taxes but, quite properly, took original cost as a basis. Thus it appears that the group returns for excess-profits taxes and income taxes for 1918 were not computed upon the same basis but upon markedly different bases; one original cost and the other cost stepped up by book profits.

With sections 240 and 320 of the Revenue Act of 1918 before him, the Commissioner of Internal Revenue, in assessing the plaintiff's income taxes for 1918 on its consolidated return, disregarded entirely the intercompany sales in 1917 on which an aggregate profit of $1,694,355.17 had been computed for the determination of the income tax liability of the several trading companies and took the original cost price of such merchandise before any intercompany sales for the basis. As will readily be seen, the practical result of that official action was to impose a tax not only on the profits the taxpayer had earned as a group in 1918 but also on some of the book profits earned by the affiliated corporations in their intercompany business in 1917 upon which they had already paid income taxes. Of this the plaintiff, having paid the consolidated income taxes for 1918, complains bitterly. The grounds of its complaint in its suit in the district court to recover these taxes, and on this appeal from a judgment dismissing its petition, are several; the first being that profits of the selling corporations on intercompany sales in 1917 of merchandise remaining in the inventories of the purchasing corporations at the beginning of 1918 should, for income tax purposes, be included as costs in computing profits made by the group on the sales of the same merchandise to the public in that year. In other words, it says profits earned by the underlying selling corporations became a part of the cost to the underlying purchasing corporations and that cost to the purchasing corporations was, in consequence, cost to the affiliated group of which they were members.

The trouble with this proposition is twofold; first, that the income tax returns for 1917 were made by separate corporations having to do exclusively with their separate profits on which they separately paid income taxes; second, that the income tax return for 1918 was a consolidated or group return. It had to do with the entire enterprise. In it, loss of one corporation could be set off against profits of another. On it, group taxes were assessed and paid, which, in case of loss by one corporation or another, might conceivably be less than the aggregate of the taxes of the members of the group. Such a situation was clearly recognized when the legislation providing consolidated income tax returns by affiliated corporations was enacted. However, and without regard to the practical effect, sometimes advantageous and sometimes disadvantageous to a group, the Congress by the tax law in force in 1918 prescribed the basis of determining the taxable net income of corporations—cost or inventories—and very definitely provided that the basis of determining income taxes and excess-profits taxes due upon consolidated returns of affiliated corporations should be the same. It is clear that by this legislation the Congress was trying to give uniformity to taxation of corporations and particularly to deal with closely affiliated or group corporations, as it had to do, in view of their number, the complexity of their organization and their importance as sources of revenue, intending, doubtless, to afford a means correctly to ascertain the tax justly due and effectively to preclude redistribution of capital and forestall manipulation of profits among the component corporations by means of intercompany transactions. The purpose of the Congress in requiring consolidated returns by affiliated corporations has been repeatedly stated by the Supreme Court and lower courts to the effect that:

"The purpose of section 240 (a section here in question) was by means of consolidated returns to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise even though it was conducted by means of more than one corporation."

(*Handy & Harman* v. *Burnet*, 284 U. S., 136, 140 [Ct. D. 425, C. B. X–2, 370]; *Burnet* v. *Aluminum Goods Manufacturing Co.*, 53 Sup. Ct., 227 (1933) [Ct. D. 631, C. B. XII–1, 283]; *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S., 152, 53 Sup. Ct., 383 [Ct. D. 637, C. B. XII–1, 281]; *Golden Cycle Corporation* v. *Commissioner*, 51 Fed. (2d), 927.)

In other words, the legislation was based upon the conception of a group of corporations distinguished from separate and individual corporations, both subject to excess-profits and income taxes; and unless the Congress was without power, for reasons presently to be discussed, to prescribe how taxable net income of corporations of both classes should, with respect to taxes of both kinds, be determined, and was without power definitely to prescribe that the basis should in each instance be the same, the plaintiff and its affiliates have by their consolidated income tax return for 1918 stepped outside the law.

The question here presented would scarcely be a problem were it not complicated by its administrative history. This, though disturbing, is not dispositive of the matter. The question was made the subject in 1924 of Solicitor's Memorandum 1530 (C. B. III-1, 307), in which it was ruled that since consolidated returns were not permitted in 1917 for income tax purposes and since intercompany profits were taxed to the separate corporations, such profits should not be eliminated in the computation of consolidated net income for income taxes in 1918. This was a ruling against the original cost basis. It was also held that since consolidated returns were required in 1917 for excess-profits tax purposes, in which intercompany profits were disregarded in computing consolidated net income, such profits should be eliminated in computing the consolidated net income for excess-profits taxes in 1918. The former ruling continued in effect until the decision of the Court of Claims in *Packard Motor Car Co.* v. *United States* (39 Fed. (2d), 991, 282 U. S., 848), where it was held that profits resulting from intercompany transactions occurring between members of an affiliated group in 1917 should be eliminated in the computation of consolidated net income for 1918 for both income and excess-profits tax purposes. This was an original cost ruling. As this decision was directly contrary to Solicitor's Memorandum 1530, that ruling was revoked by General Counsel's Memorandum 9584 (C. B. X-2, 372). The decision in the Packard Motor Co. case was in accord with the evident trend of decisions to disregard transactions between members of an affiliated group when computing their consolidated net income. (*Burnet* v. *Aluminum Goods Manufacturing Co.*, 53 Sup. Ct., 227 (1933); *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S., 152, 53 Sup. Ct., 383; *Fidelity National Bank & Trust Co.* v. *Commissioner*, 39 Fed. (2d), 58, 62; *Commissioner* v. *Liberty National Co.*, 58 Fed. (2d), 57 [Ct. D. 659, C. B. XII-1, 168]; *Brownsville Coal & Coke Co.* v. *Heiner*, 38 Fed. (2d), 248, 251.) On that decision the learned trial court based its judgment in the instant case, which we shall sustain unless we should be influenced by the plaintiff's contention that the ruling of the court in that case, and consequently in this one, was wrong because it effected a double income tax as to those items of intercompany profits which were involved in the 1917 computation and that double taxation can not be sustained except by express legislative authority.

The trouble with this position—the plaintiff's second in assailing the tax as unlawfully assessed and collected—is, as the learned trial judge found, and we observe, that express authority does exist in sections 240 and 320 of the Revenue Act of 1918.

Dealing with group taxation and declaring a basis upon which it should be computed in consolidated returns, the statute means cost to the group as a taxable entity, not cost to a purchasing subsidiary in which there is included a profit to the selling subsidiary. However often such transactions involving profits may occur between affiliated corporations, cost to the group is still the cost to the first selling unit—the original cost—and it is plain that the Congress in providing the basis of taxation was fully aware that a situation of double taxation might arise and that, when it did, its mandate of a single basis would apply and should be obeyed.

Clearly there was in this case, double taxation on certain intercompany profits made in 1917, yet double taxation is not per se unlawful. Although seemingly unfair, when the purpose of a taxing Act is plain courts will not interfere. (*T. W. Phillips, Jr., Inc.*, v. *Commissioner*, 63 Fed. (2d), 101.) On this point the statute (sections 240 and 320 of the Revenue Act of 1918 (40 Stat., 1081, 1091) and section 1331 of the Revenue Act of 1921 (42 Stat., 319)), not being ambiguous, leaves nothing to be construed. It is only possible to give effect to the statute by following its plain words, even though it may result in double taxation. It is not permissible to ignore its words in order to avoid double taxation.

In requiring consolidated income tax returns by affiliated corporations and providing a basis which, as in this case, involves computation (as to costs) in the preceding tax year, the appellant complains that the statute, on an erroneous interpretation by the trial court, was made retroactive when by no express language or necessary implication was it so. (*United States* v. *Heth*, 3 Cranch, 398, 413; *Shwab* v. *Doyle*, 258 U. S., 529 534, 535, 537.) The taxing Act dealt only with taxes in tax years and in that sense the tax imposed was not retroactive. In determining gain from transactions in the current year—in this case sales to the public of merchandise involved in intercompany dealings and carried over by the group from the previous year—the statute was not retroactive in its taxing operation (*Liberty National Co.* v. *Commissioner*, 58 Fed. (2d), 57, 60); it only provided that the taxpayer or the Commissioner might go into the past year for data upon which correctly to determine profits made in the tax year, a practice not only necessary but generally and validly followed in other situations.

Regarding the remaining questions insubstantial, the judgment of the district court is affirmed.

SECTION 245.—TAXES ON INSURANCE COMPANIES.

ARTICLE 684: Taxes and expenses with respect to real estate. XIII–24–6850 Ct. D. 839

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF SUPREME COURT.

GROSS INCOME—DEDUCTIONS—LIFE INSURANCE COMPANY—CONSTITUTIONALITY.

Sections 245(b) of the Revenue Acts of 1921 and 1924 are constitutional and do not lay a direct tax upon property nor upon its rental value.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *The Independent Life Insurance Co.*

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 21, 1934.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the court.

This case involves the validity of deficiency assessments of income taxes made by the Commissioner against the life insurance company for 1923 and 1924. The 1921 Revenue Act (42 Stat., 261), section 244(a) defines gross income of such companies as that received from interest, dividends and rents. Premiums and capital gains are excluded. Section 245(a) directs that net income be ascertained by making specified deductions from gross income. These include 4 per cent of the company's reserve, "(6) Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company * * *," and "(7) A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence." But it is provided, section 245(b) that no deduction shall be made under paragraphs (6) and (7) "on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied." Provisions similarly worded and having the same meaning are contained in the Revenue Act of 1924, sections 244, 245. (43 Stat., 289.)

During 1923 and 1924 respondent owned a building of which it occupied part and rented part. Its tax return for each year included in gross income the rents received for the space let and deducted the taxes, expenses and depreciation chargeable to the whole building. The result for 1923 was a net of \$3,615.30 whereas 4 per cent of book value amounted to \$18,400. The result for 1924 was minus \$14,629.76, 4 per cent of the then book value being \$19,770.32. The Commissioner, following section 245(b) added to the rents received from lessees in each year a sum sufficient to make the net equal to the required 4 per cent. On that basis the amount of the deficiency for 1923 was $298.97 and for 1924 $1,115.65.[1] The Board of Tax Appeals held them direct taxes and therefore invalid. (17 B. T. A., 757.) The Circuit Court of Appeals affirmed, one of the judges dissenting. (67 F. (2d), 470.) Its decision conflicts with *Commissioner* v. *Lafayette Life Insurance Co.* (C. C. A. 7) (67 F. (2d), 209) and *Commissioner* v. *Rockford Life Insurance Co.* (C. C. A. 7) (67 F. (2d), 213).

The question for decision is whether the statutory provisions relied on violate the rule that no direct tax shall be laid unless in proportion to the census. (Constitution, Article I, section 9, clause 4.) In support of the decision below, respondent maintains that the "rental value" of the space occupied by it was included in net income and taxed and that the exaction is a direct tax on the land itself and void for lack of apportionment.

If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it can not be sustained for that would be to lay a direct tax requiring apportionment. (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 580, 581; 158 U. S., 601, 635, 637, 659; *Brushaber* v. *Union Pac. R. R.*, 240 U. S., 1, 16, 17; *Eisner* v. *Macomber*, 252 U. S., 189, 205 [T. D. 3010, C. B. 3, 25]; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S., 288, 294; *Bromley* v. *McCaughn*, 280 U. S., 124, 136; *Willcuts* v. *Bunn*, 282 U. S., 216, 227 [Ct. D. 280, C. B. X-1, 209].) The rental value of the building used by the owner does not constitute income within the meaning of the sixteenth amendment. (*Eisner* v. *Macomber*, supra, 207; *Stratton's Independence* v. *Howbert*, 231 U. S., 399, 415, 417; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 185; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S., 170, 174 [T. D. 3881, C. B. V-1, 199]; *Taft* v. *Bowers*, 278 U. S., 470, 481, 482 [Ct. D. 49, C. B. VIII-1, 226]; *MacLaughlin* v. *Alliance Ins. Co.*, 286 U. S., 244, 249, 250. Cf. *Burk-Waggoner Assn.* v. *Hopkins*, 269 U. S., 110, 114 [T. D. 3790, C. B. V-1, 147].)

Earlier Acts taxed life insurance companies' incomes substantially the same as those of other corporations. Because of the character of the business, that method proved unsatisfactory to the Government and to the companies. The provisions under consideration were enacted upon the recommendation of representatives of the latter. As rents received for buildings were required to be included in gross and expenses chargeable to them were allowed to be deducted, it is to be inferred that Congress found—as concededly the fact was—that the annual net yields from investments in such buildings ordinarily amounted to at least 4 per cent of book value. Where an insurance company owns and occupies the whole of a building, it receives no rents therefor and is not allowed to deduct the expenses chargeable to the building. Where part is used by the company and part let, the rents are required to be included in the gross, but expenses may not be deducted unless, if it be necessary, there is added to the rents received an amount to make the total sufficient, after deduction of expenses, to leave 4 per cent of book value. All calculations contemplated by section 245(b) are made subject to that limitation. Congress intended that the rule should apply only where rents exceed such 4 per cent. Where they are less than that, addition of the prescribed rental value and deduction of expenses operate to increase taxable income.[2] The classification is not without foundation.

The company is not required to include in gross any amount to cover rental value of space used by it, but in order that, subject to the specified limitation, it may have the advantage of deducting a part of the expenses chargeable

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[1] In 1923, rents were $73,620.48. Taxes, expenses, and depreciation were $70,005.18. Book value was stipulated to be $460,000. The Commissioner called the difference between $18,400 (4 per cent of $460,000) and $3,615.30 ($73,620.48—$70,005.18) or $14,784.70 the "value of space owned and occupied by company." That, added to rents received, amounted to $88,405.18. He then subtracted from gross income so increased the sum of permissible deductions, including the $70,005.18.

In 1924, rents were $71,289.21. Taxes, expenses, and depreciation were $85,918.97. Book value was $494,257.97. The Commissioner added $19,770.32 (4 per cent of $494,257.97) and $14,629.76 ($85,918.97—$71,289.21) and called the sum, $34,400.08, the "value of space owned and occupied by company." That, added to rents received, amounted to $105,689.29; and from gross income so increased were subtracted the deductions, including the $85,918.97.

[2] Take for example: Book value of building, $1,000,000; 4 per cent of book value, $40,000; rents received, $30,000; expenses, $60,000. If the calculation prescribed by section 245(b) is not made, taxable income is $30,000.

The calculation prescribed by section 245(b) follows: Rents, $30,000, plus "rental value," $70,000 (expenses, $60,000, minus rents, $30,000, plus the 4 per cent—$40,000) amounts to $100,000, less expenses, $60,000, leaves taxable income, $40,000. (Cf. article 686, Treasury Regulations 62 and 65.)

to the building, it is permitted to make calculations by means of such an addition. The statute does not prescribe any basis for the apportionment of expenses between space used by the company and that for which it receives rents. The calculation indicated operates as such an apportionment where the rents received are more than 4 per cent of book value, but less than that amount plus expenses.[3] In such cases the addition, called rental value of space occupied by the company, is employed to permit a deduction on account of expenses. That, as is clearly shown in the dissenting opinion, *supra*, page 473,[4] is the arithmetical equivalent of lessening the deduction by the amount of the so-called rental value.

Respondent cites *National Life Insurance Co.* v. *United States* (277 U. S., 508 [T. D. 4206, C. B. VII–2, 296]), but the distinction between that case and this one is fundamental and obvious. There the effect of the statutory deduction was to impose a direct tax on the income of exempt securities, amounting to taxation of the securities themselves. We held that the tax imposed, so far as it affected State and municipal bonds, was unconstitutional and that, in so far as it affected United States bonds, it was contrary to the statute. In *Denman* v. *Slayton* (282 U. S., 514 [Ct. D. 218, C. B. X–1, 280]), we held the taxpayer not entitled to deduct the interest on debts incurred to purchase securities the interest on which was exempt. The opinion points out the distinction between that exclusion from deductions and the taxation of exempt securities condemned in *National Life Insurance Co.* v. *United States*. As shown above, the prescribed calculation, section 245(b), is in substance a diminution or apportionment of expenses to be deducted from gross income under the circumstances specified. (See *Anderson* v. *Forty-two Broadway Co.*, 239 U. S., 69.)

Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax. (*Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S., 301, 304 [Ct. D. 331, C. B. X–1, 390]; *Stanton* v. *Baltic Mining Co.*, 240 U. S., 103; *Brushaber* v *Union Pac. R. R.* supra, 23–24.) It is clear that the provisions under consideration do not lay a tax upon respondent's building or the rental value of the space occupied by it or upon any part of either.

Reversed.

PART IV.—ADMINISTRATIVE PROVISIONS.

SECTION 257.—RETURNS TO BE PUBLIC RECORDS.

ARTICLE 1090: Inspection of returns. XIII–23–6840
T. D. 4436

Amendment to Treasury Decision 4359, as amended by Treasury Decisions 4378 and 4397, to permit inspection of returns by the Committee on the Judiciary of the House of Representatives.

TREASURY DEPARTMENT,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4359 [C. B. XI–2, 305] (being regulations prescribed by the Secretary and approved by the President, applicable to the inspection of returns under the Revenue Act of 1932 and prior Revenue Acts, and incorporated as part of article 421 of Income Tax Regulations 77), as amended by Treasury Decisions 4378

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[3] Take for example: Book value of building, $1,000,000; 4 per cent of book value, $40,000; rents received, $50,000; expenses, $60,000.

On that basis the calculation is: Rents, $50,000 plus "rental value," $50,000 (expenses $60,000 minus rents $50,000 plus 4 per cent, $40,000) amounts to $100,000 less expenses $60,000 leaves taxable income $40,000. Deduction of expenses operates to reduce taxable income by $10,000.

Assume rents received were $100,000. No rental value need be added. Deducting expenses, $60,000, leaves taxable income $40,000.

[4] Not printed in Bulletin service.

(C. B. XII-2, 219) and 4397 (C. B. XII-2, 220), is further amended by changing paragraph numbered 13(a) thereof to read as follows:

13. (a) Notwithstanding any other provisions of these regulations, returns may be inspected by the Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts, appointed under Senate Resolution 349, Seventy-second Congress; the Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees, appointed under Senate Resolution 78, Seventy-third Congress; or by the Committee on the Judiciary of the House of Representatives authorized by House Resolution 145, Seventy-third Congress, to investigate the conduct of equity and bankruptcy receiverships in Federal courts, to the same extent and in the same manner as by a select committee of the Senate or House of Representatives specially authorized to investigate returns by a resolution of the Senate or House of Representatives.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

Approved May 21, 1934.

FRANKLIN D. ROOSEVELT,
The White House.

EXECUTIVE ORDER—AUTHORIZATION OF COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES TO INSPECT TAX RETURNS.

By virtue of the authority vested in me by section 257(a) of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 51), section 55 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 809), and section 55 of the Revenue Act of 1932 (ch. 209, 47 Stat., 169, 189), it is hereby ordered that tax returns shall be open to inspection by the Committee on the Judiciary of the House of Representatives authorized by House Resolution 145, Seventy-third Congress, to investigate the conduct of equity and bankruptcy receiverships in Federal courts, such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury and approved by the President under date of December 13, 1932, as amended under date of August 3, 1933, as further amended under date of October 18, 1933, and as further amended this date.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 21, 1934.

ARTICLE 1090: Inspection of returns. XIII-26-6871
T. D. 4440

Amendment to Treasury Decision 4359, as amended by Treasury Decisions 4378, 4397, and 4436, to permit inspection of returns by the Special Committee Investigating the Munitions Industry, United States Senate.

TREASURY DEPARTMENT,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4359 [C. B. XI-2, 305] (being regulations prescribed by the Secretary and approved by the President, applicable to the inspection of returns under the Revenue Act of 1932 and prior Revenue Acts, and incorporated as part of article 421 of Income Tax Regulations 77), as amended by Treasury Decisions 4378 (C. B. XII-2, 219), 4397 (C. B. XII-2, 220), and 4436 (May 21, 1934 [page 304, this Bulletin]), is further amended by changing paragraph numbered 13(a) thereof to read as follows:

13. (a) Notwithstanding any other provisions of these regulations, returns may be inspected by the Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts, appointed under Senate Resolution 349, Seventy-second Congress; the Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees, appointed under Senate Resolution 78, Seventy-third Congress; the Committee on the Judiciary of the House of Representatives authorized by House Resolution 145, Seventy-third Congress, to investigate the conduct of equity and bankruptcy receiverships in Federal courts; or by the Special Committee Investigating the Munitions Industry, appointed under Senate Resolution 206, Seventy-third Congress, to the same extent and in the same manner as by a select committee of the Senate or House of Representatives specially authorized to investigate returns by a resolution of the Senate or House of Representatives.

H. MORGENTHAU, Jr.,
Secretary of the Treasury

Approved June 15, 1934.
FRANKLIN D. ROOSEVELT,
The White House.

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EXECUTIVE ORDER—AUTHORIZATION OF SPECIAL COMMITTEE INVESTIGATING THE MUNITIONS INDUSTRY, UNITED STATES SENATE, TO INSPECT INCOME RETURNS.

By virtue of the authority vested in me by section 257(a) of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 51), section 55 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 809), and section 55 of the Revenue Act of 1932 (ch. 209, 47 Stat., 169, 189), it is hereby ordered that income returns shall be open to inspection by the Special Committee Investigating the Munitions Industry, United States Senate, authorized by Senate Resolution 206, Seventy-third Congress, to investigate the manufacture of and traffic in arms, munitions, and other implements of war, such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury and approved by the President under date of December 13, 1932, as amended under date of August 3, 1933, as further amended under dates of October 18, 1933, and May 21, 1934, and as further amended this date.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
June 15, 1934.

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTION 270.—DATE ON WHICH TAX SHALL BE PAID.

ARTICLE 1203: Collection of tax by suit. XIII-8-6664
Ct. D. 789

FEDERAL TAXES—BOND—DECISION OF SUPREME COURT.

SUIT—ABATEMENT.

A cause of action upon a bond given to secure the payment of taxes and running to the obligee "or his successors" does not abate upon the death or separation from office of the several successors in whose names the suit is revived because of the failure of the Government to make substitution within the time prescribed by section 11 of the Act of February 13, 1925. Failure to comply with the statute forecloses the particular remedy therein provided but does not destroy the right. The cause of action which arose in favor of the original obligee survives for appropriate enforcement by his several successors.

SUPREME COURT OF THE UNITED STATES.

Alvin F. Fix, Collector of Internal Revenue for the First Collection District of Pennsylvania, petitioner, v. *Philadelphia Barge Co. and National Surety Co.*

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 8, 1934.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the court.

This is an action originally brought by MacLaughlin, a collector of internal revenue, in a Federal district court, against respondents, to recover on a bond conditioned for the payment of such income taxes assessed against the Barge company as should remain unabated after consideration of a claim for abatement by the Commissioner of Internal Revenue. The obligee named in the bond is Ephraim Lederer, collector of internal revenue when the bond was executed, "or his successors." MacLaughlin having died, the case was first revived in the name of Ladner, and upon his resignation, in the name of petitioner. All three, in turn, succeeded to the office held by Lederer.

In the district court the surety company filed an affidavit of defense, incorporating a plea that the cause of action upon the bond had abated, and had been lost, by failure to comply with section 11 of the Act of February 13, 1925 (ch. 229, 43 Stat., 936, 941; U. S. C., Title 28, section 780). In support of that contention, the plea alleges that suit in assumpsit on the same bond had been brought by one McCaughn, the first successor of Lederer; that, pending the suit, McCaughn resigned as collector; that judgment nevertheless was thereafter entered in his favor; and that subsequently, upon a suggestion of abatement of the cause of action, an order was entered striking the judgment from the record by reason of the fact that the action upon which the judgment was rendered had abated prior to the entry thereof.

The district court held that since one suit, brought by a successor of the original obligee, had abated by reason of the failure of the Government to make substitution under the Act of 1925, there resulted an abatement of the cause of action as well as of the writ. (60 F. (2d), 333.) Upon the basis of this ruling and upon a præcipe filed by the United States attorney, final judgment was entered against the collector, which judgment was affirmed by the Circuit Court of Appeals. (63 F. (2d), 258.)

Respondents raise some question as to the right of the Government to appeal to the court below, but the point is so obviously without merit that we do not stop to state or discuss it.

Section 11 of the Act of 1925, so far as pertinent, provides that where, during the pendency of an action brought by or against an officer of the United States, relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court where the action is pending, "to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." The original Act on the subject, of which the Act of 1925 is an amplification, was passed February 8, 1899 (ch. 121, 30 Stat., 822), evidently in response to a suggestion of this court in *United States ex rel. Bernardin* v. *Butterworth* (169 U. S., 600), decided in 1898. (See *Murphy* v. *Utter*, 186 U. S., 95, 101; *Caledonian Coal Co.* v. *Baker*, 196 U. S.. 432, 440–442; *Irwin* v. *Wright*, 258 U. S., 219, 222.) In the Butterworth case it was held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the commissioner; and that it could not be revived in the name of his successor, even with the latter's consent. The court suggested that in view of the inconvenience occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that in such cases it should be lawful for the successor in office to be brought into the case. The purpose of the Act, as explained in the House committee report (H. Rept. No. 960, Fifty-fifth Congress, second session), and by the Member of the House who reported the bill from the committee (Congressional Record, volume 31, part 4, pages 3865–3866), was to permit the suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office.

The Act is purely remedial, designed to remove what this court in the Butterworth case called an "inconvenience." Failure to comply with the statute forcloses the particular remedy therein provided; it does not destroy the right. There is a clear difference between the action and the *cause* of action. Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending upon its nature and the applicable rule. (See *Sanders' Adm'x* v. *Louisville & N. R. Co.*, 111 Fed., 708, 710; *Martin* v. *Wabash R. Co.*, 142 Fed., 650, 651. Compare *Green* v. *Watkins*, 6 Wheat., 260; *Henshaw* v. *Miller*, 17 How., 212, 219; *Warren* v. *Furstenheim*, 35 Fed., 691, 695.) The vice of the ruling below, and of the argument here in support of it, is the failure to give effect to this distinction. The present bond runs to each successor, as it ran to the original obligee and with like effect; and, notwithstanding the termination of the latter's possession of the office. the cause of action which arose in his favor survives for appropriate enforcement by his several successors. (*Tyler* v. *Hand et al.*, 7 How., 573; *Bowers* v. *American Surety Co.*, 30 F. (2d)., 244 [Ct. D. 51, C. B. VIII–1, 271].) This accords with the policy of the revival statute, as observed by Judge L. Hand in the case last cited. A conclusion to the contrary would subvert the purpose of the bond, which "is to create an obligation in favor of the incumbents, as they succeed each other."

Judgment reversed.

Article 1203: Collection of tax by suit. XIII-26-6867
Ct. D. 843

INCOME TAX—REVISED STATUTES—DECISION OF COURT.

Suit—Qui Tam Action—False Returns—Consent of Commissioner.

Section 3214, Revised Statutes, requires the consent of the Commissioner to the commencement of a suit for the recovery of internal revenue taxes, fines, penalties, and forfeitures. The Act of March 2, 1863, as supplemented and amended, Title 31, sections 231–235, and Title 18, section 80, U. S. C. A., do not authorize the institution of *qui tam* actions alleging fraud against the United States by the filing of false and fraudulent income tax returns.

District Court of the United States for the Western District of Pennsylvania.

David A. Olson, in his own behalf and in behalf of the United States of America, plaintiff, v. *W. L. Mellon, defendant.*

United States of America, on the relation of Albert R. Knight and Albert R. Knight in his own behalf, plaintiffs, v. *William L. Mellon, H. L. Stone, Gail R. Nutty, F. A. Leroy, W. J. Guthrie, and George S. Davison, defendants.*

[October 18, 1933.]

OPINION.

Gibson, District Judge: In each of the above entitled cases a statutory demurrer has been filed by the defendant. The cases are qui tam actions wherein the plaintiff alleges in each that the defendant has defrauded the United States of income tax due by means of a false and fraudulent return, and seeks a verdict of the United States and himself for twice the amount of the alleged unpaid tax and the statutory penalty of $2,000 imposed upon one who has presented a false claim against the United States. The demurrer asserts that no law of the United States exists which authorizes the plaintiff to bring the suit, and that the averments of the plaintiff's statements do not constitute a cause of action under the laws of the United States.

As statutory authority for his action the plaintiff, Olson, has pointed to the Act of March 2, 1863, "as supplemented and amended," and the plaintiff, Knight, to U. S. C. A., Title 31, sections 231–235, and Title 18, U. S. C. A., section 80.

Section 80 of Title 18 is as follows:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000, or imprisoned not more than 10 years, or both. (R. S., section 5438; May 30, 1908, ch. 235, 35 Stat., 555; March 4, 1909, ch. 321, section 35, 35 Stat., 1095; October 23, 1918, ch. 194, 40 Stat., 1015.)"

Sections 231 and 232 follow:

"SEC. 231. *Liability of persons making false claims.*—Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section 80 of Title 18, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." (R. S., section 3490.)

"SEC. 232. *Same; suits.*—The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent." (R. S., section 3491.)

The statutes, as quoted supra, on their faces at least, furnish strong support of the right of the plaintiffs to institute the present actions. In the Olson case, however, the defendant asserts that the Act of March 2, 1863 (12 Stat., 696), is now obsolete; and in the other cases the defendants contend that the quotation of sections 231–235, Title 31, U. S. C. A., was in fact an unofficial and mistaken substitution of the text for section 3490, R. S., which was narrower in scope and did not authorize *qui tam* actions to collect income tax unlawfully withheld.

The Act establishing the Revised Statutes of the United States was approved June 22, 1874. By it all Acts of Congress passed prior to December 1, 1873, any section of which was embraced in the revision, were repealed, and the section applicable thereto was established in lieu thereof. Sections 5438 and 3490 of the Revised Statutes had each been a part of the Act of March 2, 1863. Section 5438 imposed a penalty upon those presenting, or obtaining the proceeds of, false claims against the United States. Section 3490 is as follows:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section 5438, Title "Crimes," shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 3491, R. S., also part of the Act of 1863, authorized qui tam actions to recover the penalties fixed by section 3490.

It will be noted that section 5438, R. S., related only to false claims *against* the United States, and was not wide enough, in its original form, to include the suppression of material matters in an income tax return. (See *United States* v. *Cohn*, 270 U. S., 339; *Capone* v. *United States*, 51 Fed. (2d), 609, 614.)

Section 5438, R. S., became section 35 of the Criminal Code (March 4, 1909), but section 3490 was not repealed when the Criminal Code was adopted, and has not since been reenacted.

By Act of October 23, 1918, section 35, Criminal Code, was amended by the insertion of the following:

"* * * or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry. * * *"

Counsel for the plaintiff Olson has contended that section 5438, R. S., prior to the amendment of 1918, was wide enough to cover a false return of income. In this contention, as stated supra, we can not agree with him. Counsel for the other plaintiffs, as we understand his position, admits that the original section 5438, R. S., is insufficient to cover a false tax return, but asserts that the amendment of 1918 *is* sufficient; and further asserts that section 3490, R. S., now includes not only the subject matter of the original section 5438, R. S., but also the amendment of 1918. Counsel concede, where a statute has been incorporated as a whole by another statute, that any amendment or repeal of the incorporated statute will not, as a general rule, either add to or take away its original effect from the incorporating Act, but will leave that statute with just the same scope it had at the time of its enactment. They contend, however, that an exception to the general rule exists when the two Acts were originally different sections of an original statute. Sections 3490 and 5438, R. S., were substantial reenactments of different sections of the Act of March 2, 1863.

Admitting the exception to the general rule under certain circumstances, we are of opinion that such circumstances do not exist in the present cases. When the Revised Statutes were adopted all prior laws covering the subject matter of any of their sections were repealed. The sections in question were widely separated, section 5438 being placed under Title LXX, "Crimes," and section 3490 under Title XXXVI, "Debts due the United States." In 1909, section 5438 was repealed, being substantially reenacted in the repealing statute as section 35 of the Criminal Code, as before stated. Section 3490 was not repealed by the Criminal Code statute. It will thus be seen that the two sections, although having their origin in the same Act of Congress, had been separated and had become parts of different statutes in their present existence.

United States Code, section 80, includes the amendment of section 35 of the Criminal Code, as quoted supra, and section 231 of the United States Code, designed as an inclusion of section 3490, R. S., appears to incorporate that amendment. It can not be claimed (and we believe is not claimed by counsel for the plaintiffs) that the United States Code, in itself, authorizes the plaintiffs' actions. The Code Act of 1926 repealed or amended no existing law, but was designed only to set forth the United States statutes as they existed on December 7, 1925. The reference in section 231 of the United States Code to "section 80 of Title 18" was one of the slight lapses likely to occur in a codification of numerous laws, and has, in itself, no force. In the United States Code annotated, prepared by the editorial staffs of West Publishing Co. and Edward Thompson Co., who also doubtless prepared the code statute, the following comment is made:

"*Editorial comment.*—Section 80 of Title 18, Criminal Code and Criminal Procedure, does not cover all of the acts formerly prohibited by R. S. section 5438, to which the original text of this section referred. * * * Criminal Code section 35 (sections 80 and 82 to 86 of Title 18), as amended, covers some Acts not covered by R. S. section 5438. Perhaps this section should be made to follow substantially the language of R. S. section 5438, as follows: * * *"

Counsel for the plaintiffs have contended that sections 3490–3491, R. S., are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. The statute is plainly penal in its nature and is not to be enlarged by implication; and unless it be so enlarged, no statutory authority exists for plaintiffs' suits.

Defendants have urged that the demurrers should be sustained for the further reason that in none of the statements of claim is it set forth that the plaintiff had the permission of the Commissioner of Internal Revenue to bring this action. Such permission is made necessary under certain circumstances by section 3214, R. S., which is as follows:

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided*, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

This section was a part of section 9 of the Act of July 13, 1866 (14 Stat., 98), amending section 41 of the Act of June 30, 1864, as amended by the Act of March 3, 1865. In a preceding part of the section it was declared to be the duty of collectors of internal revenue to prosecute for the recovery of any sums which may be forfeited by law. It then provided that all suits for fines, penalties and forfeitures should be brought in the name of the United States, "in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise. * * *" The section did not specifically mention the Act of March 2, 1863, certain of the provisions of which were incorporated in sections 3490–3494 of the Revised Statutes. Were the reference to qui tam actions not present, the section thus far might be taken as controlling collectors; but following the provision incorporated in section 3214, R. S., is the following:

"*Provided*, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector, deputy collector, assessor, assistant assessor, revenue agent, or inspector of internal revenue, the United States shall not be subject to any costs of suit, nor shall the fees of any attorney or counsel employed by any such officer be allowed in the settlement of his account, unless the employment of such attorney or counsel shall be authorized by the Commissioner of Internal Revenue either expressly or by general regulations."

Many of the practices in existence at the time of the passage of the Revenue Acts of 1863 to 1870 have been changed by statute or have become obsolete in use. At the time the Act of 1866 was passed an informer was entitled to receive a moiety of the amount of a penalty or forfeiture recovered pursuant to his information—in fact, the Act itself makes such provision. And a collector, deputy collector or revenue agent, if the knowledge came to him other than in the regular performance of his duty, could at that time be such informer.

We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of section 3214, R. S. As we interpret it, it discloses a plain intent on the part of Congress to keep all cases for the collection of internal revenue taxes, fines, penalties and forfeitures under the supervision of the Commissioner of Internal Revenue. It was existing law when it and sections 3490–3494 became parts of the Revised Statutes, and can not be held to be repealed by the amendment of section 35, Criminal Code (5438 R. S.), by the Act of 1918, even if it be held—and it is still a mooted question—that the amendment is broad enough to include false income tax returns. The sections may well exist together.

Being of opinion that the amendment of section 35, Criminal Code, by the Act of 1918, is not to be read into the provisions of sections 3490–3494, R. S., and that consent of the Commissioner of Internal Revenue is necessary to the lawful institution of a suit for the recovery of internal revenue fines and penalties, and, therefore, that each of the plaintiffs in the present actions is without statutory authority necessary as a basis for his action, the statutory demurrers filed in each case must be sustained.

ARTICLE 1206: Compromise of tax cases.

REVENUE ACTS OF 1916 AND 1918.

Effect of Board's finding with respect to sufficiency of evidence as to compromise. (See Ct. D. 823, page 329.)

SECTION 275.—ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

ARTICLE 1251: Additions to tax in case of a deficiency.

REVENUE ACTS OF 1916, 1918, AND 1921.

Imposition of fraud penalty (1) with respect to original returns for 1917, 1918, and 1919 where taxpayer acquitted of evasion under amended returns for same years; (2) where taxpayer convicted of evasion by filing fraudulent return for 1921. (See Ct. D. 823, page 329.)

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1271: Period of limitation upon assessment of tax.

REVENUE ACT OF 1926.

Instructions governing the execution of consent agreements. (See Mim. 4134, page 98.)

ARTICLE 1271: Period of limitation upon assessment of tax. XIII-9-6678 Ct. D. 793

(Also Section 325 (Revenue Act of 1918), Article 811 (Regulations 45); Section 284, Article 1302.)

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. STATUTE OF LIMITATIONS—TIME AND PLACE OF FILING RETURN.

The delivery of a tax return to an internal revenue agent for forwarding to the Commissioner is not a compliance with the statute requiring that returns be filed with the collector so as to start the running of the statute of limitations from the time of such delivery.

2. PAYMENTS—ALLOCATION—RETURNS REQUIRED FOR FISCAL YEARS FILED ON CALENDAR YEAR BASIS.

Where the taxpayer files its returns on a calendar year basis for the years 1917, 1918, and 1919, but is required to file returns on a fiscal year basis for those years, the taxes paid in 1920 for the calendar year 1919 need not be applied only to the deficiency found due for the fiscal year ending March 31, 1920, where credit has been allowed upon the tax assessed for the fiscal year ending March 31, 1919, for all payments made during the calendar years 1919 and 1920.

3. INVESTED CAPITAL—GOOD WILL—BURDEN OF PROOF.

An offer received by the taxpayer for its trade name and good will established by house-to-house advertising does not definitely establish the value of the good will so as to justify an increase in invested capital in the amount of the offer. Good will or other intangibles can be regarded as capital assets for tax purposes only where there has been in effect a purchase thereof or a definite appropriation therefor from earnings already accumulated for that purpose, and the burden is upon the taxpayer to establish the distinction between expense of conducting the business, including normal sales promotion, and the purchase price of an established asset.

4. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (22 B. T. A., 1351) affirmed.

5. CERTIORARI DENIED.

Petition for certiorari denied November 13, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

W. H. Hill Co., by Union Guardian Trust Co., Receiver, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review decision of United States Board of Tax Appeals.

Before MOORMAN, HICKS, and HICKENLOOPER, Circuit Judges.

[April 10, 1933.]

OPINION.

HICKENLOOPER, Circuit Judge: During the years 1917, 1918, and 1919, the W. H. Hill Co. kept its books upon a fiscal year basis, but for each of these years it filed its returns for income and excess profits taxes upon a calendar year basis. For the year 1920, the return was filed for the fiscal year beginning April 1, 1920, and ending March 31, 1921, so that there was a period of three months (January 1, 1920, to March 31, 1920) for which no return was filed. While the return for 1920 was being prepared an audit was made on behalf of the Commissioner of Internal Revenue, and the attention of the company was called both to the fact that no return covered the interim period above mentioned and to the fact that the prior returns should have been made on the fiscal year basis. Returns were accordingly prepared, inter alia, for the fiscal years ending March 31, 1919, and March 31, 1920, which returns were delivered to the internal revenue agent making the audit, and by him were delivered to the internal revenue agent in charge, at Detroit, under date of July 16, 1921. This procedure was adopted at the suggestion of the examining agent who said he "would attend to the filing."

No official action seems to have been taken upon these new returns until January 25, 1924, when a jeopardy assessment was made for the fiscal year ending March 31, 1919. In his notice of this assessment the Commissioner said that in view of the fact that a request for relief under the provisions of section 210, Revenue Act of 1917, or sections 327–328, Revenue Act of 1918, had been made, and the further fact "that any overassessments found due by reason of the application of the above provisions may be jeopardized by the tolling (running) of the statute of limitations unless a formal claim is filed, it is deemed expedient by this office that the above tax be assessed immediately * * * and that a claim be filed by you to protect your interests in the matter." Thereupon a claim for abatement was filed for the net amount of the deficiency assessment, the amounts theretofore paid on the calendar year basis having been deducted, but no action was taken upon the return for the year ending March 31, 1920, except that, seemingly, an application for special assessment under sections 327–328 of the Revenue Act of 1918 was also filed for the latter year.

On January 11, 1926, this request for special assessment was denied and the petitioner protested against such denial under date of February 6, 1926. Again delay ensued, no action being taken until August 25, 1926, when the Commissioner reversed his former ruling, allowed the request, and, upon the data contained in the several returns and the report of the audit, found an overassessment of $27,867.60 for the year ending March 31, 1919, and a deficiency of $63,679.57 for the year ending March 31, 1920. The claim for abatement already pending was therefore allowed for the amount of the overassessment, and denied as to the balance, leaving $3,392.87 still due under the assessment of January 25, 1924, which amount is not here involved.

Petitioner appealed to the Board of Tax Appeals as to the assessment for the year ending March 31, 1920, claiming that the return for that year was filed, within the intent of the Act, on July 16, 1921, when it was delivered to the representative of the Commissioner conducting the audit, and by him delivered to the internal revenue agent in charge, and that the statute of limitations had thus run against any deficiency assessment or the collection of any further tax. It is conceded by the Government that the statute had run if the returns are to be regarded as "filed" on the date above mentioned; and it is conceded by the petitioner that its contention is without merit unless the delivery of the returns to the revenue agents was sufficient compliance with the Act to start the running of the statute. This is the principal question involved. The Board of Tax Appeals held against petitioner and the present petition to review followed.

It may be conceded for the purposes of this case that the returns of July, 1921, were promptly forwarded to the Commissioner, and even that the Commissioner had the power to assess the tax where the taxpayer had filed no return. (Revised Statutes, section 3176; 26 U. S. C. A., section 97; Revenue Act 1918, section 250(c).) But there seems to us to be a radical difference between lodging a paper, designated a return, with the Commissioner, and filing the same paper with the collector. In the first case no tax is assessed and no payment is required until the Commissioner shall have acted on the record before him. In the other, the amount of the tax is immediately entered upon the appropriate list and collection is made in due course unless a claim for abatement is filed which will suspend the running of the statute. Here the law required that returns be filed *with the collector*. This was obviously for the purpose of facilitating the prompt and orderly assessment and collection of taxes. At best the internal revenue agent was but the agent of the taxpayer for the purpose of filing the returns, and the situation is no different than it would have been had the taxpayer itself delivered the returns to the Commissioner.

In *Lucas* v. *Pilliod Lumber Co.* (281 U. S., 245 [Ct. D. 266, C. B. IX-2, 396]) it was held that the delivery of an unverified return to the collector did not start the running of the statute of limitations, that "no officer had power to substitute something else for the thing specified," and that "meticulous compliance by the taxpayer with all named conditions" was necessary to secure the benefit of the limitation. Compare, also, *Florsheim Bros. Co.* v. *United States* (280 U. S., 453 [Ct. D. 167, C. B. IX-1, 260]). If the filing of a return to which the verification was inadvertently omitted, but upon which the tax was in fact assessed, is insufficient to start the running of the statute, we can not conclude that lodging a return with the Commissioner, upon which return no tax was then assessed, was that meticulous compliance with the Act which was necessary to start the running of such statute.

The present case is not one merely of an inaccurate or erroneous return. (Cf. *United States* v. *Mabel Elevator Co.*, 17 F. (2d), 109 (D. C. Minn.).) Nor is it a case, strictly speaking, of a deficiency assessment upon audit of returns properly filed. Until the return for the fiscal year ending March 31, 1920, was duly filed there was not only no return covering that fiscal year, but no return whatever for the three months interim between January 1 and March 31, 1920. In *Paso Robles Mercantile Co.* v. *Commissioner* (33 F. (2d), 653 (C. C. A. 9)) there may be an intimation that where the taxpayer's books are kept on a fiscal year basis, but returns are made upon the calendar year basis, the statute will begin to run whenever returns have been filed which actually cover the entire fiscal period, for it then becomes the duty of the Commissioner to make the readjustments; but even this principle, if it be sound, does not help the petitioner in the present case. As we have said, it is conceded by the petitioner that the statute has not run unless the returns which were delivered to the internal revenue agent are to be regarded as "filed"; and we can not so regard them.

It is also contended by the petitioner that in view of the fact that nine months of the calendar year of 1919 are included in the fiscal year ending March 31, 1920, the taxes paid in 1920 for the calendar year 1919 should be applied, and, as we understand the contention, could be applied, only to the payment of taxes found due for the fiscal year ending March 31, 1920. The contention is without merit. The petitioner has received credit upon the tax assessed for the fiscal year ending March 31, 1919, for all payments made during the calendar years 1919 and 1920, and can not complain. This is consistent with the procedure recognized in *American Hide & Leather Co.* v. *United States* (284 U. S., 343 [Ct. D. 444, C. B. XI-1, 201]).

Lastly, it is urged that the Board of Tax Appeals erred in refusing to allow to petitioner an increase of at least $500,000 in invested capital for the year ending March 31, 1920. During the early years of its corporate life (1895 to 1913) the petitioner had spent approximately $750,000 in house-to-house sample advertising, these expenditures being charged to expense. In 1914 this method of advertising was discontinued and publicity was secured through newspaper and magazine advertising. In 1913 the company received an offer from responsible purchasers of $500,000 for the trade name "Hill's Cascara Bromide Quinine" and the good will established by the sample advertising. It is therefore contended that this offer definitely establishes the value of such good will and that petitioner should be permitted to set up an earned surplus of at least that amount.

It is apparent that the only theory upon which this item might be included in invested capital is that it was definitely paid for out of earnings, that is, that it forms a part of the earned surplus which, after being earned, was invested from time to time in the purchase of good will and the establishment of a valuable trade name. Where there has been an actual purchase from another of patents, trade names, good will, or other intangibles, paid for from surplus, of course no question can arise as to the fact of investment or the amount to be included in the invested capital; but where such an asset is built up with the business itself it is almost always impossible to allocate any item of the expense of promotion and of carrying on the business to the purchase of the good will which has been thus gradually established. In order to include such value there must have been, in effect, a purchase (cf. *La Belle Iron Works* v. *United States*, 256 U. S., 377, 388 [Ct. D. 12, C. B. 4, 373]; *Landesman-Hirschheimer Co.* v. *Commissioner*, 44 F. (2d), 521, 523 (C. C. A. 6)), or a definite appropriation from earnings already accumulated for the specific purpose; for it is the cost to the corporation which is controlling, and unless the line of demarcation can be drawn between expense of conducting the business, including normal sales promotion, and the purchase price of an established asset, the value of the intangible property may not be included. The burden was upon the petitioner to clearly establish this (*Morris Coal Co.* v. *Commissioner*, 48 F. (2d), 810 (C. C. A. 6)), and a failure to do so is fatal. (*Richmond Hosiery Mills* v. *Commissioner*, 29 F. (2d), 262 (C. C. A. 5); *Three-in-One Oil Co.* v. *United States*, 35 F. (2d), 987 (Ct. Cls.). Compare *Concrete Engineering Co.* v. *Commissioner*, 58 F. (2d), 566 (C. C. A. 8).)

In the present case we are of the opinion that no distinction can be drawn between house-to-house sample advertising and any other type of advertising. It is not shown that the value of the good will arose from the advertising alone, or that such advertising was more intensive or more costly than was normal and necessary for the continuance of the business. The value of the good will may have been in substantial part due to the inherent merit of the product, and the advertising but a normal expense of placing it before the public.

Upon the authorities cited and for the reasons above stated the decision of the Board of Tax Appeals must be affirmed.

ARTICLE 1271: Period of limitation upon assessment of tax.

XIII-10-6688
Ct. D. 796

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. WAIVER—VALIDITY.

A waiver signed by the taxpayer and the Commissioner just before the expiration of the period of limitation upon assessment of tax for the year 1917, although the year to which it should apply was not specified, is valid as a waiver for the year 1917 where the statute had run on all prior years and the only matter in controversy was the tax for that year.

2. WAIVER—ESTOPPEL.

Where the taxpayer and the Commissioner consent to a waiver, rely upon it as valid and act accordingly, the taxpayer may not thereafter repudiate the waiver.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (25 B. T. A., 238) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Spencer K. Mulford, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

[July 25, 1933.]

OPINION.

DAVIS, Circuit Judge: This case is here on petition to review the order of redetermination of the United States Board of Tax Appeals. The question at issue is whether or not the waiver filed by the taxpayer for the year 1917 is valid.

The petitioner filed his income tax return in March, 1918, for the calendar year of 1917, but the return was not then audited and before his actual liability was determined, the statute of limitations for assessment for that year was about to expire and he was requested to execute a waiver. This he did on February 5, 1923, as follows:

"FEBRUARY 5, 1923.
(Date.)

"INCOME AND PROFITS TAX WAIVER.

"In pursuance of the provisions of subdivision (d) of section 250 of the Revenue Act of 1921 Spencer K. Mulford of Wyncote, Penna., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of the said ________________ for the years __________ or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, irrespective of any period of limitations.

"This waiver expires one year from date.

[Signed.] SPENCER K. MULFORD,
Taxpayer.
By ___________________
[Signed.] D. H. BLAIR,
Commissioner."

On December 10, 1923, the taxpayer executed another waiver expressly covering the year 1917. This waiver by its terms expired December 31, 1924. On December 8, 1924, a third waiver, covering the year 1917, was executed and filed, extending the limitation to December 31, 1925.

The deficiency of $36,354.47 here involved was assessed December 23, 1925, eight days before the expiration of the last waiver. A claim in abatement was filed, but this was rejected on November 4, 1927, and the petition in this case was filed by the taxpayer the same day. The Board determined that the waivers were valid and the petitioner owed the deficiency of $36,354.47.

The petitioner says that the deficiency for the calendar year of 1917 is barred from assessment and collection by the expiration of the statute of limitations and that it was not extended by the first waiver of February 5, 1923.

This contention is based upon the assumption that this waiver is not applicable to the year 1917 or to any particular year because no year is mentioned in the waiver; that it was void for uncertainty and the omission of the year can not be supplied by parol evidence or inference and that the waiver, therefore, did not prevent the statute from running.

There seems to be no question as to the correctness of the amount of the tax if the waiver extended the limitation of the statute. The entire question rests upon the validity of this first waiver as to the year 1917.

This waiver was dated February 5, 1923, a little less than two months before the 5-year period of limitations to make the assessment for that year, expired on March 30, 1923. The taxpayer and the Commissioner both, doubtless had some year in mind when this waiver was executed. The object in their minds was to waive the statute of limitations for that year. "An effective and not a futile act was intended." (*Stange* v. *United States*, 282 U. S., 270, 277 [Ct. D. 274, C. B. X-1, 414].) The effective act was the consent of the taxpayer and Commissioner to a determination, assessment and collection of the correct amount of taxes due under the return made by the petitioner for the year which they both had in mind. The only contested tax matter between the taxpayer and the Commissioner was the tax involved in the return for the year 1917. The waiver was intended to apply to that year, otherwise it would not have been executed for there was no other tax or year in question that called for a waiver. The statute had already run as to the taxes for all the years prior to 1917. There was, therefore, no other year or tax to which it would or could apply than the year 1917. As there was no other year to which the waiver could apply, "there seems to be no basis for denying its obvious purpose." (*Burnet* v. *Chicago Equipment Co.*, 282 U. S., 295 [Ct. D. 276, C. B. X-1, 323].) Consequently the circumstances force us to the conclusion that the parties intended this waiver to apply to the year 1917 and if they did, as the Board found, we think that it did not err in so finding.

In any event it appears that both the petitioner and the Commissioner consented to this waiver, relied upon it as valid and acted accordingly. The petitioner may not now repudiate it. (*Liberty Baking Co.* v. *Heiner*, 37 Fed. (2d), 703 [Ct. D. 194, C. B. IX-1, 231]; *Magee* v. *United States*, 282 U. S., 432, 434 [Ct. D. 285, C. B. X-1, 189].)

If this waiver was valid for the year 1917, it is decisive of the issue before us, for the petitioner's entire argument is based upon the validity of this waiver. He says that:

"The document of December 10, 1923, relied upon by the Commissioner as a link in the chain of waivers extending the statutory period for collection of the jeopardy assessment of December 23, 1925, for the year 1917, is void for three reasons: (1) It is the renewal of a prior void waiver, (2) was induced by the misrepresentation of a fact, and (3) obtained under duress."

His major premise is that the waiver of February 5, 1923, is invalid. This is untenable, as we have above held, and falls, and so the minor premises, based thereon, must fall with it. This being a valid waiver, under the circumstances of this case, the renewal waivers of December 10, 1923, and December 9, 1924, were valid. They were, therefore, not induced by the misrepresentation of a fact nor obtained under duress.

It follows that the order of redetermination of the Board must be affirmed and the determination of the Commissioner approved.

Article 1271: Period of limitation upon assessment of tax.

XIII-13-6724
Ct. D. 804

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

1. Waiver—Validity—Executed After Expiration of Statutory Period—Effect of Repeal of Section 1106(a) of the Revenue Act of 1926.

A waiver executed and filed by a transferee on November 6, 1926, extending the period for assessment of 1917 income and profits taxes, is valid even though executed and filed after the statutory period for assessment had expired, since section 1106(a) of the Revenue Act of 1926 was repealed as of its effective date by section 612 of the Revenue Act of 1928. Section 1106(a) is to be treated as though it had never been a part of the Revenue Act of 1926.

2. Decisions Reversed.

The decisions of the Circuit Court of Appeals, Seventh Circuit (65 Fed. (2d), 925), and of the Board of Tax Appeals (22 B. T. A., 833) reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. The Newport Co.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 5, 1934.]

OPINION.

Mr. Justice STONE delivered the opinion of the court.

This case comes here on certiorari to review a judgment of the Court of Appeals for the Seventh Circuit (65 F. (2d), 925), affirming a decision of the Board of Tax Appeals, that a deficiency assessment against respondent as transferee of the assets of the Newport Chemical Works, Inc., for 1917 income and profits taxes of the transferor was barred by the statute of limitations.

In 1919 the Chemical Works, a Maine corporation, after it had filed its tax return for 1917, transferred all its assets to the respondent, a Delaware corporation, which, as consideration for the transfer, issued its stock to the stockholders of the transferor and assumed all liabilities of the transferor. On March 1, 1920, the Supreme Court of Maine entered a decree which purported to dissolve the Chemical Works. The statutory period of limitation for the assessment and collection of the 1917 taxes, as the Government concedes, expired on April 1, 1923, five years after the return for that year had been filed. Whether this period was extended by waiver so as to include the date of the deficiency assessment fixed by the Commissioner's 60-day letter of March 14, 1927, depends on the validity and effect of several documents filed with the Commissioner by the Chemical Works or by respondent.

During the period from December 15, 1920, to November, 1926, six documents, asserted by the Government to be waivers extending the time for assessment, were executed by the Chemical Works by an officer or its general counsel, and lodged with the Commissioner. On or about November 6, 1926, a further waiver extending the period for assessment to December 31, 1927, executed by respondent by its president, was filed with the Commissioner.

The court below and the Board of Tax Appeals both held, as respondent argues here, that the period for assessment and collection of the tax, which had been indefinitely extended by the terms of the first waiver, was terminated and the assessment barred on April 1, 1924, by a departmental ruling (Mim. 3085, C. B. II-1, 174, April 11, 1923); that all the subsequent waivers, before that of November 6, 1926, were void because they were given by the Chemical Works, which had been previously dissolved; and that, as the assessment against the Chemical Works had thus been barred prior to the Revenue Act of 1926, the right to assess the respondent as transferee could not, under the provisions of that Act, be revived by respondent's waiver of November 6, 1926.

Several independent grounds are urged by the Government to support the challenged deficiency assessment. The only one which we need now consider is that the waiver of November 6, 1926, unaided by the earlier ones, extended the time for the assessment against the respondent, as transferee of the Chemical Works, until its expiry date, December 31, 1927. Before that date the assessment had been made.

Respondent, as such transferee, became liable for any tax which might have been lawfully assessed against its transferor before the transfer, and section 280(a)1 of the Act of 1926 directs that such liability "shall * * * be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed" by that Act. (*Phillips v. Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X-1, 264].) If, as respondent maintains and as the court below held, any assessment was barred before respondent's waiver of November 6, 1926, the effect of that waiver upon the right to assess respondent pursuant to section 280 must be determined by the Revenue Act of 1926.

The provisions of the Act applicable to limitations and waivers are found in sections 277 and 278. Section 277 fixes the period of limitation, but section 278(c) provides:

"Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Had these provisions stood alone the waiver of November 6, 1926, if otherwise valid, would have extended the time for assessment to the specified date, December 31, 1927, even though it was made after the period for assessment had expired. There is nothing in section 278(c) or related sections which requires that a waiver be given prior to the expiration of the statutory period, and this court has uniformly held that, under the identical section 278(c) of the 1924 Act, the defense of the statute of limitations may be waived by the taxpayer after, as well as before, the expiration of the statutory period. (*McDonnell* v. *United States*, 288 U. S., 420 [Ct. D. 570, C. B. XI-2, 328]; *Stange* v. *United States*, 282 U. S., 270 [Ct. D. 274, C. B. X-1, 414]; *Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S., 283, 287 [Ct. D. 279, C. B. X-1, 274]; *Burnet* v. *Railway Equipment Co.*, 282 U. S., 295, 298 [Ct. D. 276, C. B. X-1, 323].)

To avoid this conclusion here, respondent relies on section 1106(a) of the Act of 1926, which provides that "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *." This section, it is said, indicates a congressional intent that, once the liability of the taxpayer is extinguished, it should not be revived by waiver. The Government argues that this attempted distinction between the defense of the bar of the statute of limitations and the defense that the liability has been extinguished is, at most, only formal and does not affect the application of section 278(c); that a defense founded on a right which may be waived by failure to plead it may likewise be waived by formal document authorized by statute. (*Burnet* v. *Desmornes*, 226 U. S., 145; see *Atlantic Coast Line* v. *Burnet*, 239 U. S., 199, 200; *Finn* v. *United States*, 123 U. S., 227, 233; compare *Stange* v. *United States*, supra.) But doubts as to the effect which Congress intended, if any, to be given to the quoted provision of section 1106(a) in construing section 278(c)[1] were removed by section 612 of the Revenue Act of 1928, which declared that section 1106(a) was repealed as of February 26, 1926, its effective date. Congress thus indicated its intention that the section should be erased from the books as though it had never been enacted, so that section 278, like other surviving sections of the 1926 Act, must be construed free of such restrictive influence, if any, as section 1106(a) would otherwise impose. Thus it must be dealt with as was the identical section in the Act of 1924 which was before the court in *Stange* v. *United States*, supra.[2]

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[1] The legislative history of section 1106(a) shows that its purpose was not to prevent a taxpayer from voluntarily agreeing to pay a tax after the period of limitation had expired. It was proposed in order to avoid the effect of a decision of the Court of Claims in *Toxaway Mills* v. *United States* (61 Ct. Cls., 363, 372 [T. D. 3805, C. B. V-1, 322]), holding that if a tax had been collected after the running of the statute of limitations the taxpayer could not set up that fact as entitling him to recover, but could establish a right to a refund only by proving that there had been an overpayment of the tax, on the theory that the statute of limitations did not extinguish the liability but merely barred the remedy. As stated in the conference report on this section of the bill (H. Rept. 356, Sixty-ninth Congress, first session, page 55):

"This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims, *Toxaway Mills* v. *United States* * * *. Obviously this section does not apply in the case of fraud or in the case of a waiver."

And see 67 Congressional Record, Part IV, page 3531. But in conference section 1106(a) was qualified by the addition of a clause denying a right to a refund unless taxpayers had in fact overpaid the tax. See conference report, H. Rept. 356, Sixty-ninth Congress, first session, pages 26, 55. Congress, in enacting these provisions, was thus concerned with refunds rather than assessments and obviously did not enact the provision for the purpose of rendering invalid waivers executed after the running of the statute. See also Senate Report 960, Seventieth Congress, first session, page 41; report of Joint Committee on Internal Revenue Taxation, Seventieth Congress, first session, House Document No. 139, page 16.

[2] It is true that section 506(a) of the Act of 1928 amended section 278(c) of the Act of 1926 by providing for extension, by consent, of the time within which an assessment might be made only if the consent were given before the expiration of the period of limitation. But section 506(b) further provided that any such consent, given after the expiration of the period of limitation, should be valid and effective according to its

That Congress, with consent of the taxpayer, has power to reinstate his tax liability and to authorize assessment of the tax can not be doubted. (*Graham and Foster* v. *Goodcell*, 282 U. S., 409, 426 [Ct. D. 287, C. B. X–1, 191]; *Mascot Oil Co.* v. *United States*, 282 U. S., 436 [Ct. D. 286, C. B. X–1, 190].) The taxpayer can not complain that Congress has availed itself of the consent which he has given, and can not object that it did so by revival of the tax "liability," rather than by removing the bar of the statute as in *McDonnell* v. *United States*, supra, and *Stange* v. *United States*, supra (see *Wm. Danzer & Co.* v. *Gulf R. R.*, 268 U. S., 633, 636; *Home Insurance Co.* v. *Dick*, 281 U. S., 397, 409).

We have considered, but do not discuss respondent's arguments based on the construction of the waiver of November 6, 1926, which are without merit. We do not doubt that rightly construed the waiver conformed to the requirements of sections 278 and 280 of the Act of 1926, and that by it respondent consented to the deficiency assessment.

Reversed.

Article 1271: Period of limitation upon assessment of tax.

REVENUE ACT OF 1926.

Suspension of statute in case of dismissal of petition. (See Ct. D. 822, page 336.)

Article 1272: Period of limitation upon collection of tax. (Also Section 1113, Article 1351.)

XIII–5–6631
Ct. D. 780

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. Waiver—Validity—Signature of Commissioner—Collection by Credit—Estoppel.

Where the taxpayer executed waivers covering the collection of income taxes for 1917 and 1918, and the Commissioner in auditing the returns for the years 1917 to 1921 credited an overassessment for 1918 at the taxpayer's request against a deficiency for the year 1917, the taxpayer is estopped to claim that collection by credit was barred on the grounds that the first waiver had expired at the time the credit was made and that the second waiver was ineffective because not signed by the Commissioner until after its expiration.

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terms if entered into after the enactment of the Act of 1928 and before January 1, 1929. It was also provided, in section 506(c), that "The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined in accordance with the law in existence at the time such waiver was filed." The application of subdivision (c) of section 506 is by its terms limited to amendments made by the section and it seems plain that it was intended to be a qualification of subdivision (a) and not a limitation upon section 612. (Compare *United States* v. *Morrow*, 266 U. S., 531.) Thus construed it prevents any retroactive operation of subdivision (a) by saving the effect of waivers already given although after the expiration of the period of limitation. That effect is to be determined by the application of the provisions of the Act of 1926, with section 1106(a) eliminated as provided by section 612 of the Act of 1928. The declared purpose of section 506 was to preserve the Commissioner's rights to waivers filed under prior Acts and to fix January 1, 1929, as the date of change from the old practice to the new. (See H. Rept. 2, Seventieth Congress, first session, page 29; S. Rept. 960, Seventieth Congress, first session, page 36; conference report, H. Rept. 1882, Seventieth Congress, first session, page 21.) If subdivision (c) were construed as a limitation upon section 612 it would nullify the operation of section 612, and would produce a "whimsical result." (See *Commissioner of Internal Revenue* v. *Oswego & Syracuse R. R. Co.*, 62 F. (2d), 518, 520.) For waivers executed after the period of limitation had run would be valid if filed prior to February 26, 1926, the effective date of the 1926 Act. Like waivers would be invalid if executed between February 26, 1926, and May 29, 1928, the effective date of the 1928 Act. But by section 506(b), supra, they would be valid if executed between May 29, 1928, and January 1, 1929. Scope is given for the operation of section 612 (see *Bernier* v. *Bernier*, 147 U. S., 242, 246), and incongruous results are avoided by treating section 1106(a) as though it had never been a part of the 1926 Act, as section 612 directs. (See *United States* v. *Katz*, 271 U. S., 354.)

2. Waiver—Consent in Writing.

The written consent of the Commissioner, required by the statute, to an extension of time for assessment and collection, is sufficiently evidenced by the indorsement of the word "waiver" upon the assessment list attached to a certificate of additional assessment signed by the Commissioner.

3. Account Stated.

Suit for recovery of alleged overpayment of tax is barred where brought more than five years after the date of payment, in the absence of an account stated giving rise to a new cause of action and a new period of limitation. A certificate of overassessment does not constitute an account stated where there remains for the Commissioner's approval a schedule of refunds and credits by which the balance due is for the first time definitively announced.

4. Decision Affirmed.

Decision of the Court of Claims (2 Fed. Supp., 773, Ct. D. 698, C. B. XII-2, 230) affirmed.

Supreme Court of the United States.

R. H. Stearns Co., Boston, Mass., petitioner, v. *The United States, respondent.*

On writ of certiorari to the Court of Claims.

[January 8, 1934.]

OPINION.

Mr. Justice Cardozo delivered the opinion of the court.

Upon the footing of an account stated the petitioner sues the Government for taxes overpaid.

Income and profits tax returns for the fiscal year ending July 31, 1917, were filed by the taxpayer in September, 1917. The tax shown by these returns as well as by amended returns for the same year was paid in full.

Income and profits tax returns for the fiscal year ending July 31, 1918, were filed in October, 1918, and again the tax was promptly paid.

Following the practice of the Bureau, the Commissioner proceeded to audit the returns to the end that the assessments might be increased or reduced according to the facts.

In February, 1921, the taxpayer signed and filed a waiver of any statutory period of limitation as to the assessment and collection of the tax for the calendar year 1917. It did this in order to be assured that the audit by the Commissioner would be deliberate and thorough. In the absence of such a consent the period of limitation would have expired in April, 1923. The extension was approved in writing by the Commissioner in February, 1923. The waiver on its face had no limit in respect of time, but under a regulation adopted in April, 1923, it spent its force on April 1, 1924, unless continued or renewed.

In February, 1923, the taxpayer signed a second waiver applicable to the fiscal years 1917 and 1918, and extending the period for collection until March 1, 1925. This waiver was not signed by the Commissioner within the term of its duration, though it was signed, years afterwards, on April 7, 1930. However, in June, 1923, while both waivers were on file, the Commissioner made an additional assessment for the fiscal year ending July 31, 1917, and on the attached assessment list wrote the word "waiver" opposite the item affecting the petitioner. The additional assessment for 1917 was reduced by a credit of an overassessment for 1916, and when so reduced amounted to $20,757.14. Payment of this amount was demanded by the collector on August 3, 1923.

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years 1918, 1919, 1920, and 1921, amounting in the aggregate to $35,727.10, and asked that the unpaid balance for 1917 be set off against the claim for overpayment and that the remainder be refunded. At that time it was the practice of the collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim.

On March 1, 1924, the Commissioner approved a schedule of overassessments which included an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the sum of $14,928.07, and sent this schedule to the collector for action in accordance with the directions appearing thereon. On June 12, 1924, the collector, following these instructions, signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits, certifying the application of $14,928.07 as a credit. On June 28, 1924, the Commissioner signed the schedule of refunds and credits, by which act for the first time he definitively announced his allowance of the claim. (*Girard Trust Co.* v. *United States*, 270 U. S., 163, 170 [T. D. 3919, C. B. V–2, 209]; *United States* v. *Swift & Co.*, 282 U. S., 468, 475 [Ct. D. 290, C. B. X–1, 283].) Before doing this, and on or about March 1, 1924, he had transmitted to the petitioner a certificate of overassessment for the fiscal year ending July 31, 1918, in the sum of $14,928.07, which sum was credited in June upon the taxes overdue. This overassessment for 1918, applied as a credit upon the unpaid tax for 1917 ($20,757.14), reduced the liability of the taxpayer to $5,829.07. Demand for the payment of this balance with accrued interest was made by the collector on September 1, 1924. Two weeks later, the petitioner complied with the demand, accepting without protest the application of the credit, and paying the resulting balance.

For nearly six years the transaction was allowed to stand unopened and unchallenged. In April, 1930, the petitioner learned through an attorney that the second waiver had not been signed by the Commissioner until after it had expired. With this knowledge it filed with the Commissioner a claim for refund of the overpaid tax for 1918 ($14,928.07) which had been collected through application as a credit upon the tax for the year before. The basis for the claim was this, that at the time of the credit the first waiver had expired, that the second waiver was ineffective because not signed by the Commissioner, that collection by credit after the term of limitation was as much prohibited as collection at such a time by suit or by distraint, and hence that the overpaid tax certified by the Commissioner in the schedule of overassessment was an undischarged indebtedness, still owing from the Government. Four days later this action was begun. The Court of Claims gave judgment in favor of the Government (2 F. Supp., 773), and a writ of certiorari brings the case here.

1. In auditing the tax for 1918 and crediting the overassessment for that year upon the tax for the year before, the Commissioner acted at the request of the petitioner, which was valid till revoked.

For the decision of this case we do not need to rule whether a "waiver" by a taxpayer consenting to the enlargement of the time for assessment or collection is ineffective unless approved by the Commissioner in writing.[1] There was here more than a waiver, an abandonment of a privilege to insist upon the fulfillment of a condition (*Stange* v. *United States*, 282 U. S., 270, 275, 276 [Ct. D. 274, C. B. X–1, 414]; *Florsheim Bros. Co.* v. *United States*, 280 U. S., 453, 446 [Ct. D. 167, C. B. IX–1, 260]); there was a positive request, which till revoked upon reasonable notice had the effect of an estoppel.

On August 3, 1923, the collector made demand upon the petitioner for the payment of $20,757.14, the tax balance then due for the year 1917. There is no dispute that the demand was timely, and that collection would have been enforced unless the taxpayer had done something to postpone the hour of payment. Waivers were then on file, one of them signed by the Commissioner, the other unsigned, but the petitioner did not rest upon these, nor would these without more have availed to avert the threatened levy. On August 9, 1923, the petitioner filed with the Commissioner a request to withhold the process of collection until credits were adjusted. In substance the request was this: Please do not collect the tax for 1917, until you have completed the audit for the years 1918 to 1921, inclusive, and if there has been overassessment for those years, set it off as a credit.

Now, the time for assessment and collection of the 1921 tax did not expire till 1925, and this without the aid of any waiver or extension. In such circumstances, request by the taxpayer that the Commissioner withhold collection for 1917 until there had been an audit of the tax for 1921 was at least equivalent to a request that he delay until the assessment for 1921 was due under the

[1] See: *Commissioner* v. *United States Refractories Corporation* (64 F. (2d), 69; affirmed by an equally divided court 290 U. S., 591, October 23, 1933); *Atlantic Mills* v. *United States* (3 F. Supp., 699); contra: *Commissioner* v. *Hind* (52 F. (2d), 1075); *John M. Parker Co.* v. *Commissioner* (49 F. (2d), 254).

statute. But before that time arrived, i. e., before 1925, the Commissioner had acted. On March 1, 1924, he had completed the reaudit, and had discovered an overassessment for one of the years covered by the petitioner's request. Within a reasonable time thereafter (June 12, 1924) he had received from the collector a report that $20,757.14 was still unpaid upon the tax for 1917. Promptly thereafter (June 28, 1924), he had complied with the petitioner's instructions by offsetting the overpayment for the one year in reduction of the balance owing for the other. The whole process had been completed within the time fixed by implication in the petitioner's request, within the time when assessment was due for the last of the group of years (1918 to 1921) to be covered by the audit.

The petitioner makes the point that by the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 875, section 609), a credit against a liability in respect of any taxable year shall be "void" if it has been made against a liability barred by limitation. The aim of that provision, as we view it, was to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval or with approval falling short of inducement or request. (Cf. *Stange* v. *United States*, supra; Revenue Act of 1928, section 506 (b) (c), ch. 852, 45 Stat., 791, 870, 871.) If nothing more than this appeared, there was to be no exercise *in invitum* of governmental power. But the aim of the statute suggests a restraint upon its meaning. To know whether liability has been barred by limitation it will not do to refer to the flight of time alone. The limitation may have been postponed by force of a simple waiver, which must then be made in adherence to the statutory forms, or so we now assume. It may have been postponed by deliberate persuasion to withhold official action. We think it an unreasonable construction that would view the prohibition of the statute as overriding the doctrine of estoppel (*Randon* v. *Tobey*, 11 How., 493, 519) and invalidating a credit made at the taxpayer's request. Here at the time of the request, the liability was still alive, unaffected as yet by any statutory bar. The request in its fair meaning reached forward into the future and prayed for the postponement of collection till the audits for later years had been completed in the usual course. This having been done, the suspended collection might be effected by credit or by distraint or by other methods prescribed by law. Congress surely did not mean that a credit was to be void if made by the Government in response to such a prayer.

The applicable principle is fundamental and unquestioned. "He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.'" (*Dolan* v. *Rodgers*, 149 N. Y., 489, 491; and *Imperator Realty Co.* v. *Tull*, 228 N. Y., 447, 457; quoting *West* v. *Blakeway*, 12 Man. & G., 729, 751.) Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in the principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. (*Imperator Realty Co.* v. *Tull*, supra.) A suit may not be built on an omission induced by him who sues. (*Swain* v. *Seamens*, 9 Wall., 254, 274; *United States* v. *Peck*, 102 U. S., 64; *Thomson* v. *Poor*, 147 N. Y., 402; *New Zealand Shipping Co.* v. *Societe des Ateliers* [1919], A. C., 1, 6; Williston, Contracts, volume 2, sections 689, 692.)

2. If we assume in favor of the petitioner that the credit is a nullity in the absence of a written waiver, approved by the Commissioner, the record supports the inference that at the time of the set-off such approval had been given.

The statute provides that no suit or proceeding shall be begun for the collection of the tax after the expiration of five years succeeding the filing of the return "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection." (Revenue Act of 1921; ch. 136, 42 Stat., 227, 265, section 250(d).) In this case, consent by the taxpayer in due form is found and indeed conceded. The only question is whether there was consent by the Commissioner. But the statute does not say that the evidence of consent shall be embodied in a single paper. (Cf. *Eclipse Lawn Mower Co.* v. *United States*, 1 F. Supp., 768 [Ct. D. 629, C. B. XII-1, 292].) Its one requirement in respect of form is that the consent shall be in writing. (*Sabin* v. *United States*, 70 Ct. Cls., 574.) There is left a wide range of administrative discretion. Any writing, formal or informal, is sufficient if made for the purpose of recording the Commissioner's approval, and if approval may be gathered therefrom as a reasonable inference.

The burden was on the petitioner, seeking a refund of its tax, to prove its allegation that the overassessment for 1918 had been illegally credited upon the tax for 1917. At the outset it might have stood upon the fact that the credit had been made after the normal term of limitation, casting the burden on the Government of going forward with evidence in proof of an extension. When its own waiver had been proved, however, the case took on another aspect. At that stage the presumption of official regularity was sufficient to sustain the inference that the Commissioner on his side had done whatever was appropriate to give support to his own act and thus validate the credit. Acts done by a public officer "which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." (*Bank of the United States* v. *Dandridge*, 12 Wheat., 64, 70; *United States* v. *Royer*, 268 U. S., 394, 398; *Knox County* v. *Ninth National Bank*, 147 U. S., 91, 97; *Mandeville* v. *Reynolds*, 68 N. Y., 528, 534; *Demings* v. *Supreme Lodge Knights of Pythias*, 131 N. Y., 522, 527; Wigmore, Evidence, volume 5, section 2524.) No doubt the presumption of regularity is subject to be rebutted. It stands until dislodged.

Now, the petitioner has failed to show that the Commissioner did not approve in writing. On the contrary the evidence is persuasive that he did. A certificate of an additional assessment for the fiscal year ending July 31, 1917, was signed, as we have seen, on June 26, 1923; and on the assessment list attached thereto, opposite the entry of the assessment against the petitioner, the following appears: "7/31/17 Fisc. 1753361. O. L. 4/17/23; waiver." The Commissioner did not sign his name below the memorandum, but the memorandum was attached to a certificate which the Commissioner did sign, and his name subscribed to the certificate authenticates also the documents attached to it, if we assume in favor of the petitioner that signing is essential. The Court of Claims was of the opinion that the word "waiver" on this list had relation to the second of the two consents on file with the Commissioner. The context and the circumstances lend support to that conclusion. The fiscal year for the petitioner ended July 31. Probably through inadvertence, the first waiver refers to a tax for the calendar year ending December 31. This might have seemed to exclude the first six months of the year ending July 31, 1917, i. e., the period from July 31, 1916, to January 1 following. We do not say that the courts would uphold so literal a construction. Almost certainly the objection, if made, would be put aside as hypercritical. (See 39 Stat., ch. 463, page 770, section 13.) Even so, the memorandum may well be allocated to the waiver that fits it precisely in preference to the one that fits it imperfectly. We turn, then, to the documents in order to relate them to one another. If we look only to its letter, the memorandum does not refer to a waiver for the calendar year ending December 31, 1917. It refers, on the contrary, to a waiver for the fiscal year ending July 31, 1917 (7/31/17). The only waiver corresponding to this description in form as well as in substance is the one filed with the Commissioner February 19, 1923, which covers the year ending July 31, 1917, as well as the year after.

The inference, therefore, is legitimate that the second of the two waivers is the one that the Commissioner had in view when he wrote this memorandum indicative of assent. At the very least the effect of the entry is to leave the purpose of the writer doubtful. Choice between two doubts should be made in such a way as to favor the presumption of official regularity.

3. The petitioner has failed to make out the existence of an account stated for its benefit, and its claim, even if otherwise valid, is barred by limitation.

Payment of the tax for the fiscal year ending July 31, 1918, was made by the petitioner, partly in 1918, and partly in 1919. Five years from the date of payment, a statute of limitations set up a bar to a suit for the recovery of the tax on the ground of illegal assessment or collection. (R. S. section 3226; 26 U. S. C., section 156; *Bonwit Teller & Co.* v. *United States*, 283 U. S., 258, 265 [Ct. D. 334, C. B. X-1, 328].) The petitioner, conceding this, maintains that in March, 1924, there was a statement of an account, giving rise to a new cause of action with a new term of limitation. (*Daube* v. *United States*, 289 U. S., 367, 370 [Ct. D. 623, C. B. XII-1, 323]; *Bonwit Teller & Co.* v. *United States*, supra.) This suit was not brought till May, 1930. In the absence of an account stated in its favor the petitioner must fail.

A recent judgment of this court recalls the essentials of an account stated as they were long ago defined. (*Daube* v. *United States*, supra.) A balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other. But plainly no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion. The taxpayer knew that the Commissioner had been requested, after determining the overassessment, to set it off against the tax for an earlier year. The taxpayer knew also that the set-off or credit would not appear on the face of the certificate of overassessment, but would require reference to another and later document, the schedule of refunds and credits. The diverse functions of these documents were pointed out by this court in *United States* v. *Swift & Co.* (282 U. S., 468, 475) and *Girard Trust Co.* v. *United States* (270 U. S., 163, 170). The taxpayer knew also that it had signed a formal waiver extending the term of collection until March, 1925, and it had no reason to believe that this waiver had not been signed by the Commissioner, if it be assumed for present purposes that such a signature was necessary. Plainly, in such circumstances the certificate of overassessment without more does not import a promise by the Commissioner to refund the amount there certified instead of applying it as a credit upon the tax of an earlier year. At most the promise to be implied is one to refund the excess after there has been a computation of the taxes unpaid for other years and an ascertainment of the balance. The statement of the account is not unconditional and definitive. It is provisional and tentative. Finality was lacking until there was an agreement as to credits. (*Newburger-Morris Co.* v. *Talcott*, 219 N. Y., 505, 512.)

The events that followed confirm this interpretation of the effect of the transaction. Upon a computation of the credits the final balance was ascertained to be in favor of the Government. The balance thereby fixed was reported to the taxpayer. After the schedule of refunds and credits had been signed by the Commissioner, the collector transmitted to the taxpayer a new statement of account by which it was clearly made to appear that the overassessment had been credited upon the tax for 1917, and that after such credit there was still owing from the taxpayer a balance of $5,829.07, which, together with the accrued interest, was thereupon collected. Then for the first time was there a final ascertainment of the balance upon consideration of both sides of the account, the debits and the credits. The taxpayer did not object to the account as submitted in its final form. Far from objecting, it paid the resulting balance, and by this act as well as by silence conceded the indebtedness. Indeed there was more than an account stated; by force of voluntary payment there was also an account settled. (*Lockwood* v. *Thorne*, 18 N. Y., 285, 292.) The statute of limitations is a bar to the recovery by the petitioner of the balance paid to the Government upon the demand of the collector. This is not disputed. It is equally a bar to the recovery of any item that entered into the account and determined the balance as thus definitely adjusted.

The judgment is affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

ARTICLE 1272: Period of limitation upon collection of tax.

XIII–13–6725
Ct. D. 807

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. WAIVER—VALIDITY—EXECUTED AFTER BAR OF STATUTE.

A waiver made and accepted after the expiration of the period of limitation, or after the expiration of any waiver period, is effective to restore the right of the Government to proceed with the assessment for collection of the deficiency.

2. WAIVER—ASSESSMENT—COLLECTION.

A waiver which extends the time for assessment contemplates also the collection of the tax after assessment.

3. Decision Affirmed.

Decision of the Board of Tax Appeals (23 B. T. A., 1331) affirmed.

4. Certiorari Denied.

Petition for certiorari denied November 20, 1933.

United States Circuit Court of Appeals for the Seventh Circuit.

Crucible Steel Casting Co., petitioner, v. Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals.

Before Alschuler and Sparks, Circuit Judges, and Wilkerson, District Judge.

[July 11, 1933.]

OPINION.

Alschuler, Circuit Judge: There is involved in this appeal the question whether the collection of the income tax for the calendar year 1918 is barred by limitation.

Petitioner's tax return was filed June 13, 1919. On February 28, 1924, petitioner executed, and the Commissioner accepted, an income and profits tax waiver wherein petitioner consented "to a determination, assessment. *and collection*" of any such taxes for the year 1918, such waiver to continue in effect for one year after the period of limitation would expire.

On November 19, 1925, after the term of the former waiver had expired, petitioner executed, and the Commissioner accepted, a further waiver, effective until December 31, 1926, whereby the time for *assessment* of the tax was waived for the specified period. Under date of November 22, 1926, petitioner executed a further waiver, in same form as the one last above, to be effective until December 31, 1927. The notice of deficiency involved in this appeal was sent to petitioner January 21, 1927.

The first contention made is that the second waiver was not made until after the period of the first waiver had expired, and that a waiver made and accepted after the expiration of the period of limitation, or after expiration of any waiver period, is ineffective to restore the right of the Government to proceed with the assessment for collection of the deficiency. In *Stange* v. *United States* (282 U. S., 270 [Ct. D. 274, C. B. X-1, 414]) it was distinctly held otherwise. The right to proceed within the period of the waiver was there upheld, notwithstanding that at the time the waiver was made the bar of the statute was already complete.

It is claimed that the last two waivers did not extend the time for collecting the tax, and that the bar on collection was complete. The first waiver waived the limitation for the "determination, assessment, and *collection*" of the taxes, while the second and third purported to extend the time only as to *assessment* of taxes, without mentioning collection. The precise contention is that the right to *collect* is barred notwithstanding the waiver was effective as to the *assessment* of the tax. The Stange case denies also this contention. There the waiver made no reference to collection, but the court held this was not essential in order to make effective the taxpayer's expressed consent to the extension of the period for assessment. Said the court: "The parties can not have intended to have the amount of the tax ascertained and to leave the taxpayer free to pay it or not. They clearly contemplated the entire procedure necessary to determination and collection of the tax." These words from the Stange case are here applicable and decisive. To like effect is *Aiken* v. *Burnet* (282 U. S., 277 [Ct. D. 275, C. B. X-1, 417]). (See also, *W. P. Brown & Sons Lumber Co.* v. *Burnet*, 282 U. S., 283 [Ct. D. 279, C. B. X-1, 274], and *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S., 295 [Ct. D. 276, C. B. X-1, 323].)

