AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

TREASURY DEPARTMENT
LIBRARY
ROOM 5013

28 734 - Copy 1

Treasury Department : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

Cumulative Bulletin XIV-1

JANUARY-JUNE, 1935

APR 2 1942

TREASURY DEPARTMENT
LIBRARY
ROOM 350

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 XIV-1

HF 6301 1A15 1935

JANUARY–JUNE, 1935

IN THIS ISSUE

	Page
Introductory Notes	III
Contents	V–VIII
Rulings Nos. 7225–7563—	
Board of Tax Appeals	1–41
Income Tax—	
Part I (1934 Act)	43–139
Part II (1932 Act)	140–157
Part III (1928 Act)	158–241
Part IV (1926 and Prior Acts)	242–380
Estate and Gift Tax	381–395
Sales Tax	396–422
Capital Stock Tax	423–424
Miscellaneous Tax	425–441
Miscellaneous	442–563
Index	565–585

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 Assistant 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 Assistant 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 Assistant 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 Assistant General Counsel for the Bureau of Internal Revenue.

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON : 1935

For sale by the Superintendent of Documents, Washington, D. C. - - - - See back of title for prices

The Internal Revenue Bulletin service for 1935 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.

The complete Bulletin service may be obtained, on a subscription basis, from the Superintendent of Documents, Government Printing Office, Washington, D. C., for $2 per year. Single copies of the weekly Bulletin, 5 cents each.

New subscribers and others desiring to obtain the 1919, 1920, and 1921 Income Tax Service may do so from the Superintendent of Documents at prices as follows: Digest of Income Tax Rulings No. 19 (contains digests of all rulings appearing in Cumulative Bulletin 1 to 5, inclusive), 50 cents per copy; Cumulative Bulletins Nos. 1 to 5, containing in full all rulings published since April, 1919, to and including December, 1921, as follows: No. 1, 30 cents; No. 2, 25 cents; No. 3, 30 cents; No. 4, 30 cents; No. 5, 25 cents.

Persons desiring to obtain the Sales Tax Cumulative Bulletins for January–June and July–December, 1921, may procure them from the Superintendent of Documents at 5 cents per copy.

Persons desiring to obtain the Internal Revenue Bulletin service for the years 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, and 1934, may do so at prices as follows:

Cumulative Bulletin I–1 (January–June, 1922)	40 cents
Cumulative Bulletin I–2 (July–December, 1922)	30 cents
Cumulative Bulletin II–1 (January–June, 1923)	30 cents
Cumulative Bulletin II–2 (July–December, 1923)	40 cents
Cumulative Bulletin III–1 (January–June, 1924)	50 cents
Cumulative Bulletin III–2 (July–December, 1924)	50 cents
Digest No. 13 (January, 1922–December, 1924)	60 cents
Cumulative Bulletin IV–1 (January–June, 1925)	40 cents
Cumulative Bulletin IV–2 (July–December, 1925)	35 cents
Digest No. 17 (January–December, 1925)	25 cents
Cumulative Bulletin V–1 (January–June, 1926)	40 cents
Cumulative Bulletin V–2 (July–December, 1926)	30 cents
Digest No. 21 (January–December, 1926)	15 cents
Cumulative Bulletin VI–1 (January–June, 1927)	40 cents
Cumulative Bulletin VI–2 (July–December, 1927)	40 cents
Digest No. 22 (January, 1925–December, 1927)	35 cents
Cumulative Bulletin VII–1 (January–June, 1928)	35 cents
Cumulative Bulletin VII–2 (July–December, 1928)	50 cents
Cumulative Bulletin VIII–1 (January–June, 1929)	50 cents
Cumulative Bulletin VIII–2 (July–December, 1929)	55 cents
Cumulative Bulletin IX–1 (January–June, 1930)	50 cents
Cumulative Bulletin IX–2 (July–December, 1930)	50 cents
Cumulative Bulletin X–1 (January–June, 1931)	65 cents
Cumulative Bulletin X–2 (July–December, 1931)	30 cents
Cumulative Bulletin XI–1 (January–June, 1932)	30 cents
Cumulative Bulletin XI–2 (July–December, 1932)	30 cents
Cumulative Bulletin XII–1 (January–June, 1933)	30 cents
Cumulative Bulletin XII–2 (July–December, 1933)	50 cents
Cumulative Bulletin XIII–1 (January–June, 1934)	50 cents
Cumulative Bulletin XIII–2 (July–December, 1934)	50 cents
Cumulative Bulletin XIV–1 (January–June, 1935)	50 cents
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 XIV–1, in addition to all decisions of the Treasury Department (called Treasury decisions) pertaining to Internal Revenue matters, contains Assistant 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 XIV, Nos. 1 to 25, inclusive) for the period January 1 to June 30, 1935. 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, 1935.

Income Tax rulings are printed in four parts. Rulings under the Revenue Act of 1934 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 86. Rulings under the Revenue Act of 1932 are published as Part II, the section and article headings corresponding with the section and article headings of the Revenue Act of 1932 and Regulations 77. Rulings under the Revenue Act of 1928 are printed as Part III, 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 will be printed as Part IV, 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 or Assistant General Counsel's memorandum.
I. R. B.—Internal Revenue Bulletin.
I. T.—Income Tax Unit.
M, N, X, Y, Z, etc.—The names of corporations, places, or businesses, according to context.
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 Division.

S. T.—Sales Tax Division.
Sil.—Silver 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 United States Court of Appeals for 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.

CONTENTS.

Ruling.	Ruling No.	Page.
Treasury decisions:		
4504	XIV-1-7236	86
4505	XIV-1-7238	122
4506	XIV-2-7249	508
4507	XIV-2-7250	524
4508	XIV-2-7252	75
4509	XIV-3-7263	522
4510	XIV-3-7262	128
4511	XIV-3-7261	107
4512	XIV-3-7265	79
4513	XIV-3-7266	509
4514	XIV-4-7276	543
4515	XIV-4-7277	537
4516	XIV-4-7280	499
4517	XIV-4-7281	519
4518	XIV-5-7290	450
4519	XIV-5-7292	116
4520	XIV-6-7309	531
4521	XIV-6-7296	410
4522	XIV-7-7320	544
4523	XIV-7-7324	124
4524	XIV-8-7335	525
4525	XIV-8-7326	536
4526	XIV-9-7347	500
4527	XIV-9-7349	532
4528	XIV-10-7364	515
4529	XIV-10-7366	82
4530	XIV-11-7377	475
4531	XIV-11-7378	510
4532	XIV-11-7379	536
4533	XIV-12-7388	550
	XIV-12-7389	550
	XIV-12-7390	551
4534	XIV-12-7392	531
4535	XIV-12-7393	118
4536	XIV-13-7406	535
4537	XIV-15-7434	534
4538	XIV-15-7435	540
4539	XIV-15-7431	141
4540	XIV-16-7447	70
4541	XIV-17-7461	525
4542	XIV-17-7462	514
4543	XIV-17-7457	83
4544	XIV-18-7475	510
4545	XIV-19-7489	523
4546	XIV-20-7502	538
4547	XIV-21-7512	449
4548	XIV-21-7514	83
4549	XIV-21-7516	462
4550	XIV-21-7517	318
4551	XIV-21-7518	542
4552	XIV-22-7527	423
4553	XIV-22-7528	524
4554	XIV-22-7530	521
4555	XIV-22-7529	528
4556	XIV-23-7541	545
4557	XIV-23-7543	507
4558	XIV-23-7544	508
4559	XIV-25-7560	542
4560	XIV-25-7562	521
	XIV-25-7563	522
Court decisions:		
902	XIV-1-7232	332
903	XIV-1-7233	332
904	XIV-1-7230	303
905	XIV-1-7229	253
906	XIV-2-7243	236
907	XIV-2-7244	335
908	XIV-3-7257	195
909	XIV-3-7258	226
910	XIV-3-7259	286
911	XIV-4-7273	193

Ruling.	Ruling No.	Page.
Court decisions—Continued.		
912	XIV-4-7272	168
913	XIV-4-7274	228
914	XIV-4-7275	240
915	XIV-5-7288	247
916	XIV-5-7287	171
917	XIV-5-7289	319
918	XIV-6-7301	267
919	XIV-6-7302	298
920	XIV-7-7314	213
921	XIV-7-7315	257
922	XIV-7-7317	327
923	XIV-8-7332	387
924	XIV-8-7331	217
925	XIV-8-7330	176
926	XIV-8-7334	284
927	XIV-9-7341	221
928	XIV-9-7344	352
929	XIV-9-7342	242
930	XIV-10-7354	231
931	XIV-10-7355	245
932	XIV-10-7358	322
933	XIV-11-7370	174
934	XIV-11-7372	338
935	XIV-11-7373	348
936	XIV-12-7386	355
937	XIV-12-7384	264
938	XIV-12-7385	293
939	XIV-13-7400	259
940	XIV-13-7402	300
941	XIV-13-7401	289
942	XIV-13-7405	421
943	XIV-14-7414	187
944	XIV-14-7415	269
945	XIV-14-7416	370
946	XIV-15-7425	272
947	XIV-15-7426	385
948	XIV-15-7430	439
949	XIV-16-7442	205
950	XIV-16-7443	339
951	XIV-16-7444	341
952	XIV-17-7454	209
953	XIV-17-7452	190
954	XIV-17-7455	234
955	XIV-18-7469	350
956	XIV-18-7468	279
957	XIV-18-7470	390
958	XIV-18-7471	503
959	XIV-19-7481	316
960	XIV-19-7484	373
961	XIV-19-7482	360
962	XIV-19-7483	365
963	XIV-20-7497	292
964	XIV-20-7498	376
965	XIV-20-7496	183
966	XIV-21-7504	160
967	XIV-21-7508	164
968	XIV-21-7509	280
969	XIV-21-7510	310
970	XIV-22-7522	156
971	XIV-22-7523	305
972	XIV-22-7524	392
973	XIV-22-7525	407
974	XIV-23-7534	158
975	XIV-23-7535	250
976	XIV-23-7537	296
977	XIV-24-7550	383
978	XIV-24-7548	178
979	XIV-24-7549	185
980	XIV-25-7557	431
981	XIV-25-7558	433
982	XIV-25-7559	438