The order appealed from is affirmed.

ARTICLE 1272: Period of limitation upon collection of tax.

XIII-20-6796
Ct. D. 826

INCOME AND PROFITS TAX—REVENUE ACTS OF 1916, 1917, AND 1918—DECISION OF COURT.

SUIT—COLLECTION BY CREDIT—STATUTE OF LIMITATIONS—ESTOPPEL.

Where, for its own convenience, the taxpayer requested that application of an overassessment for the year 1918 as a credit upon a deficiency assessment, timely made, for the year 1917 be held in abeyance until the whole matter of taxes for the years 1916 to 1920 could be determined, it is estopped to assert, as a basis for recovery, that collection of the additional assessment for 1917 was barred at the time when the credits were made.

COURT OF CLAIMS OF THE UNITED STATES.

Clinton Coal Co. v. *The United States.*

[February 5, 1934.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

The plaintiff brings this suit to recover $43,927.65, being a portion of the overassessment of its income and profits tax for the year 1918 which was applied against an additional assessment timely made of tax for the year 1917, with interest.

The case before the court is one in which the Bureau of Internal Revenue having had under consideration the amount of plaintiff's taxes for the years 1916 to 1920, inclusive, the Commissioner notified plaintiff by letter that he had determined that $53,973.35 additional taxes were due for 1917 and that there was an overassessment for 1918 of $73,925.53. In the same letter plaintiff was advised of other adjustments on its taxes which are not necessary to be considered here. The plaintiff then referred the matter to its duly authorized attorney, Charles A. Crawford. Crawford had a conference with the collector in charge of the collection of these taxes and certain communications passed between them. In this conference and by letters to the collector the attorney for plaintiff requested the collector "to hold up action upon the above items (meaning plaintiff's taxes under consideration), until the certificates are received from Washington and the whole matter closed." This same request was repeated in different communications and different forms and the collector answered that the collection of these amounts would be held in abeyance in accordance with the request. Later, and on February 19, 1924, the Commissioner made an additional assessment for 1917 in the amount of which the plaintiff had been before notified ($53,973.35), and also a small additional assessment for the year 1920, and directed the collector to withhold demand pending comparison with the schedule of overassessments. This assessment was in time and there was nothing to prevent its collection except the agreement above shown. On February 25, 1924, the Commissioner approved the schedule of overassessments showing an overassessment of plaintiff's taxes for the year 1918 in the amount of $73,925.53, and sent the same to the collector with instructions to apply the overpayment as a credit against taxes due, if any, which was accordingly returned to the Commissioner by the collector showing that of the said overassessment in the amount of $73,925.53, $29,997.88 had been applied as a credit against the unpaid original tax for 1920 and the balance of $43,927.65 against additional assessment for the year 1917 in the amount of $53,973.35, leaving $10,045.70 still due thereon. Before the schedule was signed the collector had sent to plaintiff a notice and demand for the balance of the 1917 taxes as above stated which the plaintiff shortly after paid, and thereafter and on June 4, 1924, the Commissioner signed the schedule of refunds and credits transmitted to him by the collector.

The record as a whole shows that the plaintiff for its own convenience all through these transactions was requesting that the collection of its taxes be held up and that all of them be adjusted in one final transaction, and that the matter was carried to a conclusion in accordance with its request. At the time, the plaintiff expressed its appreciation and paid the amount still remaining on its 1917 taxes. After having thus confirmed the transaction no further objections were made until more than five years afterwards when it filed the claim for refund of $43,927.65 for the year 1918 upon which the suit is now brought.

It is urged on behalf of plaintiff that these communications and agreements were had and made with the collector and not with the Commissioner. It is not necessary to here lay down any general rule with reference to the effect of communications made to a United States collector of taxes or agreements made with him. It is sufficient to say that in this particular case we find that the collector had full charge of the matter of collecting these taxes subject to special directions from the Commissioner of Internal Revenue. By the negotiations and agreement entered into with the collector made at a time when the tax could be collected, the plaintiff succeeded in having the collection postponed, and the arrangement which it had requested having been carried out by the defendant it can not now be heard to complain thereof.

In view of the recent decisions of this court, it will not be necessary to state herein further reasons why the plaintiff can not maintain its action. If any be sought, reference is made to the cases of *Naumkeag Steam Cotton Co.* v. *United States* (76 C. Cls., 687, certiorari denied); *R. H. Stearns Co.* v. *United States*, decided January 8, 1934 (291 U. S., 54 [Ct. D. 780, page 321, this Bulletin]), affirming the decision of this court; and the opinion in the case of *Samuel Daube* v. *United States*, this day rendered, all of which show that the plaintiff is estopped under the circumstances from maintaining its action. We might also add that under the rule laid down in the last-named decision the plaintiff's action is barred, no claim for refund having been filed in time in view of the fact that the evidence shows there was no account stated.

Defendant also bases a defense on the fact that what is called "Form 368-M" was attached to the schedule of overassessments, but we do not find it necessary to consider this matter.

Plaintiff's petition must be dismissed. It is so ordered.

SECTION 279.—JEOPARDY ASSESSMENTS.

ARTICLE 1281: Jeopardy assessments. XIII-19-6784
(Also Section 270, Article 1206; Section 275, Ct. D. 823
Article 1251.)

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1916, 1918, 1921, 1924, AND 1926—DECISION OF COURT.

1. FALSE AND FRAUDULENT RETURNS—PENALTIES—PLEADINGS.

Where taxpayer's petition to the Board of Tax Appeals alleges that amounts assessed against him as penalties were assessed upon the ground that he had unlawfully and willfully attempted to evade payment of taxes imposed for the years 1917, 1918, 1919, and 1921, and the Commissioner in his answer denies error in making the assessment and denies generally the material allegations of fact contained in the petition, the issue of fraud, being inherent in the Commissioner's determination, is sufficiently pleaded, since section 601 of the Revenue Act of 1928, which amended section 907(a) of the Revenue Act of 1924 and provided for the first time that the burden of proving fraud should be upon the Commissioner, had not been enacted at the time the answer was filed.

2. FALSE AND FRAUDULENT RETURNS—LIMITATION—JEOPARDY ASSESSMENT.

A jeopardy assessment made in November, 1924, for income and excess profits taxes for 1917, 1918, and 1919, and fraud penalties, is not barred by the statute of limitations where the Board finds, on proper and sufficient evidence, that returns for those years were false and fraudulent with intent to evade taxes, since section 278(a) of the Revenue Act of 1926 provides that, where fraud is found, the tax may be assessed at any time.

3. Compromise and Settlement—Evidence—Sufficiency—Effect of Board's Finding.

Where evidence offered by petitioner to show that certain payments were made in compromise and settlement of all taxes and penalties for the years in question is met by evidence offered by the Commissioner tending to show that the requirements of section 3229 of the Revised Statutes with respect to the consent of the Secretary of the Treasury and the filing of an opinion by the Solicitor of Internal Revenue had not been complied with, the finding of the Board of Tax Appeals that the evidence failed to establish that a compromise had been reached is sufficiently supported, and is binding upon the court.

4. Res Judicata.

Acquittal upon an indictment charging willful attempt to defeat and evade taxes under amended returns for 1917, 1918, and 1919 does not operate, under the doctrine of res judicata, as a bar to the imposition of penalties imposed because of fraud in the original returns for those years.

5. Constitutionality.

A conviction for willful attempt to defeat or evade tax by filing a false and fraudulent return for the year 1921 does not, under the fifth amendment to the Constitution of the United States, operate as a bar to the imposition of an added penalty for filing the same fraudulent return; it being within the power of Congress to prescribe fine and imprisonment through criminal prosecution under section 253 of the Revenue Act of 1921 and also the added penalty under section 250(d) of that Act, as parts of one punishment.

6. Decision Affirmed.

Decision of the Board of Tax Appeals (26 B. T. A., 670) affirmed.

United States Circuit Court of Appeals, Fourth Circuit.

John R. Hanby, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before Parker, Northcott, and Soper, Circuit Judges.

[October 3, 1933.]

OPINION.

Soper, Circuit Judge: A petition was filed by the taxpayer to review a decision of the Board of Tax Appeals affirming the Commissioner's determination of additional income and excess profits taxes for the years 1917, 1918, 1919, 1920, and 1921. The sum of the deficiencies of the taxes in these years, as so approved, is $22,829.64, to which penalties in the amount of $20,556.35 have been added. For the year 1917 there was imposed under R. S. section 3176, as amended by section 16 of the Revenue Act of 1916 (39 Stat., 756, 775), a penalty of 50 per cent of the excess profits tax, for failure to make and file the excess profits return, and also a penalty of 100 per cent of the income tax, for willfully making a false and fraudulent income tax return; while for each of the other years there was imposed under section 250(b) of the Revenue Acts of 1918 and 1921 (40 Stat., 1057, 42 Stat., 227), a penalty of 50 per cent of the amount of the deficiency, for false and fraudulent understatement, with intent to evade the tax or the amount which should have been paid. Petitioner does not question the amount of the deficiencies assessed, but advances divers reasons why the assessment may not now be imposed upon the following facts as found by the Board.

Petitioner was engaged during the years in question at Wilmington, N. C., in the manufacture and wholesale distribution of candies and soft drinks, under the trade name of Crescent Candy Co. A false record book was kept, under petitioner's direction, the accounts of the business were deliberately manipulated in order that his taxable gain might be understated and false returns, based upon these accounts, were filed in due time for each of the years 1917 to 1921. On June 9, 1923, after an examination of petitioner's books, a deficiency letter, with attached statement showing an additional tax and penalty of $63,892.37 for the years 1917, 1918, and 1919 was mailed to petitioner, and as a result petitioner filed amended returns for those years, admitting part of the liability asserted. Conferences were then had in Washington between a representative of the petitioner and representatives of the Bureau of Internal Revenue, and as a consequence of these discussions, an additional assessment of taxes and penalties was made by the Commissioner, and additional payments were made by the taxpayer under circumstances to be later more fully described. In the year 1924 a further examination of petitioner's books was had, and a second deficiency letter, showing additional taxes and penalties in the sum of $43,385.99, was mailed to petitioner on October 11, 1924. A jeopardy assessment for this sum followed in November, 1924; and the present proceeding grows out of the respondent's rejection on June 3, 1927, of petitioner's claim for abatement of the full amount of the additional assessment. In the meantime petitioner was indicted in the United States District Court for the Eastern District of North Carolina for willful attempt to defeat and evade the taxes imposed by law, by filing false and fraudulent amended returns for the years 1917, 1918, and 1919, and also for filing a false and fraudulent original return for 1921. He was tried under this indictment and acquitted of the charges with reference to the amended returns for 1917, 1918, and 1919, but convicted of the charge in relation to his original return for 1921.

Upon these facts, petitioner contends (1) that the assessment in November, 1924, of taxes and penalties for 1917, 1918, and 1919 was barred by the statute of limitations; (2) that there was a binding settlement and compromise of tax liability for the years 1917, 1918, and 1919; (3) that the acquittal of petitioner on criminal charges in connection with the amended returns for 1917, 1918, and 1919 is *res judicata*, as to his liability for fraud penalties for those years; and (4) that the indictment and conviction of petitioner on the charge of filing a false and fraudulent original return for 1921 operates as a bar under the doctrine of double jeopardy, to the further imposition of the fraud penalty for that year.

There is also a preliminary procedural question. Petitioner earnestly contends, as to the penalties imposed, that the question of fraud was not properly raised by the pleadings before the Board, and hence that certain objections made by him at the hearing to evidence of fraud offered by the respondent should have been sustained, leaving no evidence in the record to support the imposition of the penalties. It is true that respondent did not affirmatively allege fraud in his answer but simply denied that he had erred in making the assessment and denied generally the material allegations of fact in the petition. Nor did the petitioner expressly allege the absence of fraud. In his specifications he referred to certain of the defenses above mentioned, and declared that the computation of tax and penalties was erroneous, being based upon improper data and records, and not in accord with the facts. But it does not follow that the question of fraud was not in issue. It is obvious that the petitioner was well aware that fraudulent conduct on his part formed the basis of the Commissioner's determination, for the petition itself contained the allegation on his part that the amounts assessed against him as penalties were assessed upon the ground that he had unlawfully and willfully attempted to evade payment of the taxes imposed upon him for the respective years. Moreover, as the Board pointed out in its opinion, the question of fraud was inherent in the Commissioner's determination. The jeopardy assessment of November 29, 1924, of $43,385.99, consisted of additional taxes and of penalties incurred from his willful attempt to evade the payment of taxes. He filed a claim in abatement of this assessment, which was rejected on June 3, 1927, and the pending petition was filed by him to secure a review of this rejection by the Board.

Since the Commissioner's determination and assessment of penalties was based on a finding of fraud, the only way in which the taxpayer could get relief was to put the question of fraud in issue; for the Board has merely a revisory capacity and its jurisdiction is limited to the issues raised by the pleadings before it. (*Popular Price Tailoring Co.* v. *Commissioner*, 33 F. (2d), 464; *Blair* v. *Matthews*, 29 F. (2d), 892; *Boggs & Buhl, Inc.*, v. *Commissioner*, 34 F. (2d), 859, 861.) Therefore unless it appears from the petition of the taxpayer that he contested the validity of the Commissioner's finding on the ground that fraud was not proved, the Commissioner's determination of fraud must necessarily stand. (Compare *Board of Tax Appeals* v. *United States*, 37 F. (2d), 442.) It would avail the taxpayer nothing in this case to interpret the general assignment of error above referred to in the manner which he now suggests as questioning only the correctness of the mathematical calculation involved in the assessment, for no error has been shown in this respect, and this interpretation would leave the finding of fraud by the Commissioner undisturbed. It may be added in passing that the point under discussion is purely formal and technical, because the Commissioner offered evidence which fully established fraudulent conduct on the part of the petitioner in connection with his tax return, and the petitioner offered no evidence on his behalf to the contrary. Under these circumstances, we think that the Board was correct in holding that the Commissioner's answer, filed on August 22, 1927, was in accord with rule 14 of the Board which then provided in substance that the answer should fully advise the petitioner and the Board of the nature of the defense and should contain a specific admission or denial of each material allegation of fact contained in the petition, and should set forth any new matters upon which the petitioner relies for defense or for affirmative relief. The issue or fraud was not new matter within the meaning of this rule because it was inherent in the Commissioner's prior determination; and it can not be said that the petitioner was in need of advice that fraud was involved since his petition disclosed that he was in possession of this information. Subsequent to the filing of the answer, section 601 of the Revenue Act of 1928 (45 Stat., 791), amending section 607(a) of the Revenue Act of 1924 (43 Stat., 253), was passed providing for the first time that the burden of proving fraud should be upon the Commissioner; and pursuant to this statute, the Board amended rule 14 to provide that the answer shall contain amongst other things a statement of any facts upon which the petitioner relies to sustain any issue raised in the petition in respect to which the burden of proof is placed upon the Commissioner; but this rule was not in effiect in 1927 when the answer was filed and such a statement was not then necessary.

This result disposes also of the first contention made by petitioner upon the facts as found by the Board, that the assessment of taxes and penalties for the years 1917, 1918, and 1919 was barred by the statute of limitations. Section 277(a)3 of the Revenue Act of 1926 (44 Stat., 9), provides: "The amount of income, excess profits and war profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed * * *." Section 278(a) provides: "In the case of a false and fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed * * * at any time." Since the Board has found, on proper and sufficient evidence, that petitioner's returns for 1917, 1918, and 1919 were false and fraudulent with intent to evade tax, and that no excess-profits return was filed for 1917, the jeopardy assessment of November, 1924, was timely.

Petitioner's next contention is that there has been a valid compromise and settlement of his liability for taxes and penalties for the years 1917, 1918, and 1919, which prevents further recovery for those years. He relies upon the authority given the Commissioner by R. S. section 3229 (26 U. S. C. A., 158) to compromise certain claims, the language of the provision being:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon * * *. Whenever a compromise is made in any case, there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of the tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise."

The evidence offered by petitioner to show that a compromise was effected in accordance with this section, tended to show that after an examination of petitioner's books by an internal revenue agent in 1923, and after receipt of the first deficiency letter, petitioner filed amended returns for the years 1917, 1918, and 1919, and also a protest to the deficiency letter in which he stated he was making an "offer of compromise in the amount of $12,880.55"; that at a conference between a representative of petitioner and certain subordinate officials in the Bureau, the facts sworn to by petitioner in the protest and in the amended returns were discussed, and petitioner's contention that there had been no fraud in the original returns was apparently accepted; that at this conference a check for $12,880.55, payable to the Commissioner, which was tendered with the protest, was tentatively accepted; that it was agreed at a later conference that this check should be accepted as part payment of the total tax which the Bureau's audit of the amended returns showed to be due, and that the balance of $7,263.22 should be met by a check payable to the collector of internal revenue for the district of North Carolina, where the taxpayer resided, and that this was done; that the check for $12,880.55 was indorsed by the Commissioner to the collector, and that both checks were indorsed by the latter official and deposited in bank, and that each check stated on its face that it was in full and final payment of all Federal taxes and penalties for the years in question. Petitioner offered no evidence that the consent of the Secretary of the Treasury to the offer of compromise had been given, or that an opinion of the Solicitor of Internal Revenue had been placed on file, as required by the provisions of R. S. section 3229 above set out.

On the other hand, the respondent offered evidence tending to show that there was no record in the office of the collector, or in the office of the General Counsel of the Bureau of Internal Revenue, or in the office of the Solicitor of Internal Revenue, that an offer of compromise had been tendered. This evidence was objected to by the petitioner, but the objection was properly overruled by the Board, since the evidence obviously tended to show that the requirements of the statute with respect to the consent of the Secretary of the Treasury, and of the filing of an opinion by the Solicitor of Internal Revenue had not been met. It was also shown that a carbon copy of an offer of compromise, dated June 14, 1923, which the petitioner claimed that he had filed with the collector on or about that date, was written on an official form that was not printed until August, 1924, and the petitioner made no effort to explain the discrepancy in dates. The Board of Tax Appeals held that the evidence failed to establish that a compromise had been reached in compliance with the provisions of R. S. section 3229, and since there was substantial evidence to support the finding, it is binding on this court. (*Ox Fibre Brush Co.* v. *Blair*, 32 F. (2d), 42.)

Petitioner nevertheless contends that the evidence outlined brings the case within the rule laid down by this court in *Oliver* v. *United States* (267 F., 544), where it was held by a divided court that upon the trial of the defendant for violating the Harrison Narcotic Act, it was error to reject evidence tending to show that the defendant had made an offer of compromise to the Commissioner of Internal Revenue, accompanied by a check in payment of the amount offered, which was indorsed by the Commissioner to the proper collector of internal revenue and deposited by the latter in bank. It was held that this evidence, in the absence of any evidence to the contrary, at least tended to show that the compromise had been approved and duly accepted by the proper officials of the Government, in accordance with the statute. That case, however, is not controlling here for the evidence of the petitioner has been met by evidence on the part of the respondent creating an issue of fact upon which the Board has made a binding decision. Moreover, the more recent decision of the Supreme Court in *Botany Mills* v. *United States* (278 U. S., 282 [Ct. D. 39, C. B. VIII-1, 279]), is conclusive of the matter. There the taxpayer's books showed the necessity of an additional assessment, and after much correspondence and numerous conferences with subordinate officials of the Bureau of Internal Revenue, it filed an amended return and paid an additional tax based upon figures agreed upon in the conferences. But the Secretary of the Treasury did not consent to the settlement, and no opinion was filed by the Solicitor of Internal Revenue. The taxpayer sued to recover a part of the additional tax on the ground that it had been illegally collected, and was met with the defense that a binding agreement of compromise had been made. The Supreme Court said page 28):

"Here the attempted settlement was made by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the Solicitor was filed in the Commissioner's office.

"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

This result renders it unnecessary to consider several assignments of error relative to the admission of evidence as to what transpired at the conferences in the Bureau, and as to the interpretation placed upon the result of those conferences by certain officials.

There is no merit in petitioner's contention that his acquittal as to the years 1917, 1918, and 1919 upon an indictment charging willful attempts to defeat and evade tax in those years, operates, under the doctrine of *res judicata*, as a bar to the imposition of fraud penalties for those years. The criminal charges as to 1917, 1918, and 1919 related only to the *amended* returns which petitioner filed after the examination of his books in 1923, and the issue here involved, of fraud in the *original* returns, is wholly distinct. There can be no estoppel by judgment, where the former and subsequent case do not involve the same claim or demand, unless the point or question to be determined in the later case is the same as that litigated and determined in the former. (*Tait* v. *Western Maryland Ry. Co.*, 53 S. C. R., 706 [Ct. D. 683, C. B. XII-1, 351]; *Cromwell* v. *County of Sac.*, 94 U. S., 351.)

Finally petitioner contends that the fraud penalty of $357.41, assessed for the year 1921 under section 250(b) of the Revenue Act of 1921 (42 Stat., 227, 265), set forth in the note,[1] may not properly be imposed upon petitioner because of his prior indictment and conviction in 1924 for having filed the same false and fraudulent return for 1921. The contention is, that the fraud penalty is a punishment for crime, and that, having once been punished in a criminal proceeding for the same offense, petitioner is protected from a second punishment by the fifth amendment to the Constitution, providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

The Board found as a fact that the petitioner had been indicted and convicted of filing a false and fraudulent return for 1921, the return being his original return for that year and the same for which the penalty now under discussion was assessed; and following the language of section 250(b), which specifically imposes the fraud penalty "in addition to other penalties provided by law for false or fraudulent returns," the Board approved the respondent's determination. It appears that the petitioner was found guilty of a violation of section 253 of the Revenue Act of 1921 (42 Stat., 268), which provides that "any individual * * * who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor," and punished by fine and imprisonment.

Thus the question is presented whether a conviction under section 253 of the Revenue Act of 1921 for willfully attempting to defeat or evade a tax by the filing of a false or fraudulent return operates as a bar to the subsequent assessment and collection under section 250(b) of that Act of the added penalty of 50 per centum of the deficiency found to exist in the same fraudulent return. Petitioner relies entirely upon *United States* v. *Lafranca* (282 U. S., 568) and *United States* v. *Chouteau* (102 U. S., 603). It was held in the former case that a civil suit for the recovery of taxes and penalties, imposed by the earlier statutes upon the illegal manufacture and traffic in intoxicating liquors, and kept alive and increased by section 35 of the National Prohibition Act, was barred by a prior conviction involving the same unlawful conduct under the National Prohibition Act. The decision was based upon an interpretation of section 5 of the Willis-Campbell Act which provided that if any act should be both a violation of the earlier laws and also of the National Prohibition Act, a conviction under one statute should be a bar to a subsequent prosecution under

[1] SEC. 250. (b) * * * If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

the other. It was said that a contrary interpretation would give rise to a grave constitutional question; and it was pointed out that the so-called tax had no relation to the ordinary support of the Government, but was an exaction imposed by statute as a punishment for an unlawful act, and that the fact that the second case was a civil action did not alter the rule that a person may not be twice punished for the same offense. In *United States* v. *Chouteau* (102 U. S., 603) it was held that where the Government had accepted a sum of money in compromise of the charges in an indictment for the removal of distilled spirits from a distillery, without paying the revenue tax thereon, it could not succeed in a civil suit for the recovery of a penalty for the same unlawful act, although R. S. section 3296 imposed not only a fine and imprisonment for unlawful removal, but also a penalty. Speaking of the defendant, the court said (page 611):

"He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the Government delusive and useless."

Respondent contends that the fifth amendment is inapplicable because (1) the identity of offenses necessary to give rise to the bar of double jeopardy has not been established, and (2) the fraud penalty imposed by section 250(b) is not a punishment for crime. Respondent's first contention is based upon the doubtful ground that the offenses must be regarded as distinct because fraud while expressly made essential to liability for the penalty provided by section 250(b) is not a necessary ingredient of the criminal offense described in section 253. For the purposes of this case, however, we shall assume the identity of the offenses. Similarly, we shall assume, contrary to the contention of the respondent, that a second punishment, even though imposed as an administrative penalty, violates the prohibition of the fifth amendment that no person shall be twice in jeopardy for the same offense. But it does not follow that recovery of the penalty in this case is barred by the fifth amendment.

It is manifest that Congress intended to impose upon such unlawful and fraudulent conduct as that of the taxpayer in this case not only a punishment by fine and imprisonment through criminal prosecution under section 253 of the Revenue Act of 1921, but also the added penalty under section 250(b) to become due and payable upon notice and demand by the collector. Under such circumstances it has been held that the statute does not impose a second punishment for the same offense, but that the several penalties are parts of a whole which is not satisfied by the imposition of a part. Thus the case of *In re Leszynsky* (15 Fed. Cases No. 8279) involved a civil suit in which the United States had recovered a money penalty imposed by R. S. 3318, and it was held that this judgment was not a bar to a subsequent criminal prosecution based on the same offense. Blatchford, circuit judge, quoting from *People* v. *Stevens* (13 Wend. (N. Y.), 341, 342), said:

"It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution. It is not punishing the same offense twice. They are but parts of one punishment. They both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times does not affect the principle. It might as well be contended that a man was punished twice when he was both fined and imprisoned, which he may be in most misdemeanors."

He also said:

"The fifth amendment to the Constitution of the United States provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' It is contended, for the United States, that the judgment in the civil suit, and the payment of it, did not subject the relator to be put in jeopardy of his life or limb. But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection (*Ex parte Lange*, 18 Wall. (85 U. S.), 163, 170), yet the criminal proceeding now instituted against the relator will not produce a second punishment for the same offense, but will only complete, on conviction, the punishment intended by Congress. The fifth amendment was proposed by Congress on the 25th of September, 1789, and was ratified by 11 States in that year and the following two years. But, that amendment has not been regarded by Congress as preventing legislation such as that found in the statute now in question."

The decision of the Board of Tax Appeals is affirmed.

ARTICLE 1281: Jeopardy assessments.

REVENUE ACT OF 1926.

Assessment against transferor pending appeal by transferee. (See Ct. D. 822, below.)

SECTION 280.—CLAIMS AGAINST TRANSFERRED ASSETS.

ARTICLE 1291: Claims in cases of transferred assets. XIII–19–6785 Ct. D. 822

(Also Section 214(a)7, Article 151; Sections 277 and 278, Article 1271; Section 279, Article 1281.)

INCOME TAX—REVENUE ACTS OF 1921 AND 1926—DECISION OF COURT.

1. CLAIMS AGAINST TRANSFERRED ASSETS—LIABILITY OF TRANSFEREE.

A company to which a foreign insurance company in 1926 sold all its American assets, with certain exceptions, part of the consideration being the assumption of the debts of the foreign company including taxes for all years prior to 1926, is liable as a transferee, under section 280 of the Revenue Act of 1926, for income taxes of the foreign company for the year 1922, and the Government may enforce its rights, as a creditor of the foreign company, against the transferee without first attempting to collect the tax from the transferor.

2. STATUTE OF LIMITATIONS.

The running of the statute of limitations upon assessment and collection of a deficiency in tax is suspended, under the provisions of section 277(b) of the Revenue Act of 1926 and section 504 (a) (b) of the Revenue Act of 1928, during the pendency of an appeal to the Board of Tax Appeals, regardless of whether the Board dismisses the petition for lack of jurisdiction or renders a decision on the merits.

3. JEOPARDY ASSESSMENT.

Where notice of deficiency is mailed to the taxpayer, the transferor company, only one day before the expiration of the statute of limitations, and petition for redetermination is thereafter filed with the Board of Tax Appeals, even though filed by the transferee the assessment of the deficiency against the transferor during the pendency of the appeal is good as a jeopardy assessment, under section 279(a) of the Revenue Act of 1926, where the period within which assessment might be made after the expiration of the time for filing petition for review of the Board's decision is known to be short.

4. DEDUCTION—UNPAID CLAIMS—BURDEN OF PROOF.

The taxpayer has the burden of proving that claims against certain companies on reinsurance contracts can not be collected, and in the absence of such showing the amount of such claims is not deductible.

5. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 247) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

American Equitable Assurance Co. of New York, petitioner on review, v. Guy T. Helvering, Commissioner of Internal Revenue, respondent on review.

Petition to review a decision of the Board of Tax Appeals holding the petitioner liable for unpaid income taxes, as transferee, under section 280 of the Revenue Act of 1926.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[December 11, 1933.]

OPINION.

CHASE. Circuit Judge: On May 25, 1926, the petitioner purchased all the assets in this country of the Norwegian Atlas Insurance Co. except "its rights to dividends or otherwise on its allowed claims against the Jefferson Insurance Co., the Liberty Marine Insurance Co. and the North Atlantic Co., all in liquidation, * * *." It paid for them in part in cash and in part by assuming certain debts of the Norwegian company. The contract bound the petitioner to pay as part of the debts assumed all taxes of the Norwegian company Federal, State or otherwise, if and when determined, for all years prior to 1926.

The above-mentioned claims are the basis of the deficiency in income for 1922 on which the taxes involved were assessed. The Norwegian company had reinsured certain risks in the three insolvent insurance companies named and as a result held provable claims against them for 1922 in the amount of $74,115.41. It kept its books on the accrual basis and this amount appeared thereon as reinsurance recoverable at the end of 1922. It reported this as income in its return for that year and deducted an equal amount with the explanation: "Various amounts credited in 1922 as recovered, which were at the same time charged three companies in liquidation. These amounts being as yet uncollected, income is accordingly reduced * * * $74,115.41." The Commissioner disallowed the deduction and made other adjustments, not here involved, in determining a deficiency.

The return of the Norwegian company was filed July 3, 1923. The notice of deficiency, mailed July 2, 1927, was given one day before the statutory 4-year period for such notice would have expired. Within 60 days thereafter this petitioner filed a petition for redetermination with the Board of Tax Appeals and it was placed upon the docket. On June 11, 1929, this petition was dismissed on motion of the Government, for lack of jurisdiction because, though filed in the name of the Norwegian company, it was signed by this petitioner as the successor to the branch of that company in the United States and not by the taxpayer. On March 11, 1928, the Commissioner assessed the deficiency against the Norwegian company and on March 15, 1929, mailed this petitioner a notice of the assessment of the deficiency against it as transferee. On May 10, 1929, this petitioner filed with the Board of Tax Appeals its petition for a redetermination of the deficiency and the present petition is to review the decision thereon.

The petitioner argues that sections 277(a)2 and 280(b)1 of the Revenue Act of 1926 bar the collection of these taxes. Under the first named section the collection of the taxes was barred unless assessed against the Norwegian Atlas within four years after its return was filed; and under the second section mentioned the period for assessment against a transferee was limited to one year from the expiration of the period of limitation of assessment against the taxpayer. However, under section 277(b) of the 1926 Act the statute of limitations was tolled during the time the Commissioner was prohibited from making an assessment and for 60 days thereafter. Section 274(a) of that Act prohibited him from making an assessment until 60 days after the mailing of a deficiency letter to the taxpayer and if a petition was filed with the Board of Tax Appeals the prohibition against assessment was extended "until the decision of the Board has become final." Its decision did not become final until the petition was dismissed on June 11, 1929, and the time for filing a petition for review had expired. (Section 1005(a) of the 1926 Act.) In the meantime the Revenue Act of 1928 took effect. By section 504(a) of that Act, section 277(b) of the 1926 Act was amended to suspend the running of the limitation on assessment until the decision of the Board became final and until 60 days thereafter "if a proceeding in respect of the deficiency is placed on the docket of the Board, * * *." This amendment applied to all cases where the period of limitations had not expired before it took effect. (Section 504(b).)

Both section 277(b) of the 1926 Act and section 504 (a) (b) of the Act of 1928 suspended the running of the statute when a proceeding in respect to the deficiency was placed on the docket of the Board. But the petitioner would have us hold that this is not so unless the Board has jurisdiction of the petition filed to initiate the proceeding placed on the docket. Its position is that, as the Board has held that it had no jurisdiction because the petition was not filed by the Norwegian company, the taxpayer, there was no proceeding placed on the docket in the sense that expression must be construed to have been used in the two last above mentioned sections. If this be so the Government must treat as a nullity, in advance of a decision by the Board of Tax Appeals, every proceeding which is placed on the docket of the Board which has such infirmities that the Board finally dismisses it for lack of jurisdiction unless it must accept the risk of the bar of the statute arising before it can know what the decision will be and so is protected only by the chance that a decision will be rendered before the unsuspended pèriod of limitation upon assessment has run. This seems to be the position taken in *Gott* v. *Live Poultry Transit Co.* (17 Del. Ch., 289, 153 Atl., 801). The language used in both the clauses providing for the tolling of the statute seems to us to negative such a view. Congress might make the period of limitation whatever it saw fit and of course, it might make no such provision at all. Having established one, it was free to suspend its running upon the occurrence of such conditions as it thought best. It did, verbally at least, make one such condition the mere placing on the docket of the Board of a proceeding in respect to the deficiency. Even though the Board dismissed this proceeding, as it did in this case, for want of jurisdiction (and we now have nothing to say about the correctness of that decision) the placing of the proceeding upon its docket gave it whatever right to act is involved in determining whether or not the petition was sufficient to give it jurisdiction to decide the matter on the merits. At any rate, a proceeding had been commenced which required the Board of Tax Appeals to make a decision though not necessarily on the merits. Because the effect of the passage of time would be the same whether the Board made its decision on the merits or on some other ground, if the period stated in the statute of limitations meantime expired, it is reasonable to believe that Congress did not intend to have the time a proceeding was pending before the Board counted any more when the decision was a dismissal for want of jurisdiction than when it was not. In other words, the time after such a proceeding was placed on the docket was not to be added to what had gone by since the return had been filed until the Board disposed of the matter in some way and 60 days had passed thereafter in which further action could be taken. Certainly, the words Congress used have this meaning literally and we are disposed to believe that such is their intended effect.

As we hold that the statute of limitations was suspended by the proceeding placed on the docket of the Board it becomes necessary to determine whether the taxes were lawfully assessed against the Norwegian company. They were assessed on March 11, 1928, and, as the Board did not dismiss the petition until June 11, 1929, they were assessed while the proceeding was pending before the Board and during the time the Commissioner was prohibited from making the assessment by section 274(a) of the 1926 Act. However, it should be noted that the deficiency notice had been sent the taxpayer on July 2, 1927, and just one day before the statute of limitations otherwise would have run. The time within which the Commissioner could assess after the time for filing a petition to review the decision of the Board had expired was known to be short. Section 279(a) of the 1926 Act (26 U. S. C. A., 1051) authorized the Commissioner, whenever he believed the assessment or collection of a deficiency would be jeopardized by delay, to assess such deficiency immediately. The assessment against the taxpayer was, therefore, good as a jeopardy assessment and the assessment against the transferee was within the allowed period thereafter.

These taxes were, by the terms of the contract made by the petitioner with the Norwegian company, to be paid by the petitioner. The Government, as the party to whom the Norwegian company owed the taxes and the real party they intended to be benefited by this agreement, may enforce the provision. (*Hendrick* v. *Lindsay*, 93 U. S., 143; 23 L. Ed., 855; *Seaver* v. *Ransom*, 224 N. Y., 233; 120 N. E., 639; *Penn Steel Co.* v. *New York City Ry. Co.*, 198 Fed., 721.)

The petitioner was a transferee within the meaning of the statute (section 280 of the 1926 Act) and the United States may proceed under it to enforce its rights, as a creditor of the taxpayer, against this petitioner, Hatch Morosco Holding Co. (50 Fed. (2d), 138), without first making any attempt to collect the taxes of the Norwegian company whose property in this country has been acquired by the petitioner.

The petitioner has not shown that the deduction claimed should have been allowed. Merely showing that the sums due for reinsurance in 1922 were not paid in that year did not prove that they could not be collected and the finding of the Board as to that must be upheld. (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X-1, 264].)

The burden to establish its right to the deduction claimed is on the taxpayer when he seeks a review. (*Burnet* v. *Houston*, 283 U. S., 223 [Ct. D. 328, C. B. X-1, 343].)

Affirmed.

SECTION 284.—CREDITS AND REFUNDS.

Article 1301: Authority for abatement, credit, and refund of tax. XIII-26-6868
(Also Section 1116, Article 1371.) Ct. D. 842

INCOME TAX—REVENUE ACTS OF 1918 AND 1926—DECISION OF COURT.

1. Credits—Overassessments—Tax "Then Due"—Authority of Commissioner.

Where the 60-day letter and notice mailed to the taxpayer for the years 1918 to 1926, inclusive, disclosed overassessments for 1918, 1919, and 1922, and deficiencies for the other years exceeding the amount of the overassessments, and where, after receipt of the letter but before the overassessments were finally allowed or the deficiencies assessed, the taxpayer paid the amount of the 1920 deficiency, the Commissioner had the right to credit the 1918 and 1919 overassessments upon the 1920 deficiency and to apply the payment made by the taxpayer upon the deficiencies then due for the later years, in accordance with the provisions of sections 284(a) and 1116(a) of the Revenue Act of 1926, notwithstanding the taxpayer's attempt to direct the application of its payment. The words "then due" as used in section 284(a) of the Revenue Act of 1926 refer to the time when the deficiency is first determined and not to the time when the credit is made. The general purpose of the above provisions is to require a mutual set-off of overpayments and deficiencies and to prevent the allowance of interest for a period during which the taxpayer is indebted to the Government.

2. Assessment—Waiver.

Where after paying the amount of the 1920 deficiency the taxpayer waived the right to appeal to the Board of Tax Appeals and consented to the overassessments and deficiencies as stated in the 60-day letter covering the years 1918 to 1926, on condition that the overassessments and deficiencies be scheduled simultaneously, such waiver and consent constitute a revocation, withdrawal, or modification of the taxpayer's direction that the payment made be applied to the 1920 deficiency, even if the taxpayer had a right to make such direction.

3. Interest.

Where the tax for the year 1920 is payable in installments, the taxpayer is entitled to interest, under section 1116(a) of the Revenue Act of 1926, on the overassessment for 1918 from the date when paid to the installment dates for the 1920 tax against which the credit was applied.

COURT OF CLAIMS OF THE UNITED STATES.

Standard Oil Co. (Indiana), a Corporation, v. *The United States.*

[February 5, 1934.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

This action is begun to recover $1,645,420.26 as additional interest due on overpayments made by plaintiff on its taxes for the years 1918 and 1919.

The facts connected with the case may at first seem to be very complicated, but the issue involved and the manner in which it arose can be stated quite simply. On March 21, 1928, the Commissioner of Internal Revenue, having had under consideration the taxes of plaintiff for the years 1918 to 1926, inclusive, sent out a so-called "60-day letter" and notice that he had determined the correct liability of plaintiff to be as shown in the table, which set out the amount of overassessments and deficiencies for each year in parallel columns, showed the total thereof, and the net deficiency. The table listed overassessments of nearly $5,000,000, of which $2,705,795.39 was for the year 1918, and total deficiencies of $7,330,926.23, of which $4,375,023.66 was for 1920. A balance was struck which showed that the net deficiency or liability of the plaintiff at that time was $2,429,297.56. (See finding 6.) This notice further stated that—

"Payment of the amount of additional tax should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him in accordance with the terms of the notice."

After the receipt of this letter and on March 24, 1928, the plaintiff paid by check to the proper collector of internal revenue the amount of the deficiency for 1920 together with interest thereon, making a total of $4,919,444.41, and at the same time in various ways the plaintiff's attorney stated that the check was in payment of taxes and interest for the year 1920. The collector accepted the check and acknowledged the payment, but, following instructions previously given by the Commissioner, did not apply the payment to the 1920 deficiency and kept it in a suspense account. Subsequently, as will be shown further on, the amount so paid was applied on other taxes then due, and the overassessments for 1918 and 1919 were applied on the deficiency for 1920, with the result that plaintiff was allowed $1,645,420.26 in interest less than it would have been had the payment been applied as directed by its attorney. How this difference in the calculation of interest arose will appear when the statutory provisions applicable thereto are considered.

It will be observed that at the time the payment was made overassessments for the years 1918, 1919, and 1922, and deficiencies for 1920, 1921, 1923, 1924, 1925, and 1926 had been determined. The overassessments had not been finally allowed nor the deficiencies finally assessed. The amount of interest to be allowed plaintiff on the final adjustment of its tax account was controlled by the provisions of the Revenue Act of 1926, as hereinafter stated. Section 283(d) thereof provided that in case of assessments made after the enactment of the Act, under Acts prior to November 23, 1921 (which was the date of the enactment of the 1921 Act), interest should be collected as part of such tax "from the date of the enactment of this Act (February 26, 1926) to the date such tax is assessed." Section 284(a) of the Revenue Act of 1926 further provided:

"(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed" by prior Acts "the amount of such overpayment shall * * * be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer."

Section 1116 of the same Act, as applied to this case, provides that upon the allowance of a credit upon an additional assessment interest shall be allowed to the due date of the amount against which the credit is taken, and if that is an additional assessment then to the due date of the assessment of that amount.

It will be seen that under these provisions overassessments drew interest from the time of their payment, while under section 283(d) deficiencies imposed by Acts prior to November 23, 1921, drew interest only from February 26, 1926. The evident purpose of the payment was to prevent any of the overassessment for 1918 or 1919 being applied on the deficiency for 1920, as such application would prevent the amount so applied from drawing interest beyond the time of its application, otherwise interest would continue to run thereon until this amount had been satisfied in the manner required by law. To state it briefly, if the overassessment had been so applied, the interest payments would have been equalized between plaintiff and defendant; on the other hand, if plaintiff could have its payment applied upon the 1920 deficiency, it would, as before stated, get interest on the overpayments from the time they were made, notwithstanding it was indebted to the Government at that time, and pay interest on the deficiency only from February 26, 1926. Plaintiff's contention is that it had the right to direct the application of the payment which it made to the collector, and when it was made it absolutely extinguished the indebtedness on the 1920 deficiency; that the overpayments could not afterwards be applied on a deficiency for 1920 because there was nothing "then due" as specified in section 284(a) of the 1926 Act quoted above; and for the same reason, after the payment was made there remained no taxes for 1920 against which a credit could be taken under the provisions of section 1116 of the same Act.

It will be seen as the discussion proceeds that if plaintiff's theory is sustained there will not only be cases where the taxpayer will be entitled to interest for a period during which he is indebted to the Government as in the instant case, but in some instances the taxpayer will be able to sue the Government for a refund and obtain a judgment, although he is actually owing a balance to the defendant at the time when suit is begun and when judgment is rendered. Certainly Congress never intended such a result, and we do not think a court should lend its support to a doctrine which would bring it about unless required so to do by clear and unambiguous provisions in the statutes applicable thereto.

The defendant, on the other hand, insists that plaintiff had no right to direct the application of the payment upon the 1920 taxes, and as it was not so applied this item of indebtedness to the Government was not extinguished but continued in full force and effect until the overpayments were allowed and applied upon it.

These contentions of the several parties constitute the issue in the case.

Ordinarily when a debtor makes a payment to a creditor he can direct how the payment shall be applied if there is more than one debt, and this rule has been applied to payments on taxes. In the absence of some provision in the statute or of circumstances that modify the original directions, we think it may be conceded that the plaintiff was entitled to have the payment applied on the 1920 deficiency as directed by its attorney. The argument of defendant is, in effect, that the statutes with reference to refunds of overpayments and interest thereon were not intended by Congress to be so construed or applied as to permit a refund of overpayment to taxpayers unless there was a net balance in favor of the taxpayer, or to require the payment of interest by the Government when the net balance was against him, and if a payment is made upon a deficiency under such circumstances as to show that it was made to defeat the Government's right to set off overpayments against deficiencies and thus require the payment of interest upon overpayments although the balance of the tax account was in favor of the Government, the taxpayer should not be permitted to so direct the application of the payment as to accomplish this result. There have been no less than five decisions by Federal courts announcing this rule and none to the contrary. As it is insisted on behalf of plaintiff that four of these decisions are not in point because the facts are not similar to those in the case at bar and that the remaining one is erroneous, it will be necessary to review these decisions and consider their application.

In *McCarl* v. *Leland* (C. A. D. C.) (42 Fed. (2d), 346), the taxpayer sought by mandamus to compel a refund for one year while a deficiency asserted by the Commissioner for another year was pending before the Board of Tax Appeals. The ultimate question was whether the taxpayer was entitled to a mandamus, and the court held that he was not; but in construing section 284 of the 1926 Act and holding that it did not sustain the taxpayer's contention, the court said that any other interpretation would permit the taxpayer "to exact from the Government interest when the net balance was against him," and further that—

"Such a result would be inequitable and inconsistent with the obvious purpose of the statute."

In *Tull & Gibbs* v. *United States* (C. C. A. 9th C.) (48 Fed. (2d), 148) the plaintiff brought a suit to recover overpayments of income and excess-profits taxes for the year 1919, but there were deficiencies claimed by the Commissioner and the judgment largely depended on whether the Commissioner had the right to apply the refund on deficiencies not finally determined. The court held that the Commissioner had the authority to determine "that the amount of the refund should or *would* be applied or credited on claimed deficiencies for other years" "even though the amount of the deficiencies had not yet been ascertained." [Italics ours.] The court gave as a reason for this ruling that—

"To hold otherwise would entitle the appellant to interest on the amount of the refund while the Government would receive no interest on the deficiencies, which might equal or exceed the refund."

In this case, had the taxpayer's contentions been sustained, it would have recovered judgment, although when the deficiencies were finally determined it appeared that it was indebted to the Government at the time the judgment was rendered.

In *Lucas* v. *Blackstone* (C. A. D. C.) (45 Fed. (2d), 291 [Ct. D. 356, C. B. X-2, 270]), the taxpayer contested the right of the Commissioner to refuse to receive payment of the deficiency of the year 1918 and instead of so doing to apply certain overpayments for the years 1917 and 1919 against such deficiency, and again the court was required to construe section 284(a) of the Revenue Act of 1926. The case closely parallels the one at bar, as the taxpayer claimed that when the overpayments for the years 1917 and 1919 were scheduled by the Commissioner there was no tax deficiency due for 1918 for the reason that the deficiency had been fully settled by a payment made by the taxpayer on October 8, 1927, but the court said:

"The Commissioner was right in refusing to accept that payment as a settlement of the deficiency * * * inasmuch as otherwise the Government would have been paying interest to the taxpayer upon the overpayments from the date of payment, whereas it would have collected interest upon the deficiency only from February 26, 1926. We have already held that such a result would contravene the plain intent of Congress."

It is true that in this case the deficiency had been finally determined but the overpayments had not been finally allowed; that is, the payment was made before the overpayments were finally scheduled. The ultimate question, therefore, was whether the deficiency had been extinguished by payment at the time the overpayment was definitely allowed, which is the same question as arises in the case at bar. The holding was in effect that if an overpayment had been disclosed by the returns and existed at the time when the payment was made the taxpayer had no right to direct the application of the payment to a deficiency; that the Commissioner was right in refusing to so accept it, and that he correctly returned it to the taxpayer instead of applying it on the deficiency.

In *Noyes* v. *United States* (C. C. A. 9th C.) (55 Fed. (2d), 870 [Ct. D. 505, C. B. XI-1, 179]), the Commissioner applied an overpayment for 1918 to a deficiency for 1917, of which the taxpayer had been notified by a 60-day letter, but which had not been finally determined and assessed. In this case the controversy related to a deficiency which had not been definitely determined, while in the former it was as to an overpayment not finally allowed. Whether the overpayment had been allowed at the time the application had been made does not appear from the opinion of the court, but the court held in effect that the Commissioner had the right to so apply overpayments as to prevent a recovery on the part of the taxpayer when "the taxpayer owes the Government a like amount." While this case applies only to one phase of the case at bar, the court again had occasion to pass on the construction of section 284(a) of the Act of 1926 and the meaning of the words "then due" used therein.

It will thus be seen that in all of these cases the various courts in order to sustain their decisions have laid down principles which are quite inconsistent with those upon which the plaintiff bases its case, and if these principles are followed must defeat it.

The case of *United States* v. *Pacific Midway Oil Co.* (D. C. N. D. Cal.) (C. C. H. 32, par. 9072 [Ct. D. 472, C. B. XI-1, 195]) is one in which the facts were parallel with the case at bar, but additional circumstances made it stronger in favor of the taxpayer than the one we now have under consideration. In that case, as in the case at bar, the taxpayer was notified that it had made overpayments for the years 1917, 1918, and 1919, and that there was a deficiency for the year 1920. The taxpayer immediately made payment of the deficiency and interest thereon, giving directions that it should be applied on the 1920 deficiency, which was accordingly done. Subsequently, the Government began a suit to recover back what was claimed to be an overpayment of interest on the overpayments resulting from this action and alleging that the collector had no right or authority under the circumstances to apply the payment on the 1920 deficiency, but on the contrary the deficiency should have been satisfied by applying the overpayments thereto. The court took under consideration the cases above cited and in accordance therewith held in substance that when a payment was made in such a manner as "to defeat the Government's right to set-off overpayments against deficiencies and thus require the payment of interest upon overpayments, such payment should be applied only to the *net balance of the deficiency*." The Government was therefore awarded judgment for the interest improperly paid.

It is not contended on behalf of plaintiff that the case last cited is not directly in point, but it is said that the decision is erroneous. The other cases cited above are said not to be in point because based on different facts, but a careful reading of these cases will show that they announced principles as the basis of each decision which were in line with the decision in the case of the Pacific Midway Oil Co., supra, and wholly inconsistent with the argument made on behalf of plaintiff. In all of them the same statute was being construed, and the basis of the decision in each of these cases was the intent of Congress as manifested by the statutes to which reference has been made.

It is insisted on behalf of plaintiff that there is nothing in the language used from which an inference of such intent can be drawn. With this we do not agree, but, on the contrary, think it is manifest from the several sections of the statute which direct the application of refunds and determine the manner in which interest can be computed that the general purpose of these provisions and the object which was sought to be attained by Congress was to require a mutual set-off of overpayments and deficiencies and to prevent the allowance of interest to the taxpayer for a period during which he was indebted to the Government. Whether the statutes accomplish such a purpose depends upon their wording. They are not entirely clear, especially section 284(a) of the 1926 Act. If Congress had intended the construction which plaintiff gives to this section, it would have been much easier, shorter, and plainer to have said: "When an overpayment * * * has been allowed * * *, the amount of such overpayment shall * * * be credited against any deficiency * * * due *at the time of such allowance.*" It did not use the word "when"; it said, "where there has been an overpayment," and made no reference to its allowance, or requirement that it should be allowed, but provided only that it should be credited against a tax "then due."

The words "where there has been an overpayment" evidently refer to a case where the Commissioner has determined that the returns disclose an overpayment in manner and amount as announced by him, and the court must hold that such a condition existed at the time when he made a statement to that effect and so notified the taxpayer. In this particular case it was at the same time when he announced the finding of a deficiency for 1920. Counsel for plaintiff contend—and we think rightly—that the application of the overpayment can not be made until it is finally allowed. They also assert that a credit can not be applied upon an indebtedness that does not exist. We think this is self-evident, but it does not tend to support plaintiff's construction of the section under consideration. The argument of plaintiff is, in effect, that the words "then due" refer solely to the time when the credit is made, although the statute does not so state and Congress must have well understood that it was unnecessary to provide that the credit could only be made upon an indebtedness which was "then due." Such a limitation on the application of the credit would be entirely unnecessary, as the section would be so understood without any special provision to that effect. We think the words "then due" refer to the time when the deficiency was first determined and found to exist. It will be noticed that plaintiff itself claims in argument that the deficiency was due on that date (March 21, 1928, when the 60-day letter and notice were sent out), and it will also be observed that by the same notice and at the same time the overpayments were determined. The case was therefore one "where there has been an overpayment of any income, war-profits, or excess-profits tax," and by the other provisions of section 284(a), the Commissioner was required to credit the overpayments upon a deficiency. Where there was more than one, he would have the right to select the deficiency or deficiencies upon which the overpayments should be applied. If, as we think, the statute directed the application of the credit at the time when it was first determined the taxpayer had no right to so direct the application of the payment as to prevent the law from being obeyed. In other words, its attempted direction was wholly inconsistent with the provisions of the statute and would have no force and effect. If we are correct in the conclusions stated above, it follows that the attempt of plaintiff to direct the application of its payment had no effect. The collector and Commissioner were right in refusing to so apply it, and the 1920 deficiency was still due when the Commissioner finally allowed the overpayments and credited them thereon.

Counsel for plaintiff cite a large number of decisions to show that there could be no credit of 1918 and 1919 overpayments until they were determined and allowed, and it is argued because the final allowance did not occur until April 24, 1928, that these overpayments could not be applied on the deficiency for 1920, but we think these decisions have no application to the case now before us. The argument for plaintiff assumes that the rule contended for by defendant required the credit of the overpayment to be made upon the deficiency prior to the allowance thereof. No such claim is made on behalf of defendant, but the defendant does argue that under the law as applied to the facts in the case the plaintiff could not direct the application of the payment which it undertook to make on the 1920 tax and we think an examination of the law will show sufficient basis for this contention. The statute that directed *where* the overpayment should be applied went into force as soon as the Commissioner determined that an overpayment had been made and that a deficiency existed, for an overpayment would exist when the Commissioner made his determination thereof although it had not been finally allowed, just as a deficiency would exist when the Commissioner so determined although the assessment had not been finally made. It is true that the Commissioner could not make an application of the overpayment until it was finally allowed, but the question in this case is not *when* the overpayment was allowed but *where* it was to be applied under the statute. It should be kept in mind that the Commissioner did not make the credit until after the overpayment had been allowed pursuant to the agreement contained in the waiver, and then computed the interest according to the provisions of the statute. There is nothing in the cases cited on this point that appears to us to support plaintiff's claim that it had the absolute right to direct the payment involved. There were cases in which overpayments and additional assessments had been determined and certified, but in none did it appear that the taxpayer made any payment after notice that an overpayment for one year and a deficiency for another had been disclosed by the returns, nor did any issue arise as to the application of any payment or credit. In all of them the manner in which the application was made was conceded to be proper, and the question to be determined was merely as to the time when the credit was finally allowed or as to the time it was taken as forming a basis for the computation of interest.

It is urged on behalf of plaintiff that the doctrine invoked by the defendant would have resulted in a different interest calculation if applied to the cases of *Boston Buick Co.* (282 U. S., 476 [Ct. D. 293, C. B. X–1, 335]) and *Pottstown Iron Co.* (282 U. S., 479 [Ct. D. 291, C. B. X–1, 301]). No explanation is given for this, and here again we think there is a confusion on the two questions of *where* the overpayment should be applied and *how* the interest should be computed. It will be observed that the application of the overpayment is controlled by section 284(a), which points out *where* the application should be made, and this is all it does. It makes no reference to the matter of interest. Section 1116 of the 1926 Act directs and controls the manner in which interest should be computed upon the allowance of a refund or credit after the determination of the place where the credit shall be applied under section 284(a). Under its terms the interest could not be calculated until after the credit had been actually allowed for many reasons, and especially for the reason that until the amount of the credit was definitely fixed by the allowance thereof there would be no way of knowing how much should be credited. So also when a refund is to be made the interest is allowed up to the date of the refund. In the case before us, as a *credit* was to be made, interest is allowed only up to the date when the taxes upon which the credit was to be applied became due. This would have to be done in all cases, and instead of being inconsistent with the rule applied in the cases cited on behalf of plaintiff is directly in accordance therewith.

The rule stated above would not delay the settlement of tax accounts appreciably, as it applies only to cases where both deficiencies and overpayments have been found by the Commissioner, and the final determination of the overpayment or deficiency as the case might be was only a matter of a few weeks at most. It would not interfere with the practice of the Department, which so far as we are aware has been entirely consistent therewith. This is shown by the cases that we have already cited. *Tull & Gibbs* v. *United States*, supra, was a case in which the deficiency had not been finally determined but the principle applied is the same. *Lucas* v. *Blackstone*, supra, was a case in which the deficiency had been finally determined and it was held that the Commissioner might refuse to apply a payment on a deficiency pending the final determination of an overassessment. In *United States* v. *Pacific Midway Oil Co.*, supra, the facts were precisely similar to those in the case at bar. So far as this matter has reached the courts, the practice of the Department has been that which was followed in the case at bar.

Where a statute is ambiguous, the courts are permitted to consider the report of the congressional committee which reported the bill carrying the provisions in controversy. In the report of the Senate Finance Committee upon the Revenue Act of 1926, reference was made to the fact that the previous law made an unfair discrimination in favor of the taxpayer in the matter of interest and it was said that "it did not seem fair at this late date to equalize the situation entirely," but what followed showed that this statement referred to a provision not in controversy herein. Further on the report stated that under the Act of 1921 "it frequently happens that a taxpayer who owes the Government money upon which he is paying no interest is collecting interest upon money which the Government owes him." It then showed how this situation had been remedied by one of the provisions under consideration in the case at bar. We think this clearly shows an intent not to permit a taxpayer to collect interest from the Government for a period during which he is shown to be indebted to it.

If, however, the construction which we have placed upon the statute following the decisions of the several courts which have so far passed upon the question be incorrect, it by no means follows that plaintiff's case is sustained. Conceding for the purposes of the argument that plaintiff had the right to direct the application of the payment in the first instance, any such direction could be revoked or modified before the application of the payment was made, and we think that the evidence shows such a revocation.

After the payment had been made, plaintiff's attorneys came to Washington and there was a long conference with the officials in the Commissioner's office. As a result of this conference a waiver of the right to appeal to the Board of Tax Appeals from the decision of the Commissioner as to deficiencies as stated in the so-called "60-day letter" and a consent thereto, together with the overassessments set forth in the same letter, was signed by the plaintiff on April 2, 1928, and filed with the Commissioner of Internal Revenue on April 4, 1928. This waiver contained a list of the overassessments and deficiencies agreed to in parallel columns, specifying the year. It was the same as was contained in the 60-day letter, except that it did not set out the balance or net deficiency, which was merely a matter of addition and subtraction. To this statement of the tax account of plaintiff was appended the following:

"This waiver of appeal and consent to assessment is given on the express condition that the overassessments shown above will be scheduled simultaneously with the assessment of the deficiencies shown above."

At the time of the execution of this waiver the plaintiff was in a somewhat peculiar position. Its attorney knew that the payment made had not been applied on the 1920 deficiency and that the Commissioner intended to apply the overpayments thereon. This is shown by the transactions between the parties and in particular by the fact that shortly after the filing of the waiver and without any further notice being received plaintiff's attorneys wrote the Commissioner a letter to which reference will hereinafter be made, in which it was contended that the overassessments could not be applied to the taxes of 1920. It could not well go on with its appeal to the Board of Tax Appeals on the 1920 assessment and at the same time claim that this assessment had been fully paid and the debt extinguished. It would practically give up nothing by executing the waiver on this matter, but it was important to finally and definitely secure the overassessments which had been listed in the preliminary schedule sent plaintiff by the Commissioner and which aggregated nearly $5,000,000, and the waiver was probably executed by plaintiff's attorney with this in view. The Government, on the other hand, had nothing to gain by the execution of a mere waiver, as the plaintiff had already practically admitted the correctness of the assessment by attempting to pay it, and naturally the Commissioner did not want to bind himself absolutely to the allowance of these huge refunds unless he got something in return for such an agreement. We think both parties were successful.

By the instrument which was signed containing the waiver the plaintiff got the overassessments definitely allowed and the Commissioner got the statement appended to the waiver, and also an agreement that the plaintiff—

"* * * consents to the assessment of the deficiencies upon the bases as to income, overassessments, and other adjustments set forth in said letter dated March 21, 1928; the years, amounts of deficiency, or overassessment as set forth in said letter being as follows:" (Here followed a similar statement of plaintiff's account for taxes as was contained in the Commissioner's letter of March 21, 1928, except that no balance was computed and listed as in that letter.)

By reference to finding 8 it will be seen that the amounts of overassessment for each year were listed in one column and the amounts of deficiencies for each year in another parallel column. In other words, it was a complete statement of the debit and credit items of plaintiff's tax account all agreed upon by both parties. It will be observed that not only were the deficiencies listed therein, including the deficiency for 1920, agreed to, but it was also agreed that they should be assessed, and when they were so assessed the overassessments were to be "scheduled simultaneously" with the assessment of the deficiencies.

We think this agreement clearly constituted a revocation or at least a withdrawal or modification of whatever directions or understanding accompanied the 1920 payment. But it is immaterial what it is called. The covenants of the agreement can not be reconciled with plaintiff's claim that the 1920 deficiency was paid and that no indebtedness existed thereon. One of the bases of the former statement was that the deficiency for 1920 was due. It was specially agreed that the same basis should be used and that this particular deficiency for 1920 should be assessed, which could mean nothing but that it stood as a liability on the part of plaintiff. Moreover, the plaintiff agreed that this deficiency should be included in a schedule of overassessments and deficiencies which the statute made final.

On April 24, 1928, the attorney for the plaintiff, apparently fearing that the result of the agreement would not be what his client desired, delivered to the Commissioner of Internal Revenue a letter at considerable length, the substance of which was that the plaintiff renewed its demand that the payment which had been made should be applied on the 1920 deficiency, and contended that this deficiency had been extinguished by such payment, by reason of which fact (as plaintiff claimed) there could be no credit of an overassessment on this deficiency. On the same day this letter was delivered the Commissioner scheduled the overpayments upon, and deficiencies in, plaintiff's taxes exactly in the manner agreed upon. The deficiencies, however, were placed in one list, which also showed the amount of interest charged against the plaintiff on the deficiency for each year. This was followed by a certificate that the deficiencies were due, and the whole signed by the Commissioner. The schedule of overassessments was in another list, separately made, and included the overassessment as stated in the waiver, and also made an interest adjustment on the additional tax for the year 1920 of $567,734.22.

We think it will be seen that the waiver agreement provided for the recognition of the existence of the deficiency for the year 1920 and its assessment and final determination, together with a simultaneous allowance of the overpayments. The whole proceeding as prescribed by the agreement was utterly inconsistent with plaintiff's claim that the 1920 deficiency had been extinguished, for if the tax for that year had been wiped out by the payment it could not be assessed, determined to be a deficiency, and made a debit item against plaintiff. No further discussion seems to be needed when attention is called to the fact that the agreement of the parties did not merely provide for the assessment of the tax for 1920, which would have been done as a matter of course, but also provided that it should be *listed as a deficiency* in the Commissioner's schedule of deficiencies and overassessments which definitely determined both. The Commissioner carried out the agreement to the letter determined the deficiency for 1920, and made the final allowance of the overassessment simultaneously as stipulated. This having been done, it was en tirely immaterial that the plaintiff had made no express agreement that the overpayment should be credited on the 1920 tax. The law determined this and the statute imperatively required that such a credit should be made.

Our conclusion, therefore, is that when the schedule was made in accordance with the agreement the deficiency was due and the overpayments allowed. Such being the case, the statute, even under the construction contended for by plaintiff, left the Commissioner no discretion in the matter. It required him to credit the overpayments upon a deficiency, and he accordingly apportioned them among the several deficiencies against plaintiff listed in the schedule, including the deficiency of 1920. We think it clear that even if plaintiff originally had the right to direct the application of the payment such right was lost under the provisions of the so-called "waiver." It follows that the application of the overpayments for 1918 and 1919 to the deficiency of 1920 must be approved and the interest calculated accordingly.

It is urged on behalf of plaintiff that even under defendant's theory of the case there is additional interest due the plaintiff in excess of the amount allowed it, and this claim is not disputed. Each of the parties submits calculations of what it claims should be the proper amount of additional interest. Neither of these calculations is correct, although the error in the defendant's calculation is caused only by using the 4 per cent rate (which is not now in force) instead of 6 per cent, the correct rate. The method of calculating the interest is practically settled by the case of the *Irving Trust Co.* v. *United States* (72 C. Cls., 578). In accordance with the rule laid down therein we hold that the due dates of the 1920 taxes under section 250 of the 1918 Act by reason of the fact that the plaintiff had not elected to pay in one sum were March 15, June 15, September 15, and December 15, 1921, and one-fourth of the deficiency was due at each of said dates. The case last above cited does not decide the precise question involved in the case at bar, but when the due date of the 1920 tax is fixed we think the remainder of the computation follows as a matter of course.

Under section 1116(a) the whole of the overassessment for 1918 would draw interest from the date when paid. It was applied to the deficiency for 1920 which, as has already been stated, came due in installments; $1,093,755.91 was credited upon each of the first and second deficiency installments in satisfaction thereof, and the balance of $518,283.57 in partial satisfaction of the third deficiency installment. Under the statute in each case interest would run from the time the overpayment was made to the time when the deficiency installment became due. The remainder of the third deficiency installment as well as the fourth installment was satisfied from the 1919 overpayment as to which there is no controversy in regard to the matter of interest. We append a note showing the computation of interest accordingly.[1] The error on the part of the plaintiff is in allocating one-fourth of the 1918 overpayment of $2,705,795.39 to each of the 1920 deficiency installments and then computing interest in accordance with such application. We think there is neither reason nor authority for this proceeding, and that correctly computed the plaintiff is entitled to $31,954.75 in addition to the amount allowed by the Commissioner for which judgment will be rendered accordingly.

ARTICLE 1302: Abatement, credit, and refund adjustments.

REVENUE ACT OF 1918.

Calendar year returns and payments adjusted to fiscal years. (See Ct. D. 793, page 313.)

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[1] Interest computation:

Interest on—

$1,093,755.91 from December 15, 1919, to March 15, 1921 (1 year and 3 months at 6 per cent)	$82,031.69
$1,093,755.91 from December 15, 1919, to June 15, 1921 (1 year and 6 months at 6 per cent)	98,438.03
$518,283.57 from December 15, 1919, to September 15, 1921 (1 year and 9 months at 6 per cent)	54,419.78
Total	234,889.50
Less: Amount allowed by the Commissioner	202,934.75
Deficiency in interest which plaintiff is entitled to recover	31,954.75

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid.

REVENUE ACT OF 1926.

Petition filed with the Board of Tax Appeals asserted to be waiver of limitation period. (See Ct. D. 778, page 159.)

PART V.—INVESTED CAPITAL.

SECTION 325 (REVENUE ACT OF 1918).—TERMS RELATING TO INVESTED CAPITAL.

ARTICLE 811 (REGULATIONS 45): Intangible and tangible property.

REVENUE ACT OF 1918.

Offer received for trade name and good will established by house-to-house advertising. (See Ct. D. 793, page 313.)

TITLE X.—BOARD OF TAX APPEALS.

SECTIONS 1003 AND 1004.—JURISDICTION.

SECTIONS 1003 AND 1004. XIII-1-6587
Ct. D. 768

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. BOARD OF TAX APPEALS—MOTION FOR REHEARING—DISCRETION OF BOARD.

Where a motion for rehearing before the Board of Tax Appeals sets forth no specific facts to be considered nor any other substantial reasons for granting a rehearing, but contains argument only, such motion is properly denied. The granting or refusing of a rehearing is within the sound discretion of the Board.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (24 B. T. A., 319) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Freeman-Hampton Oil Corporation, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals (District of Texas).

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

[June 1, 1933.]

OPINION.

FOSTER, Circuit Judge: In this case petitioner is the owner of gas and oil leases and the question presented is whether certain expenses incurred in connection therewith are to be returned to it through deductions for depletion or depreciation under the provisions of section 234 of the Revenue Act of 1921 and similar provisions of later statutes. The case was submitted to the Board on stipulation, no other evidence being offered. We refer to the findings and opinion of the Board for the facts in detail. (24 B. T. A., 319.) Touching the question presented the material part of the stipulation is as follows:

"Petitioner is a Texas corporation engaged in the production of oil and gas. During the respective taxable periods herein involved, petitioner was the owner of certain oil and gas leases and, during said periods, expended certain sums of money in connection with discovery, exploration, drilling and development of said leases. All of said sums of money were capitalized on petitioner's books. Certain proportions thereof represented expenditures for physical properties and the remainder represented incidental expenditures made for wages, fuel, hauling, etc., in connection with the exploration, drilling and development of said leases. Said last-mentioned expenditures were not represented by physical properties."

The stipulation provided for the amount of deficiency to be assessed in either event over the taxable period from June 30, 1924, to December 31, 1927, but showed no other figures upon which judgment could be predicated.

The Board found the stipulation inadequate in that it furnished no primary facts. Error is assigned to this ruling.

Petitioner relies on the case of *A. T. Jergins Trust* v. *Commissioner* (22 B. T. A., 551). There the Board had a similar question to consider and held that amounts expended for wages, fuel, repairs, and hauling, etc., in connection with development and drilling of the wells were expenditures for the improvement of the property, for which the statute permits the taxpayer to deduct depreciation. In that case the Board was able to determine what specific amounts had entered into the physical property. The difficulty in applying that decision, and similar decisions of the Board, also relied upon by petitioner, to this case is at once apparent. Here the stipulation is that expenditures were made for wages, fuel, hauling, etc., not only in connection with drilling and development of the lease, but also for exploration, and it is expressly stipulated that these expenditures were not represented by physical property. Conceding that certain of the expenditures made have actually entered into the physical property of petitioner, there are no figures given, no attempt was made to show what the expenditures really were, and the Board could not guess at them. We experience the same difficulty as did the Board and must hold that petitioner has failed to sustain the burden of showing that the additional taxes were improperly determined.

Error is also assigned to the refusal of the Board to grant a rehearing. The rehearing was sought for reasons set forth in a memorandum annexed to the motion. The memorandum is lengthy but amounts to no more than a discussion of the A. T. Jergins Trust case with the attempt to bring the case at bar within that ruling. Neither the motion nor the memorandum sets up any specific facts to be later considered by the Board or attempts to give any other substantial reasons. We may assume that it was impracticable for petitioner to allege and prove the concrete facts necessary to sustain its contentions and that it has not merely inadvertently stipulated itself out of court. The granting or refusing of a rehearing was within the sound discretion of the Board. We find no abuse of discretion in this case. The petition is denied and the judgment of the Board is affirmed.

Sections 1003 and 1004.

REVENUE ACT OF 1926.

Board of Tax Appeals authority to consider question previously raised but not decided where case remanded by court. (See Ct. D. 834, page 216.)

SECTIONS 1003 AND 1004. XIII-20-6797
(Also Section 213(a), Article 50.) Ct. D. 825

INCOME TAX—REVENUE ACTS OF 1921, 1926, AND 1928—DECISION OF COURT.

1. BOARD OF TAX APPEALS—FINDING OF FACT—CORRECTION OF ERROR—INCORPORATION IN RECORD.

The Board of Tax Appeals has the right to issue an order correcting an error in its finding as to the value of certain corporate stock even after 30 days from the date of the report of a division of the Board, where the evidence fails to support such finding and the facts stand undisputed that there was a mistake in writing the figures, and such an order may be incorporated in the record before the Circuit Court of Appeals.

2. BOARD OF TAX APPEALS—EVIDENCE—CORPORATE STOCK—FAIR MARKET VALUE.

Evidence submitted as to sales of stock, earnings of the company, dividends paid, and profits earned in excess of dividends, substantially supports a finding as to the fair market value of corporate stock.

3. INCOME—WHEN TAXABLE—STOCK HELD IN TRUST.

Where, in accordance with a resolution adopted by the board of directors of a corporation, a certificate for 40 shares of its capital stock was periodically issued to a trustee, to be held for the taxpayer in consideration of his agreement to remain in the employ of the corporation continuously for five years from March 1, 1917, at the end of which period the shares were to be assigned to him, the fair market value of the 200 shares in 1922, when a new certificate therefor was issued and delivered to the taxpayer, constitutes taxable income to him in that year.

4. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (24 B. T. A., 702) affirmed.

5. CERTIORARI DENIED.

Petition for certiorari denied April 30, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fred S. Olson, appellant, v. *Commissioner of Internal Revenue, appellee.*

Petition for review of decision of the United States Board of Tax Appeals.

Before EVANS, SPARKS, and FITZHENRY, Circuit Judges.

[November 3, 1933.]

OPINION.

SPARKS, Circuit Judge: This is a petition for review of a decision of the Board of Tax Appeals pursuant to sections 1001 and 1002 of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 109, 110; U. S. C. Supp. VI, Title 26, section 641, 642). That decision affirmed a determination of the Commissioner that there was a deficiency in income tax due from petitioner for the year 1922 in the sum of $20,557.96.

There is no controversy as to the primary facts involved as they appear in the findings of fact of the Board of Tax Appeals. Petitioner is the president of the American Appraisal Co., a personal service corporation of a close character with its principal office in Milwaukee, Wis. Its only business is that of making appraisals and valuations of property, and it owns no real estate. On December 31, 1922, it had a capital stock of $300,000, divided into 3,000 shares of the par value of $100 each. On March 13, 1917, its board of directors passed the following resolution:

"*Resolved*, that in consideration of Messrs. L. H. Olson, F. S. Olson and A. F. Bailey agreeing to remain continuously in the employ of the company, for a period of five years from March 1, 1917, their respective ledger accounts be each credited monthly with $333.33⅓ commencing with the present month.

"That, on March 1 of each year, in consideration of the total credit balance thus credited, there be issued 3 certificates for 40 shares each, par value $100 per share of the capital stock of the company, to a trustee to be designated by Messrs. L. H. Olson, F. S. Olson and A. F. Bailey; said certificate to be held for and on behalf of these three gentlemen.

"That all dividends which may be paid on shares as issued to the trustee shall, immediately as such dividends are received, be assigned to Messrs. L. H. Olson, F. S. Olson and A. F. Bailey respectively, and when they respectively shall have been continuously in the employ of the company for a period of five years, namely on March 1, 1922, said trustee shall immediately assign all of the 600 shares then issued, to Messrs. L. H. Olson, F. S. Olson and A. F. Bailey, respectively, in equal amounts of 200 shares each.

"In the event of the death while in the employ of the company, of Mr. L. H. Olson, Mr. F. S. Olson, or Mr. A. F. Bailey or either of them prior to March 1, 1922, said trustee shall assign and deliver to the legal representative of the decedent, all of the shares issued in his behalf at the time of his death, subject only to provision that the shares so issued shall first be offered to the company by the heir or heirs of the decedent before they may be sold in the open market."

In accordance with that resolution petitioner's account on the company's books was credited with $333.33 each month for two years ending April 1, 1919. In that month an account designated as O. F. Hiemke, trustee for F. S. Olson, L. H. Olson, and A. F. Bailey, was opened on the books of the company, and thereafter $1,000, the sum of the three credits theretofore entered on the respective accounts, was credited to the trustee account each month. This method was continued until the several transactions were completed on February 28, 1922. In order to care for the liability created by the resolution, the company charged the $1,000 to operating expenses each month during the five years. Those accounts were taken and allowed as deductions in the company's income tax returns.

On February 28, 1918, journal entries were made on the books of the company, crediting treasury stock with $12,000 and charging the account of petitioner with $4,000. On April 30, 1919, petitioner's account was charged with $4,000, and the account of the trustee credited with it. At the same time, the trustee's account was charged with that amount, and the capital stock credited with it. On February 28 of each of the years 1920, 1921, and 1922, the account of the trustee was charged with $12,000, the sum of the accounts for the three employees, and the capital stock account was credited with $12,000. On each of the years 1918 to 1922, inclusive, 3 certificates for 40 shares each were issued and delivered by the company to the trustee for the three respective accounts. Dividends on the stock held by the trustee were either paid to the two Olsons and Bailey or were credited to their accounts and drawn by them at their pleasure.

On or about March 1, 1922, the original stock certificates which had been issued to the trustee were surrendered and a new stock certificate for 200 shares was issued to petitioner. This stock he included in his income tax return for that year at its par value. The respondent increased that amount to $80,000 and asserted the deficiency in controversy.

On petitioner's appeal to the Board, the action of respondent was sustained. The Board in its findings which were promulgated on November 10, 1931, stated that the fair market value of the stock was $250 a share at the time of the transfer to petitioner on March 1, 1922. In the written opinion of the Board which accompanied those findings, however, the market value was stated to be $400, and that value was used in the Board's computation of the deficiency on December 28, 1931. On December 22, 1932, respondent filed in this court a certified copy of an order of the Board, as of December 12, 1932, correcting an error in the findings by ordering the figures and words "$250 per share" deleted and substituting therefor the figures and words "$400 per share." On January 23, 1933, respondent filed a written motion in this court to the effect that the Board's order of December 12, 1932, be incorporated in this record, and that it should be heard at the time the cause was argued on the merits. The motion was presented to this court by the parties at that time.

It is first contended by petitioner that since the Board had definitely found that the stock at the time of the transfer had a fair market value of $250 per share, it was error for it to undertake, in its opinion, to deduce from the evidence that it had a fair market value of $400 per share at that time, and likewise error for it to change its original findings by the order of December 12,

1932. Petitioner therefore argues that the order should not be incorporated in this record, and respondent's motion should be denied.

In *Lincoln National Bank* v. *Perry* (66 Fed., 887), the Circuit Court of Appeals in discussing the jurisdiction of the trial court to correct the record on appeal, said, at page 888:

"We are not prepared to admit that the circuit court exceeded its power, in undertaking to amend its record in the manner aforesaid, if it was satisfied that through accident or inadvertence, or a misprision of the clerk, the record did not in fact speak the truth. The power to correct mistakes in its record, occasioned by oversight, which are of such nature that the record does not show what was in fact done or decided, is a power that is inherent in all courts of superior jurisdiction, and is frequently exercised in furtherance of justice. The power in question does not extend, of course, to the correction of errors of law committed by the court, which, in all cases, must be remedied by appeal or writ of error, but is strictly limited to the correction of mistakes or misprisions of the clerk or other officers, by reason of which the record does not speak the truth, or fails to speak the whole truth."

In *Wight* v. *Nicholson* (134 U. S., 136), the court quoted with approval from the case of *Bilansky* v. *Minnesota* (3 Minn., 427), as follows:

"And while we admit the power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. * * * But when the facts stand undisputed, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. It is our opinion that this power, of necessity, exists in the district court, and that its exercise must in a great measure be governed by the facts of each case."

While the statute does not specifically fix the terms for the Board of Tax Appeals, yet the applicable statutes provide that the report of the division shall become the report of the Board within 30 days after such report by the division, unless a review is directed by the chairman. It is therefore contended by petitioner that any modification of the report should be made within 30 days and while the report of the division is under consideration by the Board. That contention is too broad in its terms and should be qualified by the principle laid down in *Wight* v. *Nicholson*, supra. If the facts stand undisputed to the effect that there was a mistake in writing the figures, "250" as the fair market value of each share of stock, instead of "$400," then the Board had a right to correct that error even after the 30 days had expired, and we think it can make no difference who made the mistake.

It was the duty of the Board to include in its report its findings of fact, or opinion or memorandum opinion. (Section 907(b) of the Revenue Act of 1924, as amended by the Revenue Act of 1928, ch. 852, 45 Stat., 791; U. S. C., Supp. VI, Title 26, section 617(b).) Under this section we think that a written opinion may perform the office of a finding of facts, and when both are used as was done in this case, they are to be considered together as the decision of the Board, and both may be looked to in determining what that decision is and the facts upon which it is based. (See *Commissioner* v. *Crescent Leather Co.*, 40 F. (2d), 833.) It is immaterial whether the term "finding of facts" or "opinion" is used, or whether both are used, and if both find facts sufficient to support the decision, the decision must stand.

It is true that in what was termed the "findings of fact," the Board found that the fair market value of the stock on March 1, 1922, was $250 per share. However, there was no evidence whatever to support that valuation. The respondent had found that it was worth $400 per share, and computed the deficiency on that finding. That finding was reviewed by the Board and sustained. The opinion which was filed as a part of the Board's finding and decision stated that the evidence supported the contention of respondent that the market value of the stock at the time received by the petitioner in 1922 was at least $400 per share and held that petitioner was liable for income tax in 1922 upon the 200 shares received in that year at the rate of $400 per share.

It is quite clear that the Board, contrary to its intention, erroneously inserted the figure *$250* instead of *$400* as the value of the stock, and we think it was such an error as the Board might rectify even after its decision was filed.

If the Board's order of December 12, 1932, be not incorporated in this record, the ruling of the Board would at least have to be reversed and remanded for a rehearing on the value of the stock on March 1, 1922 (section 1003(b), Act of February 26, 1926, ch. 27, 44 Stat., 110; 26 U. S. C. A., section 1226(b)), because of the inconsistency of the decision as to said value, which we are convinced was occasioned merely through oversight. Remanding the cause for such purpose would no doubt accomplish the same result as permitting the certified copy of the order of the Board to be incorporated in this record now, but we can see no good reason why that should be necessary. Respondent's motion to incorporate the Board's order of December 12, 1932, into this record is sustained.

The next question presented is whether there is substantial evidence in the record to support the valuation of $400 per share. The record discloses that there was a sale of some of the same stock of this company in 1921 at a price of $400 per share, and the earnings of the company in 1920 were in excess of $200 per share. The company also paid cash dividends of at least 500 per cent over the period from 1918 to 1921, inclusive, and had profits in excess of the dividends paid. It also paid a cash dividend of 100 per cent in 1921. This was sufficient to support the Board's finding, and petitioner's contention in this respect can not be sustained. It is true that there was evidence introduced to the effect that the stock had no market value, but we are not permitted to weigh the evidence.

The further contention was made by petitioner that even though he received a stock certificate for 200 shares in 1922, in fact he had owned all but 40 of those shares prior to 1922 in that they had been issued to the trustee to hold for him, and the beneficial interest had been in him as soon as they were issued. However, the terms of the resolution plainly refute such contention. Moreover, petitioner is hardly in a position to urge this point in view of the fact that he himself included the entire 200 shares of stock in his income tax return for the year 1922 instead of making a return for the 40 shares issued each year from 1918 to 1922, inclusive.

The decision of the Board is affirmed.

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTION 1113.—LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

Article 1351: Suits for recovery of taxes erroneously collected.

REVENUE ACT OF 1921.

Certificate of overassessment asserted to constitute account stated. (See Ct. D. 780, page 321.)

Article 1351: Suits for recovery of taxes erroneously collected. XIII-11-6698 Ct. D. 800

(Also Section 201, Article 1542.)

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. Suit—Claims for Refund—Sufficiency.

Where a trustee under trust deeds executed in 1919, by which certain stock was transferred to it for the use of beneficiaries, filed claims for refund asserting only that the tax upon dividends and interest should be computed at surtax rates for 1916, the year when suit to compel distribution of dividends was commenced, rather than at 1919 rates, the year when the suit was terminated and distribution made, such claims are not a sufficient basis for suits brought to recover the taxes paid on the grounds that the dividends distributed were not income to the trustee and that deduction should be allowed for trustee's commissions.

2. Income—Dividends—When Taxable.

Where dividends were received by the trustee in 1919, pursuant to a court order terminating a suit brought in 1916 to compel distribution, the tax was properly computed at 1919 rates.

3. Certiorari Denied.

Petition for certiorari denied January 22, 1934.

United States Circuit Court of Appeals for the Seventh Circuit.

Continental-Illinois National Bank & Trust Co. of Chicago (formerly Illinois Bank & Trust Co., formerly Illinois Merchants Trust Co.), as Trustee of Accumulations for the Estate of Suzanne M. Anderson and as Trustee of Accumulations for the Estate of Wendell W. Anderson, appellant, v. *The United States of America, appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

[October 16, 1933.]

OPINION.

Wilkerson, District Judge: This appeal involves income taxes on two trust estates created under trust deeds which are the same in all essential respects. The deeds were executed on June 28, 1919, and each of them transferred to the appellant bank as trustee 175 shares of the stock of the Ford Motor Co. The deeds were in the usual form and amounted in effect to a gift of the stock for the use of the named beneficiaries.

On June 10, 1919, there had been terminated by the Supreme Court of Michigan a suit to compel a distribution of the accumulated cash surplus of the Ford company. That suit was brought in the Circuit Court of Wayne County, Mich., in 1916, and in December, 1917, a decree was entered ordering a distribution to the extent of one-half of the cash surplus then on hand. An appeal was taken by the Ford company to the Supreme Court of Michigan, and on February 7, 1919, the order of distribution was affirmed. On June 10, 1919, a petition for rehearing was denied and the mandate of the Michigan Supreme Court issued. On July 10, 1919, the directors of the Ford company authorized a distribution of dividends in compliance with the decree of the Circuit Court of Wayne County and appellant bank received in each of the trust estates $182,106.18 as such dividends and interest thereon from the Ford company. The facts with reference to the litigation in the Michigan court are more fully stated in *Dodge* v. *United States* (64 Ct. Cls., 178 [T. D. 4077, C. B. VI-2, 146] and *Kales* v. *Woodworth* (32 Fed. (2d), 37 [T. D. 4080, C. B. VI-2, 149]).

On March 15, 1920, appellant bank as trustee filed its fiduciary and individual returns of income for 1919 in respect of such trusts, and paid $6,589.93 income tax for each of the beneficiaries. On September 23, 1922, after an audit by the Commissioner, an additional tax of $66,519.43 was assessed against each of the beneficiaries. The taxes so assessed were paid on November 10, 1922, under protest. On October 8, 1923, claims for refund, together with amended fiduciary and individual returns for 1919, were filed with the collector, and after the rejection of such claims on August 2, 1924, these suits were brought.

Appellant in its returns had computed the taxes on the basis of the rates applicable for 1916, the year in which the suit to compel the distribution was brought. The additional assessment was made on the basis of rates for 1919, the year in which the dividends were paid.

Appellant claims that in view of sections 213(b) and 202 of the Revenue Act of 1918 (40 Stat., 1065, 1060) and the regulations promulgated under the Revenue Act of 1918 (article 1562, Regulations 45 (1920 Ed.), as amended by T. D. 3206, C. B. July–December, 1921, 55) the Ford distribution was not income to the trustee. It is also claimed that in computing the net income in each case the trustee's fees and commissions, which amounted to $3,529.98, should have been deducted (section 214(a)1, Revenue Act of 1918 (40 Stat., 1066)).

The United States urges that regardless of the soundness of the propositions now put forward by appellant as grounds of recovery, but not presented to the

Commissioner, the suits can not be maintained because the claims for refund do not comply with the requirements of the Revenue Act and regulations.

In the original returns made by the trustee the Ford distributions were listed as "dividends received directly from Ford Motor Co. and paid under order of court out of surplus in the hands of corporation, July 31, 1916." In amended returns the income was described as "dividends and interest paid under order of court dated 7-31-16, taxable at 1916 rates as set forth in the statement of facts attached hereto."

In the statement accompanying the amended returns the facts relative to the litigation are set forth with the conclusion that "as a result of said distribution there was received by Illinois Trust & Savings Bank, trustee of the trust estate * * *, the sum of $181,142.33, upon which sum said trustee paid an income tax computed on the basis of the surtax prescribed in the Revenue Act of 1916, as income derived during 1916."

In the exceptions filed to the proposed additional assessment, there is no mention made of the date of the trust agreements, nor is there any statement concerning the terms of those agreements. There are no averments to the effect that there are no other documents relating to the liability for taxes on the distribution. In short, the facts stated are those relating to the litigation in the Michigan courts, which were relied upon to support the claim that the tax should be estimated on the basis of 1916 surtax rates.

In the exceptions is the following:

"However, if for any reason the amount received by this trustee upon which additional assessment is proposed to be levied, is not 1916 income, then it should be held 1917 income, calculable on 1916 surtax rates * * *."

In the letter of protest accompanying the remittances for the additional tax it is stated:

"The amount of said tax is a tax on income alleged to be derived by us as trustee in the year 1919 by reason of a certain dividend paid by Ford Motor Co., then a Michigan corporation, as a result of a suit in which John F. Dodge et al. were plaintiffs and the Ford Motor Co. et al. were defendants. The amount of said tax being arrived at by calculating the tax on said dividend and interest received thereon on the basis of surtax rates in force and effect for the year 1919, whereas, we are (as) trustee, allege that the income derived by us from said dividends, was income derived either during the year 1916 or during the year 1917.

"Having already paid the income tax on the income so derived, calculated on surtax rates, in force and effect for the year 1917 on the basis of 1916 accrual, in full it is our contention that no further tax is due from us as trustee at 1919 rates on said dividend to the Government, by reason of said dividend having been paid to us."

In the claims for refund, the grounds relied upon are stated as follows:

"The tax, for the refund of which this claim is filed, was erroneously and illegally assessed and collected, although duly protested, in respect of a distribution of $168,659.63 made by the Ford Motor Co. to Illinois Trust & Savings Bank, trustee of Wendell W. Anderson, one of its stockholders. Such distribution was income to the said trustee for 1916, or 1917, and was not income to said trustee for 1919. For further reasons why this application should be allowed, reference is hereby made to brief attached hereto, dated February 17, 1922, filed with the Committee on Appeals and Review of the Bureau of Internal Revenue."

The brief which is referred to in the claims consists of the statement of facts and exceptions filed with the Commissioner before the additional assessment was made, and the letter of protest to the collector, a portion of which is quoted above.

Appellant urges that certain language in the exceptions filed with the Commissioner is broad enough to include the grounds upon which it now relies. To be sure, in some of the exceptions there is the statement that the dividend was not taxable at 1919 rates, but when those statements are read as a part of the entire document, it is clear that the trustee intended to admit that it was liable for a tax upon the dividends, and that the only controversy related to the year the surtax rates of which should be applied in computing the tax. Neither in the claims for refund, nor in the papers therein referred to, or connected therewith, is there a statement of fact tending to show that the trustee was not liable for any tax on the dividends.

Appellant also urges that the returns of the trustee showed that no returns were made for the year 1918, and that the Government agents who made the audit upon which the additional assessment was based, must have ascertained the date and terms of the trust agreements. In our opinion, the possibility or probability that the Government agents might have ascertained the facts now relied on for recovery can not take the place of compliance with the requirements of the statutes and the departmental regulations made pursuant thereto.

Section 1318 of the Revenue Act of 1921 (42 Stat., 315) provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

Article 1013 of Regulations 62 provides:

"Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the plaintiff. All facts relied upon in support of the claim should be clearly set forth under oath. * * *"

The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. (*United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S., 269 [Ct. D. 336, C. B. X-1, 431]; *Tucker* v. *Alexander*, 275 U. S., 228 [T. D. 3973, C. B. VI-1, 287]; *Arizona Commercial Mining Co.* v. *Casey*, 32 Fed. (2d), 288; *Meinrath Brokerage Co.* v. *Crooks*, 28 Fed. (2d), 991 [Ct. D. 42, C. B. VIII-1, 287]; *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d), 626 [T. D. 3980, C. B. VI-1, 225].) One of the objects of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted so as to insure an orderly administration of the revenue. (*United States* v. *Felt & Tarrant Mfg. Co.*, supra.)

If we were to give to all of the papers and documents before the Commissioner the same effect as if they were set out in the claims for refund, there would be absent from the claims the statement of any fact relating to the date of the trust and its terms. Nor may the court be asked to speculate as to what the Commissioner might have discovered in connection with the audit. The trustee acted precisely as if there was a definite agreement between the settlors of the trusts and the trustee that the trustee should pay the tax on the dividend when it was declared. Everything done by the trustee up to the time of the trial tended to show such an understanding. If the trust agreement itself had been filed with the Commissioner he would have been warranted in believing, in the absence of an express statement to the contrary, that there was a separate agreement which relieved the settlors from paying the tax and obligated the trustee to do so.

The case here is not one of liberality in allowing amendments of claims either before or after they have been barred by the statute of limitations. (*United States* v. *Factors & Finance Co.*, 288 U. S., 89 [Ct. D. 628, C. B. XII-1, 315]; *United States* v. *Henry Prentiss & Co.*, 288 U. S., 73 [Ct. D. 627, C. B. XII-1, 311]; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S., 62 [Ct. D. 626, C. B. XII-1, 307].) No attempt was made by appellant to amend its claim. If we assume, for the purpose of the argument, that an amendment would have been permitted if timely application had been made, that fact does not relieve appellant from compliance with the plain requirement of the statute and regulation.

Appellant in the claims for refund stated facts which it said entitled it to the benefit of the 1916 tax rates. The plain language of the returns and claims is that some tax is due from the trustee. The only question raised was as to the rate which should be applied in computing the tax. Appellant now seeks recovery on grounds not stated in the claims which, if well taken, would have relieved the trustee from the payment of the tax even on 1916 rates. The act of the trustee in paying the original tax is utterly inconsistent with the claim now put forward by it. The position of the appellant, in our opinion, stretches the rule of liberality beyond reasonable limits, and carried to its conclusion would nullify the requirement of the statute and regulation.

Appellant was not entitled to any refund upon the grounds stated and argued before the Commissioner. The tax was properly computed by the Commissioner on the basis of 1919 rates. (*Dodge et al., Executors, etc.*, v. *United States*, 64

Ct. Cls., 178; *Kales* v. *Woodworth*, supra.) The failure to state the facts in the claims for refund also precludes appellant from claiming a deduction for trustee's fees or commissions in computing the net income.

We do not pass upon the other questions raised by appellant. We are not to be understood, however, as agreeing with the construction of the statute under which the effect of the creation of the trust was to relieve both the settlors and the trustee from the payment of any tax on this dividend. It is not necessary to determine what the Government might have done with respect to taxing the settlors, if the trustee had not represented that it was liable for the tax on the dividend.

The judgments of the district court should be and they are affirmed.

SECTION 1114.—PENALTIES.

ARTICLE 1361: Penalties.

REVENUE ACT OF 1926.

Willful failure to supply information. (See Ct. D. 771, page 144.)

SECTION 1116.—INTEREST ON REFUNDS AND CREDITS.

ARTICLE 1371: Interest on refunds and credits.

REVENUE ACTS OF 1918 AND 1926.

Overassessments of tax for 1918 applied against tax for 1920 payable in installments. (See Ct. D. 842, page 339.)

ESTATE AND GIFT TAX RULINGS.

TITLE III.—GIFT TAX. (1932)

SECTION 501.—IMPOSITION OF TAX.

REGULATIONS 79, ARTICLE 2: Transfers reached. XIII–22–6820
(Also Section 506 and Article 17.) G. C. M. 13147

Computation of the value of an irrevocably assigned life insurance policy for gift tax purposes.

A ruling is requested as to the proper method of computing the value of a life insurance policy, for gift tax purposes, which was irrevocably assigned on April 1, 1933, without consideration.

Section 501 of the Revenue Act of 1932 imposes a tax upon all transfers of property by any individual after June 6, 1932, to the extent that they are donative in character and exceed the authorized deductions.

Section 506 of that Act provides that—

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Article 2 of Regulations 79 reads in part as follows:

The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * *

(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift.

A life insurance policy in the amount of $100,000 taken out on January 1, 1928, was irrevocably assigned by the insured on April 1, 1933, without consideration. The annual premium of $2,849 was payable in advance on January 1. The policy provides in part as follows:

The cash surrender value shall be the reserve on the face of the policy at the end of the insurance year or, event of default, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any outstanding paid-up additions, under section 2, option (c), plus any dividends standing to the credit of the policy, under section 2, option (d), and less a surrender charge for the third to the ninth years, inclusive, of not more than 1½ per cent of the face of the policy. Such reserve will be computed on the basis of the American Table of Mortality and interest at 3 per cent, and the amount of paid-up insurance under (2) and the term of the continued insurance and amount of pure endowment under (3) will be computed on the same basis at the attained age of the insured on the date of default.

The values in the table opposite are computed in accordance with the above provisions, assuming that premiums have been paid in full when due for the number of years stated, that there is no indebtedness to the company, no outstanding paid-up additions, no dividends standing to the credit of the policy and that no dividends have been applied on the accelerative endowment plan; the surrender charge, if any, has been deducted.

After the policy has been in force for a period of four years the cash surrender value for each $1,000 of the face amount is $46, and after the policy has been in force for a period of five years the cash surrender value for each $1,000 of the face amount is $63. All premiums were paid when due, no indebtedness was due the company by the holder prior to assignment, and there were no paid-up additions and no dividends standing to the credit of the policy.

It is to "the net cash surrender value, if any," that the addition of "the prepaid insurance adjusted to the date of the gift" (article 2, Regulations 79) is to be made. The word "prepaid," meaning in advance or beforehand, obviously refers to a payment antedating the making of the gift. Fundamentally, life insurance, like other insurance, is simply a contract. By paying premiums the insured obtains the promise of the insurer to pay money on the former's death, or before that event. As such promise by the insurer is "insurance," and is bought by the premium payments, the two words, "prepaid insurance," manifestly mean a premium payment made before the gift to obtain the promise of the insurer. That promise may be to pay a sum in cash on surrender of the policy contract, or, if not surrendered, to pay the face of the policy on the insured's death. Whatever the terms of the promise, the obtaining or purchasing thereof is through premium payments.

The following examples illustrate the Bureau's interpretation of the meaning of the concluding clause of subdivision (5) of article 2, Regulations 79, reading—"plus the prepaid insurance adjusted to the date of the gift":

1. In a case where the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, and where such value was increased to $6,300 immediately upon the payment on January 1, 1933, of the $2,849 premium due for the insurance year 1933, the amount of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $6,300, representing the cash surrender value of the policy, plus $861.75, representing the prepaid insurance adjusted to the date of the gift. (Premium paid January 1. 1933, $2,849 less $1,700, the additional cash surrender value created by the payment of such premium, and less $287.25, representing the earned premium from January 1 to April 1, 1933; $2,849 − $1,700 = $1,149 − $287.25 = $861.75.)

2. In a case where the premium was duly paid for the insurance year 1933, where the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, where the cash surrender value was increased to $6,300 at the end of the insurance year 1933, and where the cash surrender value of $6,300 was adjustable to the date of surrender of the policy, the amount of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $5,025 (representing the cash surrender value adjusted to April 1, 1933), plus the present worth of $1,275 (the balance added to the cash

surrender value at the end of the insurance year 1933), plus $861.75, representing the unearned premium adjusted to the date of the gift and computed in the manner set forth in example 1.

3. In a case where the $2,849 premium was duly paid for the insurance year 1933, where the cash surrender value of the policy at the end of the insurance year 1932 was $4,600, where that value was increased to $6,300 at the end of the insurance year 1933, and where the cash surrender value of $6,300 was not adjustable to the date of surrender of the policy, the value of the gift on April 1, 1933, the date on which the policy was irrevocably assigned, was $4,600 (representing the cash surrender value of the policy), plus the present worth of $1,700, the amount added to the cash surrender value at the end of the insurance year 1933, plus $861.75, representing the unearned premium adjusted to the date of the gift and computed in the manner set forth in example 1.

In view of the foregoing, it is held that, where the insured makes a gift of the insurance to another, the insured having theretofore paid a premium in purchase of the insurer's promise, which promise covers a period not yet elapsed when the gift is made, the value of the gift includes (as illustrated in the foregoing examples) the net cash surrender value of the policy at the date of the gift and that proportionate part of the premium paid before the gift, which covers a period extending beyond the gift. When the premium payment purchases the right to an increased cash surrender value, which is not available until the end of the policy year, a discount is required in arriving at its present worth as of the date of the gift.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

TITLE III.—ESTATE TAX. (1926)

REGULATIONS 70, ARTICLE 77: Assessments. XIII-16-6757
Ct. D. 815

ESTATE TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. COLLECTION—LIMITATION—CONSTRUCTION.

A statute of limitation invoked to bar the right of the United States to collect taxes must be strictly construed in favor of the Government.

2. ASSESSMENT—COLLECTION—LIMITATION—APPEAL TO BOARD—SUSPENSION OF RUNNING OF STATUTE OF LIMITATION.

Where an appeal is filed with the Board of Tax Appeals from the determination of a deficiency in estate tax due under the Revenue Act of 1921, the period of limitation upon assessment and collection provided by section 1009(a) of the Revenue Act of 1924 and section 1109(a) of the Revenue Act of 1926 is extended, since section 310(b) of those Acts, when considered in connection with section 308(a) and section 318 (b) and (j) of the Revenue Act of 1926, provide for a suspension of the running of the statute of limitation during the pendency of an appeal, and are applicable to estate taxes not only in cases arising under the Revenue Act of 1926 but also under prior Acts. Section 1009(a) expressly excepts section 310(a) from its operation.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

John Parrott, Jr., and Mary Emilie Parrott Williams, as Executor and Executrix, respectively, of the Estate of Mary Emilie Parrott, Deceased, appellants, v. *John P. McLaughlin, Collector of Internal Revenue, appellee.*

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

[October 23, 1933.]

OPINION.

SAWTELLE, Circuit Judge: Appellants filed suit to recover from appellee the sum of $47,609.49, with interest, being the amount of estate taxes alleged to have been illegally collected by appellee from appellants, on the ground that both the assessment and the collection thereof were barred by the statute of limitations.

A general demurrer to the complaint was sustained, appellants failed to plead further, and judgment of dismissal was entered; followed by this appeal.

The facts are not in dispute. The pertinent events, in order of time, are as follows:

March 1, 1922, Mary Emilie Parrott, a resident of the county of San Mateo, State of California, died testate, leaving therein real and personal property.

August 31, 1923, her executors filed Federal estate tax return and paid the tax thereon.

August 12, 1925, the Commissioner of Internal Revenue gave notice of a deficiency in the payment of the tax due under the Revenue Act of 1921.

October 9, 1925, the executors appealed to the Board of Tax Appeals from the determination of the Commissioner.

November 18, 1926, the cause was heard before the Board of Tax Appeals.

June 6, 1927, the Board of Tax Appeals sustained the Commissioner's determination that there was a deficiency in said estate tax in the sum of $46,643.41.

November 10, 1928, the executors appealed to this court to review the decision of the Board of Tax Appeals.

January 28, 1928, no bond having been filed to stay assessment, the Commissioner made assessment of $46,643.41.

April 14, 1928, the executors paid the additional tax under protest.

February 4, 1929, this court affirmed the decision of the Board of Tax Appeals.

February 3, 1931, the Commissioner rejected the claim for refund of the additional tax.

As stated by appellants, "There is, of course, only one error complained of and that is the error in sustaining the demurrer to the complaint, with the consequent dismissal of the case upon failure of the plaintiffs to amend."

This specification in turn involves the question of the running of the statute of limitations upon the assessment and collection of the estate tax during the pendency of the appeal to the Board of Tax Appeals. This question was not raised before the Board, nor before this court on the prior appeal, although, according to appellants' contention here, the statute of limitations had run against the tax before the Board entered judgment in favor of the Commissioner on June 6, 1927.

Appellants having failed to file the bond on appeal to this court, as required by section 1001 of the Act of 1926 (26 U. S. C. A., section 1224), the Commissioner made the assessment on January 28, 1928.

Appellants invoke the principle announced by the Supreme Court in *Gould* v. *Gould* (245 U. S., 151), regarding the construction of the income tax Act of 1913. In that case the court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

Other cases cited in support of this principle are: *United States* v. *Field* (255 U. S., 257); *United States* v. *Merriam* (263 U. S., 179 [T. D. 3535, C. B. II-2, 87]); *Crooks* v. *Harrelson* (282 U. S., 55 [Ct. D. 271, C. B. X-1, 469]).

In the instant case, however, we must not overlook another principle, equally well established by the same court, namely:

"Statutes of limitation sought to be applied to bar rights of the Government (unlike statutes *levying* taxes), must receive a strict construction in favor of the Government." (*United States* v. *Whited & Wheless, Ltd.*, supra; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S., 456, 462.)

In the case of *United States* v. *Whited & Wheless* (246 U. S., 552, 561), the court, interpreting a limitation statute, said:

"Fundamental to the interpretation of the statute which the answering of this question renders necessary, lies the rule of law settled 'as a great principle of public policy' that the 'United States, asserting rights vested in them as a sovereign Government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound.' * * *"

Both of these cases were followed and cited by Judge Mack, speaking for the Circuit Court of Appeals for the Sixth Circuit, in *W. P. Brown & Sons Lumber Co.* v. *Commissioner* (38 F. (2d), 425, 428), in which Judge Mack said:

"Statutes imposing limitations upon actions by the United States are to be strictly construed in favor of the Government."

The case of *United States* v. *Whited & Wheless*, supra, was cited by the Supreme Court in *Independent Coal Co.* v. *United States* (274 U. S., 640, 650), and the case of *Dupont de Nemours & Co.* v. *Davis*, supra, was cited by the same court in *Phillips* v. *Commissioner* (283 U. S., 590, 603).

In the case of *Loewer Realty Co.* v. *Anderson* (C. C. A. 2) (31 F. (2d), 268, 269 [Ct. D. 125, C. B. VIII-2, 218]), the court said:

"Statutes of limitation barring the collection of taxes must receive a strict construction in favor of the Government."

(See also *Imhoff-Berg Silk Dyeing Co.* v. *United States*, 43 F. (2d), 836, 840.)

The pertinent sections of the Acts of 1924 and 1926 are set forth in the footnote.[1]

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[1] Revenue Act of 1924:

"SEC. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by Part I of this title, the executor, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the executor may file an appeal with the Board of Tax Appeals established by section 900." (43 Stat., 308.)

"SEC. 310. (a) Except as provided in section 311 and in subdivision (b) of section 308 and in subdivision (b) of section 312, the amount of the estate taxes imposed by Part I of this title shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of five years after the return was filed." (43 Stat., 310.)

"SEC. 310. (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the executor under subdivision (a) of section 308 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board." (43 Stat., 310.)

"SEC. 316. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any estate tax imposed by the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or additional tax or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by Part I of this title, except that the period of limitation prescribed in section 1009 shall be applied in lieu of the period prescribed in subdivision (a) of section 310." (43 Stat., 312.)

"SEC. 1009. (a) Except as provided in sections 277, 278, 310, and 311, and subdivisions (b) and (c) of this section, all internal-revenue taxes shall, notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, be assessed within four years after such taxes became due, and no proceeding in court for the collection of such taxes shall be begun after the expiration of five years after such taxes became due." (43 Stat., 341.)

"SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c):

"Title II (called 'Income Tax') as of January 1, 1924;

"Title IV (called 'Estate Tax');

* * * * * * *

"Sections * * * 1322 * * * (being certain administrative provisions).

"(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, * * *." (43 Stat., 352.)

It is not disputed that the tax in question was imposed upon the estate by the Revenue Act of 1921 (42 Stat., 227, ch. 136), and became due on March 1, 1923.

Appellants contend, however, that the period of limitation prescribed for the assessment of the tax was four years, and that that period expired March 1, 1927. (Revenue Act of 1921, section 1322; 42 Stat., 315.)

The Board of Tax Appeals was created by the Revenue Act of June 2, 1924 (43 Stat., 336, section 900 (26 U. S. C. A., section 1211)), and appellants appealed to said Board under the provisions of said Act.

Section 1100(a) of the Revenue Act of 1924 repealed the Act of 1921, subject to the limitations provided in subdivisions (b) and (c). (43 Stat., 352.) Subdivision (b) provides that the parts of the Act of 1921 so repealed shall (except as provided in sections 280 and *316* and except as otherwise provided in the Act of 1924) remain in force for the assessment and collection of all

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Revenue Act of 1926:

"SEC. 310. (a) Except as provided in section 311, the amount of the estate taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed." (44 Stat., 77; 26 U. S. C. A., section 1110.)

"SEC. 310. (b) The running of the statute of limitations provided in this section or in section 311 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 308) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter." (44 Stat., 77; 26 U. S. C. A., section 1110.)

"SEC. 318. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any estate or gift tax imposed by the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 308 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or additional tax or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except that in the case of an estate tax imposed by the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the period of limitation prescribed in section 1109 of this Act shall be applied in lieu of the period prescribed in subdivision (a) of section 310." (44 Stat., 81; 26 U. S. C. A., section 1118.)

"SEC. 318. (b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 308 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title III of such Act or to so much of an estate tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (h) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (a) of section 319." (44 Stat., 82; 26 U. S. C. A., section 1118.)

"SEC. 1109. (a) Except as provided in sections 277, 278, 310, and 311—

"(1) Notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, all internal-revenue taxes shall (except as provided in paragraph (2) or (3) of this subdivision) be assessed within four years after such taxes became due, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due." (44 Stat., 114; 26 U. S. C. A., section 105.)

"SEC. 1200. (a) The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b): * * *

"Part I of Title III (called 'Estate Tax');

* * * * * * *

"Sections * * * 1009 * * * (being certain administrative provisions).

"(b) The parts of the Revenue Act of 1924 which are repealed by this Act shall (except as provided in sections 283 and 318 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1924, of all taxes imposed by prior income, war-profits, or excess-profits tax Acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. * * *." (44 Stat., 125.)

taxes imposed by the Act of 1921. Said section 316 of the Act of 1924 provides that:

"If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any estate tax imposed by the Revenue Act of * * * 1921 * * *, the amount which should be assessed * * * shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations * * * as in the case of the taxes imposed by Part I of this title, except that the period of limitation prescribed in section 1009 shall be applied in lieu of the period prescribed in subdivision (a) of section 310."

Section 1009(a) of the Act of 1924 provides that except as provided in sections 277, 278, *310* and 311, all taxes shall be assessed within four years after such taxes became due; whereas section 310(a) provides that all taxes shall be assessed within four years after the return was filed.

As we interpret sections 316 and 1009(a) while changing the period within which an assessment of the tax is required to be made, they do not pretend to strike down or destroy subdivision (b) of section 310, which extends the time within which the assessment is to be made if an appeal be filed by the taxpayer with the Board of Tax Appeals. On the contrary, section 1009(a) expressly excepts section 310(a) from its operation, thus tolling the statute of limitations.

The Act of 1926 (section 1200(a)) repealed certain parts of the Act of 1924, including the estate tax, subject, however, to the limitations set forth in subdivision (b). (44 Stat., 125.) This subdivision provides that the parts which are repealed shall, except as provided in sections 283 and *318*, remain in force for the assessment and collection of all taxes imposed by the Act of 1924.

Section 318(a) is similar to section 316 of the Act of 1924, except that it includes a gift tax as well as an estate tax, provides for a tax notice of the amount proposed to be assessed under section 308(a) of the Act, and provides that, "* * * except that in the case of an estate tax imposed by the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the period of limitation prescribed in section 1109 of this Act shall be applied in lieu of the period prescribed in subdivision (a) of section 310."

Section 318(b) provides:

"If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 308 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title III of such Act or to so much of an estate tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section except as provided in subdivision (h) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (a) of section 319."

Section 310(b) of the Acts of 1924 and 1926, respectively, read as follows:

"(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the executor under subdivision (a) of section 308 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board." (43 Stat., 310.)

"(b) The running of the statute of limitations provided in this section or in section 311 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 308) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter." (44 Stat., 77.)

Appellants contend that "the periods of limitations set up in section 1009(a) of the 1924 Act and in section 1109(a) of the 1926 Act were not extended by the provisions of section 310(b) of either Act during the pendency of the appeal."

With this contention we can not agree. We are of the opinion that a fair interpretation of the two Acts in question lead to the opposite conclusion. If it be conceded that sections 316 and 1009(a) of the Act of 1924 and sections 318(a) and 1109 of the Act of 1926, changed the period of limitations generally within which the assessment is required to be paid, it does not follow that the period of limitation is not extended and the statute is not tolled during the pendency of an appeal to the Board of Tax Appeals. Clearly, we think, section 310(b) of said Acts, when considered in connection with sections 308(a) and 318(b), provide for a suspension of the running of the statute during the pendency of an appeal and are applicable to estate taxes imposed by the Act of 1921.

Furthermore, section 318(j) of the Act of 1926 seems applicable here and to lend support to the proposition that the Congress recognized section 310(b) as tolling the statute, not only in cases arising under the 1926 Act, but under prior Acts of Congress as well. That section reads as follows:

"In the case of any estate or gift tax imposed by prior Act of Congress, in computing the period of limitations provided in section 310 or 311 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 310) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court." (44 Stat., 84.)

There was no error in sustaining the demurrer to appellants' complaint; and the judgment of the district court is affirmed.

TITLE IV.—ESTATE TAX. (1918)

PUBLIC, CHARITABLE, AND SIMILAR BEQUESTS.

Regulations 37(1921), Article 56: Conditional bequests. XIII–10–6689
Ct. D. 797

ESTATE TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

Deduction—Remainder to Charity on Death of Life Tenant Without Issue—Presumption.

Where decedent's residuary estate was devised to charity in the event his daughter, the life tenant, died without issue, and where before the decedent's death the daughter had undergone a surgical operation which rendered her incapable of bearing children, the value of the bequest to charity was ascertainable at the date of the decedent's death and the estate is entitled to the deduction provided by section 403(a)3 of the Revenue Act of 1918. Under the facts established at the time of decedent's death, the presumption that a woman is capable of bearing children as long as she lives, relied upon by the Government as irrebuttable and conclusive, is not applicable.

SUPREME COURT OF THE UNITED STATES.

The United States, petitioner, v. *Provident Trust Co., as Administrator of the Estate of George Theodore Roberts, Deceased.*

On writ of certiorari to the Court of Claims.

[February 5, 1934.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the court.

The Provident Trust Co. is the administrator, with will annexed, of the estate of the deceased, who died in 1921, leaving a will thereafter duly admitted to probate. Subsequent to the filing of the Federal estate tax return, the Commissioner of Internal Revenue imposed an additional estate tax, amounting with interest to something over $21,000. The trust company paid the amount, and filed a claim for refund of $18,404.05, on the ground that under the provisions of the will the value of the residuary estate, less the value of the life estate of the daughter of deceased, should have been but was not allowed as a deduction from the gross estate. The Commissioner rejected the claim and this action was brought.

The will, after making certain bequests, devised the remainder of the estate to the trust company, in trust to pay the income thereof to deceased's daughter during her natural life, and upon her death to her lawful issue; and further provided that upon the death of the daughter without issue, the testator's residuary estate should be distributed among designated charitable institutions and societies—all belonging to that class of organizations, bequests to which are deductible from the gross estate under the provisions of section 403(a)3 of the Revenue Act of 1918 (ch. 18, 40 Stat., 1057, 1098). At the time of deceased's death, the daughter was 50 years of age. She had been in poor health and under a physician's care; and on February 9, 1914, upon medical advice, an operation was performed removing her uterus, Fallopian tubes, and both ovaries. The court below specifically found—"The operation and removal of the organs were necessary to prevent further impairment of her health. After the operation she could not have become pregnant nor could she have given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child." Following her death, a State orphans' court awarded the residue of the estate, subject to payment of transfer or inheritance taxes which might be due, to the charitable organizations named in the will.

Upon the foregoing facts, the court below held that respondent was entitled to recover, and accordingly awarded judgment in the sum of $17,204.66. (— Ct. Cls., —; 2 F. Supp., 472.)

Section 403(a)3, supra, so far as it is pertinent here, provides that for the purpose of determining the value of the net estate to be taxed there shall be deducted from the value of the gross estate—"(3) The amount of all bequests, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *." Article 53, Treasury Regulations 37, declares that the amount of the deduction in such case is the value at the date of decedent's death of the remainder interest in the money or property which is devised or bequeathed to charity. (Compare *Ithaca Trust Co.* v. *United States*, 279 U. S., 151 [Ct. D. 61, C. B. VIII-1, 313].) It follows that in making a deduction for that interest, the value thereof must be determined from data available at the time of the death of decedent. (Compare *Humes* v. *United States*, 276 U. S., 487, 494 [T. D. 4185, C. B. VII-2, 378].)

The Government contended in the court below, as it contends here, that, in view of the restriction in respect of issue contained in the will, the value could not be thus determined, since the law, without regard to the fact, conclusively presumes that a woman is capable of bearing children as long as she lives; and that this presumption controls where the organs of reproduction have been completely removed and inability to bear children admits of no valid dispute, no less than where the question turns upon the circumstance of age alone, or upon conflicting evidence or medical opinions. The lower court held otherwise for the reason that the facts established, as of the date of decedent's death, forbade any other conclusion than that the daughter was incapable of bearing children, and a presumption to the contrary could not be indulged.

The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof. Mr. Best, writing more than 90 years ago when the force of the rule was more strictly regarded than it has come to be since, said that modern courts of justice (that is to say, the courts of that day) were slow to recognize presumptions as irrebuttable, and were disposed to restrict rather than extend the number.

"Many presumptions," he says, "which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either been ranged among praesumptiones juris tantum, or considered as presumptions of fact, to be made at the discretion of a jury. * * * By an arbitrary rule, to preclude a party from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and it must be confessed that there are several presumptions still retained in this class which never ought to have found their way into it, and which, it is to be feared, often operate seriously to the defeat of justice." (Best, Presumptions of Law and Fact (London, 1844), section 18.)

Certainly the world has gained in experience since that was written; and the binding effect, in respect of particular situations, of the ancient rule precluding proof of facts to the end of avoiding supposed injurious results thought to be of greater consequence than the predominance of truth over error, still remains a proper subject of judicial inquiry to be made and resolved in the light of such further experience and knowledge. (Compare *Funk* v. *United States*, 290 U. S., 371, decided December 11, 1933.)

The foregoing observations are peculiarly apposite to the phase of the subject now under review; for, as suggested by counsel for respondent, the presumption here involved had its origin at a time when medical knowledge was meager, and many centuries before the discovery of anesthetics and, consequently, before surgical operations of the kind here involved became practicable. It was not until a comparatively recent period, therefore, that the effect of such an operation was disclosed to observation, and the incontrovertible fact recognized that a woman subjected thereto was permanently incapable of bearing children.

The Government argues that the rule is one of substantive law and evidence to overcome it is inadmissible. Whether in particular instances so-called irrebuttable presumptions are, in a more accurate sense, rules of substantive law rather than true presumptions, is a matter in respect of which a good deal has been said by modern commentators on the law of evidence. (2 Chamberlayne on Evidence, sections 1086, 1087, 1159, et seq.; 5 Wigmore on Evidence, 2d Ed., section 2492. Compare *Heiner* v. *Donnan*, 285 U. S., 312, 328–329 [Ct. D. 473, C. B. XI–1, 324]; 2 Thayer, Evidence, 351–352, 540–541, 545–546.) But it is unnecessary to consider that interesting distinction, since, as will appear, the presumption in question in this instance must be dealt with as open to rebuttal and, therefore, in any aspect of the matter, as a true presumption.

The presumption generally has been held to be conclusive when the element of age alone is involved, albeit Lord Coke's view that the law seeth no impossibility of issue, even though both husband and wife be an hundred years old (Coke on Littleton, 551; 2 Blackstone Commentaries, 125), if now asserted for the first time, might well be put aside as a rhetorical extravagance. But the presumption, even where age alone is involved, has not been universally upheld as conclusive or applied under all circumstances. It has been followed to a greater extent in this country than in England, though even here exceptional cases are to be found;[1] and in England such cases are very numerous.[2] It does not seem necessary to review the decisions in either jurisdiction. It is enough to say that the English courts have treated the rule as possessing a considerable degree of flexibility and have refused to give it a conclusive effect in a large number of cases; while the American courts, adhering to a more rigid view, have applied the rule more generally. See extended note (67 A. L. R.,

[1] *Male* v. *Williams* (48 N. J. Eq., 33, 36); *Ansonia National Bank* v. *Kunkel* (105 Conn., 744, 753); *Moore's Ex'or* v. *Beauchamp* (5 Dana (Ky.), 70, 72); Bacot's case MS. (N. J.), cited in note to Apgar's case (37 N. J. Eq., 502); *Apgar* v. *Apgar* (38 N. J. Eq., 549, 552); *Carney* v. *Kain* (40 W. Va., 758, 811). And in *Denver, etc., Railway* v. *Harris* (122 U. S., 597, 608), a personal injury case, this court sustained without question the admission of evidence that the injured person had been rendered impotent as a result of the physical injury.

[2] See note to Apgar's case, supra, note 1.

538, et seq.), where the decisions are classified and digested. Few cases have arisen where elements other than, or in addition to, that of age were present, and the conclusive character of the rule in such cases is by no means established. Thus in *Hill* v. *Spencer* (196 Ill., 65, 70), the Supreme Court of Illinois, held meaningless an allegation that a woman was past the age of child bearing, but was careful to add, "unless more than a mere matter of age is stated in the bill." (See *Denver, etc., Railway* v. *Harris*, supra, note 1.) And speaking generally this court has said (*Lincoln* v. *French*, 105 U. S., 614, 616–617)—"But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown."

The basis for the interposition of an irrebuttable presumption is embodied in the general statement of Mr. Wigmore, quoted by the court below, that evidence of certain kinds of facts is excluded "because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth." (1 Wigmore on Evidence, 2d Ed., section 11.) Relating this obviously correct view to the presumption here invoked, not only do we perceive no grounds of expediency or policy that call for its hard and fast application to a particular physical condition, when ignorance has been supplanted by knowledge so as to put beyond the range of doubt the destructive effect of that condition upon the capacity of child bearing, but we conclude affirmatively that the policy of the statute under review as applied to the case in hand is quite to the contrary.

The important point to be emphasized is that the question arises with respect to a surgical operation, the inevitably destructive effect of which upon the power of procreation is established by tangible and irrefutable proof. Moreover, the case does not involve the rule against perpetuities, the devolution of property, the rights or title of living persons in or to property, or any other situation such as constituted the background of practically all the decisions which have sustained the conclusiveness of the presumption. We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests. (*Edwards* v. *Slocum*, 264 U. S., 61, 63 [T. D. 3584, C. B. III-1, 479].) And, in that view, we well may assume that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation. (Compare *Humes* v. *United States*, supra, at page 494.)

The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. (See *Ithaca Trust Co.* v. *United States*, supra.) Thus stated, the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason.

The judgment of the court below is affirmed.

REGULATIONS 37(1921), ARTICLE 61: Deduction for claims and expenses. XIII–23–6832 Ct. D. 835

ESTATE TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTIONS—ESTATE OF NONRESIDENT—CONSTITUTIONALITY.

Section 403(b)1 of the Revenue Act of 1918, limiting allowable deductions in the case of nonresidents to 10 per cent of the gross estate situated in the United States, is constitutional.

2. Gross Estate—Pledged Securities.

The total value of pledged securities is includible in the gross estate of a decedent as an interest subject to the payment of charges against the estate, within the meaning of section 402(a) of the Revenue Act of 1918.

3. Certiorari Denied.

Petition for certiorari denied May 14, 1934.

United States Circuit Court of Appeals for the Second Circuit.

City Bank Farmers Trust Co., as Executor of the Last Will and Testament of Evelyn Bostwick Voronoff, Deceased, plaintiff appellee and appellant, v. Frank Collis Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, Deceased, defendant appellant and appellee.

[January 8, 1934.]

OPINION.

Appeals by both parties from a judgment of the District Court for the Southern District of New York, in an action to recover for estate taxes erroneously collected.

L. Hand, Circuit Judge: This is an action against a collector of internal revenue to recover estate taxes erroneously collected, tried upon stipulated facts before a judge, who gave judgment for the plaintiff for part of the amount claimed. The facts are as follows: The plaintiff's testatrix, Voronoff, was a citizen and resident of France who died in Paris in March, 1921. She had property real and personal both in the United States and elsewhere, of about $4,270,000, of which $435,000 was outside the United States; her total debts and administration expenses were somewhat over $1,000,000. Securities amounting to $1,049,000, pledged with a bank (the plaintiff), in the sum of $557,000, were among the American assets. In assessing the estate tax the Commissioner included in the gross estate the total value of the pledged securities, instead of only the surplus after deducting the loans; and in allowing deductions, he followed section 403(b)1 of the Act of 1918, which in the case of a nonresident limited allowable deductions to 10 per cent of the gross estate. The plaintiff paid the tax as assessed, and sued to recover the excess over a tax computed, first, by excluding from the gross estate the amount of the loans secured by the pledge; and second, by allowing as deduction that share of the debts which the American assets bore to the gross estate both here and abroad. Its position is that the limit fixed by section 403(b)1 was unconstitutional; and that section 402(a) meant to include only the surplus of the pledge in the gross estate. The judge ruled with the plaintiff on the first point, and against it on the second and both sides appealed.

The more troublesome question is the first, for the section undoubtedly fixed a standard, altogether unfair and unreasonable in its incidence, as Congress itself recognized in 1928 (section 401(a) of the Act of 1928). Its unconstitutionality does not, however, inevitably follow. The argument is in two parts; first, that to ignore the decedent's debts in computing an estate tax is to levy a direct tax, not an excise, and is unconstitutional for that reason (section 9, Article I); second, that even if the tax be an excise, the resulting inequality violates the fifth amendment. As to the first, the theory is that creditors do not succeed to the decedent's property by his death; they could collect before and they may equally collect thereafter; death is not the "generative source" of their right. Therefore, a succession tax based upon the gross estate, or indeed upon any part of the property which is required to pay creditors, is not a succession tax at all. Even so, it might be possible to defend the greater part of the tax at bar; for when a nonresident owns property outside the United States, Congress might perhaps require the executor to marshal the indebtedness first against the foreign assets, treating the property within the United States so relieved as passing by death. However, this would not here be enough, because the foreign assets would not pay the debts and other charges; and the larger question must be answered.

The argument proceeds that, since no excise may be levied upon the property which passes to creditors, the calculation of the succession tax upon what passes to legatees must not include property allocable to creditors, either in the base or in the determination of the rate. *Frick* v. *Pennsylvania* (268 U. S., 473) is said so to hold. In that case the State tried to defend a succession tax levied on all the property of a resident inside and outside the State, on the theory that it might levy a tax upon the succession to the property within the State, calculated as though all the property was within it. But the court said no, because that would indirectly tax the property outside, though in *Maxwell* v. *Bugbee* (250 U. S., 525) a State had been allowed to use such property to fix the rate of taxation upon the succession to local property. In both cases the question was only of the fourteenth amendment; but *Frick* v. *Pennsylvania*, supra (268 U. S., 473), certainly did hold that a succession tax upon property within the power of a taxing State may not be computed by including within the base property beyond its power; and it seems to us to make no difference whether in the case of a State the property is beyond its borders, or in the case of the United States the tax is beyond its powers as defined by the Constitution. Thus the question can not be avoided whether the succession to creditors is a proper subject for an excise. The defendant invokes that part of *Frick* v. *Pennsylvania* in which the court allowed the base to include property taken by the United States for its own estate taxes. The court did not say, however, that a tax upon the passage of that property was an excise; that question could not arise, and the case is no authority as to it. Nor do we see that *Plummer* v. *Coler* (178 U. S., 115) is material. The point appears to be res integra.

It is of course true that death does not create the decedent's debts, as it does create the claims of legatees and next of kin. But the debts were the decedent's and he has died; how far they shall constitute claims against another person, his executor or his legatees, is obviously another question; the dead man's promises may bind them, or they may not; that is a question on which the law must speak, and its voice has never been unequivocal. Thus it by no means follows that death may not be an occasion on which to levy an excise. It would be hazardous to attempt a definition of that term; but we think it safe to say that it includes an event or transaction which determines legal relations (*Knowlton* v. *Moore*, 178 U. S., 41, 47); or the exercise of a single one of those powers whose aggregate makes up the concept of property (*Bromley* v. *McCaughn*, 280 U. S., 124). It will be enough, if the death of the debtor has a substantial legal effect upon the creditor's remedies or rights; if he can not pursue the same remedies, or any remedies, or get recognition of his right, except, through the intervention of the State.

Historically there can be no doubt that death had important results. The notion of a continuation of a dead man's personality came very slowly in the common law; representation was not easily evolved. Even to-day it is not universal; many duties die with the obligor. In early times the testator had even to direct his executor to pay debts; they were like legacies; (II Pollock & Maitland, 341); and while by the end of the thirteenth century the action of debt lay against the executor (II Pollock & Maitland, 345; III Holdsworth, 578, 579), it was limited to cases where the testator could not wage his law. Assumpsit did not follow till the sixteenth century, and very doubtfully even then, until Slade's case (4 Coke, 92(b)), in 1602 (III Holdsworth, 451, 452); account was not possible until the eighteenth century (III Holdsworth, 579); and though detinue came earlier, it was a most inadequate remedy. The complete remedies of creditors as we now know them, are the result of a long and tentative series of steps.

If, disregarding history, we look at the present position of creditors, the same thing is true. A dead man can not be sued; his creditors must wait until his representative is appointed, or must get one appointed on their own motion; and though he may be sued, collection must await the distribution of the estate. All debts must be brought into hotch-pot and share ratably. Back of this too lies a long and confused history, resulting in an active intervention of the court. So it seems to us that as matter of constitutional interpretation, it is not true to say that the passage of property to a decedent's representative may not be the occasion of an excise even upon so much of the property as must inevitably pass to creditors.

That however does not answer the second argument, drawn from the unfair discrimination of a tax reckoned on the gross estate; it may violate the fifth amendment, though an excise. We might find too great difficulties, if it were applied to residents; certainly its incidence would be a matter of pure accident; the legatees of a testator who left no debts would pay no more than those of one, most of whose assets were necessary to pay his debts. It is the distributees who feel the pinch of succession taxes, and it would be hard to find any rational justification for such a distribution of burdens. Moreover, the 10 per cent allowance does not cure the evil; every decedent leaves some debts, and the limitation merely creates a favored class, leaving the rest to pay a tax upon what by no possibility they can receive. We shall assume arguendo, therefore, that a tax, computed on the gross estate alone, or with a deduction for debts based upon the gross estate, would be invalid, if applied to residents. Though section 403(b)1 touches only nonresidents, the inequality is the same; it is as arbitrary to determine their burdens at the mere sport of accident, as those of residents. Moreover, the fifth amendment protects them to some extent at any rate, as it does citizens. (*Wong Wing* v. *United States*, 163 U. S., 228; *Japanese Immigrant* case, 189 U. S., 86; *Russian Volunteer Fleet* v. *United States*, 284 U. S., 481.) But the sanctions which enforce the discrimination are very different in the two cases; a resident, by which we understand one domiciled in the United States (*Bowring* v. *Bowers*, 24 Fed. (2d), 918, 921 (C. C. A. 2) [T. D. 4164, C. B. VII–1, 98]; *Farmers L. & T. Co.* v. *United States*, 60 Fed. (2d), 618, 619), can not escape. Not so a nonresident, especially when as here she was an alien as well. She invested in the United States only because better financial opportunities offered; she might take away her funds without disturbance to any other interest; it was not necessary for her to uproot those ties which make up the concept of a home; she might refuse to be unjustly used with the loss of only a hopeful field for profit. We might agree that had she died before she had a reasonable chance to withdraw, her legatees might complain; this would not avail them, for she kept her property in the United States more than two years after the Act of 1918 was passed. Her ability thus to avoid the consequence may not indeed justify the national polity of section 403(b)1; but it removes the grievance. *Truax* v. *Raich* (239 U. S., 33) well illustrates the distinction between those cases where an alien may invoke the fifth or fourteenth amendment and those where he may not. The plaintiff was an alien, admitted to the United States under its immigration laws; as such he had an interest, secured by law paramount to that of Arizona. The fourteenth amendment protected that interest by forbidding the State to entrench upon it indirectly. An alien, who invests funds in the United States, has indeed an interest also, though a lessor one; but the laws of the United States do not vouchsafe it; so far as it is a right, it must derive from treaty or the like. The United States, if not otherwise bound, may recognize that interest so far as seems wise; it may impose upon it such conditions as it chooses.

From the earliest times aliens have been under disabilities at common law. Originally indeed they could not hold land at all (I Pollock & Maitland, 442; IX Holdsworth, 92); and after this was changed, their land escheated to the king upon their death; it was neither heritable nor descendible. (Coke on Littleton, 2 b. n., 3.) The same was generally true in the States until changed by statute. (*Fairfax* v. *Hunter*, 7 Cranch, 603, 621; *McCormack* v. *Coddington*, 184 N. Y., 467, 475; *Sands* v. *Lynham*, 27 Gratt., 291, 297; II Kent's Comm., 54.) For this reason the Supreme Court in 1850 upheld a succession tax levied on land by a State, and limited it to nonresident aliens. (*Mager* v. *Grima*, 8 How., 490.) It is true that this was before the fourteenth amendment, but the reasoning adopted is equally applicable now as then; it was based upon the absolute power of a State to forbid aliens to hold property within its borders, and as a corollary to admit them on what terms it pleased. Furthermore, the question seems to us foreclosed by *Burnet* v. *Brooks* (288 U. S., 378 [Ct. D. 648, C. B. XII–1, 362]). The Supreme Court had very recently decided that no State might levy a succession tax upon choses in action at the domicile of the obligor. (*Farmers L. & T. Co.* v. *Minnesota*, 280 U. S., 204; *Baldwin* v. *Missouri*, 281 U. S., 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S., 1.) In *First National Bank* v. *Maine* (284 U. S., 312), this had been extended to shares of stock in a local corporation. This, as we read the opinions, was because the situs of such property was the domicile of the obligee; that put it beyond the jurisdiction of the State. Obviously, if this were a doctrine of universal application, it also applied to the United States. But that the court denied; the fourteenth amendment forbade the double taxation of citizens, but it did not protect nonresidents, who must rely only upon international arrangements between the United States and their sovereigns; for example, treaties, such as in this very case protect Frenchmen against discrimination by the States. (Article VII of the French Treaty of 1858, 10 St. at L., 996.) Thus the United States is not bound in dealing with nonresidents, as are the States, or even the United States, when citizens are concerned. This does not imply one measure of equity for citizens and another for aliens; it recognizes that the interests at stake are different; that the intercourse between nations is matter for international agreement, that, conceding the protection of the Constitution to nonresidents so far as they are admitted, they have only such rights of intercourse as the Nation chooses to accord. For these reasons we think that section 403(b)1 does not violate the fifth amendment.

The last question is whether the pledged securities should be excluded from the gross estate up to the amount of the loans. The statute, section 403(a)1, plainly meant the opposite; among the deductions allowed were "unpaid mortgages," an impossible item unless the whole value of the mortgaged property is to be included in the gross estate under section 402(a), as an "interest * * * subject to the payment of charges against his estate." The regulations under the Act of 1918 (article 15, Regulations 37) specifically so provided; and their successors as well. Section 402(a) was reenacted in 1921 and 1924 without change, though under a different section number; it is most unlikely that a contrary intent should have escaped expression for so long. The interest of a pledgee has indeed somewhat baffled common lawyers, but it is usually said that "title" remains in the pledgor, and that the pledgee has only a "special property"; in New York as elsewhere. (*Smith* v. *Savin*, 141 N. Y., 315, 326; *Gillet* v. *Bank of America*, 160 N. Y., 549, 560.) When the question here at bar arose under the New York transfer tax law, the full value of the pledge was included in the estate. (*In re Hallenbeck*, 231 N. Y., 409. See also *Larson* v. *MacMiller*, 56 Utah, 84.) The pledgee in substance has no more than a power to sell the pledge upon default and to recoup; the rise or fall in value of the pledge is on the pledgor's account; he may redeem it by payment of the debt from any of his assets, and if the pledgee returns it, he may still collect the debt. Moreover, at least in the case of a solvent estate like that at bar, upon the pledgor's death, the pledgee stands in no different position from any other creditor, except that he need not wait for administration to realize his claim. Debts must be paid before distribution, and the creditors are all secured, for the chances of the decedent's solvency end, unless indeed the property falls in value, a risk which the pledgee also shares as to the pledge. Whether the executor chooses to redeem the pledge or let the pledgee sell it, rests in his choice; no one can say whether or not it will in the end be a part of the net estate. If the executor does redeem it, the payment must be apportioned among all the assets, foreign and domestic; if he does not, the value of the gross estate can not depend upon his decision. The judge was right in holding that under section 402(a) the gross estate included the full value of the securities.

Judgment reversed; complaint dismissed.

SALES TAX RULINGS.

TITLE IV.—MANUFACTURERS' EXCISE TAXES (1932), AS AMENDED BY REVENUE ACT OF 1934.

XIII-24-6853
Mim. 4182

Amendments to the Revenue Act of 1932, by the Revenue Act of 1934, with respect to the taxes imposed on soft drinks, etc., articles made of fur, jewelry, matches, and candy.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 1, 1934.

Collectors of Internal Revenue and Others Concerned:

Attention is called to the fact that the Revenue Act of 1934 repeals or amends the following sections in Title IV of the Revenue Act of 1932, relating to manufacturers' excise taxes:

SOFT DRINKS, ETC.

Under the provisions of section 601 of the Revenue Act of 1934, no tax shall be imposed under section 615 of the Revenue Act of 1932 on the sale or use of the articles enumerated therein, by the manufacturer, producer, or importer, or bottler, or dealer, if such sale or use takes place after May 10, 1934.

FURS.

Under the provisions of section 608 of the Revenue Act of 1934, the tax imposed under section 604 of the Revenue Act of 1932 shall not apply with respect to the sale by the manufacturer, producer, or importer, after May 10, 1934, for less than $75 of articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value. Any sale of such articles by the manufacturer, producer, or importer, on or after May 11, 1934, for $75 or more, is taxable.

JEWELRY, ETC.

Under the provisions of section 609 of the Revenue Act of 1934, the tax imposed under section 605 of the Revenue Act of 1932 shall not apply to the sale by the manufacturer, producer, or importer, after May 10, 1934, of any article enumerated therein, including parts for watches and clocks, for less than $25. Any sale of such articles by the manufacturer, producer, or importer, on or after May 11, 1934, for $25 or more, is taxable.

MATCHES.

Section 612 of the Revenue Act of 1932, as amended by section 611 of the Revenue Act of 1934, increases the tax on fancy wooden matches and wooden matches having a stained, dyed, or colored stick or stem from 2 cents per thousand to 5 cents per thousand. On and after May 11, 1934, the taxes imposed on the sale of matches by the manufacturer, producer, or importer are as follows:

(a) Paper matches in books, one-half of 1 cent per thousand;
(b) Fancy wooden matches or wooden matches having a stained, dyed, or colored stick or stem, regardless of whether packed in boxes or in bulk, 5 cents per thousand;
(c) All other matches, 2 cents per thousand.

CANDY.

Under the provisions of section 614 of the Revenue Act of 1934, the tax imposed under section 613 of the Revenue Act of 1932 shall not apply to sales of candy by the manufacturer, producer, or importer after May 10, 1934.

Inquiries in regard to this mimeograph should refer to the number and the symbols MT: ST.

WRIGHT MATTHEWS,
Acting Commissioner.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)

SECTION 601(c)2.—MALT SIRUP.

REGULATIONS 44, ARTICLE 14: Exempt sales. XIII-6-6643
S. T. 721

Malt sirup may not be sold tax-free for use in the production of whisky.

Inquiry is made whether malt sirup may be sold tax-free for use in the production of whisky.

Section 601(c)2 of the Revenue Act of 1932 imposes a tax upon the sale by the manufacturer, producer, or importer of malt sirup and other specified malt products, unless sold to a baker for use in baking or to a manufacturer or producer of malted milk, medicinal products, foods, cereal beverages, or textiles, for use in the manufacture or production of such products.

It is contended that since whisky is made from cereal grains it is a cereal beverage within the meaning of section 601(c)2, and that malt sirup sold for use in its production may be sold tax-free, provided the certificate required by article 14 of Regulations 44 is furnished.

The term "cereal beverages" as used in section 601(c)2 includes only those beverages which are brewed from malted cereal grains, such as beer, ale, etc. Whisky falls within the class of distilled spirits, irrespective of the materials used in its production.

It is held that whisky is not a cereal beverage within the meaning of section 601(c)2 of the Revenue Act of 1932, and that malt sirup may not be sold tax-free for use in its manufacture.

SECTION 602.—TIRES AND INNER TUBES.

REGULATIONS 46, ARTICLE 20: Basis of tax. XIII-13-6726
S. T. 729

Computation of the manufacturers' excise tax on tires containing cotton on which the processing tax or floor tax imposed by the Agricultural Adjustment Act has been paid.

A ruling is requested on the following issues: (1) Whether the proviso in section 9(a) of the Agricultural Adjustment Act is applicable to the floor tax imposed by section 16(a) of that Act and (2) whether, where tires on hand on August 1, 1933, which were sold after that date by the manufacturer or producer, can not be identified with respect to their tax-paid cotton content, the "first in, first out" method may be used in computing the manufacturers' excise tax.

Section 602 of the Revenue Act of 1932 imposes a tax on tires and inner tubes sold by the manufacturer, producer, or importer based upon their weight.

Section 9(a) of the Agricultural Adjustment Act imposes a processing tax on agricultural commodities and contains a proviso reading as follows:

* * * *Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

Section 16(a) of the Agricultural Adjustment Act imposes a tax on floor stocks of any article processed wholly or in chief value from any commodity with respect to which a processing tax is levied, and is effective on the date the processing tax on the commodity first takes effect. The processing tax on cotton became effective on August 1, 1933.

The tax imposed by section 602 of the Revenue Act of 1932 on tires and inner tubes is a manufacturers' sales tax within the meaning of the foregoing proviso. This proviso relates only to the *processing* tax and is not applicable to the floor tax imposed by section 16(a). Accordingly, in computing the manufacturers' excise tax on tires on hand on August 1, 1933, which were sold by the manufacturer or producer on or after that date, no deduction may be made for the weight of the cotton content of such tires on which the floor tax has been paid. The same rule applies to cotton in process of fabrication, completed cotton fabric, or cotton fabric on hand on August 1, 1933 (upon which the floor tax has been paid), which is later used in the manufacture of tires.

Where the manufacturer of tires had on hand on August 1, 1933, cotton, fabricated or in course of fabrication, on which the floor tax was due or paid, the manufacturers' excise tax on tires manufactured on or after that date should be computed without the weight deduction allowable under the proviso in section 9(a) of the Agricultural Adjustment Act, until processed cotton has been consumed in an amount equal to the August 1, 1933, inventory of such material on which the floor tax was due or paid.

Where tires containing cotton on which the processing tax has been paid have been added to the stock of tires on hand on August 1, 1933, containing cotton on which the floor tax has been paid, and have been so intermingled with such tires that it is not possible to identify each class of tires, with respect to their tax-paid cotton content, the "first in, first out" method may be used for the purpose of computing the manufacturers' excise tax. In other words, to the extent of the number of tires of any one size and type on hand on August 1, 1933, plus the number of tires manufactured on or after that date from processed cotton on hand on August 1, 1933, subject to floor tax, the manufacturers' excise tax on the sale of such tires must be based upon the full weight of all the tires. In computing the manufacturers' excise tax on subsequent sales of tires of the same size and type, a deduction may be made of the weight of the processed cotton contained therein on which the *processing* tax has been paid, as provided in section 9(a) of the Agricultural Adjustment Act.

SECTION 606.—AUTOMOBILES, ETC.

REGULATIONS 46, ARTICLE 36: Scope of tax. XIII–6–6644
S. T. 722

Distinction between automobile truck chassis and tractors.

Inquiry is made with respect to the types of automobile chassis which come within the meaning of the term "tractors," as used in section 606(b) of the Revenue Act of 1932 and article 36 of Regulations 46, and which are not subject to tax when sold.

Section 606(a) of the Revenue Act of 1932 imposes a tax on sales by the manufacturer of automobile truck chassis and automobile truck bodies. Subdivision (b) of that section imposes a tax on sales by the manufacturer of other automobile chassis and bodies, except tractors.

The term "tractors" is generally understood to include automotive vehicles designed for the purpose of pulling or drawing vehicles, plows, road-building machinery, etc. While it may be possible to design a tractor so that it could carry a load, its construction is usually for drawing or pulling. An automotive truck chassis, however styled, which is so designed that it may be readily equipped with a truck body or other type of body, and the specifications for which are included among truck chassis specifications, is subject to tax under section 606(a) of the Revenue Act of 1932 as an automobile truck chassis, regardless of its wheel base, or whether it is equipped with a fifth wheel and used only for a pulling or tractive function for a following trailer.

Automotive chassis of the short wheel base type specially designed for the purpose of drawing or pulling trailers, whether or not there is mounted thereon a lower fifth wheel, and which may not be equipped with a truck body or other automobile body, are considered tractors within the meaning of the law and regulations and, therefore, are not subject to tax when sold.

REGULATIONS 46, ARTICLE 41: Definition of parts or accessories.

XIII-16-6758
S. T. 736

Certain equipment for an automobile truck chassis, known as "six wheel attachment," is subject to the manufacturers' excise tax as a "part or accessory."

The question presented is whether the "six wheel attachment" in question is a trailer or a semitrailer not subject to tax (*Martin Rocking Fifth Wheel Co.* v. *United States*, 60 Ct. Cl., 466, T. D. 3716, C. B. IV-1, 317), or a part or accessory taxable under the law.

Section 606(c) of the Revenue Act of 1932 imposes a tax on parts or accessories for automobile trucks or other automobile chassis and bodies, or motor cycles.

Article 41 of Regulations 46 provides in part:

The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motor cycle, includes (*a*) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (*b*) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (*c*) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation.

The equipment in question, known as "six wheel attachment," consists of an extension for the frame of an automobile truck chassis with supporting springs, wheels, and axle. It is used for the purpose of increasing the capacity and carrying power of the truck to which it is attached by lengthening the frame and giving the rear of the truck chassis the support of additional wheels and springs. It is not intended to carry a separate load, which is the function of a trailer or semitrailer.

Determination of what constitutes automobile accessories depends upon the particular facts of each case. (*Cuno Engineering Corporation* v. *United States*, 43 Fed. (2d), 259.) The United States Supreme Court in the case of *Universal Battery Co.* v. *United States* (281 U. S., 580), in approving the administrative regulations of the Bureau, said:

* * * We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

The equipment under consideration is not a separate vehicle capable of carrying a load by itself, which is characteristic of trailers and semitrailers, but is so designed that it must be attached to and become a part of the truck chassis. It is thus "primarily adapted for use in motor vehicles."

In view of the foregoing, it is held that the equipment in question constitutes a "part or accessory" within the meaning of section 606(c) of the Revenue Act of 1932, and article 41 of Regulations 46, and as such is subject to the tax imposed by that section.

77602°—34——13

REGULATIONS 46, ARTICLE 41: Definition of parts or accessories. XIII-21-6809 S. T. 739

Taxability of automobile floor mats.

The question is presented whether automobile floor mats are subject to tax as "parts or accessories" under section 606(c) of the Revenue Act of 1932.

The law imposes a tax equivalent to 2 per cent of the price for which parts or accessories for automobile trucks or other automobile chassis and bodies are sold by the manufacturer, producer, or importer.

Article 41 of Regulations 46 provides in part as follows:

> The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motor cycle, includes (*a*) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (*b*) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (*c*) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.
>
> The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Various manufacturers make floor coverings for automobiles which are generally known as "universal mats." All of the mats are designed for replacement of mats used in automobiles.

It is held that automobile floor mats of every kind and description, regardless of whether minor cutting or fitting operations are required before installation, constitute "parts or accessories," within the meaning of section 606(c) of the Revenue Act of 1932 and article 41 of Regulations 46, and as such are subject to the tax imposed by that Act.

REGULATIONS 46, ARTICLE 42: Parts and accessories sold to manufacturers. XIII-4-6619 S. T. 719
(Also Regulations 46, Article 16.)

An automobile manufacturer is liable for the tax on parts or accessories purchased tax-free which he uses in the manufacture of an article not subject to tax or sells for repair or replacement purposes.

Inquiry is made whether an automobile manufacturer who purchases parts or accessories free from tax and uses them in the manufacture of an article not subject to tax, or sells them for repair or replacement purposes, is liable for the tax imposed by section 606(c) of the Revenue Act of 1932.

Section 606(c) of the Revenue Act of 1932 imposes a tax on the sale of automobile parts or accessories other than tires or inner tubes. Section 620 provides for the sale of such parts or accessories tax free for use as material in the manufacture or production of a taxable article. Section 622 provides for the tax upon the use of such articles by the manufacturer.

Where a manufacturer of automobile truck chassis and bodies, or other automobile chassis and bodies, purchases parts or accessories tax-free under the provisions of section 606(c) of the Revenue Act of 1932 and article 42 of Regulations 46, and later uses such parts or accessories in the manufacture of an article which is not taxable under subsection (a) or (b) of section 606, or resells the same for repair or replacement purposes, the manufacturer is liable for the tax on the parts or accessories so used or resold by him.

SECTION 609.—SPORTING GOODS.

REGULATIONS 46, ARTICLE 55: Games. XIII–15–6745
S. T. 733

"Tally cards" or similar devices used in baseball and horse racing pools are taxable as games or parts of games. S. T. 662 modified.

Section 609 of the Revenue Act of 1932 imposes a tax on sales of games and parts of games by the manufacturer, producer, or importer.

It was held in S. T. 662 (C. B. XII–1, 403) that baseball pool tickets and pari-mutuel tickets are not taxable as games or parts of games. The conclusion has been reached that this ruling should be restricted to those tickets or devices with respect to which the purchaser has the opportunity to choose the particular baseball team or the particular horse upon which he desires to wager. Such a ticket or device is merely the evidence of the holder's right to participate in a fund or pool in the event the baseball team or horse designated by the ticket or device should win. The transaction in such a case constitutes the purchase of a ticket and nothing more. Baseball pool tickets and pari-mutuel tickets of this type are not taxable as games or parts of games and to this extent the published ruling is affirmed.

However, with respect to some baseball or horse racing pools certain so-called tally cards are provided for use by the participants. These tally cards have folded slips of paper attached thereto which contain the names of baseball teams or horses but the names are concealed from the purchaser. In such a case the purchaser merely selects a particular slip of paper containing unknown data relating to the pool. Such a device promotes interest in the transaction and increases the gaming element involved. This additional element of uncertainty is characteristic of a game of chance and is deemed sufficient to distinguish devices of this kind from the mere purchase of a ticket. Tally cards or similar devices of this type constitute games or parts of games, within the meaning of section 609 of the Revenue Act of 1932, and are subject to tax as such.

S. T. 662, supra, is modified to the extent herein indicated.

REGULATIONS 46, ARTICLE 55: Games. XIII–23–6833
S. T. 741

The machine known as the "electric traveling crane" is taxable as a game.

The question has arisen whether the machine known as the "electric traveling crane" is taxable as a game. This machine consists of a glass inclosed cabinet in which there is a miniature crane. Candy and other articles are placed on the floor of the cabinet. The electrically operated mechanism is released by inserting a coin in a slot. By turning a knob the player endeavors to manipulate the crane so that it will grasp one of the articles. If successful, the crane is brought to an upright position and the article is released and dropped into a chute from which it may be removed by the player.

Section 609 of the Revenue Act of 1932 imposes a tax upon the sale of games and parts of games by the manufacturer, producer, or importer. Article 53 of Regulations 46 provides in part as follows:

The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement.

It is clear that both skill and chance are involved in the operation of the machine in question, and that it "is designed to furnish sport, recreation, or amusement." It is, therefore, held that the "electric traveling crane" is a game within the meaning of section 609 of the Revenue Act of 1932 and article 53 of Regulations 46, and is subject to the tax imposed by that section of the Act.

SECTION 616 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).—ELECTRICAL ENERGY.

REGULATIONS 42, ARTICLE 40: Scope of tax. XIII–9–6680
S. T. 725

Taxability of sales of electrical energy for industrial consumption where a portion of the energy is diverted for domestic consumption.

Inquiry is made relative to the taxability of sales of electrical energy for industrial consumption where a portion of the energy is diverted for domestic consumption.

Section 616 of the Revenue Act of 1932, as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), imposes upon the sale of electrical energy for domestic or commercial consumption and not for resale a tax of 3 per cent of the price for which the energy is sold, the tax to be paid by the vendor. The statute provides that the sale of electrical energy to an owner or lessee of a building for resale to the tenants therein shall be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

The situations presented are as follows:

(1) A portion of the energy purchased by the coal mining company is diverted to the homes of company employees at no particular cost; the monthly

rent paid by the company employees to the coal company being considered to cover the amount of the electrical energy consumed by the employees.

Where electrical energy is sold to an industrial establishment through one meter for industrial consumption, and a portion of the energy is used by employees of the industrial establishment for domestic consumption without being remetered or made the subject of a specific charge, the tax imposed by section 616 of the Revenue Act of 1932, as amended, does not attach.

(2) A portion of the energy purchased by the coal mining company is diverted to the homes of the company employees and is billed the employees by the coal company at a flat charge per month regardless of the amount of energy consumed.

Where a portion of the energy sold through one meter to an industrial establishment for industrial consumption is diverted to its employees residing in houses owned by the industrial establishment for domestic consumption, there being no measurement made of the energy so used or determination of the price for which sold by the power company but merely a flat charge per month by the industrial establishment for the service, the tax does not attach.

(3) A portion of the energy purchased by the coal mining company is diverted to the homes of the company employees and is paid for by such employees on a metered basis; the payments by the employees being to the coal company.

If the industrial establishment is the owner or lessee of the buildings occupied by the employees, the power company is liable for the tax on energy sold to the industrial establishment which is remetered either by the power company or by the industrial establishment and resold to tenants of such buildings. In cases where the industrial establishment is not the owner or lessee of the buildings in question, it will be necessary for such company to register with the collector of internal revenue, as provided in Treasury Decision 4393 (C. B. XII–2, 322), and to pay tax as a vendor on the energy it resells to its employees for domestic use.

SECTION 617.—GASOLINE.

Regulations 44, Article 43: Scope of tax. XIII–15–6746
S. T. 734

The M Corporation, being a "blender" of gasoline, is a "producer" within the meaning of section 617 of the Revenue Act of 1932. As a "producer" of gasoline the corporation must pay taxes on all gasoline sold by it whether produced by it or by others.

On June 20, 1932, the M Corporation, then a nonproducer of gasoline, acquired x gallons of gasoline from the N Corporation. The gasoline consisted of stocks in the pipe lines of the P Corporation and in refinery storage, warehouses, etc., of the N Corporation. The M Corporation entered into an agreement with the N Corporation for the use of the latter's facilities for the disposition of the gasoline, a portion of which was later blended by the P Corporation, at the direction of the M Corporation. The question is presented whether the M Corporation by reason of the blending of a portion of the gasoline in the manner stated was a "producer" of gasoline, within the meaning of section 617 of the Revenue Act of 1932, and, if so, whether it was a "producer" only as to the gasoline actually blended, or as to all the gasoline sold by it.

Section 617(a) of the Revenue Act of 1932 imposes a tax of 1 cent a gallon "on gasoline sold * * * by a producer of gasoline * * *."

Section 617(c)1 provides that—

The term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

The blending of a portion of the gasoline by the pipe line company, at the direction of the M Corporation, constitutes the act of the M Corporation. Since the M Corporation is a "blender" of gasoline it falls within the meaning of the term "producer" used in section 617 of the Revenue Act of 1932.

With respect to the question whether the M Corporation is a "producer" only as to the gasoline actually blended, or as to all the gasoline sold by it, it is held that since the corporation is a "producer," and the statute imposes a tax on gasoline sold by a "producer," the M Corporation must pay the tax on all gasoline sold by it on or after June 21, 1932, even though it did not actually produce all such gasoline.

SECTION 617 OF THE REVENUE ACT OF 1932, AS AMENDED BY SECTION 211 OF THE NATIONAL INDUSTRIAL RECOVERY ACT.—GASOLINE.

Regulations 44, Article 43: Scope of tax. XIII–23–6834
(Also Section 620, as amended, and Article 7.) S. T. 742

A manufacturer of taxable brake lining may purchase aviation gasoline tax-free for use as a material in the manufacture of such brake lining.

A ruling is requested whether aviation gasoline may be purchased tax-free from the producers thereof for use in the manufacture of taxable brake lining.

The use of aviation gasoline in the manufacture of brake lining involves the following operations: Crude rubber is broken down in a mill and is then put into solution with aviation gasoline to form a cement, consisting of approximately 20 per cent rubber and 80 per cent aviation gasoline. The cement is then combined with various raw materials such as rubber, asbestos, sulphur, oxides, and fillers. The mixture is placed in a mixer and is masticated for three hours. The aviation gasoline in the cement causes the rubber to cling around the asbestos fibres. This could not be accomplished without the use of the gasoline, nor could the necessary plastic condition be obtained.

Section 620 of the Revenue Act of 1932, as amended by section 4(a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), provides in part as follows:

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in this title;

It is held that aviation gasoline purchased for use in the manner indicated as a material in the manufacture of brake lining which is taxable under section 606(c) of the Revenue Act of 1932, when sold by the manufacturer thereof, may be purchased tax-free under section 620, as amended, upon compliance with the requirements of Treasury Decision 4399 [C. B. XII-2, 330]. The manufacturer of the brake lining will be liable for tax at the rate of 1 cent per gallon on all such gasoline purchased tax-free which is used in the manufacture of articles not taxable under Title IV, or for any other purpose.

REGULATIONS 44, ARTICLE 44: Use of terms. XIII-19-6786
S. T. 738

Taxability of engine distillate.

The question is presented whether engine distillate is "gasoline" within the meaning of section 617(c)2 of the Revenue Act of 1932, as amended by section 211 of the National Industrial Recovery Act.

The law imposes a tax on gasoline sold by the importer or producer thereof and provides that "the term 'gasoline' means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes. * * *"

Article 44 of Regulations 44, as amended by Treasury Decision 4400 (C. B. XII-2, 327), reads in part as follows:

> The term "gasoline" includes (1) all products commonly or commercially known as gasoline regardless of their classifications or uses, * * *.

The Bureau of Mines of the Department of Commerce has held that engine distillate is essentially a low-grade gasoline.

In view of the foregoing, it is held that engine distillate is "gasoline" within the meaning of section 617(c)2 of the Revenue Act of 1932, and is subject to the tax imposed by section 617(a) of that Act, as amended.

SECTION 617 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE NATIONAL INDUSTRIAL RECOVERY ACT AND SECTION 603(d) OF THE REVENUE ACT OF 1934.

XIII-24-6854
Mim. 4183

Procedure for registering and bonding producers or importers of gasoline and manufacturers or producers of lubricating oil.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 2, 1934.

Collectors of Internal Revenue:

Section 603(d) of the Revenue Act of 1934 amends section 617 of the Revenue Act of 1932, as amended, by adding at the end thereof the following subsection:

> (d) Every person subject to tax under this section or section 601(c)(1) shall, before the thirtieth day after the date of the enactment of the Revenue Act of 1934 (or in the case of a person commencing business after such day before incurring any liability for tax under such sections) register with the

collector for the district in which is located his principal place of business (or, if he has no principal place of business in the United States, with the collector at Baltimore, Md.) and shall give a bond, to be approved by such collector, conditioned that he shall not engage in any attempt, by himself or by collusion with others, to defraud the United States of any tax under such sections; that he shall render truly and completely all returns, statements, and inventories required by law or regulations in pursuance thereof and shall pay all taxes due under such sections; and that he shall comply with all requirements of law and regulations in pursuance thereof with respect to tax under such sections. Such bond shall be in such sum as the collector may require in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, but not less than $2,000. The collector may from time to time require new or additional bond in accordance with this subsection. Every person who fails to register or give bond as required by this subsection, or who in connection with any purchase of gasoline or lubricating oil falsely represents himself to be registered and bonded as provided by this subsection, or who willfully makes any false statement in an application for registration under this subsection, shall upon conviction thereof be fined not more than $5,000 or imprisoned not more than five years, or both, together with the costs of prosecution. If the Commissioner finds that any manufacturer or producer has at any time evaded any Federal tax on gasoline or lubricating oil, he may revoke the registration of such manufacturer or producer, and no sale to, or for resale to, such manufacturer or producer thereafter shall be tax-free under section 601(c)(1), this section, or section 620, as amended, but such manufacturer or producer shall not be relieved of the requirement of giving bond under this subsection.

Pursuant to the above provisions, every importer or producer of gasoline and every manufacturer or producer of lubricating oil shall before June 9, 1934 (or in the case of a person commencing business after such date, before incurring any liability for tax on such products), register with the collector of the district in which is located his principal place of business (or if he has no principal place of business in the United States, with the collector at Baltimore, Md.) and shall give a bond to be approved by such collector.

Registration.—Form 637A shall be used in making application for registry. Heretofore, these forms have been used only where the applicants desired to avail themselves of the provisions of law pertaining to tax-free sales, where registration was a condition precedent to the right to buy or sell tax free. The law now requires, without regard to tax-free sales, that all producers or importers of gasoline and all manufacturers or producers of lubricating oil not only shall register but also shall post a satisfactory bond.

Those persons to whom certificate of registry on Form 637 had been issued prior to the enactment of the Revenue Act of 1934, as producers of gasoline or as manufacturers or producers of lubricating oil, will not be required to reregister.

Bonding.—Every producer or importer of gasoline, and every manufacturer or producer of lubricating oil, must give bond on Form 928 before June 9, 1934, or before commencing business after such date. Upon the receipt of the bond, the collector will issue the certificate of registry, if the taxpayer has not previously been furnished with such certificate.

Such bond shall be in a sum equivalent to the approximate amount of tax which would be incurred during a 3-month period at the rates of tax now in effect, but in no case shall the bond be for less than $2,000. Where the amount of the bond under such circumstances will exceed $30,000, the collector may accept a bond for not less than $30,000. In such cases, there should be submitted to the collector for transmittal to the Commissioner, all facts pertaining to the ownership and value of the property and equipment which will be of assistance to the Commissioner in determining whether a larger bond should be required from the applicant. In transmitting this data, the collector should submit his recommendation as to the sufficiency of the bond.

Bonds must be in multiples of $100. Where the sum equivalent to the approximate amount of tax which would be incurred during a 3-month period is an odd amount, the amount of the bond shall be increased to the next multiple of $100. For example, if the approximate amount of tax likely to be incurred during a 3-month period amounts to $6,666.66, the amount of the bond shall be $6,700.

If the sureties on the bond are individuals, Form 33, Affidavit of individual surety on bond, must be executed in conformity with the instructions in paragraph 2 on the bond.

Bonds should be filed in duplicate, the duplicate to be retained by the collector and the original forwarded to the Commissioner, marked for the attention of the Sales Tax Division, Miscellaneous Tax Unit.

Bond forms (Department Form 928) will be furnished promptly to collectors for distribution.

Correspondence in regard to the procedure outlined herein will refer to the number of this mimeograph and the symbols MT-ST.

WRIGHT MATTHEWS,
Acting Commissioner.

Approved June 2, 1934.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIII-25-6862
T. D. 4439

Bonding producers or importers of gasoline and manufacturers or producers of lubricating oil (section 603(d) of the Revenue Act of 1934).—Regulations 44, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 603(d) of the Revenue Act of 1934 amends section 617 of the Revenue Act of 1932, as amended, by adding at the end thereof the following subsection:

(d) Every person subject to tax under this section or section 601(c)1 shall, before the thirtieth day after the date of the enactment of the Revenue Act of 1934 (or in the case of a person commencing business after such day before incurring any liability for tax under such sections) register with the collector for the district in which is located his principal place of business (or, if he has no principal place of business in the United States, with the collector at Baltimore, Md.) and shall give a bond, to be approved by such collector, conditioned that he shall not engage in any attempt, by himself or by collusion with others, to defraud the United States of any tax under such sections; that he shall render truly and completely all returns, statements, and inventories required by law or regulations in pursuance thereof and shall pay all taxes due under such sections; and that he shall comply with all requirements of law and regulations in pursuance thereof with respect to tax under such sections. Such bond shall be in such sum as the collector may require in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, but not less than $2,000. The collector may from time to time require new or additional bond in accordance with this subsection. Every person who fails to register or give bond as required by this subsection, or who in connection with any purchase of gasoline or lubricating oil falsely represents himself to be registered and bonded as provided by this subsection, or who willfully makes any false statement in an application for registration under this subsection, shall upon conviction thereof be fined not more than $5,000 or imprisoned not more than five years, or both, together with the costs of prosecution. If the Commissioner finds that any manufacturer or producer has at any time evaded any Federal tax on gasoline or lubricating oil, he may revoke the registration of such manufacturer or producer, and no sale to, or for resale to, such manufacturer or producer thereafter shall be tax-free under section 601(c)1, this section, or section 620, as amended, but such manufacturer or producer shall not be relieved of the requirement of giving bond under this subsection.

Pursuant to the above provisions, every importer or producer of gasoline and every manufacturer or producer of lubricating oil shall before June 9, 1934 (or in the case of a person commencing business after such date, before incurring any liability for tax on such products), file bond on Form 928 with the collector of the district in which is located his principal place of business (or if he has no principal place of business in the United States, with the collector at Baltimore, Md.), such bond to be approved by the collector. Bonds filed before July 1, 1934, will be accepted as timely filed.

Such bond shall be in a sum equivalent to the approximate amount of tax which would be incurred during a 3-month period at the rates of tax now in effect, but in no case shall the bond be for less than $2,000.

Where the amount of the bond under such circumstances will exceed $30,000, the collector may accept a bond for not less than $30,000. In such cases there should be submitted to the collector for transmittal to the Commissioner all facts pertaining to the ownership and value of the property and equipment which will be of assistance to the Commissioner in determining whether a larger bond should be required from the applicant. In transmitting this data the collector should submit his recommendation as to the sufficiency of the bond.

Bonds must be in multiples of $100. Where the sum equivalent to the approximate amount of tax which would be incurred during a 3-month period is an odd amount, the amount of the bond shall be increased to the next multiple of $100. For example, if the approximate amount of tax likely to be incurred during a 3-month period amounts to $6,666.66, the amount of the bond shall be $6,700.

If the sureties on the bond are individuals, Form 33, Affidavit of individual surety on bond, must be executed in conformity with the instructions in paragraph 1 on the bond.

WRIGHT MATTHEWS,
Acting Commissioner.

Approved June 8, 1934.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

REGULATIONS 46, ARTICLE 17: Sales to States or political subdivisions thereof and to the United States. XIII-3-6604 S. T. 717

Tires and inner tubes may not be sold tax-free to automobile manufacturers for use as component parts of automobiles manufactured and sold by them to States or political subdivisions thereof.

Inquiry is made whether under subdivision (3) of section 620 of the Revenue Act of 1932 (added by the Act of June 16, 1933, Public, No. 73, Seventy-third Congress) tires and inner tubes may be sold tax-free to automobile manufacturers for use as component parts of automobiles manufactured and sold by them to States or political subdivisions thereof for use in the exercise of an essential governmental function.

Section 620, as amended, provides that:

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

* * * * * * *

(3) for resale by the vendee to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

Article 17 of Regulations 46, as amended by Treasury Decision 4398 (C. B. XII-2, 337), provides that in order to establish exemption from tax in accordance with section 620(3), the manufacturer must obtain from his "vendee (hereinafter referred to as the 'dealer')" prior to or at the time of sale, and retain in his possession, a sworn statement showing that the article is to be resold by the dealer direct to a State or political subdivision thereof for use in the exercise of an essential governmental function, and that the manufacturer must obtain from the dealer proof that the article has been so resold by the dealer.

Under the provisions of the law and regulations it is clear that articles may be sold tax-free only to dealers who resell them in due course direct to a State or political subdivision thereof for use in the exercise of an essential governmental function. Automobile manufacturers are not ordinarily dealers in tires and inner tubes in the sense in which the word is commonly used or within the meaning of the law and regulations.

It is accordingly held that manufacturers of tires and inner tubes may not sell such articles tax-free to automobile manufacturers for use as component parts of automobiles manufactured and sold by them to States or political subdivisions thereof even though used in the exercise of an essential governmental function.

SECTION 621.—CREDITS AND REFUNDS.