Ruling.	Ruling No.	Page.
Opinions of Attorney General:		
8	XIV-10-7359	442
9	XIV-19-7488	444
Assistant General Counsel's memoranda:		
13681	XIV-3-7254	58
14012	XIV-6-7299	145
14021	XIV-1-7231	326
14116	XIV-10-7351	102
14128	XIV-3-7256	142
14129	XIV-9-7345	428
14182	XIV-9-7340	152
14198	XIV-13-7399	261
14207	XIV-7-7311	68
14348	XIV-7-7318	427
14349	XIV-11-7368	47
14350	XIV-11-7371	201
14375	XIV-9-7338	52
14407	XIV-7-7316	103
14448	XIV-12-7383	98
14462	XIV-10-7360	497
14509	XIV-13-7396	84
14526	XIV-15-7427	417
14549	XIV-17-7451	154
14532	XIV-13-7403	397
14585	XIV-13-7404	400
14593	XIV-16-7437	50
14607	XIV-14-7410	62
14625	XIV-16-7440	114
14666	XIV-19-7479	181
14693	XIV-17-7453	197
14710	XIV-17-7450	44
14836	XIV-20-7492	45
14839	XIV-20-7493	73
14893	XIV-21-7505	102
14987	XIV-24-7547	90
15062	XIV-25-7555	131
Board of Tax Appeals:		
13425	XIV-13-7394	32
13426	XIV-13-7394	32
26996	XIV-9-7337	6
39534	XIV-3-7253	2
39538	XIV-3-7253	8
39568	XIV-3-7253	17
39569	XIV-3-7253	17
40710	XIV-19-7477	13
42277	XIV-21-7503	30
42313	XIV-16-7436	24
43052	XIV-14-7408	8
43733	XIV-3-7253	20
47011	XIV-21-7503	30
47210	XIV-22-7519	18
47211	XIV-22-7519	18
47212	XIV-22-7519	18
47415	XIV-13-7394	24
47444	XIV-12-7380	25
47900	XIV-3-7253	20
48268	XIV-17-7449	25
48977	XIV-4-7267	36
49860	XIV-22-7519	30, 32
50073	XIV-14-7408	8
51931	XIV-21-7503	30
52517	XIV-12-7380	9
52518	XIV-12-7380	9
52640	XIV-9-7337	11
52995	XIV-14-7408	27
52996	XIV-14-7408	27
53489	XIV-12-7280	25
53685	XIV-21-7503	28
53778	XIV-20-7491	29, 39
54050	XIV-19-7477	16
54346	XIV-21-7503	29
54347	XIV-21-7503	29
54451	XIV-20-7491	41
54739	XIV-16-7436	9
54740	XIV-16-7436	5
54741	XIV-16-7436	22
55553	XIV-3-7253	20
56382	XIV-17-7449	11
56443	XIV-9-7337	6
57916	XIV-1-7225	

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con.		
58180	XIV-9-7337	27
53400	XIV-9-7337	2
58604	XIV-9-7337	15, 35
58787	XIV-9-7337	8
58788	XIV-9-7337	8
58789	XIV-9-7337	21
58958	XIV-14-7408	2
59457	XIV-17-7449	39
59486	XIV-21-7503	18
59598	XIV-16-7436	14
59865	XIV-8-7325	31
59957	XIV-14-7408	15, 16
60061	XIV-9-7337	2
60227	XIV-16-7436	22
60228	XIV-16-7436	5
60229	XIV-16-7436	9
60235	XIV-24-7545	27
60236	XIV-24-7545	27
60237	XIV-24-7545	27
60313	XIV-21-7503	30
60381	XIV-8-7325	29
60569	XIV-19-7477	16
60789	XIV-19-7477	31
60929	XIV-20-7491	28
61042	XIV-9-7337	28
61043	XIV-9-7337	28
61156	XIV-21-7503	18
61290	XIV-14-7408	27
61291	XIV-14-7408	27
61345	XIV-21-7503	31
61722	XIV-7-7310	13
61750	XIV-12-7380	17
61754	XIV-17-7449	8, 28
61932	XIV-9-7337	40
62510	XIV-17-7449	21
62676	XIV-17-7449	10
62694	XIV-23-7532	39
62695	XIV-23-7532	39
62717	XIV-1-7225	15
62718	XIV-17-7449	9
62734	XIV-17-7449	9
62813	XIV-17-7449	19
62832	XIV-1-7225	40
62833	XIV-1-7225	40
62834	XIV-1-7225	40
63553	XIV-11-7367	32
63741	XIV-16-7436	24
63916	XIV-7-7310	21
64334	XIV-3-7253	20
64500	XIV-17-7449	34
64501	XIV-17-7449	29
64560	XIV-3-7253	20
64782	XIV-15-7420	23
65122	XIV-14-7408	27
65123	XIV-14-7408	27
65169	XIV-17-7449	9
65173	XIV-8-7325	16
65177	XIV-14-7408	25
65310	XIV-14-7408	2
65311	XIV-14-7408	2
65492	XIV-4-7267	36
65676	XIV-9-7337	28
65677	XIV-9-7337	28
65921	XIV-3-7253	6
65924	XIV-3-7253	6
66964	XIV-19-7477	16
66969	XIV-11-7367	16
67197	XIV-4-7267	36
67259	XIV-11-7367	24, 27
67422	XIV-19-7477	16
67506	XIV-23-7532	20
67581	XIV-19-7477	17
67602	XIV-15-7420	23
67681	XIV-1-7225	33, 35
67750	XIV-22-7519	29
67751	XIV-22-7519	29
67776	XIV-24-7545	38
67843	XIV-7-7310	40
68001	XIV-18-7465	11
68002	XIV-18-7465	11
68003	XIV-18-7465	11

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con.		
68034	XIV-9-7337	5
68159	XIV-2-7239	6
68164	XIV-24-7545	3
68338	XIV-16-7436	7, 13
68415	XIV-3-7253	4
68501	XIV-2-7239	20
68503	XIV-18-7465	11
68504	XIV-18-7465	11
68505	XIV-18-7465	11
69166	XIV-19-7477	7, 18
69259	XIV-2-7239	19
69345	XIV-24-7545	4
69636	XIV-7-7310	9
69677	XIV-3-7253	11
69678	XIV-3-7253	11
69679	XIV-3-7253	3
69680	XIV-3-7253	15
69681	XIV-3-7253	11
69682	XIV-3-7253	3
69683	XIV-3-7253	16
69684	XIV-3-7253	3
69685	XIV-3-7253	11
69686	XIV-3-7253	15
69698	XIV-7-7310	5
70437	XIV-23-7532	12
70558	XIV-9-7337	40
70899	XIV-19-7477	31
71145	XIV-9-7337	41
71310	XIV-17-7449	9
71311	XIV-17-7449	9
71347	XIV-1-7225	40
71348	XIV-1-7225	40
71349	XIV-1-7225	40
71350	XIV-1-7225	37
71351	XIV-1-7225	37
71353	XIV-7-7310	33
71588	XIV-24-7545	15, 35
71599	XIV-20-7491	7
71649	XIV-14-7408	4
71650	XIV-14-7408	4
71718	XIV-14-7408	5
71744	XIV-11-7367	16
71951	XIV-14-7408	27
72157	XIV-16-7436	16
72158	XIV-16-7436	16
72236	XIV-1-7225	28, 38
72605	XIV-11-7367	18
72711	XIV-11-7467	37
72712	XIV-11-7367	37
72713	XIV-11-7367	24
72714	XIV-11-7367	24
72861	XIV-15-7420	23
73089	XIV-1-7225	28
73099	XIV-6-7294	34
73614	XIV-3-7253	2
73758	XIV-5-7282	20
73869	XIV-23-7532	19
73954	XIV-24-7545	3
74090	XIV-24-7545	41
74688	XIV-24-7545	41
77560	XIV-22-7519	26
77568	XIV-22-7519	26
Office decisions (I. T.):		
2842	XIV-1-7226	43
2843	XIV-1-7227	77
2844	XIV-1-7228	111
2845	XIV-2-7240	57
2846	XIV-2-7241	112
2847	XIV-2-7242	148
2848	XIV-3-7255	60
2849	XIV-4-7268	60
2850	XIV-4-7269	61
2851	XIV-4-7270	62
2852	XIV-4-7271	72
2853	XIV-5-7284	110
2854	XIV-5-7286	130
2855	XIV-6-7295	72
2856	XIV-6-7297	84
2857	XIV-6-7298	127
2858	XIV-6-7300	147

Ruling.	Ruling No.	Page.
Office decisions (I. T.)—Con.		
2859	XIV-7-7312	101
2860	XIV-7-7313	115
2861	XIV-7-7321	529
2863	XIV-8-7327	73
2864	XIV-8-7328	94
2865	XIV-8-7329	115
2866	XIV-9-7339	54
2867	XIV-9-7343	291
2868	XIV-10-7352	111
2869	XIV-10-7353	113
2870	XIV-10-7356	288
2871	XIV-10-7357	288
2872	XIV-11-7369	71
2873	XIV-12-7382	51
2874	XIV-12-7381	49
2875	XIV-13-7395	81
2876	XIV-13-7397	123
2877	XIV-13-7398	137
2878	XIV-14-7409	57
2879	XIV-14-7411	64
2880	XIV-14-7412	95
2881	XIV-14-7413	150
2882	XIV-15-7421	64
2883	XIV-15-7422	86
2884	XIV-15-7423	151
2885	XIV-16-7438	64
2886	XIV-16-7439	103
2887	XIV-17-7456	519
2888	XIV-18-7466	54
2889	XIV-18-7467	65
2890	XIV-19-7480	225
2891	XIV-19-7478	50
2892	XIV-20-7495	148
2893	XIV-21-7506	205
2894	XIV-21-7507	239
2895	XIV-22-7521	140
2896	XIV-22-7520	96
2897	XIV-23-7533	144
2898	XIV-24-7546	70
2899	XIV-25-7553	67
Office decisions (E. T.):		
6	XIV-2-7245	381
7	XIV-16-7445	382
Office decisions (S. T.):		
795	XIV-2-7246	413
796	XIV-4-7278	411
797	XIV-5-7293	408
798	XIV-8-7333	414
799	XIV-11-7374	420
800	XIV-12-7387	396
801	XIV-15-7428	415
802	XIV-15-7429	419
803	XIV-16-7446	405
804	XIV-17-7458	418
805	XIV-17-7459	425
806	XIV-19-7485	416
807	XIV-19-7486	413
808	XIV-20-7499	396
809	XIV-20-7500	416
810	XIV-21-7511	412
811	XIV-22-7526	409
812	XIV-24-7551	406
813	XIV-25-7556	425
Office decisions (P. T.):		
18	XIV-2-7247	449
19	XIV-3-7260	449
20	XIV-6-7303	448
21	XIV-6-7304	496
22	XIV-6-7305	497
23	XIV-7-7319	493
24	XIV-18-7472	494
25	XIV-18-7473	498
26	XIV-23-7539	499
27	XIV-23-7538	447
Office decision (Sil.):		
4	XIV-2-7248	495
Office decisions (T.):		
6	XIV-1-7235	559
7	XIV-6-7307	559
8	XIV-10-7362	559

Ruling.	Ruling No.	Page.
Office decisions (T.)—Con.		
9	XIV–14–7418	560
10	XIV–19–7487	560
11	XIV–23–7540	560
Office decisions (MS.):		
158	XIV–1–7234	553
159	XIV–6–7306	554
160	XIV–10–7361	555
161	XIV–14–7417	556
162	XIV–17–7464	557
163	XIV–21–7515	558
Mimeographs:		
4281	XIV–5–7283	92
4284	XIV–5–7285	128
4286	XIV–7–7322	539
Mimeographs—Continued.		
4298	XIV–11–7375	547
4299	XIV–9–7350	93
4301	XIV–10–7365	138
4303	XIV–16–7441	133
4306	XIV–15–7432	528
4311	XIV–15–7424	208
4317	XIV–17–7460	544
4323	XIV–20–7494	119
4338	XIV–23–7536	379
Miscellaneous	XIV–9–7346	551
	XIV–18–7474	552
	XIV–25–7554	90
	XIV–25–7561	561

CONTENTS OF CUMULATIVE BULLETINS (I. T.) 1 TO 5; S. T. FOR 1920 AND 1921; INTERNAL REVENUE I-1, I-2, II-1, II-2, III-1, III-2, IV-1, IV-2, V-1, V-2, VI-1, VI-2, VII-1, VII-2, VIII-1, VIII-2, IX-1, IX-2, X-1, X-2, XI-1, XI-2, XII-1, XII-2, XIII-1, XIII-2, AND XIV-1.

Cumulative Bulletin.	Ruling Nos.
Income Tax:	
December, 1919 (No. 1)	1–655
January–June, 1920 (No. 2)	656–1033
July–December, 1920 (No. 3)	1034–1368
January–June, 1921 (No. 4)	1369–1710
July–December, 1921 (No. 5)	1711–1996
Sales Tax:	
1920 (S. T. 1–20)	1–112
January–June, 1921	113–265
July–December, 1921	266–356
Internal Revenue Bulletin:	
January–June, 1922 (No. I–1)	1–383
July–December, 1922 (No. I–2)	384–665
January–June, 1923 (No. II–1)	666–956
July–December, 1923 (No. II–2)	957–1276
January–June, 1924 (No. III–1)	1277–1641
July–December, 1924 (No. III–2)	1642–1949
January–June, 1925 (No. IV–1)	1950–2251
July–December, 1925 (No. IV–2)	2252–2523
January–June, 1926 (No. V–1)	2524–2813
July–December, 1926 (No. V–2)	2814–3026
January–June, 1927 (No. VI–1)	3027–3291
July–December, 1927 (No. VI–2)	3292–3557
January–June, 1928 (No. VII–1)	3558–3784
July–December, 1928 (No. VII–2)	3785–4052
January–June, 1929 (No. VIII–1)	4053–4248
July–December, 1929 (No. VIII–2)	4249–4487
January–June, 1930 (No. IX–1)	4488–4683
July–December, 1930 (No. IX–2)	4684–4887
January–June, 1931 (No. X–1)	4888–5124
July–December, 1931 (No. X–2)	5125–5338
January–June, 1932 (No. XI–1)	5339–5531
July–December, 1932 (No. XI–2)	5532–5961
January–June, 1933 (No. XII–1)	5962–6262
July–December, 1933 (No. XII–2)	6263–6581
January–June, 1934 (No. XIII–1)	6582–6871
July–December, 1934 (No. XIII–2)	6872–7224
January–June, 1935 (No. XIV–1)	7225–7563

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, 1935, 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, 1935, inclusive.]

[a] XIV-24-7545

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
Allegheny Garbage Co	44860	30	636
Allen, Irene C	25414	25	834
Allied American Corporation	31704	25	1276
Ambassador Petroleum Co	40039	28	868
American Central Life Insurance Co.[2]	30133 31998 56024 63436	30	1182

[1] Estate tax decision; acquiescence relates to deduction of $133,000.
[2] Acquiescence relates to issue whether petitioner received interest on mortgages when it bid in property upon foreclosure.

[a] Ruling No. 7545 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service from January 1, 1932, to June 30, 1935.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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 [1]	39167	24	334
American South African Line, Inc	62955 68830 70701	30	753
Anco Investment Co	58647	30	988
Anderson, C. K	33242	27	1305
Anderson, Gustave	36224	26	1208
Anderson, J. H	63827	30	1274
Ann Arbor R. R. Co	25869	29	331
Arguimbau, Frank M	73614	31	604
Armstrong, C. George	58400	31	418
Arnold & Winsor Co	61553	29	670
Ashforth, Albert B., estate of [2]	47190 48009 49354	26	1188
Ashforth et al., Mabel A., executors [2]	47190 48009 49354	26	1188
Atkins, J. B., estate of	38520	28	500
Atkins, Mrs. J. B	38519	28	500
Atlantic Coast Line R. R. Co	58958 65310 65311	31	730
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
Baltimore & Ohio R. R. Co. [3]	37239	30	194
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
Beasley, W. E	60061	31	580
Beaumont, Louis D	31931 46569 49422	25	474
Bebb, Richard E., estate of [4]	41295	27	1091
Beggs, John I. (Trusts)	65675	30	370
Behr, Charles B	39534	30	1290
Bell, Ivor B. [5]	22335	27	377
Bellows Falls Power Co	18592 29104	25	195

[1] Estate tax decision.
[2] Nonacquiescence published in Bulletin XII–1, page 1, withdrawn.
[3] Acquiescence relates to issue involving contributions by shippers for construction of side and spur tracks; and deduction for internal revenue stamps affixed to bonds.
[4] Estate tax decision; acquiescence relates to deduction of $133,000.
[5] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Benedum, M. L.[1]	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
Blair, Jr., Mrs. Wiley	69682	31	212
Bloodgood, Edith B	26750	25	513
Blum, Julius, trustee	39242 40939 45741 51507	25	119
Blumenthal, Lucy A	64975	30	591
Boehringer, Rudolph [2]	49891	29	8
Boos Bros. Cafeteria Co	39200	25	651
Borg & Beck Co	24223 34964	24	995
Bostick, Jr., John, trustee	68382	31	25
Bowden, Paul Akers	54923	26	1410
Braun, Arthur E., trustee	54556	29	1161
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 [3]	32584 44153 44684	25	780
Buck et al., Mary M., executors [3]	32584 44153 44684	25	780
Buena Vista Land & Development Co	2025	13	895
Buffalo Union Iron Furnace Co.[4]	16075 16076	23	439
Bullington, Orville	69684	31	212
Bullington, Mrs. Sadie	69679	31	212
Bullis, Helen H	68164 73954	32	501
Bullock, George [5]	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
Byers Trust, A. T	68382	31	25

[1] Acquiescence relates to right of overriding royalty owners to benefit of section 211(b), Revenue Act of 1918.

[2] Acquiescence relates to issue involving section 115(g) of the Revenue Act of 1928.

[3] 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.

[4] Acquiescence relates to issue regarding deductions for obsolescence of blast furnaces.

[5] Acquiescence relates to issue 2 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
C.			
California Coast Oil Co	25018	25	902
Camp Manufacturing Co	35955	25	537
Canaday, Inc., Ward M	58632	29	355
Canfield et al., Frances Marshall, executors	68415	31	724
Canfield, George F., estate of	68415	31	724
Canning, John F	41482	29	99
Capital Compress Co	49303	31	273
Carman, F. J	44321 44939 50178	25	162
Carnie, Goudie Manufacturing Co	20074 27095	24	679
Carol, Sue (Mrs. Nick Stuart)	63963 71025	30	443
Carolina, Clinchfield & Ohio Ry	71649 71650	31	730
Carter Publications, Inc	44838 66891	28	160
Caspar Lumber Co	57729	30	579
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.[1]	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
Century Circuit, Inc., of Delaware	69345	31	764
Champion, David J.[2]	55569 63818	27	1312
Champion, T. Pierre [2]	55568	27	1312
Chapman & Dewey Land Co	37403 51059	25	1166
Chapman & Dewey Lumber Co	33466 37402 47130 50196 51058	25	1166
Chicago & Northwestern Ry. Co.[3]	36343	22	1407
Christopher, Rachel S.[4]	47704	26	292
City Bank Farmers Trust Co., executor	59797	29	190
City Bank Farmers Trust Co. et al., executors [4]	31869	23	663
Clark et al., James, executors	34499	24	1235
Cleland Estate Co., Inc., Henry A.[5]	33585 40890 51197	29	436
Clements, W. L	46058	24	506
Cleveland Trinidad Paving Co.[6]	41962 46297	20	772
Clinchfield Securities Co	40554	25	446

[1] Acquiescence relates to issue regarding apportionment of taxes among affiliated corporations.
[2] Acquiescence relates to basis upon which gain or loss upon redemption of stock should be computed.
[3] Acquiescence relates to following issues: Material and supplies adjustment; amortization of bond premium; assessment of association of railway executives; railroad Y. M. C. A.
[4] Estate tax decision.
[5] Acquiescence does not relate to basis of property devised subject to a life estate.
[6] Nonacquiescence notice published in Cumulative Bulletin X-2, pages 83 and 84, revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Clinton Cotton Mills, Inc	54880	28	1311
Coats, Inc. (R. I.), J. & P.[1]	38904	28	1127
Colgate, Mary	61882	27	506
Colorado & Utah Coal Co	53799	26	588
Columbian Carbon Co.[2]	42743	25	456
Columbus Brick & Tile Co.[3]	42707	26	794
Commercial Investment Trust Corporation [4]	43495 50051	28	143
Cone, Emma S., executrix [5]	68034	31	515
Cone, Irving H., estate of [5]	68034	31	515
Connecticut River Power Co	18591 29106	25	195
Connelly, James A.[6]	44081 45833 46267 51967 60566 66948	30	331
Connelly, L. B.[6]	44083 45834	30	331
Connelly, Mary B.[6]	44082	30	331
Conservative Gas Co	72391	30	552
Continental Legal and Protective Association	44859	30	636
Contractors Construction & Supply Co.[7]	41963	20	772
Cook, Elizabeth E.[8]	38579	25	1351
Cook, M. M., estate of	53044	27	33
Cook, P. W	54740 60228	32	100
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
Cosmopolitan Bond & Mortgage Co.[9]	44617	30	717
Costello, Joseph [10]	22640	27	377
Cotton, G. E	59655	25	866
Couchman, William Venning	67729 70957	30	118
Cox, Attilla	69698	31	819
Cox, Carrie G	69698	31	819
Crane, Alexander B., estate of [11]	71718	30	29
Crane et al., Alexander M., executor [11]	71718	30	29
Croker, Bula E	41121	27	588

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

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

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

[4] 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.