Regulations 44, Article 52: Credits and refunds. XIII–15–6752 T. D. 4426

Credits and refunds.—Section 621(a) of the Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 52, Regulations 44, amended.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last paragraph of article 52 of Regulations 44, approved June 18, 1932, as added by Treasury Decision 4412, approved December 6, 1933 [C. B. XII–2, 340], is amended to read as follows:

Where articles taxable under Title IV are sold by a manufacturer tax-paid to a dealer who resells and delivers such articles direct to a State or political subdivision thereof after July 1, 1933, for use in the exercise of an essential governmental function, the manufacturer who paid the tax on such articles may be allowed a refund or may take credit against the tax due upon any subsequent monthly return, in the amount of tax paid by him under this title with respect to the sale of any such article to the dealer, provided the manufacturer has in his possession evidence showing that (A) such article has after the date section 621(a)3 takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund. The claim for refund or credit must be supported by an affidavit of the manufacturer showing (1) the name and address of each dealer; (2) the amount of tax allowable to each dealer; (3) the date the tax was paid to the United States in each case; and (4) whether the manufacturer has repaid or agreed to repay the amount of such tax to the dealer. The affidavit of the manufacturer must also show that he has in his possession, subject to examination by internal revenue officers, a sworn statement from each dealer involved (or if the amount of the tax involved in any dealer's credit or refund is $10 or less, his statement may be signed or acknowledged before two witnesses instead of under oath) stating (*a*) whether the articles on which the tax was paid have been resold and delivered after July 1, 1933, by him direct to a State or a political subdivision thereof for use in the exercise of an essential governmental function; (*b*) the State or political subdivision thereof to which the sales were made; (*c*) the nature of the governmental function, i. e., the kind of activities for which purchased; and (*d*) that the dealer has consented to the allowance of the credit or refund where the manufacturer has neither repaid nor agreed to repay the amount of such tax to the dealer.

Guy T. Helvering,
Commissioner of Internal Revenue.

Approved April 3, 1934.

H. Morgenthau, Jr.,
Secretary of the Treasury.

REGULATIONS 46, ARTICLE 71: Credits and refunds.

XIII-16-6761
T. D. 4427

Credits and refunds.—Section 621 of the Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 71, Regulations 46, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last paragraph of article 71 of Regulations 46, approved June 18, 1932, as added by Treasury Decision 4413, approved December 6, 1933 [C. B. XII-2, 341], is amended to read as follows:

Where articles taxable under Title IV are sold by a manufacturer tax-paid to a dealer who resells and delivers such articles direct to a State or political subdivision thereof after July 1, 1933, for use in the exercise of an essential governmental function, the manufacturer who paid the tax on such articles may be allowed a refund, or may take credit against the tax due upon any subsequent monthly return, in the amount of tax paid by him under this title with respect to the sale of any such article to the dealer, provided the manufacturer has in his possession evidence showing that (A) such article has after the date section 621(a)3 takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund. The claim for refund or credit must be supported by an affidavit of the manufacturer showing (1) the name and address of each dealer; (2) the amount of tax allowable to each dealer; (3) the date the tax was paid to the United States in each case; and (4) whether the manufacturer has repaid or agreed to repay the amount of such tax to the dealer. The affidavit of the manufacturer must also show that he has in his possession, subject to examination by internal revenue officers, a sworn statement from each dealer involved (or if the amount of the tax involved in any dealer's credit or refund is $10 or less, his statement may be signed or acknowledged before two witnesses instead of under oath), stating (*a*) whether the articles on which the tax was paid have been resold and delivered after July 1, 1933, by him direct to a State or a political subdivision thereof for use in the exercise of an essential governmental function; (*b*) the State or political subdivision thereof to which the sales were made; (*c*) the nature of the governmental function, i. e., the kind of activities for which purchased; and (*d*) that the dealer has consented to the allowance of the credit or refund where the manufacturer has neither repaid nor agreed to repay the amount of such tax to the dealer.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 10, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

SECTION 630, AS ADDED BY SECTION 5 OF THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).—EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

REGULATIONS 44, ARTICLE 57½: Exemption of certain supplies for vessels. XIII-7-6654 S. T. 724
(Also Regulations 46, Article 76½.)

Taxability of sales of articles for use on vessels of the Coast Guard.

Inquiry is made whether sales to vessels of the Coast Guard are exempt from tax as sales to "vessels of war of the United States," under section 630 of the Revenue Act of 1932, added to Title IV of that Act by section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).

Section 630 provides, in part, that no tax under Title IV of the Revenue Act of 1932 shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores or legitimate equipment on "vessels of war of the United States." Regulations under these provisions of law were prescribed in Treasury Decision 4387 (C. B. XII-2, 347), adding article 76½ to Regulations 46, and in Treasury Decision 4388 (C. B. XII-2, 345), adding article 57½ to Regulations 44.

Title 14, section 1, U. S. C. A., provides:

* * * The Coast Guard shall constitute a part of the military forces of the United States and shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct. * * *

In view of these provisions of law it is held that sales made to vessels of the Coast Guard are not exempt from tax as sales made to "vessels of war of the United States," within the purview of section 630, except when such vessels are operating as a part of the Navy, subject to orders of the Secretary of the Navy, in time of war or by direction of the President.

REGULATIONS 44, ARTICLE 57½: Exemption of certain supplies for vessels. XIII-14-6736 S. T. 730
(Also Regulations 46, Article 76½.)

Naval aircraft are not "vessels of war of the United States" within the meaning of section 630 of the Revenue Act of 1932.

Section 630 of the Revenue Act of 1932, as added by section 5 of the Act of June 16, 1933, supra, provides in part:

Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this title shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores or legitimate equipment on vessels of war of the United States * * *.

Article 57½ of Regulations 44 (T. D. 4388, C. B. XII-2, 345) provides in part:

The term "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation on water but does not include aircraft.

The term "vessel" has been variously defined. Section 3 of the United States Revised Statutes (U. S. C. A., Title 1, section 3) provides that—

> * * * The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Article 9(b) of Customs Regulations (1931) provides that—

> The word "vessel," within the meaning of the navigation laws, includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water, but does not include sea planes or other aircraft.

In view of the foregoing, even though aircraft play an important part in the operation of the Navy and perform important functions in time of war, they do not fall within the term "vessels" as used in section 630 of the Revenue Act of 1932, as added by section 5 of the Act of June 16, 1933, supra.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)
TITLE V.—MISCELLANEOUS TAXES. (1932)

REGULATIONS 46 AND 42. XIII-14-6737
S. T. 731

Liability of Federal land banks, Federal intermediate credit banks, Central Bank for Cooperatives, Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives for taxes imposed by Titles IV and V of the Revenue Act of 1932.

The Federal land banks were established under the Act of July 17, 1916 (39 Stat., 360). The Federal Government owns the majority of the capital stock of each of such banks. The Federal intermediate credit banks were established under the Act of March 4, 1923 (42 Stat., 1454), which provides that all of the capital stock of such banks shall be owned by the United States. Pursuant to the provisions of the Farm Credit Act of 1933, approved June 16, 1933 (Public, No. 75, Seventy-third Congress), the governor of the Farm Credit Administration has organized and chartered, in addition to the Central Bank for Cooperatives, a Production Credit Corporation and a Bank for Cooperatives in each of the 12 land bank districts, and also various Production Credit Associations.

Section 931 of Title 12, U. S. C. A., reads as follows:

> *Federal land banks; national farm associations; mortgages and bonds as instrumentalities of Government.*—Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of sections 761 and 781 of this chapter. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Section 1111 of Title 12, U. S. C. A., reads as follows:

> *Capital and income: debentures instrumentalities of Government.*—The privileges of tax exemption accorded under section 931 of this chapter shall

apply also to each Federal intermediate credit bank, including its capital, reserve, or surplus, and the income derived therefrom, and the debentures issued under this subchapter shall be deemed and held to be instrumentalities of the Government and shall enjoy the same tax exemptions as are accorded farm loan bonds in said section.

Section 63 of the Farm Credit Act of 1933, supra, provides:

The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, * * *. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.

It is clear from the provisions of these statutes that the organizations in question are agencies of the Federal Government and that they are specifically exempt from Federal taxes with certain exceptions not here material. The obligations designated in the statutes as instrumentalities of the Government of the United States are also specifically exempted from tax.

The taxes under Title IV of the Revenue Act of 1932 are imposed upon the *sales of certain articles by the manufacturer, producer, or importer*. The taxes must be paid by them and not by the purchaser. (Article 3, Regulations 46.) Consequently, when a Federal agency is the purchaser of such articles the exemption from taxation granted by the statutes above quoted does not apply, since the Federal agency is not the taxpayer. The mere fact that the amount of the tax may be passed on to the agency does not warrant exemption. Accordingly, sales to such agencies of articles specified in Title IV of the Revenue Act of 1932 are subject to the taxes imposed by that title, except sales of firearms, shells, cartridges, electrical energy, and certain supplies for vessels of war of the United States which are specifically exempted by the Act imposing these taxes.

Where payments for the use of a safe deposit box are made from the public funds of any of the foregoing agencies, or a check, draft, or order for the payment of money is drawn against such funds, the taxes imposed by sections 741 and 751 of Title V of the Revenue Act of 1932, respectively, do not attach.

Amounts paid by such agencies for telegraph, telephone, radio, or cable services or facilities furnished to them are expressly exempted by section 701(b) of the Revenue Act of 1932.

The foregoing exemptions from Federal taxes shall not apply with respect to any Production Credit Association after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, after the stock held in it by the United States has been retired.

TITLE VI.—EXCISE TAXES. (1924)

SECTION 600(3).—AUTOMOBILE PARTS OR ACCESSORIES.

REGULATIONS 47 (1924), ARTICLE 16: Parts or accessories. XIII-12-6710 Ct. D. 803

EXCISE TAX—REVENUE ACTS OF 1918, 1921, 1924, AND 1928—DECISION OF SUPREME COURT.

1. SUIT—REFUND OF AUTOMOBILE ACCESSORIES TAX—BURDEN OF TAX—PROOF.

Where a manufacturer of automobile accessories institutes any proceeding, whether before the Commissioner or before the courts in suits against either the United States or a collector, for the recovery of excise taxes alleged to have been erroneously and illegally collected under the provisions of subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, it is required by section 424(a)2 of the Revenue Act of 1928 to satisfactorily establish, by appropriate proof, that the burden of the tax has been borne by it and not by the purchaser.

2. SUIT—CLAIMS FOR REFUND—JURISDICTION OF COURT—FINALITY OF JUDGMENT.

Section 424 of the Revenue Act of 1928 does not limit the consideration of refund claims of the designated class exclusively to the Commissioner, does not abrogate the authority of the courts to entertain a suit and render final judgment after denial of a claim by the Commissioner, nor does it restrict the judgment of a court to the condition that it shall be final and binding only if and when the claimant submits the required proof to the Commissioner.

3. CONSTITUTIONALITY.

The restrictions imposed by section 424 of the Revenue Act of 1928 upon the recovery of excise taxes are not in violation of the due process clause of the fifth amendment to the Constitution.

4. DECISIONS REVERSED.

Decisions of the Circuit Courts of Appeals in *Eaton* v. *American Chain Co., Inc.* (2d Cir.) (63 Fed. (2d), 783, Ct. D. 696, C. B. XII-2, 369) and in *Routzahn, Collector,* v. *Willard Storage Battery Co.* (6th Cir.) (65 Fed. (2d), 89), and of the Court of Claims *Jefferson Electric Mfg. Co.* v. *United States* (38 Fed. (2d), 139), reversed.

SUPREME COURT OF THE UNITED STATES.

171. *The United States, petitioner,* v. *Jefferson Electric Manufacturing Co.*

On certiorari to the Court of Claims.

196. *American Chain Co., Inc., petitioner,* v. *Robert O. Eaton, Collector, etc.*

On certiorari to the United States Circuit Court of Appeals for the Second Circuit.

329. *C. F. Routzahn, Collector, etc., petitioner,* v. *Willard Storage Battery Co.*

On certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 12, 1934.]

OPINION.

Mr. Justice VAN DEVANTER delivered the opinion of the court.

These are actions at law brought—in one instance against the United States and in two against a revenue collector—to recover in each instance money alleged to have been erroneously and illegally exacted as an excise tax—under subdivision 3 of section 900 of the Revenue Acts of 1918[1] and 1921[2] and subdivision 3 of section 600 of the Revenue Act of 1924[3]—from the plaintiff, a corporate manufacturer, on sales by it of articles which the revenue officers regarded as automobile parts or accessories.

In No. 171[4] the Court of Claims awarded the plaintiff $20,017.58 with interest and denied a counterclaim interposed by the United States. In No. 196[5] the District Court for the District of Connecticut gave the plaintiff judgments on three claims[6] for $329,250, $170,470.36, and $98,416.41 with interest on each sum; and the judgments were reversed by the Circuit Court of Appeals.[7] In No. 329[8] the District Court for the Northern District of Ohio rendered judgments for the plaintiff on five claims[9] for $89,195.36, $249,275.32, $189,853.88, $173,934.45, and $41,764.57 with interest on each sum; and the judgments were affirmed by the Circuit Court of Appeals.[10] The cases are here on certiorari.

After the taxes were collected, timely applications for refund were duly made by the plaintiffs, and the applications were denied. The actions were brought within the time generally limited therefor,[11] but not prior to April 30, 1928.

The applications for refund and the actions proceeded on the theory that the sales were not taxable under the Revenue Acts because the articles sold were not automobile parts or accessories within the meaning of those Acts, and not on the theory that the amount collected was in excess of what was properly collectible on taxable sales.

In each case the court's authority to entertain the action and the plaintiff's right to recover were challenged in various ways as precluded by section 424 of the Revenue Act of 1928,[12] which provides:

"Sec. 424. *Refund of automobile accessories tax.*

"(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

"(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

"(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

"(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

As respects actions brought on or after April 30, 1928, to recover taxes charged to have been wholly invalid and not merely in excess of what was lawful, which is the situation here, the construction and application of section

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1 Ch. 18, 40 Stat., 1057, 1122.
2 Ch. 136, 42 Stat., 227, 291.
3 Ch. 234, 43 Stat., 253, 322.
4 69 Ct. Cls., 150; 38 F. (2d), 139; 2 F. Supp., 778.
5 58 F. (2d), 246, 248.
6 Each claim was asserted in a separate suit, but the suits were tried together and after judgment were consolidated for purposes of appeal.
7 63 F. (2d), 783.
8 For opinion overruling motion to dismiss action see 8 Am. Fed. Tax Reports, 11274.
9 Here again the several claims were asserted in separate suits, but the suits were tried together and after judgment were consolidated for purposes of appeal.
10 65 F. (2d), 89.
11 26 U. S. C., section 156.
12 Ch. 852, 45 Stat., 791, 866; 26 U. S. C., section 2424.

424, particularly subdivision (a)(2), are matters about which there has been much contrariety of opinion, as is shown in three lines of decision.

The decisions in the first line regard subdivision (a)(2) as committing all claims for the refunding of taxes of the class in question here to the Commissioner of Internal Revenue for final determination and precluding any examination of such claims in the courts. This view has been taken by district judges in two cases [13] and by a circuit judge in a dissenting opinion in another case.[14]

The decisions in the second line are to the effect that the subdivision relates to administrative action by the Commissioner, but not to proceedings in the courts, and leaves a taxpayer who has applied to the Commissioner unsuccessfully free to sue on his claim and the courts free to entertain the suit and adjudicate the claim—as could be and commonly was done before section 424 was enacted—save that under that section a judgment for the taxpayer in a suit brought on or after April 30, 1928, does not become obligatory or entitle him to the refund awarded by the judgment, unless and until (y) he satisfies the Commissioner that the tax was not collected directly or indirectly from the purchasers of the articles sold, or if so collected has been returned to the purchasers, or (z) gives the bond described in subdivision (a)(3). Such has been the ruling in two cases. In one the ruling was by the District Court for the Eastern District of Pennsylvania,[15] and the Circuit Court of Appeals for that circuit substantially sustained it, and in that connection said,[16] "This section clearly refers to a 'refund' of taxes by the Commissioner, and nowhere refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the court. In other words, this section is an administrative measure for the guidance of the Commissioner in the 'refund' of taxes, and does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit." The other case is No. 329 now under review, where the ruling was by the District Court for the Northern District of Ohio [17] and was fully sustained by the Circuit Court of Appeals for that circuit, as is shown by the following excerpts from its opinion:[18]

"Section 424(a) deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds. Its provisions are not in conflict with the general provisions of law authorizing suits for refund of taxes. [Citing cases.]

"We agree with the authorities above cited, not only in reliance upon familiar principles governing repeal by implication, but also because the section appears to us to have an obvious literal meaning perfectly applicable to refunds by the Commissioner after judicial determination of the legality of the tax.

* * * * * * *

"If the claim for refund is made pursuant to a judgment of the court in an action begun prior to April 30, 1928, the Commissioner is not forbidden to refund under the applicable statute, and this may well be without qualification, although this we are not required to decide. Failing to bring himself within the condition of paragraph 1, because of not having pursued his claim to judgment in an action begun prior to the critical date, the taxpayer must establish to the satisfaction of the Commissioner * * * (b) that such amount was not collected

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[13] *Sterling Spring Co. v. Routzahn, Collector* [Ct. D. 113, C. B. VIII–2, 358]; *Twentieth Century Manufacturing Co. v. Hopkins, Collector* [Ct. D. 370, C. B. X–2, 408].

[14] *McCaughn, Collector, v. Electric Storage Battery Co.* (63 F. (2d), 715, 718–719).

[15] *Electric Storage Battery Co. v. McCaughn, Collector* (52 F. (2d), 205).

[16] *McCaughn, Collector, v. Electric Storage Battery Co.* (63 F. (2d), 715, 718).

[17] For opinion overruling preliminary motion to dismiss see *Willard Storage Battery Co. v. Routzahn, Collector* (8 Am. Fed. Tax Rep., 11274). After the hearing on the merits the court, in rendering judgment for the plaintiff, said:

"The objection to the court's jurisdiction founded on section 424 * * * has heretofore been ruled on. There is an error in that opinion where it is said that any refund after judgment would be pursuant to sub (3) of section 424 and would be conditional and for the benefit of consumers. If refunds are made, they may be under either sub (2) or (3), depending upon whether the plaintiff bore the tax or passed it on, etc. Those are matters for the Commissioner to decide; the court has nothing to do with them, and no evidence respecting them was offered.

"According to two recent decisions of the Court of Claims * * * the absence of such evidence should prevent recovery. But with great respect. I am unable to agree with the holdings on that point. I still think it is for the Commissioner alone to determine the facts necessary to be established as the basis of refunds under either sub (2) or (3). Where as here, taxes on sales not taxable have been collected, then on proof to the satisfaction of the Commissioner 'that such amount was not collected, directly, or indirectly, from the purchaser or lessee,' or if collected has been returned, they may be refunded."

[18] *Routzahn, Collector, v. Willard Storage Battery Co.* (65 F. (2d), 89).

directly or indirectly from the purchasers, or (c) that such amount, although collected from the purchasers, was returned to them."

The decisions in the third line, like those in the second, regard the subdivision as neither cutting off the right of a taxpayer to sue for a refund after applying unsuccessfully to the Commissioner nor abrogating the authority of the courts to entertain the suit. But, unlike those in the second, they regard the subdivision as substantively limiting the right to a refund of taxes of the designated class to instances where the taxpayer either has not directly or indirectly collected the tax from the purchaser or after so collecting it has returned it to him. In other words, they regard the subdivision as making this substantive limitation an element of the right to a refund of such taxes, and therefore as requiring that this element, like others, be satisfactorily established in any proceedings where an asserted right to a refund is presented for examination and determination, whether the proceeding be before the Commissioner or be a suit brought after an application to him has been unavailing. The Court of Claims has so ruled in two cases,[19] one being No. 171 now under review; and the District Court for the District of Connecticut came to a like conclusion in No. 196[20] also now under review.

We are of opinion that the view taken in the third line of decisions is right.

When section 424 was enacted the internal revenue laws contained many related provisions constituting what this court has termed a comprehensive "system of corrective justice" in respect of the assessment and collection of erroneous or illegal taxes.[21] A summary of this system—it still is part of the internal revenue laws—will portray it sufficiently for present purposes. Anterior to collection the Commissioner possesses exclusive authority to revise, correct or reject assessments and the courts are forbidden to entertain suits "to restrain the assessment or collection." After collection aggrieved taxpayers are accorded a limited time within which to apply for refunds, and the Commissioner is authorized to grant the applications where the taxes are shown to have been erroneous or illegal; but a denial by him is not final. If the application is either denied or not acted on by the Commissioner the taxpayer is accorded a fixed period within which to bring suit for a refund against the United States or the collector who received the tax, and if in the suit he establishes that the tax was erroneous or invalid, that it was paid by him, and that his claim has been duly and seasonably presented and prosecuted, he is entitled to judgment for a refund of the amount paid with interest.[22]

As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.[23]

That rule is applicable here. The existing system developed through long years of experience comprehends the entire subject, including all claims for refund. Section 424 is a new enactment and relates to a designated class of such claims, concededly within the scope of the existing system. Obviously the section is intended to make some change as respects the particular class and must be given effect accordingly; but to determine what change is intended it must be examined in the light of the existing system.

As respects claims of the designated class section 424 plainly prescribes, in subdivision (a)(2), an additional substantive element of the right to refund—the additional element being that the taxpayer has not directly or indirectly collected the tax from the purchaser, or, after so collecting it, has returned it to him, so that the burden of the tax has been borne by the taxpayer and not the purchaser. Of subdivision (a) (3) it suffices to observe that it enables a taxpayer who has not borne the burden of the tax but has collected it from purchasers, and so is not entitled to a refund under subdivision (a)(2), to

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19 *Boyle Valve Co.* v. *United States* (69 Ct. Cls., 38 F. (2d), 135); *Jefferson Electric Manufacturing Co.* v. *United States* (69 Ct. Cls., 150, 38 F. (2d), 139).

20 *American Chain Co.* v. *Eaton, Collector* (58 F. (2d), 246); Id., 248.

21 *Dodge* v. *Osborn* (240 U. S., 118, 120–121).

22 26 U. S. C., sections 149, 154, 156, 157; 28 U. S. C., sections 41(5)(20), 250(1), 284, 285, 286, 842; 31 U. S. C., section 225; *Philadelphia* v. *Collector* (5 Wall., 720, 731–733); *Nichols* v. *United States* (7 Wall., 122, 130–131); *Cheatham* v. *Norvekl, Collector* (92 U. S., 85, 88–90); *United States* v. *Hvoslef* (237 U. S., 1, 10); *United States* v. *Emery, Bird, Thayer Realty Co.* (237 U. S., 28, 31–32); *Sage* v. *United States* (250 U. S., 33, 38–39); *Moore Ice Cream Co.* v. *Rose* (289 U. S., 373).

23 *United States* v. *Barnes* (222 U. S., 513, 520), and cases cited; *United States* v. *Sweet* (245 U. S., 563, 572); *Panama R. R. Co.* v. *Johnson* (264 U. S., 375, 384).

obtain from the Commissioner a qualified refund by giving a bond promptly to use the amount refunded in reimbursing the purchasers. No such bond has been given in the cases now before us and in all the right to judgment for a refund is rested on other facts independently of that.

Apart from the change already described we think subdivision (a)(2) discloses no purpose to depart from the existing system. It does not purport to commit the decision of claims for refund exclusively to the Commissioner, or to give finality to his denials, or to take from aggrieved claimants the right to sue on their claims after denial or inaction by him, or to withdraw from the courts the power to entertain such suits. As to these matters, therefore, the rules prescribed in the existing system remain, as before, both applicable and controlling.

The clause in that subdivision saying the additional element to which it relates is to be "established to the satisfaction of the Commissioner" is much relied on; but we think it does not require a different conclusion. Only by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion in respect of such refunds. A more rational view is that it is largely admonitive and means that the additional element is not lightly to be inferred but to be established by proof which convinces in the sense of inducing belief. Such words often are so construed where applied to one who, like the Commissioner, is charged with the duty of ascertaining a matter of fact as a basis for further action.[24]

While the clause speaks only of the Commissioner, this becomes of minor significance when it is reflected that under the existing system he is the one to whom all claims for refund must be presented and on whom the duty of making an examination and decision is primarily placed, and that it doubtless was assumed—rightly we think—that under that system a taxpayer could by suit secure a judicial reexamination of his claim, and, if he did, the claim necessarily would be judged by the same substantive standards as if it were before the Commissioner. We say "necessarily," because subdivision (a)(2) says at the outset "No refund shall be made of any amount paid * * * unless," etc., and thus shows that it is to be applied by all who examine and determine claims for refunds—the courts as well as the Commissioner.

This view of the words "established to the satisfaction of the Commissioner" has support in a long-continued practice under a similar provision in a customs law of 1864[25] under which certain customs duties, if paid under protest, were to be refunded to the importer when "shown to the satisfaction of the Secretary of the Treasury" to have been excessive. That provision remained in force many years,[26] and during that period was uniformly treated as neither investing the Secretary with final authority nor putting aside general provisions permitting suits for refunds, but as leaving the importer free, after an unavailing appeal to the Secretary, to sue under the general provisions and obtain a judicial reexamination of his claim.[27]

Some reliance is placed on *Williamsport Wire Rope Co.* v. *United States* (277 U. S., 551 [T. D. 4172, C. B. VII-2, 323]); but that case is not in point. It was a suit for the refunding of excess-profits and war-profits taxes assessed under section 301 of the Revenue Act of 1918, and the question presented was whether in such a suit a refusal by the Commissioner to make a special assessment under sections 327 (a) and (d) and 328 was open to reexamination. In answering the question in the negative, this court referred to the purpose with which those sections provide for a special assessment, the language employed in expressing the conditions under which it is to be made, and the prescribed procedure; pointed out that the task involved is one requiring technical or special knowledge and experience in respect of such tax problems and ready access to data in the Bureau of Internal Revenue relating to a large group of taxpayers; and held that these exceptional conditions enforce the conclusion that Congress intended to confide the task to the Commissioner, subject only to a review by the Board of Tax Appeals where a direct appeal to that body is permitted, and thereby to exclude a reexamination in the courts

[24] *Bryan* v. *Moore* (81 Ind., 9, 11–13); *Kenyon* v. *City of Mondovi* (98 Wisc., 50, 54); *Callan* v. *Hanson* (86 Iowa, 420, 423); *Sams Automatic Car Coupler Co.* v. *League* (25 Colo., 129, 135); *Walker* v. *Collins* (59 Fed., 70, 74).

[25] Ch. 171, section 16, 13 Stat., 215; section 3012½, Rev. Stat.

[26] See ch. 407, section 29, 26 Stat., 142; ch. 6, section 28, 36 Stat., 104.

[27] See *Arnson* v. *Murphy* (109 U. S., 238); *Hagar* v. *Swayne* (149 U. S., 242); *Schoenfeld* v. *Hendricks* (152 U. S., 691, 693); *White* v. *Arthur* (10 Fed., 80, 88).

such as in other situations is had in suits for refunds. It is very plain that no such exceptional conditions are involved in giving effect to subdivision (a) (2) of section 424.

As to the effect to be given to that subdivision in suits for refunds, we are of opinion that, as it makes the right to a refund to depend on an additional element—that the taxpayer has not collected the tax, directly or indirectly, from the purchaser, or, if it was so collected, has returned it to him—the courts in adjudicating claims of the designated class are under a duty to give effect to the subdivision by regarding the additional element as a matter to be shown by suitable allegation and established by appropriate proof, like other elements of such a right or cause of action, and by determining the sufficiency of pleadings and evidence accordingly.[28]

We can not assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser. That view rests on two untenable premises—one that the question whether the burden of the tax has thus been borne by the taxpayer is solely for administrative solution, and the other that a judgment for a refund may be given subject to the condition that it is to become obligatory and be given effect only if and when the claimant proves to the Commissioner that he alone has borne the burden of the tax. Our reasons for rejecting the first premise already have been shown. Those for rejecting the other will be shortly stated. A judgment so conditioned is merely a finding that the tax paid by the claimant was invalid, coupled with a declaration that it should be refunded to him if he proves to the Commissioner that in other respects he is entitled to it. Decisions of this court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.[29] The district courts are created and exist under that article. While the Court of Claims is created under a different article, the statute defining its jurisdiction of suits for refunds and those defining the jurisdiction of the district courts are alike, in that both contemplate that the judgments in such suits shall fully and finally determine whether the claimants are entitled to the refunds for which they sue.

The contention is made that subdivision (a) (2), when construed and applied as we hold it should be, infringes the due process clause of the fifth amendment to the Constitution in that it strikes down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before section 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that section 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (*a*) must show that he alone has borne the burden of the tax, or (*b*), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. But it can not be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in

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[28] *Kings County Savings Institution* v. *Blair* (116 U. S., 200, 205–206).

[29] *Hayburn's case* (2 Dall., 409) and note; *United States* v. *Ferreira* (13 How., 40) and note; *Gordon* v. *United States* (2 Wall., 561); same case (117 U. S., 697); *United States* v. *Jones* (119 U. S., 477); *In re Sanborn* (148 U. S., 222); *La Abra Silver Mining Co.* v. *United States* (175 U. S., 423, 456–457); *Muskrat* v. *United States* (219 U. S., 346).

such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution.

The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:[30]

"This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."

As our conclusion respecting the operation of subdivision (a)(2) is applicable both where the suit for a refund is against the United States and where it is against the collector, there is no need for considering the arguments advanced concerning the power of Congress to condition or withdraw the consent of the United States to be sued.[31]

We come now to consider and dispose of the three cases and to apply to them our conclusions respecting the construction and operation of subdivision (a) (2) of section 424.

No. 171.

In the petition the plaintiff alleged that it absorbed the taxes in question and paid the same from its own funds; that no other person or persons paid the same either directly or indirectly; and that no other person or persons has any right either at law or in equity to the refund sought or any part of it. The defendant's answer was a general traverse accompanied by a counterclaim based on an alleged allowance and payment to the plaintiff, through error and mistake, of certain claims for the refunding of like taxes aggregating $69,264.66. The Court of Claims made special findings of fact whereon it gave judgment for the plaintiff. The findings show that the taxes in question were assessed on sales by the plaintiff of ignition coils which the revenue officers regarded as parts or accessories for automobiles, but which the court regarded as equally adapted to other uses not comprehended in the taxing Acts; and that the taxing period in question began with May, 1919, and continued to the end of February, 1926. Pertinent portions of the findings are as follows:

"7. For the taxable period in question * * * plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise tax expense.'

"8. For a part of the taxable period in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

"Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

"Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoices to customers the following: 'On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21 of amount indicated equal price,' during the period when the 5% tax rate was in effect,

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[30] *Claflin* v. *Godfrey* (38 Mass., 1, 6). To the same effect are *Steuerwald* v. *Richter* (158 Wisc., 597, 604); *Sanford* v. *First National Bank* (238 Fed., 298, 301); *Portsmouth Cotton Oil Corporation* v. *Fourth National Bank* (280 Fed., 879, 882).

[31] See *Darrington* v. *Bank of Alabama* (13 How., 12, 17); *Beers* v. *Arkansas* (20 How., 527, 529); *In re Ayers* (123 U. S., 443, 505); *Hans* v. *Louisiana* (134 U. S., 1, 17–18); *United States* v. *Heinszen & Co.* (206 U. S., 370, 391 (Harlan, J.)); *Graham and Foster* v. *Goodcell* (282 U. S., 409, 430–431 [Ct. D. 287, C. B. X–1, 191]).

and substantially the same notation during the period when the 2½% rate was in effect, '1/21' being changed to '1/41' and '20/21' to '40/41.' It does not definitely appear what the practice was thereafter as to notations on invoices.

"9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories.

"10. It is not possible from the state of the record to determine the amount of excise tax paid for the period when plaintiff made the aforesaid tax notations on invoices sent to its customers."

These findings, which are all that bear on the question of who paid the taxes and bore the burden thereof, are wanting in precision and apparently conflicting. If findings 7 and 9 were not otherwise qualified they might be regarded as meaning that the sales were at catalogue prices and that these prices did not include, and the purchasers did not pay, the tax or any part of it. But finding 8 makes it at least doubtful that findings 7 and 9 have that meaning, for it is plainly inferable from finding 8 that during much of the taxing period the plaintiff sold on invoices bearing notations indicating that when the tax was 5 per cent of the selling price 1/21 of the amount shown on the invoice represented the tax and 20/21 represented the selling price; and that when the tax was 2½ per cent of the selling price the fractions were changed to 1/41 and 40/41. The findings leave it uncertain whether plaintiff in making its returns to the revenue officers gave the amount shown on the invoices or 20/21 (later 40/41) of that amount as the selling price; and they also leave it uncertain on which basis the tax was computed. If by its invoices the plaintiff represented to its purchasers that the amount shown thereon included the tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other controlling circumstances of which there is no finding, that it did not collect the tax from the purchasers but itself bore the burden thereof.

Because of the uncertainty and apparent conflict in the findings the judgment must be reversed and the cause remanded to the Court of Claims for a new trial and full and specific findings.

No. 196.

This case comprises three separate suits, designated in the district court as Nos. 3360, 3371, and 3421, which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. They were tried to the court under stipulation in writing waiving a jury. The court made special findings of fact on which it based its judgments. In the complaints the plaintiff alleged that the tax was not paid directly or indirectly by the purchasers, but entirely by the plaintiff; that the sales were at a flat price and no amount for the tax was included therein; and that the plaintiff absorbed the tax. These allegations and some others were denied by the defendant in his answer. In various ways the defendant challenged the plaintiff's right to sue for a refund and the court's power to entertain such a suit, the challenge being grounded on subdivision (a) (2) of section 424; and the court held the challenge was not tenable. At the conclusion of the evidence the defendant moved for judgments thereon in his favor, and the motion was denied.

The circuit court of appeals reexamined the evidence, concluded therefrom, contrary to the findings of the district court, that the articles on sales of which the tax was assessed were accessories for the taxable vehicles enumerated in the taxing Acts, and on that ground sustained the tax and reversed the judgments, without considering the rulings relating to subdivision (a)(2) of section 424.

The questions presented for consideration here are those involved in the rulings of the district court and that involved in the reversal by the circuit court of appeals on a reexamination of the evidence. The challenge of the plaintiff's right to sue for a refund and of the court's power to entertain such a suit was rightly overruled. This is sufficiently shown in the earlier part of this opinion. Whether the district court erred in denying the defendant's motion at the conclusion of the evidence for judgments thereon in his favor must be determined by ascertaining whether there was substantial evidence fairly tending to establish every element of the plaintiff's causes of action. We think there was such evidence. There was conflict in it; parts of it admitted of diverging inferences: and as to some matters the prepondering weight was difficult of ascertainment. But these were all matters for the trial court to determine. It was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict.[32] We are accordingly of opinion that the motion was rightly overruled, and that the circuit court of appeals erred in not so holding. Even if there was some basis for thinking the weight of the evidence was with the defendant, as was strongly urged at our bar, it was not within the province of that court to reexamine the evidence and reverse the judgments because of what it regarded as error of fact.[33]

Whether the special findings give the requisite support to the judgments rendered thereon is a different question and is one which is open to consideration here.[34] The findings are long and the view which we take of one of them makes it unnecessary to state the others. The one relates to the matter made essential by subdivision (a)(2) of section 424, and is the only finding on the subject. It reads as follows:

"Paragraph 5 of the complaint alleged that the taxes in question were paid entirely by the plaintiff, and neither directly nor indirectly by the plaintiff's purchasers. These allegations also were denied.

"As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof. The evidence on this issue relating to the periods involved in cases Nos. 3360 and 3421, disclosed that the plaintiff at some time during the period between January 1 and December 31, 1923, reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that the amount charged to the customer 1/21 part was required by the sales tax in question. Thereafter the plaintiff computed and paid the excise tax upon the basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax, 5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before. Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the real sale price, especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them."

Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371 is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of differing opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it.

That which follows relates to suits Nos. 3360 and 3421 and evidently means that the plaintiff by its invoices was indicating to the purchasers that 1/21 of the amount it was collecting from them represented the tax on the sales and 20/21 represented its "real sales price"; and that the plaintiff itself computed the tax on the basis of this "real sales price" and thereafter paid the tax as so computed, thereby saving to itself the difference between the tax resulting from that computation and the tax which would have resulted had the full amount collected from the purchasers been used as the basis for the computation. If that be what is meant, the court rightly concluded that the tax was collected from the purchasers. It is of no importance that the prior sales price had been reduced by the amount of the tax, for under the taxing Act the tax was to be computed on the price for which the articles actually were sold and not on some prior and discarded price. But the court's further conclusion that, as the price theretofore in vogue was reduced by the amount of the tax, the plaintiff in effect returned to the purchasers the tax it collected from them—because they got the articles for a price which was that much less than it would have been had the prior sales price been still in vogue—is

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[32] U. S. C., section 773; *Copelin* v. *Insurance Co.* (9 Wall., 461); *Dooley* v. *Pease* (180 U. S., 126, 131).

[33] 28 U. S. C., section 879; *Martinton* v. *Fairbanks* (112 U. S., 670, 672); *Davis* v. *Schwartz* (155 U. S., 631, 636); *Law* v. *United States* (266 U. S., 494, 496).

[34] 28 U. S. C., section 875.

shown by its mere statement to be not a finding of fact but unsatisfactory reasoning having little tendency to establish its objective. That conclusion must therefore be disregarded. It results that the finding, while showing that the plaintiff collected the tax from the purchasers, does not show whether it returned the tax to them. Thus the finding does not adequately respond to the issue arising on the plaintiff's allegation that it absorbed the tax—for, having collected it from them, the plaintiff could absorb it only by returning it to them. With that matter left in this situation the finding plainly does not support the judgments which rest on it.

As the judgments of the district court in the three suits must be reversed because of insufficiencies in the special findings, and as the reversal by the circuit court of appeals was put on an untenable ground, we deem it the better course to enter here a judgment reversing the judgments of both courts and remanding the suits to the district court with a direction to vacate its findings and grant a new trial in each suit.

No. 329.

This case comprises five separate suits which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. The trial was to the court under a written stipulation waiving a jury. The court made special findings and based its judgments on them. At the outset the plaintiff's right to recover on the facts stated in the petitions was challenged by the defendant by motions to dismiss and the motions were overruled. There were also motions at the close of the evidence for judgments thereon in favor of the defendant which also were overruled. These rulings and the sufficiency of the facts found to support the judgments are the matters presented for consideration here. There was neither allegation nor proof that the plaintiff had not collected the tax from the purchasers, or after so collecting it had returned it to them; and of course there was no finding on the subject. The suits proceeded throughout as if that question was one for administrative solution after judgment, if the plaintiff prevailed. What we have said in the earlier part of this opinion shows that this was a mistaken theory. The judgments in both courts below must be reversed accordingly and the causes remanded to the district court with directions to set aside the findings, and to sustain the motions to dismiss—but without prejudice to the exercise by that court of its discretion in permitting amendments of the petitions.

Our conclusions in Nos. 171, 196 and 329 when summarized require that the judgments in all be reversed and the causes remanded with directions as before indicated.

Judgments reversed.

TITLE V.—TAX ON TRANSPORTATION AND OTHER FACILITIES, AND ON INSURANCE. (1918)

TRANSPORTATION OF OIL BY PIPE LINE.

REGULATIONS 49, ARTICLE 92: Miscellaneous provisions. XIII-5-6627 Ct. D. 779

TRANSPORTATION TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. TAX ON TRANSPORTATION OF OIL—CONSTITUTIONALITY.

The tax imposed by sections 500(e) and 501(d)2 of the Revenue Act of 1918 upon the transportation of oil by private pipe line is constitutional.

2. SAME—REPEAL—"SAVING CLAUSE."

The tax upon the transportation of oil by private pipe line, levied under the provisions of section 500(e) and 501(d)2 of the Revenue Act of 1918, accrued under the Revenue Act of 1918 within the meaning of the "saving clause" contained in section 1400(b) of the Revenue Act of 1921, although prior to the repeal of the Revenue Act of 1918 no correct determination of a reasonable charge for such transportation was made by the Commissioner in accordance with section 501(d)2 of that Act.

3. COLLECTION—VALIDITY—ABATEMENT—ALLOCATION TO ONE OF THREE ASSESSMENTS.

Where for the period from April 1, 1919, to December 31, 1921, there have been three assessments of tax for the transportation of oil by pipe line levied under sections 500(e) and 501(d)2 of the Revenue Act of 1918, each assessment covering a part of the period and from each of which claims in abatement were filed, and while the claims were pending the taxpayer and the Commissioner agreed upon the amount of oil transported and the reasonable charge therefor, and after computation of the tax upon the agreed basis demand for payment was made, it was immaterial to which assessment such payment was applied if the total amount demanded and paid was equal to that which had been agreed upon.

4. INTEREST.

Section 250 (e) and (h) of the Revenue Act of 1921 expressly requires the imposition of penalty and interest upon overdue taxes accruing under the Revenue Act of 1918, and interest upon the tax for the transportation of oil by pipe line was properly chargeable from the date of demand until the tax was paid.

5. DECISION AFFIRMED.

The decision of the District Court, Northern District of California, Southern Division (Ct. D. 466, C. B. XI-1, 353, 55 Fed. (2d), 274), affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Standard Oil Co., a Corporation, appellant, v. *John P. McLaughlin, United States Collector of Internal Revenue for the First District of California, appellee.*

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

[September 16, 1933.]

OPINION.

WILBUR, Circuit Judge: The Standard Oil Co. brought suit in the District Court of the United States for the Northern District of California against the defendant as collector of internal revenue, to recover taxes paid under protest to the collector for the years 1919, 1920, and 1921. From a judgment in favor of the defendant the Standard Oil Co. has brought this appeal.

The appellant is a California corporation owning and operating its own pipe lines for the transportation of its own oil. It is not a common carrier of oil and transports no oil not owned by it. The Revenue Act of 1918, under which the tax was collected, provides as follows:

" SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

* * * * * * *

"(e) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of oil by pipe line;

* * * * * * *

" SEC. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

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"(d) The tax imposed by subdivision (e) of section 500 shall apply to all transportation of oil by pipe line. In case no charge for transportation is made, by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation, and if the tax can not be computed from actual bona fide rates or tariffs, it shall be computed (1) on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or (2) if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner."

It is admitted that there were neither "any actual bona fide rates or tariffs in existence from which the tax could be computed" nor "any basis of rates or tariffs of other pipe lines for like service or for pipe line movement like the movement of oil through the pipe lines of plaintiff." Under the statute (section 501(d)2, supra), therefore, the tax had to be computed on the "basis of a reasonable charge for such transportation" fixed by the Commissioner. In accordance with Treasury Decision No. 2834, Regulations 49, article 22, which required the taxpayer to notify the Commissioner of cases coming under section 501(d)2, supra, the appellant reported these facts to the Commissioner of Internal Revenue on May 7, 1919, and requested him to fix the reasonable charge for transportation of oil by appellant. This determination was delayed and the time within which appellant should file its return was extended from time to time until September 28, 1920, when the Commissioner certified an assessment of taxes in the sum of $467,853.74 covering taxes due from April 1, 1919, to May 31, 1920. Demand for payment was made by the collector in April, 1921, and on April 14, 1921, a claim for abatement was filed by appellant. On February 14, 1922, another assessment was certified covering taxes due from April 1, 1919, to September 30, 1921, in the sum of $2,333,042.17, and demand for payment thereof was made March 1, 1922, as to which assessment a claim for abatement was filed on March 10, 1922. A third assessment in the sum of $598,967.23, covering additional tax due for the period from April 1, 1919, to September 30, 1921, and also tax due from October 1, 1921, to December 31, 1921, was certified on December 27, 1922, demand for payment made by the collector on January 16, 1923, and a claim for abatement of the same filed by appellant on January 23, 1923. No determination was had as to any of the claims for abatement until July 24, 1924, when the sum of $853,710.22 was allowed by way of abatement on the second assessment, leaving a balance of $1,479,331.95, the claims as to the first and third assessments being allowed in full, the notice stating "As your entire liability for the period covered by this assessment has been paid and credited against another assessment, the claim is allowed in full."

At the time when the formal notice of adjustment of the claim for abatement was given, the taxes abated had in fact been paid on a recomputation of which appellant received informal notice February 16, 1923, and formal notice June 27, 1923. Formal demand for payment of the recomputed tax was made March 19, 1924; the tax was paid under protest March 29, 1924, and negotiations for compromise of demands for penalty and interest at 1 per cent per month were entered into. The penalty was compromised but the interest was not, and appellant finally paid under protest the interest at 1 per cent per month from the time of formal notice of the recomputation (June 27, 1923) to the time when the tax was paid. A claim for refund having been duly made and denied this action was commenced to recover the taxes ($1,479,331.95) and interest paid ($139,811.16).

The appellant contends that the statute as applied to it is unconstitutional, (1) because it is a direct tax which is not apportioned according to census, as required by Article I, section 9, clause 4 of the Constitution; (2) because, if it should be held to be an excise tax, it is not uniform, as required by Article I, section 8, clause 1 of the Constitution; (3) because there is a delegation of legislative power to the Commissioner to fix the basis upon which the tax is computed; and (4) because the Act violates the due process clause of the fifth amendment to the Constitution in that the taxpayer has no opportunity to be heard as to the reasonableness of the charges fixed by the Commissioner.

The contention of appellant that the tax is a direct tax is based upon two grounds, (1) that it was impossible for it to use its own property without incurring the tax; and (2) as the law was administered the tax could not be passed on to the consumer and hence was a direct and not an indirect tax. In *Motter* v. *Derby Oil Co.* (16 F. (2d), 717 [T. D. 3965, C. B. VI-1, 294]), a case where the taxpayer owned and used its own pipe line for transporting oil, the identical statute was attacked as unconstitutional because it was a direct tax. The Circuit Court of Appeals for the Eighth Circuit there held that the statute did not impose a direct tax but that it imposed an excise tax on the employment of pipe-line facilities for the transportation of oil, which the court held was clearly within the power of Congress to impose. The court also held that the delegation of power to the Commissioner to fix a reasonable charge was not a delegation of legislative power where the rate is fixed with reference to the charges of similar transportation companies. In *Meischke-Smith* v. *Wardell* (286 Fed., 785, 793 (under section 501(d)1, supra) [T. D. 3461, C. B. II-1, 256]), this court, speaking through Judge Morrow, held that a similar provision of the war Revenue Act of 1917, section 501, was constitutional as applied to a pipe line owned and used by an oil company for transporting its own oil. It is claimed that this determination was not involved in the case, but it was directly involved and decided although the court might have rested with the holding that the two companies, the producing and the transportation companies, were not identical. This court also held in that case that the Act of 1917, supra, applied to private pipe lines used by the owner and not dedicated to a common use. A similar tax was upheld under the Revenue Act of 1918, now under consideration, by the Circuit Court of Appeals of the Fifth Circuit in *Dixie Oil Co.* v. *United States* (24 F. (2d), 804 [T. D. 4166, C. B. VII-1, 295]), although it does not appear that the constitutionality of the statute was considered, although the court cited *Motter* v. *Derby Oil Co.* (16 F. (2d), 717) with approval.

In view of our own decision in *Meischke-Smith* v. *Wardell*, supra, and the more recent decision by the Circuit Court of Appeals of the Eighth Circuit in *Motter* v. *Derby Oil Co.* (16 F. (2d), 717), in which certiorari was denied by the Supreme Court, we feel that it is unnecessary to discuss the numerous authorities cited by the appellant on the subject of a direct tax. We agree with the trial court that the tax imposed was an excise tax and was not required by the Constitution to be apportioned to the States in accordance with the census. (See *Bromley* v. *McCaughn*, 280 U. S., 124 [Ct. D. 140, C. B. VIII-2, 392].) It is not a necessary incident of an excise tax that it can be shifted to the ultimate consumer. (*Knowlton* v. *Moore*, 178 U. S., 41, citing *Nicol* v. *Ames*, 173 U. S., 509.)

If the tax is held to be an excise tax, appellant then contends the statute is unconstitutional because the tax is not uniform in that while the percentage of 8 per cent named in the law remained fixed, the effective tax was not 8 per cent of any definite figure, but simply a figure to be named by the Commissioner as the reasonable charge for the transportation service. In *Billings* v. *United States* (232 U. S., 261) Chief Justice White, speaking for the court, said:

"It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. (*Flint* v. *Stone-Tracy Co.*, 220 U. S., 107; *McCray* v. *United States*, 195 U. S., 27; *Knowlton* v. *Moore*, 178 U. S., 41.)"

There can be no doubt that the statute in question here meets the requirement of geographical uniformity. The mere fact that the base on which the 8 per cent tax is computed may vary in different circumstances bearing on the reasonableness of the charge for the transportation of oil in pipe lines, does not constitute a lack of uniformity as that term is used in connection with excise taxes. The amount of the tax in each case will depend upon the amount of oil transported and the reasonable charge therefor, but all those under the same circumstances will pay the same tax.

It is also appellant's contention that the provision in the statute giving the Commissioner authority to determine the reasonable charge for the transportation of oil, in absence of fixed rates or tariffs of the taxpayer or of fixed rates or tariffs of other pipe lines rendering similar services, is a delegation of legislative power making the statute unconstitutional. The rule in this regard is stated in the early case of *Field* v. *Clark* (143 U. S., 649), as follows:

"The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

Cases are numerous in which statutes have been upheld which give to administrative officers the power to determine facts on which the legislation is based. (See *Union Bridge Co.* v. *United States*, 204 U. S., 364; *Field* v. *Clark*, supra; *Monongahela Bridge Co.* v. *United States*, 216 U. S., 177; *United States* v. *Grimaud*, 220 U. S., 506: *Buttfield* v. *Stranahan*, 192 U. S., 470; *Hampton & Co.*

v. *United States*, 276 U. S., 394.) We are in full accord with the opinion of the trial judge in this regard wherein he stated:

"The taxing statute, however, designates the thing to be taxed—transportation of oil—fixes the rate of taxation—8 per cent—and levies the tax. The only thing remaining to be determined is, in case of taxpayers situated as is plaintiff, the reasonable charge for transportation to be used as a basis for computing the tax levied. The Commissioner is left to find a fact, which in the nature of things Congress could not find in advance; what he is required to do is merely in execution of the Act of Congress in levying this transportation tax. This is not a delegation of legislative power contrary to the Constitution. (*Hampton & Co.* v. *United States*, 276 U. S., 394.)"

It clearly appears from the provisions of section 501(d) that the reasonable charge contemplated is a charge similar to that made by the owners of pipe lines where they have dedicated their property to a public use. The reasonable charge for such use has been fixed by numerous decisions of the Supreme Court to be a fair return upon a fair valuation of the property utilized in performing the public service. In determining the tax it was evidently assumed by Congress that the rates actually charged by such transportation companies would be fair and reasonable rates and that such rates should be applied to the private carrier where such rates were available. Sub. (d)(2) furnishes a rule for the determination of the charges, in case there is no other pipe line carrier serving the public. They must be reasonable charges and equivalent to those which would be imposed by the taxpayer if it received compensation for such transportation. The use of the word "reasonable" in this connection, we think, could have no other significance than that the charges fixed should be such as to give a fair return upon a fair value of the property used in the transportation of the oil. In this connection it should be said that the tax of $2,333,042.17 fixed by the assessment of February 14, 1922, was based upon the proposed pipe line transportation rates filed by appellant with the California State Railroad Commission when the power of the commission to require the appellant to act as a common carrier of oil through its pipe lines was asserted by the State railroad commission. While the Commissioner of Internal Revenue may have been right in assuming that such charges would have been imposed by the taxpayer "if it received compensation for such transportation" (sub. (d), supra), nevertheless, in abating this tax the Commissioner evidently concluded that the charges fixed by him must be reasonable and that the schedule of rates filed by the appellant with the railroad commission were unreasonable and excessive. Evidently on that theory the charges were cut almost in half by the Commissioner when he acted upon the claims in abatement. It is well established that the legislature can delegate the power to fix the amount of the rates and charges. Laws delegating such power to regulatory bodies such as the Interstate Commerce Commission and other similar State commissions have been uniformly upheld, notwithstanding the fact that the Congress is prohibited by the Constitution from delegating its power, and that State constitutions, either expressly or by necessary implication, contain similar inhibitions. The fact that in the case at bar the right to fix reasonable charges for transportation is merely incidental to the imposition of a tax does not alter the legal situation. We think the law in that regard is clearly constitutional.

The next contention advanced in the attack on the constitutionality of the law is with reference to a long line of decisions holding that to constitute due process of law required by the Constitution a taxpayer must be given an opportunity to be heard at some stage in the proceedings fixing the tax. That this opportunity was provided and actually utilized by the appellant in this case by the hearing had upon its claims in abatement wherein the tax originally claimed was cut about in half, is not seriously disputed. The method of attacking a tax by way of a petition for abatement is established by the rules of the Treasury Department and under the Act of Congress such rules become a part of the law. The appellant was entitled to a hearing under this regulation and had such a hearing. This, we think, was sufficient. (See *Orient Insurance Co.* v. *Board of Assessors*, 221 U. S., 358.) The appellant in this regard contends that the rules of the Treasury Department did not specifically provide for a hearing on the petition for abatement but we think the taxpayer has an opportunity through the petition itself to assert any fact which, in his judgment, affects the validity or amount of the tax and the fact that under the rules of the Treasury Department such a petition must be acted upon constitutes a sufficient hearing whether or not the taxpayer adduces evidence before the Commissioner.

Appellant claims that as sections 500–501 of the Revenue Act of 1918 were expressly repealed by the Revenue Act of 1921 the Commissioner had no authority thereafter to fix the reasonable charge for the use of its pipe line as a basis for the imposition of the 8 per cent tax and that therefore the tax can not be assessed or collected after the repeal of the statute levying the tax. This, of course, would be true in the absence of a general or special saving clause. Such a general saving clause is found in section 13 of Revised Statutes, as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing Act shall so expressly provide * * *."

The Revenue Act of 1921, section 1400, subsection (b), also contains a special saving clause, in part, as follows:

"The parts * * * which are repealed by this Act shall * * * remain in force for the assessment and collection of all taxes which have accrued * * * and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any such taxes."

We shall first consider the effect of the saving clause contained in the Revenue Act of 1921. If it shall be found that this clause was sufficient to justify the collection of the tax in the case at bar it will be unnecessary to consider whether or not the general saving clause in Revised Statutes section 13 is applicable in a case where the repealing statute contains a special saving clause. (See *Great Northern Railway Co.* v. *United States*, 208 U. S., 452, 465.)

The saving clause contained in the Revenue Act of 1921, supra, applies to all taxes "which have accrued" and authorizes the "assessment and collection" of such taxes with the appropriate penalties and forfeitures "which have accrued or may accrue in relation to such taxes." It is argued that until the tax is due and payable it has not accrued. Appellant cites *Clapp* v. *Mason* (94 U. S., 589); *Mason* v. *Sargent* (104 U. S., 689); *Sturges* v. *United States* (117 U. S., 363); *Meredith* v. *United States* (13 Peters, 486); *United States* v. *Woodward* (256 U. S., 632 [T. D. 3195, C. B. 4, 153]); *People* v. *Carpenter* (274 Ill., 103); *United States* v. *Anderson* and *United States* v. *Yale & Towne Mfg. Co.* (269 U. S., 422 [T. D. 3839, C. B. V-1, 179]); *Lucas* v. *American Code Co.* (280 U. S., 445 [Ct. D. 168, C. B. IX-1, 314]); *Lucas* v. *North Texas Lumber Co.* (281 U. S., 11 [Ct. D. 169, C. B. IX-1, 294]); *Lucas* v. *Ox Fibre Brush Co.* (281 U. S., 115 [Ct. D. 265, C. B. IX-2, 384]), and many other cases in which the word "accrued" has been considered and defined for the purposes of the decision. We will not undertake to follow the ramifications of the argument. Suffice it to say that the word "accrued" has more than one definition and in any event when used in legislation is to be interpreted in connection with the context of the statute so as to effectuate the purpose of the legislature. Appellant's claim is that Congress has relieved it of taxes for the years 1919, 1920, 1921, where other taxpayers similarly situated had already paid the tax, or it had accrued as to them. This relief is not claimed because of any reason distinguishing the case of the appellant from the case of the others but solely because of the delay of the taxing officers or of the appellant, or both, in arriving at the amount of the tax. The appellant contends that it had always been pressing the Commissioner to fix a "reasonable charge" for the use of its pipe line and that the delay was wholly due to the uncertainty in the statute and the inability of the Commissioner to reach a conclusion upon the law and the facts. Granting this for the moment, still no reason is shown why Congress in repealing the law levying a tax which had been paid by others should make an exception in favor of the appellant and others, if any, who had not paid the tax. The repealing Act was not a remedial Act and did not purport to remedy past wrongs, but looked solely to the future in its repeal of the tax. To ascribe to Congress an intent to relieve the appellant from a tax liability for the years 1919, 1920, and 1921 would be to hold that Congress intended to make a gift of public property to them. (*Estate of Stanford*, 58 Pac., 462, 126 Cal., 112.) The saving clause contemplates the "accrual" of the tax before it is assessed. The appellant admits that when the tax is so far fixed that its amount is definitely ascertainable it has "accrued," although it is not yet due or payable, citing *United States* v. *Anderson* and *United States* v. *Yale & Towne Mfg. Co.* (269 U. S., 422), supra, where the Supreme Court said:

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued."

In short, the appellant's contention comes to this, that the tax had not accrued because, to quote from its brief, "the Commissioner had not determined what should be considered a reasonable charge applicable to plaintiff's transportation of its own oil upon which the tax could be computed. * * * The tax in this case depended upon an unknown quantity when the statute was repealed, i. e., the Commissioner's determination as to a reasonable charge against which it could be assessed."

As a matter of fact, on September 28, 1920, the Commissioner had certified an assessment of taxes covering the taxes due from April 1, 1919, to May 31, 1920, and payment therefor had been demanded. This assessment was based upon the cost of transporting oil as ascertained from the books of the appellant. This cost varied from month to month and from place to place but the Commissioner acted upon it and made an assessment upon the basis of such costs. This determination was in effect a decision that the actual cost of transportation of oil was a reasonable amount to be charged for such transportation. The appellant insists throughout that the act of the Commissioner, in fixing a reasonable charge, is a separate and distinct act from the making of the assessment, and, consequently, ignores this assessment as a determination of the reasonable charge for transportation. The act of the Commissioner in fixing the charge is an integral part of the assessment. It could be performed in advance of the formal assessment or at the time of the assessment. The act of making the assessment *ipso facto* determines the reasonable charge. Assuming that the assessment which was based upon the cost of transportation of oil as shown by the appellant's books was in effect a determination by the Commissioner that the cost of transportation was a reasonable charge for such transportation, the appellant had at hand in its own books a basis for fixing the amount of the tax for the other months of the period for which the tax was applicable under the Revenue Act of 1918. If we accept this premise the tax had "accrued" within the rule as advocated by the appellant. Although we see no escape from this proposition we wish to place our decision upon the broader ground that regardless of the action of the Commissioner in fixing the amount of the tax, the tax accrued before the repeal of the Revenue Act of 1918. In this connection it should be noted that this tax is payable monthly at the time fixed for filing the monthly return without previous assessment by the Commissioner or notice from the collector, and in default of such payment a penalty of 5 per cent and interest at 1 per cent per month is added. (Revenue Act, 1918, section 502.) This section requiring monthly returns (section 502, supra), which is expressly made applicable to persons "receiving any payments referred to in section 500," supra, we think is applicable as well to those who transport their own oil in their own pipe lines, who are taxable under section 501(d)2, supra. No doubt appellant would concede this, subject to the qualification that the Commissioner should first determine the reasonable charge to be applied. In any event we think the obstacle to such payment suggested by the appellant is more imaginary than real. The statute which requires a monthly return and payment of the tax without assessment necessarily implies that the taxpayer shall in the first instance estimate the amount of the tax payable, subject to correction by the assessment made later by the Commissioner. It is true that in the case of a public utility transportation company whose charges are based upon rates fixed for transportation of oil by it, the company is only required to add 8 per cent thereto and return the amount so collected from its customers. So far as the statute is concerned, we see no reason why the private carrier of oil might not with equal facility set up a tentative charge for the transportation of its own oil and pay a tax thereon monthly with its return subject, of course, to the final determination of the reasonableness of the charge by the Commissioner, just as the appellant did set up its estimate of its cost of transportation of its own oil in its own pipe lines. The statute provides:

"In case no charge for transportation is made, by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation."

It is true that the statute in such case provides that "if the tax can not be computed on actual bona fide rates or tariffs, it should be computed" upon a basis determined by the Commissioner as required by law. It is also true that the Regulations 49, Treasury Decision 3824, under the Revenue Act of 1918, section 500, provides in accordance with the terms of the statute for the return of the tax (article 67), and provides further (article 22) that "in the cases falling within the above-quoted provision of section 501, the basis of the computation of tax shall be upon the legal rates or tariffs of the carrier and, in the absence thereof, the actual rates or tariffs of other carriers for like service. If the basis of the tax can not be readily determined in the manner stated, the facts should be forthwith reported by the carrier to the Commissioner of Internal Revenue for determination by him of the basis of computation."

Article 91 also provides for monthly returns of taxes collected by the carrier and in cases in which it is impossible to make a proper return within the prescribed time provides for the extension of time, not exceeding 60 days, by the collector, upon application by the taxpayer and a proper showing for such extension, as was done in the case at bar.

Under these regulations the appellant properly assumed that it was entitled to have the reasonable charge for transportation of oil fixed by the Commissioner before it made its return and paid the tax. The Commissioner acquiesced in this view and extended the time for return from time to time. The Commissioner ultimately made the assessment based upon the investigation and reports made by subordinates in his Department, without any formal return by the taxpayer.

In view of this situation the contention of the appellant comes to this: That notwithstanding that the statute fixed the rate of the tax and the base upon which it should be computed subject to a finding of the fact by the Commissioner, namely, the reasonable charge for transportation of oil, and provided that the tax should be payable before assessment and upon monthly returns, nevertheless the tax did not "accrue" before the repeal of the Revenue Act of 1918 because the Commissioner delayed in finding the fact necessary to a fixing of the amount of the tax. By section 502 of the Revenue Act of 1918 the Commissioner was authorized to require the taxpayer to furnish returns giving such information as might be desired by him for the purpose of fixing the tax. If the Commissioner had required the taxpayer to furnish the necessary information to fix a reasonable charge such as the reasonable value of the property devoted to the transportation service, the reasonable charge could have been fixed and the tax assessed immediately upon the return. Instead, the rules of the Treasury Department evidently contemplated that the necessary information would be either furnished by the taxpayer or acquired by the Commissioner by investigation and that amount of the "reasonable charge" would be given to the taxpayer as a basis upon which to make his return of the tax and payment thereon. The delay in fixing the amount of the tax was neither required nor contemplated by the law of 1918. The obligation to pay the tax was fixed by the revenue law of 1918. By engaging in the business of transporting oil in its pipe line the appellant became obligated to pay that tax to the United States. The law fixed the amount of the tax, namely, 8 per cent, upon a reasonable charge for the transportation of the oil actually transported. It left to the Commissioner the determination of the facts and the amount of the tax levied by Congress in accordance with the facts as determined by him. Under these circumstances we think it clear that within the meaning of Congress the tax had accrued before the Revenue Act of 1918 was repealed. We think this so clearly follows from the decision of the Supreme Court in *United States* v. *Anderson*, supra, that we deem it unnecessary to discuss the numerous cases cited upon that subject.

We conclude that the saving clause in the Revenue Act of 1921 covered the tax here involved.

The appellant contends that in any event it should recover the taxes levied for the months of October, November, and December, 1921, amounting to $151,993.79. This contention is based upon a somewhat curious situation which developed during the effort of the Commissioner to arrive at a conclusion as to the correct amount of the tax which should be paid by the appellant upon its use of the pipe line for the transportation of oil during the period that the Revenue Act of 1918 was in effect. The three assessments made by the Commissioner overlap. The first assessment was from April 1, 1919, to May 31, 1920. The second assessment covered the same period and in addition the months from June 1, 1920, to and including September 30, 1921. The third assessment was for the months of October, November, and December, 1921, and also included an additional tax for the period covered by the second assessment. Claims in abatement were filed by the appellant from each of these determinations. While these claims were pending the Commissioner and the appellant, after numerous conferences and much correspondence, agreed upon the amount of the reasonable charge for the transportation of oil and also upon the amount of the oil transported. Under this agreement it only remained to compute the tax at the rate specified by the statute (8 per cent). The tax was computed by the Commissioner and demand made for the amount thereof June 27, 1923. This amount, after correction of a relatively trifling error of $151.17, is the amount which was paid by the taxpayer in March, 1924. In fixing the amount of the tax the Commissioner directed the collector that the payment should be applied to the second assessment, namely, the assessment covering the period from April 1, 1919, to October 1, 1921. The tax was so collected and applied.

The appellant contends that inasmuch as the tax it paid was for the period extending to December 31, 1921, it had overpaid the tax for which it is liable by the amount which accrued during the months of October, November, and December for the transportation of the oil transported during those months. At the time the tax was demanded (June 27, 1923) and paid (March 29, 1924), the Commissioner had not formally acted upon the appellant's claims for abatement, but in July, 1924, he did so act. He abated the first assessment covering the period from April 1, 1919, to May, 1920, upon the ground that the tax had been satisfied by the payment of the second assessment which covered the same period. Similarly he abated the third assessment which covered the period from October 1, 1921, to December 31, 1921, and also covered a supplemental assessment for the period covered by the second assessment (April 1, 1919, to October 1, 1921) upon the ground that by the payment of $1,479,331.95 upon the second assessment that tax (to December 31, 1921) had been satisfied. The conclusion is inescapable that the Commissioner fixed the entire tax for the entire period from April 1, 1919, to December 31, 1921, at the sum of $1,479,331.95, and as a matter of convenience applied that tax to the second assessment. The parties to this action agreed upon the trial that the rates fixed by the Commissioner for the transportation of oil in his communication to the appellant were reasonable, and that the amounts of oil transported in the various months were the amounts shown by the books of the appellant. Upon the basis of this agreement the position of the appellant is correct that the tax for the period ending October 1, 1921, would be $151,993.79, less than the amount it paid. Its contention that it is entitled to a return of the amounts which appellant estimates for the last three months of 1921 ($151,993.79) is not based upon the merits as the total amount of the tax for which the appellant was liable, if any, was agreed upon but upon the method by which the Commissioner undertook to carry out the terms of the agreement he made with the appellant in regard to the total amount of the tax due from it for the entire period during which the Revenue Act of 1918 was in force. To this technical position of the appellant we think there is a technical answer, namely, that his determination that the tax for the period ending October 1, 1921, was $1,479,331.95, was in effect a determination that the reasonable rates to be charged for that period were sufficient as applied to the oil transported to amount, at the tax rate of 8 per cent, to the tax paid by the taxpayer. The agreement of the Commissioner with the appellant, before he acted upon the claims in abatement, as to the reasonable rates chargeable and the agreement of the parties upon the trial of the case that the amount fixed by the agreement was reasonable, does not alter the fact that the action of the Commissioner upon the claim in abatement in legal effect fixed a larger amount as a reasonable charge than the amount agreed upon between the Commissioner and the appellant before he acted upon the claim in abatement, an amount larger than agreed upon at the trial as a "reasonable charge." Neither the prior, nor subsequent, agreement of the Commissioner as to what constituted a reasonable charge can alter the effect of his act in determining the amount of the tax when he passed upon the appellant's claims in abatement. It was evidently with this in view that the Commissioner acted in passing upon the claim in abatement. He evidently concluded that as the amount of the tax had been agreed upon with the appellant it was immaterial in exactly what manner he ruled upon the claims in abatement if the total amount demanded was equal to that which had been agreed to and paid by the taxpayer. In this view we think the Commissioner was correct for the reasons stated. The court is bound by the determination of the Commissioner upon the claims in abatement wherein the Commissioner fixed the tax for the period up to October 1, 1921, at the amount of $1,479,331.95. In any event, the agreement that certain rates are reasonable is not an agreement that rates 10 per cent greater are unreasonable.

The appellant was required to pay, and did pay, interest amounting to $139,-811.16. This interest was computed at the rate of 1 per cent a month from June 27, 1923, when the payment of the agreed amount of the tax was demanded by the Commissioner, to the date of the payment in March, 1924. Appellant contends that it is not liable for this interest. This contention is based in part upon the proposition that the saving clause in the Revenue Act of 1921, above quoted, expressly excepted the tax and penalties thereon, but did not expressly cover interest upon the tax. In this regard it may be stated that it is not altogether clear that the interest is not a part of the penalty. Section 502 of the Revenue Act of 1918, supra, provides:

"If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due."

Assuming, however, that the interest of 1 per cent a month is not a part of the penalty referred to in the statute, as might be indicated by the comma after the phrase, "a penalty of 5 per centum," the appellee meets the contention of the appellant by two claims: First, that all taxes bear interest regardless of whether or not the statute expressly so provides, citing in support of that contention the case of *Billings* v. *United States* (232 U. S., 261), where it is held that if the interest rate is not fixed by statute the taxes bear interest at a rate which must be reasonable and in conformity with the custom of the community; second, in addition to section 502 of the Revenue Act of 1918, supra, relating to interest, the appellee points out the somewhat different provisions of section 250(e) of the Revenue Act of 1921, providing for the collection of interest on overdue taxes, and section 250(h) of that Act which makes sub. (e) applicable to taxes "which have accrued or may accrue under the Revenue Act of 1918".

In view of the complexity of the situation we quote somewhat extensively from the supplemental reply brief of the appellee in which appellee's position in regard to the payment of interest is stated with a confession of doubt as to the proper method of computing interest:

"To be quite candid, we think the application of section 250(e) is not entirely clear. It seems to contemplate notice and demand by the collector, and interest running at 1 per cent thereafter unless a claim in abatement is filed. Applying this retroactively would mean making a 6 per cent interest rate apply to the taxes as originally demanded by the collector, throughout the whole period when the abatement of these taxes, or any part of them, was pending.

"On the other hand, it seems contrary to reason to say that claims in abatement were really pending after June, 1923. It can hardly be disputed that when the Commissioner and the appellant agreed upon the rate, the quantities of oil, the distances and the amount of tax payable, there was, in fact, a full consideration of all the previous determinations of the Commissioner and of the taxpayer's claims in abatement. Now, whatever be the name we give to the agreement incorporated in the record at page 90, and again at page 232, it is manifest that by it the Commissioner modified all previous rulings, both as to rates and the amount of tax payable, and, in fact, fixed a rate and an amount of tax under that rate which was accepted by the taxpayer as correct in amount. The taxpayer's contention that previous rates were unreasonably high was thus accepted.

"The Commissioner demanded the payment of this amount on June 27, 1923, and at that time notified the taxpayer that a 5 per cent penalty and interest 1 per cent per month were payable under Revised Statutes section 3184 (26 U. S. C. A., section 104) (Rec., pages 87-89). At this time the taxpayer's claims in abatement were, in a common sense meaning of the term, no longer pending. It seems to us that a notice of the amount of tax due was given this taxpayer, which was sufficient to start the rate of interest running at 1 per cent under section 3184 of the Revised Statutes. There was a notice and demand, which the plaintiff received by mail, stating the amount of taxes and demanding payment, as required by Revised Statutes, section 3184. It is true that

Revised Statutes, section 3184, contemplates that the collector shall give this notice, either in person or by a deputy, but it would seem that this language is broad enough to include a notice from the Commissioner himself."

Upon the subject of interest we conclude:

First: That whether or not interest was expressly saved by the provisions of the repealing clause of the law of 1921, that Act, by section 250 (e) and (h) expressly required the imposition of the penalty and interest as therein fixed upon taxes accruing under the Revenue Act of 1918.

Second: That, inasmuch as the Commissioner had assessed the tax for the period ending October 31, 1921, by his assessment made February 14, 1922, and the collector had demanded the payment thereof on March 1, 1922, interest began to run thereon at the rate of 1 per cent per month upon such demand in accordance with the provisions of section 250(e) of the Revenue Act of 1921, in the absence of a claim in abatement; that by the filing of the claim of abatement within 10 days after demand based upon this tax the interest rate became 6 per centum from the date of the demand so long as that claim in abatement was pending and undisposed of, to wit, to and including July 24, 1924. The tax was paid on March 29, 1924, and interest ceased at that time.

Our conclusion, then, is that the amount of interest properly chargeable to the appellant was the sum of 6 per centum per annum from the date of demand, March 1, 1922, to the date of payment, March 29, 1924; that is, for a little over two years. The interest actually collected was less than this amount (about 9 per cent). In this view the interest charge was less than that fixed by statute and the appellant is not entitled to recover any part of the interest so paid. The appellant's answer to this proposition is that the provisions of the statute of 1921 fixing interest charges is applicable only to the income taxes. We see no reason why Congress should make a distinction between two types of taxes in fixing the penalty for failure to pay the tax when it was due. The language of section 250 (e) (h) is definite and applies generally to all taxes levied under the Act of 1918 which includes the transportation tax in issue in this case. We think that the interest rate upon overdue taxes fixed in the law of 1921 for taxes under the Revenue Act of 1918 applies to the transportation tax where the demand for the tax was made after the enactment of the Revenue Act of 1921.

Judgment affirmed.

Regulations 49, Article 92: Miscellaneous provisions.

XIII-8-6666
Ct. D. 790

TRANSPORTATION TAX—REVENUE ACTS OF 1917 AND 1918—DECISION OF SUPREME COURT.

Tax on Transportation of Oil—Basis.

A private pipe line company operating oil-gathering lines in Oklahoma and making a charge therefor not appropriate for the service rendered is subject to tax on the "transportation" of oil by pipe line under sections 500, 501, and 503 of the Revenue Act of 1917 and sections 500–502 of the Revenue Act of 1918, based upon the accustomed rates of other carriers in the same field for like services.

Supreme Court of the United States.

Acel C. Alexander, Collector of Internal Revenue, petitioner, v. Cosden Pipe Line Co.

Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 8, 1934.]

OPINION.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action at law brought in the District Court for the Western District of Oklahoma to recover from the defendant moneys alleged to have been wrongfully exacted by him, as collector of internal revenue, from the plaintiff as excise taxes on the transportation of crude oil through the latter's pipe line.

Apart from matters eliminated during the pendency of the suit, four distinct claims were asserted. The first related to the transportation of 2,022,248.41 barrels for Cosden & Co. between November 1, 1917, and March 31, 1919, whereon an additional assessment of $15,066.87 was made and collected. The second related to the transportation of 20,644,020.34 barrels for the same company between April 1, 1919, and March 31, 1921, whereon an additional assessment of $170,946.04 was made and collected—of which sum a refund of $5,793.76 was made pending the suit, thereby reducing the claim to $165,152.28. The third related to the transportation of 3,666,048.39 barrels for the same company between July 1, 1918, and March 31, 1919, whereon an assessment of $36,666.50 was made and collected. The fourth related to the transportation of 99,590.31 barrels for the Pierce Oil Corporation between November 1, 1917, and March 31, 1919, whereon an assessment of $995.90 was made and collected.

The issues were tried under a written stipulation waiving a jury, and the court made special findings of fact and declarations of law whereon it rendered a judgment awarding the plaintiff the full amount of each of the first two claims, $18,333.25 on the third, and $746.92 on the fourth—with interest on each of these sums.

The defendant appealed to the Circuit Court of Appeals, which sustained the awards on the first and second claims, wholly rejected the third, reduced the award on the fourth $375.71, and accorded the plaintiff a limited time within which to file a remittitur of the amount awarded on the third claim and of $375.71 of that awarded on the fourth. The remittitur was seasonably filed and thereupon the court of appeals affirmed the judgment of the trial court as modified and reduced by the remittitur. (63 F. (2d), 663.)

The case is here on certiorari.

The discussion in the briefs makes it advisable to point out at the outset that we have no occasion to reexamine the third and fourth claims. In the district court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the court of appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the court of appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not seasonably petitioning for a review.[1] And the defendant is not entitled to complain of the parts of the decision which were in his favor—as were the rejection of the third claim and the reduction of the award on the fourth—but only of such as were adverse to him[2]—as was the refusal wholly to disapprove, or further to reduce, the award on the fourth claim. It is doubtful that the defendant's petition for certiorari contains any real challenge of the ruling of the court of appeals on the fourth claim. But, be this as it may, the Solicitor General, speaking for the defendant, in the argument at the bar disclaimed any purpose to ask this court to reexamine or disturb that ruling. This disclaimer, made on behalf of the only party who then had any semblance of right to ask such a reexamination, eliminated any need for considering the fourth claim just as a like disclaimer in the petition for certiorari would have done. For these reasons it should be understood that the merits of the third and fourth claims are not here under consideration, but are regarded as settled by the decision of the court of appeals.

Another matter bearing on the scope of the present examination needs attention. The defendant asks that the evidence be examined in connection with

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[1] *United States* v. *Hickey* (17 Wall., 9, 13); *United States* v. *Blackfeather* (155 U. S., 180, 186); *Chittenden* v. *Brewster* (2 Wall., 191, 196); *The William Bagaley* (5 Wall., 377); *Canal Co.* v. *Gordon* (6 Wall., 561, 568); *The Maria Martin* (12 Wall., 31, 40–41); *New Orleans Mail Co.* v. *Flanders* (12 Wall., 130, 134–135); *Mount Pleasant* v. *Beckwith* (100 U. S., 514, 527); *Clark* v. *Killian* (103 U. S., 766, 769); *Loudon* v. *Taxing District* (104 U. S., 771, 774); *Hubbard* v. *Todd* (171 U. S., 474, 494); *Bolles* v. *Outing Co.* (175 U. S., 262, 268); *Landram* v. *Jordan* (203 U. S., 56, 62); *Peoria, etc., Ry. Co.* v. *United States* (263 U. S., 528, 536); *United States* v. *American Ry. Exp. Co.* (265 U. S., 425, 435); *Federal Trade Commission* v. *Pacific States Paper Trade Association* (273 U. S., 52, 66); *Charles Warner Co.* v. *Independent Pier Co.* (278 U. S., 85, 91); *Langnes* v. *Green* (282 U. S., 531, 538).

[2] *Marine Insurance Co.* v. *Woods* (6 Cranch, 29, 42); *Corning* v. *Troy Iron & Nail Factory* (15 How., 451, 464–465); *Chittenden* v. *Brewster* (2 Wall., 191, 196); *Loudon* v. *Taxing District* (104 U. S., 771, 774).

his motion for judgment thereon which was made and denied in the trial court, and the plaintiff answers that this can not be done because the evidence has not been brought into the record by a proper bill of exceptions. The objections which the plaintiff makes to the bill are that it does not purport to contain all of the evidence but only such as is material to the defendant's assignment of errors, and that the evidence, both testimonial and documentary, appearing therein is set out without any attempt at condensation or narration.

Rule 10 of the court of appeals,[3] like rule 8 of this court,[4] provides:

"Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the ruling to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

The bill, after the usual introductory recitals, contains an agreed statement of particular facts, sets out other evidence produced by the plaintiff and by the defendant, each in turn, and then says "This is all the evidence offered and taken at the trial." Other statements follow to the effect that later on, but before the finding, the court admitted an additional and specified item of evidence to which the parties agreed; that at the close of the evidence the defendant moved for judgment in his favor as to each of the claims because there was not sufficient evidence to support a finding or judgment against him; and that the court denied this motion and the defendant reserved an exception. At the end is a stipulation wherein the parties, through their counsel, agree that the bill contains "all the evidence material to the defendant's assignment of errors" and all exceptions taken in the course of the trial, and consent that "the same be settled and filed as the settled bill of exceptions"; and then follows a certificate by the trial judge authenticating and allowing the bill in the same terms that are used in the stipulation. The reference in the stipulation and certificate to "the defendant's assignment of errors" is explained by the fact that during the period given for the preparation and presentation of the bill the defendant had sought and the trial judge had allowed an appeal to the Circuit Court of Appeals; and with his application for the appeal the defendant had presented and filed an assignment of errors showing the rulings and questions which he intended to present on the appeal—one of the rulings being the denial of his motion at the close of the evidence for judgment thereon in his favor.

A survey of the bill from its beginning to its end shows, we think, that it contains all of the evidence. The statement to that effect in the body of the bill is not overcome or qualified by the statement in the concluding stipulation and certificate that it contains all that is "material to the defendant's assignment of errors." When regard is had to the circumstances in which the later statement was made there is no room to doubt that it was intended to be, and is, as comprehensive as the first. As the defendant's assignment of errors, to which the stipulation and certificate refer, brought in question the sufficiency of the evidence to support the judgment, the conclusion is unavoidable that counsel when entering into the stipulation and the trial judge when giving the certificate understood that all the evidence was material to the solution of that question, and that they used the terms appearing in the stipulation and certificate as comprehending, not merely a part of the evidence, but all of it.[5]

It is true that the evidence is set out without any attempt at condensation or narration; but it is also true that the plaintiff expressly consented to the allowance of the bill in this form, and that the court of appeals not only made no criticism of the bill but examined the evidence and rejected the third claim as without necessary evidential support.

The evidence is not of large volume. Besides 5 pages of stipulated facts, it includes 20 pages of testimony given by three witnesses and 30 pages of documents. Without doubt much of it could have been condensed and narrated without in anywise affecting its purport or substance,[6] but other parts, particularly some of the documents, are of such a nature that a literal reproduction well might have been regarded as essential to a proper understanding of them.

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[3] *Caldwell* v. *United States* (36 F. (2d), 738, 739–740).
[4] 286 U. S., 598.
[5] See *Waldron* v. *Waldron* (156 U. S., 361, 378).
[6] See *Krauss Bros. Co.* v. *Mellon* (276 U. S., 386, 390–391).

Of course, the rule relating to condensation and narration should be respected by the bar and by trial judges,[7] and should be appropriately enforced by appellate courts;[8] but we are of opinion that in the circumstances here shown the plaintiff is not in a position where it with good grace can complain of the form in which the evidence is set out, and that the infraction of the rule in this instance is not of such extent or moment as to justfy us in now declining to regard the evidence as brought into the record by the bill.

We come then to a consideration of the first and second claims. The errors assigned as to them involve the sufficiency of the evidence to support any judgment against the defendant and the sufficiency of the special findings to support the particular judgment rendered thereon. Most of the pertinent findings have such support in the evidence that they must be accepted here, but some are without such support. We shall summarize the facts found so far as they are pertinent and shall refer to the evidence where there is need for it. In this way the evidence and findings will both be reflected sufficiently for present purposes.

The plaintiff, an Oklahoma corporation, owns pipe lines leading into Tulsa, Okla., from oil fields in that State and operates its lines in the transportation, intrastate, of crude oil. All of its stock is owned by Cosden & Co., another Oklahoma corporation, which operates an oil refinery at Tulsa. While not stated in the findings, the evidence shows that the two corporations are under substantially the same management, have the same offices, and in part have the same employees.

The plaintiff is engaged chiefly in carrying oil for Cosden & Co., but it also carries large quantities for others. It does not hold itself out as a common carrier, is not required by the State to file or publish rates or tariffs, and does not file or promulgate either. Common carrier pipe lines operating in the vicinity of the plaintiff's lines have both trunk lines and gathering lines—and also tariff stations at which oil is received into the trunk lines. The plaintiff has no tariff stations and receives oil at any place along its lines where it can obtain the oil. Its lines are gathering lines only and comparable only to the gathering lines of the common carriers; and the service which it renders, as compared with that rendered by the common carriers, is a gathering service only. While not appearing in the findings, the stipulated facts included the following:

"Any pipe line reaching from any point where oil is purchased or produced to the trunk or main line or to storage tanks at or near the main or trunk line or to tank farms is called a gathering line, without regard to its size, the distance, or the amount of oil carried through such line to the trunk or main pipe line, or to the trunk or main pipe line storage tanks, or to a tank farm.