[5] Estate tax decision.

[6] Acquiescence relates to question whether the value of rights to subscribe to certain bonds constitutes income.

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

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

[9] Acquiescence relates to issue involving method of accounting used by taxpayer.

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

[11] Nonacquiescence published in Cumulative Bulletin XIII-1, page 20, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Dancer, Edith M., estate of [2]	70456	30	1277
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
Dockweiler et al., Isidore B., executors and trustees [2]	50828	30	1136
Doernbecher Manufacturing Co	34853, 43527, 46421, 50607, 63628, 71534	30	973
Dohme, Alfred R. L	68159	31	671
Dolese & Shepherd Co. Syndicate No. 3	41136	30	1171
Dome Co	41887	26	967
Dominion National Bank	52165	26	421
Donnelly, Catherine, estate of	56443	31	577
Donnelly et al., Garrett J., executors	56443	31	577
Douglas Co., John	38726	23	1307
Drake, Francis E	46804	30	475
Drexel Packing Co	20775	24	376
Duff, Robert C.[7]	37552	23	1342
Duncan, T. P	65921	31	212
Duncan, Mrs. T. P	65924	31	212
Dunham, Walter E	66308	27	1068
Dunne, Finley Peter	54444	29	1109
du Pont, Pierre S.[8]	26996	18	1028

[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.
[8] Nonacquiescence published in Cumulative Bulletin IX–2, page 72, revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Eldridge, Alice H.[1]	64779	30	1321
Eldridge, A. S.[1]	64778	30	1321
Elgin Compress Co	49302	31	273
Elliott-Granite Linen Corporation	48212	26	936
Elmore Milling Co	46768 52972	27	84
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
Eustis, Augustus H	71637	30	820
Evans, A. T	64397	30	746
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 Educational and Cooperative State Union of Nebraska	10596 18105 27194 31748	30	1051
Farmers Life Insurance Co.[3]	43317	27	423
Farmers' Loan & Trust Co., trustee	29465	26	1359
Farmers Union State Exchange	18105	30	1051
Fawsett, Charles F	64474	31	139
Federal Street & Pleasant Valley Passenger Ry. Co	29758	24	262
Fidelity Savings & Loan Association	14862 31801 39406 45215	23	1059
Fifth Avenue Bank of New York, executor [4]	69166	32	208
First Citizens Bank & Trust Co	71598	32	335
First National Bank of Boston, administrator	36438 46583	25	252
First National Bank of Key West	45186	26	370
First National Bank in Mobile	63732	30	632
Fisher, Charles D., estate of	68338	32	82

[1] Acquiescence relates to issue whether dividends declared in 1929 constituted income to the petitioners in 1929 or 1930.
[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] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Fitch, Florence H	51670	29	1299
Florence Manufacturing Co	15383, 26079	25	676
Folk, H. B	28396, 31018	25	599
Fordyce et al., William C., trustees	58647	30	988
Forest Products Chemical Co	46621	27	638
Forres, Lord	40229, 43973	25	154
Foster, L. B. [1]	43086	26	1328
Foster, N. C., estate of [2]	32984	25	414
Foster et al., Willard, executor [2]	32984	25	414
Fox, Fontaine [3]	71084	30	451
Frank, Emil	50224	27	1158
Frischkorn Development Co	30496, 35170, 42452	30	8
Fuhlage, Alfred E [4]	61754	32	222
G.			
Gambill, A. A	47902	26	995
Gamble & Stockton Co. [5]	42707	26	794
Gardner, Charles E. [6]	38575	25	1351
Garron et al., Isabel K. J., executors [2]	47705	26	292
Gay, D. J	58787	31	580
Gay, E. C	58788	31	580
George, Jerome R	45240	27	765
George Machinery Co., R. B	61218	26	594
Gibbs, G. Wildy	31329	28	18
Gillette Rubber Co	43052, 50073	31	483
Ginsberg, Albert A	27628	24	18
Ginsberg, Nathan A	27629	24	18
Given, T. H., estate of	54556	29	1161
Glancy, Inc., A. R	62062	31	236
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 [7]	22332	27	377
Gordon, Max L. [7]	22333	27	377
Gore Bros., Inc	39538	30	1290
Gottlieb Realty Co	42528	28	418
Graeper, W. A	46619	27	632
Grand River Gravel Co	23085	22	1124
Grant, Harry Johnston	51794	30	1028

[1] Acquiescence relates to issue regarding filing of separate return for 1925.
[2] Estate tax decision.
[3] 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.
[4] Acquiescence relates to issue whether taxpayer is entitled to the statutory personal exemption as the head of a family.
[5] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc.
[6] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[7] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Green, Robert D.[1]	53647	24	719
Green, W. S	43786 46373 63487	26	1017
Grey Bull Corporation	47376	27	853
Griffis, Stanton [2]	38577	25	1351
Griffiths, Eva Lavino	63354	30	852
Griffiths, George W	42498	25	1292
Griffiths, John	43074	25	1292
Guaranty Building & Loan Co	55352	27	754
Gudeon, Walter T	54739 60229	32	100
Gulf Coast Irrigation Co.[3]	33694 40081 41343	24	958
Gullett, C. E	52517	31	1067
Gullett, W. J	52518	31	1067
Gummey, Frank B.[4]	61056	26	894
Gurnee, Augustus Coe, estate of [5]	42619	24	461
H.			
Haberland, Paul	29289	25	1370
Hafner, Alfred	48389 57132	31	338
Hailey-Ola Coal Co	30962	24	895
Halladay, Sarah P	26754	25	513
Hamburg, Jr., Sam	30304	24	915
Handly, Franklin Miller	66810 67671 74406	30	1271
Hanna, R. J., estate of	62718	31	1126
Hanna, Virginia W., executrix	62718	31	1126
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
Harkness, Edward S	65169 71310	31	1100
Harkness, Mary S	71311	31	1100
Harnischfeger, Henry, estate of [6]	69636	31	224
Harnischfeger et al., Marie E., executors [6]	69636	31	224
Harper, H. T	62784	31	1126
Harrah, Marie E	25269	27	1305
Harrah, William F	21643	27	1305
Harrison, Inc., J. M	50594	30	455
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 transactions 1, 2, 3, and 4.
[2] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[3] Acquiescence relates to all issues except affiliation issue.
[4] Nonacquiescence published in Cumulative Bulletin XII-1, page 17, withdrawn.
[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
Hazelwood, N. H	61334	29	595
Hemphill, Clifford [1]	38573	25	1351
Henningsen, Walter F	56668 62845	30	301
Hervey, W. R	46806	25	1282
Hess, Nathaniel J	33279	24	475
Hettman, Walter E.[2]	22341	27	377
Hewitt, Erskine	57032 63141	30	962
Hickman, Fannie Snyder	16253	24	438
Hillman, F. D., estate of	62676	31	1126
Hillman et al., Judson McClintock, administrators	62676	31	1126
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
Holliday, John H	64127	29	1272
Hollingsworth, A. E	54282	27	621
Hollister, George Buell	29461	26	1359
Holmby Corporation	51303	28	1091
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.[4]	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
Hubbard, Edward, estate of	63878 67569	30	619
Hubbard, Mildred M	63837	30	619
Hubbard, Mildred M., formerly executrix	63878	30	619
Hubbard, Mildred M., transferee	67569	30	619
Hunter, C. W., executor	45417	26	417
Hunter, George H., estate of	45417	26	417
Huntington, Henry E., estate of [4]	45429	28	289
Hurt et al., Mrs. A. B., executors	28099	30	653
Hurt, Joel, estate of	28099	30	653
Huyler's, Inc	28369 29154 39841	24	425

[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 ncreasing deficiency for 1925 by amount of interest accrued on bonds exchanged for art objects.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
I.			
Independent Ice & Coal Co	67639	27	1346
Indiana Lamp Corporation	52761	28	491
Ingalls, Charles C., estate of [1]	57835	25	773
Insull, Margaret A	68002 68504	32	47
Insull, Samuel	68003 68503	32	47
Insull, Jr., Samuel	68001 68505	32	47
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, Chester Addison [2]	50206	31	55
Jones, R. D	69858	29	928
K.			
Kammerdiner, J	41643 46555	25	495
Kansas City Leasehold & Improvement Co. [3]	35718	17	213
Kansas City & Memphis Farms Co	51060	25	1166
Kansas City Southern Railway Co. and affiliated companies [4]	22668 35527 35528 35529 35530 35531	22	929
Kasch, Ed	48293	25	284
Kasch, Theodora	48293	25	284
Kell, Frank	69677	31	212
Kell, Mrs. Frank	69678	31	212
Kell, Joe A	69681	31	212
Kell, Willie May	69685	31	212
Kelley, John P	38233	26	212
Kent, Everett E	39576 42589 46064	26	482
Kessler J. M	52640	31	849
Kibele, O. B. [5]	24882	27	377
King, Henrietta M., estate of	52632	31	95
Kingsbury, K. R	56382	31	1126
Kinney Co., Inc., G. R	31397 32980	26	1091

[1] Estate tax decision.
[2] Acquiescence as to issue whether petitioner should be allowed to file his return on community property basis.
[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: 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.
[5] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Kirchner, Julius C	25428	27	1305
Kleberg et al., Robert J., executors	52632	31	95
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 [1]	35443	21	1347
Langworthy, Marjorie C.[2]	71961	30	1216
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
Letts, Jr., Arthur	62106	30	800
Ley, George W.[3]	22336	27	377
Ley, Mary C.[3]	22337	27	377
Liberty Farms Co	26717 29899	22	1298
Liberty Hosiery Mills	66546	31	64
Lido Building Co., Inc	53385	31	461
Lincoln, Robert Todd, estate of [1]	39167	24	334
Lippincott et al., J. Bertram, executors [1]	49233	27	735
Lippincott, Walter, estate of [1]	49233	27	735
Littauer, Eugene, estate of [4]	51858	25	21
Littauer et al., Lucius N., executors [4]	51858	25	21
Little, C. B	61821	27	1022
Lloyd, Walter [5]	44089	30	331
Loeb, Jr., et al., William, trustees	34161	26	635
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.			
MacCallum Gauge Co	70437	32	544
Malta Temple Association [6]	29476	16	408
Manistique & Lake Superior R. R. Co	35337	29	331
Markham Irrigation Co.[7]	41344	24	958
Marston, Edgar L	61961	29	976