"The gathering charge is a sum paid for the service rendered in moving oil from the point where it is tendered to or received by the carrier, whether it be the working tank at the well or the storage tanks in the field, to the trunk or main line tariff stations, or to a tank farm of the carrier or to main line storage tanks. And the rate charged for such gathering service is a flat rate, being the same by the same carrier in the same field, whether the distance traversed by the gathering line be 25 yards or 25 miles."

All of the matters recited thus far were true during the period of the transportation in question.

The oil named in the first and second claims was owned by Cosden & Co., and was transported for it by the plaintiff in the latter's pipe line—that in the first claim between November 1, 1917, and March 31, 1919, and that in the second between April 1, 1919, and March 31, 1921.

The plaintiff charged and Cosden & Co. paid 5 cents per barrel for the transportation in the first claim and 10 cents per barrel for that in the second; and the plaintiff collected from Cosden & Co. and paid over to the revenue collector an excise tax on such transportation computed at the statutory rate on the amounts so charged and paid.

The Commissioner of Internal Revenue found and ruled that 20 cents per barrel was the proper charge on which to base and compute the excise tax, and he accordingly made the additional assessments involved in the two claims. The plaintiff paid these assessments to the defendant collector, applied unsuccessfully for a refund and then brought this suit.

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[7] *Lincoln* v. *Claflin* (7 Wall., 132, 136–137); *Krauss Bros. Co.* v. *Mellon*, supra.

[8] See *Newton* v. *Consolidated Gas Co.* (258 U. S., 165, 173–174); *Houston* v. *Southwestern Bell Tel. Co.* (259 U. S., 318, 325); *Barber Asphalt Co.* v. *Standard Asphalt Co.* (275 U. S., 372, 387); *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.* (276 U. S., 305, 308, et seq.).

While there is no finding on the point, the evidence shows that the Commissioner in holding 20 cents the proper charge on which to base and compute the tax proceeded on the theory that the transportation included both a gathering and a trunk line service, and determined that 12½ cents was the proper charge for the former and 7½ cents for the latter.

The usual and customary charge of common carrier pipe lines in that vicinity for gathering service was from 12 to 12½ cents per barrel from November 1, 1917, to December 31, 1921.

The plaintiff's charge to Cosden & Co. during that period varied. From a date several months earlier than November 1, 1917, to July 1, 1918, the charge was 5 cents per barrel; from July 1, 1918, to March 31, 1919, no charge was made, although large quantities of oil were then being carried by the plaintiff for that company; and thereafter the charge was 10 cents. Its charges to others also varied. From November 1, 1917, to December 31, 1921, they ranged through 7, 10, 12, 15 and 17½ cents per barrel; and their average was 13 cents for the first five months of that period and 16.4 cents for the rest of the time—the average being arrived at in each instance by dividing the total receipts from that transportation by the total number of barrels included therein.

The plaintiff's "actual costs and expenses of carrying oil" were 7.8 cents per barrel in 1918, 7.6 cents in 1919, 10.7 cents in 1920, and 8.8 cents in 1921. This finding is supported by uncontradicted evidence based on a definite computation made after the oil was carried and the costs and expenses were incurred. Two other findings are to the effect that the charges for carrying oil for Cosden & Co. were "sufficient to take care of the actual costs and expenses" of that service. But these findings must be put aside. They rest entirely on a statement by one of the witnesses that the charges were fixed periodically by estimating in advance "what the expenses of operating the pipe line would be" and "how much oil would be pumped into the pipe line," and are inconsistent with uncontradicted evidence showing the amount of oil carried and the actual costs and expenses as definitely computed after the transportation was completed.

The trial court concluded as matter of law that where the plaintiff made and collected a charge for carrying oil that charge became, under the applicable statutes, the sole and exclusive basis for the collection of the transportation tax. It therefore held the additional assessment in the first and second claims wholly invalid and gave the plaintiff an award for all that had been exacted from it under those assessments. The court of appeals sustained that ruling.

The applicable statutes are sections 500, 501 and 503, of the Revenue Act of 1917,[9] which was controlling at the time of the transportation in the first claim, and sections 500–502 of the Revenue Act of 1918[10] which was controlling at the time of the transportation in the second claim.

The Act of 1917, in section 500(d) imposed on the "transportation of oil by pipe line" a tax "equivalent to 5 per centum of the amount paid" therefor; in the first paragraph of section 501 declared the tax should be paid by the person "paying for" the transportation; and in section 503 laid on the carrier a duty to collect the tax from the person paying for the transportation, to make informative monthly returns under oath, and to pay to the collector of internal revenue all taxes so collected by it and "the taxes imposed upon it" under the second paragraph of section 501, which declared:

"In case such carrier does not, because of its ownership of the commodity transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such commodity if the carrier received payment for such transportation: *Provided*, That in case of a carrier which on May 1, 1917, had no rates or tariffs on file with the proper Federal or State authority, the tax shall be computed on the basis of the rates or tariffs of other carriers for like services as ascertained and determined by the Commissioner of Internal Revenue."

The Act of 1918, in its sections 500(e), 501(a) and 502, reenacted these provisions, save that it increased the tax to 8 per centum and substituted for the second paragraph of section 501 the following:

"SEC. 501. (d) The tax imposed by subdivision (e) of section 500 shall apply to all transportation of oil by pipe line. In case no charge for transportation is

[9] Ch. 63, 40 Stat., 300, 314.
[10] Ch. 18, 40 Stat., 1057, 1101.

made, by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation, and if the tax can not be computed from actual bona fide rates or tariffs, it shall be computed (1) on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or (2) if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner."

We can not assent to the construction which the courts below placed on these statutes. It must be conceded that the statutes are not happily phrased and that some of their provisions separately considered give color to that construction. But the statutes are to be considered, each in its entirety and not as if each of its provisions was independent and unaffected by the others. Although imposing a tax, they are to be construed reasonably and the intent and purpose of each is to be ascertained by examining all of its provisions.

From such an examination we are of opinion that both statutes disclose—that of 1917 by plain implication and that of 1918 by express declaration—an intent and purpose to impose the tax on all "transportation" of oil by pipe line—whether the pipe line be a common carrier or a private carrier, and whether it be transporting its own oil or that of others. The Revenue Bureau has so construed them[11] and that construction has received judicial approval.[12]

Plainly both statutes disclose an intent and purpose to lay the tax equally on all transportation of oil by pipe line and to prevent exceptional relations or conditions from effecting a departure from that standard. In the main both proceed on the assumption that usually carriers will charge and shippers pay the customary commercial rate for the transportation, and therefore that the amount charged and paid will be in most instances a fair basis on which to compute the tax. But neither statute stops there. Both recognize that there may be cases where the carrier, by reason of owning the oil or for other reasons, does not receive the compensation which it otherwise would receive; and both provide, although in somewhat different terms, for using the rates of other carriers for like services as a basis for computing the tax in such cases. We do not overlook the clause "if the carrier received payment for such transportation" in the provision of the 1917 Act, nor the clause "in case no charge for transportation is made" in the provision of the 1918 Act. But we think it apparent from each of the Acts as a whole that the words "payment" and "charge" in the quoted clauses mean a payment and charge reasonably appropriate for the service rendered. The provisions in which those words are found distinctly reflect the sense in which the words are used, for they make the rates of other carriers for like services—in short, the commercial rates in that vicinity—an alternative or substitute basis for computing the tax. Obviously the provisions do not mean that a merely nominal payment or charge will avoid the tax, for this would render them absurd; and if that be not their meaning we perceive no meaning other than that before stated which reasonably can be attributed to them.

It is said that the Commissioner of Internal Revenue has construed the provisions last considered as not including instances where there is an actual payment, even though it be much below the customary charge, and we are asked to give effect to that construction. In this the fact is overlooked that it was the Commissioner who made the additional assessments now in question and refused the application for a refund. But it does appear that while this suit has been pending the Commissioner in several instances has allowed applications for a refund on the basis of the construction now asserted. Of that construction it suffices to say that it has been neither uniform nor of long standing, and that in these circumstances we would not be justified in yielding to it.

When the statutes as we construe them are applied to the evidence and the special findings it is plain that the defendant's motion for judgment in his favor on the evidence is not well taken as to the first and second claims, and

[11] Treasury Regulations 49, article 92, as amended by Treasury Decision 3197, of July 18, 1921; Commissioner's Instructions, September 6, 1921.

[12] *Meischke-Smith* v. *Wardell* (286 Fed., 785 [T. D. 3461, C. B. II–1, 256]); *Motter* v. *Derby Oil Co.* (16 F. (2d), 717 [T. D. 3965, C. B. VI–1, 294]); *Dixie Oil Co.* v. *United States* (24 F. (2d), 804 [T. D. 4166, C. B. VII–1, 295]); *Alexander* v. *Carter Oil Co.* (53 F. (2d), 964); *Standard Oil Co.* v. *McLaughlin* (67 F. (2d), 110 [Ct. D. 779, page 402, this Bulletin]).

that his objection that the special findings do not as to them support the judgment rendered against him is well taken. Under the evidence, and also the findings, the transportation involved in these claims was a gathering service and the proper charge therefor on which to base the tax was 12½ cents per barrel. The charges of 5 and 10 cents per barrel actually collected by the plaintiff were not appropriate for the service rendered. The plaintiff had been varying its charges without regard to the cost of the service or purpose to make the same charge to one patron as to another, and had no fixed rate that was appropriate. It therefore was necessary to resort to the accustomed rate of other carriers in the same field as a basis for the tax. Their accustomed rate for gathering service was 12½ cents per barrel. The additional assessments were made on a basis of 20 cents per barrel, and to the extent that they rested on the difference between a rate of 12½ cents and a rate of 20 cents they were excessive and invalid. As the plaintiff had paid the excess it was entitled to recover it, but the recovery should not have included what was attributable to the gathering charge of 12½ cents per barrel.

The judgments of both courts must be reversed as to the first and second claims and the cause remanded to the district court with directions to render judgment on the findings as to these claims in conformity with the views expressed in this opinion and to respect the decision of the Circuit Court of Appeals on the third and fourth claims and the remittitur given thereunder.

Judgments reversed.

CAPITAL STOCK TAX.

TITLE VII.—SPECIAL TAXES. (1924)

SECTION 700.—CAPITAL STOCK TAX.

REGULATIONS 64 (1924), ARTICLE 11: Basis of the tax: "Carrying on or doing business." XIII–16–6759 Ct. D. 816

CAPITAL STOCK TAX—REVENUE ACTS OF 1918, 1921, AND 1924—DECISION OF COURT.

1. MASSACHUSETTS TRUST—TAXABLE AS ASSOCIATION—CARRYING ON BUSINESS.

A Massachusetts investment trust which was established in 1919 to continue for a designated period, its assets consisting of stock in certain companies, and the trust instrument granting to the trustees broad powers of management and limiting the power of the sole beneficiary to the election of successor trustees in case of death or resignation of a trustee, and which during the years 1920 to 1926 sold and exchanged certain securities originally in the corpus of the trust, purchased and sold securities not connected with corporations represented in the original corpus, received stock dividends, loaned and borrowed money, and purchased an interest in an oil syndicate, is subject to capital stock tax as an "association" which was "doing business" in each taxable year, within the meaning of section 1000(a) of the Revenue Acts of 1918 and 1921 and section 700(a) of the Revenue Act of 1924.

2. DECISION AFFIRMED.

Decision of the District Court, Southern District of New York (2 Fed. Supp., 716, Ct. D. 692, C. B. XII–1, 468), affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Henry Ittleson, Phillip W. Haberman, and Blanche F. Ittleson, as Trustees of Ittleson Investment Trust, plaintiffs-appellants, v. Charles W. Anderson, Collector of Internal Revenue, defendant-appellee.

[November 6, 1933.]

OPINION.

Appeal from the District Court for the Southern District of New York. Action by plaintiffs against the defendant to recover capital stock taxes paid under duress. Judgment for defendant; plaintiffs appeal. Affirmed.

MANTON, Circuit Judge: Appellants brought this action to recover capital stock taxes paid by a trust, established under the laws of Massachusetts, which were levied under the provisions of the Revenue Acts of 1918, 1921, and 1924, for the years 1921, 1922, 1923, 1924, 1925, and 1926. The taxes are based on the claim that the trust, of which the appellants are trustees, is a business association and subject to the capital stock tax on the same basis as corporations. The provisions of the three taxing Acts are substantially the same and impose annually a special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000

(Revenue Act of 1918, section 1000, 40 Stat., 1126). The taxes imposed by this section do not apply in any year to any corporation which was not engaged in business during the preceding year ending June 30. And section 1 of the Revenue Act of 1918 defines corporations as including associations, joint-stock companies and insurance companies.

The trust, for which the appellants are trustees, was established in 1919 by the named beneficiary. By Article IX of the declaration of trust, the duration of the trust is limited to the lives of the grantor and the members of his immediate family and an additional period of three years. At the time of its creation, he conveyed property to himself and two cotrustees to be held in trust for the benefit of the holders of certificates of beneficial interest. Two certificates, representing the entire beneficial interest, were issued to the grantor as a single beneficiary, and the beneficial interest remained so throughout the entire period in question. The property consisted of five blocks of stock, most of which remained unsold from the inception of the trust throughout the tax years in question. The trustees collected the dividends and interest from the trust investments and paid over part of the income to the grantor as the sole beneficiary. Most of the remainder of the income was reinvested by loaning it to the grantor, and, in one or two instances, with his approval, to companies in which he was interested. Provisions were made in the trust instrument for the election of officers, appointing executive committees and for a common seal, but none of these devices was used. The trustees assumed and carried on entire control over the trust. The beneficiary was empowered to elect successor trustees in case of death or resignation, but had no power to remove trustees.

The appellants maintain that the trust was not an association within the Revenue Acts in question because (*a*) there was but one beneficiary of the trust and therefore there could not be any association, statutory or otherwise; (*b*) that the appellants, during the years in question, were not engaged as trustees in carrying on a business enterprise; and (*c*) that the trust instrument did not provide for a quasi corporate form of organization.

As to (*a*) the argument is advanced that a single beneficiary can not constitute an association, as that term is used, because an essential ingredient of an association is a union of at least two persons for the prosecution of some common enterprise (*Hecht* v. *Malley*, 265 U. S., 144 [T. D. 3595, C. B. III-1, 489]). It is true that the definition of an association as a "body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise," stated in *Hecht* v. *Malley*, supra, suggests the presence of not only the methods and forms of a corporation but also a plurality of persons united in the use of such forms and methods. Usually there are a number of trustees and of beneficiaries in a business trust but there is no reason to say that every business trust must have more than one trustee and more than one beneficiary at all times. This tax is a special excise on the privilege of doing business in a certain form. The test is whether or not business is being conducted in a quasi corporate form. (*Hecht* v. *Malley*, supra.) The fact that negotiable shares of beneficial interest, which may be transferred at any time, may be lodged in the hands of one beneficiary for a time or even for the duration of the association does not change the fact that the business is being conducted by the trustees in quasi corporate form.

After the decision in *Hecht* v. *Malley* (265 U. S., 144), the Treasury Department, in conformity with that opinion, promulgated article 1504, Regulations 65, providing:

"Holding trusts, in which the trustees are merely holding property for the collection of the income and its distribution among the beneficiaries, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, are not associations within the meaning of the law. The trust and beneficiaries thereof will be subject to tax as provided in articles 341–347. Operating trusts, whether or not of the Massachusetts type, in which the trustees are not restricted to the mere collection of funds and their payments to the beneficiaries, but are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise, are to be deemed associations within the meaning of the Act, regardless of the control exercised by the beneficiaries."

This regulation is not only in conformity with the authority of the statute, but has found approval in the decided cases (*Hecht* v. *Malley*, 265 U. S., 144, 161; *Sloan* v. *Commissioner*, 64 Fed. (2d), 666 (C. C. A. 9); *White* v. *Hornblower*, 27 Fed. (2d), 777 (C. C. A. 1). The rule is that control by the beneficiary is not the determinative factor in deciding whether a Massachusetts trust, engaged in doing business, is subject to the Federal tax as an association. This rule supports the view here adopted that a trust may be an association even though the negotiable certificates of beneficial interest are held by one beneficiary.

As to (*b*), this trust was created in Massachusetts on December 31, 1919, and in addition to the terms referred to, the trust instrument recites as its general purposes, the investment and liquidation of the trust estate and gives the trustees power to engage in any business to promote the general purposes and provides for transferable certificates of beneficial participation. It provided all the powers of administration usual in the form of business associations known as a Massachusetts trust. It has been authoritatively settled that such a trust may be an association within the Revenue Acts. (*Hecht* v. *Malley*, 265 U. S., 144.) Many trusts have been held taxable as associations. (*Sloan* v. *Commissioner*, 63 Fed. (2d), 666 (C. C. A. 9); *Merchants Trust Co.* v. *Welch*, 59 Fed. (2d), 630 (C. C. A. 9); *Trust No 5833* v. *Welch*, 54 Fed. (2d), 323 (C. C. A. 9) [Ct. D. 490, C. B. XI–1, 138]; *Little Four Oil & Gas Co.* v. *Lewellyn*, 35 Fed. (2d), 149 (C. C. A. 3) [Ct. D. 118, C. B. VIII–2, 264]; *United States* v. *Neal*, 28 Fed. (2d), 1022 (C. C. A. 1).) Other trusts have been held not to be taxable as an association. (*Lansdowne Realty Trust* v. *Commissioner*, 50 Fed. (2d), 56 (C. C. A. 1); *Gardiner* v. *United States*, 49 Fed. (2d), 992 (C. C. A. 1); *Allen* v. *Commissioner*, 49 Fed. (2d), 717 [Ct. D. 417, C. B. X–2, 315].)

An examination of these cases indicates the rule to be that whether or not a particular trust is taxable as an association depends not so much upon the extent of the powers given to the trustees in the deed of trust but rather upon the nature of the activities of the trustees and the use they make of the powers given to them. (*Gardiner* v. *United States*, supra.) A distinction is to be drawn between the activities of trustees under a strict trust as distinguished from the activities under a business trust. Even in the strict trust the activities of the trustees, in preserving the trust estate, may partake of the nature of business transactions. It is a matter of degree. When, on the one hand, the trustees promote and conduct a particular business enterprise with the trust estate, it is considered an association. The usual type is a trust for the development of real estate (*Trust No. 5833* v. *Welch*, supra) or for the active management of developed real estate (*United States* v. *Neal*, supra). When, on the other hand, a trustee is merely engaged in the amount of business activity necessary to preserve the corpus and otherwise discharge the functions traditionally attributable to a strict trust, it is not treated as an association. (*Lansdowne* v. *Commissioner*, supra; *Gardiner* v. *Commissioner*, supra; *Allen* v. *Commissioner*, supra.) Between these extremes is the field where trustees in the management of trust property engage in considerable business activity and the question then presented is whether they function as a business organization or merely as trustees under the modern conception of what a strict trustee has a duty and right to do.

In the present case, the trustees were not engaged in the promotion or preservation of a specific trust res like real estate as in the cases cited but were entrusted with shares of stock which we may expect to be subject to considerable activity and exchange even in the hands of trustees under a strict trust. Preservation of the corpus requires acceptance of stock dividends, exercise of stock rights, and, in some cases, sale, exchange and purchase of stock. In the modern use of the trust device a trustee of the strict trust, traditionally concerned with preservation, may engage in some activities with a view of an accretion to the corpus. A distinction between a strict and business trust can not be made solely upon the presence or absence of the profit motive. When that motive exists in a strict trust, it is to a restricted extent. When the trustee of an estate consising of securities engages in considerable business activity and is trading those securities and loans and invests the proceeds so that he is in reality conducting an investment business for profit, then the estate is in business and is taxable as an association.

Examining the activities of the trust in the instant case, for the years in question, it will be noticed that some of the securities originally in the corpus were sold; others were exchanged for stock of corporations controlled by the sole beneficiary; stock dividends were received; money was borrowed to exercise stock rights; loans were made to the beneficiary and to corporations he controlled; notes of a corporation, whose stock was in the original trust estate and retained there, were bought and sold the next year; stock and bonds of the corporations not connected with the corporations represented in the original corpus were purchased and sold within the year or in the next year on two occasions; and an interest in an oil syndicate was purchased. Activities such as the purchase and sale of stock and bonds of corporations not connected with the corporations represented in the original corpus and the purchase of an interest in an oil syndicate for profit (May Stores stock, United States Public Service bonds; Amster Syndicate) were sufficient upon which to base a finding that this was a business trust, although the other activities of the trustees considered alone might well have been within the limits of a strict trust.

The issues were tried before a jury of one but both sides moved for the direction of a verdict without more and a decision was made by the court on this issue of fact. Since both parties moved for a direction of a verdict, a finding by a court having substantial evidence to support it is conclusive upon us. (*Williams* v. *Vreeland*, 250 U. S., 295.) On this finding, the judgment below must be supported, even though other activities of the trust referred to may well be argued not to come within the limits of a business trust.

The question remains whether the evidence warrants a finding that the trust was engaged in business in each taxable year. There is some evidence supporting the finding below that they were engaged in business during each of the years in question. In these circumstances, the trust was taxable as an association engaged in business in each taxable year. (*Edwards* v. *Chile Copper Co.*, 270 U. S., 452 [T. D. 3857, C. B. V-1, 410]; *Argonaut Consolidated Co.* v. *Anderson*, 52 Fed. (2d), 55 (C. C. A. 2) [Ct. D. 404, C. B. X-2, 441].)

Since the activities of the trust were found below, with evidence to support that finding, to be engaged in business during each taxable year, the judgment is affirmed.

MISCELLANEOUS TAX RULINGS.

TITLE V.—MISCELLANEOUS TAXES. (1932)

SECTION 701.—TELEGRAPH, TELEPHONE, RADIO, AND CABLE FACILITIES.

REGULATIONS 42, ARTICLE 3: Basis and rate of tax. XIII–25–6861
S. T. 744

Taxability of payments by a radio broadcasting station for "time wire service."

The question is presented whether payments made to a telegraph or telephone company by a radio broadcasting station for "time wire service" are taxable under section 701 of the Revenue Act of 1932.

The X Broadcasting Station receives news items daily over the facilities of the Y Telegraph Co. and the Z Telephone Co. The charges for each type of service are based upon the actual time the service is in use.

Section 701 of the Revenue Act of 1932 imposes a tax upon payments for the transmission of telegraph, telephone, cable, or radio dispatches, messages, and conversations originating within the United States. The only exemption applicable to radio broadcasting stations or networks is that contained in section 701(a)2, which relates only to amounts paid for so much of a leased wire or talking circuit special service furnished to such stations or networks as is utilized in the conduct of their business as such.

It is clear that neither the service furnished by the Y Telegraph Co. nor the Z Telephone Co. is a leased wire or talking circuit special service. Consequently, the exemption provided by section 701(a)2 does not apply.

The exemption provided in section 701(b) with respect to payments for services or facilities utilized in the collection of news for, or in the dissemination of news through, the public press is applicable only to payments made by newspapers or press associations for messages from one newspaper or press association to another newspaper or press association, or to or from their bona fide correspondents which deal exclusively with the collection of news for the public press, or with the dissemination of news through the public press. (Article 20 of Regulations 42; S. T. 646, C. B. XII–1, 422.) The payments in question are not made for services or facilities utilized for any of the purposes specified in section 701(b). Accordingly, the exemption therein provided is not applicable.

In view of the foregoing, it is held that the payments made by the X Broadcasting Station to the Y Telegraph Co. and the Z Telephone Co. for the facilities referred to are taxable under section 701 of the Revenue Act of 1932.

SECTION 500 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 711 OF THE REVENUE ACT OF 1932.—ADMISSIONS.

REGULATIONS 43, ARTICLE 12: Admissions to which exemption applies. XIII–2–6594 S. T. 715

The M Benevolent Association, which pays sick benefits to its members in return for dues, is not a charitable organization. Admissions to entertainments for the benefit of such an organization are not exempt from tax.

A ruling is requested whether admissions to entertainments, all the proceeds of which inure to the benefit of the M Benevolent Association, are exempt from tax on the ground that the association is a charitable organization.

The association was organized for mutual assistance and the promotion of friendly interests and social enjoyment among its members, consisting of employees of the M Company. Membership continues during employment and dues and benefits are measured by the salaries received from the M Company. A committee composed of members of the association has charge of all entertainments.

Under the provisions of section 500 of the Revenue Act of 1926, as amended by section 711 of the Revenue Act of 1932, admissions, with certain exceptions not here material, all the proceeds of which inure exclusively to the benefit of a charitable institution, society, or organization are not subject to tax.

The term "charitable" contemplates some public benefit open to an indefinite number of persons. Where the purpose of an organization is personal or private, it is not, in a legal sense, charitable. In other words, it is only where the purpose to be accomplished is that of public usefulness untainted by personal or private consideration that the organization is entitled to exemption on the ground that it is organized and operated exclusively for charitable purposes. (I. T. 2291, C. B. V–1, 82.)

Where an organization pays benefits to its members on a contractual basis and they are entitled to definite benefits in return for dues paid, the organization is not a charitable organization, within the meaning of the law.

It is held that the M Benevolent Association is not a charitable organization and that proceeds of admissions to entertainments for its benefit are not exempt from tax.

SCHEDULE A–3 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 723 OF THE REVENUE ACT OF 1932.

REGULATIONS 71, ARTICLE 34: Sales or transfers subject to tax. XIII–6–6645 S. T. 723

Transfers of stock from the nominee of a decedent to the decedent's executor are taxable.

The question is presented whether a transfer of stock from the name of the decedent's nominee to the executor of the decedent is subject to the stamp tax imposed upon the transfer of legal title to stock by Schedule A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932.

The law cited imposes a stamp tax upon sales or transfers of shares and certificates of corporate stock. The tax so imposed is levied upon the various acts specified in the law. (*Goodyear Tire & Rubber Co.* v. *United States*, 273 U. S., 100 [T. D. 3992, C. B. VI-1, 332].)

Article 35(r) of Regulations 71 reads as follows:

> Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

If the decedent were living a transfer of stock to him from his nominee would constitute a taxable transfer. Inasmuch as the executor of the decedent represents the decedent a transfer of stock from the decedent's nominee to the decedent's executor has the same status as a transfer from the nominee to the decedent during his lifetime.

It is held that a transfer of stock from the decedent's nominee to the executor of the decedent is a transfer resulting from the voluntary act of the parties and not wholly by operation of law. Accordingly, such a transfer is subject to the stamp tax imposed by Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

SCHEDULE A-3 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 723(a) OF THE REVENUE ACT OF 1932, AND SCHEDULE A-9, AS ADDED BY SECTION 724(a) OF THE REVENUE ACT OF 1932.

REGULATIONS 71, ARTICLE 136: Parties to taxable instrument liable. XIII-15-6747 S. T. 735

Liability for stamp tax on the transfer by or to a Federal agency of bonds or stock of a private corporation.

The stamp taxes in question are imposed under Title VIII of the Revenue Act of 1926, as amended by the Revenue Acts of 1928 and 1932. Section 800 of that title provides that:

> On and after the expiration of 30 days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. * * *

The provisions of law quoted are controlling with respect to all stamp taxes imposed under that title. The law clearly imposes a dual liability for these stamp taxes, one resting upon the person who makes, signs, or issues the document, the other resting upon the one for whose benefit the same is made, signed, or issued. (*Granby Mercantile Co.* v. *Webster*, 98 Fed., 604; *Home Title Insurance Co. of New York* v. *Keith*, 230 Fed., 905.)

Where a Federal agency, expressly or impliedly exempt from tax by the Federal Government, is the transferor or transferee of bonds or stock of a private corporation the tax will be payable by and collectible from other parties to the transactions who are not entitled to exemption. The circumstance that the burden of the tax may sometimes be shifted to the exempt Federal agency is insufficient to warrant exemption. Where, however, exemption is granted with respect to an instrument, such as that contained in section 801 of the Revenue Act of 1926 relating to instruments issued by the United States, foreign governments, States, political subdivisions, etc., neither party to the transaction is liable.

SCHEDULE A-8 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS ADDED BY SECTION 725 OF THE REVENUE ACT OF 1932.—CONVEYANCES.

REGULATIONS 71, ARTICLE 77: Tax, how computed. XIII-17-6768 S. T. 737

Computation of stamp tax on conveyances.

Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932, imposes a stamp tax on conveyances of realty sold when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100. Inquiry is made as to the amount of stamp taxes due in the following cases:

(1) A, the owner of certain real estate, sold it to B for a consideration of $4,000. B paid the amount of $2,500 in cash, leaving a balance due of $1,500. A accepted bonds of the Home Owners' Loan Corporation for the balance of $1,500, and gave B a deed to the property.

Question. Should the stamp tax be based upon the original purchase price of $4,000, or upon the balance of $1,500?

Answer. Inasmuch as the consideration for the deed conveying title to the property was $4,000, the tax should be computed on that amount.

(2) The holder of a trust deed in the amount of $2,000 foreclosed upon the property securing the deed. At the foreclosure sale, because of taxes and additional expenses incurred, the holder of the trust deed bid in the property for $2,500, and a public trustee's deed was issued to him. The purchaser then accepted bonds of the Home Owners' Loan Corporation in the amount of $1,500 as consideration for the retransfer of the property to the former owner.

Question. (*a*) In what sum should revenue stamps be placed on the public trustee's deed? (*b*) Will the deed conveying the property to the former owner require any revenue stamps; if so, in what amount?

Answer. (*a*) The tax should be computed on the amount bid for the property plus any costs paid by the purchaser at the foreclosure sale. (*b*) The deed from the purchaser to the former owner of the property is a conveyance of realty sold and the tax should be computed upon the amount paid, namely, $1,500.

Regulations 71, Article 79: "Sold" defined. XIII–2–6595 S. T. 716

A deed reconveying real property from mortgagee to mortgagor for a valuable consideration is taxable.

Question is presented whether a deed of conveyance executed under the following circumstances is subject to the stamp tax imposed by Schedule A–8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

To avoid foreclosure proceedings, A (mortgagor) deeded real property covered by a mortgage to B (mortgagee) in consideration of the cancellation of the mortgage debt. This transaction is clearly taxable. (Article 112, Regulations 71.) To enable A to secure a loan from the M Corporation, B deeded the property back to A on the condition that the indebtedness of A to B would be paid out of the proceeds of the loan. The question to be decided is whether the deed from B to A is subject to tax.

Inasmuch as it appears that A's indebtedness to B on reconveyance of the property is to be paid in full or to the extent of the proceeds of any loan A may obtain from the M Corporation, it is clear that the deed from B to A was made for a valuable consideration and is therefore tantamount to a sale. (Article 79, Regulations 71.) It follows, therefore, that such deed is subject to the tax, computed upon the total amount of the indebtedness reassumed by A.

Regulations 71, Article 84: What constitutes real property determinable by law of State where located. XIII–18–6777 G. C. M. 13035

An instrument granting a permanent right of way or easement with respect to land in certain States is taxable as a conveyance of "lands, tenements, or other realty."

Advice is requested whether an instrument granting a permanent right of way or easement with respect to land in Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania, and West Virginia is subject to the stamp tax imposed by Schedule A–8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

Schedule A–8 of Title VIII of the Revenue Act of 1926 imposes a stamp tax on any "Deed, instrument, or writing * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, * * *," when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100.

By the terms of the typical instrument submitted the grantor gives and grants to the grantee, its successors and assigns, "the permanent right and easement to construct, operate, and maintain two (2) electric transmission lines, consisting of the necessary towers, wires, fixtures and appliances" over certain described realty. The instrument contains, among other provisions, the following:

Together with the right to enter upon said strip of land (but not upon grantor's lands outside the boundaries thereof) at all times for the purpose of constructing, reconstructing, inspecting, repairing, renewing and maintaining or removing said towers, wires and other parts of said transmission lines and the right to prohibit or prevent at all times the construction or maintenance of any buildings or permanent structures within the limits of said strip of land except as hereinafter provided, and the right at all times to trim and cut down any trees or remove any other obstructions within said strip of land which standard practice for the construction, operation and maintenance of such transmission lines reasonably requires.

The grantor herein, for itself, its successors and assigns, hereby reserves the right to place filling material to raise the ground line, as hereinbefore provided, in any manner said grantor, its successors and assigns, may elect, provided said filling material does not come in contact with the towers of the grantee herein, its successors and assigns, and provided further that if said filling interferes with the natural drainage from said towers, said grantor, its successors and assigns, shall provide suitable drainage for the site of said towers.

The grantor herein, for itself and its successors and assigns, further agrees that those parts of any buildings constructed by the grantor herein, its successors and assigns, within the said most easterly and most westerly twenty-five (25) feet of said strip of land shall not be used for storing explosives, oil, gasoline or other highly inflammable material.

TO HAVE AND TO HOLD the above granted and bargained right-of-way and easement unto said grantee, its successors and assigns forever, subject to the rights and conditions hereinabove set forth.

It is clear that the instrument in question is intended to convey and actually does convey in perpetuity a right in the land of the grantor, which right constitutes a servitude or easement. Although it is in reality an easement in gross, in that there is apparently no dominant tenement to which the right in the land of the servient tenement is attached, nevertheless, it is an easement or right in the land of another, without profit to the grantee. Such a servitude or easement is, generally, an incorporeal hereditament, and as such constitutes an interest in real property.

For stamp tax purposes, however, the law of the State in which the property is situated determines what constitutes "lands, tenements, or other realty." (Article 84 of Regulations 71.)

ILLINOIS.

Under the law of Illinois the instrument in question constitutes a perpetual easement. The interest conveyed thereby comes within the term "estate in lands," and is an estate in fee under the Illinois law. (*D. M. Goodwillie Co.* v. *Commonwealth Electric Co. et al.*, 241 Ill., 42, 89 N. E., 272.)

INDIANA.

Section 900, Burn's Annotated Statutes of Indiana, 1926, contains the following:

The word "land," and the phrases "real estate" and "real property" include lands, tenements and hereditaments.

In *Adams et al.* v. *Merrill* (45 Ind. App., 315, 85 N. E., 114), the Appellate Court of Indiana held that the foregoing definition included "incorporeal hereditaments." In *Branson* v. *Studebaker*

(133 Ind., 147, 33 N. E., 98), the Supreme Court of Indiana said "A fee may exist in an incorporeal hereditament, and may, of course under this principle, exist in an easement."

MICHIGAN.

Section 76(9) of the 1929 Compiled Laws of Michigan reads as follows:

The word "land," or "lands," and the words "real estate," shall be construed to include lands, tenements, and real estate, and all rights thereto, and interests therein;

See also Michigan uniform partnership act, section 2.

In *Smith et al.* v. *Kennedy et al.* (224 Mich., 378, 194 N. W., 998), the Supreme Court of Michigan recognized an easement in gross as valid in the State of Michigan. In *Mahar* v. *Grand Rapids Terminal Ry. Co.* (174 Mich., 138, 140 N. W., 535), it was held that an easement in gross may be granted in perpetuity and may be created in fee, so that the fee of the land is in one person and the fee of the easement upon such land is in another. In *Epworth Assembly* v. *Ludington & N. Ry.* (236 Mich., 565, 211 N. W., 99), the Supreme Court of Michigan held, in considering the grant of an easement, that the test of determination is the intention of the parties. In the instant case it is clear that the grantor intended to grant in perpetuity a permanent easement, which was a perpetual restriction on his own use of the land and a perpetual right in another to use the land for certain purposes.

NEW YORK.

Section 40 of the "general construction law" of New York (ch. 23, Cahill's Consolidated Laws, 1930) provides that "The term 'real property' includes real estate, lands, tenements and hereditaments, corporeal and incorporeal." It was held in the case of *In re Niagara Falls & W. R. Co.* (85 N. Y. Stat. Rep., 546) that an easement, although only an incorporeal right, and appurtenant to the dominant tenement, is properly denominated an interest in the land which constitutes the servient tenement, and that the expression "an estate or interest in land," when used in a statute, is broad enough to include such right.

OHIO.

Section 4677 of the Ohio General Code provides that the terms "land" and "real estate" include rights and easements of an incorporeal nature. In that State a permanent right of way clearly constitutes "lands, tenements, or other realty."

PENNSYLVANIA.

In *Tide-Water Pipe Co., Ltd.*, v. *Bell* (280 Pa., 104, 124 Atl., 351), the Supreme Court of Pennsylvania held that a right of way or easement, or servitude, in perpetuity, is an estate or interest in lands. (See also *Nauman* v. *Treen Box Co.*, 280 Pa., 97, 124 Atl., 349.)

WEST VIRGINIA.

Under the law of West Virginia a right of way secured by grant is an incorporeal hereditament, and may be the subject of grant, devise, or inheritance. (*McClung* v. *Sewell Valley R. Co.*, 97 W. Va., 685, 127 S. E., 53.) In that case reference is made, with approval, to the decision in *Uhl* v. *Ohio River R. Co. et al.* (41 S. E., 340, 343), in which the Supreme Court of West Virginia held that a grant of a perpetual right of way conveyed an easement in fee, that is, an incorporeal hereditament.

In view of the foregoing, it is held that the instrument above referred to, when executed and delivered with respect to land in any of the States mentioned, operates as a conveyance of "lands, tenements, or other realty," and is subject to the tax imposed by Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 751.—CHECKS, ETC.

REGULATIONS 42, ARTICLE 36: Scope of tax. XIII-21-6810
S. T. 740

Checks drawn by municipal officials against funds deposited to the credit of a municipal liquor store are taxable.

A municipality operates a liquor store. Two separate checking accounts are maintained, one for the municipality proper and the other for the municipal liquor store. Inquiry is made whether checks drawn by the municipal officials against funds deposited in the account of the municipal liquor store are subject to tax.

Section 751(a) of the Revenue Act of 1932 imposes a tax of 2 cents upon each check, draft, or order for the payment of money, drawn upon any bank, banker, or trust company. Article 36 of Regulations 42, as amended by Treasury Decision 4396 (C. B. XII-2, 355), provides that—

> * * * Checks, drafts, or orders drawn against public funds by officers of a State or political subdivision thereof are not subject to the tax where drawn in connection with the exercise of an essential governmental function. The term "public funds" as here used includes funds on deposit for the benefit of the public.

States and political subdivisions thereof have a dual character and possess two kinds of power—one that is governmental and one that is proprietary. The Supreme Court of the United States in *South Carolina* v. *United States* (199 U. S., 437) held that the operation by the State of South Carolina of dispensaries for the wholesale and retail sale of liquor constituted the exercise of a proprietary rather than an essential governmental function of the State, and that the Federal Government had the power to levy license taxes against the State with respect to such activity.

In view of the foregoing, it is held that a municipality in operating a municipal liquor store is not engaged in the exercise of an essential governmental function; that checks drawn by municipal officers against funds on deposit to the credit of a municipal liquor store are not drawn against public funds "in connection with the exercise of an essential governmental function," within the purview of the regulations; and that such checks are subject to tax.

TITLE V.—ADMISSIONS AND DUES. (1926)

SECTION 500(a)1 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 411(a) OF THE REVENUE ACT OF 1928 AND SECTION 711(a) OF THE REVENUE ACT OF 1932, AND SECTION 500(a)5 OF THE REVENUE ACT OF 1926.—ADMISSIONS AND DUES.

Regulations 43, Article 10: Basis, rate, and computation of tax. (Also Article 1.) XIII-9-6681 S. T. 726

Computation of tax on admissions to dances, cabarets, etc., where there is a minimum charge per person.

A ruling is requested relative to the proper method of computing the tax on admissions to dances, cabarets, etc., where there is a minimum charge per person and food and/or beverages may or may not be ordered by the patrons to the amount of the minimum charge.

Section 500(a)1 of the Revenue Act of 1926, as amended by section 411(a) of the Revenue Act of 1928 and by section 711(a) of the Revenue Act of 1932, imposes a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place. Section 500(a)5 of the Revenue Act of 1926 imposes a tax as follows:

(5) A tax of 1½ cents for each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise. Where the amount paid for admission is 50 cents or less, no tax shall be imposed.

Where a minimum charge is made for each person admitted to a particular place, the amount of such charge is an admission charge within the meaning of section 500(a)1 of the Revenue Act of 1926, as amended, and is subject to the tax imposed by that section. If the menu prices at this place are higher at the time when dancing and entertainment are furnished, it is held that the charge for admission is included in the charge made for refreshments, service, or merchandise. In that event 20 per cent of such charge is taxable under section 500(a)5 of the Revenue Act of 1926, provided the entire amount of each bill less the minimum charge exceeds $2.50.

Where a fixed and definite charge is made for admission, which charge includes the cost of dinner and dancing, the entire charge is an admission charge within the meaning of section 500(a)1 of the Revenue Act of 1926, as amended, and is subject to the tax imposed by that section.

TAX ON DUES.

REGULATIONS 43–II, ARTICLE 5: Social clubs. XIII–22–6821
Ct. D. 833

TAX ON DUES—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. SOCIAL CLUB—CHARACTER OF ORGANIZATION.

A club organized to maintain a center for investigation and improvement of the civic, business, and social affairs of a community and to provide a club room, library, and other conveniences for the entertainment and recreation of its members and guests, and whose functions include both social and educational, civic, or artistic activities, is a social club within the meaning of section 801 of the Revenue Act of 1921 and section 501 of the Revenue Acts of 1924 and 1926, where the facts disclose that its social functions constitute a material part of the club's activities.

2. DECISION AFFIRMED.

Decision of the district court (Ct. D. 561, C. B. XI–2, 552) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

9711. *The Town Club of St. Louis, a Corporation, appellant,* v. *United States of America, appellee.*

9712. *The Town Club of St. Louis, a Corporation, appellant,* v. *Louis J. Becker, Collector of Internal Revenue for the First District of Missouri, appellee.*

Appeals from the District Court of the United States for the Eastern District of Missouri.

[January 22, 1934.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

Appellant in cause No. 9711 sues the United States at law to recover the sum of $6,281.84 for taxes alleged to have been illegally paid during a period from April 9, 1924, to December 19, 1925. In cause No. 9712 the suit is against the collector of internal revenue to recover the sum of $10,522.14 for taxes alleged to have been illegally paid during the period beginning January 16, 1926, and ending March 31, 1928. Demand for refund was made and refused. A jury was waived and the two cases were by consent consolidated for trial and submitted to the court upon pleadings and proofs. The legal effect of the facts in the two cases is the same.

The taxes involved were assessed and collected under the provisions of section 801 of the Revenue Act of 1921, which provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 801 of the Revenue Act of 1918, a tax equivalent to 10 per centum of any amount paid on or after such date, for any period after such date, (a) as dues or membership fees (where the dues or fees of an active resident annual member are in excess of $10 per year) to any social, athletic, or sporting club or organization; or (b) as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees (not including initiation fees) of an active resident annual member are in excess of $10 per year; such taxes to be paid by the person paying such dues or fees: *Provided*, That there shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member, but shall pay no tax upon the amount paid for life membership."

This section was carried, without material change, into the Revenue Acts of 1924 and 1926, and may be referred to as the statutory law applicable to the cases under consideration. The appellant is an organization of St. Louis, Mo., women. It has approximately 2,000 members—perhaps more. As alleged in its petition, the club was organized under article 10, of chapter 33, Revised Statutes of Missouri, 1909, and amendments thereto, which provide for the organization of benevolent, religious, scientific, fraternal-beneficial, educational, and miscellaneous associations.

The articles of association, article 4, state the object and purpose of the club as follows:

"ART. 4. The object and purpose of the association shall be for the discussion of questions of commercial, industrial, civic, and social interest; for the encouragement of good reading and the cultivation of art and literature and rational social amusement; to aid and assist the industrial, commercial, civic and social development of the city of St. Louis, and more especially as they pertain to women; to provide, establish, and maintain a clubhouse or club rooms with library and other facilities appropriate and convenient for the entertainment of its members and their guests; and for the conduct of lawful and rational out-of-door play games and exercises; provided, however, that the association as such shall have no connection with partisan politics or partisan organizations, nor shall it ever be committed to the indorsement of any particular measure or measures."

The club's constitution, article 2, provides:

"The objects of this association shall be to provide and maintain an organized center for the investigation, discussion and improvement of the civic, business and social affairs of the city of St. Louis, and more especially as they pertain to women, and to provide club room, library and other conveniences for its members; provided that the organization as such shall never be committed to the indorsement of any particular measure."

Regulations No. 43, part 2, article 5, of the Treasury Department, which gives the departmental construction of section 801 of the Revenue Act of 1921, reads as follows:

"ART. 5. *Social clubs.*—Any organization which maintains quarters, arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a 'social * * * club or organization' within the meaning of the Act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, singing society, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization then it is 'social * * * club or organization' within the meaning of the Act. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is so clearly not a 'social * * * club or organization' that its possession and use of the building furnished with social club facilities does not render taxable dues or fees paid to it. Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system or are local fraternal organizations among the students of a college or university payments to them are expressly exempt."

This law was long administered by the Department in accordance with the foregoing definition, and "the substantial reenactment in later Acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation" (*Brewster* v. *Gage*, 280 U. S., 327, 337 [Ct. D. 148, C. B. IX–1, 274]); "for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government." (*National Lead Co.* v. *United States*, 252 U. S., 140, 147; *United States* v. *Bailey*, 9 Pet., 238, 256.)

The question presented, then, is whether appellant was, during the periods when the taxes sued for were assessed and exacted, a "social, athletic, or sporting club or organization" within the meaning of said section 801 of the applicable Revenue Act, and so subject to the taxes levied, or whether its functions were civic and/or educational, and so exempt. The court found the issues in favor of the Government. Appellant requested neither findings of fact nor conclusions of law, contenting itself with motions to modify those made by the court and for a new trial. As a strict matter of procedure the court made no specific findings. It discussed in its opinion certain facts deemed necessary to warrant the conclusion reached, and said that such findings and conclusions might be taken in lieu of a formal finding of facts and conclusions of law. In keeping with the liberal attitude of the trial court we may, perhaps, be justified in departing from the established procedural rule and inquire whether such findings support the judgment entered.

The so-called fact findings contained in the opinion follow:

"The evidence in the case at bar preponderantly disclosed that the activities of plaintiff were predominantly civic and educational, as contradistinguished from social. But this evidence came, for the most part, from officers of plaintiff who have had occasion to be wholly and closely familiar with plaintiff's activities only since 1928, or later; whereas, the period from April 9, 1924, and up to March 3, 1928, is the period involved in these controversies.

"To make out its contentions respecting the activities during the period between April 9, 1924, and March 3, 1928, the defendant offered many, if not all, of the issues of 'The Informant' (plaintiff's official publication), as also many—perhaps all—programs embodying plaintiff's activities between the dates last above-mentioned. None of these publications by plaintiff, subsequent to March, 1928, was offered, for the very simple reason that the club's activities for the latter period were not in dispute, nor in issue here. I have, however, carefully examined the programs of the club as issued by it between the years 1924 and 1928. These show that within the period named there were given or seemingly fostered by the club, that is, given under its auspices, 10 dances, 5 musicales, 2 picnics, 9 swimming parties, 5 teas, 14 card parties, 2 shows, 5 miscellaneous parties, luncheons, etc., and 11 other functions which may or not have been either educational or social, or mixed.

"During the same period there were a total of 97 functions which, in my opinion, were educational, artistic or civic.

"So, the totals stand, 52 clearly social; 97 clearly educational or civic or artistic, and 11 doubtful or mixed.

"The club had a lounge, used also as a library; a piano—perhaps three; a swimming pool, and maintains, and maintained, large and well-furnished quarters, including a kitchen and dining rooms, wherein meals are served to members and their guests."

Of course the court, in its opinion, merely summarized and digested the evidence adduced at the hearing, but it can not be said that the facts so found do not substantially support the conclusion reached. That conclusion and its basis is thus stated:

"I think the rule of the Department intends, and the proper construction of the statute is, that if any material, that is, important, substanial, part of the club's activities (but not necessarily as much as a moiety thereof) are social as contradistinguished from the remaining nonsocial activities, it is taxable; otherwise, of course, it is not taxable.

"As said already, thoroughgoing reliance can not be put on the language of either the articles of association or the constitution, or both. But both of these instruments may be considered in connection with the actual functions and activities of the plaintiff. So here, not only do the articles of association and constitution of the club prescribe as among its objects the providing and maintenance of 'an organized center for the investigation, discussion and improvement of the * * * social affairs of the city of St. Louis * * * as they pertain to women and to provide club rooms, library and other conveniences for its members,' but the programs and publications promulgated by the club show that during the period here in controversy, either 39 per cent or 58 per cent approximately (according to whether the 11 doubtful activities of the club are allocated to the one side or to the other) constituted matters which were social rather than civic, artistic or educational.

"I am not able to say that such a per cent of total activities does not constitute a material part of the club's functions."

The decision turns upon the question of whether the actual social activities of a club of this nature are so extensive as to form a material purpose of the association, or are merely subordinate and incidental to a predominate purpose. That purpose, as stated in the articles of association and constitution, while not conclusive, should of course be considered, and, it will be observed, as stated by the trial court, that both articles and constitution "give the same prominence to the social phase that they give to the educational and civic phases." Necessarily each case of this nature must be controlled by its own peculiar facts. For this reason cases will be found which support exemption from this tax. However, we think the facts before us support the conclusion reached by the trial court, and in the following cases among others: *Quadrangle Club* v. *United States* (C. C. A. 7) (64 F. (2d), 80); *Fleming* v. *Reinecke* (C. C. A. 7) (52 F. (2d), 449, certiorari denied, 284 U. S., 689); *Women's University Club* v. *United States* (Ct. Cls.) (50 F. (2d), 469); *Women's University Club of Seattle* v. *Poe*, (D. C.) (52 F. (2d), 447); *Army and Navy Club of America* v. *United States* (Ct. Cls.) (53 F. (2d), 277, certiorari denied, 285 U. S., 548); *Union League Club of Chicago* v. *United States* (Ct. Cls.) (decided November 6, 1933).

In the case last cited the summary of the court upon the facts before it seems peculiarly applicable here:

"Upon all of the evidence the court finds as an ultimate fact that the predominant purpose and the activities of the plaintiff are civic, philanthropic, or charitable, and that its main purposes have been those expressed in the object clause of its certificate of incorporation, but that the functions of the club in administering to the social enjoyment, physical well being, and entertainment of its members were not merely incidental to its main purpose but constituted a very important and material part of its activities and were necessary to its prosperity."

Appellant filed no motion for judgment. No action was taken to procure a ruling upon any contention that, under the evidence, the judgment must be for appellant—plaintiff below. Therefore, we are not called upon to review the record to ascertain whether the evidence produced supports the quasi findings of the trial court. However, a glance at that evidence, which is preserved in the transcript, but serves to emphasize the social character of the club and its material activities. The club had a seven-story and basement building. The first and second floors were rented by it for use as shops. The club quarters embraced a lounge and library containing many volumes of reading matter (together with current newspapers and periodicals), dining room, cafeteria, private dining rooms, and swimming pools. The "Informant," the club's official publication, recites the following attractive social features:

"*a*. A spacious lounge, with open fire and balcony, to meet guests and friends.

"*b*. A reading nook with magazines, papers and writing desks.

"*c*. Dining rooms, cafeteria, service (two floors): Private dining rooms, where luncheons, dinners and teas may be given.

"*d*. A swimming pool, open the year round—modern and well equipped.

"*e*. Rest room with couches and dressing table. The programs are arranged to appeal to a large variety of tastes. Lectures by nationally known men and women on the great events and topics of the day; book reviews, teas, musicales, card parties, dances and dramatic performances."

The reports of the program committees emphasize these social features above all other club activities. A further recital of the evidence would seem unnecessary. It follows that the judgments below should be affirmed and it is so ordered.

TITLE VIII.—STAMP TAXES. (1926)

SCHEDULE A-3.—CAPITAL STOCK, SALES OR TRANSFERS.

REGULATIONS 71 (1926), ARTICLE 34: Sales or transfers subject to tax. XIII-3-6605 G. C. M. 12642

The stamp tax on the transfer of its stock from the name of a partnership to the names of the partners may be asserted against a corporation.

An opinion is requested with respect to the liability of a corporation for stamp tax on the transfer of shares of its stock from the name of a partnership to the names of the partners.

A and B entered into a partnership agreement whereby each was to have an undivided one-half interest in certain oil and gas leases.

Later, A, B, and C organized the M Corporation, which issued its stock to various persons in exchange for oil leases. The partnership assigned certain oil and gas leases to the corporation in exchange for x shares of the corporation's stock. At about the same time the corporation issued y shares of its stock to the partnership as compensation for services rendered by A and B in the organization of the corporation. Subsequently, the partnership turned into the corporation the x and y shares of stock with the request that the corporation issue to A and B, individually, one-half of the number of shares turned in by the partnership. The corporation canceled the certificates of stock turned in by the partnership and issued new certificates to A and B, as requested. Stamp tax was paid on the issue of the x and y shares to the partnership, but no stamp tax was paid on the new certificates issued upon the transfer of the shares from the name of the partnership to the names of the partners. Stamp tax upon such transfer was later assessed against and was paid by the M Corporation.

The corporation contends that this tax was erroneously collected, since no transfer of legal title to the stock occurred when the shares were transferred from the name of the partnership to the names of the partners, and that in any event the corporation was not liable for the stamp tax on such transfer.

Schedule A-3 of Title VIII of the Revenue Act of 1926, which was the law in force at the time when the transactions in question occurred, imposed a stamp tax on all sales or transfers of legal title to shares or certificates of stock. By the common law of Texas a partnership is not an entity. (*Glasscock* v. *Price et al.*, 92 Tex., 271, 47 S. W., 965; *McManus et al.* v. *Cash & Luckel*, 101 Tex., 261, 108 S. W., 800.) However, partnerships may be formed in that State (article 6113, Complete Texas Statutes, 1928) and may do business as such. (Article 6122, idem.) In the instant case a partnership agreement was made and the shares were originally issued in the name of the partnership. Partners may by agreement make that separate property which before belonged to the firm, and such an agreement may be implied from an acquiescence by the firm in such use of partnership property by one of the members as would withdraw his interest in it from the common burden. (*Swearingen* v. *Bassett*, 65 Tex., 267.) The ownership of one partner in the property of the firm is subject to the like ownership of all the partners who hold subject to each other's ownership. (*Warren* v. *Wallis*, 38 Tex., 225.) In the absence of proof to the contrary, partners will be presumed to be equally interested in the partnership funds and property. (See *Houghton* v. *Puryear*, 30 S. W., 583 (Texas).)

The interest of each partner in the shares of stock originally issued to the partnership was an undivided interest. There were nevertheless some differences in the right, title, and interest of each. Under the partnership there was a community of interest in the shares which did not exist after the shares were placed in the names of the individual partners. It appears that the shares of stock in question comprised all the assets of the partnership and that the shares were issued to the individual partners in connection with the dissolution of the partnership and in liquidation of its assets. The transfer of stock from a firm to individual members thereof upon dissolution of the business is subject to tax. (Article 34(v), Regulations 71.) In the instant case the transfer of legal title from the partnership to the partners was such a transfer as brings the transaction within the terms of the law and regulations.

Liability for payment of the stamp taxes in question is fixed by the provisions of section 800 of the Revenue Act of 1926, which provides that:

> * * * there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. * * *

The language of this section is comprehensive in its scope. It has been interpreted as warranting the conclusion that any party to a taxable transaction is responsible to the Government for affixing and canceling stamps in the required amount. (Article 136, Regulations 71.) When the M Company canceled the old certificates then standing in the name of the partnership and issued the new certificates in exchange therefor it clearly brought itself within the provisions of the statute subjecting such transactions to stamp tax.

A further indication of the intent of Congress to impose a liability on the corporation in connection with the tax on transfers of its stock may be found in the terms of Schedule A–3, providing: "That in case of sale where the evidence of transfer is shown only by the books of the corporation or other organization the stamp shall be placed upon such books * * *." Since the stockholder does not have ready access to the books, it would seem clear that it is the duty of the corporation to cause the stamps to be affixed and that if the required stamps are not purchased by others the corporation itself becomes liable for the tax.

Accordingly, it is the opinion of this office that the stamp tax in question was properly assessed and collected from the M Corporation.

E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

SCHEDULE A–5, AS AMENDED BY SECTION 442 OF THE REVENUE ACT OF 1928.—PASSAGE TICKETS.

Regulations 71, Article 53: Passage tickets issued to certain foreign representatives. XIII–5–6628 S. T. 720

> Consular officers of Germany and Poland are exempt from the tax on passage tickets.

The question is presented whether consular officers of Germany and Poland are exempt from the tax imposed on passage tickets by Schedule A–5 of Title VIII of the Revenue Act of 1926, as amended by section 442 of the Revenue Act of 1928.

S. T. 681 (C. B. XII–1, 455) contains a list of consular officers who have been held to be exempt from the tax on passage tickets.

In view of the provisions of Article XVII of the Treaty of Friendship, Commerce and Consular Rights of December 8, 1923, between the United States and Germany, and the provisions of Article XV of the Treaty of Friendship, Commerce and Consular Rights of June 15, 1931, between the United States and Poland, effective July 9, 1933, consular officers of Germany and Poland, and the members of their families, are entitled to exemption from the tax on passage tickets, subject to the conditions outlined in S. T. 681, supra, except that in the case of consular officers of Poland the exemption applies only to passage tickets purchased on or after July 9, 1933, the effective date of the treaty.

Accordingly, the consular officers of Germany and Poland are added to the list published in S. T. 681.

TITLE VIII.—STAMP TAXES. (1924 AND 1926)

SCHEDULE A.—BONDS, ETC.

REGULATIONS 71, ARTICLE 19: Certificates of indebtedness. XIII–17–6769 Ct. D. 818

STAMP TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

"CORPORATE SECURITIES"—GUARANTEED FIRST MORTGAGE CERTIFICATES.

Guaranteed first mortgage certificates, assigning either an interest in a specific bond and mortgage or in a group of bonds and mortgages, guaranteeing to the assignees the payment of principal and interest, making the issuer the irrevocable agent to transact business necessary in connection with the mortgages, having such physical form, size, and appearance as is used generally for corporate securities with assignability by indorsement and registration on the books of the company, which are listed on the New York Real Estate Exchange and under State law are proper and legal investments for the funds of trusts and estates, are instruments known generally as corporate securities and are taxable under section 800, Title VIII, Schedule A(1), of the Revenue Acts of 1924 and 1926. The repeal of Schedule A(2), Title XI of the Revenue Act of 1918, by section 1400(a) of the Revenue Act of 1921 does not indicate that Congress did not intend to tax such instruments.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Lawyers Mortgage Co., plaintiff-appellee, v. *Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, defendant-appellant.*

Appeal from the District Court for the Southern District of New York. Action to recover stamp taxes paid under protest. Judgment for plaintiff; defendant appeals. Reversed.

[December 4, 1933.]

OPINION.

MANTON, Circuit Judge: Appellee recovered moneys paid under protest as stamp taxes alleged to be due upon the issuance by it, during the period from February 16, 1926, to February 1, 1930, of guaranteed first mortgage certificates without placing thereon documentary stamps. Appellant made the assessment pursuant to section 800, Schedule A, Title VIII, of the Revenue Acts of 1924 and 1926 (26 U. S. C., section 901), which provided for a stamp tax "On all bonds, debentures, or certificates of indebtedness issued by any corporation ('person' in the 1924 Act) and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents * * *." A summary judgment was granted below on a motion made therefor by the appellee.

The appellee, a corporation, is organized under the New York insurance law. During the period in question it owned various bonds secured by mortgages on real estate. It issued, in connection with these bonds, two classes of first mortgage certificates.

The first class of certificates "assigned and transferred" to a designated assignee, termed by the certificate "the assured," a share or interest to the extent of a certain sum in a specified bond and mortgage. The appellee certified in this form of certificate that "it holds said bond and mortgage together with any guaranties of payment, insurance policies and other instruments and evidences of title relating thereto for the benefit of the assured." On the face of each certificate it appeared that it was one of a series of like tenor of an aggregate sum not in excess of the bond and mortgage, and that the certificates were all secured by the bond and mortgage. The certificate guarantees to the assured the payment of interest, at the rate of 5½ per cent per annum, within 5 days after the due date of interest, under the terms of the bond and mortgage and the payment of the principal amount as and when collected, but in any event, absolutely within 18 months after payment shall be due and shall be demanded by the assured. By its terms the appellee was appointed irrevocable agent of the assured to collect or sue for interest and principal due under the bond and mortgage, to satisfy and discharge the mortgage in its own name on receiving full payment, to collect, sue for, receive or compromise the fire insurance on the mortgaged property in case of loss by fire, to extend under such terms and conditions as it may see fit, the time of payment of installments of interest or principal due under the mortgage, to extend or waive any right, provision or option contained in the bond and mortgage, and to take any action it may deem necessary to enforce any of the provisions of the bond and mortgage. By the certificate the appellee reserved the privilege, at its option, to take up the certificate at any time on giving 30 days' notice to the assured upon payment of the principal amount and interest.

The second class of certificates contained substantially the same provisions. It was issued upon a group of bonds and mortgages held by the appellee and assigned to the "assured" an undivided share to the extent of the sum stated in the bonds and mortgages specified. These bonds and mortgages have the same dates of maturity.

The physical form, size and appearance of these first mortgage certificates with steel engraved colored border, printed in registered form with assignability by indorsement and registration on the books of the company, were such as is used generally for corporate securities. This has been held a matter of importance in cases of a documentary stamp tax. (*United States* v. *Isham*, 17 Wall., 496; *Goodyear Tire & Rubber Co.* v. *United States*, 273 U. S., 100, 103 [T. D. 3992, C. B. VI-1, 332]; *United States* v. *Klausner*, 25 Fed. (2d), 608 (C. C. A. 2).)

In *Lawyers Mortgage Co.* v. *Bowers* (285 U. S., 182), the court dealt with the question of liability of this appellee for the capital stock tax imposed under the provisions of the Revenue Act of 1921 (section 100. 42 Stat., 294), the issue there being whether the appellee was an insurance company under the terms of that Act (section 246, 42 Stat., 262). It was said that the guarantee by the plaintiff constituted an insurance contract. But the insurance part of the business of the corporation was held to be incidental and it was held not to be an insurance company and subject to the capital stock tax. But whether or not these certificates are instruments known generally as corporate securities is an entirely different question. There is the guarantee of the corporation obligating the appellee to pay or see that the holder is paid in any event which makes it a corporate security (*Lederer* v. *Fidelity Trust Co.*, 267 U. S., 17 [T. D. 8674, C. B. IV-1, 339]). These first mortgage certificates are listed on the New York Real Estate Exchange where other real estate securities, bonds and stocks are listed. Under the New York personal property law, section 21, and the decedent estates law, section 111, they are proper and legal investments for the funds of trusts and estates.

The Circuit Court of Appeals for the Eighth Circuit, in construing this statute, said that it was the intention of Congress that it should be regarded broadly and comprehensively. (*Willcuts* v. *Investors Syndicate*, 57 Fed. (2d), 811 [Ct. D. 523, C. B. XI-2, 563].) In *Fidelity Trust Co.* v. *Lederer* (supra), railroad equipment certificates were issued by a trust company as security for moneys advanced by a syndicate to purchase equipment leased by the trust company and the railroad company was under a contract for periodical payments as rentals with the ultimate acquisition of title by it. The certificates were payable with interest to bearer or registered holder from the rentals thus to be paid by the railroad company and it was held that they were subject to a stamp tax under the provisions of the Act of February 24, 1919 (Title XI, section 1100, Schedule A). They were classed as instruments issued by a corporation known generally as corporate securities. The court said at page 22:

"We do not regard the precise elements of the Trust company's undertaking as important. If it were only to collect and pay money received by the company under the secured contract of the railroad it would be a security for money payment."

The appellee imposed upon itself an obligation to collect and pay the money under the secured contract—the bond—with the mortgagor and the undertaking of the appellee was therefore, in the language of the Supreme Court, a security for money payment. The appellee promises to pay interest and principal in any case within the time specified in the certificate. In *Mortgage Guaranty Co.* v. *Welch* (38 Fed. (2d), 184 (C. C. A. 9)), the stamp tax there considered involved the provisions of the Revenue Act of 1926 (26 U. S. C., section 901) and the question at issue was whether certain first mortgage participation certificates issued by the plaintiff were corporate securities. It was held they were. It appeared that the corporation loaned money upon notes secured by mortgages on real estate and that it transferred groups of these notes and mortgages to a trust company which, under the terms of the written agreement, held them for the benefit of the persons to whom the taxpayer corporation sold undivided shares in them. The notes and mortgages were guaranteed to the purchaser as to payment of interest and principal. The instruments used to make transfers of interests were called first mortgage certificates. The substance of those certificates was substantially the same as that in the guaranteed first mortgage certificates at bar, and the only difference was that the bonds and mortgages were held by a depositary instead of the corporation issuing the participating certificates, as here, and the corporation issuing the certificates had the power to substitute other bonds and mortgages for those originally placed with the depositary. But these differences do not change the character of the instrument issued by the appellee. The test is whether the certificates issued at bar are generally known as corporate securities. The internal transactions of the company are not so important. In the Mortgage Guaranty Co. case and the instant case, the purchaser of the certificate relied upon the stability of the issuing company and the public generally would not have a different view of the two types of certificates in determining whether they were or were not corporate securities.

It is contended that the repeal of subdivision 2 of Schedule A of Title XI, of the Act of 1918 (40 Stat., 1135) by section 1400(a) of the Act of 1921 (42 Stat., 321) without reenactment indicates that Congress did not intend to tax such instruments as those issued by appellee as "corporate securities." It is argued that mortgage certificates were taxable under subdivision 2 of Schedule A[1] and

[1] SCHEDULE A.—STAMP TAXES.

1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Provided further*, That when a bond conditioned for the repayment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured.

2. Bonds, indemnity and surety: On all bonds executed for indemnifying any person who shall have become bound or engaged as surety, and on all bonds executed for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies, and on all other bonds of any description, made, issued, or executed, not otherwise provided for in this schedule, except such as may be required in legal proceedings, 50 cents: *Provided*, That where a premium is charged for the issuance, execution, renewal or continuance of such bond the tax shall be 1 cent on each dollar or fractional part thereof of the premium charged: *Provided further*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

that it could not have been the intention to tax them under subdivision 1 also as "corporate securities." A similar contention was made and answered in *Mortgage Guarantee Co.* v. *Welch* (38 Fed. (2d), 184 (C. C. A. 9)). Moreover, the repealed provision of the 1918 Act dealt with the stamp tax upon "Bonds, indemnity and surety," and the intent of that subdivision was clearly to tax surety and indemnity bonds in whatever form they might be issued. Surety and indemnity bonds are not sold for investment purposes and Congress, recognizing this, had in mind that subdivision taxing the issuance of policies rather than of securities. The guaranteed first mortgage certificates here involved are in an entirely different form and are different obligations. The repealed provision covered only bonds and obligations or policies of insurance as such. It applied to those instruments whose purpose was to guarantee the obligation of others and whose penalty matured only in the event of the breach of such obligation but not to documents of independent value which passed currently as corporate securities at their face or market value.

The genesis of this legislation may be found in the Revenue Act of 1898 (30 Stat., 448), where bonds, debentures or certificates of indebtedness by any association, company, or corporation were taxed on each $100 of face value or fraction thereof, 5 cents, and bonds of indemnity and surety were taxed 50 cents. These provisions were reenacted in the Revenue Act of 1914 (38 Stat., 745). See the reports of the Ways and Means and Finance Committees (House Report 1163, Sixty-third Congress, second session, page 7, and Senate Report 813, Sixty-third Congress, second session, page 9). A Revenue Act imposing a stamp tax was passed on October 3, 1917 (40 Stat., 300). It enlarged the scope of the provisions of the former Acts relating to bonds of indemnity and surety by substituting for the guaranty "of the payment of any sum of money" a guaranty for due execution and performance of "any contract, obligation, or requirement."

The Revenue Act of 1918 (40 Stat., 1057) added a clause to the provisions for certificates of indebtedness to cover "all instruments, however termed, issued by any corporation with interest coupons or in registered form," and then classified instruments referred to as "those known generally as corporate securities." The provision for bonds of indemnity and surety was made applicable to policies of guarantee, including those guaranteeing mortgages, by adding the clause, "and on all policies of guaranty and fidelity insurance, including policies guaranteeing titles to real estate and mortgage guarantee policies." See the report of the Ways and Means Committee (House Report 767, Sixty-fifth Congress, second session, page 117).

The Revenue Act of 1921 (42 Stat., 227) reenacted verbatim the provisions of the 1918 Act relating to bonds of indebtedness, but omitted entirely the provisions of the Revenue Act of 1918 relating to bonds of indemnity and policies of guarantee. The Finance Committee pointed out the reason therefor (Senate Report No. 275, Sixty-seventh Congress, first session, page 30; House Report 486, Sixty-seventh Congress, first session, page 55). And thus there was a repeal of the entire tax upon these instruments to which the conferees agreed, including policies of guarantee and indemnity and surety bonds. The repeal is not because there was a conflict between the classes enumerated therein and those enumerated in the subdivision relating to instruments of indebtedness, but because of disagreement between the House and the Senate as to the method of imposing a tax upon the bonds and policies of indemnity.

The 1924 and 1926 Acts continue the provision for bonds of indebtedness and plainly specify the instruments which are subject to the stamp tax. The instruments here in question, we think, are corporate securities, known generally as such, and were taxable under the statute.

Decree reversed.

SCHEDULE A-7 OF TITLE VIII OF THE REVENUE ACT OF 1926.—FOREIGN INSURANCE POLICIES.

REGULATIONS 71, ARTICLE 72: Credits and refunds. XIII-23-6835
S. T. 743
(Also Article 62.)

A refund of stamp tax paid on a foreign insurance policy is not allowable where a part of the premium is refunded prior to the expiration of the policy, or the amount of the premium is reduced.

The question is presented whether a refund of a part of the stamp tax paid pursuant to Schedule A-7 of Title VIII of the Revenue Act of 1926 on foreign insurance policies is allowable in the following cases:

(1) A foreign insurance policy subject to the stamp tax imposed by Schedule A-7, Title VIII of the Revenue Act of 1926, is canceled after the payment of the tax and prior to the expiration of the policy, and a part of the premium is refunded to the insured. Is a refund allowable of that portion of the stamp tax paid on the amount of the premium refunded to the insured?

The tax imposed by Schedule A-7 of Title VIII of the Revenue Act of 1926 is due when the policy becomes effective, that is, when the insurance becomes a binding contract, and must be paid on the basis of the full premium charged. (Article 62 (f) and (g) of Regulations 71.) If, after payment of the tax on that basis, the policy is canceled or amended and a part of the premium is returned, no part of the tax may be refunded for the reason that the tax accrued when the policy was issued and became a binding contract of insurance.

(2) If a foreign insurance policy subject to the stamp tax is obtained, and an estimated premium is paid therefor, which premium is adjusted by a reduction in the amount thereof at the end of the first year, must the tax on the entire estimated premium be paid at the time of the issuance of the policy, or can the tax on the premium for the first year be paid at the time of the issuance of the policy, and the tax on the premium for the subsequent years be paid at the commencement of the second year in which the policy is in force, at which time the amount of the premium as adjusted will be known? If this is not permissible, can a refund of the difference between the tax on the estimated premium and the tax on the adjusted premium be obtained at the time the premium is adjusted?

If the amount of the premium payable is estimated when the policy is issued and becomes effective, and it is subsequently determined that the amount of the premium should be reduced, no part of the tax may be refunded, for the reason that the tax accrued on the basis of the premium charged when the policy was issued.

MISCELLANEOUS RULINGS.

NATIONAL INDUSTRIAL RECOVERY ACT.

EXCISE TAX ON DIVIDENDS.

SECTION 213.

XIII–5–6629
I. T. 2757

In cases where the Government is unable to collect from the foreign corporation the tax imposed by section 213 of the National Industrial Recovery Act on the receipt of dividends the individual shareholder will be held liable for the tax.

Advice is requested relative to the liability of a citizen of the United States who receives dividends on stock of a foreign corporation through a foreign bank which does not withhold the 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act. Inquiry is made whether there is any liability imposed on the individual to make a return and pay the tax to the United States.

Section 213(a) of the National Industrial Recovery Act provides in part as follows:

There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. * * *

A citizen of the United States is required to include in his gross income under the provisions of the Revenue Act of 1932 dividends on stock of a foreign corporation. Inasmuch as the 5 per cent excise tax is imposed upon the receipt of dividends required to be included in the gross income of the recipient, in cases where the Government is unable to collect the tax from the foreign corporation, the individual shareholder will be held liable for the tax.

SECTION 213.

XIII–11–6699
I. T. 2766

Where the resolution of the board of directors of a corporation provided for the payment of a dividend to stockholders of record as of a future date, the date of record as specified in the dividend resolution, and not the date of the resolution, constitutes the date of "dividends declared" within the meaning of section 213(a) of the National Industrial Recovery Act.

SECTION 213. XIII-22-6824
G. C. M. 13174

Where the resolution of the board of directors of a corporation provided for the payment of a dividend to stockholders of record as of a future date, the date of the corporate resolution, and not the record date specified therein, is the date of "dividends declared" within the meaning of section 213(a) of the National Industrial Recovery Act.

Recommended that I. T. 2766 (page 443, this Bulletin) be revoked.

Question has arisen relative to the construction of the term "dividends declared" in I. T. 2766, wherein it was held that "the date of record as specified in the dividend resolution, and not the date of the resolution, constitutes the date of 'dividends declared' within the meaning of section 213(a) of the National Industrial Recovery Act."

The sole question presented is whether dividends are declared, within the meaning of the Act, on the date the corporate resolution is adopted by the board of directors (assuming a binding and valid resolution), or on the date of record as of which the stockholders to whom the dividend is payable are ascertained.

The Committee on Finance of the Senate reported H. R. 5755 (the National Industrial Recovery Act) with the following amendment imposing an excise tax upon dividends:

SEC. 212. (a) There is hereby imposed upon the receipt, after the enactment of this Act, of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. (The section number was changed to 213(a).)

As so reported, the section imposed a tax upon all dividends received after the enactment of the Act by any person other than a domestic corporation, and required that the tax be deducted and withheld from the dividends by the payor corporation. Many corporations had already declared and committed themselves to the payment of dividends which would be received by stockholders after the enactment of the Act, and in some cases had already ascertained the stockholders to whom the dividends would be payable and had prepared checks in payment of such dividends. These corporations contended that it would be unfair to require them to withhold the payment of the dividends beyond the dates on which they were committed to pay them, to pay smaller dividends than they were then committed to pay, and to require such corporations to incur the expense of preparing new checks in the amount of the dividend less the tax. Apparently in recognition of the situations so called to his attention, the chairman of the Committee on Finance, on June 9, 1933, offered an amendment to the Senate committee amendment, the purpose of which is shown by the following excerpt from the Congressional Record (volume 77, No. 72, page 5576, June 9, 1933, page 5404 of bound volume):

Mr. HARRISON. I desire to offer an amendment that will clarify and perfect the Senate committee amendment.

The Senate committee amendment is in the form of one amendment, as I understand, and, with reference to the tax on dividends, some question has been raised because some of the corporations perhaps have declared a dividend, but payment has not been made. It goes into effect after the passage of the Act. We have clarified it to the extent that the tax shall not apply until after the bill is enacted and until after the dividend has been declared. It seems to me that is fair. The experts have passed on it.

The VICE PRESIDENT. The amendment proposed by the Senator from Mississippi will be stated.

Mr. HARRISON. I ask that this amendment to the Senate committee amendment be adopted.

The CHIEF CLERK. On page 35, line 12, it is proposed to strike out "after the enactment of this Act," and the commas before and after such words, and after line 17 to insert a new sentence, as follows:

"The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act."

The VICE PRESIDENT. The question is on agreeing to the amendment offered by the Senator from Mississippi to the amendment of the committee.

The amendment to the amendment was agreed to.

The apparent intent of Congress, as indicated by the foregoing quotation and the situation which was presented to the chairman of the Committee on Finance, was to relieve from the imposition of the tax dividends which had, in effect, been promised to stockholders in a certain amount through the adoption of corporate resolutions prior to the date of the enactment of the Act, as well as to relieve some corporations from the burden of duplicating expensive preparations for the payment of such dividends. It is apparent, therefore, that the words "dividends declared," contained in the last sentence of section 213(a) of the National Industrial Recovery Act, mean dividends definitely authorized to be paid by a valid and binding corporate resolution adopted and published to the stockholders on or before June 15, 1933. That is to say, if, on or before June 15, 1933, the directors of a corporation adopted an appropriate resolution definitely committing the corporation to the payment of a certain dividend at a later date, Congress intended such a dividend to fall within the exception provided in the last sentence of section 213(a), notwithstanding the fact that some time might elapse after the adoption of the resolution before the stockholders to whom the dividend was payable were ascertained. Section 213(a) of the National Industrial Recovery Act should, it is believed, be so construed as to carry out the intent of Congress expressed in the manner set out above.

In view of the foregoing, it is held that where the resolution of the board of directors of a corporation provided unequivocally for the payment of a dividend to stockholders of record as of a future date, the date of the corporate resolution, and not the record date specified therein, is the date of "dividends declared" within the meaning of the National Industrial Recovery Act. This conclusion does not in any sense modify the rulings of this office that a declaration of dividends must definitely, and without any contingency, commit the corporation to payment, or the rule in the lessor-lessee cases that rental payments by the lessee corporation directly to the lessor's stockholders are dividends subject to tax. (T. D. 4372, C. B. XII-2, 387.)

In arriving at the above conclusion, this office is cognizant of the judicial difference of opinion with respect to the construction of the word "declared," and does not here commit itself to any meaning of that term except in so far as concerns its usage in section 213(a) of the National Industrial Recovery Act.

It is recommended that I. T. 2766 be revoked.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

SECTION 213. XIII–22–6825
I. T. 2786

In view of General Counsel's Memorandum 13174 [page 444, this Bulletin], I. T. 2766 [page 443, this Bulletin], wherein it was held that " Where the resolution of the board of directors of a corporation provided for the payment of a dividend to stockholders of record as of a future date, the date of record as specified in the dividend resolution, and not the date of the resolution, constitutes the date of ' dividends declared ' within the meaning of section 213(a) of the National Industrial Recovery Act," is revoked.

SECTION 215.—CAPITAL STOCK TAX.

REGULATIONS 64, ARTICLE 24: Adjusted declared value. XIII–3–6606
S. T. 718

The original declared value of a corporation's capital stock may not be less than zero.

Question is presented whether a so-called " minus " or " less than zero " value may be used as the original declared value of a corporation's capital stock for capital stock tax purposes.

Section 215(a) of the National Industrial Recovery Act (approved June 16, 1933, Public, No. 67, Seventy-third Congress) imposes upon every domestic corporation with respect to carrying on or doing business an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

Section 215(f) provides that for the first year ending June 30 in respect of which a tax is imposed by section 215 the adjusted declared value shall be the value as declared by the corporation in its first return (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by such section. Section 215(f) further provides that for any subsequent year ending June 30 the adjusted declared value shall be the original declared value with certain specified adjustments.

In considering the question presented it may be noted that section 216 of the same law provides for the imposition of an excess profits tax. These two taxes are correlated. In this connection the report of the Senate Finance Committee, dated May 29, 1933, with respect to the capital stock tax, contains the following statement:

Section 215 provides for a new tax similar in principle to the capital stock tax which was levied from 1916 to 1926. In order to avoid controversy as to the value of the capital stock, the tax is imposed on value declared by the corporation. A reasonable value is, however, assured by means of an excess profits tax imposed by section 216 and based on the relation of the net income of the corporation to such declared value.

With respect to the excess profits tax provisions of the law the report states: "The primary object of this tax is to induce corporations automatically to declare a fair value for their corporate stock * * *."

The term "adjusted declared value" is peculiar to the statute here under consideration. Its meaning is not explained in general corporation law, or in accounting terminology, or in any Federal taxing statute. The only light thrown on the matter is contained in section 215(f), which states that the adjusted declared value shall be the value *as declared by the corporation.* The word "value" is defined in a standard dictionary as "the rate of worth set upon goods; worth estimated in money or commodities; in a restricted sense, market price." Certainly one who held capital stock which he deemed to be absolutely worthless would cause surprise to the average man if he declared that the capital stock in question had a value less than zero. It is true that shares of stock often have no value whatever, but it is decidedly questionable whether an individual or a corporation may properly fix the value of capital stock at any specified figure less than nothing.

In view of the foregoing, it is held that the original declared value of a corporation's stock may not be less than zero. Where a corporation returns a so-called "minus" value as the original declared value of its capital stock, zero should be used as the basis for determining the adjusted declared value for the succeeding taxable year.

REGULATIONS 64, ARTICLE 24: Adjusted declared value. XIII-12-6711
S. T. 727

Interest on tax-exempt securities, dividends, gain from sale of capital assets, etc., constitute "earnings and profits" within the meaning of section 215(f)3 of the National Industrial Recovery Act.

REGULATIONS 64, ARTICLE 24: Adjusted declared value. XIII-12-6712
S. T. 728

Adjustment of "original declared value" where a corporation retires part of its capital stock.

The capital stock of the M Corporation outstanding as of its last income-tax taxable year ended on June 30, 1933, had a par value of $45x$ dollars. In its capital stock tax return for the taxable year ended June 30, 1933, the taxpayer reported a declared value for its stock of $21x$ dollars as of the date of its last income tax return. Since that date the corporation purchased for $5x$ dollars for the purpose of retirement one-third ($15x$ dollars) of the par value of its outstanding capital stock. One-third of the declared value of the total capital stock is $7x$ dollars. The question is raised whether the retirement of the capital stock constitutes "property distributed in liquidation to shareholders" within the meaning of section 215(f)A of the National Industrial Recovery Act and, if so, whether the adjustment for the year ended June 30, 1934, of the original declared value of the corporation's capital stock should be limited to $5x$ dollars, the amount paid for the stock, or whether the adjustment should be $7x$ dollars, representing one-third of the original declared value of the capital stock.

Section 215(f) of the National Industrial Recovery Act provides that—

For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section * * *. For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating * * *.

Section 215(g) provides that—

The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Section 115(c) of the Revenue Act of 1932 provides that "amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock." Subdivision (h) of that section prescribes that "As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock." Article 625 of Regulations 77 provides that "A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, * * * by the complete retirement of any part of the stock whether or not pro rata among the shareholders."

The counterpart of section 115(c) of the Revenue Act of 1932 is found in section 201(c) of the Revenue Acts of 1924 and 1926. This latter section was the subject of consideration in Solicitor's Memorandum 4181 (C. B. IV–2, 12), I. T. 2388 (C. B. VI–2, 14), and General Counsel's Memorandum 5180 (C. B. VII–2, 110).

In view of the foregoing, it is held that the amount of $5x$ dollars paid for one-third ($15x$ dollars) of the par value of the M Corporation's capital stock constitutes "property distributed in liquidation to shareholders" within the purview of section 215(f), supra. The adjustment of the original declared value should be limited to $5x$ dollars, the amount paid in redemption of the stock.

REGULATIONS 64, ARTICLE 51: Return by domestic corporation. XIII–14–6738 S. T. 732

Where a State bank is converted into a national bank during the taxable year each bank is subject to the capital stock tax.

Section 215(a) of the National Industrial Recovery Act (Public, No. 67, Seventy-third Congress) imposes a capital stock tax upon every domestic corporation with respect to carrying on or doing business for any part of "each year ending June 30."

A corporation carrying on business as a State bank for a part of the year ending June 30, 1934, was succeeded in the same year by a new corporation carrying on business as a national bank. Under the terms of the law the State bank and the national bank each incurred liability for the capital stock tax for the taxable year ending June 30, 1934, since they were separate corporations carrying on business for a part of that taxable year.

A return must be filed by each bank. The new corporation must declare the value of its capital stock as of the date of organization.

AGRICULTURAL ADJUSTMENT ACT.

SECTION 9.—PROCESSING TAX.