[1] Estate tax decision.
[2] Acquiescence relates to reorganization issue.
[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; acquiescence relates to issues 4, 5, and 7 of decision.
[5] Acquiescence relates to question whether the value of rights to subscribe to certain bonds constitutes income.
[6] Nonacquiescence published in Cumulative Bulletin VIII-2, page 67, withdrawn.
[7] Acquiescence relates to all issues except affiliation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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 [1]	22334	27	377
Marvin, Walter S.[2]	38578	25	351
Matagarda Canal Co.[3]	40082 41345	24	958
Matchette, Franklin J	40710	26	909
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
McRae, Louise C., executrix [4]	32303	30	1087
McRae, Philip, estate of [4]	32303	30	1087
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
Mercantile Trust Co. of Baltimore et al	68338	32	82
Merrill, Isaac L	61722	31	530
Messer, Richard B., estate of [4]	42513	27	556
Metropolitan Properties Corporation	45032	24	220
Michigan Central R. R. Co.[6]	19930	28	437
Michigan Trust Co. et al., executors [4]	42513	27	556
Milby & Dow Coal & Mining Co	22021 22022 26259 42184	24	40
Milgrim & Bros., Inc., H.[7]	33177	24	853
Milliken, Sallie Gibbs	31330	28	18
Mississippi Packing Co., Inc	20772	24	376

[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 issues regarding allocation of total cost between common and preferred stocks purchased.
[3] Acquiescence relates to all issues except affiliations issue.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence, except in so far as concerns the question of situs.
[6] 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.
[7] Acquiescence relates to issue 1 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Missouri State Life Insurance Co.[1]	58241, 62386	29	401
Mitchell, L. C	41610	28	767
Mitchell, Oscar [2]	41680, 41874, 54673	27	101
Mobile Light & Railroad Co.[3]	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.[4]	50320	29	139
National Contracting Co.[5]	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
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 [6]	28045	26	696
Newbury, Mollie Netcher	38049	26	101
Newbury, Mollie Netcher, trustee	38052	26	101
Newell et al., Sterling, executors [7]	57835	25	773
New England Power Co	18593, 29105	25	195
Newman et al., Rose, executors [7]	59598	31	772
Newman, Samuel, estate of [7]	59598	31	772

[1] 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.

[2] 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.

[3] 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.

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

[5] 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.

[6] Nonacquiescence published in Cumulative Bulletin XI-2, page 15, revoked.

[7] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
New Market Investment Co.[1]	35719	17	213
Newton, Elizabeth K.[1]	47703	26	292
Newton, Joseph R., estate of [2]	47705	26	292
New York Central R. R. Co.[3]	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.[4]	34945	24	307
Noyes, Jansen [5]	38574	25	1351
O.			
Oakley, Richard H	45778	24	1082
O'Donohoe, John F	69686	31	212
O'Donohoe, Mrs. John F	69680	31	212
Olmsted, George W.[6]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[6]	44089 45746 48143 54713 60745	30	331
Olympia Harbor Lumber Co	64272	30	114
Ontario Realty Co.[1]	35721	17	213
O'Rear, E. C.[7]	32335	28	698
Osborne, Owen, estate of [8]	59957	29	374
P.			
Pacific Coast Biscuit Co. et al.[9]	71588	32	39
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
Parke, Davis & Co	62717	31	427
Parker, Clara B., executrix [10]	58604	31	644
Parker, George D., estate of [10]	58604	31	644
Parkland Ice & Coal Storage Co	67640	27	1346
Parriott, F. B.[11]	30989	28	917

[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] Estate tax decision.

[3] 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.

[4] Acquiescence relates to inventory issue.

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

[6] Acquiescence relates to question whether the value of rights to subscribe to certain bonds constitutes income.

[7] Acquiescence relates to issue as to allowable deduction of cost of operating automobile partly used in taxpayer's business in 1924.

[8] Nonacquiescence published in Cumulative Bulletin XIII-1, page 27, withdrawn.

[9] Acquiescence with respect to deduction of expense incident to amendment of petitioner's charter.

[10] Acquiescence relates to all questions wherein decision was not wholly in favor of Commissioner except decision regarding existence of partnership of George D. Parker Co.

[11] 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.
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
Peck, Clara S., estate of	61520, 61521	31	87
Peck et al., Fremont C., executors	61520, 61521	31	87
Pegg, Albert O.[1]	22338	27	377
Pennsylvania Indemnity Co	71992	30	413
Pennsylvania Investors Co	20766	24	376
Peoples Life Insurance Co.[2]	66969, 71744	31	706
Perkins et al., Jacob	28701	25	1123
Pershouse, Alice E	26749	25	513
Pershouse, Mabel B	26748	25	513
Peters, Andrew J.[3]	54050	28	976
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
Pitkin, George P	65173	31	403
Pittsburgh Athletic Co.[3]	60569, 66964, 67422	27	1074
Pittsburgh Melting Co	44858	30	636
Pittsburgh & West Virginia Ry. Co	72157, 72158	32	66
Pizitz Dry Goods Co., Louis	46585	22	161
P-M-K Petroleum Co.[4]	50576, 54779	24	360
Polar Ice & Coal Co	67638	27	1346
Pope, Olive R	29274	25	1161
Powell, Benjamin I	50380	26	509
Powel, T. I. Hare [5]	64464	27	55
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.[6]	45896, 59468	27	28
Prosser, Constance B	26752	25	513
Provident Trust Co. of Philadelphia, executor [7]	59957	29	374
Putnam Trust Co	34743	26	655
Putty, Mrs. Malcolm	69683	31	212

[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 only to treatment of rental value.
[3] Nonacquiescence published in Cumulative Bulletin XII-2, page 24, revoked.
[4] Acquiescence relates to third issue of decision.
[5] Nonacquiescence published in Cumulative Bulletin XII-1, page 21, withdrawn.
[6] Acquiescence relates to deduction of loss resulting from liquidation of one of its subsidiaries.
[7] Nonacquiescence published in Cumulative Bulletin XIII-1, page 28, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Q.			
Quinn, Evan V	8544	26	970
Quinn, Martin M	8598	26	970
Quinn, Paul H	8574	26	970
R.			
Ramish, Adolph	39568	30	1290
Ramish, Inc., Adolph	39569	30	1290
Randall, Marjorie G.[1]	38971	27	475
Rapp, John W., estate of	28618	24	1061
Rauh Realty Co	32822	26	48
Ray Oil Co.[2]	34332	28	1204
Reardon & Sons Co., John	20773	24	376
Reese, Augusta Bliss	62424	29	565
Remco Steamship Co	57728	30	579
Reynard Corporation [3]	67386 70795	30	451
Reynolds Cattle Co	68445 71463	31	206
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
Richardson, Amy S., executrix [4]	64023	31	245
Richardson, Charles W., estate of [4]	64023	31	245
Riggs National Bank [5]	30903	17	615
Roach Studios, Inc., Hal	61750	31	828
Robertson, Callie E	42496	28	635
Robertson, R. R	42497	28	635
Robson, Clara P., estate of	26645	25	949
Rodeo-Vallejo Ferry Co.[6]	36411 48528	24	936
Rogers, Brown & Crocker Bros., Inc	67581	32	207
Rosenberg, Louis	27626	24	18
Rosenbloom Finance Corporation [7]	35778 40903	24	763
Roth, Gorton	22568	26	631
Roy & Titcomb, Inc	29138	24	969
Ruiz, M	67097	30	746
Russell, C. C	46060	24	506
Russell, Mrs. C. C	46061	24	506
S.			
St. Johns Investment Co	50613	30	973
St. Louis Union Trust Co. et al., cotrustees	65675	30	370
St. Louis Union Trust Co., executor [8]	45966	27	318
Sanders, W. C	26651	25	949
San Marcos Compress Co	49304	31	273

[1] Acquiescence in that part of decision relating to deductibility of loss sustained in 1924 from sale of residence.
[2] Acquiescence relates to issue whether petitioner was taxable in 1923 as a trust or as an association.
[3] 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.
[4] Estate tax decision.
[5] Nonacquiescence published in Cumulative Bulletin X-2, page 99, withdrawn.
[6] Acquiescence relates to deduction of contribution to Victory Highway Association.
[7] Acquiescence relates to holding of Board that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[8] 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.
San Martinez Oil Co	37447 43121	25	218
Sappington, G. Ridgely	51944	25	1385
Savings Feature of the Relief Department of the Baltimore & Ohio R. R. Co	59486 61156	32	295
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.[1]	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 [2]	45429	28	289
Selbert, Ltd	57059	29	319
Sells Sporting Goods Co	20771	24	376
Shaffer, C. B.[3]	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
Shepherd, Cettie G., estate of [4]	69166	32	208
Simcoe Realty Co.[5]	35720	17	213
Simmons, II, et al., Edward C., executors	47210	32	320
Simmons, Edward H	47211	32	320
Simmons, George W., estate of	47212	32	320
Simmons et al., Richard W., executors	47212	32	320
Simmons, Wallace D., estate of	47210	32	320
Simms Oil Co.[6]	61497	28	1106
Simms Petroleum Co.[6]	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
Sipes, Jasper	72605	31	709
Smathers, E. E., estate of [7]	29260	29	1350
Smathers Power Typewriter Co	43968	28	327
Smith et al., Elizabeth D., executors	39291 49668	25	291
Smith, I. N., estate of	39291 49668	25	291

[1] Acquiescence relates to inventory issue.

[2] 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.

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

[4] Estate tax decision.

[5] 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.

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

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Sneed, Jr., J. T.[1]	45694	30	1121
South Memphis Land Co	44500	27	897
Southard, Jennie	42592	27	554
Southern Railway Co. et al.[2]	21481 29951 37887– 37898	27	673
Spangler, Georgia M	56320	29	263
Spangler, J. W	56321	29	263
Sprague-Sells Corporation	42006 42434	30	1165
Sprague & Son Co., C. H.[3]	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
Starr, Frank C	69259	31	671
Stauffen, Theodora B	26756	25	513
Stearns, Robert L	37573	24	1013
Steege, W. E	67098	30	746
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.[4]	43416	23	610
Stock Yards Bank of Cincinnati	41085	25	964
Stockham, Elijah	22569	26	631
Stone et al., Irving K., executors and trustees [5]	43830	26	1
Stone, Irving Lee, estate of [5]	43830	26	1
Stoneman, David	27627	24	18
Storey, H. M	62813	31	1126
Straubel, F. L. G	56867	29	516
Stromeyer, Irene	55341	28	472
Stromeyer, William A	55342	28	472
Strong, Harold C.[6]	38576	25	1351
Stuart, Charles	53796	29	605
Stuart, Jr., Willoughby H	73869	32	573

[1] Acquiescence relates to Board's holding that bonuses should be taxed as separate or community property in accordance with the classification of the properties under the lease; and issue in connection with assessment of deficiency for 1925.

[2] 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?

[3] Acquiescence relates to inventory issue.

[4] 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.

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

[6] 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.
Sugar Creek Coal & Mining Co	73758	31	344
Sullivan, Eugene C	29389	26	1359
Summerfield Co	58711	29	77
Sunburst Oil & Refining Co	45979	23	829
Sweinhart, James	54784	29	1179
T.			
Talbot, J. A.[1]	36191	23	792
Texas Irrigation Co.[2]	40083, 41346	24	958
Thiele, Walter	67506	32	134
Thompson, Edward W	51103	28	657
Thompson, W. L	51104	28	657
Three Rivers Security Corporation	44857, 44880	30	636
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
Torrens, James H.[4]	53778	31	787
Tracy, David E., estate of	54828, 62982	30	1156
Tracy et al., Gertrude Hemler, trustee	54828, 62982	30	1156
Tracy, William R	45513	25	1055
Tricou, Sallie S	28093, 40258	25	713
Trinity Drilling Co.[5]	61498	28	1106
Trout, H. W	39020	27	1210
True, Edward C	68501	31	671
Turbeville, Allie M	43733, 47900, 55553, 64334, 64560	31	283
Turner, Kathleen M.[6]	22340	27	377
Turrish, Henry	44742	24	913
Twin Bell Oil Syndicate	29518	26	165

[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 in Board's decision in so far as it holds that petitioner was not taxable on any part of the proceeds of the 100 shares preferred stock given by him to his four sons in 1928.
[5] Acquiescence relates to basis for computing depreciation on assets acquired by Simms Oil Co. in 1925 from Clayton Oil & Refining Co.
[6] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
U.			
Ulster & Delaware R. R. Co	28927	25	109
Union Lard Corporation	20769	24	376
Union Pacific R. R. Co. et al [1]	35639–35649, 35684, 35685, 40060, 40061, 40062	26	1126
Union & Peoples National Bank of Jackson et al., administrators [2]	70456	30	1277
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 [2]	31869	23	663
Walker Products Corporation	44856	30	636
Ward Bros. Co	30992	24	989
Warner Co.[3]	53039, 53040, 59190	26	1225
Warner, Ralph C	62510	31	1126
Washington Market Co	43912	25	576
Watson, Jr., John H	53414	27	463
Wayne County & Home Savings Bank [4]	49144	26	761
Weeks, Alanson	63916	31	627
Weis, Samuel W	62126	30	478
Wheelock, R. L	37806	28	611
Wheelock, Mrs. R. L	37805	28	611
White Oak Transportation Co.[5]	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, L. H	58789	31	580
Williams, W. W	46062	24	506
Williamson, Alexander B	40231, 43972	25	154
Williamson, Archibald (Lord Forres)	40229, 43973	25	154

[1] Acquiescence relates to donations issue; amortization of discount on bonds issued prior to 1913; computation of tax for 1920.
[2] Estate tax decision.
[3] Nonacquiescence published in Cumulative Bulletin XII–1, page 24, withdrawn.
[4] Nonacquiescence published in Cumulative Bulletin XI–2, page 18, revoked.
[5] Acquiescence relates to inventory issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Wilson & Co., Inc., of California	20768	24	376
Wilson & Co., Lee	33826	25	840
Wilson Commission Co	20767	24	376
Wilson Furs, Inc	57058	29	319
Wilson, George S., estate of [1]	50828	30	1136
Wilson Shipbuilding Co.[2]	34337	25	182
Winne, Walter G	60900	27	369
Wood, Fred T	38808	27	162
Wood Lumber Co., E. K	23605 24156	25	1013
Woodard, John S.[3]	71962	30	1216
Woodward, Arthur P	54741 60227	32	100
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] Estate tax decision.
[2] Acquiescence does not relate to issue 5 of decision.
[3] Acquiescence relates to reorganization issue.

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 Central Life Insurance Co.[2]	30133 31998 56024 63436	30	1182
American Ideal Cleaning Co	49205	30	529
American Railways Co	67662	30	939
American Refrigerator Transit Co	64782 67602 72861	31	465
American Seating Co.[3]	14676	14	328
Ames, Muriel Oakes	71811	30	516
Ames, Jr., Ward	49817	27	624
Apartment Corporation	42024	26	849
Appleby, Francis S	73089	31	533
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 [4]	32177	23	1311
Ballinger, Walter F., estate of [4]	32177	23	1311
Baltimore & Ohio R. R. Co.[5]	37239	30	194
Bank of California, National Association	55537 60699	30	556
Bankers Trust Co., trustee	32459	24	10

[1] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[2] Nonacquiescence relates to issue whether certain funds denominated "Insured's personal benefit fund" were reserve funds required by law; and issue whether the petitioner's liability on outstanding unsurrendered unpaid coupons constitutes a reserve fund required by law.
[3] Acquiescence published in Cumulative Bulletin VIII-2, page 2, withdrawn.
[4] Estate tax decision.
[5] Nonacquiescence relates to deductibility as expense for year 1920 of amount for maintenance of ways and structures.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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.[2]	19128	17	213
Bell & Sons, Samuel	38056 41647 45616	22	793
Beresford, Vivien Helen de la Poer, estate of [3]	67259	31	329
Berkeley Hall School, Inc	47415	31	1116
Bindley, Mary M., estate of	58871	28	113
Blair, Cecil Charles	69803	29	1096
Blair, Edward T	42313 63741	31	1192
Bliss, Sydney R	55902	26	962
Bliss, Valentine	53422	26	732
Blum, Bessie	52221	29	580
Blum, David	52220	29	580
Board of Fire Underwriters of the City of Duluth	43150	26	860
Boca Ceiga Development Co	40446	25	941
Boehringer, Rudolph [4]	49891	29	8
Boston Safe Deposit & Trust Co. et al., executors [3]	49272	30	679
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
Brooklyn Radio Service Corporation	61229	31	269
Brooks, Reginald	68560	31	70
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
Browning, John N	72713	31	927
Browning, S. P	72714	31	927
Buck, John A., estate of [5]	32584 44153 44684	25	780
Buck et al., Mary M., executors [5]	32584 44153 44684	25	780
Buffalo Union Iron Furnace Co.[6]	16075 16076	23	439

[1] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[2] Nonacquiescence in issue as to whether petitioner is entitled to deduction for amortization of the Lee tract warehouse for 1918.
[3] Estate tax decision.
[4] Nonacquiescence relates to issue involving reorganization.
[5] Estate tax decision; nonacquiescence relates to deduction of amount of a claim filed against the estate and allowed by probate court.
[6] Nonacquiescence relates to issue regarding deduction from gross income of fiscal year ended April 30, 1919, of reserve for relining blast furnaces.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Bullock, George [1]	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.[2]	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 Estate Co	47444 53489	31	607
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
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.[3]	24837	25	499
Central Union Trust Co. of New York, executor	31736	25	757
Champion, David J.[4]	55569 63818	27	1312
Champion, T. Pierre [4]	55568	27	1312
Chapman, C. F	52496	28	53
Charavay, Marius A	70005 71592	29	1255
Chemical National Bank of New York	45604	30	178
Chenowith, H. C	38349	26	301
Chicago Dock & Canal Co	48268	32	231
Chicago & North Western Ry. Co.[5]	36343	22	1407
Chidlaw, Harry K	69782	29	1096
Clark, Percy H	65177	31	1082
Clark Thread Co.[6]	38903 47974	28	1127
Cleland Estate Co., Inc., Henry A.[7]	33585 40890 51197	29	436
Coastwise Transportation Corporation	39916	28	725

[1] Nonacquiescence relates to issue 1 of decision.
[2] Acquiescence published in Cumulative Bulletin X-1, page 10, withdrawn.
[3] Nonacquiescence relates to issue regarding Board's jurisdiction of subsidiaries.
[4] Nonacquiescence relates to issue whether redemption of stock was equivalent to taxable dividend.
[5] Nonacquiescence relates to following issues: Undermaintenance; profit and loss on bonds retired; amortization of bond discount.
[6] Nonacquiescence relates to issue respecting depreciation.
[7] Nonacquiescence relates to basis for determination of gain or loss on the sale of property devised subject to a life estate.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Cobleigh, Margaret Edwards, estate of [1]	40765	24	176
Cochrane, David K.[2]	60428	26	1167
Columbia Pacific Shipping Co	50968	29	964
Columbus Brick & Tile Co.[3]	42707	26	794
Commercial Garage Co	41646	22	793
Commercial Investment Trust Corporation [4]	43495 50051	28	143
Community Bond & Mortgage Corporation	43784	27	480
Community Telephone Co	77568	32	164
Community Water Service Co	77560	32	164
Cone, Edward K	58777	26	1401
Connelly, James A.[5]	14081 45833 46267 51967 60566 66948	30	331
Connelly, L. B.[5]	44083 45834	30	331
Connelly, Mary B.[5]	44082	30	331
Cook, Elizabeth E.[6]	38579	25	1351
Cook, Sam	35014	25	92
Cooper, A. T.[7]	3144	7	798
Cosmopolitan Bond & Mortgage Co.[8]	44617	30	717
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.[9]	26874 26875 28792	26	234
Cuppia, Jerome C	58545	26	1401
Curlee, Shelby H., trustee	48833	28	773
D.			
Davidson, Watson P	46486	27	158
Davis, C. R.[10]	10299 32950	10 20	1233 931
Davis, Frederick H	37324	24	405
Davis, Thomas L	37395	24	405
Degener, John F., estate of [1]	38500	26	185
Degener, Jr., et al., John F., executors [1]	38500	26	185
De Lisser, Horace, estate of [11]	2459	2	102