REGULATIONS 81, ARTICLE 2: Definitions. XIII-7-6655
(Also Article 11.) P. T. 3

Processing tax on field corn attaches to all field corn put in process, except where it is processed not in the form of flour for feed purposes only.

Inquiry is made whether, where field corn is put in process and as a result of such processing corn meal and another product best adapted for feed purposes are obtained, the processing tax will attach only with respect to that portion of the field corn from which the corn meal was produced.

Section 9 of the Agricultural Adjustment Act provides:

(d) As used in part 2 of this title—

(1) In case of * * * corn, the term "processing" means the milling or other processing (except cleaning and drying) of * * * corn for market, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.

The processing tax is imposed upon the first domestic processing of field corn. The measure of the tax is the number of bushels of corn put in process. (Articles 4, 5, and 7, Regulations 81.) No tax is required to be paid upon the grinding or cracking of field corn "not in the form of flour for feed purposes only" for the reason that section 9(d)1, supra, specifically excludes such operations from the term "processing." To hold that the tax attaches only with respect to that portion of the product resulting from the first domestic processing which may be used for other than feed purposes would not give effect to the word "only" as used in the statute. Accordingly, if corn is ground or cracked for feed purposes, but in such grinding or cracking a product for other use results therefrom, the exemption provided by the statute does not apply, and the entire quantity of corn so put in process is subject to tax.

A person whose activities are restricted to the grinding or cracking of field corn, not in the form of flour, for feed purposes only, must file an affidavit to that effect with the collector of internal revenue for the district in which such person's principal place of business is located. To be accepted as evidence of exemption from tax the affidavit must show that the only milling done is the grinding or cracking of field corn, not in the form of flour, for feed purposes only, and that if any change in this respect is made the collector will be promptly advised. In such cases no processing tax return will be required unless and until such person begins the milling or other processing of field corn for general purposes, including custom milling for toll as well as commercial milling.

REGULATIONS 81, ARTICLE 2: Definitions. XIII–11–6700
P. T. 6

Conversion of wheat into wheat malt constitutes the first domestic processing.

The question in issue is whether the conversion of wheat into wheat malt, or the subsequent grinding of the wheat malt into flour, is the first domestic processing of the commodity within the meaning of the Agricultural Adjustment Act.

Section 9 of the Agricultural Adjustment Act reads, in part, as follows:

(a) * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. * * *

(d) As used in part 2 of this title—

(1) In case of wheat, rice, and corn, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, rice, or corn for market, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only.

The conversion of wheat into wheat malt involves the following operations: After the removal of seeds, dirt, and other foreign substances, the wheat is steeped in water until it is water-soaked and soft. It is then spread out and kept at a certain temperature for several days, during which the wheat undergoes a chemical change. After being kiln dried and cleaned of sprouts it becomes wheat malt. Later such malt is ground into wheat malt flour.

The conversion of wheat into wheat malt in the manner indicated, which results in a material change in the commodity constitutes "other processing" within the meaning of the definition of "processing" contained in the Agricultural Adjustment Act. Such conversion is the first domestic processing of the wheat which is subject to the tax imposed by that Act.

REGULATIONS 81, ARTICLE 2: Definitions. XIII–4–6623
REGULATIONS 82, ARTICLE 1: Definitions. T. D. 4417

Processing and other taxes under the Agricultural Adjustment Act.—Article 2(f), Regulations 81, and article 1(h), Regulations 82, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

1. Paragraph (f) of article 2 of Regulations 81, approved July 12, 1933, relating to processing tax and compensating tax under the Agricultural Adjustment Act, is hereby amended to read as follows:

(f) *Effective date* means the day upon which any tax under the Act becomes effective with respect to a commodity.

The effective date of the taxes with respect to a basic agricultural commodity is the first day of the marketing year therefor next following the date of the proclamation of the Secretary of Agriculture that rental or benefit payments are to be made with respect to that commodity.

In the case of a tax with respect to a basic agricultural commodity the effective date includes the earliest moment of that day, the beginning of which shall be determined in accordance with the law regulating standard time zones, that is to say, such effective date with respect to any particular place shall begin in accordance with the United States standard time for the time zone within which such place is located.

In the case of a tax with respect to a commodity found by the Secretary of Agriculture to be competing disadvantageously with a taxable basic agricultural commodity the effective date is the day when he signs the proclamation of such finding, beginning at the time when such proclamation is signed and irrespective of any time zone.

The effective date with respect to each particular commodity will be announced by the Commissioner of Internal Revenue.

2. Paragraph (h) of article 1 of Regulations 82, approved June 29, 1933, relating to the tax on floor stocks under the Agricultural Adjustment Act, is hereby amended to read as follows:

(h) *Effective date* means the day upon which any tax under the Act becomes effective with respect to a commodity.

The effective date of the taxes with respect to a basic agricultural commodity is the first day of the marketing year therefor next following the date of the proclamation of the Secretary of Agriculture that rental or benefit payments are to be made with respect to that commodity.

In the case of a tax with respect to a basic agricultural commodity the effective date includes the earliest moment of that day, the beginning of which shall be determined in accordance with the law regulating standard time zones, that is to say, such effective date with respect to any particular place shall begin in accordance with the United States standard time for the time zone within which such place is located.

In the case of a tax with respect to a commodity found by the Secretary of Agriculture to be competing disadvantageously with a taxable basic agricultural commodity the effective date is the day when he signs the proclamation of such finding, beginning at the time when such proclamation is signed and irrespective of any time zone.

The effective date with respect to each particular commodity will be announced by the Commissioner of Internal Revenue.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 18, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

REGULATIONS 81, ARTICLE 2(h)4, (i): Definitions. XIII-20-6798
P.T. 8

The M Company, which slaughters hogs for the owners thereof, is not the agent of the owners but is an independent contractor. The company is the first domestic processor of the hogs and is liable for the processing tax.

Hogs are delivered by the owners to the M Company, which is engaged in the business of slaughtering hogs. The company kills the hogs, removes the hair, chills the carcasses, and returns them to the respective owners. The carcasses are not eviscerated. The owners pay the company a stipulated price per hog for its work.

The questions have arisen (1) whether the company is the first domestic processor of the hogs within the meaning of section 9(d)4 of the Agricultural Adjustment Act; (2) whether for the purpose of the processing tax the company acts as the agent of the owners of the hogs which it slaughters; and (3) if the company acts as such agent, whether the agent or the principal is liable for the processing tax.

Section 9(a) of the Agricultural Adjustment Act imposes a processing tax upon the first domestic processing, and provides that the tax shall be paid by the processor. Section 9(d)4 of the Act defines the processing of hogs as "the slaughter of hogs for market." The words "for market" are evidently used to distinguish the slaughtering of hogs where the resultant product is sold from slaughtering by the owner of the hogs for his own use.

One who is engaged in the business of slaughtering hogs for others, as in the instant case, is deemed to be an independent contractor and not the agent of the owners whose hogs are slaughtered. Such a contractor is the first domestic processor of the hogs within the meaning of the Act. Accordingly, the M Company is liable for the processing tax.

REGULATIONS 81, ARTICLE 8: Liability for the tax. XIII–23–6837 P. T. 10

A processor of hogs is liable for the processing tax even though the resulting products spoil prior to marketing.

Inquiry is made whether the processor of hogs is liable for the payment of the processing tax where the pork products resulting from the slaughtering of hogs for market spoil before they can be marketed.

Section 9(a) of the Agricultural Adjustment Act provides for the imposition of a processing tax upon the first domestic processing of basic agricultural commoditites, such tax to be paid by the processor. Section 9(d)4 of the Act defines the processing of hogs as "the slaughter of hogs for market."

The processor's liability for the processing tax is incurred upon the slaughtering of the hogs for market. Consequently, the fact that the resulting pork products spoil before they are marketed does not affect the processor's liability for the processing tax.

SECTION 15.—EXEMPTIONS AND COMPENSATING TAXES.

REGULATIONS 81, ARTICLE 9: Exemptions from processing tax. XIII–8–6667 P. T. 4

Application of the term "producer."

Inquiry is made whether, under certain circumstances, the owner of land upon which wheat is grown is the "producer" within the meaning of that portion of section 15(b) of the Agricultural Adjustment Act which reads as follows:

> No tax shall be required to be paid on the processing of any commodity by or for the producer thereof for consumption by his own family, employees, or household; * * *.

The following situations are presented:

(1) Where a person owns the land and another works the land, both furnishing portions of the tools, seed, etc., and receiving share and share alike.

(2) Where a person owns the land and has it worked by a tenant who supplies all machinery, tools, seed, and labor, and returns to the owner for the use of the land a stated portion of the crop produced.

(3) Where a person owns the land, furnishes all machinery, tools, and seed, and the person employed to work the land furnishes only the labor, receiving for his labor a stated share of the crop produced.

In the first case there is neither the relationship of landlord and tenant nor that of employer and employee. Each person furnishes something in a common undertaking, that is, one furnishes the land and part of the necessary tools and seed and the other his labor and part of the necessary tools and seed. In such a case each person should be regarded as a "producer" within the meaning of the Act.

In the second case the tenant has the temporary right to possession of the land and produces the crop. He turns over to his landlord as rental for the land a portion of the crop instead of a money rental. The landlord can not be regarded as a producer in such a case. The tenant is the "producer" within the meaning of the Act.

In the third case there is the relationship of employer and employee. The owner of the land is the "producer" even though the crop is grown through the labor of an employee who receives a stated share of the crop produced.

The conclusions reached herein apply only to the case of an *individual* producer. (See article 9(a)1 of Regulations 81 and G. C. M. 12159, C. B. XII-2, 431.)

Regulations 81, Article 32: Refund of tax paid on products delivered for charitable distribution or use. XIII-7-6657 T. D. 4419

Processing tax and other taxes under the Agricultural Adjustment Act.—Refund of tax paid with respect to products delivered for charitable distribution or use.—Article 32 of Regulations 81 (approved July 12, 1933) amended.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 32 of Regulations 81 (approved July 12, 1933), relating to the processing tax and compensating tax under the Agricultural Adjustment Act, approved May 12, 1933, is hereby amended to read as follows:

Art. 32. *Refund of tax paid with respect to products delivered for charitable distribution or use.*—(*a*) Any person who delivers any product, with respect to which tax has been paid under the Act, to an organization for charitable distribution or use shall be entitled to a refund of the amount of tax which has been paid with respect to the product so delivered. The amount of refund of tax paid as tax on floor stock or as compensating tax shall be the amount of such tax actually due and paid. The amount of refund of tax paid as processing tax shall be determined in accordance with the rate of processing tax in effect at the time of the first domestic processing of the commodity from which the product delivered was processed, and in accordance with the proper conversion factor (prescribed by the Secretary of Agriculture) applicable at the time when the product is delivered.

(b) The owner of the product who delivers it to an organization for charitable distribution or use must execute claim for such refund on the prescribed form, in accordance with these regulations and the instructions contained on such form. Such claim must be filed with the collector of internal revenue for the district in which the principal office of the claimant is located.

(c) The facts alleged in support of the claim should be set forth in detail, including (1) such description of each product delivered as shall be required to determine the rate of tax refund applicable in accordance with the conversion factor established therefor by the Secretary of Agriculture, (2) proof satisfactory to the Commissioner that the tax, refund of which is claimed, was actually paid to a collector of internal revenue, (3) the quantity of each product delivered, and the net taxed content thereof, (4) the name and address of the organization to which delivery of the product was made and the date of delivery, (5) the distribution or use to be made of the product by the organization, and (6) a copy of the bill of lading, if any, covering the product delivered.

There must be attached to the claim an affidavit executed by a responsible officer of the organization which received the product. The affidavit must identify the particular product received, show the date of receipt, and state specifically that the product will be used exclusively for the relief of the poor and indigent. The affidavit must also state that it is executed for the purpose of supporting a claim for refund of tax with respect to the products delivered to the organization.

One claim may include more than one delivery either to the same organization or to more than one organization.

The right to refund will be determined by the distribution or use made of the product, and not by the character of the organization to which the delivery is made. If a person delivers any such product to an organization for charitable distribution or use and the total amount of such product is not used by such organization in distribution to the poor and indigent, the claim for refund shall be limited to that proportion of the tax represented by the portion of the product which is actually distributed to or among the poor and indigent.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 2, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

SECTION 15.—EXEMPTIONS AND COMPENSATING TAXES.
SECTION 16.—FLOOR STOCKS.

REGULATIONS 81, ARTICLE 4: Nature of the tax. XIII–19–6787
REGULATIONS 82, ARTICLE 2: Nature of the tax. P. T. 7

Tax on processing of jute yarn into twine and tax on floor stocks of such twine.

The terms "jute yarn," "first domestic processing of jute yarn," and "twine" are defined by the regulations made by the Secretary of Agriculture, with the approval of the President, dated December 1, 1933 [T. D. 4415, page 515, this Bulletin], as follows:

Jute yarn is material, spun or otherwise prepared, wholly or in chief value from jute, in form for use in weaving or twisting or other manufacturing.

The first domestic processing of jute yarn is the manufacture or preparation in any form of said yarn into twine, and includes the twisting, or polishing, or sizing, or the putting up of said yarn into balls, cones, tubes, reels, skeins or other forms of put-ups of twine, or any other preparation for market of said yarn as twine.

Twine is line, cord, string or other tying material made from jute yarn, of a length not less than 275 feet per pound, finished weight of twine, and includes polished twine and unpolished twine, and twine made from a single ply or more than one ply of jute yarn.

The first domestic processing of jute yarn into twine (as these terms are above defined), on or after December 1, 1933, is subject (under the provisions of section 15(d) of the Agricultural Adjustment Act) to the processing tax, and the processor is liable for the tax computed on the total weight of the jute yarn put into such process.

The tax upon the first domestic processing of jute yarn into twine became effective on December 1, 1933. All such twine, which was held on December 1, 1933, for sale or other disposition, became subject to the tax on floor stocks imposed under section 16(a) of the Act. The tax on floor stocks of twine is computed on the total weight of the twine. (T. D. 4415, supra.)

PROCESSING TAX—COTTON.—SECTION 15.—EXEMPTIONS AND COMPENSATING TAXES. SECTION 17.—EXPORTATIONS.

REGULATIONS 81, ARTICLE 32: Refund of tax paid with respect to products delivered for charitable distribution or use. XIII-10-6690 P. T. 5

REGULATIONS 83, ARTICLE 3: Drawback.

Effect on refunds of change in cotton conversion factors.

Section 15(c) of the Agricultural Adjustment Act provides for the refund of taxes paid with respect to any product delivered to any organization for charitable distribution or use. Section 17(a) provides for the refund of taxes paid with respect to any product exported to any foreign country. Section 10(c) authorizes the Secretary of Agriculture to establish "conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto." Pursuant to this authority, certain cotton conversion factors were established which were in effect prior to December 1, 1933. Revised conversion factors were later established which became effective on that date. The question presented for consideration is which conversion factors apply in determining the amounts of refunds made after December 1, 1933.

In the case of a floor tax or compensating tax, the amount of the tax paid with respect to the particular goods delivered or exported is known and, consequently, no conversion factor is required to determine the amount to be refunded. With respect to the processing tax, conversion factors are required to determine how much processing tax was paid. The particular questions raised are whether the revised conversion factors established by the Secretary of Agriculture apply in the adjustment (1) of such claims *filed* on and after December 1, 1933, (2) of such claims *allowed* on and after that date, (3) of such claims with respect to articles *exported* on and after that date, or *delivered* on and after that date for charitable distribution or use, and (4) of such claims where the tax was *paid* on and after December 1, 1933.

The date on which the claim was filed, the date on which the claim was allowed, and the date on which the tax was paid are all immaterial. It is the time at which the right to refund had its inception or accrued which is decisive. The right to refund has its inception or accrues at the time when exportation or delivery for charitable distribution or use occurs conformably to the statute. Accordingly, exportations or deliveries prior to December 1, 1933, are controlled by the conversion factors then in effect, while exportations or deliveries on or after December 1, 1933, are controlled by the conversion factors in effect on and after that date.

The term "tax paid" indicates the amount of tax actually due and paid rather than the amount of tax actually paid. Any overpayment of tax is refundable to the person who actually made the overpayment and not to the person who delivered or exported the article to which the tax relates.

SECTION 16.—FLOOR STOCKS.

REGULATIONS 82, ARTICLE 5: Held for sale or other disposition. XIII-20-6799 P. T. 9

Taxability under section 16(a)1 of the Agricultural Adjustment Act of new and unused multiwall paper bags on hand on December 1, 1933.

Inquiry is made whether stocks of new and unused multiwall paper bags, held on December 1, 1933, by a manufacturer of a product other than paper bags, are subject to the tax on floor stocks imposed by section 16(a)1 of the Agricultural Adjustment Act.

On December 1, 1933, the manufacturer had on hand new and unused multiwall paper bags of a weight of more than 200 pounds per thousand bags, which had been purchased for use as containers for the product sold by the manufacturer. Each bag had printed thereon the name of the manufacturer, the name of the particular brand, and other data.

The tax imposed by section 16(a)1 of the Agricultural Adjustment Act became effective on December 1, 1933, with respect to floor stocks of multiwall paper bags, as defined in Treasury Decision 4415 [page 515, this Bulletin]. Paragraph E of Treasury Decision 4415, supra, defines "multiwall paper bags" as "bags having more than one wall and weighing more than 200 pounds per thousand bags."

The words "held for sale or other disposition" used in section 16(a)1 of the Agricultural Adjustment Act are broad in scope. The empty bags in question had not been used. They were articles of commerce subject to sale or other disposition and were held by the company when the processing tax on paper products became effective. If the bags were held for sale the tax would unquestionably be due. The words "other disposition" are not restricted by the terms of the statute. The ultimate use to which the bags were put is immaterial. The criterion of taxability is whether, on the effective date of the Act, the bags were held for any one of the purposes specified in the Act. It was clearly the purpose of the statute to impose a tax with respect to such articles which had been processed prior to the effective date of the Act, and which would compete with bags manufactured or processed after the Act became effective.

In view of the foregoing, it is held that the multiwall paper bags in question, which come within the definition of such bags contained in Treasury Decision 4415, supra, were held on December 1, 1933, for sale or other disposition, within the meaning of section 16(a)1 of the Agricultural Adjustment Act, and that they are subject to the tax on floor stock imposed by that section.

REGULATIONS 82, ARTICLE 6: Obligation of the tax; person liable. XIII-24-6851 P. T. 11

For floor tax purposes, title to flour sold under the so-called "——— sales contract" passes to the buyer upon delivery of the flour to the carrier.

Inquiry is made as to when title to flour sold under the so-called "——— sales contract" passes to the purchaser for the purpose of determining liability under section 16(a)1 of the Agricultural Adjustment Act imposing a tax on floor stocks.

Millers in Minnesota sold flour under a form of contract known as the "——— sales contract." In order to determine whether the seller or the buyer is liable for the tax on floor stocks with respect to flour sold under such a contract, it is necessary to determine when title to such flour passed to the buyer.

Paragraph 7(c) of the contract in question provides, in part, as follows:

> Subject to the lien of seller for the unpaid purchase price, delivery by seller of goods to the carrier at point of shipment shall constitute delivery to buyer.

Article 6 of Regulations 82 provides that the person liable for the tax on floor stocks, and obligated to pay the tax, is the one who, on the effective date, owns the article held for sale or other disposition.

The general rule regarding the transfer of title as between the seller and buyer is that appropriation of the goods by the seller, by delivery to a carrier, transfers the title to the buyer. (See Williston on Sales (2d edition) volume 1, page 582, section 278, rule 4(2).) This general rule is contained in the uniform sales act which was adopted by the State of Minnesota on June 1, 1917. (Laws 1917, ch. 465.) Section 18 of the uniform sales act reads as follows:

> Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Rule 4(2) of section 19 of the same act reads as follows:

> Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Section 20(2) of the same act reads as follows:

> Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller

thereby reserves the property in the goods. But, if except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

Practically the same provisions as are contained in section 20(2) are found in section 40(B) of the uniform bill of lading act, adopted by the State of Minnesota on June 1, 1917 (Laws of 1917, ch. 399).

From the foregoing it is clear that the parties to the contract in question contemplated transfer of title to the merchandise when the merchandise was delivered by the seller to the carrier. If the merchandise was delivered to the carrier before July 9, 1933, the date on which the tax on floor stocks became effective on certain stocks of articles processed wholly or in chief value from wheat and held on that date for sale or other disposition, it is clear in this case that title to such merchandise was in the buyer on the effective date of the floor tax, regardless of whether the merchandise was shipped on an order bill of lading directed to the seller or on an order bill of lading directed to the buyer. In such a situation, the buyer is liable for the floor tax with respect to the flour so sold and delivered.

SECTION 16.—FLOOR STOCKS. SECTION 17.—EXPORTATIONS.

Regulations 82, Article 1: Definitions. XIII-4-6620
Regulations 83, Article 3: Drawback. P.T. 2

Cotton bags containing flour, sugar, cement, or other product on August 1, 1933, are not subject to the tax on floor stocks of articles processed from cotton.

An exporter of products contained in cotton bags is not entitled to a drawback of floor stock tax or processing tax paid on such bags.

An opinion is requested whether (1) cotton bags containing flour, sugar, cement, or other product on August 1, 1933, are subject to the tax on floor stocks of articles processed from cotton imposed by the Agricultural Adjustment Act, and (2) whether an exporter of products contained in cotton bags is entitled to a drawback of any tax on floor stocks or processing tax paid on such bags.

The processing tax imposed by the Agricultural Adjustment Act became effective on August 1, 1933, with respect to cotton. On that date section 16(a) of the Act also became effective and imposed a tax on floor stocks of articles processed wholly or in chief value from cotton, and which were on that date held by any person for sale or other disposition.

It is held that cotton bags containing flour, sugar, cement, or other product on August 1, 1933, are not subject to the tax imposed by section 16(a)1 of the Agricultural Adjustment Act. It is also held that an exporter of products contained in cotton bags is not entitled to a drawback of any floor stock tax or processing tax paid on account of such bags.

MISCELLANEOUS.

XIII–13–6729
T. D. 4425

Processing and other taxes with respect to hogs under the Agricultural Adjustment Act.

Prescribing regulations in conformity with Hog Regulations, Series 1, made by the Secretary of Agriculture and approved by the President October 18, 1933, as supplemented, revised, and, in part, superseded by Hog Regulations, Series 1, Supplement 1, made by the Secretary of Agriculture and approved by the President November 14, 1933, Hog Regulations, Series 1, Revision 1, approved December 21, 1933, Hog Regulations, Series 1, Supplement 2, approved January 9, 1934, and Hog Regulations, Series 1, Supplement 3, approved January 27, 1934. Treasury Decision 4406, approved November 11, 1933 [C. B. XII–2, 453], revoked.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D.C.

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated August 17, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that benefit payments are to be made with respect to hogs, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to the processing tax on hogs, made by the Secretary of Agriculture, with the approval of the President, dated October 18, 1933, as supplemented, revised, and, in part, superseded by regulations made by the Secretary of Agriculture, and approved by the President under dates of November 14, 1933, and December 21, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for hogs shall begin November 5, 1933.

I do hereby find that the rate of tax as of November 5, 1933, which equals the difference between the current average farm price for hogs and the fair exchange value of hogs, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of hogs, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of hogs, or products thereof, or in the depression of the farm price of hogs. I do accordingly hereby determine: As of November 5, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be fifty (50) cents per hundred (100) weight, live weight; as of December 1, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar per hundred (100) weight, live weight; as of February 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar fifty (50) cents per hundred (100) weight, live weight; as of March 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be two (2) dollars twenty-five (25) cents per hundred (100) weight, live weight, which said rate, as of the effective date thereof, will prevent the accumulation of surplus stocks and depression of the farm price of hogs.

I. Definitions.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The first domestic processing is the slaughtering of hogs for market.

Slaughtering.—Slaughtering is the actual killing of hogs. Hogs condemned by an authorized Federal, State, county or municipal inspector as being totally unfit for human food shall not be considered hogs slaughtered for market within the meaning of these regulations.

Live weight.—Live weight is the weight of the live animal at the time of slaughter. However, the actual weight at the time of purchase may be used as live weight in the meaning of these regulations, provided the hogs are shipped direct to the slaughterhouse for immediate slaughter within three (3) days after purchase is made.

Carcass.—Carcass is the animal body after the blood, hair, toes, and viscera have been removed.

Wiltshire.—A Wiltshire is half of a hog carcass with head, feet and part of jowl removed, consisting of the ham, side, and shoulder in one piece.

Cumberland.—A Cumberland is similar to a Wiltshire except that the ham is removed.

Cuts.—Cuts are the various parts into which the hog carcass is divided in the operation of converting the carcass into products which go into commercial trade.

Ham.—A ham is that part of the hog carcass which consists of the hind leg extending from the foot to the backbone (not inclusive). It may include part or all of the hock and part or all of the pelvic bone.

Regular ham.—A regular ham is a ham, either long-cut or short-cut, from which skin has not been removed. This classification includes such styles as American, English, Italian and all other varieties of unskinned hams.

Skinned ham.—A skinned ham is a ham, either long-cut or short-cut, of any description from which all or part of the skin has been removed.

Boneless ham.—A boneless ham is a ham of any description from which all of the bone has been removed.

Rough shoulder.—A rough shoulder is that part of the hog carcass extending from near the third rib to but not including the jowl, with the foot removed.

Regular shoulder.—A regular shoulder is a rough shoulder with neck and rib bones removed. This classification includes such styles as English, New York, New Orleans, and all other varieties of unskinned shoulders.

Skinned shoulders.—A skinned shoulder is a regular shoulder from which part or all of the skin has been removed.

Picnic.—A picnic is a cut comprising about the lower two-thirds of the shoulder. This classification includes regular shank, short shank, shankless, and skinned or unskinned picnics; and also shanks (sometimes called hocks) which may have been previously separated.

Boneless picnic.—A boneless picnic is a picnic of any description from which all of the bone has been removed.

Shoulder butt.—A shoulder butt is the top portion of the shoulder which is removed from the shoulder in making a picnic.

Butt.—The butt is the portion of the shoulder butt after removal of plate. This classification includes such styles as Boston, Milwaukee, Buffalo, and all other types of butts except boneless butts.

Boneless butt.—A boneless butt is a Boston or other style butt with bone removed.

Plate.—A plate is the fat portion of the shoulder butt.

Rough short ribs.—Rough short ribs are the middle portion of the hog carcass after removal of the hams and shoulders.

Short ribs.—Short ribs are the rough short ribs with the backbone and tenderloin removed.

Extra short ribs.—Extra short ribs are the rough short ribs with the loin removed.

Short clears.—Short clears are the rough short ribs with the backbone, spareribs, and tenderloin removed.

Extra short clears.—Extra short clears are the rough short ribs with the loin and spareribs removed.

Rib back.—The rib back is the upper half of the rough side with the tenderloin removed.

Pork loin.—Pork loin is that portion of the side of the carcass from which the belly and fat back have been removed; it usually contains the backbone, back ribs, and tenderloin and has but a small amount of fat on the outside. This classification however includes bladeless loin, tenderloin, and boneless loin, either domestic trim or Canadian style.

Fat back.—Fat back is that portion of the side which remains after removal of the pork loin and belly. This classification includes skinned, unskinned, and long-cut and short-cut fat backs.

Spareribs.—Spareribs are the meaty ribs taken from the side in half or whole sheets.

Belly (when cured and smoked, commonly known as bacon)—

Dry salt trim (commonly known as "belly D. S. trim"): The roughly trimmed portion of the rough side remaining after removal of loin and fat backs and including or excluding spareribs, whether or not put down in dry salt.

Pickle trim (commonly known as "belly S. P. trim"): Same as above except trimmed reasonably square. This classification includes English style bellies and all belly cuts not otherwise described, including fancy trimmed bellies and briskets.

Briskets.—Briskets are pieces removed from the shoulder ends of bellies.

Jowl.—A jowl is the cheek and part of the neck. This classification includes jowl butts and bacon squares.

Head.—The head is the hog skull and jaw bones with attached organs and fleshy covering, except the jowls.

Trimmings.—The trimmings are the boneless meat of all degrees of lean and fat derived from any portion of the hog carcass which has lost its identity as a major cut.

Foot.—The foot is that part of the front or hind leg from approximately the knee joint downward.

Neck bones.—Neck bones are bones of the neck with adhering flesh after removal from the rough shoulder.

Cheek meat and temple meat.—Cheek meat and temple meat consist of the fleshy covering of the upper jawbone and fore part of skull.

Lard.—Lard is edible hog fat after rendering. This includes refined and unrefined lard, neutral lard and leaf lard. Unrendered fats should be converted to a lard yield basis.

Viscera.—Viscera are the intestines, with their contents, and vital organs of the body cavities, with their attached fats.

Edible offal.—Edible offal are the various edible products obtained from hog viscera and hog heads; also the hog feet and tails.

Inedible offal.—Inedible offal are the various inedible products obtained in the slaughter of hogs, consisting largely of blood, hair, bristles, parts of the viscera and their contents, and skin.

Tankage.—Tankage is the residue from rendering or cooking operations in the production of lard or grease from hog products.

Fresh, chilled, or green meat.—Fresh, chilled, or green meat is meat which has not been subjected to any preservative treatment, such as cooking, drying, freezing, or the use of curing agents.

Frozen meat.—Frozen meat is fresh meat held below the freezing temperature of such meat.

In cure.—In cure (usually called by the trade "in process of cure") is meat under treatment of curing or preservative agents. This includes all meat packed as barreled pork.

Cured meat.—Cured meat is meat which has gone through a complete curing or preservative process.

Put down or pack.—To place meat in cure.

Smoked meat.—Smoked meat is meat exposed to a smoking treatment.

Cooked meat.—Cooked meat is meat exposed to a cooking treatment.

Canned meat.—Canned meat is meat cooked and packed in hermetically sealed metal or glass containers.

Dried meat.—Dried meat is meat preserved by a drying treatment.

General.—Barreled pork is to be classified according to the cut from which derived, and reported on basis of put-down green weight.

Sausage.—Sausage is chopped or ground meat composed wholly or in chief value from pork and seasoned. It may be in bulk, or stuffed in animal casings, or packed in other containers.

Fresh sausage.—Fresh sausage is sausage made of fresh or frozen meat and not subjected to a treatment of smoking, cooking, or drying.

Smoked and/or cooked sausage.—Smoked and/or cooked sausage is sausage made from fresh, frozen, or cured meat and further treated by smoking or cooking, or both, but not treated by drying.

Dried sausage.—Dried sausage is sausage made from fresh, frozen, or cured meat and further treated by drying. It may be further treated by smoking or cooking, or both. It includes all cervelats, salamis, and mettwursts of Italian, German, Polish, or other styles.

Luncheon meats.—Luncheon meats are mixtures prepared for eating without further cooking and include such articles as pork loaf, sandwich meat, head cheese, souse, and similar combinations. This classification does not include canned loins or canned tongue; whole or part pieces of canned ham, which are derived from hams; canned deviled ham, canned spiced ham, and canned spiced luncheon meats which are derived from trimmings. They are to be considered as cooked products of the cuts from which derived and are subject to the conversion factor prescribed therefor.

II. Conversion Factors.

I do hereby establish the following conversion factors for articles processed from hogs, to determine the amount of tax imposed or refunds to be made with respect thereto.

The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following articles processed wholly or in chief value from hogs:

Article.	Conversion factor.				
	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Carcass:					
Head and leaf included	132	132	125	140	178
Head included, leaf removed	134	134	127	142	181
Head removed, leaf included	138	138	131	146	186
Head and leaf removed	139	139	132	147	188
Wiltshire side	145	145	138	154	196
Cumberland side	132	132	125	140	178
Regular ham	194	194	184	206	242
Skinned ham	219	219	205	229	292
Boneless ham	252	252	239	267	340
Rough shoulder	85	85	81	90	115
Regular shoulder	89	89	86	94	120
Skinned shoulder	94	94	89	100	127
Picnic	76	76	72	81	103
Boneless picnic	99	99	95	105	129
Shoulder butt and butt	123	123	116	130	166
Boneless butt	179	179	170	190	242
Plate	80	80	76	85	108
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	135	135	129	143	182
Pork loin	216	216	205	229	292
Fat back	87	87	83	92	117
Spareribs	66	66	63	70	89
Belly D. S. trim	124	124	118	131	167
Belly S. P. trim and briskets	180	180	171	191	243
Jowl	80	80	76	85	108
Head	60	60	58	63	81
Trimmings	80	80	76	85	108
Neck bones	19	19	18	20	26
Feet	19	19	18	20	26
Tails	44	44	42	47	59
Livers, hearts, and kidneys	44	44	42	47	59
Snouts, ears, lips, and miscellaneous edible offal	22	22	21	23	30
Cheek meat	88	88	84	94	118
Brains	44	44	42	47	59
Tongues	166	166	157	176	224
Lard	110	----------	----------	----------	----------
Pork sausage	80	80	76	85	112
Dried sausage (including cervelats and salamis)	60	60	57	63. 75	84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	76	76	72. 20	81. 75	106. 40
Inedible offal	0	0	0	0	0

In the event that any taxpayer or person entitled to a refund establishes that any or all types of sausages, processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the listed conversion factor, then the conversion factor, for each pound of pork, green weight, which said sausages are established to contain, shall be the following percentage of the per pound processing tax on hogs:

(*a*) If fresh meat, 80 per cent.
(*b*) If cured, dry salt meat, 80 per cent.
(*c*) If cured, sweet pickle meat, 76 per cent.
(*d*) If smoked meat, 85 per cent.
(*e*) If cooked, dried or canned meat, 112 per cent.

Edible products, wholly or in chief value of pork, for which no specific conversion factor is prescribed in these regulations are not excluded from the payment of the compensating or floor stocks taxes. They shall be subject, with respect to the amount of their pork content, to the conversion factor prescribed for the cut from which they are derived in whole or in chief part.

PAR. E. The regulations, with respect to the processing tax on hogs, made by the Secretary of Agriculture, with approval of the President, dated October 18, 1933, as supplemented by regulations made by the Secretary of Agriculture and approved by the President under date of January 9, 1934, provide:

In addition to the conversion factors established in Hog Regulations, Series 1, and in Hog Regulations, Series 1, Supplement 1, I do hereby establish the following conversion factors, to be used to restore to a live-weight basis hog products sold by the producer of the hogs, in order to determine the amount of tax imposed or refunds to be made with respect thereto.

The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following hog products sold by the producer of the hogs:

Article.	Conversion factor.
	Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried, or canned pork	178

PAR. F. The regulations, with respect to the processing tax on hogs, made by the Secretary of Agriculture, with the approval of the President, dated October 18, 1933, as supplemented and, in part, revised by regulations made by the Secretary of Agriculture and approved by the President under date of January 27, 1934, provide:

EXEMPTION.

In my judgment, the imposition of the processing tax upon hogs processed by the producer thereof who, together with his own family, employees, or household, sells or exchanges not more than three hundred (300) pounds of the products derived therefrom, during any marketing year, is unnecessary to effectuate the declared policy of the Act. Accordingly, I do hereby exempt from the processing tax, hogs processed by the producer thereof who, together with his own family, employees, or household, sells or exchanges not more than three hundred (300) pounds of the products derived therefrom, during any marketing year: *Provided, however,* That if the producer processes hogs produced by him and, together with his own family, employees, or household, sells or exchanges, during any marketing year, products derived therefrom in excess of three hundred (300) pounds, but not in excess of one thousand (1,000) pounds, he shall be entitled to the foregoing exemption, but shall pay the processing tax on the excess above three hundred (300) pounds, restored to a live-weight basis by use of the conversion factors prescribed in Hog Regulations, Series 1, Supplement 2: *Provided further,* That if the producer, together with his own family, employees, or household, processes hogs produced by him and sells or exchanges more than one thousand (1,000) pounds of the products derived therefrom, during any marketing year, he shall not be entitled to the foregoing exemption.

When hogs are owned on a share basis, the foregoing exemption shall be apportioned between the joint owners thereof on the basis of their respective shares.

When a producer has processed hogs produced by him and has sold, during the marketing year, products derived therefrom in excess of one thousand (1,000) pounds, and has failed to pay the processing tax on hogs, for the month in which the said hogs were processed, due to a reliance on the foregoing exemption, then he shall be liable for the processing tax upon all of the hogs, live weight, theretofore slaughtered, with respect to which no processing tax has been paid, as for the month in which the hog products sold exceeded one thousand (1,000) pounds, at the rate of tax in effect on the date of slaughter of the hogs. To restore the hog products sold to a live-weight basis, the producer shall use the conversion factors prescribed by Hog Regulations, Series 1, Supplement 2.[1]

When hog products are retained for consumption and consumed by the producer and his family, employees, or household, to that extent the hogs shall be deemed to have been processed for that purpose and not for sale or exchange.

The term "producer" means the owner of the hog at the time of farrowing.

When the hogs are processed by the producer, it will not be necessary for the producer to furnish an affidavit, or witnessed statement, upon the processing of hogs for sale or exchange by him, of the hog products sold or exchanged, to the extent of the foregoing exemption and tolerance allowance, and/or upon the processing of hogs for consumption by himself, his family, employees, or household, of the hogs slaughtered for that purpose, provided the producer keeps a written record showing: the date on which the hogs were slaughtered; the number of hogs slaughtered; the live weight of the hogs slaughtered (where not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); the hog products sold, the weight thereof, the price paid therefor, the date of the sale, and (where practicable) the name and address of the person to whom sold; the hog products consumed by himself, his family, employees, or household and the actual or estimated weight thereof; and the live weight of hogs processed for the producer, his family, employees, or household, together with the name and address of the processor thereof.

The foregoing exemption and tolerance allowance shall be effective as of November 5, 1933, the date on which the first marketing year for hogs began.

PAR. G. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. H. Section 10(a), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. I. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

PAR. J. Section 1119, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

Whether or not the method of collecting any tax imposed by Titles IV, V, VI, or VII is specifically provided therein, any such tax may, under regulations prescribed by the Commissioner with the approval of the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of Title VIII, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be collected in such manner.

[1] Paragraph E, above.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of hogs becomes effective at the earliest moment of November 5, 1933. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from hogs, and imported on or after November 5, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from hogs which, on November 5, 1933, are held for sale or other disposition.

The rates of processing tax are given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamation of the Secretary of Agriculture, set forth in paragraph B, above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to hogs. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to products processed or manufactured wholly or in chief value from hogs, the date, November 5, 1933, is the "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, that is, the date when the processing tax on hogs first takes effect. See article 2(*b*) for the dates subsequent to November 5, 1933, when increased rates of processing tax become effective.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph D, above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of hogs becomes effective at the first moment of November 5, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 4. The first return of processing tax shall embrace the period November 5, 1933, to November 30, 1933, both inclusive, and shall be filed on or before December 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rates of tax applicable to the first domestic processing of hogs are: As of November 5, 1933, 50 cents per hundredweight, live weight; as of December 1, 1933, $1 per hundredweight, live weight; as of February 1, 1934, $1.50 per hundredweight, live weight; as of March 1, 1934, $2.25 per hundredweight, live weight.

(*c*) For the period from November 5, 1933, to November 30, 1933, both inclusive, and for each calendar month thereafter, each processor of hogs shall keep a record of (1) the number and weight of hogs on hand at the beginning of the period, (2) the number and weight of hogs received during the period, (3) the number and weight of hogs shipped or delivered during the period, (4) the number and weight of hogs on hand at the end of the period. The number and weight must be ascertained by actual count and weight and not by estimation.

(*d*) Exemption: (1) The term "producer" as used in these regulations means the owner of the hog from the time it was farrowed.

(2) For the purposes of exemption from processing tax, the processing of a hog, or the sale or exchange of the products derived therefrom, by any member of the family or household, or by an employee, of the producer of the hog, shall be deemed to have been done by the producer himself.

(3) A producer who processes hogs produced by him and who, during any marketing year, sells or exchanges not more than 300 pounds of the products derived therefrom, is exempt from processing tax on the live-weight equivalent

thereof, computed in accordance with the conversion factors prescribed, as set forth in paragraph (8) below.

If a producer processes hogs which he has not owned from the time they were farrowed, and sells or exchanges any of the products derived therefrom, he is not entitled to any exemption from the tax on such processing, and must pay the processing tax on the entire live weight of all the hogs so processed, from which the products sold or exchanged were derived.

(4) A producer who processes hogs produced by him and who, during any marketing year, sells or exchanges products derived therefrom in excess of 300 pounds but not in excess of 1,000 pounds shall be entitled to the exemption on 300 pounds of such products but shall pay the processing tax on the excess above 300 pounds. The processing tax on such excess shall be computed on a live-weight basis in accordance with the conversion factors hereinafter set forth in paragraph (8) below, and at the rate of tax in effect on the date of slaughter of the hogs from which such excess was processed.

(5) When hogs are jointly owned, the exemption as to 300 pounds shall be apportioned between the joint owners thereof on the basis of their respective shares.

(6) When hog products are retained for consumption and consumed by the producer and his family, employees, or household, to that extent the hogs shall be deemed to have been processed for that purpose and not for sale or exchange.

(7) A producer who processes hogs produced by him and who sells or exchanges during any marketing year more than 1,000 pounds of the products derived therefrom shall not be entitled to the above exemption of 300 pounds. When such total sales or exchanges exceed 1,000 pounds, the producer becomes liable for the processing tax on the live-weight equivalent of all products derived from hogs processed, which were sold or exchanged by him during the marketing year, at the rate of tax in effect on the date of the slaughter of the hogs from which the products sold or exchanged were processed. The return of such producer-processor for the month in which such total sales or exchanges during the marketing year first exceed 1,000 pounds shall show the tax liability of such processor for the first 300 pounds. For the purpose of determining the amount of tax to be paid, such producer shall use the conversion factors set forth in paragraph (8) below to restore to a live-weight basis the hog products sold or exchanged.

(8) To restore to a live-weight basis hog products sold or exchanged, the producer shall use the conversion factors prescribed as follows:

Article.	Conversion factor.
	Per cent.
Dressed carcass	132
Lard	110
All fresh, frozen, in cure, or barreled pork, dry salt cured pork	132
All pickle-cured pork	125
All smoked pork	140
All cooked, dried, or canned pork	178

(9) Each such producer-processor shall keep a written record showing: (*a*) The date on which the hogs were slaughtered; (*b*) the number of hogs slaughtered; (*c*) the live weight of the hogs slaughtered (or if that is not practicable, an estimate of the live weight of the hogs and the basis used in arriving at this estimate); (*d*) the hog products sold or exchanged; (*e*) the weight thereof; (*f*) the price paid therefor; (*g*) the date of the sale or exchange; (*h*) the name and address of the person to whom sold or exchanged, where practicable; (*i*) the hog products consumed by himself, his family, employees, or household; and (*j*) the actual or estimated weight thereof. Such record shall be retained on the premises of the producer, and shall be open for inspection, at any reasonable time or times, by any internal revenue officer.

(10) The above exemption is effective as of November 5, 1933, the date on which the first marketing year for hogs began.

(11) P. T. Form 4–X is prescribed as the form of monthly processing tax return of a producer-processor of hogs. Return on this form must be made by each producer-processor for the period from November 5, 1933, to the end of

the month in which his sales or exchanges or products derived from the hogs processed by him during that period first exceed 300 pounds. Return must be made for each month thereafter during the marketing year as long as he holds for sale or exchange products derived from hogs produced and processed by him.

ART. 3. *Rates of tax.*—(*a*) The amounts of tax imposed with respect to certain articles processed wholly or in chief value from hogs, as determined upon the basis of the determination by the Secretary of Agriculture of processing tax rates given in article 2 and of his prescription of conversion factors in his regulations set forth in paragraph D, above, are as follows:

Rates of tax on floor stocks of articles or products processed wholly or in chief value from hogs held for sale or other disposition November 5, 1933, and rates of compensating tax on such articles or products effective from November 5, 1933, to November 30, 1933, both inclusive.

[Rates of tax shown are cents per pound.]

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	0.66	0.66	0.62	0.7	0.89
Head included, leaf removed	.67	.67	.63	.71	.90
Head removed, leaf included	.69	.69	.65	.73	.93
Head and leaf removed	.69	.69	.66	.73	.94
Wiltshire side	.72	.72	.69	.77	.98
Cumberland side	.66	.66	.62	.7	.89
Regular ham	.97	.97	.92	1.03	1.21
Skinned ham	1.09	1.09	1.02	1.14	1.46
Boneless ham	1.26	1.26	1.19	1.33	1.7
Rough shoulder	.42	.42	.4	.45	.57
Regular shoulder	.44	.44	.43	.47	.6
Skinned shoulder	.47	.47	.44	.5	.63
Picnic	.38	.38	.36	.4	.51
Boneless picnic	.49	.49	.47	.52	.64
Shoulder butt and butt	.61	.61	.58	.65	.83
Boneless butt	.89	.89	.85	.95	1.21
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	.67	.67	.64	.71	.91
Pork loin	1.08	1.08	1.02	1.14	1.46
Fat back	.43	.43	.41	.46	.58
Spareribs	.33	.33	.31	.35	.44
Belly D. S. trim	.62	.62	.59	.65	.83
Belly S. P. trim and briskets	.9	.9	.85	.95	1.21
Plate, jowl, and trimmings	.4	.4	.38	.42	.54
Head	.3	.3	.29	.31	.4
Neck bones and feet	.09	.09	.09	.1	.13
Tails, livers, hearts, kidneys, and brains	.22	.22	.21	.23	.29
Snouts, ears, lips, and miscellaneous edible offal	.11	.11	.1	.11	.15
Cheek meat	.44	.44	.42	.47	.59
Tongues	.83	.83	.78	.88	1.12
Lard	.55	----	----	----	----
Pork sausage	.4	.4	.38	.42	.56
Dried sausage (including cervelats and salamis)	.3	.3	.28	.31	.42
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	.38	.38	.36	.4	.53
Sausage, pork content [1]	.4	.4	.38	.42	.56

[1] See note (1) following table in subdivision (*d*) of this article.

(*b*) *Rates of compensating tax on articles or products processed wholly or in chief value from hogs effective from December 1, 1933, to January 31, 1934, both inclusive.*

[Rates of tax shown are cents per pound.]

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	1. 32	1. 32	1. 25	1. 4	1. 78
Head included, leaf removed	1. 34	1. 34	1. 27	1. 42	1. 81
Head removed, leaf included	1. 38	1. 38	1. 31	1. 46	1. 86
Head and leaf removed	1. 39	1. 39	1. 32	1. 47	1. 88
Wiltshire side	1. 45	1. 45	1. 38	1. 54	1. 96
Cumberland side	1. 32	1. 32	1. 25	1. 4	1. 78
Regular ham	1. 94	1. 94	1. 84	2. 06	2. 42
Skinned ham	2. 19	2. 19	2. 05	2. 29	2. 92
Boneless ham	2. 52	2. 52	2. 39	2. 67	3. 4
Rough shoulder	. 85	. 85	. 81	. 9	1. 15
Regular shoulder	. 89	. 89	. 86	. 94	1. 2
Skinned shoulder	. 94	. 94	. 89	1	1. 27
Picnic	. 76	. 76	. 72	. 81	1. 03
Boneless picnic	. 99	. 99	. 95	1. 05	1. 29
Shoulder butt and butt	1. 23	1. 23	1. 16	1. 3	1. 66
Boneless butt	1. 79	1. 79	1. 7	1. 9	2. 42
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	1. 35	1. 35	1. 29	1. 43	1. 82
Pork loin	2. 16	2. 16	2. 05	2. 29	2. 92
Fat back	. 87	. 87	. 83	. 92	1. 17
Spareribs	. 66	. 66	. 63	. 7	. 89
Belly D. S. trim	1. 24	1. 24	1. 18	1. 31	1. 67
Belly S. P. trim and briskets	1. 8	1. 8	1. 71	1. 91	2. 43
Plate, jowl, and trimmings	. 8	. 8	. 76	. 85	1. 08
Head	. 6	. 6	. 58	. 63	. 81
Neck bones and feet	. 19	. 19	. 18	. 2	. 26
Tails, livers, hearts, kidneys, and brains	. 44	. 44	. 42	. 47	. 59
Snouts, ears, lips, and miscellaneous edible offal	. 22	. 22	. 21	. 23	. 3
Cheek meat	. 88	. 88	. 84	. 94	1. 18
Tongues	1. 66	1. 66	1. 57	1. 76	2. 24
Lard	1. 1				
Pork sausage	. 8	. 8	. 76	. 85	1. 12
Dried sausage (including cervelats and salamis)	. 6	. 6	. 57	. 63	. 84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	. 76	. 76	. 72	. 81	1. 21
Sausage, pork content [1]	. 8	. 8	. 76	. 85	1. 9

[1] See note (1) following table in subdivision (*d*) of this article.

(*c*) *Rates of compensating tax on articles or products processed wholly or in chief value from hogs, effective from February 1, 1934, to February 28, 1934, both inclusive.*

[Rates of tax shown are cents per pound.]

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	1.98	1.98	1.87	2.1	2.67
Head included, leaf removed	2.01	2.01	1.9	2.13	2.71
Head removed, leaf included	2.07	2.07	1.96	2.19	2.79
Head and leaf removed	2.08	2.08	1.98	2.2	2.82
Wiltshire side	2.17	2.17	2.07	2.31	2.94
Cumberland side	1.98	1.98	1.87	2.1	2.67
Regular ham	2.91	2.91	2.76	3.09	3.63
Skinned ham	3.28	3.28	3.07	3.43	4.38
Boneless ham	3.78	3.78	3.58	4	5.1
Rough shoulder	1.27	1.27	1.21	1.35	1.72
Regular shoulder	1.33	1.33	1.29	1.41	1.8
Skinned shoulder	1.41	1.41	1.33	1.5	1.9
Picnic	1.14	1.14	1.08	1.21	1.54
Boneless picnic	1.48	1.48	1.42	1.57	1.93
Shoulder butt and butt	1.84	1.84	1.74	1.95	2.49
Boneless butt	2.68	2.68	2.55	2.85	3.63
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	2.02	2.02	1.93	2.14	2.73
Pork loin	3.24	3.24	3.07	3.43	4.38
Fat back	1.3	1.3	1.24	1.38	1.75
Spareribs	.99	.99	.94	1.05	1.33
Belly D. S. trim	1.86	1.86	1.77	1.96	2.5
Belly S. P. trim and briskets	2.7	2.7	2.56	2.86	3.64
Plate, jowl, and trimmings	1.2	1.2	1.14	1.27	1.62
Head	.9	.9	.87	.94	1.21
Neck bones and feet	.28	.28	.27	.3	.39
Tails, livers, hearts, kidneys, and brains	.66	.66	.63	.7	.88
Snouts, ears, lips, and miscellaneous edible offal	.33	.33	.31	.34	.45
Cheek meat	1.32	1.32	1.26	1.41	1.77
Tongues	2.49	2.49	2.35	2.64	3.36
Lard	1.65	-------	-------	-------	-------
Pork sausage	1.2	1.2	1.14	1.27	1.68
Dried sausage (including cervelats and salamis)	.9	.9	.85	.95	1.26
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1.14	1.14	1.08	1.22	1.59
Sausage, pork content [1]	1.2	1.2	1.14	1.27	1.68

[1] See note (1) following table in subdivision (*d*) of this article.

(*d*) *Rates of compensating tax on articles or products processed wholly or in chief value from hogs, effective on and after March 1, 1934.*

[Rates of tax shown are cents per pound.]

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Carcass:					
Head and leaf included	2. 97	2. 97	2. 81	3. 15	4
Head included, leaf removed	3. 01	3. 01	2. 85	3. 19	4. 07
Head removed, leaf included	3. 1	3. 1	2. 94	3. 28	4. 18
Head and leaf removed	3. 12	3. 12	2. 97	3. 3	4. 23
Wiltshire side	3. 26	3. 26	3. 1	3. 46	4. 41
Cumberland side	2. 97	2. 97	2. 81	3. 15	4
Regular ham	4. 36	4. 36	4. 14	4. 63	5. 44
Skinned ham	4. 92	4. 92	4. 61	5. 15	6. 57
Boneless ham	5. 67	5. 67	5. 37	6	7. 65
Rough shoulder	1. 91	1. 91	1. 82	2. 02	2. 58
Regular shoulder	2	2	1. 93	2. 11	2. 7
Skinned shoulder	2. 11	2. 11	2	2. 25	2. 85
Picnic	1. 71	1. 71	1. 62	1. 82	2. 31
Boneless picnic	2. 22	2. 22	2. 13	2. 36	2. 9
Shoulder butt and butt	2. 76	2. 76	2. 61	2. 92	3. 73
Boneless butt	4. 02	4. 02	3. 82	4. 27	5. 44
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	3. 03	3. 03	2. 9	3. 21	4. 09
Pork loin	4. 86	4. 86	4. 61	5. 15	6. 57
Fat back	1. 95	1. 95	1. 86	2. 07	2. 63
Spareribs	1. 48	1. 48	1. 41	1. 57	2
Belly D. S. trim	2. 79	2. 79	2. 65	2. 94	3. 75
Belly S. P. trim and briskets	4. 05	4. 05	3. 84	4. 29	5. 46
Plate, jowl, and trimmings	1. 8	1. 8	1. 71	1. 91	2. 43
Head	1. 35	1. 35	1. 8	1. 41	1. 82
Neck bones and feet	. 42	. 42	. 4	. 45	. 58
Tails, livers, hearts, kidneys, and brains	. 99	. 99	. 94	1. 05	1. 32
Snouts, ears, lips, and miscellaneous edible offal	. 49	. 49	. 47	. 51	. 67
Cheek meat	1. 98	1. 98	1. 89	2. 11	2. 65
Tongues	3. 73	3. 73	3. 53	3. 96	5. 04
Lard	2. 47				
Pork sausage	1. 8	1. 8	1. 71	1. 91	2. 52
Dried sausage (including cervelats and salamis)	1. 35	1. 35	1. 28	1. 43	1. 89
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1. 71	1. 71	1. 62	1. 83	2. 39
Sausage, pork content (see note 1)	1. 8	1. 8	1. 71	1. 91	2. 52

NOTE.—(1) In the event that the taxpayer can establish that any or all of the types of sausages processed wholly or in chief value from hogs listed above contain more or less pork, green weight, than that represented by the rate listed, then for each pound of pork, green weight, which said sausages are established to contain, the rate of tax applicable in such case shall be as shown in the schedule above. The whole (actual) weight as well as the total pork content shall be reported.

(2) Edible products wholly or in chief value of pork, which are not specifically listed, are subject, with respect to the amount of their pork content, to tax at the rate listed for the cut from which they are derived in whole or in chief part. Each product shall be described, and the cut from which it was derived in whole or in chief part shall be shown. With respect to each described product there shall be entered on the return (*a*) the whole (actual) weight, (*b*) the pork content, and (*c*) the rate of tax, corresponding with that shown for the cut in the schedule above.

(3) Establishment of the pork content of products, as provided in notes (1) and (2) shall be substantiated by authentic records or other satisfactory proof.

ART. 4. *Floor stocks.*—(*a*) On November 5, 1933, the tax on floor stocks becomes effective on certain articles, processed wholly or in chief value from hogs, which on that date are held for sale or other disposition. The respective rates of tax applicable to such articles are given in article 3(*a*) of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 34, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before December 5, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 44, Floor tax inventory, record and return. This return must be filed on or before January 4, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

See article 7 for list of prescribed forms.

(*b*) Every person who, on November 5, 1933, owns a warehouse receipt for products processed wholly or in chief value from hogs, shall indorse plainly on such receipt a statement showing his name and address and that he owned such receipt on the first moment of November 5, 1933, and is responsible for payment of the floor tax on the products represented by the receipt.

If, on said date, any such receipt is in the possession of any person other than the owner, such person shall indorse such statement for the owner on the receipt, together with such person's name and official title, if any.

If on or after November 5, 1933, any person buys for himself or as agent for his principal any such products, and in such sale delivery of the products is made either in whole or in part by a warehouse receipt issued prior to said date, such person shall not accept as valid delivery any such receipt unless the statement required above is indorsed on the receipt, or unless there is attached thereto the owner's receipt on Form 1, showing payment of the tax on floor stocks on the products represented by such warehouse receipt.

When any such receipt (issued before November 5, 1933) is presented to the warehouse, either for the purpose of withdrawing all or part of the products represented thereby, or for the purpose of surrendering the receipt and receiving a new receipt or new receipts covering the same products or any part thereof, the warehouseman, before delivering such products or any part thereof, or such new receipt or new receipts, shall require that the receipt so presented or surrendered has attached thereto a receipt from the collector of internal revenue for the district, on Form 1, showing that the floor tax has been paid on the products represented by the receipt so presented or surrendered, or shall forthwith notify the collector that a receipt has been presented or surrendered without there being attached thereto Form 1. The notice to the collector shall give the date and serial number of the receipt, the kind and quantity of products covered thereby, the name of the person to whom the receipt was issued, and the name or names of all persons who have indorsed such receipt, and the name and address of the person who presents or surrenders such receipt.

Each person, who, on November 5, 1933, owns such products in a warehouse, for which a warehouse receipt has been issued before that date, shall, before such receipt is presented or surrendered to the warehouse (as set forth above), and in any event not later than December 5, 1933, file with the collector of internal revenue for the district, an inventory and return on P. T. Form 34 in accordance with the provisions of article 11 of Regulations 82. The payment of the tax shown on any such return may be postponed to December 5, 1933, except that the tax on any product in a warehouse, for which a warehouse receipt has been issued prior to November 5, 1933, must be paid on or before the presentation or surrender of such warehouse receipt to the warehouse, but not later than December 5, 1933. (For further postponement in the case of certain existing contracts, see article 6(*b*).)

(*c*) Each person who, on the effective date, holds for sale or other disposition any hog products, shall make a true and correct inventory thereof, as of the earliest moment of that date, and shall preserve a copy of such inventory, together with a record of all facts necessary to the determination of the correctness of such inventory. Such copy of inventory record shall be preserved and kept open for inspection and subject to all the requirements relative to records set forth in Regulations 82, article 21.

Art. 5. *Compensating tax on imported articles.*—On and after November 5, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from hogs, and imported into the United States or any possession thereof in which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The respective rates of tax applicable to such products are given in article 3 of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 14. See article 7 for list of prescribed forms.

Art. 6. *Existing contracts.*—(*a*) For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after November 5, 1933, of an article processed wholly or in chief value from hogs, the tax on such processing (if done on or after November 5, 1933) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

The vendee under such a contract is entitled, where optional rates may be applicable, to exercise such option.

(*b*) If a processor, jobber, or wholesaler has such a contract, made before November 5, 1933, calling for delivery on or after that date of products processed wholly or in chief value from hogs, which products are on November 5, 1933, in a public warehouse and a receipt therefor has been issued and the receipt for such products is not presented to the warehouse before December 5, 1933, payment of the floor tax on such products may be postponed until such receipt is so presented, but in any event not later than February 3, 1934. The collector's receipt on Form 1 must be attached to such receipt when presented.

Art. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to hogs are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 4	Processing tax return	Regulations 81, article 11.
P. T. Form 4–X	Processing tax return of producer-processor.	Regulations 81, article 11.
P. T. Form 14	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31 (b).
P. T. Form 34	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 44	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51, revised.	Monthly statement of importer	Regulations 81, article 21.

Art. 8. Treasury Decision 4406 [C. B. XII–2, 453], approved November 11, 1933, is hereby revoked.

Guy T. Helvering,
Commissioner of Internal Revenue.

Approved March 20, 1934.

H. Morgenthau Jr.,
Secretary of the Treasury.

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XIII-21-6811
T. D. 4433

Processing and other taxes with respect to cotton under the Agricultural Adjustment Act.

Partly revoking Treasury Decision 4389, approved September 6, 1933 [C. B. XII-2, 438], and prescribing regulations in conformity with Cotton Regulations, Series 2, made by the Secretary of Agriculture and approved by the President July 14, 1933, as supplemented, revised, and, in part, superseded by Cotton Regulations, Series 2, Supplement 1, and Supplement 2, made by the Secretary of Agriculture and approved by the President July 28, 1933, and November 29, 1933, respectively.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated July 14, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to the processing tax on cotton, made by the Secretary of Agriculture, with the approval of the President, dated July 14, 1933, as supplemented, revised and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated July 28, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for cotton shall begin August 1, 1933.

I do hereby determine as of August 1, 1933, that the processing tax on the first domestic processing of cotton shall be at the rate of 4.2 cents per pound of lint cotton, net weight, which rate equals the difference between the current average farm price for cotton and the fair exchange value of cotton, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

The net weight of lint cotton subject to the processing tax shall be determined by deducting the weight of tare (bagging, ties, and patches) from the gross weight of the bale.

PAR. E. The regulations, with respect to the processing tax on cotton, made by the Secretary of Agriculture, with the approval of the President, dated July 14, 1933, as supplemented, revised and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated November 29, 1933, in force and effect on and after December 1, 1933, provide:

I. DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing—

(*a*) With respect to cotton that is to be spun, is every state of manufacture or processing up to the removal of the bobbin or cop from the spinning machine on which its yarn has been spun;

(*b*) With respect to cotton that is not to be spun, is that amount and degree of manufacture or processing up to the point where the cotton is fashioned into an article, either to be packaged and sold as such, or to be used for further manufacturing into a different type of article.

Absorbent cotton.—Absorbent cotton is cotton treated chemically to remove natural fatty substances and further prepared for surgical purposes.

Adhesive tape.—Adhesive tape is a cut-edge ribbon of cotton cloth having adhesive on one side, usually intended for surgical purposes.

Artificial leather.— Artificial leather is a stout coarse cotton fabric, spread or coated with nitrocellulose or varnish, and grained and finished, usually to resemble leather.

Auto slip cover cloth.—Auto slip cover cloth is a medium-weight cotton fabric, plain weave, with ingrain colored warp stripes.

Awning stripes.—Awning stripes is a strong durable cotton canvas made in colored stripes with colored warp yarns, or having printed, stenciled, and/or painted stripes. This classification includes ingrain solid colored awning material.

Bags.—Bags are cotton containers woven, or cut and sewn, into tubular form and closed on one end. Tubular woven or seamless bags generally contain a few colored ingrain warp stripes.

Bathing suits.—Bathing suits are torso outer garments, in one piece, or in two separate pieces, top and bottom, fabricated from a knit cotton fabric.

Bathrobes.—Bathrobes are lounging robes with sleeves, full length, front opened, usually with belt-cord, and made of terry cloth, blanket cloth, or other cotton fabrics.

Batting.—Batting is layers of cotton, cleaned and slightly matted.

Bed sheets.—Bed sheets are articles of bedding, torn or cut from cotton fabric, and hemmed at both ends.

Bed spreads.—Bed spreads are cotton household articles, commonly known as counterpanes, cut and hemmed, or fringed on both ends, made from bedspread and/or woven quilt fabric.

Bed spread and quilting.—Bed spread and quilting are cotton fabrics used for making the top covers of a bed, such as crochet quilts, Marseilles quilts, satin quilts, dimity spreads, and crinkled or raised pattern spreads.

Belts, machinery.—Machinery belts are cotton articles used to transmit power, woven from heavy cabled yarns into a strong fabric, one or more plies of which are stitched, stapled, or vulcanized together into a continuous band.

Blanketing.—Blanketing is a napped cotton cloth having comparatively fine count warp yarns and coarse soft spun filling yarns.

Blankets.—Blankets are articles, made from blanketing, cut and hemmed in sizes suitable for bedding and other purposes.

Bleached.—Bleached is a term indicating that the fibers in any state have been treated with chemicals for the purpose of whitening.

Book cloth.—Book cloth is a woven cotton fabric which has been heavily filled, and is generally glazed and embossed.

Bloomers.—Bloomers is an article of underwear for covering the lower portion of the torso and the thighs, with elastic at waist, and with or without elastic at knees, made from a knit cotton fabric.

Braided fabric.—Braided fabric is a flat, round, or tubular narrow fabric plaited from cotton yarns.

Breeches, riding.—Riding breeches are trousers, including jodhpurs, wide at the hips and shaped to fit the legs below the knees. They may be calf length or ankle length.

Broadcloth.—Broadcloth is a cotton fabric woven with fine yarns, with warp yarns predominating.

Buckram.—Buckram is a coarse, plain woven, light-weight cotton fabric, with a heavy glue dressing, used as stiffening material in garments or other articles.

Canton flannel.—Canton flannel is a cotton fabric with twill face and napped back.

Carded.—Carded is a term meaning that the cotton fibers have been separated, straightened, and mixed by passage through a carding machine but not through a comber.

Carded fabrics.—Carded fabrics are any cotton products made from carded yarns.

Carded yarns.—Carded yarns are yarns made of carded cotton fibers.

Card strips.—Card strips are the flat strips, cylinder strips, and doffer strips, inclusive, which are removed during the carding process.

Casings, pneumatic.—Pneumatic casings are articles made from cord, weftless cord, and/or square woven tire fabrics, impregnated and coated with vulcanized rubber and used as the outer covering or casing for pneumatic tubes.

Chambray.—Chambray is a medium-weight, plain woven cotton fabric, having a colored warp and white weft, usually dressed and calendered.

Cheesecloth.—Cheesecloth is a light-weight, thin, loose woven cotton gauze, without dressing; also called tobacco cloth, and sometimes used for mosquito netting.

Chenille fabric.—Chenille fabric is a cotton fabric woven with chenille weft yarns.

Chenille yarn.—Chenille yarn is a cotton yarn having a cut pile protruding all around at right angles.

Coated products.—Coated products are cotton fabrics which have been impregnated with, and/or to which have been applied, one or more layers of nitrocellulose, pigmented linseed oil, clay, rubber, and/or like materials in order to impart a durable and impervious surface.

Coats, work.—Work coats are work garments, including jumpers, that cover the torso, full button or half open, usually made from denim.

Colored.—Colored is a term meaning that the fibers, in any state of preparation, have been impregnated with dyestuffs and/or other coloring matter, but does not include articles having only colored borders, hems, selvages, or occasional stripes used as distinctive markings, such as the types of towels which have a colored border or stripes.

Combed.—Combed is a term meaning that the fibers of carded cotton have been further straightened and separated by a combing machine.

Combed fabrics.—Combed fabrics are any cotton products made from combed yarns.

Combed yarns.—Combed yarns are yarns in which the carded cotton fibers have been passed through a comber.

Comber waste or comber noils.—Comber waste or comber noils are the fibers which are combed out during the combing process.

Conveyer belts.—Conveyer belts are cotton articles made for use in transporting merchandise and other materials, constructed from plied yarn duck, of single or numerous layers which are stitched, stapled, or vulcanized together and connected into an endless loop.

Cordage.—Cordage is a term used in a collective sense to include all kinds of twines, cords, and ropes.

Corduroy.—Corduroy is a cut weft pile fabric having a surface of pile welts.

Corset cloth.—Corset cloth is a strong, heavy cotton fabric, satin weave, usually with woven figured designs.

Cottonades.—Cottonades are heavy, coarse, cotton fabrics plain woven with ingrain colored checks and stripes, sometimes with napped back.

Crash towels.—Crash towels are household articles cut and hemmed from crash toweling fabric.

Crash toweling.—Crash toweling is a medium-weight cotton toweling fabric, made with plain, twilled, or herringbone weave, and usually having warp colored borders.

Crepe.—Crepe is a light-weight cotton cloth, with a fine crinkly surface.

Crinoline.—Crinoline is a stiff, open, light-weight cotton fabric heavily dressed, usually plain woven, commonly used for interlinings and hat construction.

Cut pile fabric.—Cut pile fabric is a cotton pile fabric, in which the upright yarn loops have been cut and brushed.

Damask, table.—Table damask is a medium-weight cotton fabric, made with uncolored and/or colored yarns, with satin or figured reversible designs.

Denim.—Denim is a strong, heavy-weight cotton fabric, twill weave, woven ingrain with single yarns.

Diapers.—Diapers are cotton articles of infant's wearing apparel, usually made from diaper cloth.

Diaper cloth.—Diaper cloth is an absorbent cotton fabric, with soft coarse weft yarns, and having a woven birdseye or diamond design.

Drawers.—Drawers is an article of underwear for covering the lower portion of the torso, and all, or parts, of the legs, fabricated from a knit cotton fabric.

Dresses, house.—House dresses are women's cotton outer garments, in one or more pieces, with or without sleeves, cut and sewn from light or medium weight woven cotton fabrics.

Dressing or filling.—Dressing or filling is a preparation applied to cotton fabrics to improve the finish and/or add weight.

Drills and twills.—Drills and twills are heavy cotton fabrics woven with twill weave and having distinct diagonal lines running across the face of the cloth.

Duck, enameled.—Enameled duck is cotton duck coated with enamel.

Duck, enameling.—Enameling duck is a heavy-weight, plain woven, cotton fabric made from single warp yarns and single or plied weft yarns.

Duck, flat.—Flat duck is a heavy-weight, plain woven, cotton fabric made from single yarns. It is usually woven with two warp ends in each heddle.

Duck, plied yarn.—Plied yarn duck is a heavy-weight, plain woven, cotton fabric, made with plied yarns.

Enameled drill.—Enameled drill is cotton drill coated with enamel.

Express stripes or hickory stripes.—Express stripes or hickory stripes is a strong, medium-weight cotton fabric, twill weave, woven ingrain usually with narrow alternating colored and white stripes.

Figured.—Figured is a term meaning woven or cut designs.

Flannelette.—Flannelette is a soft cotton fabric napped on both sides.

Frieze (loop pile) fabric.—A frieze (loop pile) fabric is a cotton cloth with uncut loop pile on the face.

Gassed or singed.—Gassed or singed is a term meaning that the cotton products that have been subjected to a flame or hot plate in order to remove protruding fibers.

Gauze.—Gauze is cheesecloth, fully bleached, uncolored and without dressing, commonly used for surgical purposes.

Gingham.—Gingham is a light-weight cotton fabric, plain weave, with large or small check or plaid patterns, ingrain colored warp and weft yarns.

Glazed or polished cotton products.—Glazed or polished cotton products are products that have been treated with dressing and subjected to brushing and/or calendering to produce a smooth, glossy surface.

Gloves.—Gloves are articles of wearing apparel for covering the hands and wrists, providing a separate compartment for each digit, fabricated from a knit or woven cotton fabric.

Chamois suede gloves.—Chamois suede gloves are cotton gloves made from closely knit high-count combed yarn with a suede finish on the face.

Jersey work gloves.—Jersey work gloves are cotton gloves made from a heavy flat knit fabric, generally fleece-lined.

Gowns, night.—Night gowns are loose, one-piece cotton articles of nightwear, with or without sleeves.

Handkerchiefs.—Handkerchiefs are accessories of wearing apparel cut from cotton fabric and hemmed.

Hosiery.—Hosiery is knit cotton footwear of any kind whatsoever.

Flat knit circular hosiery.—Flat knit circular hosiery is cotton hosiery knit with a plain smooth surface on circular seamless knitting machines, having a single cylinder, and classified as those with (1) 144 or fewer needle spaces, (2) 145 to 200 needle spaces, and (3) over 200 needle spaces.

Full fashioned hosiery.—Full fashioned hosiery is cotton hosiery knit on a flat machine to definite patterns to fit the shape of the leg and feet after seaming.

Ribbed knit hosiery.—Ribbed knit hosiery is seamless cotton hosiery, knit with a firm elastic consistency, having lateral wales or inner and outer surfaces, and produced on circular knitting machines having different sets and numbers of needles in cylinder and dial, and classified as those having (1) less than 300 needle spaces, and (2) 300 or more needle spaces.

Huckaback toweling or huck toweling.—Huckaback toweling or huck toweling is cotton toweling woven with small designs and soft spun weft yarns.

Huck towels.—Huck towels are household articles cut and hemmed from huckaback toweling fabric.

Hunting coats and vests.—Hunting coats and vests are cotton coats and vests for covering the torso, with or without sleeves, usually full-buttoned, with special pockets, made from a variety of cotton fabrics and generally interlined.

Infants' wear.—See "Undershirts—Bands and wrappers, infants"; "Pants, infants."

Ingrain.—Ingrain is a term indicating textile products made wholly or in part of cotton yarn that has been previously dyed.

Jerseys.—See "Pullover sweaters and jerseys."

Knickers.—Knickers are short wide-leg cotton trousers fitted to the calf of the leg by bands of self-material or by elastic knit cuffs.

Knit articles other than hosiery.—Knit articles other than hosiery are cotton articles knitted or made from knit fabrics, except hosiery.

Knit fabric.—Knit fabric is a cotton fabric composed of one or more systems of yarns interlacing with self, or with each other, forming rows of loops but not tied.

Lace.—Lace is a cotton fabric composed of cotton yarn or thread intertwined at intervals forming open-mesh and/or closed patterns.

Laps.—Laps are layers of carded or combed cotton fibers wound on a roller.

Picker laps.—Picker laps are laps consisting of cotton which has been partially cleaned by one or more picking processes and formed into a lap.

Ribbon laps.—Ribbon laps are laps formed from sliver laps.

Sliver laps.—Sliver laps are laps formed from card slivers.

Laundry nets and dye nets.—Laundry nets and dye nets are open-mesh cotton containers woven or cut and sewn into tubular form and closed on one end.

Lawn.—Lawn is a thin, sheer, plain woven cotton fabric, usually lightly dressed.

Marquisette.—See "Scrim, curtain or marquisette."

Matched patterns.—Matched patterns is a term meaning an article in which figures or colors have been pieced and fitted so that the symmetrical pattern scheme is preserved.

Mattress felt.—Mattress felt is several layers of cotton batting arranged in tiers and cut to mattress size.

Mattress ticks.—Mattress ticks are cotton articles of bedding, cut and sewn into a container for felt, springs, or stuffing. They are usually made from cotton ticking, or mattress damask, and tufted.

Mercerized yarns and fabrics.—Mercerized yarns and fabrics are cotton yarns and fabrics chemically treated under tension for the purpose of adding luster to the product.

Moleskin.—Moleskin is a strong, heavy-weight cotton fabric, napped on the back, generally with a weft faced twill or modified satin weave.

Mosquito nettings.—Mosquito nettings are—

(1) Cotton cheesecloth, heavily sized;

(2) Leno woven cotton gauze, heavily sized;

(3) Light-weight cheesecloth having several warp and weft yarns placed closely to each other at regular intervals, being about 180 meshes per square inch;

(4) Machine-made cotton netting of yarns twisted around each other so as to produce hexagonal meshes, called bobbinette.

Mufflers.—See "Scarfs or Mufflers."

Napkins.—Napkins are cotton household articles, usually damask, cut square and hemmed, or fringed on two or four sides.

Napped fabric.—Napped fabric is a cotton fabric which has been scratched and/or brushed, in order to raise the loose fibers into a nap, on one or both sides.

Narrow fabric (12 inches or under), elastic or nonelastic.—Narrow fabric (12 inches or under), elastic or nonelastic, is a woven, knit, or braided web, tape, or tube with fast selvages and/or cut edges. When fabricated with the introduction of rubber thread it becomes elastic.

Net.—Net is a cotton fabric made of yarn or twine knotted into open meshes of uniform size and shape.

Noncotton content.—Noncotton content is any material other than cotton contained in or attached to cotton articles as a part thereof, such as sizing or buttons, or rayon, silk or any other textile fibers. However (except as to "rugs and mats, other than cotton weft"), the "noncotton content" figures given in the table of conversion factors herein established contain no allowance for rayon, silk, or other textile fibers.

Novelty yarn.—Novelty yarn is a cotton yarn having an unusual appearance, such as loops, knobs, or corkscrew effects.

Oilcloth.—Oilcloth is a cotton fabric spread or coated with enamel, or with vegetable oil, or animal oil, or other oils, mixed with pigments and/or minerals.

Oilcloth, table and shelf.—Table and shelf oilcloth is oilcloth, with a muslin or other light cotton fabric base.

Osnaburg.—Osnaburg is a plain woven, strong, coarse fabric made of carded cotton and/or carded cotton waste yarns.

Outerwear, knit.—Knit outerwear is a knit cotton garment for outerwear of any type whatsoever, but does not include hosiery.

Overalls.—Overalls is a work garment, usually made from denim, either sleeveless with a bib and straps over the shoulders, or with sleeves and a long open front.

Pajama checks or nainsook checks.—Pajama checks or nainsook checks are medium-weight cotton fabrics with a distinctive cross bar pattern.

Pajamas.—Pajamas are garments of night wear, either in one piece, with pants effect, or in two pieces, consisting of blouse and pants.

Pants, infants'.—Infants' pants are knit pants for infants' underwear.

Pants, knit.—Knit pants are close-fitting knit cotton articles of underclothing without elastic at the bottoms.

Pants, work.—Work pants are men's outer garments, including dungarees, usually made of coarse cotton fabrics such as denims, cottonades, or trouserings and duck, for covering the lower part of the torso and legs.

Pile fabric.—Pile fabric is a cotton fabric having a surface made of upright loops which may be cut or uncut.

Pillow cases.—Pillow cases are cotton articles of bedding, woven or sewn into tubular form, closed on one end, and hemmed, for use as coverings for bed pillows.

Pin checks.—Pin checks is a medium-weight cotton fabric plain weave, with ingrain small checked or striped patterns.

Pique.—Pique is a heavy, stout cotton fabric having a raised surface of transverse cords or welts.

Plush.—Plush is a cotton fabric having a deep cut pile.

Polished.—See "Glazed or polished cotton products."

Poplin.—Poplin is a medium-weight cotton fabric, plain weave, with fine cross rib effect, warp yarns predominating.

Powder puffs.—Powder puffs are cosmetic accessories quilted from cut pile cotton fabrics.

Print cloth.—Print cloth is a plain woven, medium-weight cotton fabric, made with single carded yarns.

Printed fabrics.—Printed fabrics are cotton fabrics decorated by printing with dyes, chemicals, or other substances.

Pull-over sweaters and jerseys.—Pull-over sweaters and jerseys are knit cotton outer garments with no fastenings, with or without sleeves, to be put on by pulling over the head.

Quilting.—See "Bedspreads and quilting."

Rep.—Rep is a heavy cotton fabric having a transverse corded surface.

Roving.—Roving is a slightly twisted, soft, and thick rope of cotton fibers.

Rubber coated and rubberized.—Rubber coated or rubberized fabrics are cotton fabrics spread, coated and/or impregnated with rubber.

Rugs or mats.—Rugs or mats are cotton floor coverings, cut from fabrics woven and defined for cutting, hemming and/or fringing, and sometimes made with a weft other than a cotton yarn weft.

Sateen.—Sateen is a closely woven cotton cloth, the face of which is formed either by the warp or the weft in satin weave.

Scarfs or mufflers.—Scarfs or mufflers are outerwear accessories cut to specified lengths from cotton fabric and faced, hemmed and/or fringed.

Scrim, curtain or marquisette.—Curtain scrim or marquisette is a lightweight cotton fabric with leno open weave.

Second-hand articles.—Second-hand articles are cotton articles that have been actually used for some clothing, or industrial, or household or other purpose, and which have been reclaimed and held for sale.

Seersucker.—Seersucker is a light-weight cotton fabric, plain weave, with puckered and ingrain stripes alternating.

Sewing thread.—See "Thread."

Shade cloth.—Shade cloth is a light-weight, plain woven cotton fabric, heavily filled, usually with clay, and designed for use on window shade rollers.

Sheetings.—Sheetings are plain woven, heavy or medium weight, cotton fabrics made with single carded yarns.

Shirting, madras.—Madras shirting is a medium-weight cotton fabric, woven with plain white, or colored narrow stripes, or small checks ingrain.

Shirts, other than work.—Shirts, other than work, are cotton articles of men's wearing apparel for covering the torso and arms, with or without collar attached, usually with full button front, but sometimes buttoned in back for evening wear, made from light to medium weight woven cotton fabrics, plain, or with matched patterns.

Shirts, work.—Work shirts are cotton outer garments of male attire, for covering the torso and arms, usually with soft attached collar, half-open or full-buttoned in front, made of medium to heavy weight cotton fabrics which are usually chambrays, coverts, or khakis.

Shorts.—Shorts are articles of underwear, similar in style to thigh-length drawers, fabricated from a woven cotton fabric.

Size or sizing.—Size or sizing is a preparation applied to cotton warp yarns to facilitate weaving and/or add weight.

Sleepers.—Sleepers are one-piece sleeping garments for children, covering the entire body with the exception of head, neck, hands, and sometimes the feet, fabricated from a knit cotton fabric.

Slips.—Slips are articles of women's and girls' underwear, with skirt and bodice in one piece, sleeveless and with built-up strap shoulders.

Sliver.—Sliver is a continuous rope of loose, untwisted cotton fibers.

Smocks.—Smocks are loose, one-piece, protective outer garments, usually with full-length front opening.

Step-ins.—Step-ins, an article of women's underwear, are thigh-length drawers, fabricated from a cotton fabric.

Suits, seersucker.—Seersucker suits are two-piece summer-outfit garments for male attire, consisting of coat and pants, and made of seersucker.

Supercarded yarns.—Supercarded yarns are yarns in which the cotton fibers have been carded twice, or have received an extra amount of carding through which an additional amount of card strips and other waste are removed.

Sweat shirts.—See "Pull-over sweaters and jerseys."

Sweater, coat.—Coat sweater is a full-length, front-opening, knit cotton sweater which buttons from neck to bottom.

Table cloths.—Table cloths are cotton household articles, cut and hemmed or fringed on both ends, or hemmed on all sides, and are usually made from damask.

Tapestries.—Tapestries are medium and heavy-weight cotton fabrics, usually woven with elaborate pictorial or verdure all-over designs, and generally woven ingrained.

Terry fabric.—Terry fabric is a cotton pile fabric in which the back and face pile loops are uncut.

Terry towels.—Terry towels are cotton household articles made from terry fabric, cut and hemmed or fringed.

Thread.—Thread is a cotton line composed of two or more converted cotton yarns usually used for sewing purposes.

Ticking.—Ticking is (1) a heavy, stout cotton fabric, warp face twill or sateen, woven ingrain with colored warp yarns; or (2) a cotton damask, all-over designs, in mattress size, usually woven ingrain with colored yarns.

Tire fabrics, cord.—Cord tire fabrics are cotton fabrics woven with cabled cord warp and an occasional weft pick sufficient to hold fabric together.

Tire fabrics, square woven.—Square woven tire fabrics are strong, stout, heavy, woven cotton cloth, plain or leno weave, made with plied yarns.

Tire cord, weftless.—Weftless tire cord is a plurality of cabled cotton cords without interlacing weft yarns.

Tobacco cloth.—See "Cheesecloth."

Tracing cloth.—Tracing cloth is a fine, plain woven cotton fabric heavily dressed, glazed and transparent enough to permit tracing with ink and copying.

Training pants.—Training pants are heavy-weight knit athletic or gymnasium cotton pants, usually with ankle length, loose fitting legs, and with draw-string or elastic top and bottoms.

Trousering.—Trousering is a heavy coarse cotton fabric, twill weave, ingrain checks and stripes, sometimes with back napped.

Trunks.—Trunks are an article of underwear, covering the lower part of the torso and thighs, fabricated from a knit cotton fabric.

Twine.—Twine is a line or a cord made up of one or more yarns of medium or hard cabled twist, used for tying, making nets and other purposes.

Tubular knit fabric.—Tubular knit fabric is seamless fabric, composed of looped and interlaced cotton yarns, produced on a circular knitting machine.

Undershirts, athletic.—Athletic undershirts are a pull-over type undershirt cut deep at the neck and arm holes, fabricated from a light-weight knit cotton fabric.

Undershirts, bands and wrappers, infants'.—Infants' undershirts, bands, and wrappers are articles of underwear for covering the upper part of the torso, with full open front and double-breasted, fastening with either ties or buttons, fabricated from a knit cotton fabric.

Undershirts, other than athletic and infants'.—Undershirts, other than infants' and athletic, are articles of underwear covering the torso, with or without sleeves, either pull-over style or half-open, fabricated from a knit cotton fabric.