[1] Estate tax decision.
[2] Acquiescence published in Cumulative Bulletin XII-1, page 3, revoked.
[3] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.
[4] Nonacquiescence relates to deduction in 1926 of excess of market value over sale price of stock sold to employees.
[5] Nonacquiescence relates to issue involving the amounts paid to stockholders by J. G. Curtis Leather Co. upon cancellation of certain stock.
[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 VII-1, page 1, withdrawn.
[8] Nonacquiescence relates to issue involving commissions charged on real estate loans.
[9] Nonacquiescence relates to expenditures for mine equipment.
[10] Acquiescence published in Cumulative Bulletin X-1, page 17, withdrawn.
[11] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 18, recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
de Mille, Cecil B.[1]	52995, 61291, 65122, 71951	31	1161
de Mille Productions, Inc., Cecil B.[1]	52996, 61290, 65123	31	1161
de Mille Productions, Inc., William C	53108, 61321	30	826
Dennett, Marie G.[2]	72023	30	49
Depew, Ganson	50860	27	515
Des Moines Improvement Co.[3]	8573	7	279
Dohrmann, Andrew B. C	20658	19	507
	23969	19	466
Dolomite, Inc	60661	28	1270
Donner, Carroll E	60237	32	364
Donner et al., Carroll E., executors	60236	32	364
Donner et al., Carroll E., guardians	60235	32	364
Donner, Joseph W	60236	32	364
Donner, Jr., Joseph W	60235	32	364
Dort, J. Dallas, estate of [4]	44735	26	1321
Douglass, Howard W., estate of [4]	40031	30	1143
Drawoh, Inc	45014	28	666
Drumheller, George	41515, 45752	27	209
Duff, Robert C.[5]	37552	23	1342
Dunham et al., Lucy Belle, executors [4]	46603	26	286
Dunham, Mary Virginia, estate of [4]	46603	26	286
E.			
East Coast Oil Co., S. A	58180	31	558
Edison Securities Corporation	52662	29	483
Edward Securities Corporation	71208	30	918
Eifert, Earl C	45781	23	1351
Eldridge, Alice H.[6]	64779	30	1321
Eldridge, A. S.[6]	64778	30	1321
Elkins, Hallie D.[7]	39255	24	572
Elkins, William L., estate of	56449	28	367
Emery, Mary M., estate of [8]	40899	25	585
Equitable, Trust Co. of New York, ancillary administrator [4]	67259	31	329
Erb et al. Ray L., executors [9]	29260	29	1315
Ethel D. Co	32032	27	25
Evening Star Newspaper Co	61870, 66855	28	762
Everhart, James William	26675	26	318

[1] Nonacquiescence does not relate to the case of Constance A. de Mille, Docket 71952, which was disposed of by stipulation.

[2] 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.

[3] Acquiescence published in Cumulative Bulletin VII-1, page 9, withdrawn

[4] Estate tax decision.

[5] Nonacquiescence relates to issue 2 of decision.

[6] Nonacquiescence relates to deduction of loss in transfer of securities to a corporation in which petitioner owned all the stock except qualifying shares.

[7] Acquiescence published in Cumulative Bulletin XI-2, page 3, revoked

[8] Acquiescence published in Cumulative Bulletin XI-2, pages 3 and 6, revoked.

[9] 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.
F.			
Fairmount Cemetery Association	30925, 42811	25	1272
Farmers Cotton Oil Co	42679	27	105
Farmers Life Insurance Co.[1]	43317	27	423
Fawsett, Charles F	72057	30	908
Feldman, Henry O	45359	28	236
Fidelity & Columbia Trust Co., trustee	65041, 65042	30	562
Fidelity Union Trust Co. et al., executors [2]	72236	31	171
Field, Marshall	36908	26	116
Fifth Street Building	16627, 29264, 45537	24	876
First National Bank in St. Louis [3]	44278, 48078	23	1124
First National Bank of Boston, administrator [2]	44746	25	612
First Peoples Trust	45403	26	551
Fisher & Fisher, Inc	60929	32	211
Fisher, Irving	61622	30	433
Fitzgerald, Thomas	62075	29	1113
Fleitmann, William M., estate of [3]	28449	22	1291
Fleitmann, Jr., et al., William M., executors [3]	28449	22	1291
Fleming, William	61042, 65676	31	623
Fleming, Mrs. William	61043, 65677	31	623
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.[4]	43086	26	1328
Founders Associates	62684	29	326
Fox, Fontaine [5]	71084	30	451
Fox River Paper Co	20878	28	1183
Franks, Jack M	53685	32	260
Fuhlage, Alfred E.[6]	61754	32	222
Fuller, Alvan T	73759	31	154
Furniture Corporation of America, Ltd	72800, 72801	30	878
G.			
Gale, Emily A	61672	27	837
Gamble & Stockton Co.[7]	42707	26	794
Garcin, Edward H	21657	22	1027

[1] Nonacquiescence does not relate to issue in connection with option payment received for purchase of land.
[2] Estate tax decision.
[3] Acquiescence notice published in Cumulative Bulletin X-2, pages 23 and 24, recalled.
[4] Nonacquiescence relates to deductions in 1924 and 1925 on account of losses resulting from alleged sales of securities.
[5] 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.
[6] Nonacquiescence relates to issue whether redemption of shares of stock represents payment in partial liquidation of a corporation or a taxable dividend.
[7] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Gardner, Charles E.[1]	38575	25	1351
Garrie, Daniel T., estate of	31736	25	757
Garvan, John Joseph, estate of [2]	44746	25	612
Gary, Virginia V., executrix [2]	40031	30	1143
Gassner, Louis [3]	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.[3]	5389	4	1073
Goldschmidt et al., Georgette, executors [4]	16138	14	1010
Goldschmidt, Henry P., estate of [4]	16138	14	1010
Graham, M. H	38335	26	301
Grant, Helen E	62029 65577 68324	29	760
Great Western Power Co. of California	48617	30	503
Green, Robert D.[5]	53647	24	719
Greenleaf Textile Corporation	46746	26	737
Gregory, Evelyn F	55299	27	223
Griffis, Stanton [1]	38577	25	1351
Grosvenor, Theodore P	60381	31	574
Guitar Trust Estate	35102	25	1213
Gulf Coast Irrigation Co.[6]	33694 40081 41343	24	958
Gulf, Mobile & Northern R. R. Co.[7] [8]	24887 42150	22	233
H.			
Hale, R. W	67750	32	356
Hale, W. T	67751	32	356
Hall, Harry E. R., estate of	70004 71598	29	1255
Hall, Martha M	64501	31	1013
Hancock, G. Allan	36867	25	607
Hanson, Charles C	15398	23	590
Harbison, Ralph W.[9]	54346	26	896
Harbison, William Albert [9]	54347	26	896
Harlan, George H	60500	30	804
Harris, Allen [10]	10980	10	1374
Harris, Simon	31632	24	512
Harrison, James M	66193	30	966

[1] 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.

[2] Estate tax decision.

[3] Acquiescence published in Cumulative Bulletin X-1, pages 24, 27, withdrawn.

[4] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 27, recalled.

[5] Nonacquiescence relates to transaction 5.

[6] Nonacquiescence relates to affiliation issue.

[7] 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.

[8] 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.

[9] Acquiescence published in Cumulative Bulletin XII-1, page 6, withdrawn.

[10] Acquiescence published in Cumulative Bulletin X-1, pages 24, 27, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Hazeltine Corporation	42277, 47011, 51931, 60313	32	4
Hedrick, J. T	33533	24	444
Heller, B. G	40634	25	259
Hemphill, Clifford [1]	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 [2]	29399	24	1144
Hill et al., Paul F., executors [2]	29399	24	1144
Hinds, Walter DeWitt, estate of [2]	49860	32	254
Hodges, Agnes Wiley, executrix	38336	26	301
Hodges, W. L., estate of	38336	26	301
Hodges, W. L., trustee	38337	26	301
Holding Corporation, O. P. P	60674	30	337
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
Honnold, W. L	55211	30	774
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. [3]	12052	22	51
Houston, George T. [3]	13104, 22008	22	51
Houston, Horace K. [3]	22009	22	51

[1] 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.

[2] Estate tax decision.

[3] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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
Hummel-Ross Fibre Corporation	59865	31	451
Hunter, G. W., estate of[2]	33564	25	1078
Huntington, Henry E., estate of[3]	45429	28	289
Hutchison Coal Co	34939	24	973
Hyde, James H	65495 69952	31	256
I.			
Illinois Life Insurance Co	67201	30	1160
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
Johnson, A. M	61345	32	156
Johnston, Hugh McBirney, individually and as executor and trustee	22028	27	1123
Jones, Bessie R	58285	27	171
Jones, Chester Addison[6]	50206	31	55
K.			
Kansas City Southern Ry. Co. and affiliated companies[7]	22668 35527 35528 35529 35530 35531	22	949
Keener Oil & Gas Co	60789	32	186
Keeys, Edward L	45360	28	236
Kelly, Francis J., executor[2]	70899	31	941
Kelly, Rose A., estate of[2]	70899	31	941
Kerbaugh, Henry S	68976	29	1014
Kerrigan, Arthur L	58794	26	1401
King, John M	41549	26	1158

[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 as to issue regarding deduction for depletion.