Underwear.—Underwear is a collective term including cotton garments of any type whatsoever worn under the visible apparel, hosiery excepted.

Uniforms, maids', nurses', etc.—Maids', nurses', and other kinds of women's uniforms are one-piece or two-piece suits, consisting of blouse and skirt, made of cotton woven fabrics, generally having distinctive characteristics of servitude or profession.

Uniforms, men's two-piece.—Men's uniforms, two-piece, are suits consisting of jacket or coat and trousers, made of woven cotton fabrics, generally bearing distinctive characteristics of servitude, profession, or fraternalism.

Union suits.—Union suits are one-piece articles of cotton underwear, knit or woven, usually full buttoned, with or without sleeves, and either long or short legs.

Velour or cotton velvet.—Velour or cotton velvet is a cut cotton warp pile fabric.

Velveteen.—Velveteen is a cut cotton weft pile fabric.

Vests, women's.—Women's vests are articles of underwear, generally for covering only the torso, sometimes having sleeves, and fabricated from knit cotton fabrics.

Voile.—Voile is a light-weight, low-count, cotton dress fabric, plain weave, made with hard or slack twisted yarns, usually gassed.

Waistsuits, children's and infants'.—Children's and infants' waistsuits are articles of underwear, torso length, buttoned front or back, reinforced by tape or other fabric, and having a number of extra buttons usually sewed on with tape to support outer garments, fabricated from knit cotton fabrics.

Warps.—Warps are cotton yarns forming the lateral basis of fabrics.

Waste.—Waste is motes and fly, card strips, comber noils, slasher waste, cuttings, clippings, rags, and similar materials (not including substandard products and short length piece goods) incident to the processing, manufacturing or fabricating of cotton or of cotton products.

Weft.—Weft is the system of yarns in woven cotton fabrics which interlaces with the warp yarns.

Woven fabrics.—Woven fabrics are fabrics composed of different systems of yarn which interlace with each other.

Yarn.—Yarn is a continuous strand, single or plied, spun from cotton fibers.

II. Conversion Factors.

In lieu of and in revision of the third paragraph of the above-mentioned Cotton Regulations, Series 2, Supplement 1 (which said paragraph was adopted in lieu of and in revision of the fourth paragraph of the above-mentioned Cotton Regulations, Series 2), I do hereby establish that the conversion factors for articles processed from cotton, effective on and after December 1, 1933, to determine the amount of tax imposed or refunds to be made with respect thereto, are as follows:

The following table fixes (1) the conversion factors, being the percentage of the per-pound processing tax on cotton, with respect to each pound of the cotton content of the following articles processed from cotton, which cotton content is found by deducting from the total weight of such articles the percentage of the total weight thereof represented by the weight of sizing or buttons, rayon, silk, other textile fibers, or other noncotton content, and (2) the percentage of the total weight of said articles determined to represent, as to "rugs and mats other than cotton weft," the weight of all noncotton content, and, as to all other said articles, the weight of all noncotton content except rayon, silk and other textile fibers other than cotton:

Articles.	Carded.						Combed.					
	Unbleached not colored.		Unbleached colored.		Bleached (colored or uncolored).		Unbleached not colored or mercerized.		Unbleached colored and/or mercerized.		Bleached (colored or uncolored—mercerized or unmercerized).	
	Conversion factor.	Noncotton content.[1]	Conversion factor.	Noncotton content.[1]	Conversion factor.	Noncotton content.[1]	Conversion factor.	Noncotton content.[1]	Conversion factor.	Noncotton content.[1]	Conversion factor.	Noncotton content.[1]
Laps:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Picker (before carding)	105	0	109	0	112	0	------	------	------	------	------	------
Ribbon and sliver	110	0	113	0	117	0	------	------	------	------	------	------
Sliver	109	0	112	0	116	0	116	0	120	0	124	0
Roving	110	0	114	0	117	0	118	0	122	0	126	0
Waste:												
Card strips	60	0	60	0	60	0	------	------	------	------	------	------
Comber waste	------	------	------	------	------	------	80	0	80	0	80	0
All other	0	------	0	------	0	------	0	------	0	------	0	------
Yarn:												
Chenille	118	0	122	0	------	------	------	------	------	------	------	------
Gassed	------	------	------	------	------	------	125	0	129	0	135	0
Novelty	113	0	116	0	------	------	123	0	127	0	------	------
Super-carded	114	0	117	0	122	0	------	------	------	------	------	------
All other	112	0	115	0	120	0	121	0	125	0	131	0
Thread, twine and cordage:												
Thread—												
Glazed	113	4.0	117	4.0	122	4.0	123	4.0	126	4.0	132	4.0
Other than glazed	113	2.0	117	2.0	122	2.0	123	2.0	126	2.0	132	2.0
Twine and cordage—												
Polished	112	10.0	115	10.0	------	------	------	------	------	------	------	------
Not polished	112	0	115	0	117	0	------	------	------	------	------	------
Woven fabrics—over 12 inches wide:												
Auto slip cover	------	------	117	5.0	------	------	------	------	------	------	------	------
Awning stripes—												
Ingrain and printed	------	------	116	5.0	------	------	------	------	------	------	------	------
Painted and stenciled	------	------	116	15.0	------	------	------	------	------	------	------	------

Bedspreads and quilting	118	2.0	122	2.0	129	4.0	135	1.0	139	1.0	142	1.0
Blanketing	117	2.5	120	2.5	126	0						
Broadcloth	115	7.0	119	5.0	126	4.0	127	7.0	131	3.0	139	1.0
Buckram	115	55.0	119	55.0								
Canton flannel	117	2.5	120	2.5	128	0.5						
Chambray			117	7.5								
Chenille	121	3.0	125	3.0								
Corduroy	118	2.5	122	2.5	127	8.0	129	2.0	133	5.0	139	8.0
Corset cloth							127	5.0	131	4.0	137	4.0
Cottonades and trousering			117	6.0								
Crash toweling	116	2.5			122	1.0						
Crepe	115	5.0	119	5.0	126	3.0	127	5.0	131	3.0	139	3.0
Crinoline	115	38.0	119	38.0	126	38.0						
Damask—table	115	5.0	119	5.0	126	4.0	127	5.0	131	3.0	139	3.0
Denim			118	7.5								
Diaper cloth	115	3.0			126	0						
Drills and twills	116	5.5	120	5.0	123	4.0	127	5.0	131	4.5	139	4.0
Duck—												
Enameling	116	6.5	120	4.0								
Flat	116	6.5	120	5.0	124	6.5						
Plied yarn	114	0	118	0	120	0						
Express stripes or hickory stripes and pin checks			117	7.5								
Flannelette	119	2.5	123	2.5	130	0.5						
Frieze			133	1.0					144	1.0		
Gingham			121	7.0					135	4.0		
Huckaback toweling	116	3.0			126	2.0						
Lawn	116	5.0	120	4.0	126	3.0	127	5.0	131	3.0	139	2.0
Marquisette or curtain scrim							127	3.0	131	3.0	139	3.0
Moleskin	117	2.5	121	2.5	124	1.0						
Mosquito netting	115	8.0	119	8.0	126	8.0						
Osnaburg	118	5.0	122	2.0	125	2.0						
Pajama checks or nainsook checks	115	6.0	119	7.0	126	7.0	127	5.0	131	3.0	139	3.0
Pique	115	5.0	119	5.0	126	5.0	127	5.0	131	3.0	139	3.0
Plush and velour, figured			139	1.0					152	1.0		
Not figured	128	0	132	1.0	138	0	139	0	143	1.0	149	0
Poplin	115	5.0	119	4.0	126	5.0	127	5.0	131	2.0	139	2.0

[1] No allowance is included for the rayon, silk, or other textile fiber content of articles (except as to rugs and mats, other than cotton weft).

Articles.	Carded.						Combed.					
	Unbleached not colored.		Unbleached colored.		Bleached (colored or uncolored).		Unbleached not colored or mercerized.		Unbleached colored and/or mercerized.		Bleached (colored or uncolored—mercerized or unmercerized).	
	Conversion factor.	Noncotton content.	Conversion factor.	Noncotton content.	Conversion factor.	Noncotton content.	Conversion factor.	Noncotton content.	Conversion factor.	Noncotton content.	Conversion factor.	Noncotton content.
Woven fabrics—over 12 inches wide—Continued.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Print cloth	115	6.5	119	6.0	122	7.0						
Rep	115	5.0	119	3.0	122	2.0	127	5.0	131	2.0	139	1.0
Sateen	116	6.0	120	5.0	123	4.0	127	6.0	131	4.0	139	3.0
Seersucker			117	5.0								
Sheetings—												
Over 40 inches	115	4.0	119	3.0	126	2.0	127	4.0	131	3.0	139	2.0
40 inches and less	116	5.0	120	5.0	122	6.0						
Shirting—madras	115	6.5	119	4.0	126	4.0	127	5.0	131	3.0	139	2.0
Tapestry			126	1.0					137	1.0		
Terry pile	115	3.0	119	0	124	0	127	2.0	131	0	139	0
Ticking			117	7.5								
Tire fabrics—												
Cord, and weftless cord	114	0					122	0				
Square woven	114	0										
Tobacco cloth and cheesecloth	115	4.0	119	2.0	126	2.0						
Velveteen	118	2.5	122	2.0	127	2.0	129	2.0	133	1.0	139	1.0
Voile	115	4.0	119	2.0	126	3.0	127	2.0	131	2.0	139	2.0
All other—												
Napped	118	2.5	122	1.0	129	0						
Not napped	115	5.0	118	4.0	125	3.0	127	4.0	131	3.0	139	2.0
Narrow fabrics (12 inches and under), woven or braided:												
Nonelastic	115	4.0	119	3.0	123	5.0	125	4.0	129	3.0	133	2.0
Elastic	115	25.0	119	25.0	123	25.0	125	25.0	129	25.0	133	25.0
Knit fabrics	115	0	119	0.5	123	0	125	0	128	0.5	133	0

Knit articles other than hosiery:												
Outerwear—												
Bathing suits	-----	-----	150	3.0	-----	-----	-----	-----	-----	-----	-----	-----
Coat—sweater	125	2.0	129	2.0	134	2.0	-----	-----	-----	-----	-----	-----
Gloves—												
Jersey work	-----	-----	143	1.0	-----	-----	-----	-----	-----	-----	-----	-----
Chamois suede	-----	-----	-----	-----	-----	-----	152	1.0	157	1.0	169	1.0
Pullover — sweaters and jerseys	139	0	143	0	148	0	-----	-----	-----	-----	-----	-----
Scarfs and mufflers	118	0	121	0	126	0	-----	-----	-----	-----	-----	-----
Sweat shirts	124	0	128	0	132	0	-----	-----	-----	-----	-----	-----
Training pants	127	0	131	0	135	0	-----	-----	-----	-----	-----	-----
All other	128	1.0	132	1.0	137	1.0	142	1.0	146	1.0	151	1.0
Underwear—												
Bands and wrappers—infants'	129	0	131	0	133	0	140	0	144	0	145	0
Drawers, bloomers, step-ins, and pants, except infants'	129	1.0	131	1.0	133	1.0	140	1.0	144	1.0	145	1.0
Pants, infants'	138	0.5	144	0.5	149	0.5	150	0.5	155	0.5	162	0.5
Sleepers	132	2.0	136	2.0	140	2.0	143	2.0	147	2.0	152	2.0
Undershirts—												
Athletic	138	0	144	0	149	0	150	0	155	0	162	0
Infants'	133	0.5	135	0.5	138	0.5	145	0.5	149	0.5	150	0.5
Other	129	1.0	131	1.0	133	1.0	140	1.0	144	1.0	145	1.0
Vests	129	0	131	0	133	0	140	0	144	0	145	0
Union suits	132	1.5	136	1.8	140	2.0	143	2.0	147	2.5	152	3.0
Waistsuits, children's	138	4.0	144	4.0	149	4.0	150	5.0	155	5.0	162	5.0
All other	133	1.0	136	1.0	139	1.0	143	1.0	147	1.0	150	1.0
Lace	120	7.0	124	7.0	132	7.0	131	7.0	135	7.0	143	7.0
Articles made from lace—												
In the manufacture of which the lace is cut parallel and/or at right angles to selvage	127	7.0	131	7.0	138	7.0	137	7.0	142	7.0	150	7.0
In the manufacture of which the lace is cut other than parallel and/or at right angles to selvage	142	7.0	146	7.0	155	7.0	154	7.0	158	7.0	168	7.0

Articles.	Carded.				Combed.			
	Unbleached not colored.		Colored or bleached.		Unbleached not colored or mercerized.		Colored, bleached, or mercerized.	
	Conversion factor.	Non-cotton content.	Conversion factor.	Non-cotton content.	Conversion factor.	Non-cotton content.	Conversion factor.	Non-cotton content.
Articles made from fabrics other than knit and lace, in the manufacture of which the cloth is cut or torn parallel to the warp and/or weft:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Bags	117	5.0	122	12.0				
Bedsheets	118	4.0	129	3.0			143	2.0
Bedspreads	123	1.0	135	3.0			150	3.0
Blankets			130	2.5				
Conveyer belts and machinery belts	115	0						
Diapers			128	0				
Gauze			126	0				
Handkerchiefs			126	5.0			143	2.0
Laundry nets and dye nets	116	0						
Mattress ticks			121	7.5			143	3.0
Napkins			129	4.0			143	3.0
Pillow cases	118	4.0	129	3.0			143	2.0
Rugs and mats—								
Chenille	121	3.0	125	3.0				
Cut pile—								
Cotton weft			144	1.0			156	1.0
Other than cotton weft			145	19.0			157	19.0
Frieze			133	1.0			144	1.0
Terry	119	3.0	125	0			142	0
Other than pile	122	3.0	126	1.0	132	3.0	137	1.0
Table cloths			129	4.0			143	3.0
Towels—								
Crash	119	2.5	125	1.0				
Huck			129	2.0				
Terry			127	0			142	0
All others—								
Not colored	118	3.0	127	4.0	135	3.0	143	2.0
Colored			125	4.0			139	2.0

Articles.	Carded.		Combed	
	Conversion factor.	Non-cotton content.[1]	Conversion factor.	Non-cotton content.[1]
Articles made from fabrics other than knit and lace, in the manufacture of which the cloth is cut other than parallel to the warp and/or weft:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Bathrobes	136	2. 0		
Breeches—riding	131	5. 0	150	4. 0
Coats—				
Work	131	6. 5		
Hunting	134	6. 0		
Dresses, house—				
Matched pattern	139	5. 0	153	4. 0
Other than matched pattern	133	4. 0	151	3. 0
Gloves	138	2. 5		
Gowns—night	137	3. 0	151	2. 0
Knickers	127	5. 0		
Overalls and work pants	128	8. 5		
Pajamas—				
Matched pattern	138	5. 0	158	4. 0
Other than matched pattern	133	5. 0	151	4. 0
Powder puffs	159	0	171	0
Shirts—				
Other than work—				
Matched pattern	143	7. 0	158	5. 0
Other than matched pattern	136	7. 0	151	5. 0
Work	126	7. 0		
Shorts	139	6. 0	154	4. 0
Slips	134	5. 0	149	3. 0
Smocks	127	6. 0		
Suits—seersucker	133	6. 0		
Uniforms—				
Men's two piece	132	7. 0		
Maid's, nurses', etc	136	7. 0		
Union suits	139	8. 0	154	5. 0
Vests—hunting, etc	131	8. 0		
All others—				
Bleached—				
Other than matched pattern	136	5. 0	151	4. 0
Matched pattern	142	5. 0	158	4. 0
Unbleached—				
Other than matched pattern	128	7. 0	142	5. 0
Matched pattern	134	7. 0	149	5. 0
Hosiery:				
Flat knit—circular—				
144 needles and less	121	0	131	0
145 to 200 needles	124	0	135	0
Over 200 needles	128	0	139	0
Ribbed knit—circular, basis size, 9 inches—				
Less than 300 needles	121	0	131	0
300 needles and over	124	0	135	0
Full fashioned	128	0	139	0
Coated products:				
Oilcloth—				
Table and shelf	122	83. 0		
Enameled drill	122	60. 0		
Enameled duck	122	55. 0		
Adhesive tape	142	50. 0		
Artificial leather	122	50. 0		

[1] No allowance is included for the rayon, silk, or other textile fiber content of articles (except as to rug and mats, other than cotton weft).

Articles.	Carded.		Combed.	
	Conversion factor.	Non-cotton content.	Conversion factor.	Non-cotton content.
Coated products—Continued.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Tracing cloth			140	40.0
Book cloth	127	50.0	139	50.0
Shade cloth	122	50.0		
Rubber-coated and rubberized, except pneumatic casings	126	60.0		
All other	124	50.0	140	50.0
Pneumatic casings	120	80.0	128	80.0
Absorbent cotton	125	0		
Batting and mattress felts	105	0		
Second-hand articles	0		0	
Articles processed in whole from comber waste	The conversion factor for such articles shall be 85 per centum of the above established conversion factor for like articles processed from raw cotton.			
Articles processed in part from comber waste	The conversion factor for such part of such articles shall be 85 per centum of the above established conversion factor for like articles processed from raw cotton.			
Articles processed in whole from card strips	The conversion factor for such articles shall be 65 per centum of the above established conversion factor for like articles processed from raw cotton.			
Articles processed in part from card strips	The conversion factor for such part of such articles shall be 65 per centum of the above established conversion factor for like articles processed from raw cotton.			
Articles processed in whole from second-hand articles or from waste other than card strips or comber waste	0		0	
Articles processed in part from second-hand articles or from waste other than card strips or comber waste.	The conversion factor for such part of such articles shall be 0 per centum.			

A. As to any article for which no conversion factor is assigned, I hereby establish (1) that, if such article is made, directly or indirectly, in some part from another article for which a conversion factor is assigned, then as to each pound of the cotton content of such part the conversion factor shall be the conversion factor for such other article, and (2) that, if such article is made, directly or indirectly, in some part from cotton, but not as to such part from another article for which a conversion factor is assigned, then as to such part, the tax or refund shall be computed at the rate of the processing tax, upon the basis of the amount of cotton established to have been actually used in the production of such part.

B. In the event that any taxpayer or person entitled to a refund establishes that any article processed from cotton, with respect to which a tax is imposed, or which may be the subject of a claim for refund, which is included in the above list, contains more or less cotton than represented by the listed conversion factor, then the amount of the tax or of the refund shall be computed at the rate of the processing tax, upon the basis of the amount of cotton established to have been actually used in the production of the article, with proper allowances for card strips and comber waste based on the conversion factor hereinabove established therefor.

C. In the event that any taxpayer or person entitled to a refund establishes that any article processed from cotton, with respect to which a tax is imposed, or which may be the subject of a claim for refund, which is included in the above list, has more or less noncotton content of the kind for which provision has been made hereinabove, than that represented by the percentage of total weight of the article deductible for noncotton content to determine the cotton content of the article, then the amount of the noncotton content to be deducted from the total weight of the article shall be the amount of noncotton content established to be actually contained in the particular article. The noncotton content to which this election refers does not include rayon, silk, or other textile fiber content of articles (except as to "rugs and mats, other than cotton weft").

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. H. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of cotton becomes effective at the earliest moment of August 1, 1933. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from cotton, and imported on or after August 1, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from cotton which, on August 1, 1933, are held for sale or other disposition.

The rate of processing tax is given in article 2 of these regulations. The rates of compensating tax are given in article 3 of these regulations.

(*b*) By virtue of the proclamation of the Secretary of Agriculture, set forth in paragraph B, above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to cotton. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to products processed or manufactured wholly or in chief value from cotton, the date, August 1, 1933, is the "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, that is, the date when the processing tax on cotton first takes effect.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph E, above, are hereby adopted as part of these regulations.

(*e*) The term "cotton" as used in these regulations means lint cotton (that is, cotton which has been ginned) of any kind, classification, type, or grade.

Art. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of cotton becomes effective at the first moment of August 1, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 2. The first return of processing tax shall embrace the period August 1, 1933, to August 31, 1933, both inclusive, and shall be filed on or before September 30, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 6 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rate of tax applicable to the first domestic processing of cotton is 4.2 cents per pound of lint cotton, net weight. The net weight of lint cotton subject to the processing tax shall be determined by deducting the weight of tare (bagging, ties, and patches) from the gross weight of the bale.

(*c*) For the period from August 1, 1933, to August 31, 1933, both inclusive, and for each calendar month thereafter, each processor of cotton shall keep a record of (1) the quantity of cotton on hand at the beginning of the period, (2) the quantity of cotton received during the period, (3) the quantity of cotton shipped or delivered during the period, (4) the quantity of cotton sold or otherwise disposed of as waste during the period, and (5) the quantity of cotton on hand at the end of the period. These quantities must be ascertained by actual weighing on accurate scales and not by estimation.

Art. 3. *Rates of tax.*—(*a*) With respect to articles processed wholly or in chief value from cotton which are (1) imported on or after December 1, 1933, or (2) exported on or after said date, or (3) delivered on or after said date to an organization for charitable distribution or use, the rates of compensating tax imposed or amount of refund allowable are set forth in the following table. Such rates of tax or refund are determined upon the basis of conversion factors with respect to each pound of cotton content of such articles set forth in paragraph E, above. The table also shows the percentage of the total weight of each article named, except "rugs and mats other than cotton weft," determined to represent the weight of all noncotton content except rayon, silk, and other textile fibers other than cotton, and as to "rugs and mats other than cotton weft," the weight of all noncotton content. To determine the cotton content, upon which the tax or refund is based, there must be deducted from the total weight of the article that percentage of the total weight which represents the noncotton content. This percentage with respect to each article is shown in the following table:

Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date, or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content.

Articles.	Carded.						Combed.					
	Unbleached not colored.		Unbleached colored.		Bleached (colored or uncolored).		Unbleached not colored or mercerized.		Unbleached colored and/or mercerized.		Bleached (colored or uncolored mercerized or unmercerized).	
	Rates of tax.	Non-cotton content.[1]	Rates of tax.	Non-cotton content.[1]	Rates of tax.	Non-cotton content.[1]	Rates of tax.	Non-cotton content.[1]	Rates of tax.	Non-cotton content.[1]	Rates of tax.	Non-cotton content.[1]
	Cents per pound.	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
Laps:												
Picker (before carding)	4.41	0	4.578	0	4.704	0						
Ribbon and sliver	4.62	0	4.746	0	4.914	0						
Sliver	4.578	0	4.704	0	4.872	0	4.872	0	5.04	0	5.208	0
Roving	4.62	0	4.788	0	4.914	0	4.956	0	5.124	0	5.292	0
Waste:												
Card strips	2.52	0	2.52	0	2.52	0						0
Comber waste							3.36	0	3.36	0	3.36	0
All other	0		0		0		0		0		0	
Yarn:												
Chenille	4.956	0	5.124	0								
Gassed							5.25	0	5.418	0	5.67	0
Novelty	4.746	0	4.872	0			5.166	0	5.334	0		
Supercarded	4.788	0	4.914	0	5.124	0						
All other	4.704	0	4.83	0	5.04	0	5.082	0	5.25	0	5.502	0
Thread, twine and cordage:												
Thread—												
Glazed	4.746	4.0	4.914	4.0	5.124	4.0	5.166	4.0	5.292	4.0	5.544	4.0
Other than glazed	4.746	2.0	4.914	2.0	5.124	2.0	5.166	2.0	5.292	2.0	5.544	2.0
Twine and cordage—												
Polished	4.704	10.0	4.83	10.0								
Not polished	4.704	0	4.83	0	4.914	0						

[1] No allowance is included for the rayon, silk, or other textile fiber content of articles (except as to rugs and mats, other than cotton weft).

Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date, or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content—Continued.

Articles.	Carded.						Combed.					
	Unbleached not colored.		Unbleached colored.		Bleached (colored or uncolored).		Unbleached not colored or mercerized.		Unbleached colored and/or mercerized.		Bleached (colored or uncolored—mercerized or unmercerized).	
	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.
	Cents per pound.	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
Woven fabrics—over 12 inches wide:												
Auto slip cover			4.914	5.0								
Awning stripes—												
Ingrain and printed			4.872	5.0								
Painted and stenciled			4.872	15.0								
Bedspreads and quilting	4.956	2.0	5.124	2.0	5.418	4.0	5.67	1.0	5.838	1.0	5.964	1.0
Blanketing	4.914	2.5	5.04	2.5	5.292	0						
Broadcloth	4.83	7.0	4.998	5.0	5.292	4.0	5.334	7.0	5.502	3.0	5.838	1.0
Buckram	4.83	55.0	4.998	55.0								
Canton flannel	4.914	2.5	5.04	2.5	5.376	0.5						
Chambray			4.914	7.5								
Chenille	5.082	3.0	5.25	3.0								
Corduroy	4.956	2.5	5.124	2.5	5.334	8.0	5.418	2.0	5.586	5.0	5.838	8.0
Corset cloth							5.334	5.0	5.502	4.0	5.754	4.0
Cottonades and trousering			4.914	6.0								
Crash toweling	4.872	2.5			5.124	1.0						
Crepe	4.83	5.0	4.998	5.0	5.292	3.0	5.334	5.0	5.502	3.0	5.838	3.0
Crinoline	4.83	38.0	4.998	38.0	5.292	38.0						
Damask—table	4.83	5.0	4.998	5.0	5.292	4.0	5.334	5.0	5.502	3.0	5.838	3.0
Denim			4.956	7.5								
Diaper cloth	4.83	3.0			5.292	0						
Drills and twills	4.872	5.5	5.04	5.0	5.166	4.0	5.334	5.0	5.502	4.5	5.838	4.0

Duck—												
Enameling	4. 872	6. 5	5. 04	4. 0								
Flat	4. 872	6. 5	5. 04	5. 0	5. 208	6. 5						
Plied yarn	4. 788	0	4. 956	0	5. 04	0						
Express stripes or hickory stripes and pin checks			4. 914	7. 5								
Flannelette	4. 998	2. 5	5. 166	2. 5	5. 46	0. 5						
Frieze			5. 586	1. 0					6. 048	1. 0		
Gingham			5. 082	7. 0					5. 670	4. 0		
Huckaback toweling	4. 872	3. 0			5. 292	2. 0						
Lawn	4. 872	5. 0	5. 04	4. 0	5. 292	3. 0	5. 334	5. 0	5. 502	3. 0	5. 838	2. 0
Marquisette or curtain scrim							5. 334	3. 0	5. 502	3. 0	5. 838	3. 0
Moleskin	4. 914	2. 5	5. 082	2. 5	5. 208	1. 0						
Mosquito netting	4. 83	8. 0	4. 998	8. 0	5. 292	8. 0						
Osnaburg	4. 956	5. 0	5. 124	2. 0	5. 25	2. 0						
Pajama checks or nainsook checks	4. 83	6. 0	4. 998	7. 0	5. 292	7. 0	5. 334	5. 0	5. 502	3. 0	5. 838	3. 0
Pique	4. 83	5. 0	4. 998	5. 0	5. 292	5. 0	5. 334	5. 0	5. 502	3. 0	5. 838	3. 0
Plush and velour, figured			5. 838	1. 0					6. 384	1. 0		
Not figured	5. 376	0	5. 544	1. 0	5. 796	0	5. 838	0	6. 006	1. 0	6. 258	0
Poplin	4. 83	5. 0	4. 998	4. 0	5. 292	5. 0	5. 334	5. 0	5. 502	2. 0	5. 838	2. 0
Print cloth	4. 83	6. 5	4. 998	6. 0	5. 124	7. 0						
Rep	4. 83	5. 0	4. 998	3. 0	5. 124	2. 0	5. 334	5. 0	5. 502	2. 0	5. 838	1. 0
Sateen	4. 872	6. 0	5. 04	5. 0	5. 166	4. 0	5. 334	6. 0	5. 502	4. 0	5. 838	3. 0
Seersucker			4. 914	5. 0								
Sheetings—												
Over 40 inches	4. 83	4. 0	4. 998	3. 0	5. 292	2. 0	5. 334	4. 0	5. 502	3. 0	5. 838	2. 0
40 inches and less	4. 872	5. 0	5. 04	5. 0	5. 124	6. 0						
Shirting—madras	4. 83	6. 5	4. 998	4. 0	5. 292	4. 0	5. 334	5. 0	5. 502	3. 0	5. 838	2. 0
Tapestry			5. 292	1. 0					5. 754	1. 0		
Terry pile	4. 83	3. 0	4. 998	0	5. 208	0	5. 334	2. 0	5. 502	0	5. 838	0
Ticking			4. 914	7. 5								
Tire fabrics—												
Cord, and weftless cord	4. 788	0					5. 124	0				
Square woven	4. 788	0										
Tobacco cloth and cheesecloth	4. 83	4. 0	4. 998	2. 0	5. 292	2. 0						
Velveteen	4. 956	2. 5	5. 124	2. 0	5. 334	2. 0	5. 418	2. 0	5. 586	1. 0	5. 838	1. 0
Voile	4. 83	4. 0	4. 998	2. 0	5. 292	3. 0	5. 334	2. 0	5. 502	2. 0	5. 838	2. 0

Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content—Continued.

Articles.	Carded.						Combed.					
	Unbleached not colored.		Unbleached colored.		Bleached (colored or uncolored.)		Unbleached not colored or mercerized.		Unbleached colored and/or mercerized.		Bleached (colored or uncolored—mercerized or unmercerized).	
	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.	Rates of tax.	Non-cotton content.
Woven fabrics—Over 12 inches wide—Continued.	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
All other—												
Napped	4. 956	2. 5	5. 124	1. 0	5. 418	0						
Not napped	4. 83	5. 0	4. 956	4. 0	5. 25	3. 0	5. 334	4. 0	5. 502	3. 0	5. 838	2. 0
Narrow fabrics (12 inches and under) woven or braided:												
Nonelastic	4. 83	4. 0	4. 998	3. 0	5. 166	5. 0	5. 25	4. 0	5. 418	3. 0	5. 586	2. 0
Elastic	4. 83	25. 0	4. 998	25. 0	5. 166	25. 0	5. 25	25. 0	5. 418	25. 0	5. 586	25. 0
Knit fabrics	4. 83	0	4. 998	0. 5	5. 166	0	5. 25	0	5. 376	0. 5	5. 586	0
Knit articles other than hosiery:												
Outerwear—												
Bathing suits			6. 30	3. 0								
Coat—sweater	5. 25	2. 0	5. 418	2. 0	5. 628	2. 0						
Gloves—												
Jersey work			6. 006	1. 0								
Chamois suede							6. 384	1. 0	6. 594	1. 0	7. 098	1. 0
Pullover—sweaters and jerseys	5. 838	0	6. 006	0	6. 216	0						
Scarfs and mufflers	4. 956	0	5. 082	0	5. 292	0						
Sweat shirts	5. 208	0	5. 376	0	5. 544	0						
Training pants	5. 334	0	5. 502	0	5. 670	0						
All other	5. 376	1. 0	5. 544	1. 0	5. 754	1. 0	5. 964	1. 0	6. 132	1. 0	6. 342	1. 0

Underwear—												
Bands and wrappers—infants'	5. 418	0	5. 502	0	5. 586	0	5. 880	0	6. 048	0	6. 090	0
Drawers, bloomers, step-ins and pants, except infants'	5. 418	1. 0	5. 502	1. 0	5. 586	1. 0	5. 880	1. 0	6. 048	1. 0	6. 090	1. 0
Pants, infants'	5. 796	0. 5	6. 048	0. 5	6. 258	0. 5	6. 300	0. 5	6. 510	0. 5	6. 804	0. 5
Sleepers	5. 544	2. 0	5. 712	2. 0	5. 880	2. 0	6. 006	2. 0	6. 174	2. 0	6. 384	2. 0
Undershirts—												
Athletic	5. 796	0	6. 048	0	6. 258	0	6. 300	0	6. 510	0	6. 804	0
Infants'	5. 586	0. 5	5. 670	0. 5	5. 796	0. 5	6. 090	0. 5	6. 258	0. 5	6. 300	0. 5
Other	5. 418	1. 0	5. 502	1. 0	5. 586	1. 0	5. 880	1. 0	6. 048	1. 0	6. 090	1. 0
Vests	5. 418	0	5. 502	0	5. 586	0	5. 880	0	6. 048	0	6. 090	0
Union suits	5. 544	1. 5	5. 712	1. 8	5. 880	2. 0	6. 006	2. 0	6. 174	2. 5	6. 384	3. 0
Waistsuits, children's	5. 796	4. 0	6. 048	4. 0	6. 258	4. 0	6. 300	5. 0	6. 510	5. 0	6. 804	5. 0
All other	5. 586	1. 0	5. 712	1. 0	5. 838	1. 0	6. 006	1. 0	6. 174	1. 0	6. 300	1. 0
Lace	5. 040	7. 0	5. 208	7. 0	5. 544	7. 0	5. 502	7. 0	5. 670	7. 0	6. 006	7. 0
Articles made from lace—												
In the manufacture of which the lace is cut parallel and/or at right angles to selvage	5. 334	7. 0	5. 502	7. 0	5. 796	7. 0	5. 754	7. 0	5. 964	7. 0	6. 300	7. 0
In the manufacture of which the lace is cut other than parallel and/or at right angles to selvage	5. 964	7. 0	6. 132	7. 0	6. 510	7. 0	6. 468	7. 0	6. 636	7. 0	7. 056	7. 0

Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date, or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content—Continued.

Articles.	Carded.				Combed.			
	Unbleached not colored.		Colored or bleached.		Unbleached not colored or mercerized.		Colored bleached or mercerized.	
	Rates of tax.	Noncotton content.	Rates of tax.	Noncotton content.	Rates of tax.	Noncotton content.	Rates of tax.	Noncotton content.
Articles made from fabrics other than knit and lace, in the manufacture of which the cloth is cut or torn parallel to the warp and/or weft:	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
Bags	4. 914	5. 0	5. 124	12. 0				
Bed sheets	4. 956	4. 0	5. 418	3. 0			6. 006	2. 0
Bed spreads	5. 166	1. 0	5. 670	3. 0			6. 300	3. 0
Blankets			5. 460	2. 5				
Conveyer belts and machinery belts	4. 830	0						
Diapers			5. 376	0				
Gauze			5. 292	0				
Handkerchiefs			5. 292	5. 0			6. 006	2. 0
Laundry nets and dye nets	4. 872	0						
Mattress ticks			5. 082	7. 5			6. 006	3. 0
Napkins			5. 418	4. 0			6. 006	3. 0
Pillow cases	4. 956	4. 0	5. 418	3. 0			6. 006	2. 0
Rugs and mats—								
Chenille	5. 082	3. 0	5. 250	3. 0				
Cut pile—								
Cotton weft			6. 048	1. 0			6. 552	1. 0
Other than cotton weft			6. 090	19. 0			6. 594	19. 0
Frieze			5. 586	1. 0			6. 048	1. 0
Terry	4. 998	3. 0	5. 250	0			5. 964	0
Other than pile	5. 124	3. 0	5. 292	1. 0	5. 544	3. 0	5. 754	1. 0
Table cloths			5. 418	4. 0			6. 006	3. 0

Towels—								
Crash	4. 998	2. 5	5. 250	1. 0				
Huck			5. 418	2. 0				
Terry			5. 334	0			5. 964	0
All others—								
Not colored	4. 956	3. 0	5. 334	4. 0	5. 670	3. 0	6. 006	2. 0
Colored			5. 250	4. 0			5. 838	2. 0

Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date, or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content—Continued.

Articles.	Carded.		Combed.	
	Rates of tax.	Noncotton content.[1]	Rates of tax.	Noncotton content.[1]
Articles made from fabrics other than knit and lace, in the manufacture of which the cloth is cut other than parallel to the warp and/or weft:	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
Bathrobes	5. 712	2. 0		
Breeches—riding	5. 502	5. 0	6. 300	4. 0
Coats—				
Work	5. 502	6. 5		
Hunting	5. 628	6. 0		
Dresses, house—				
Matched pattern	5. 838	5. 0	6. 426	4. 0
Other than matched pattern	5. 586	4. 0	6. 342	3. 0
Gloves	5. 796	2. 5		
Gowns—night	5. 754	3. 0	6. 342	2. 0
Knickers	5. 334	5. 0		
Overalls and work pants	5. 376	8. 5		
Pajamas—				
Matched pattern	5. 796	5. 0	6. 636	4. 0
Other than matched pattern	5. 586	5. 0	6. 342	4. 0
Powder puffs	6. 678	0	7. 182	0
Shirts—				
Other than work—				
Matched pattern	6. 006	7. 0	6. 636	5. 0
Other than matched pattern	5. 712	7. 0	6. 342	5. 0
Work	5. 292	7. 0		
Shorts	5. 838	6. 0	6. 468	4. 0
Slips	5. 628	5. 0	6. 258	3. 0
Smocks	5. 334	6. 0		
Suits—seersucker	5. 586	6. 0		
Uniforms—				
Men's two piece	5. 544	7. 0		
Maid's, nurses', etc	5. 712	7. 0		
Union suits	5. 838	8. 0	6. 468	5. 0
Vests—hunting, etc	5. 502	8. 0		
All others—				
Bleached—				
Other than matched pattern	5. 712	5. 0	6. 342	4. 0
Matched pattern	5. 964	5. 0	6. 636	4. 0
Unbleached—				
Other than matched pattern	5. 376	7. 0	5. 964	5. 0
Matched pattern	5. 628	7. 0	6. 258	5. 0
Hosiery:				
Flat knit—circular—				
144 needles and less	5. 082	0	5. 502	0
145 to 200 needles	5. 208	0	5. 670	0
Over 200 needles	5. 376	0	5. 838	0
Ribbed knit—circular, basis size, 9 inches—				
Less than 300 needles	5. 082	0	5. 502	0
300 needles and over	5. 208	0	5. 670	0
Full fashioned	5. 376	0	5. 838	0

[1] No allowance is included for the rayon, silk, or other textile fiber content of articles (except as to rugs and mats, other than cotton weft).

***Rates of tax applicable with respect to articles processed wholly or in chief value from cotton and imported on or after December 1, 1933, and in determining refunds upon exportation on or after said date, or upon delivery on or after said date to an organization for charitable distribution or use, and giving percentages representing noncotton content*—Continued.**

Articles.	Carded.		Combed.	
	Rates of tax.	Noncotton content.	Rates of tax.	Noncotton content.
Coated products:				
Oilcloth—	*Cents per pound.*	*Per cent.*	*Cents per pound.*	*Per cent.*
Table and shelf	5. 124	83. 0	-------	-------
Enameled—				
Drill	5. 124	60. 0	-------	-------
Duck	5. 124	55. 0	-------	-------
Adhesive tape	5. 964	50. 0	-------	-------
Artificial leather	5. 124	50. 0	-------	-------
Tracing cloth	-------	-------	5. 880	40. 0
Book cloth	5. 334	50. 0	5. 838	50. 0
Shade cloth	5. 124	50. 0	-------	-------
Rubber-coated and rubberized, except pneumatic casings	5. 292	60. 0	-------	-------
All other	5. 208	50. 0	5. 880	50. 0
Pneumatic casings	5. 040	80. 0	5. 376	80. 0
Absorbent cotton	5. 250	0	-------	-------
Batting and mattress felts	4. 410	0	-------	-------
Second-hand articles	0	-------	0	-------
Articles processed in whole from comber waste	The rates of tax for such articles shall be 85 per centum of the rates of tax listed above for like articles processed from raw cotton.			
Articles processed in part from comber waste	The rates of tax for such part of such articles shall be 85 per centum of the rates of tax listed above for like articles processed from raw cotton.			
Articles processed in whole from card strips	The rates of tax for such articles shall be 65 per centum of the rates of tax listed above for like articles processed from raw cotton.			
Articles processed in part from card strips	The rates of tax for such part of such articles shall be 65 per centum of the rates of tax listed above for like articles processed from raw cotton.			
Articles processed in whole from second-hand articles or from waste other than card strips or comber waste	0	-------	0	-------
Articles processed in part from second-hand articles or from waste other than card strips or comber waste	The rate of tax for such part of such articles shall be 0 per centum.			

(*b*) In the case of any article processed wholly or in chief value from cotton (but not named in the list set forth in paragraph (*a*) of this article of these regulations), which is made, directly or indirectly, in some part from an article designated in such list, the rate of tax on the content of such part of the article is the same as for the listed article from which the taxable article was made.

(*c*) If part of an article processed wholly or in chief value from cotton is made directly or indirectly from cotton (but is not made, directly or indirectly, from an article listed in paragraph (a) of this article of these regulations), the rate of tax as to such part shall be 4.2 cents per pound of lint cotton net weight established to have been actually used in the production of such part.

(*d*) In the event that any taxpayer or person entitled to a refund establishes that any article processed from cotton, with respect to which a tax is imposed, or which may be the subject of a claim for refund, which is included in the above list, contains more or less cotton than represented by the listed conversion factor, then the amount of the tax or of the refund shall be computed at the rate of the processing tax, upon the basis of the amount of cotton established to have been *actually used* in the production of the article, with proper allowances for card strips and comber waste based on the conversion factor established therefor.

(*e*) In the event that any taxpayer or person entitled to a refund establishes that any article processed from cotton, with respect to which a tax is imposed, or which may be the subject of a claim for refund, which is included in the above list, has more or less noncotton content of the kind for which provision has been made hereinabove, than that represented by the percentage of total weight of the article deductible for noncotton content to determine the cotton content of the article, then the amount of the noncotton content to be deducted from the total weight of the article shall be the amount of noncotton content established to be actually contained in the particular article. The noncotton content to which this election refers does not include rayon, silk, or other textile fiber content of articles (except as to " rugs and mats, other than cotton weft ").

(*f*) The cotton content of an article or product processed from cotton shall be deemed to mean the weight of cotton or of any form of cotton in the article or product. The cotton content of any such article is found by deducting from the total weight of such article, the percentage of the total weight thereof represented by the weight of sizing or buttons, rayon, silk, other textile fibers, or other noncotton content.

(*g*) In determining whether an article is processed or wholly in chief value from cotton (for the purposes of the compensating tax on imported articles) the combined values of the cotton and of every processed form of it used in making the article (including any processed form of cotton for which the conversion factor is zero) shall be the value of the cotton as a component. In determining the amount of tax with respect to an article processed wholly or in chief value from cotton, as thus determined, the weight of the content consisting of any processed form of cotton for which the conversion factor is zero may be disregarded.

(*h*) Any refund of tax, made pursuant to the provisions of section 15(c) or 17(a) of the Act, shall be made only on the following basis:

1. If the tax paid was a tax on floor stocks or compensating tax, the amount of refund shall be the amount of tax actually due and paid with respect to the particular product delivered or exported.

2. If the tax paid was a processing tax, the amount of the refund shall be determined in accordance with the rate of processing tax in effect at the time of the first domestic processing of the commodity from which the delivered or exported product was processed and in accordance with the proper conversion factor (prescribed by the Secretary of Agriculture) in effect at the time the product was delivered or exported.

ART. 4. *Compensating tax on imported articles.*—On and after August 1, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from cotton and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The rate of tax applicable to the cotton content of such articles is given in article 3 of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 12. See article 6 for list of prescribed forms.

ART. 5. *Existing contracts.*—(*a*) For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

(*b*) If a processor has such a contract for delivery on or after August 1, 1933, of an article processed wholly or in chief value from cotton, the tax on such processing (if done on or after August 1, 1933) must be returned on the current monthly return and then paid.

Art. 6. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83; and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to cotton are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 2	Processing tax return	Regulations 81, article 11.
P. T. Form 12	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32. Regulations 82, articles 19, 20.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 51	Monthly statement of importer of cotton products.	Regulations 81, article 21.

Art. 7. Treasury Decision 4389, approved September 6, 1933, shall remain in force and effect in so far as it relates to liability for tax incurred, or right to refund accrued, prior to December 1, 1933. These regulations shall be in force and effect as of the earliest moment of December 1, 1933, in so far as they relate to liability for tax incurred, or right to refund accrued, on or after that date.

Guy T. Helvering,
Commissioner of Internal Revenue.

Approved May 10, 1934.

H. Morgenthau, Jr.,
Secretary of the Treasury.

XIII-26-6869
T. D. 4441

Processing and other taxes with respect to sugar beets or sugar cane under the Agricultural Adjustment Act, as amended.

Processing tax, effective June 8, 1934, on the first domestic processing of sugar beets or sugar cane; tax on floor stocks of certain products processed from sugar beets or sugar cane held on June 8, 1934, for sale or other disposition; compensating tax on products processed or manufactured wholly or partly from sugar beets or sugar cane and imported on or after June 8, 1934.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Paragraph A. Section 9(a), Agricultural Adjustment Act, as amended by section 9 of the Act approved May 9, 1934, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; except that, in the case of sugar beets and sugar cane, the Secretary of Agriculture shall, on or before the thirtieth day after the adoption of this amendment,[1] proclaim that rental or benefit payments with respect to said commodities are to be made, and the processing tax shall be in effect on and after the thirtieth day after the date of the adoption of this amendment. In the case of sugar beets and sugar cane, the calendar year shall be considered to be the marketing year and for the year 1934 the marketing year shall begin January 1, 1934.

PAR. B. Section 9(b), Agricultural Adjustment Act, as amended by section 3(b) of the Act approved May 9, 1934, provides in part:

In the case of sugar beets or sugar cane the rate of tax shall be applied to the direct-consumption sugar, resulting from the first domestic processing, translated into terms of pounds of raw value according to regulations to be issued by the Secretary of Agriculture, and the rate of tax to be so applied shall be the higher of the two following quotients: The difference between the current average farm price and the fair exchange value (1) of a ton of sugar beets and (2) of a ton of sugar cane, divided in the case of each commodity by the average extraction therefrom of sugar in terms of pounds of raw value (which average extraction shall be determined from available statistics of the Department of Agriculture); except that such rate shall not exceed the amount of the reduction by the President on a pound of sugar raw value of the rate of duty in effect on January 1, 1934, under paragraph 501 of the Tariff Act of 1930, as adjusted to the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter I.

PAR. C. Section 9(d)6, Agricultural Adjustment Act, as amended by section 2 of the Act approved May 9, 1934, provides in part:

In the case of sugar beets and sugar cane—

(A) The term "first domestic processing" means each domestic processing, including each processing of successive domestic processings, of sugar beets, sugar cane, or raw sugar, which directly results in direct-consumption sugar.

(B) The term "sugar" means sugar in any form whatsoever, derived from sugar beets or sugar cane, whether raw sugar or direct-consumption sugar, including also edible molasses, sirups, and any mixture containing sugar (except blackstrap molasses and beet molasses).

(C) The term "blackstrap molasses" means the commercially so-designated "by-product" of the cane-sugar industry, not used for human consumption or for the extraction of sugar.

(D) The term "beet molasses" means the commercially so-designated "by-product" of the beet-sugar industry, not used for human consumption or for the extraction of sugar.

(E) The term "raw sugar" means any sugar, as defined above, manufactured or marketed in, or brought into, the United States, in any form whatsoever, for the purpose of being, or which shall be, further refined (or improved in quality, or further prepared for distribution or use).

(F) The term "direct-consumption sugar" means any sugar, as defined above, manufactured or marketed in, or brought into, the United States in any form whatsoever, for any purpose other than to be further refined (or improved in quality, or further prepared for distribution or use).

(G) The term "raw value" means a standard unit of sugar testing 96 sugar degrees by the polariscope. All taxes shall be imposed * * * in terms of "raw value" and for purposes of * * * tax measurements all sugar shall be translated into terms of "raw value" according to regulations to be issued by the Secretary, except that in the case of direct-consumption sugar produced in continental United States from sugar beets the raw value of such sugar shall be one and seven one-hundredths times the weight thereof.

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[1] Amendment approved May 9, 1934.

Par. D. Section 10(f), Agricultural Adjustment Act, as amended by section 7 of the Act approved May 9, 1934, provides:

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugar cane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.

Par. E. Section 13, Agricultural Adjustment Act, as amended by section 15 of the Act approved May 9, 1934, provides in part:

Sec. 13. In the case of sugar beets and sugar cane, the taxes provided by this title shall cease to be in effect, and the powers vested in the President or in the Secretary of Agriculture shall terminate at the end of three years after the adoption of this amendment[1] unless this title ceases to be in effect at an earlier date, as hereinabove provided. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

Par. F. Section 15(e), Agricultural Adjustment Act, as amended by section 11 of the Act approved May 9, 1934, provides in part:

(e) During any period for which a processing tax is in effect with respect to any commodity there shall be levied, assessed, collected, and paid upon any article processed or manufactured wholly or partly from such commodity and imported into the United States or any possession thereof to which this title applies, from any foreign country or from any possession of the United States to which this title does not apply, whether imported as merchandise, or as a container of merchandise, or otherwise, a compensating tax equal to the amount of the processing tax in effect with respect to domestic processing of such commodity at the time of importation.

Par. G. Section 16, Agricultural Adjustment Act, as amended by sections 10 and 17 of the Act approved May 9, 1934, provides in part:

Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. Such tax upon articles imported prior to, but in customs custody or control on, the effective date, shall be paid prior to release therefrom. In the case of sugar, the tax on floor stocks, except the retail stocks of persons engaged in retail trade, shall be paid for the month in which the stocks are sold, or used in the manufacture of other articles, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

* * * * * * *

(b) The tax imposed by subsection (a) shall not apply to the retail stocks of persons engaged in retail trade, held at the date the processing tax first takes effect; but such retail stocks shall not be deemed to include stocks held in a warehouse on such date, or such portion of other stocks held on such date as are not sold or otherwise disposed of within 30 days thereafter. * * *

[1] Amendment approved May 9, 1934.

(c)1 Any sugar, imported prior to the effective date of a processing tax on sugar beets and sugar cane, with respect to which it is established (under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury) that there was paid at the time of importation a duty at the rate in effect on January 1, 1934, and (2) any sugar held on April 25, 1934, by, or to be delivered under a bona fide contract of sale entered into prior to April 25, 1934, to, any manufacturer or converter, for use in the production of any article (except sugar) and not for ultimate consumption as sugar, and (3) any article (except sugar) processed wholly or in chief value from sugar beets, sugar cane, or any product thereof, shall be exempt from taxation under subsection (a) of this section, but sugar held in customs custody or control on April 25, 1934, shall not be exempt from taxation under subsection (a) of this section, unless the rate of duty paid upon the withdrawal thereof was the rate of duty in effect on January 1, 1934. * * *

PAR. H. The proclamation of the Secretary of Agriculture, dated May 9, 1934, provides:

I, H. A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to sugar beets and sugar cane, basic agricultural commodities.

PAR. I. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and articles processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto.

PAR. J. The regulations with respect to sugar beets and sugar cane, made by the Secretary of Agriculture, and approved by the President, on June 4, 1934, provide:

I find (1) that the difference between the current average farm price and the fair exchange value of a ton of sugar beets divided by the average extraction of sugar therefrom, in terms of pounds of raw value, gives a quotient of 0.4077 cent per pound of sugar raw value, and (2) that the difference between the current average farm price and the fair exchange value of a ton of sugar cane divided by the average extraction of sugar therefrom, in terms of pounds of raw value, gives a quotient of 0.7939 cent per pound of sugar raw value (which current average farm prices, fair exchange values, and average extractions of sugar, for both sugar beets and sugar cane, have been ascertained and determined by me from available statistics of the Department of Agriculture). I further find that, if the amount of 0.7939 cent (the higher of the two quotients resulting as hereinabove determined) be applied as the rate of tax to the direct-consumption sugar resulting from the first domestic processing of sugar beets or sugar cane, translated into terms of pounds of raw value, such rate will exceed the amount of 0.5 cent, by which amount the President, by proclamation issued May 9, 1934, reduced the rate of duty on a pound of sugar raw value in effect on January 1, 1934, under paragraph 501 of the Tariff Act of 1930, as adjusted to the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter I. I do accordingly determine as of June 8, 1934, that the processing tax, upon the direct-consumption sugar, resulting from the first domestic processing of sugar beets and sugar cane, shall be at the rate of 0.5 cent per pound of sugar raw value, which rate of tax equals, but does not exceed, the amount of the reduction by the President on a pound of sugar raw value of the rate of duty in effect on January 1, 1934, under paragraph 501 of the Tariff Act of 1930, as adjusted to the treaty of commerical reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter I.

DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The term "first domestic processing" means each domestic processing, including each processing of successive domestic processings, of sugar beets, sugar cane, or raw sugar, which directly results in direct-consumption sugar.

Sugar.—The term "sugar" means sugar in any form whatsoever, derived from sugar beets or sugar cane, whether raw sugar or direct-consumption sugar, including also edible molasses, sirups, and any mixture containing sugar (except blackstrap molasses and beet molasses).

Blackstrap molasses.—The term "blackstrap molasses" means the commercially so-designated by-product of the cane-sugar industry, not used for human consumption or for the extraction of sugar.

Beet molasses.—The term "beet molasses" means the commercially so-designated by-product of the beet-sugar industry, not used for human consumption or for the extraction of sugar.

Raw sugar.—The term "raw sugar" means any sugar, as defined above, manufactured or marketed in, or brought into, the United States, in any form whatsoever, for the purpose of being, or which shall be, further refined (or improved in quality, or further prepared for distribution or use).

Direct-consumption sugar.—The term "direct-consumption sugar" means any sugar, as defined above, manufactured or marketed in, or brought into, the United States in any form whatsoever, for any purpose other than to be further refined (or improved in quality, or further prepared for distribution or use).

Beet sugar.—The term "beet sugar" means all direct-consumption sugar resulting from the processing of sugar beets.

Sugar sirup.—The term "sugar sirup" means any product made by dissolving to the consistency of sirup any sucrose sugar which has been at any time wholly or partially crystallized.

Cane sirup and sirup of cane juice.—The terms "cane sirup" and "sirup of cane juice" means sirup made by the evaporation of the juice of the sugar cane or by the solution of sugar cane concrete.

Granulated sugar, lump sugar, cube sugar, powdered sugar, sugar in the form of blocks, cones, or any other molded shape, and confectioners' sugar.—The terms "granulated sugar," "lump sugar," "cube sugar," "powdered sugar," "sugar in the form of blocks, cones, or any other molded shape," and "confectioners' sugar" mean the commercially so-described or so-designated different forms of sugar, testing by the polariscope 99.8 sugar degrees or above.

Washed sugar, clarified sugar, plantation white sugar, turbinado, centrifugal sugar, and muscavado sugar.—The terms "washed sugar," "clarified sugar," "plantation white sugar," "turbinado," "centrifugal sugar," and "muscavado sugar" mean the commercially so-designated or so-described different products produced from sugar cane.

Refiners' soft sugar.—The term "refiners' soft sugar" (sometimes called "brown sugar") means the commercially so-designated or so-described product produced in the process of refining raw sugar.

Sugar mixtures.—The term "sugar mixtures" means the commercially so-designated or so-described mixtures containing sugar.

Edible molasses.—The term "edible molasses" means the commercially so-designated or so-described by-product of the sugar-cane industry, used for human consumption (including first molasses, second molasses, and other molasses, when used for human consumption).

Raw value.—The term "raw value" means a standard unit of sugar testing 96 sugar degrees by the polariscope. All taxes shall be imposed and all quotas shall be established in terms of "raw value" and for the purposes of quota and tax measurements all sugar shall be translated into terms of "raw value" according to regulations to be issued by the Secretary, except that in the case of direct-consumption sugar produced in continental United States from sugar beets, the raw value of such sugar shall be one and seven one-hundredths times the weight thereof.

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Invert sugar, invert sirup, or invert mush.—The terms "invert sugar," "invert sirup," or "invert mush," mean any product resulting from the complete or partial inversion, whether in one or more stages, of any sucrose sugar which has been at any time wholly or partially crystallized.

Total sugar content.—The term "total sugar content" (or "total sugars") means the sum of the sucrose (Clerget) and the reducing sugars contained in any grade or type of sugar as defined in the Act.

Refiners' sirup.—The term "refiners' sirup" means either the intermediate or final molasses obtained in the process of refining raw sugar.

Converter.—The term "converter" means any person who converts into any article, or uses in the manufacture of any article, any product or by-product of sugar beets or sugar cane.

Formulae for Translating Sugar into Terms of "Raw Value."

Section 9(d)6(G) of the Agricultural Adjustment Act, as amended, provides as follows:

"The term 'raw value' means a standard unit of sugar testing 96 sugar degrees by the polariscope. All taxes shall be imposed and all quotas shall be established in terms of 'raw value' and for purposes of quota and tax measurements all sugar shall be translated into terms of 'raw value' according to regulations to be issued by the Secretary, except that in the case of direct-consumption sugar produced in continental United States from sugar beets the raw value of such sugar shall be one and seven one-hundredths times the weight thereof."

I find that, in order to obtain 100 pounds of refined cane sugar, testing by the polariscope 99.8 sugar degrees and above, it is necessary to use 107 pounds of sugar raw value, i. e., sugar testing by the polariscope 96 sugar degrees, and that the raw value of 1 pound of refined sugar testing by the polariscope 99.8 sugar degrees or above, is, therefore, 1.07 pounds. I also find that the pounds of sugar raw value to be added for each degree (and fraction of a degree in proportion), of polarization, from 96 degrees to 100 degrees, is to be determined by the formula $\frac{1.07-1.00}{100-96}$ and is 0.0175 pound.

I find that the most accurate method for translating any quantity of sugar testing by the polariscope less than 96 degrees into terms of raw value is to find what weight of sugar raw value will have the same weight of total sugar content as such quantity of sugar. I further find that the total sugar content per pound of 96 degree sugar (i. e., raw value sugar) is 0.972 pound. I, therefore, find that the raw value of any sugar testing less than 96 degrees by the polariscope is to be determined by dividing the number of pounds of the total sugar content thereof by 0.972 pound.

I do hereby prescribe that, in determining the total sugar content of any sugar, the amount of the sucrose (Clerget) and of the reducing or invert sugars contained therein shall be ascertained in the manner prescribed in paragraphs 758, 759, 762, and 763 of the United States Customs Regulations (1931 edition) or in the manner prescribed on pages 367 to 383, inclusive, of Official and Tentative Methods of the Association of Official Agricultural Chemists (1930 edition).

Conversion Factors.

The following table fixes the amount of sugar, in terms of pounds of sugar raw value, with respect to 1 pound, net weight, of the following listed articles:

	Pounds of sugar raw value per pound of article.
Beet sugar and other direct-consumption sugar, including granulated sugar, lump sugar, cube sugar, powdered sugar, sugar in the form of blocks, cones, or any other molded shape, and confectioners' sugar, testing by the polariscope 99.8 sugar degrees or above	1.07
Direct-consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, and muscovado sugar, testing by the polariscope:	
Not less than 99°, but less than 99.8°	1.0525
Not less than 98°, but less than 99°	1.0350
Not less than 97°, but less than 98°	1.0175
Not less than 96°, but less than 97°	1.0000

Direct consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, and muscovado sugar, testing by the polariscope less than 96 degrees, and refiners' soft sugar, sugar mixtures, sirups, and edible molasses, having a total sugar content as follows:

Pounds of total sugar content.	Pounds of sugar raw value per pound of article.	Pounds of total sugar content.	Pounds of sugar raw value per pound of article.	Pounds of total sugar content.	Pounds of sugar raw value per pound of article.
0.97	0.9979	0.64	0.6584	0.31	0.3189
.96	.9877	.63	.6481	.30	.3086
.95	.9773	.62	.6379	.29	.2984
.94	.9670	.61	.6276	.28	.2881
.93	.9568	.60	.6173	.27	.2778
.92	.9465	.59	.6070	.26	.2675
.91	.9362	.58	.5967	.25	.2572
.90	.9259	.57	.5864	.24	.2469
.89	.9156	.56	.5761	.23	.2366
.88	.9053	.55	.5658	.22	.2263
.87	.8950	.54	.5556	.21	.2160
.86	.8848	.53	.5453	.20	.2058
.85	.8745	.52	.5350	.19	.1955
.84	.8642	.51	.5247	.18	.1852
.83	.8539	.50	.5144	.17	.1749
.82	.8436	.49	.5041	.16	.1646
.81	.8333	.48	.4938	.15	.1543
.80	.8230	.47	.4835	.14	.1440
.79	.8128	.46	.4733	.13	.1337
.78	.8025	.45	.4630	.12	.1235
.77	.7922	.44	.4527	.11	.1132
.76	.7819	.43	.4424	.10	.1029
.75	.7716	.42	.4321	.09	.0926
.74	.7613	.41	.4218	.08	.0823
.73	.7510	.40	.4115	.07	.0720
.72	.7407	.39	.4012	.06	.0617
.71	.7305	.38	.3909	.05	.0514
.70	.7202	.37	.3807	.04	.0412
.69	.7099	.36	.3704	.03	.0309
.68	.6996	.35	.3601	.02	.0206
.67	.6893	.34	.3498	.01	.0103
.66	.6790	.33	.3395		
.65	.6687	.32	.3292		

In the event that the Commissioner of Internal Revenue, or any taxpayer, or any person entitled to refund shall establish (1) that any product, by-product, or article, derived wholly or partly from the processing of sugar beets, sugar cane, and/or any product or by-product thereof, does not come within any of the above classifications and has had no conversion factor established for it, or (2) that any product, by-product, or article, derived wholly or partly from the processing of sugar beets, sugar cane, and/or any product or by-product thereof, which comes within any of the above classifications contains more or less total sugar expressed in terms of raw value than is represented by the listed conversion factor, then, in either event, the amount of the tax or refund with respect to such product, by-product, or article shall be computed at the rate of the processing tax, on the basis of the amount of total sugar content expressed in terms of raw value established to be actually contained therein.

EXEMPTIONS.

In my judgment, the imposition of the processing tax applied to the sirup of cane juice (sometimes called "molasses") resulting from the first domestic processing of sugar cane, by or for the producer thereof, who, together with his family, employees, or household, finally prepares for distribution or use and sells directly to, or exchanges directly with, consumers, or who sells to, or exchanges with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, not more than two hundred (200) gallons, in the aggregate, of sirup of cane juice, produced during any crop year, is unnecessary to effectuate the declared policy of the Act. Accordingly, I do hereby exempt from the processing tax sirup of cane juice, resulting from the first domestic processing of sugar cane by or for the producer thereof who, together with his family, employees, or household, finally prepares for distribution or use and sells directly to, or exchanges directly with, consumers, or sells to, or exchanges with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, not more than two hundred (200) gallons, in the aggregate, of sirup of cane juice, produced during any crop year; provided, however, that if the producer processes or has processed for him sugar cane produced by him, and together with his family, employees, or household, finally prepares for distribution or use and sells directly to, or exchanges with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers, without further improving in quality, or further preparing for distribution or use, in excess of two hundred (200) gallons, but not in excess of five hundred (500) gallons, in the aggregate, of sirup of cane juice, produced during any crop year, such processing shall be exempt to the extent of two hundred (200) gallons, but shall be subject to the processing tax on the amount in excess of two hundred (200) gallons, sold directly to, or exchanged directly with, consumers, or sold to, or exchanged with, any person for sale to, or exchange with, or sold to, or exchanged with, consumers; provided further, that if the producer processes or has processed for him sugar cane produced by him, and together with his family, employees, or household, finally prepares for distribution or use and sells directly to, or exchanges directly with, consumers, or sells to, or exchanges with, any person for sale to, or exchange with, and who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, more than five hundred (500) gallons, in the aggregate, of sirup of cane juice, produced during any crop year, such processing shall not be subject to the foregoing exemption. For the purposes of this exemption, the crop year shall be considered to commence with the harvesting of the sugar cane. For the purpose of determining any tax due on sirup of cane juice produced by or for a producer and sold by him, a gallon of sirup of cane juice shall be deemed to weigh eleven and one-third (11⅓) pounds and to contain sixty-five per cent (65%) of total sugars, unless the person subject to tax establishes to the satisfaction of the Commissioner of Internal Revenue that the said sirup of cane juice has a different weight and/or contains a different percentage of total sugar.

PAR. K. The regulations with respect to the processing tax on sugar beets and sugar cane, made by the Secretary of Agriculture, and approved by the President, on June 4, 1934, as revised and, in part, superseded by regulations made by the Secretary of Agriculture, and approved by the President, on June 7, 1934, provide:

I do hereby find as of June 8, 1934, after investigation and due notice and opportunity for hearing to interested parties and due consideration having been given to all of the facts, that the processing tax upon the direct-consumption sugar resulting from the first domestic processing of sugar beets and sugar cane, at the rate of 0.5 cent per pound of sugar raw value (which rate, except as limited by the amount of the reduction by the President on a pound of sugar raw value of the rate of duty in effect on January 1, 1934, under paragraph 601 of the Tariff Act of 1930, as adjusted to the treaty of commercial reciprocity concluded by the United States and the Republic of Cuba on December 11, 1902, and/or the provisions of the Act of December 17, 1903, Chapter I, equals the higher of the two following quotients: The difference between the current average farm price and the fair exchange value (1) of a ton of sugar beets and (2) of a ton of sugar cane, divided in the case of each commodity by the average extraction therefrom of sugar in terms of pounds of raw value), if applied as the rate of tax upon sirup of cane juice and edible molasses resulting from the first domestic processing of sugar cane will cause such reduction in the quantity of such sirup of cane juice and edible molasses domestically consumed as to result in the accumulation of surplus stocks of sugar cane, sirup of cane juice, and edible molasses or in the depression of the farm price of sugar cane. I do accordingly determine as of June 8, 1934, that the rate of the processing tax upon sirup of cane juice and edible molasses, resulting from the first domestic processing of sugar cane, shall be 0.125 cent per pound of the total sugar content thereof translated into terms of pounds of raw value, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of sugar cane, sirup of cane juice, and edible molasses, or in the depression of the farm price of sugar cane.

PAR. L. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. M. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. N. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

PAR. O. Section 1119, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

Whether or not the method of collecting any tax imposed by Titles IV, V, VI, or VII is specifically provided therein, any such tax may, under regulations prescribed by the Commissioner with the approval of the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of Title VIII, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be collected in such manner.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act, as amended, and the proclamations and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of sugar beets or sugar cane becomes effective at the earliest moment of June 8, 1934. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or partly from sugar beets or sugar cane, and imported on or after June 8, 1934. At the same moment there becomes effective a tax on floor stocks of certain articles processed from sugar beets or sugar cane which, on June 8, 1934, are held for sale or other disposition.

The rates of processing tax are given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamation of the Secretary of Agriculture, set forth in paragraph H, above, the provisions of Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, to the extent that they are not modified herein, become applicable to sugar beets or sugar cane.

(*c*) With respect to products processed wholly or partly from sugar beets or sugar cane, the date, June 8, 1934, is the "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, that is, the date when the processing tax on sugar beets or sugar cane first takes effect.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph J, above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of sugar beets or sugar cane becomes effective at the first moment of June 8, 1934. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 8. The first return of processing tax shall embrace the period June 8, 1934, to June 30, 1934, both dates inclusive, and shall be filed on or before July 31, 1934. Returns for subsequent months shall be filed on or before the last day of the month following that for which the return is made. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rate of tax applicable to the direct-consumption sugar, resulting from the first domestic processing (as herein defined) of sugar beets or sugar cane, is 0.5 cent per pound of sugar raw value, except that the rate of processing tax upon sirup of cane juice and edible molasses resulting from the first domestic processing of sugar cane is 0.125 cent per pound of the total sugar content thereof translated into terms of raw value.

(*c*) For the period from June 8, 1934, to June 30, 1934, both inclusive, and for each calendar month thereafter, each person engaged in successive domestic processings of sugar beets or sugar cane or raw sugar, which directly results in direct-consumption sugar, shall keep a record with respect to sugar beets or sugar cane or raw sugar of (1) the quantity on hand at the beginning of the period, (2) the quantity received during the period, (3) the quantity shipped or delivered during the period, (4) the quantity sold or otherwise disposed of during the period, (5) the quantity on hand at the end of the period, and (6) the quantity put in process during the period. These quantities must be ascertained by actual weighing on accurate scales and not by estimation.

(*d*) *Exemption.*—(1) The term "producer" as used in these regulations means the grower of sugar cane.

(2) For the purposes of exemption from processing tax, the processing of sugar cane, or the sale or exchange of sirup of cane juice and/or edible molasses derived therefrom, by any member of the family or household, or by an employee, of the producer of the sugar cane shall be deemed to have been done by the producer himself.

(3) If the producer processes, or has processed for him, sugar cane produced by him, and finally prepares for distribution or use, and sells directly to, or exchanges directly with consumers, or sells to, or exchanges with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, not more than 200 gallons in the aggregate, of sirup of cane juice produced during any crop year, such processing is exempt from processing tax.

(4) If the producer processes or has processed for him sugar cane produced by him and finally prepares for distribution or use and sells directly to, or exchanges with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, in excess of 200 gallons, but not in excess of 500 gallons, in the aggregate, of sirup of cane juice produced during any crop year, such processing is exempt to the extent of 200 gallons and is subject to the processing tax on the amount in excess of 200 gallons sold directly to, or exchanged directly with, consumers, or sold to, or exchanged with, any person for sale to, or exchange with, or sold to, or exchanged with, consumers.

(5) If the producer processes or has processed for him sugar cane produced by him, and finally prepares for distribution or use and sells directly to, or exchanges directly with, consumers, or sells to, or exchanges with, any person

for sale to, or exchange with, and who shall sell to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use more than 500 gallons, in the aggregate, of sirup of cane juice produced during any crop year, such processing is not exempt from the tax.

(6) For the purpose of exemption, the crop year commences with the harvesting of the sugar cane.

(7) The tax due on the processing of sirup of cane juice by or for a producer and sold by him shall be computed upon the basis of a gallon of sirup of cane juice being deemed to weigh 11⅓ pounds and to contain 65 per cent of total sugars, unless the person subject to tax shall establish to the satisfaction of the Commissioner of Internal Revenue that the said sirup of cane juice has a different weight and/or contains a different percentage of total sugar content.

(8) Products of the processing of sugar cane which are retained for consumption by the producer shall be deemed to have been processed for that purpose and not for sale or exchange.

(9) Each such producer-processor shall keep a written record showing: (*a*) the date on which the sugar cane was processed; (*b*) the quantity in pounds of sugar cane processed; (*c*) the quantity of sirup of cane juice produced (that is, finally prepared for distribution or use); (*d*) the quantity of sirup of cane juice sold directly to, or exchanged directly with, consumers or sold to, or exchanged with, any person for sale to, or exchange with, or who shall sell to, or exchange with, consumers; (*e*) the date of the sale or exchange; (*f*) the name and address of each such person to whom sold or exchanged; (*g*) the quantity of sirup of cane juice consumed by himself, his family, employees, or household. Such record shall be retained on the premises of the producer, and shall be open for inspection, at any reasonable time or times, by any internal revenue officer.

(10) P. T. Form 8–X is prescribed as the form of monthly processing tax return of a producer-processor of sugar cane. Return on this form must be made by each producer-processor for each calendar month during the crop year in which he makes sales or exchanges of, or holds for sale, sirup of cane juice processed by him.

ART. 3. *Rates of tax.*—(*a*) The amounts of tax imposed or of refund allowable with respect to articles processed from sugar beets or sugar cane, as determined on the basis of conversion factors prescribed by the Secretary of Agriculture in his regulations, set forth in paragraph J, above, are as follows:

Rates of tax on floor stocks of certain articles processed from sugar beets or sugar cane held for sale or other disposition on June 8, 1934, and rates of compensating tax on articles processed or manufactured wholly or partly from sugar beets or sugar cane and imported on or after June 8, 1934, and amounts of refunds allowable.

Articles.	Rates of tax (cents per pound).
(A) Beet sugar and other direct-consumption sugar (including granulated sugar, lump sugar, cube sugar, powdered sugar, sugar in the form of blocks, cones or any other molded shape, and confectioners' sugar), testing by the polariscope 99.8 sugar degrees or above	0.535
(B) Direct-consumption sugar (including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, and muscovado sugar), testing by the polariscope:	
Not less than 99°, but less than 99.8°	.526
Not less than 98°, but less than 99°	.517
Not less than 97°, but less than 98°	.508
Not less than 96°, but less than 97°	.5
(C) Direct-consumption sugar (including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, and muscovado sugar), testing by the polariscope less than 96 degrees, refiners' soft sugar, sugar mixtures, and invert sugar, invert sirup, or invert mush. (Subject to tax according to total sugar content, at rates shown in column A of table on page 512.)	
(D) Sirups of cane juice and edible molasses. (Subject to tax according to total sugar content, at rates shown in column B of table on page 512.)	

Rates of tax on floor stocks of certain articles processed from sugar beets, etc.—Continued.

(E) Other articles containing taxable sugar (not subject to tax on floor stocks):
(1) Articles containing sugar other than sirups of cane juice or edible molasses. (Subject to tax according to total sugar content, at rates shown in column A of table below.)
(2) Articles containing sirups of cane juice or edible molasses. (Subject to tax according to total sugar content, at rates shown in column B of table below.)

Table of tax rates applicable to direct-consumption sugar, testing by the polariscope less than 96 degrees, refiners' soft sugar, sugar mixtures, and invert sugar, invert sirup or invert mush, sirups of cane juice and edible molasses, and other articles containing taxable sugar, having a total sugar content as follows:

Pounds of total sugar content.	Rate of tax (cents per pound).		Pounds of total sugar content.	Rate of tax (cents per pound).		Pounds of total sugar content.	Rate of tax (cents per pound).	
	A	B		A	B		A	B
0.97	0.498	0.124	0.64	0.329	0.082	0.31	0.159	0.039
.96	.493	.123	.63	.324	.081	.30	.154	.038
.95	.488	.122	.62	.318	.079	.29	.149	.037
.94	.483	.120	.61	.313	.078	.28	.144	.036
.93	.478	.119	.60	.308	.077	.27	.138	.034
.92	.473	.118	.59	.303	.075	.26	.133	.033
.91	.468	.117	.58	.298	.074	.25	.128	.032
.90	.462	.115	.57	.293	.073	.24	.123	.030
.89	.457	.114	.56	.288	.072	.23	.118	.029
.88	.452	.113	.55	.282	.070	.22	.113	.028
.87	.447	.111	.54	.277	.069	.21	.018	.027
.86	.442	.110	.53	.272	.068	.20	.102	.025
.85	.437	.109	.52	.267	.066	.19	.097	.024
.84	.432	.108	.51	.262	.065	.18	.092	.023
.83	.426	.106	.50	.257	.064	.17	.087	.021
.82	.421	.105	.49	.252	.063	.16	.082	.020
.81	.416	.104	.48	.246	.061	.15	.077	.019
.80	.411	.102	.47	.241	.060	.14	.072	.018
.79	.406	.101	.46	.236	.059	.13	.066	.016
.78	.401	.100	.45	.231	.057	.12	.061	.015
.77	.396	.099	.44	.226	.056	.11	.056	.014
.76	.390	.097	.43	.221	.055	.10	.051	.012
.75	.385	.096	.42	.216	.054	.09	.046	.011
.74	.380	.095	.41	.210	.052	.08	.041	.010
.73	.375	.093	.40	.205	.051	.07	.036	.009
.72	.370	.092	.39	.200	.050	.06	.030	.007
.71	.365	.091	.38	.195	.048	.05	.025	.006
.70	.360	.090	.37	.190	.047	.04	.020	.005
.69	.354	.088	.36	.185	.046	.03	.015	.003
.68	.349	.087	.35	.180	.045	.02	.010	.002
.67	.344	.086	.34	.174	.043	.01	.005	.001
.66	.339	.084	.33	.169	.042			
.65	.334	.083	.32	.164	.041			

In determining the total sugar content of any sugar (as defined), the amount of the sucrose (Clerget) and of the reducing or invert sugars contained therein shall be ascertained in the manner prescribed in paragraphs 758, 759, 762, and 763 of the United States Customs Regulations (1931 edition) or in the manner prescribed on pages 367 to 383, inclusive, of Official and Tentative Methods of the Association of Official Agricultural Chemists (1930 edition).

(*b*) In the event that the Commissioner of Internal Revenue, or any taxpayer, or any person entitled to refund, shall establish (1) that any product, by-product, or article, derived wholly or partly from the processing of sugar beets, sugar cane, and/or any product or by-product thereof, does not come within any of the above classifications and with respect to which no rate of tax shown is applicable, or (2) that any product, by-product, or article, derived wholly or partly from the processing of sugar beets, sugar cane, and/or any product or by-product thereof, which comes within any of the above classifications contains more or less total sugar expressed in terms of raw value than is represented by the rate listed, then, in either event, the amount of the tax with respect to such product, by-product, or article shall be computed at the rate of the processing tax, on the basis of the amount of total sugar content expressed in terms of raw value established to be actually contained therein.

(*c*) Any refund of tax, made pursuant to the provisions of section 15(c) or 17(a) of the Act, shall be made only on the following basis:

(1) If the tax paid was a tax on floor stocks or compensating tax, the amount of refund shall be the amount of tax actually due and paid with respect to the particular product delivered or exported.

(2) If the tax paid was a processing tax, the amount of the refund shall be determined in accordance with the rate of processing tax in effect at the time of the first domestic processing of the commodity from which the delivered or exported product was processed and in accordance with the proper conversion factor (prescribed by the Secretary of Agriculture) in effect at the time the product was delivered or exported.

ART. 4. *Floor stocks.*—(*a*) On June 8, 1934, the tax on floor stocks becomes effective on certain articles processed from sugar beets or sugar cane, which on that date are held for sale or other disposition. The respective rates of tax applicable to such articles are given in article 3 of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

(*b*) In the case of floor stocks held by a person other than one engaged in retail trade, the provisions of Regulations 82 relative to inventory and return are modified as follows:

(1) The tax on floor stocks shall be paid for the month in which the stocks are sold, or used in the manufacture of other articles. Such tax upon articles imported prior to, but in customs custody or control on, June 8, 1934, shall be paid prior to release therefrom. The form prescribed for inventory of floor stocks other than separate retail stocks is P. T. Form 38, Inventory return of certain articles processed from sugar beets or sugar cane. Articles imported prior to but held in customs custody or control on June 8, 1934, must be reported on P. T. Form 38 separately from other stocks. Inventory return on P. T. Form 38 must be submitted at the time of filing the first return on P. T. Form 38–A. The form prescribed for return of floor tax due on floor stocks, other than separate retail stocks, is P. T. Form 38–A. Such returns must be filed promptly after the close of each month irrespective of whether or not such floor stocks are sold or used in the manufacture of other articles, but not later than the last day of the month following that for which the return is made, or with respect to floor stocks in customs custody on June 8, 1934, prior to withdrawal from such custody. The tax shown thereon to be due must be paid at the time the return is filed.

(*c*) Exempt from the floor stocks tax are:

(1) Any sugar, as defined, imported prior to June 8, 1934, with respect to which it is established that there was paid at the time of importation a duty at the rate in effect on January 1, 1934. This exemption applies to stocks held on June 8, 1934, which can be identified as having been imported and the duty paid thereon at the rate in effect January 1, 1934, even though held in a form different from that in which imported. Any such exemption claimed must be supported by proof in the form of a certified copy of the customs form showing when, where, and to whom, the duty was paid, and of sworn statements of each person who owned the article from the time of release from customs custody, establishing the identity of the article and the content thereof with respect to which duty has been paid at the rate in effect January 1, 1934.

(2) Any sugar held on April 25, 1934, by, or to be delivered under a bona fide contract of sale entered into prior to April 25, 1934, to, any manufacturer or converter, for use in the production of any article (except sugar) and not for ultimate consumption as sugar.

In the case of a vendor under any such contract, it will be assumed, unless proof be furnished to the contrary, that all sales or deliveries made on or after April 25, 1934, were made from sugar held on April 25, 1934, until sugar equal to the quantity so held shall have been all sold or delivered. The difference between the quantity of sugar held on April 25, 1934, and the quantity sold, delivered, or otherwise disposed of during the period beginning April 25, 1934, and ending June 7, 1934, is exempt from the tax on floor stocks only to the extent of the quantity remaining on June 8, 1934, to be delivered under such contracts.

In the case of a manufacturer or converter it will be assumed, unless proof be furnished to the contrary, that all sugar used during the period beginning April 25, 1934, and ending June 7, 1934, in the production of any article (except sugar), and not for ultimate consumption as sugar, was used from sugar held on April 25, 1934, until sugar equal to the quantity so held shall have been used, and that sugar subsequently received was used in the order of its receipt.

The quantity of sugar held by a manufacturer on April 25, 1934, and the quantity received by him during the period beginning April 25, 1934, and ending June 7, 1934, which was held on April 25, 1934, to be delivered to him under such a contract, is exempt from the tax on floor stocks to the extent that such sugar is not used during the period.

(3) Any article (except sugar) processed wholly or in chief value from sugar beets, sugar cane, or any product thereof.

(*d*) The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 48, Floor tax inventory, record and return. This return must be filed on or before August 7, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

(*e*) Each person who, on the effective date, holds for sale or other disposition sugar as defined, shall make a true and correct inventory thereof, as of the earliest moment of that date, and shall preserve such inventory, together with a record of all facts necessary to the determination of the correctness of such inventory. Such record shall be preserved and kept open for inspection and subject to all the requirements relative to records set forth in Regulations 82, article 21.

ART. 5. *Compensating tax on imported articles.*—On and after June 8, 1934, a compensating tax is in effect on all articles processed or manufactured wholly or partly from sugar beets or sugar cane, and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The rates of tax applicable to such articles are given in article 3 of these regulations. For detailed regulations as to this tax, see Regulations 81.

No article processed wholly or partly from sugar beets or sugar cane may be released from customs custody until the compensating tax due thereon has been paid except raw sugar as defined which is to be further refined (or improved in quality, or further prepared for distribution or use). Such sugar shall be held in customs custody until its release is authorized by the collector of internal revenue with whom return and copies of customs entries for each withdrawal shall be filed as provided in article 20 of Regulations 81. The return in such case must show that the article to be withdrawn is to be further refined or improved in quality or further prepared for distribution or use, and the place to which such article is to be transported for that purpose. The collector of internal revenue shall certify on the copies of the customs entry authority for the release of the article from customs custody for the purpose stated and without the payment of the compensating tax. Said forms will be handled as provided in the article referred to in Regulations 81.

The form prescribed for return of the compensating tax is P. T. Form 18. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after June 8, 1934, of an article processed wholly or in chief value from sugar beets or sugar cane, the tax on such processing (if done on or after June 8, 1934) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to sugar beets or sugar cane are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 8	Processing tax return	Regulations 81, article 11.
P. T. Form 8X	Processing tax return of producer-processor.	Regulations 81, article 11, article 2(*d*) of these regulations.
P. T. Form 18	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund of overpayment under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(*a*).
P. T. Form 24C	Claim for refund—Articles delivered for charitable distribution or use.	Regulations 81, article 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(*b*).
P. T. Form 38	Inventory return of floor stocks by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 81, article 11, as amended by article 4 of these regulations.
P. T. Form 38A	Return of tax due on floor stocks by a person other than one engaged in retail trade.	Regulations 82, article 11, as amended by article 4 of these regulations.
P. T. Form 48	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16, as amended by article 4 of these regulations.
P. T. Form 51, revised.	Monthly statement of importer	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 20, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

XIII-3-6608
T. D. 4415

Processing and other taxes with respect to certain paper, and jute fabric and jute yarn under the Agricultural Adjustment Act.

Processing tax, effective December 1, 1933, on the first domestic processing of certain paper, jute fabric, and jute yarn; tax on floor stocks of certain products processed wholly or in chief value from such paper, jute fabric, or jute yarn held on December 1, 1933, for sale or other disposition; compensating tax on certain products processed or manufactured wholly or in chief value from such paper, jute fabric, or jute yarn and imported on or after December 1, 1933.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 15(d), Agricultural Adjustment Act, provides, in part:

The Secretary of Agriculture shall ascertain from time to time whether the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof. If the Secretary of Agriculture finds, after investigation and due notice and opportunity for hearing to interested parties, that such disadvantages in competition exist, or will exist, he shall proclaim such finding. The Secretary shall specify in this proclamation the competing commodity and the compensating rate of tax on the processing thereof necessary to prevent such disadvantages in competition. Thereafter there shall be levied, assessed, and collected upon the first domestic processing of such competing commodity a tax, to be paid by the processor, at the rate specified, until such rate is altered pursuant to a further finding under this section, or the tax or rate thereof on the basic agricultural commodity is altered or terminated. In no case shall the tax imposed upon such competing commodity exceed that imposed per equivalent unit, as determined by the Secretary, upon the basic agricultural commodity.

PAR. B. A proclamation of the Secretary of Agriculture, made 12.01 a. m., December 1, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress, known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, after investigation and due notice and opportunity for hearing to interested parties, and due consideration having been given to all of the facts, hereby find, and do hereby proclaim, that the payment of the processing tax upon cotton is causing, and will cause, to the processors thereof disadvantages in competition from paper, by reason of excessive shifts in consumption between such commodities or products thereof, I do accordingly hereby specify that the compensating rate of tax on the processing of paper, necessary to prevent such disadvantages in competition, is 2.04 cents per pound weight of paper, on the first domestic processing of paper into multiwall paper bags; 3.36 cents per pound weight of paper, on the first domestic processing of coated paper into coated paper bags; 2.14 cents per pound weight of open-mesh paper fabric, on the first domestic processing of open-mesh paper fabric into open-mesh paper bags; 0.715 cent per pound weight of paper, on the first domestic processing of paper into paper towels; 4.06 cents per pound weight of paper, on the first domestic processing of paper into gummed paper tape. Hereafter there shall be levied, assessed, and collected, upon the first domestic processing of paper into multiwall paper bags, coated paper into coated paper bags, open-mesh paper fabric into open-mesh paper bags, paper into paper towels, or paper into gummed paper tape, as aforesaid, a tax, to be paid by the processors thereof, at the rates hereinabove specified, until such rates are altered pursuant to a further finding under section 15(d) of said Act, or the tax or the rate thereof on cotton is altered or terminated.

PAR. C. A proclamation of the Secretary of Agriculture, made 12.01 a. m., December 1, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress, known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, after investigation and due notice and opportunity for hearing to interested parties, and due consideration having been given to all of the facts, hereby find, and do hereby proclaim, that the payment of the processing tax upon cotton is causing, and will cause, to the processors thereof disadvantages in competition from jute fabric and jute yarn, by reason of excessive shifts in consumption between such commodities or products thereof. I do accordingly hereby specify that the compensating rate of tax on the processing of jute fabric necessary to prevent such disadvantages in competition, is 2.9 cents per pound of jute fabric, on the first domestic processing of jute fabric into bags, and that the compensating rate of tax on the processing of jute yarn, necessary to prevent such disadvantages in competition, is 2.9 cents per pound of jute yarn, on the first domestic processing of jute yarn into twine of a length 275 feet per pound, or over, finished weight of twine. Hereafter, there shall be levied, assessed and collected upon the first domestic processing of jute fabric into bags and jute yarn into twine, as aforesaid, a tax, to be paid by the processor thereof, at the rates hereinabove specified, until such rates are altered, pursuant to a further finding under section 15(d) of said Act, or the tax or rate thereof on cotton is altered or terminated.

PAR. D. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. E. The regulations, with respect to paper, and the products thereof, made by the Secretary of Agriculture, with the approval of the President, dated December 1, 1933, provide, in part:

I. DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The first domestic processing of paper is—

(*a*) The manufacture or fabrication of paper into multiwall paper bags, or paper towels, or gummed paper tape; or

(*b*) The manufacture of coated paper into coated paper bags; or

(*c*) The manufacture of open-mesh paper fabric into open-mesh paper bags.

Paper.—Paper is a compacted web of cellulose fibers, sized or unsized, filled or unfilled, coated or uncoated, gummed or ungummed, in the form of a sheet and made from an aqueous suspension.

Weight of paper.—Weight of paper includes the fiber, and any filler, sizing, coating, adhesive, gum, or other material, composing the finished sheet or web, as used in any processing herein defined.

Multiwall paper bags.—Multiwall paper bags are bags having more than one wall and weighing more than 200 pounds per thousand bags.

Coated paper bags.—Coated paper bags are bags of the type usually made from so-called coated rope paper or coated craft paper, or similar material.

Open-mesh paper fabric.—Open-mesh paper fabric is fabric woven in open-mesh form from spun paper, or twisted paper, or paper yarn, or paper filament.

Open-mesh paper bags.—Open-mesh paper bags are bags made from open-mesh paper fabric.

Paper towel.—Paper towel is any paper toweling, but does not include tissues of the type commonly known as "cleansing tissues" or "facial tissues."

Gummed paper tape.—Gummed paper tape is paper, one surface of which is covered with gum or other adhesive material, processed for distribution in ribbon form, and less than 2 inches in width.

Secondhand articles.—Secondhand articles are multiwall paper bags, coated paper bags or open-mesh paper bags which have been used one or more times for the purpose for which processed.

II. CONVERSION FACTORS.

I hereby establish the following conversion factors for articles processed wholly or in chief value from paper, coated paper, or open-mesh paper fabric, as aforesaid, to determine the amount of tax imposed or refunds to be made with respect thereto:

The following table fixes the percentage of the per pound processing tax on paper, coated paper, or open-mesh paper fabric, determined for the respective processings set forth hereinabove, with respect to each pound of the following articles:

Article.		Conversion factor for finished weight of article.
Multiwall paper bags	per cent	102.06
Coated paper bags	do	104.71
Open-mesh paper bags	do	100.50
Paper towels	do	102.04
Gummed paper tape	do	103.80
Secondhand articles	do	0.00

In the event that any taxpayer or person entitled to a refund establishes that a greater or lesser amount of paper, or coated paper, or open-mesh paper fabric was used in the production of multiwall paper bags, coated paper bags, open-mesh paper bags, paper towels and gummed paper tape, respectively, included in the above list, processed wholly or in chief value from paper, or coated paper, or open-mesh paper fabric, on which a tax is imposed or which may be the subject of a claim for refund, than the amount represented by the listed conversion factors, then the amount of the tax, or of the refund, shall be computed at the rate of the processing tax upon the basis of the amount of paper, or coated paper, or open-mesh paper fabric established to have been actually used in the production of the particular article.

PAR. F. The regulations with respect to jute fabric and jute yarn, and the products thereof, made by the Secretary of Agriculture, with the approval of the President, dated December 1, 1933, provide, in part:

I. DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing:

(*a*) The first domestic processing of jute fabric is the manufacture of jute fabric into bags.

(*b*) The first domestic processing of jute yarn is the manufacture or preparation in any form of said yarn into twine, and includes the twisting, or polishing, or sizing, or the putting up of said yarn into balls, cones, tubes, reels, skeins or other forms of put-ups of twine, or any other preparation for market of said yarn as twine.

Jute fabric.—Jute fabric is fabric or cloth, woven or otherwise manufactured, wholly or in chief value from jute or jute yarn.

Jute yarn.—Jute yarn is material, spun or otherwise prepared, wholly or in chief value from jute, in form for use in weaving or twisting or other manufacturing.

Bags.—Bags are all bags less than 6 feet in length and less than 3 feet in width, made from jute fabric.

Twine.—Twine is line, cord, string or other tying material made from jute yarn, of a length not less than 275 feet per pound, finished weight of twine, and includes polished twine and unpolished twine, and twine made from a single ply or more than one ply of jute yarn.

Polished jute twine.—Polished jute twine is jute twine that has been specially treated with sizing or other nonjute material to improve its strength, quality, or appearance.

Unpolished jute twine.—Unpolished jute twine is twine other than polished jute twine.

Finished weight of twine.—Finished weight of twine means the weight of the jute yarn and any filler, or sizing, or any other nonjute material composing the finished twine.

Secondhand articles.—Secondhand articles are jute bags or jute twine which have been used one or more times for the purpose for which processed.

II. CONVERSION FACTORS.

I hereby establish the following conversion factors for articles processed wholly or in chief value from jute fabric or jute yarn, as aforesaid, to determine the amount of tax imposed or refunds to be made with respect thereto:

The following table fixes the percentage of the per pound processing tax on jute fabric or jute yarn, determined for the respective processings set forth hereinabove, with respect to each pound of the following articles:

Article.		Conversion factor for finished weight of article.
Bags	per cent	100.5
Twine:		
Unpolished	do	100.1
Polished	do	91.0
Secondhand articles	do	0.0

In the event that any taxpayer or person entitled to a refund establishes that a greater or lesser amount of jute fabric or jute yarn was used in the production of jute bags or jute twine, respectively, included in the above list, processed wholly or in chief value from jute fabric or jute yarn, on which a tax is imposed or which may be the subject of a claim for refund, than the amount represented by the listed conversion factors, then the amount of the tax, or of the refund, shall be computed at the rate of the processing tax upon the basis of the amount of jute fabric or jute yarn established to have been actually used in the production of the particular article.

PAR. G. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. H. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. I. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this Act.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations effective as of December 1, 1933, are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamations and regulations of the Secretary of Agriculture, processing taxes on the first domestic processing of certain paper, jute fabric, and jute yarn, become effective at 12.01 a. m. December 1, 1933. At the same moment there becomes effective a compensating tax on certain articles processed or manufactured wholly or in chief value from paper, jute fabric, or jute yarn, and imported after 12.01 a. m. December 1, 1933. At the same moment there becomes effective a tax on floor stocks of certain articles processed wholly or in chief value from paper, jute fabric, or jute yarn, which on December 1, 1933, are held for sale or other disposition.

The rates of processing tax are given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamations of the Secretary of Agriculture, set forth in paragraphs B and C above, and of his regulations set forth in paragraphs E and F above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to certain paper, jute fabric, and jute yarn. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to certain products processed or manufactured wholly or in chief value from paper, jute fabric, or jute yarn, the date, December 1, 1933, is the "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, that is, the date when the processing tax with respect to the competing commodities named first takes effect.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraphs E and F above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of certain paper, jute fabric, and jute yarn, becomes effective at 12.01 a. m., December 1, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 2A. The first return of processing tax shall embrace the period December 1, 1933, to December 31, 1933, both inclusive, and shall be filed on or before January 31, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rate of tax on the processing of paper is 2.04 cents per pound weight of paper, on the first domestic processing of paper into multiwall paper bags; 3.36 cents per pound weight of paper, on the first domestic processing of coated paper into coated paper bags; 2.14 cents per pound weight of open-mesh paper fabric, on the first domestic processing of open-mesh paper fabric into open-mesh paper bags; 0.715 cent per pound weight of paper, on the first domestic processing of paper into paper towels; 4.06 cents per pound weight of paper, on the first domestic processing of paper into gummed paper tape.

(c) In accordance with the regulations of the Secretary of Agriculture, the rate of tax on the processing of jute fabric, is 2.9 cents per pound of jute fabric, on the first domestic processing of jute fabric into bags, and the rate of tax on the processing of jute yarn is 2.9 cents per pound of jute yarn, on the first domestic processing of jute yarn into twine of a length 275 feet per pound, or over, finished weight of twine.

ART. 3. *Rates of tax.*—The amounts of tax imposed with respect to certain articles processed wholly or in chief value from paper, jute fabric, or jute yarn, as determined upon the basis of the rates of tax on the first domestic processing thereof specified in the proclamations of the Secretary of Agriculture, given in article 2, and of his prescription of conversion factors in his regulations set forth in paragraphs E and F above, are as follows:

Rates of tax on floor stocks of articles processed wholly or in chief value from paper, jute fabric, or jute yarn, held for sale or other disposition on December 1, 1933, and rates of compensating tax on imports of such articles effective on and after December 1, 1933.

Articles processed wholly or in chief value from—	Rates of tax.
A. Paper:	*Cents per pound.*
1. Multiwall paper bags (bags having more than one wall and weighing more than 200 pounds per 1,000 bags)	2.082
2. Coated paper bags (bags of the type usually made from so-called coated rope paper or coated kraft paper, or similar material)	3.518
3. Open-mesh paper bags (bags made from open-mesh paper fabric)	2.150
4. Paper towels (any paper toweling, but does not include tissues of the type commonly known as "cleansing tissues" or "facial tissues")	.729
5. Gummed paper tape (paper one surface of which is covered with gum or other adhesive material, processed for distribution in ribbon form and less than 2 inches in width)	4.214
B. Jute fabric and jute yarn:	
1. Bags (all bags less than 6 feet in length and less than 3 feet in width made from jute fabric)	2.914
2. Twine (line, cord, string or other tying material made from jute yarn of a length not less than 275 feet per pound finished weight of twine, and twine made from a single ply or more than one ply of jute yarn)—	
(a) Unpolished	2.902
(b) Polished	2.639

In the event that any taxpayer can establish that a greater or lesser amount of paper, or coated paper, or open-mesh paper fabric, or jute fabric, or jute yarn was used in the production of any article processed wholly or in chief value from one of said commodities, included in the above list, than the amount represented by the rate listed, then the amount of tax for such article shall be computed at the rate of the processing tax upon the basis of the amount of the commodity established to have been actually used in the production of the particular article.

ART. 4. *Floor stocks.*—(a) On December 1, 1933, the tax on floor stocks becomes effective on certain stocks of articles processed wholly or in chief value from paper, jute fabric, or jute yarn with respect to which a processing tax is in effect, which on that date are held for sale or other disposition. The rate of tax applicable is given in article 3 of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 32A, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before December 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 42A, Floor tax inventory, record and return. This return must be filed on or before January 30, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

See article 7 for list of prescribed forms.

ART. 5. *Compensating tax on imported articles.*—On and after December 1, 1933, a compensating tax is in effect on certain articles processed wholly or in chief value from paper, jute fabric, or jute yarn and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The rate of tax applicable to such articles is given in article 3 of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 12A. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after December 1, 1933, of certain articles processed wholly or in chief value from paper, jute fabric, or jute yarn, the tax on such processing (if done on or after December 1, 1933) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

The vendee under such a contract is entitled, where optional rates may be applicable, to exercise such option.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to certain paper, jute fabric, and jute yarn are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 2A	Processing tax return	Regulations 81, article 11.
P. T. Form 12A	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(*a*), 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(*b*).
P. T. Form 32A	Floor tax inventory and return, by a person *other* than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 42A	Floor tax inventory, record, and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51	Monthly statement of importer	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 8, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

COTTON CONTROL ACT. (1934)

REGULATIONS 84, ARTICLE 16: Transportation, etc., of lint cotton. XIII-23-6842 T. D. 4438

Bale tags not required before July 1, 1934, with respect to cotton harvested and ginned prior to June 1, 1934.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Reference is made to section 14(b) of the Cotton Control Act approved April 21, 1934 (Public, No. 169, Seventy-third Congress), which reads as follows:

Except as may be permitted by regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury, with due regard for the protection of the revenue, no person shall: (1) Transport, except for storing or warehousing, under the provisions of section 4(f) beyond the boundaries of the county where produced any lint cotton to which a bale tag issued under this Act is not attached; or (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

Bales of lint cotton harvested and ginned prior to June 1, 1934, may be transported, sold, purchased, or opened at any time prior to July 1, 1934, even though a bale tag is not attached.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved June 1, 1934.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

TITLE II OF THE LIQUOR TAXING ACT OF 1934.

XIII-6-6648
T. D. 4418

Stamps indicating tax payment of distilled spirits in bottles.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Supervisors of Permits, and Others Concerned:

Title II of the Liquor Taxing Act of 1934 reads as follows:

TITLE II.

SEC. 201. No person shall (except as provided in section 202) transport, possess, buy, sell, or transfer any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

(a) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(b) Distilled spirits in bond or in customs custody;

(c) Distilled spirits in immediate containers required to be stamped under existing law;

(d) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(e) Distilled spirits on which no internal-revenue tax is required to be paid;

(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; or

(g) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

SEC. 202. Every person who, on the effective date of this title, holds for sale (or use in the manufacture or production of an article intended for sale) any distilled spirits in containers required to be stamped by section 201, on which all internal-revenue taxes have been paid, may possess such spirits, but shall, not later than the tenth day after such date, apply for, and shall be sold (in accordance with section 203) the requisite stamps. Such stamps shall be promptly affixed to the immediate containers of such spirits, except that when such spirits contained in bottles in closed cases are held for sale or sold otherwise than at retail, such stamps need not be affixed until the cases are opened or sold at retail, when such stamps shall be immediately affixed to the bottles, but such stamps shall be sold or transferred in connection with any sale or transfer of such spirits and the person in possession of such spirits shall be in possession of such stamps therefor.

SEC. 203. Any person placing or intending to place any distilled spirits upon which all internal-revenue taxes have been paid into any container upon which a stamp is required by this title, or withdrawing or intending to withdraw any imported spirits in such containers from customs custody, shall be entitled to purchase sufficient stamps for stamping such containers. Such stamps shall be issued by the Commissioner of Internal Revenue to each collector of internal revenue, upon his requisition, in such numbers as may be necessary in his district, and shall be sold by the collectors to persons entitled thereto upon application therefor and compliance with regulations under this title, at a price of 1 cent for each stamp, except that in the case of stamps for containers of less than one-half pint the price shall be one-quarter of 1 cent for each stamp. When in his judgment there is no danger to the revenue, and upon the giving of such bonds or other security as he may deem necessary, the Commissioner may authorize (1) the sale prior to the effective date of this title of such stamps and (2) the sale of such stamps to importers for stamping containers in the country from which imported.

SEC. 204. Every person emptying any container stamped under the provisions of this title shall at the time of emptying such container destroy the stamp thereon.

SEC. 205. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing, and destroying stamps required by this title, the form and denominations of such stamps, proof that applicants are entitled to such stamps, and the method of accounting for receipts from the sale of such stamps, and (b) such other regulations as he shall deem necessary for the enforcement of this title.

SEC. 206. All distilled spirits found in any container required to bear a stamp by this title, which container is not stamped in compliance with this title and regulations issued thereunder, shall be forfeited to the United States. Distilled spirits placed in such containers prior to the effective date of this title shall not be subject to this section until the expiration of 10 days after the effective date of this title, nor (when it is established that application for stamps therefor was made within the proper time) until such stamps are received by the applicant.

SEC. 207. Any person who violates any provision of this title, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under this title, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by this title, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by this title, or who places any distilled spirits in any bottle which has been filled and stamped under this title without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under this title to any container of distilled spirits on which any tax due is unpaid, or who makes any false statement in any application for stamps under this title, or who has in his possession any such stamps obtained by him otherwise than as provided in sections 202 and 203, or who sells or transfers any such stamp otherwise than as provided in section 202, shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. Any officer authorized to enforce any provisions of law relating to internal revenue stamps is authorized to enforce the provisions of this section and the provisions of section 7 of the Act of March 3, 1897, relating to the bottling of distilled spirits in bond.

SEC. 208. This title shall take effect on the thirtieth day following the date of the enactment of this Act, except that if on or before the twentieth day following the date of the enactment of this Act the Secretary of the Treasury finds that it is impracticable to put this title into effect on the thirtieth day following the date of the enactment of this Act and so proclaims, specifying the date, not later than the sixtieth day following the date of the enactment of this Act, on which it will be practicable to put this title into effect, this title shall take effect on the date specified in such proclamation. Notwithstanding the previous provisions of this section, this section and sections 202, 203, and 205 shall take effect on the date of the enactment of this Act.

Pursuant to the above-quoted title of the Liquor Taxing Act of 1934, the following regulations are prescribed:

REGULATIONS RELATING TO STAMPS INDICATING TAX PAYMENT OF DISTILLED SPIRITS IN BOTTLES.

PARAGRAPH 1. In accordance with the provisions of the Liquor Taxing Act of 1934, the immediate containers of distilled spirits will, on and after February 10, 1934, be required to bear a stamp indicating the payment of all internal-revenue taxes thereon, with the following exceptions:

(*a*) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(*b*) Distilled spirits in bond or in customs custody;

(*c*) Distilled spirits in immediate containers required to be stamped under existing law;

(*d*) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(*e*) Distilled spirits on which no internal-revenue tax is required to be paid;

(*f*) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale;

(*g*) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier;

(*h*) Distilled spirits temporarily exempted under paragraph 3 or 8.

PAR. 2. Every person who places tax-paid distilled spirits in bottles not excepted by the statute must, at that time, attach thereto the stamp prescribed by these regulations.

PAR. 3. Importers may, under the law, obtain stamps to send abroad for affixing to bottles to be shipped to this country. Where stamps are affixed to bottles before entry into this country, the name and address of the importer must be placed on the stamp, as required by paragraph 5 of these regulations. Where stamps are not placed on bottles prior to shipment from abroad, the importer will be entitled to purchase from the collector the requisite number of stamps to be affixed to the bottles. Such stamps need not be affixed to the bottles until the cases are opened or sold at retail, provided the stamps are sold or transferred in connection with any sale or transfer of such cases of bottles and the person in possession thereof is in possession of such stamps therefor.

PAR. 4. Stamps prescribed by these regulations will be in the following denominations: Quarts, fifth-gallons, pints, half-pints, and less than half-pints. The price is 1 cent for each stamp, except that in the case of stamps for bottles of less than one-half pint, the price is one-quarter of 1 cent for each stamp. Stamps for bottles containing less than one-half pint will be issued in sheets of 50. Stamps of other denominations will be issued in sheets of 25.

PAR. 5. Prior to affixing any stamp to a bottle under these regulations, the person affixing the stamp must place his name and address thereon, in writing or by rubber stamp, printing, or perforating. The name and address must be plain and legible.

PAR. 6. The stamps must be affixed to the bottles with the use of strong adhesive glue or paste. The stamps must pass over the mouth of the bottle, extending an equal distance on two sides of the bottle. No part of the stamp shall be obscured or covered by any label or otherwise.

PAR. 7. Except as provided in paragraph 8, collectors will sell the stamps upon application therefor, only to registered distillers, rectifiers, importers, proprietors of concentration, general and special bonded warehouses, and wholesale dealers and retail druggists authorized to bottle alcohol for nonbeverage purposes. The statute authorizes collectors to sell these stamps prior to February 10, 1934. In supplying the stamps for use under these regulations, collectors will require such evidence as they deem proper as to the need for the quantity of stamps for which application is made. Form 237 will indicate to collectors the approximate number of stamps required by rectifiers.

PAR. 8. Every person who, on February 10, 1934, holds for sale (or use in the manufacture or production of an article intended for sale) any distilled spirits in bottles required to be stamped, on which all internal-revenue taxes have been paid, may possess such spirits, but shall, not later than February 20, 1934, apply for, and shall be sold the requisite stamps. Such stamps shall be promptly affixed to the bottles containing such spirits, except that when such spirits contained in bottles in closed cases are held for sale or sold otherwise than at retail, such stamps need not be affixed until the cases are opened or sold at retail, when such stamps shall be immediately affixed to the bottles, but such stamps shall be sold or transferred in connection with any sale or transfer of such spirits and the person in possession of such spirits shall be in possession of such stamps therefor. Application for stamps for use under this paragraph may be made to collectors prior to February 10, 1934.

PAR. 9. Every person emptying any bottle stamped under the provisions of Title II of the Liquor Taxing Act of 1934 shall, at the time of emptying such bottle, destroy the stamp thereon.

PAR. 10. All distilled spirits found in any bottle required to bear a stamp by Title II of the Liquor Taxing Act of 1934, which bottle is not stamped in compliance with that title and regulations issued thereunder, shall be forfeited to the United States.

Distilled spirits placed in bottles prior to February 10, 1934, shall not be subject to forfeiture until February 20, 1934, nor (when it is established that application for stamps therefor was made within the proper time) until such stamps are received by the applicant.

PAR. 11. Any person who violates any provision of Title II of the Liquor Taxing Law of 1934, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under that title, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by that title, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by that title, or who places any distilled spirits in any bottle which has been filled and stamped under that title without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under that title to any container of distilled spirits on which any tax due is unpaid, or who makes any false statement in any application for stamps under that title, or who has in his possession any such stamps obtained by him otherwise than as provided in sections 202 and 203 of Title II of the Liquor Taxing Act of 1934, or who sells or transfers any such stamp otherwise than as provided in section 202 of that title, shall, on conviction, be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. Any officer authorized to enforce any provision of law relating to internal-revenue stamps is authorized to enforce the provisions of this paragraph and the provisions of section 7 of the Act of March 3, 1897, relating to the bottling of distilled spirits in bond.

PAR. 12. Distilled spirits arriving in the United States, Hawaii or Alaska from any Territory or possession of the United States in which the internal-revenue laws are not in effect shall be subject to the provisions of Title II of the Liquor Taxing Act of 1934 and regulations issued pursuant thereto, and shall, for the purposes of obtaining and affixing stamps, be treated as an importation.

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 27, 1934.
STEPHEN B. GIBBONS,
Acting Secretary of the Treasury.

XIII-8-6665
T. D. 4420

Stamps indicating tax payment of distilled spirits in bottles; supplementing Treasury Decision 4418 [page 522, this Bulletin].

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Supervisors of Permits, and Others Concerned:

Paragraph 4 of Treasury Decision 4418, dated January 27, 1934, is hereby amended to read as follows:

PAR. 4. (a) Stamps prescribed by these regulations will be in the following denominations: Quarts, fifth-gallons, pints, half-pints, and less than half-pints. The price is 1 cent for each stamp, except that in the case of stamps for bottles of less than one-half pint, the price is one-quarter of 1 cent for each stamp. Stamps for bottles containing less than one-half pint will be issued in sheets of 50. Stamps of other denominations will be issued in sheets of 25.

(b) When bottles containing distilled spirits are of sizes for which no stamps are provided, the person required to affix the stamps will write or print on the stamps the exact quantity of spirits contained in the bottles. For this purpose on bottles containing more than one-half pint and less than 1 pint of distilled spirits, stamps of the half-pint denominations will be used. For bottles containing more than 1 pint and less than one-fifth gallon, stamps of the pint denomination will be used. For bottles containing more than one-fifth gallon and less than 1 quart, stamps of the one-fifth gallon denomination will be used. For bottles containing more than 1 quart, stamps of the 1 quart denomination will be used. Stamps of the denomination of less than half-pint need not be overprinted with the exact quantity of spirits contained in the bottle.

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 13, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

XIII–16–6762
T. D. 4428

Stamps indicating tax payment of distilled spirits in bottles; supplementing Treasury Decision 4418 [page 522, this Bulletin].

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, District Supervisors, and Others Concerned:

Paragraph 5 of Treasury Decision 4418, approved January 27, 1934, is hereby amended to read as follows:

PAR. 5. (*a*) Prior to affixing any stamp to a bottle under these regulations, the person affixing the stamp must place his name and address thereon, in writing or by rubber stamp, printing, or perforating. The name and address must be plain and legible.

(*b*) When stamps are attached to bottles by the distiller of the spirits contained in the bottle, the registry number of the distillery producing the spirits may be substituted for the name of the distiller.

(*c*) When stamps are attached to bottles containing rectified spirits, the Federal Alcohol Control Administration permit number may be substituted for the name of the rectifier.

(*d*) If a number is used as provided in subparagraph (*b*) or (*c*), such number must be accompanied by some designation or symbol sufficiently indicative of the class or series to which the number pertains, at least, in the case of distillers the letter " D " and the number of the collection district, and, in the case of rectifiers, the letter " R."

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 12, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

XIII–18–6779
T. D. 4429

Stamps indicating tax payment of distilled spirits in bottles; amending Treasury Decision 4418 [page 522, this Bulletin].

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Supervisors of Permits, and Others Concerned:

Paragraphs 3 and 7, of Treasury Decision 4418, approved January 27, 1934, are hereby amended to read as follows:

PAR. 3. When distilled spirits are imported, the importer will be entitled to purchase from the collector of internal revenue the requisite number of stamps to be affixed to the bottles. Collectors of customs will not release any imported distilled spirits unless the importer has affixed to each bottle the stamp required by law, or has in his possession the requisite number of stamps to be affixed to the bottles. Such stamps need not be affixed to the bottles until the cases are opened or sold at retail, provided the stamps are sold or transferred in connection with any sale or transfer of such cases of bottles and the person in possession thereof is in possession of such stamps therefor.

PAR. 7. (a) Except as provided in paragraph 8, collectors will sell the stamps upon application therefor, only to registered distillers, rectifiers, importers, proprietors of concentration, general and special bonded warehouses, and retail druggists and wholesale dealers authorized to bottle and sell alcohol for nonbeverage purposes. In supplying the stamps for use under these regulations, collectors will require such evidence as they deem proper as to the need for the quantity of stamps for which application is made. Form 237 will indicate to collectors the approximate number of stamps required by rectifiers.

(b) Each distiller, rectifier, importer, proprietor of concentration, general or special bonded warehouse, or retail druggist or wholesale dealer authorized to bottle alcohol for nonbeverage purposes, who purchases stamps from the collector of internal revenue, will render a report each month (the first report being for the month of May) on Form 96, stating the number of stamps of each denomination on hand the 1st day of the month, the number purchased during the month, the number used during the month, and the number on hand at the close of the month. One copy of the report on Form 96 must be mailed to the collector, and one copy to the Commissioner of Industrial Alcohol, on or before the 5th day of the month following the month for which the report is rendered. One copy must be retained in the files of the person rendering the report.

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 25, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

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[FORM 96. TREASURY DEPARTMENT, BUREAU OF INDUSTRIAL ALCOHOL. APRIL, 1934.]

MONTHLY REPORT OF STRIP STAMPS PURCHASED AND USED UNDER THE LIQUOR TAXING ACT OF 1934.

Month of-------------------, 193--.

Report of: ------------------------. Operating as: ----------------------.
(Name.) (Distiller, Rectifier, Importer, etc.)

Located at:---------------------------. In:---------------------------.
(Street and number.) (City and State.)

	Quart.	Fifth gallon.	Pint.	Half pint.	Less than half pint.
1. On hand 1st day of month					
2. Purchased during month					
3. Total to be accounted for					
4. Used during month					
5. On hand last day of month					
6. Total (same as line 3)					

(Signature.)

INSTRUCTIONS.

This form will be prepared by distillers, rectifiers, importers, proprietors of concentration, general and special bonded warehouses, retail druggists and wholesale liquor dealers authorized to sell alcohol for nonbeverage purposes, who purchase strip stamps for affixing to bottles of distilled spirits under the Liquor Taxing Act of 1934. This form will be prepared in triplicate and one copy forwarded to the collector of internal revenue for the district, and one copy to the Commissioner of Industrial Alcohol, Washington, D. C., on or before the 5th day of the month following the month for which the report is rendered. The other copy will be retained by the person making the report.

XIII-13-6728
T. D. 4424

United States Pharmacopœia and National Formulary alcoholic preparations.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Supervisors of Permits, and Others Concerned:

United States Pharmacopœia tincture of ginger, under whatever name sold, is classified as an intoxicating liquor. The manufacturer thereof must qualify as a rectifier, and pay rectifier's special tax. The product is subject to tax on rectified spirits and the sale thereof would require wholesale or retail liquor dealer's special tax stamp, even though such sale is for medicinal purposes. United States Pharmacopœia tincture of ginger is subject to the provisions of Title II of the Liquor Taxing Act of 1934, and stamps as provided in Treasury Decision 4418 [page 522, this Bulletin] must be placed upon the bottle in which the preparation is distributed and sold.

The following United States Pharmacopœia and National Formulary preparations which are used by physicians and pharmacists principally as vehicles, and which are capable of beverage use, may be made with alcohol and sold in good faith for legitimate nonbeverage purposes without incurring special taxes for their manufacture and sale: Elixir aromaticum; elixir anisi; elixir aromaticum rubrum; elixir aurantii amari; elixir cardamomi compositum; elixir glycyrrhizæ; elixir glycyrrhizæ aromaticum; elixir taraxaci compositum; elixir terpini hydratis; spiritus ætheris; spiritus myrciæ; tinctura amara; tinctura aromatica; tinctura aurantii dulcis; tinctura limonis corticis.

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 15, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

TAX ON FERMENTED LIQUOR (ACT OF MARCH 22, 1933).

REGULATIONS 9 (Pro.), SECTION 16: Labels. XIII–12–6715
T. D. 4423

Fermented liquor.—Regulations 9 amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, Supervisors of Permits, and Others Concerned:

Section 16 of Regulations 9 as amended by Treasury Decision 15 [Pro.], approved July 11, 1933, is hereby further amended to read as follows:

SEC. 16. (a) The name of the manufacturer of the fermented liquor and the place of manufacture must be embossed on, or indented in, metal barrels or kegs. The name of the manufacturer and the place of manufacture must be branded by burning on the side across the staves, and must extend over 60 per cent or more of the circumference, of wooden barrels or kegs containing fermented liquor. The branding must be of sufficient depth and size so that it may not be scraped from barrels without leaving traces to indicate scraping.

No wooden barrel or keg which has been rebranded across the staves and no wooden barrel or keg which has the name of more than one manufacturer branded thereon may be used by a brewer as a container for fermented liquor, provided that the removal and replacement of one or more staves by the brewer whose name and address are originally so branded on a barrel or keg shall not be deemed to be a rebranding hereunder.

Each bottle containing fermented liquors must be labeled, and each closed case of bottles must be labeled or branded, showing, in clearly legible figures and letters, the following:

(1) The name of the manufacturer;

(2) The location of the brewery, by city, or town, and State;

(3) The serial number of the basic permit under which the fermented liquor is produced;

(4) The special name of the liquor, if any. (The use of the words beer, ale, porter, lager, bock, stout, etc., is permissible on such labels);

(5) "Tax-paid at the rate prescribed by internal revenue law," or "Internal revenue tax paid."

Wooden or metal barrels and kegs must also bear labels or brands, or be embossed or indented, showing the data in the above items Nos. 3 and 4.

(b) Where such fermented liquor is bottled or marketed by a distributor or dealer, and it is not desired to disclose on the label the name of the actual manufacturer, the label above-described must contain all the prescribed data, except that the name and address of the bottler, distributor or dealer may be substituted for the name and address of the actual manufacturer.

(c) If the name of a distributor appears on the label in addition to the name of the manufacturer, the distributor's name must be preceded by the phrase, "Packed for ______________" or "Distributed by ______________."

(d) Attention is called to the fact that under the Food and Drugs Act the name and other data on the labels may not imply a foreign origin of the fermented liquor, unless such name or data are followed by the word "type" or "style," or the other data on the label clearly show the domestic origin of the fermented liquor.

(e) Copies of the labels are not required to be submitted to the supervisor or the Commissioner unless requested.

D. S. BLISS,
Commissioner of Industrial Alcohol.
GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 13, 1934.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.

SECTION 3244, REVISED STATUTES.—SPECIAL TAXES.

XIII-23-6836
Ct. D. 836

SPECIAL EXCISE TAXES—REVISED STATUTES—DECISION OF SUPREME COURT.

1. RETAIL AND WHOLESALE LIQUOR DEALERS—IMMUNITY OF STATE—GOVERNMENTAL FUNCTION.

Where a State, pursuant to authority granted by its legislature, engages in the manufacture, sale and importation of, and traffic in, intoxicating liquors through State liquor stores, under a department of liquor control, it is not exercising a governmental function but is conducting business of a private nature, and is not immune from the tax imposed upon liquor dealers by section 205 of Title 26 of the United States Code (Revised Statutes, section 3244, as amended).

2. SAME—POLICE POWER.

A State which engages in the liquor business is not immune from Federal taxation on the ground that the conduct of such business is in the exercise of its police power. Police power is a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on.

3. SAME—STATE AS A "PERSON."

When a State becomes a dealer in intoxicating liquors it falls within the reach of the Federal tax either as a "person" under the statutory extension of that word to include a corporation (section 11, Title 26 of the United States Code (Revised Statutes, section 3140)), or as a "person" without regard to such extension.

4. DECISION FOLLOWED.

South Carolina v. *United States* (199 U. S., 437 (T. D. 961, volume 8, Treasury Decisions, 116) followed.

SUPREME COURT OF THE UNITED STATES.

The State of Ohio, complainant, v. *Guy T. Helvering, as an Individual and as Commissioner of Internal Revenue, and Thomas J. Connor, Carl E. Moore, Harry F. Busey, and Charles H. Graves, as Individuals and as United States Collectors of Internal Revenue in the State of Ohio.*

Motion for leave to file bill of complaint.

[May 21, 1934.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the court.

Upon the motion of complainant for leave to file a bill of complaint invoking the original jurisdiction of this court, a rule was issued directing the defendants to show cause why such leave should not be granted. Defendants, by their return to the rule, oppose the motion upon the ground, among others, that the merits have been conclusively settled against complainant by prior decision of this court.

The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are collectors of internal revenue in the several internal revenue districts in the State of Ohio; that on December 22, 1933, the State legislature passed an act providing a system of control for the manufacture, sale and importation of, and traffic in, beer and intoxicating liquors within the State, and creating a State monopoly for the distribution and sale of all spirituous liquors under a department of liquor control; that the State has purchased intoxicating liquors at a cost of more than $4,500,000 for sale to permit holders and to the public through its State stores, each of which will be entirely and exclusively State owned, managed and controlled; that the State is about to open in the various counties 187 such State liquor stores; that defendants have threatened to, and unless enjoined by this court will, levy and collect excise taxes on the agencies and operations of the State in the conduct of its department of liquor control, and enforce against the State, its officers, agents and employees, penalties for nonpayment of taxes imposed by section 3244, R. S. (U. S. C., Title 26, section 205), and other designated statutes of the United States; that complainant is not subject to these statutes and is immune from any tax imposed thereby; and that the Acts of Congress which impose such taxes do not by their terms include a State, or its officers or employees, and were not intended to do so. It is further alleged that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign State; and it, therefore, is contended that the equity power of the court is properly invoked under the principles stated in *Hill* v. *Wallace* (259 U. S., 44, 62).

The State act deals with the subject in great detail; but for present purposes the provisions set forth in the bill to which we have just referred are all that require consideration.

The provisions of the Federal statutes, so far as necessary to be stated, follow:

U. S. C., Title 26, section 205 (R. S., section 3244, as amended):

"(a) *Retail liquor dealers.*—Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than 5 wine gallons at the same time shall be regarded as a retail dealer in liquors.

"(b) *Wholesale liquor dealers.*—Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quantities of not less than 5 wine gallons at the same time shall be regarded as a wholesale liquor dealer."

U. S. C., Title 26, section 11 (R. S., section 3140):

"* * * where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Putting aside various preliminary questions raised by defendants (compare *Ex parte Bakelite Corp'n*, 279 U. S., 438, 448; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 553), we pass at once to the fundamental question involved in the State's challenge to the validity of the tax. That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established—that "the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are * * * exempt from taxation by the United States." (*Indian Motocycle Co.* v. *United States*, 283 U. S., 570, 575 [Ct. D. 354, C. B. X-1, 439]; *McCulloch* v. *Maryland*, 4 Wheat., 316, 436; *The Collector* v. *Day*, 11 Wall., 113; and other cases cited in *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S., 466, March 5, 1934.) But, by the very terms of the rule, the immunity of the States from Federal taxation is limited to those agencies which are of a governmental character. Whenever a State engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in *South Carolina* v. *United States* (199 U. S., 437), a case in no substantial respect distinguishable from the present one, definitely so held. Compare *Board of Trustees* v. *United States* (289 U. S., 48, 59).

The South Carolina case arose under a State statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispensaries to be operated by the State. This court, while sustaining the validity of the statute and fully accepting the rule that the National Government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the State of its governmental functions, held that "whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation." The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

A distinction is sought in the fact that after that case was decided the eighteenth amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enabled a State to carry it on under the police power. The point seems to us altogether fanciful. The eighteenth amendment outlawed the traffic; but. certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. (*Rippe* v. *Becker*, 56 Minn., 100, 111–112.) If a State chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the Federal Government is concerned. (Compare *Georgia* v. *Chattanooga*, 264 U. S., 472, 480–483; *United States Bank* v. *Planters' Bank*, 9 Wheat., 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet., 318. 823; *Briscoe* v. *Bank of Kentucky*, 11 Pet., 257, 323–325; *Curran* v. *State of Arkansas*, 15 How., 304, 309.)

We find no merit in the further contention that a State is not embraced within the meaning of the word "person," as used in U. S. C., Title 26, section 205, and defined in section 11, *supra*. By section 205 the tax is levied upon every "person who sells, etc."; and by section 11 the word "person" is to be construed as meaning and including a partnership, association, company or corporation, as well as a natural person. Whether the word "person" or "corporation" includes a State or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby* (147 U. S., 508, 517), it is said that the word "person" in the statute there under consideration would include the United States as a body politic and corporate. (See also *Giddings* v. *Holter*, 19 Mont., 263, 266; *State* v. *Herold*, 9 Kan., 194, 199.) A State is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record "with intent that any person may be defrauded." (*Martin* v. *State*, 24 Texas, 61, 68.) Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word "person" should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a State. (*State of Indiana* v. *Woram*, 6 Hill (N. Y.), 33, 38.) And a State is a person or a corporation within the purview of the priority provisions of the Bankruptcy Act.[1] (*In re Western Implement Co.*, 166 Fed., 576, 582. Compare *In re Jensen*, 59 N. Y. Supp., 653, 655; *Bray* v. *Wallingford*, 20 Conn., 416, 418; *County of Lancaster* v. *Trimble*, 34 Neb., 752, 756; *Rains* v. *City of Oshkosh*, 14 Wis., 372, 374; 1 Black. Comm., 123.)

In the South Carolina case this court disposed of the question by holding that since the State was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the State. While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the State itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a "person" under the statutory extension of that word to include a corporation, or as a "person" without regard to such extension. The motion for leave to file the bill of complaint, accordingly, is denied.

Mr. Justice STONE concurs in the result.

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[1] U. S. C., Title 11, section 104(b)5—"debts owing to any person who by the laws of the States or the United States is entitled to priority." This construction is explicitly adopted by the amendment of May 27, 1926 (ch. 406, section 15, 44 Stat., 666; U. S. C., Supp. VII, Title 11, section 104(b)7).

MISCELLANEOUS.

XIII-20-6803
T. D. 4432

Establishing an Alcohol Tax Unit in the Bureau of Internal Revenue, and defining its jurisdiction.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Officers and Employees of the Bureau of Internal Revenue, Collectors of Internal Revenue, and Others Concerned:

1. There is hereby established in the Bureau of Internal Revenue a unit to be known as the Alcohol Tax Unit, at the head of which shall be a Deputy Commissioner of Internal Revenue appointed as required by law.

2. The Alcohol Tax Unit shall be charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

(*a*) The production, custody, and supervision of distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids;

(*b*) The establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored;

(*c*) The determination, assertion, and assessment of all internal revenue taxes and penalties pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, and the compromise thereof, except that all moneys shall be received and accounted for by the collectors of internal revenue under the direction of the Commissioner of Internal Revenue;

(*d*) Inquiries and investigations relating to the filing of returns for occupational and commodity taxes and penalties in respect to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, except that the collectors of internal revenue will remain charged with the routine inspection of the places of business of retail dealers in such liquors and liquids;

(*e*) The investigation, prevention, and detection of violations of the laws pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, or any regulations issued thereunder, and the apprehension of offenders against such laws;

(*f*) The detention and seizure, for violation of laws relating to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, and other such liquors and liquids, of property, whether real or personal (except seizure under distraint warrant), and the custody, control, sale, and disposition of property so seized;

(*g*) The discharge of liens under section 902 of the Revenue Act of 1926.

3. There are conferred and imposed upon the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit, and the assistants, inspectors, and agents under his supervision, subject to the direction of the Commissioner of Internal Revenue and subject to such regulations as he may prescribe from time to time with the approval of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred and imposed upon the Secretary of the Treasury and/or the Commissioner of Internal Revenue under the provisions of the Executive order of March 10, 1934 (No. 6639), and of section 4(a) of the Act approved March 3, 1927, entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," in so far as they relate to the duties to be performed by the Alcohol Tax Unit as enumerated in paragraph 2 hereof.

4. Except as may hereafter be otherwise provided, all regulations prescribed, all orders and instructions issued, and all forms adopted for the enforcement of the laws heretofore administered by the Commissioner of Industrial Alcohol or the Bureau of Industrial Alcohol, and assistants, inspectors, and agents thereunder, and remaining in effect after the repeal of the eighteenth amendment, will continue in effect as regulations, orders, instructions, and forms of the Bureau of Internal Revenue: *Provided*, That the term "Commissioner" or "Commissioner of Industrial Alcohol" and the term "supervisor" or "supervisor of permits," wherever used in such regulations, orders, instructions, and forms, shall be held to mean, respectively, "Deputy Commissioner of Internal Revenue" and "district supervisor."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 10, 1934.
HENRY MORGENTHAU, Jr.,
Secretary of the Treasury.

XIII-2-6596
Mim. 4120

Special taxes on retail and wholesale liquor dealers.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., December 12, 1933.

Collectors of Internal Revenue and Others Concerned:

1. Following the repeal of the eighteenth amendment, it is anticipated that many retail and wholesale dealers in fermented malt liquors will desire to expand their places of business so as to include the sale of liquors containing more than 3.2 per cent of alcohol by weight. Numerous inquiries are being received from collectors and others concerned in regard to the procedure which must be followed in order for malt liquor dealers to qualify as retail and wholesale liquor dealers.

2. Persons desiring to procure special tax stamps as retail and wholesale liquor dealers are required to file returns with the collectors of internal revenue for their districts, on Form 11, accompanied

by proper remittance of tax, in accordance with the rates prescribed as follows:

SECTION 3244, REVISED STATUTES, AS AMENDED, FOURTH SUBDIVISION.

That retail dealers in liquors shall pay $25.

Every person who sells or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than 5 wine gallons at the same time, shall be regarded as a retail dealer in liquors.

Wholesale liquor dealers shall each pay $100.

Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than 5 wine gallons at the same time, shall be regarded as a wholesale liquor-dealer.

But no distiller who has given the required bond and who sells only distilled spirits of his own production at the place of manufacture, or at the place of storage in bond, in the original packages to which the tax-paid stamps are affixed, shall be required to pay the special tax of a wholesale liquor-dealer on account of such sales.

SECTION 3246, REVISED STATUTES, AS AMENDED.

Nothing in this chapter shall be construed to impose a special tax upon vintners who sell wine of their own growth, or manufacturers who sell wine produced from grapes grown by others, at the place where the same is made or at the general business office of such vintner or manufacturer: *Provided*, That no vintner or manufacturer shall have more than one office for the sale of such wine that shall be exempt from special tax under this Act; nor shall any special tax be imposed upon apothecaries as to wines or spirituous liquors which they use exclusively in the preparation or making-up of medicines.

Nor shall any special tax be imposed upon manufacturing chemists or flavoring extract manufacturers for recovering tax-paid alcohol or spirituous liquors from dregs or marc of percolation or extraction if said recovered alcohol or spirituous liquors be again used in the manufacture of flavoring extracts.

SECTION 3243, REVISED STATUTES.

The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

3. A qualified wholesale liquor dealer can not sell liquors in retail quantities of less than 5 gallons without incurring liability as a retail liquor dealer. Likewise, a qualified retail liquor dealer can not sell liquors in wholesale quantities of 5 gallons or more to the same party at the same time without incurring liability to special tax as a wholesale liquor dealer.

4. Pursuant to the provisions of section 3237, Revised Statutes, as amended, the taxes referred to above shall be due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the amount of tax due is reckoned for one year, and in the latter case the amount of tax required is prorated from the 1st day of the month in which such business was commenced to the end of the fiscal year.

5. Treasury Decision 415, issued September 30, 1901, distinguishes between the business of a malt liquor dealer and a liquor dealer in the following manner:

The business of a retail malt-liquor dealer being under the statute a separate business from that of a retail liquor dealer, one who begins the business of a retail malt-liquor dealer and takes out the requisite special-tax stamps for the year, and thereafter begins business as a retail liquor dealer and takes out the special-tax stamp as such dealer, is not entitled to the redemption of the special-tax stamp issued to him as a retail malt-liquor dealer.

6. A person who is already engaged in the sale of malt liquors and desires to expand his business in order to sell distilled spirits and wines will be required to qualify as a liquor dealer on a prorated basis from the 1st day of the month in which such business was commenced to the end of the fiscal year, and no refund of the special tax paid as a malt liquor dealer will be allowed.

7. A special taxpayer does not incur the 25 per cent and specific penalties when he commences the sale of distilled spirits and wines, provided he files a return on Form 11 and remits the required tax to the collector of internal revenue on or before the last day of the month in which he commences business as a retail or wholesale liquor dealer.

8. All persons now in possession of retail and wholesale liquor dealers special tax stamps, issued pursuant to the provisions of the National Prohibition Act and the Act of March 22, 1933, will not be required to purchase new stamps for the remainder of the present fiscal year in order to conduct the sale of distilled spirits, wines, and fermented malt liquors after the effective date of the twenty-first amendment.

9. Attention is also directed to the fact that retail and wholesale fermented liquor dealers' special tax stamps, issued to cover the sale of beer containing not more than 3.2 per cent of alcohol by weight, may also be used to cover the sale of malt liquors of a higher alcoholic content.

10. It is the belief of the Bureau that the dissemination of the information contained in this mimeograph by collectors to all of the dealers in their respective districts may result in the elimination of misunderstanding and in a number of cases obviate the necessity on the part of such dealers of purchasing two special tax stamps.

11. Correspondence in regard to the procedure outlined herein should refer to the number of this mimeograph and to the symbols MT:ST.

GUY T. HELVERING,
Commissioner.

XIII-23-6829
T. D. 4435

Filling of packages for entry into bonded warehouses.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, District Supervisors, and Others Concerned:

Paragraph 27 of the Gauging Manual, January, 1934, is hereby amended to read as follows:

All packages of distilled spirits below 150 proof will be filled to capacity, except (1) where upon suspension of distilling operations there are insufficient spirits to completely fill the last package, or (2) where, upon application and proper showing, the Commissioner may authorize a certain wantage or content per package to permit subsequent heating of the spirits in warehouse or reduction in proof in the original package upon tax payment, or for other valid reason. In such cases notation showing the wantage allowed, or that a uniform quantity was placed in each package, or that the package was a remnant, as the case may be, will be made by the storekeeper-gauger on Form 1520 or Form 59½ covering the entry gauge of the packages.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 26, 1934.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIII–23–6841
T. D. 4437

Wine produced by grape growers.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue, District Supervisors, and Others Concerned:

1. It appears that, by reasons of weather and market conditions, many grape growers were unable to make sale of their 1933 crops. To prevent complete loss of their grapes, certain growers produced wine therefrom without qualifying as winemakers under the law. Such growers, in order to dispose of wines so produced, may qualify as winemakers in accordance with Regulations No. 7, effective May 1, 1930, relating to the production, fortification, tax payment, etc., of wine, or they may pay tax under the rules herein promulgated. The permission will apply where the wine was produced by the grower of the grapes and is still owned by him and in his possession and on the premises where the grapes were grown. Such permission will not apply where the grapes were crushed or the wine was produced by parties other than the grower, or off the grower's premises; nor where the grower has parted with title to the grapes or the wine produced therefrom.

2. The permission extends only to natural wine containing not more than 14 per cent of alcohol by volume. It does not extend to fortified wine.

3. A grower choosing in accordance with this regulation to qualify as a winemaker must make application, accompanied by a sufficient bond, within 60 days after the date of the approval of this regulation. After qualifying he will take up on his monthly reports as a winemaker, Forms 701 and 702, all wines on hand and in process of manufacture.

4. A grower deciding to make immediate payment of tax instead of qualifying as a winemaker will, within 60 days after the date of approval of this regulation, submit to the collector of internal revenue such sworn statement of the circumstances as will enable the collector to determine whether the case is within the scope hereof. If the statement shows the case not within the scope hereof, the collector will notify the party to that effect. If the statement shows the case apparently within this regulation, the collector will cause an inspection to be made to verify the allegations, and determine

the amount of the wine and the alcoholic content. If the report justifies, the collector will notify the grower of the amount of tax due, and the grower forthwith will make payment of the tax, and the collector will issue wine stamps in the necessary amounts and denominations to be affixed to the containers of the wine and canceled. A grower thus making payment of tax on the wine will not be subject to special tax as a wholesale or retail dealer under the internal revenue laws. He will not, however, thereby gain any immunity under any local law or ordinance, etc.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 28, 1934.
H. MORGENTHAU, Jr.,
Secretary of the Treasury.

HARRISON NARCOTIC LAW, AS AMENDED BY SECTION 432 OF THE REVENUE ACT OF 1928.

XIII-12-6713
Mim. 4156

Registration of departments of chemistry, medicine, dentistry, veterinary, and pharmacy, in schools, colleges, and universities.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 27, 1934.

Collectors of Internal Revenue and Others Concerned:

1. The attention of this Bureau has been directed to the fact that an apparent lack of uniformity exists with respect to the registration, under the Harrison narcotic law, as amended, of departments of chemistry, medicine, dentistry, veterinary, and pharmacy in various schools, colleges, and universities throughout the country.

2. Section 1 of the Harrison narcotic law, as amended by section 432 of the Revenue Act of 1928, requires the registration and payment of internal revenue taxes on or before July 1 of each year, as follows:

> * * * Importers, manufacturers, producers, or compounders, $24 a year; wholesale dealers, $12 a year; retail dealers, $3 a year; physicians, dentists, veterinary surgeons, and other practitioners lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, shall pay $1 each year or fraction thereof during which they engage in any of such activities. * * *

3. Pursuant to article 10, Regulations 5, issued by the Bureau of Prohibition in January, 1928, persons subject to tax under the abovementioned law are divided into classes as follows:

Class.	Annual tax rate.	Persons liable.
I	$24	Importers, manufacturers, producers, compounders, chemists.
II	12	Wholesale dealers.
III	3	Retail dealers.
IV	1	Physicians, dentists, veterinary surgeons, and other practitioners.
V	1	Manufacturers of and dealers in exempt preparations (including dispensing physicians).

4. Pursuant to the authority contained in the Act entitled "An Act to create in the Treasury Department a Bureau of Narcotics, and for other purposes," approved June 14, 1930, it has been held that the use of narcotics as a part of the activities of medical schools and colleges is more an activity of a practitioner than a compounder, and such institutions have been required to register under Class IV, and pay special tax at the rate of $1 a year.

5. This classification of medical schools and colleges, however, does not include all colleges or departments of a university which might have use for narcotic drugs, such as for instance a department of chemistry, inasmuch as the use of narcotic drugs in the two types of institutions vary. It would appear that in medical schools and colleges generally narcotic drugs are used primarily for demonstration purposes in order to familiarize students with the physical and chemical properties of the various preparations. Other colleges have departments which use narcotic drugs almost exclusively for research and experimental purposes. The use of narcotics for these purposes is not in the nature of a practitioner's use but more that of a compounder, and such institutions are classified in Class I and required to pay the same rate of tax as a compounder.

6. Colleges of medicine and pharmacy may ordinarily be registered in Classes IV and III respectively as at present, but the higher special tax liability in Class I will apply to such of these as are engaged in analytical and/or experimental work and all other educational institutions where other departments are registered to obtain narcotics solely for research or experimental purposes.

7. In the registration of educational institutions collectors should ascertain the purpose for which such institutions purchase narcotic drugs before they can be properly classified. In order to insure uniformity of action collectors shall conduct a survey of the educational institutions registered within their respective districts for the purpose of readjusting registration and tax wherever necessary.

8. Correspondence relative to the procedure outlined herein should refer to the number of this mimeograph and to the symbols MT: ST.

WRIGHT MATTHEWS,
Acting Commissioner.

SECTION 3 OF THE VINSON ACT (PUBLIC, NO. 135, SEVENTY-THIRD CONGRESS).

XIII–22–6822
T. D. 4434

Section 3 of the Vinson Act—Excess profits on Navy contracts.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.
NAVY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE NAVY,
Washington, D. C.

To Officers and Employees of the Treasury Department, the Navy Department, and Others Concerned:

The Act known as the Vinson Act (Public, No. 135, Seventy-third Congress, H. R. 6604), was approved March 27, 1934, and is entitled

"An Act to establish the composition of the United States Navy with respect to the categories of vessels limited by the treaties signed at Washington, February 6, 1922, and at London, April 22, 1930, at the limits prescribed by those treaties; to authorize the construction of certain naval vessels; and for other purposes." The Act, among other things, authorizes the President, subject to the provisions of those treaties, to undertake the construction of certain naval vessels and naval aircraft or parts thereof. Section 3 of the Act provides:

SEC. 3. The Secretary of the Navy is hereby directed to submit annually to the Bureau of the Budget estimates for the construction of the foregoing vessels and aircraft; and there is hereby authorized to be appropriated such sums as may be necessary to carry into effect the provisions of this Act: *Provided*, That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(*a*) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(*b*) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract price, such amount to become the property of the United States: *Provided*, That if such amount is not voluntarily paid the Secretary of the Treasury may collect the same under the usual methods employed under the internal revenue laws to collect Federal income taxes.

(*c*) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Act, but any subdivision of any contract or subcontract involving an amount in excess of $10,000 shall be subject to the conditions herein prescribed.

(*d*) That the manufacturing spaces and books of its own plant, affiliates, and subdivisions shall at all times be subject to inspection and audit by any person designated by the Secretary of the Navy, the Secretary of the Treasury, and/or by a duly authorized committee of Congress.

(*e*) To make no subcontract unless the subcontractor agrees to the foregoing conditions.

The report shall be in form prescribed by the Secretary of the Navy and shall state the total contract price, the cost of performing the contract, the net income, and the per centum such net income bears to the contract price. A copy of such report shall be transmitted to the Secretary of the Treasury for consideration in connection with the Federal income tax returns of the contractor for the taxable year or years concerned.

The method of ascertaining the amount of excess profit to be paid into the Treasury shall be determined by the Secretary of the Treasury in agreement with the Secretary of the Navy and made available to the public. The method initially fixed upon shall be so determined on or before June 30, 1934: *Provided*, That in any case where an excess profit may be found to be owing to the United States in consequence hereof, the Secretary of the Treasury shall allow credit for any Federal income taxes paid or remaining to be paid upon the amount of such excess profit.

The contract or subcontracts referred to herein are limited to those where the award exceeds $10,000.

The method of ascertaining the amount of excess profit to be paid to the United States in respect of contracts entered into under the Vinson Act shall be as follows:

The excess profit shall be determined on each contract separately upon the completion or other termination of the contract. The amount of such excess profit shall be the amount of the profit on the contract in excess of 10 per cent of the total contract price. The amount of the profit on the contract shall be the difference between the total contract price and the cost of performing the contract. The cost of performing the contract shall be the direct costs, such as material and labor, incurred by the contractor in performing the contract, plus a reasonable proportion of any indirect costs (including overhead or general expenses) appertaining to the contract which are not usually directly allocated to the cost of performing the contract. No general rule may be stated for ascertaining the reasonable proportion of the indirect costs to be allocated to the cost of performing a contract which would be applicable to all cases. The proper proportion of the indirect costs to be applied to the cost of performing a particular contract depends upon all the facts and circumstances relating to the performance of the particular contract. The contractor shall include as a part of the report required to be made to the Secretary of the Navy upon the completion or other termination of the contract, a statement explaining the manner in which such indirect costs were determined and allocated to the cost of performing the contract.

A copy of the report relating to the contract required to be made to the Secretary of the Navy shall immediately upon completion or other termination of the contract be filed by the contractor with the collector of internal revenue for the collection district in which the contractor's Federal income tax returns are required to be filed. The contractor shall pay any excess profit disclosed in such report to the collector of internal revenue at the time such report is filed.

The duty of determining the profit, and the excess profit, if any, on contracts entered into under the Vinson Act is hereby delegated to the Commissioner of Internal Revenue.

If the Commissioner determines in respect of any contract entered into under the Vinson Act that there is an excess profit in an amount exceeding the excess profit, if any, shown upon the copy of the report filed with the collector of internal revenue and already paid, or, in case no such copy is filed and/or no excess profit is paid, the Commissioner finds and determines that the contract has been completed or otherwise terminated and that an excess profit has been received, the Commissioner may proceed to collect such unpaid excess profit under the usual methods employed under the internal revenue laws to collect Federal income taxes.

T. J. Coolidge,
Acting Secretary of the Treasury.

May 19, 1934.

Agreed to by—
William D. Leahy,
Acting Secretary of the Navy.

OLEOMARGARINE.

XIII-2-6597
MS. 146

Schedule of oleomargarine produced and materials used during the month of November, 1933, as compared with November, 1932.

	November, 1933.	November, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23,724,099	[2] 18,986,644
Total withdrawn tax-paid	22,798,520	19,134,769
Ingredient schedule for uncolored oleomargarine:		
Butter	477	356
Cocoanut oil	14,242,567	11,863,417
Corn oil	40,805	1,097
Cottonseed oil	1,909,316	1,355,289
Derivative of glycerine	62,187	32,490
Lecithin	304	45
Milk	5,703,204	4,429,307
Neutral lard	788,755	781,019
Oleo oil	1,743,154	973,697
Oleo stearine	269,116	279,820
Oleo stock	40,965	30,586
Palm oil	51,435	16,800
Peanut oil	264,790	212,162
Salt	1,382,855	1,048,148
Soda (benzoate of)	9,854	6,766
Sugar	11,517	
Total	26,521,301	21,030,999
Total production of colored oleomargarine	218,559	[3] 179,446
Total withdrawn tax-paid	39,540	47,508
Ingredient schedule for colored oleomargarine:		
Butter	57	
Cocoanut oil	64,125	72,128
Color	204	204
Cottonseed oil	29,098	23,126
Derivative of glycerine	302	7
Milk	61,686	56,083
Neutral lard	13,254	22,822
Oleo oil	65,086	41,247
Oleo stearine	1,762	2,685
Oleo stock	315	1,045
Palm oil	8,200	7,150
Peanut oil	1,849	2,945
Salt	17,248	15,376
Soda (benzoate of)	15	8
Sugar	15	
Total	263,216	244,826

[1] Of the amount produced, 4,552 pounds were reworked.
[2] Of the amount produced, 16,798 pounds were reworked.
[3] Of the amount produced, 128 pounds were reworked.

XIII-6-6647
MS. 147

Schedule of oleomargarine produced and materials used during the month of December, 1933, as compared with December, 1932.

	December, 1933.	December, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 21,045,338	[2] 19,878,688
Total withdrawn tax-paid	20,798,767	19,408,896
Ingredient schedule for uncolored oleomargarine:		
Butter	35	680
Cocoanut oil	12,920,437	12,151,466
Corn oil	11,965	1,732
Cottonseed oil	1,729,576	1,483,383
Derivative of glycerine	56,595	32,427
Lecithin	232	60
Milk	5,009,851	4,664,112
Neutral lard	667,026	942,036
Oleo oil	1,187,742	1,169,827
Oleo stearine	216,064	271,482
Oleo stock	35,512	24,120
Palm oil	33,650	17,210
Peanut oil	244,264	204,603
Salt	1,228,876	1,144,822
Soda (benzoate of)	7,895	6,340
Sugar	7,471	
Total	23,357,191	22,114,299
Total production of colored oleomargarine	340,474	[3] 263,549
Total withdrawn tax-paid	34,772	56,897
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	108,062	82,710
Color	304	240
Cottonseed oil	55,865	35,266
Derivative of glycerine	405	5
Milk	96,639	72,010
Neutral lard	28,509	26,398
Oleo oil	79,268	45,489
Oleo stearine	8,926	4,615
Oleo stock	4,638	200
Palm oil		15,190
Peanut oil	1,606	2,094
Salt	27,226	19,163
Soda (benzoate of)	3	13
Sugar	29	
Total	411,480	303,393

[1] Of the amount produced, 4,839 pounds were reworked.
[2] Of the amount produced, 8,274 pounds were reworked.
[3] Of the amount produced, 4,980 pounds were reworked.

XIII-11-6701
MS. 148

Schedule of oleomargarine produced and materials used during the month of January, 1934, as compared with January, 1933.

	January, 1934.	January, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 17,626,472	[2] 20,810,940
Total withdrawn tax-paid	18,388,960	20,852,156
Ingredient schedule for uncolored oleomargarine:		
Butter	1,575	242
Cocoanut oil	10,468,150	13,357,454
Corn oil	600	1,297
Cottonseed oil	1,494,402	1,442,092
Derivative of glycerine	44,166	30,857
Lecithin	288	44
Milk	4,242,931	4,972,203
Neutral lard	815,841	715,235
Oleo oil	1,176,943	926,476
Oleo stearine	257,852	256,499
Oleo stock	23,565	21,875
Palm oil	31,124	16,649
Peanut oil	219,995	262,737
Salt	1,026,892	1,153,674
Soda (benzoate of)	7,030	8,534
Sugar	9,228	
Total	19,820,582	23,165,863
Total production of colored oleomargarine	[3] 243,885	[4] 211,601
Total withdrawn tax-paid	32,150	45,488
Ingredient schedule for colored oleomargarine:		
Butter		120
Cocoanut oil	90,224	76,860
Color	199	137
Corn oil		17
Cottonseed oil	41,737	24,981
Derivative of glycerine	134	19
Milk	69,590	66,449
Neutral lard	20,355	19,603
Oleo oil	42,978	34,611
Oleo stearine	7,050	1,963
Oleo stock	305	565
Palm oil		8,500
Peanut oil	1,276	2,808
Salt	21,274	16,618
Soda (benzoate of)	2	11
Sugar	60	
Total	295,184	253,264

[1] Of the amount produced, 12,244 pounds were reworked.
[2] Of the amount produced, 8,171 pounds were reworked.
[3] Of the amount produced, 10 pounds were reworked.
[4] Of the amount produced, 126 pounds were reworked.

XIII–15–6750
MS. 149

Schedule of oleomargarine produced and materials used during the month of February, 1934, as compared with February, 1933.

	February, 1934.	February, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 21,339,483	[2] 17,071,153
Total withdrawn tax-paid	21,648,593	17,161,852
Ingredient schedule for uncolored oleomargarine:		
Butter	950	190
Cocoanut oil	12,670,156	10,639,930
Corn oil	500	2,499
Cottonseed oil	1,849,016	1,249,446
Derivative of glycerine	54,624	28,728
Lecithin	451	36
Milk	4,971,649	3,933,193
Neutral lard	889,846	687,529
Oleo oil	1,492,919	911,164
Oleo stearine	246,015	228,169
Oleo stock	25,289	17,730
Palm oil	16,732	11,020
Peanut oil	192,676	140,991
Salt	1,173,343	965,316
Soda (benzoate of)	7,994	5,831
Sugar	10,410	
Total	23,602,570	18,821,777
Total production of colored oleomargarine	232,739	174,943
Total withdrawn tax-paid	34,922	36,673
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	74,906	66,309
Color	177	187
Cottonseed oil	40,382	24,148
Derivative of glycerine	83	16
Milk	69,566	55,209
Neutral lard	21,819	15,980
Oleo oil	48,600	27,999
Oleo stearine	5,740	2,595
Oleo stock	175	275
Palm oil		7,300
Peanut oil	1,836	2,220
Salt	19,061	15,138
Soda (benzoate of)	9	10
Sugar	49	
Total	282,403	217,383

[1] Of the amount produced, 4,435 pounds were reworked.
[2] Of the amount produced, 5,932 pounds were reworked.

Schedule of oleomargarine produced and materials used during month of March, 1934, as compared with March, 1933.

	March, 1934.	March, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23,278,526	[2] 21,066,488
Total withdrawn tax-paid	21,722,510	20,592,445
Ingredient schedule for uncolored oleomargarine:		
Butter	695	379
Cocoanut oil	13,496,211	13,402,390
Corn oil	700	6,299
Cottonseed oil	2,093,284	1,351,331
Derivative of glycerine	52,779	32,023
Lecithin	392	64
Milk	5,583,433	4,942,687
Neutral lard	1,077,727	701,089
Oleo oil	1,753,973	973,520
Oleo stearine	293,295	225,936
Oleo stock	28,756	26,035
Palm oil		42,946
Peanut oil	270,057	188,341
Salt	1,348,510	1,175,713
Soda (benzoate of)	8,738	7,888
Soya bean oil		3,480
Sugar	14,496	8,904
Total	26,023,046	23,089,025
Total production of colored oleomargarine	[3] 337,942	320,952
Total withdrawn tax-paid	58,976	38,884
Ingredient schedule for colored oleomargarine:		
Butter		120
Cocoanut oil	103,099	95,591
Color	357	279
Corn oil		2
Cottonseed oil	64,412	56,881
Derivative of glycerine	362	10
Milk	98,350	98,090
Neutral lard	29,928	28,439
Oleo oil	70,432	54,451
Oleo stearine	12,137	6,263
Oleo stock	1,050	2,934
Palm oil		20,200
Peanut oil	2,814	2,466
Salt	28,666	26,473
Soda (benzoate of)	15	9
Sugar	60	60
Total	411,682	392,268

[1] Of the amount produced, 6,746 pounds were reworked.
[2] Of the amount produced, 3,635 pounds were reworked.
[3] Of the amount produced, 19 pounds were reworked.

XIII-23-6838
MS. 151

Schedule of oleomargarine produced and materials used during the month of April, 1934, as compared with April, 1933.

	April, 1934.	April, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 17,773,926	[2] 20,181,102
Total withdrawn tax-paid	18,870,176	20,722,788
Ingredient schedule for uncolored oleomargarine:		
Butter	380	400
Cocoanut oil	10,488,100	12,706,613
Corn oil	700	7,095
Cottonseed oil	2,027,865	1,340,689
Derivative of glycerine	42,291	33,984
Lecithin	200	92
Milk	4,147,911	4,783,090
Neutral lard	589,549	756,205
Oleo oil	1,055,131	1,061,581
Oleo stearine	236,296	274,785
Oleo stock	22,016	26,716
Palm oil		42,946
Peanut oil	212,378	201,897
Salt	1,014,329	1,151,290
Soda (benzoate of)	6,725	7,789
Soya bean oil		3,640
Sugar	9,490	10,272
Total	19,853,361	22,409,084
Total production of colored oleomargarine	248,588	257,465
Total withdrawn tax-paid	37,442	35,180
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	70,600	81,007
Color	307	225
Corn oil		30
Cottonseed oil	44,893	41,510
Derivative of glycerine	326	58
Milk	77,370	75,041
Neutral lard	25,115	18,955
Oleo oil	50,012	46,465
Oleo stearine	8,630	7,605
Oleo stock	661	1,050
Palm oil		14,800
Peanut oil	2,840	2,001
Salt	21,021	19,868
Soda (benzoate of)	14	17
Sugar	54	24
Total	301,843	308,656

[1] Of the amount produced, 13,606 pounds were reworked.
[2] Of the amount produced, 7,857 pounds were reworked.

MISCELLANEOUS.

XIII-15-6748

H. R. 6670. PUBLIC, NO. 88, SEVENTY-THIRD CONGRESS. [FEDERAL FARM MORTGAGE CORPORATION ACT.]

An Act to provide for the establishment of a corporation to aid in the refinancing of farm debts, and for other purposes.

* * * * * * *

Sec. 12. (a) The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

(b) Mortgages executed to the Land Bank Commissioner and mortgages held by the corporation, and the credit instruments secured thereby, and bonds issued by the corporation under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except estate, inheritance, and gift taxes).

* * * * * * *

Approved January 31, 1934.

XIII-15-6749

H. R. 7928. PUBLIC, NO. 107, SEVENTY-THIRD CONGRESS.

An Act to amend subsection (b) of section 12 of the Act entitled "An Act to provide for the establishment of a corporation to aid in the refinancing of farm debts, and for other purposes," approved January 31, 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 12 of the Act entitled "An Act to provide for the establishment of a corporation to aid in the refinancing of farm debts, and for other purposes," approved January 31, 1934, is amended to read as follows:

(b) Mortgages executed to the Land Bank Commissioner and mortgages held by the corporation, and the credit instruments secured thereby, and bonds issued by the corporation under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes).

Approved February 26, 1934.

H. R. 7478. PUBLIC, NO. 142, SEVENTY-THIRD CONGRESS.

XIII–19–6788

An Act to amend the Agricultural Adjustment Act so as to include cattle and other products as basic agricultural commodities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of the Agricultural Adjustment Act, as amended, is amended by adding after the word "hogs" a comma and the word "cattle."

SEC. 2. Subsection (a) of section 12 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof a new paragraph as follows:

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: *Provided,* That not more than 60 per centum of such amount shall be used for either of such industries.

SEC. 3. (a) Subsection (d) of section 9 of the Agricultural Adjustment Act, as amended, is amended by renumbering paragraph (5) as paragraph (6) and by adding after paragraph (4) a new paragraph as follows:

(5) In case of peanuts, the term "processing" means the cleaning, polishing, grading, shelling, crushing, or other processing thereof.

(b) Section 11 of such Act, as amended, is amended by adding after the word "tobacco" a comma and the word "peanuts."

SEC. 4. Section 11 of the Agricultural Adjustment Act, as amended, is amended by adding after the word "wheat" a comma and the words "rye, flax, barley."

SEC. 5. Section 11 of the Agricultural Adjustment Act, as amended, is amended by adding after the words "field corn" a comma and the words "grain sorghums."

*   *   *   *   *   *   *

SEC. 7. The first sentence of subsection (2) of section 8 of the Agricultural Adjustment Act, as amended, is amended to read as follows: "After due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce."

Approved April 7, 1934.

XIII–5–6630
D. C. 230 (Revised)

Laws and Regulations Governing the Recognition of Attorneys, Agents, and Other Persons Representing Claimants and Others Before the Treasury Department and Offices Thereof.

[1934. Second Supplement to Department Circular No. 230 (Revised) of July 1, 1927. Committee on Enrollment and Disbarment.]

Treasury Department,
Office of the Secretary,
Washington, January 5, 1934.

Section 1 of Treasury Department Circular No. 230 (revised) dated July 1, 1927, prescribing rules and regulations governing the recognition of attorneys and agents and other persons representing claimants before the Treasury Department and offices thereof as amended by first supplement dated August 8, 1933, is hereby further amended to read as follows:

A committee on enrollment and disbarment is hereby created consisting of six members who shall be appointed by the Secretary of the Treasury, of whom two shall be detailed from the office of the Secretary. The Secretary of the Treasury shall designate a chairman and vice chairman of the committee. The chairman shall be designated from the members detailed from the Secretary's office. The committee shall make such rules for its own government as it considers advisable. The committee shall meet regularly on Tuesday and Friday of each week if a business day, and shall meet on other days at the call of the chairman. Three members shall constitute a quorum.

The committee shall receive and consider applications to be recognized as attorney, agent, or other representative before the Treasury Department or offices thereof; receive complaints against those enrolled; conduct hearings; make inquiries; perform other duties as prescribed herein, and do all things necessary in the matter of proceedings for enrollment, suspension, or disbarment of such attorneys, agents, or other representatives, pursuant to these regulations; and submit its recommendations thereon to the Secretary of the Treasury for approval.

The Secretary of the Treasury shall appoint an attorney for the committee who shall not be a member of the committee. Such attorney shall be the legal adviser of the committee, present all formal complaints against enrolled attorneys or agents, and represent the Government in all proceedings before the committee. Such attorney shall also be the secretary of the committee and shall keep and maintain its records and shall have the custody of all of its papers, records, rolls, etc.

H. Morgenthau, Jr.,
Secretary of the Treasury.

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[1] XIII–26–6870

Disbarments and suspensions from practice before Treasury Department of attorneys and agents.[2]

DISBARMENTS.

The Secretary of the Treasury, after due notice and opportunity for hearing, has ordered the disbarment from further practice be-

[1] This ruling (6870) includes also rulings Nos. 6588, 6598, 6607, 6621, 6633, 6646, 6656, 6668, 6682, 6691, 6702, 6714, 6727, 6739, 6751, 6760, 6770, 6778, 6790, 6802, 6813, 6823, 6839, 6852, and 6883. These rulings have been thus consolidated because publication of each one separately would be largely duplication.

[2] This list includes all attorneys and agents whose disbarment from practice before the Treasury Department was published during the 12-month period ended June 30, 1934, and all suspensions in effect during the 6-month period January 1–June 30, 1934, inclusive. It does not include those barred from practice by reason of disapproval of their application for enrollment.

fore the Treasury Department of the following-named **attorneys and agents:**

Name.	Address.	Date of disbarment.	Cause.
Ainslie, E. G	Formerly Houston, Tex., now Pontiac, Mich.	June 30, 1933	Charged with embezzling funds of an employer. Charges found proved.
Allen, W. S	Los Angeles, Calif.	Mar. 30, 1934	Charged with having been convicted in State court for misappropriation of funds. Charges found proved.
Bacchus, Robert R	Springfield, Ill	Mar. 1, 1933	Charged with knowingly preparing false income tax returns for 2 taxpayers. Charges found proved.
Barnett, Lewis	New York, N.Y	Jan. 4, 1933	Charged with attempting to extort money from a client to settle an alleged deficiency in income tax. Charges found proved.
Burns, James J	Philadelphia, Pa	June 1, 1934	Charged with making false income tax returns for himself. Charges found proved.
Cathrae, William M	Eustis, Fla	May 17, 1934	Charged with knowingly preparing fraudulent income tax returns for taxpayers. Charges found proved.
Chaiken, Frank D	New York, N.Y	May 8, 1934	Charged with failure to file income tax returns and to pay income taxes for two years. Charges found proved.
Clark, Paul E	Orange, Calif	June 30, 1933	Charged with theft of funds and conviction for such offense in State court. Charges found proved.
Clarke, Forrest S	Modesto, Calif	June 30, 1933	Charged with embezzling funds of a taxpayer, paid to respondent to be delivered to collector of internal revenue. Charges found proved.
Crane, Richard M	Denver, Colo	June 28, 1933	Charged with having been convicted for conspiracy to defraud, in State court. Charges found proved.
Davidson, Robert	Detroit, Mich	Mar. 28, 1934	Charged with issuing worthless checks to a collector of internal revenue in payment of taxes, and with other offenses. Charges found proved.
Davis, James C	Fort Smith, Ark	June 30, 1933	Charged with preparing false income tax returns, and fraudulently procuring a closing agreement in two tax cases. Charges found proved.
Dorenkamp, Henry J.	Louisville, Ky	May 4, 1934	Charged with preparing a false Federal income tax return for a taxpayer and with having been convicted in United States district court for preparing such false return. Charges found proved.
Elconin, Abraham V.	Formerly Toledo, Ohio, now Detroit, Mich.	May 29, 1934	Charged with knowingly filing protest containing false statement of facts in a tax case for a taxpayer and making false statement of facts before a conference on such tax case. Charges found proved.
Gorman, John J	Chicago, Ill	Feb. 23, 1933	Charged with having been disbarred by the Supreme Court of the State of Illinois. Charges found proved.
Hackett, Chauncey	Formerly Washington, D. C., now Provincetown, Mass.	May 18, 1934	Charged with having been disbarred as an attorney by the Supreme Court of the District of Columbia. Charges found proved.
Herlehy, Catherine G.	Detroit, Mich	Aug. 2, 1933	Charged with having been disbarred from practice as an attorney in the Federal court of the eastern district of Michigan. Charges found proved.
Hindenlang, Theodore G.	Newark, N.J	June 30, 1933	Charged with having been disbarred by the Supreme Court of New Jersey. Charges found proved.
James, David H	Indianapolis, Ind.	June 30, 1933	Charged with embezzling funds paid to respondent to be delivered to the collector of internal revenue. Charges found proved.
Keller, Al S	Los Angeles, Calif.	Feb. 2, 1933	Charged with having been convicted and sentenced in a criminal case in a State court. Charges found proved.
Krissoff, Abraham	Formerly New York, N.Y., now Long Branch, N.J.	Apr. 10, 1934	Charged with having been disbarred by the Supreme Court of New York for professional misconduct. Charges found proved.
Lackey, Clarence A	Formerly St. Louis, Mo., now East St. Louis, Ill.	Feb. 26, 1934	Charged with having been indicted and convicted for making false income tax returns for a taxpayer. Charges found proved.

Name.	Address.	Date of disbarment.	Cause.
Lichtenberg, Joseph	Baltimore, Md	July 20, 1933	Charged with having been disbarred from practice as an attorney before the courts of Baltimore, Md. Charges found proved.
McLaurin, Sylvester L.	Washington, D.C.	Feb. 20, 1934	Charged with having been disbarred as attorney by the Supreme Court of the District of Columbia. Charges found proved.
Neely, Robert E	Chicago, Ill	Aug. 3, 1933	Charged with handling a tax case in which respondent gained knowledge of the facts and issues involved while employed as acting collector of internal revenue, and with retaining funds of the taxpayer after demand made therefor by the taxpayer, said funds having been received in trust and intended for payment to the collector of internal revenue. Charges found proved.
O'Brien, Hugh J	Rochester, N.Y	Apr. 10, 1934	Charged with receiving money to adjust the income tax liability of two clients and appropriating such funds to his own use. Charges found proved.
O'Toole, Arthur J	Jersey City, N. J.	Apr. 10, 1934	Charged with having been convicted in State court for misappropriation of funds. Charges found proved.
Pickett, Thomas Y	Dallas, Tex	Feb. 23, 1933	Charged with having been convicted and sentenced in a criminal case in the United States district court. Charges found proved.
Rowe, Homer W	Formerly Midland, Tex., later Brownfield, Tex.	Feb. 26, 1934	Charged with appropriating money belonging to a National Farm Loan Association to his own use. Charges found proved.
Schmitz, Charles	San Francisco, Calif.	May 4, 1934	Charged with having been convicted and sentenced in United States district court for conspiracy to violate the National Prohibition Act. Charges found proved.
Siegal, Abner	Formerly Washington, D. C.	June 30, 1933	Charged with having been convicted of crime, and disbarred as attorney by the Supreme Court of the District of Columbia. Charges found proved.
Silverstrom, Samuel D.	Chicago, Ill	May 8, 1934	Charged with knowingly preparing and filing false claim for refund and procuring payment of such false claim for a taxpayer. Charges found proved.
Stauning, Andreas Kragh.	Formerly St. Paul, Minn., now Boise, Idaho.	May 3, 1934	Charged with misappropriating funds and with having been disbarred from practice as attorney by the Supreme Court of Minnesota. Charges found proved.
Weinstock, Leonard H.	St. Paul, Minn	June 30, 1933	Charged with filing false income tax returns for himself. Charges found proved.
Wolford, H. C	Erie, Pa	Feb. 24, 1933	Charged with having been convicted and sentenced in a criminal case in the United States district court. Charges found proved.

SUSPENSIONS.

The Secretary of the Treasury, after due notice and opportunity for hearing, has ordered the suspension from practice before the Treasury Department for the period stated in each case of the following-named attorneys and agents:

Name.	Address.	Period of suspension.	Cause.
McClellan, Robert B.	San Francisco, Calif.	60 days, from Feb. 21, 1934.	Charged with soliciting employment in Federal tax matters. Charges found proved.
Phillips, Martin I	New York, N. Y.	1 year, from June 30, 1933.	Charged with filing false income tax returns for himself. Charges found proved.
Winters, R. C	Abilene, Tex	6 months, from Feb. 27, 1934.	Charged with having received the full amount of taxes due from a taxpayer to be paid to collector of internal revenue and paying such taxes in quarterly installments. Charges found proved.

Resignation from enrollment to practice before the Treasury Department.

The following-named person has tendered his resignation from enrollment to practice before the Treasury Department. The Acting Secretary of the Treasury has accepted his resignation and ordered his name stricken from the roll of attorneys and agents enrolled to practice before the Treasury Department. He is therefore no longer entitled to practice before the Treasury Department.

Name.	Address.	Designation.	Date of acceptance.
Hayes, K. Sheridan	Formerly Washington, D. C., later New York, N. Y., now Washington, D. C.	Agent	Dec. 29, 1933

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