[7] 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.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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
Krause et al., Frances A., executors [2]	49860	32	254
Krug, George F	46713	30	1375
Krull, Francis [3]	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
Langworthy, Marjorie C.[4]	71961	30	1216
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 [3]	7435	8	298
Liebes & Co., H	28544 35038	23	787
Linderman, William S., executor	58871	28	113
Littauer, Eugene, estate of [5]	51858	25	21
Littauer et al., Lucius N., executors [5]	51858	25	21
Livingood, Charles J., executor [6]	40899	25	585
Lloyd, Walter [7]	48120	30	331
Loffland, J. M.[8]	13425	10	14
Loffland, T. S.[8]	13426	10	14
Louis, Cora K	49179	29	1200
Louisville Trust Co. et al., trustees	65040	30	562
M.			
Malernee, D. B	63553	31	662
Mallory, L. W., estate of	33231	27	750
Manchester Coal Co	33392	24	577
Manhattan Life Insurance Co	60827	28	129
Manus-Muller & Co., Inc	59778	30	1015
Margay Oil Corporation	44891	26	199
Markham Irrigation Co.[9]	41344	24	958
Marvin, Walter S.[10]	38578	25	1351

[1] Acquiescence published in Cumulative Bulletin VII-1, page 17, withdrawn.
[2] Estate tax decision.
[3] Acquiescence published in Cumulative Bulletin X-1, pages 36, 38, withdrawn.
[4] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.
[5] 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.
[6] Acquiescence published in Cumulative Bulletin XI-2, pages 3 and 6, revoked.
[7] Nonacquiescence relates to issue involving the amounts paid to stockholders by J. G. Curtis Leather Co. upon cancellation of certain stock.
[8] Nonacquiescence relates to depreciation allowable under the Revenue Act of 1913; acquiescence published in Cumulative Bulletin VIII-1, page 27, withdrawn in so far as it applies to this issue.
[9] Nonacquiescence relates to affiliation issue.
[10] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Matagarda Canal Co.[1]	40082, 41345	24	958
Matheson, Hugh M	71353	31	493
McCabe, Ben C	69783	29	1096
McCabe, George H., estate of	69779	29	1096
McCabe, James	69778	29	1096
McCabe, James Roscoe	69781	29	1096
McCabe, Milton Mathew	69777	29	1096
McCabe, William John	69780	29	1096
McCabe, Jr., William John	69784	29	1096
McCormick et al. Cyrus H., trustees	44139	26	1172
McCrory, Luke W., trustee	32444	25	994
McCurdy, William H., estate of [2]	67681	31	379
McGrath, James W. and Antonette	65040	30	562
McGrath, Marie Louise	65042	30	562
McGrath, Robert E	65039	30	562
McIlvaine et al., William B., trustees	52931, 57226	29	304
McLister, Frank	48562	27	155
McMillan, William Northrup, estate of [3]	45966	27	318
Meyer, Robert R	44032	27	44
Michigan Central R. R. Co.[4]	19930	28	437
Miglietta, Olga K	36379	25	243
Miles Realty Co	51394	31	443
Miller, Albert	45368	28	236
Mills, J. H. Goadby	58797	26	1401
Missouri State Life Insurance Co.[5]	58241, 62386	29	401
Mitchell, Oscar [6]	41680, 41874, 54673	27	101
Mitchell, William	58799	26	1401
Mitten Management, Inc	42494, 53990, 61861	29	576
Modjeski, Ralph	49517	28	1051
Moore, Alma V	64790, 68219	30	1197
Moore Bread Co	41645	22	793
Moore, G. H	38351	26	301
Moore, John R	64791, 68218	30	1197
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

[1] Nonacquiescence relates to affiliation issue.
[2] Estate tax decision.
[3] Estate tax decision; nonacquiescence as to question of situs.
[4] 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.
[5] 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.
[6] Nonacquiescence relates to issue regarding deduction from income of sprinkling tax.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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 [1]	44652	27	1070
Moser, Carolyn L	55937	29	216
Mosser, Charles F	55399	27	513
Mott, Charles Stewart	51585, 57506	30	1040
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.[2]	50320	29	139
National Contracting Co.[3]	24520	25	407
National Grange Mutual Liability Co	73099	31	666
National Land & Construction Co	40126	25	562
National Pipe & Foundry Co.[4]	32997	19	242
Neal et al., J. Henry, trustees	45403	26	551
Neill, James [5]	9290	8	299
Nelms, Frank Haywood	51887	27	65
Nelms, Mrs. Frank Haywood	51888	27	65
Netcher, Charles, estate of	42435	31	41
Newbury, Mollie Netcher, trustee	42435	31	41
Newport Co	35431	24	1246
New York Central R. R. Co.[6]	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.[7]	34945	24	307
Northport Shores, Inc	64500	31	1013
Noyes, Jansen [8]	38574	25	1351

[1] Estate tax decision.

[2] 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.

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

[4] 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.

[5] Acquiescence published in Cumulative Bulletin X-1, page 46, withdrawn.

[6] 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.

[7] Nonacquiescence relates to statute of limitations issue.

[8] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
O.			
Oakman et al., Mamie R	42917	24	84
Ogden, Hugh W	23943	24	1239
Old Mission Portland Cement Co	38853	25	305
Old National Bank in Evansville, executor [1]	67681	31	379
Olinger Mortuary Association	36502	23	1281
Oliver, Olive Hume	65640	30	1380
Olmsted, George W.[2]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[2]	44089 45746 48143 54713 60745	30	331
Omaha Coca-Cola Bottling Co	52641	26	1123
O'Rear, E. C.[3]	32335	28	698
Oregon Terminals Co	68893	29	1332
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 Coast Biscuit Co. et al.[4]	71588	32	39
Pacific Nash Motor Co	45169 45170	23	953
Pacific Rock & Gravel Co	28776	26	296
Parker, Clara B., executrix [5]	58604	31	644
Parker et al., Emily King, trustees [1]	53320	30	342
Parker, George D., estate of [5]	58604	31	644
Parker, Herbert L., estate of [1]	53320	30	342
Parriott, F. B.[6]	30989	28	917
Peabody, Cornelia Haven, estate of [1]	39647	24	787
Peabody et al., Stephen, executors [1]	39647	24	787
Petaluma & Santa Rosa R. R. Co.[7]	13830	11	541
Phelps et al., Luis James, executors [8]	50336	27	1224
Phillips, William S	24446 31769	24	98
Pierce, Edward A	58796	26	1401
Pittsburgh & Lake Erie R. R. Co.[9]	42764	28	259

[1] Estate tax decision.
[2] Nonacquiescence relates to issue involving the amounts paid to stockholders by J. G. Curtis Leather Co. upon cancellation of certain stock.
[3] Nonacquiescence relates to issue regarding amount of loss sustained by petitioner by reason of destruction by fire of his residence and furniture.
[4] Nonacquiescence with respect to deduction of amounts expended in connection with dissolution and liquidation of a corporation.
[5] Nonacquiescence relates to issue regarding existence of George D. Parker Co. partnership.
[6] Nonacquiescence relates to interpretation of article 1567, Regulations 45, as applied to exchange of stock of Pittsburgh Texas Oil & Gas Co.
[7] 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.
[8] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[9] Nonacquiescence relates to rental interest question and Board's decision with respect to portion of mail pay received in 1921.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Plains Realty Co	48977, 65492, 67197	31	412
Plant, Henry Bradley	43889, 48984, 52094, 55659, 60923	30	133
Plettner, Maude Brown	33345	25	631
P-M-K Petroleum Co.[1]	50576, 54779	24	360
Portland Furniture Manufacturing Co	61809, 70367	30	878
Post & Sheldon Corporation	56695	28	26
Price, Harry	70008, 71596	29	1255
Proctor Shop, Inc.[2]	58909, 66268	30	721
Prosperity Co., Inc.[3]	45896, 59468	27	28
Prouty, Olive H	57829	30	1068
Pryor & Lockhart Development Co	38872, 45668, 51326	26	1054
Purse, James N	54124	27	725
Q.			
Quinn, Porte F	67156	31	142
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
Reybine, Alpheus, estate of [6]	60660	31	314
Reybine, Martha H., executrix [6]	60660	31	314
Reynard Corporation [7]	67386, 70795	30	451
Richardson et al., Forrest, executors [6]	44652	27	1070
Richfield Oil Co	42921	25	101
Riffel, Henry [8]	3576	3	436
Riley, Anna E	61066	29	160

[1] Nonacquiescence relates to first issue of decision.
[2] Acquiescence published in Bulletin XIII–33, page 1, revoked.
[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] Estate tax decision.
[7] 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.
[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.
Riley Stoker Corporation	36584	26	749
Rio Grande Land & Canal Co	71350	31	507
Rio Grande Reservoir & Ditch Co	71351	31	507
Roberts, Walter B	37534	24	405
Robertson, J. G	49552 52370	28	53
Rockwood, George O	72711	31	927
Rockwood, William M	72712	31	927
Rodeo-Vallejo Ferry Co.[1]	36411 48528	24	936
Rorimer, Louis	58850	27	871
Rosenbloom Finance Corporation [2]	35778 40903	24	763
Ross, Blanche S.[3]	51171	28	39
Ross, Walter L	73282	30	562
Rosser, E. M., executor [4]	40765	24	176
Roth, W. A.[5]	45065	22	587
S.			
St. Louis Southwestern Ry. Co	13319 27768 33938	24	917
St. Louis Union Trust Co., executor [6]	45966	27	318
Salomon, Leon [5]	3725 12231	4 8	1109 979
San Carlos Milling Co., Ltd.[7]	39525	24	1132
Sand Springs Ry. Co	32438 32439	21	1291
Sather Lease—Thomas Sather & Co	31979	26	86
Schoen, Louis	56776	30	1075
Schwartz-Kasser Improvement Co	36876	26	322
Scott, Thomas B., estate of [8]	50336	27	1224
Scovell, Clinton H., estate of [4]	49272	30	679
Seaconnet Coal Co.[9]	18089	24	307
Seatree, William Ernest	22094 33640	25	396
Security First National Bank of Los Angeles et al., executors [10]	45429	28	289
Security Savings & Commercial Bank	59523	29	176
Selwyn Eddy Co	21612	25	1341
Shaffer, C. B.[11]	29259	29	1315
Shaffer, John C	50086 59511	28	1293
Sheaffer Penn Co., W. A	36604	27	1056
Shepherd Syndicate	48332 51327	26	1062

[1] Nonacquiescence relates to first issue of decision.
[2] Nonacquiescence does not relate to the Board's holding that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[3] Gift tax decision.
[4] Estate tax decision.
[5] Acquiescence published in Cumulative Bulletin X–1, pages 56, 57, withdrawn.
[6] Estate tax decision; nonacquiescence as to question of situs.
[7] 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.
[8] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[9] Nonacquiescence relates to statute of limitations issue.
[10] 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.
[11] 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.
Shlenker, Simon J	58801	26	1401
Silberblatt, Solomon	46335	28	73
Skewes-Cox, Edith Page	61669 68335	29	167
Skiff, Frank V.[1]	51173	28	39
Small's, Inc	53791	24	686
Smathers, E. E., estate of [2]	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
Sneed, Jr., J. T.[3]	45694	30	1121
Snyder, Inc., H. S. & M. W	36686	26	692
Southern California Rock & Gravel Co	30898	26	296
Southern Railway Co. et al.[4]	21481 29951 37887– 37898	27	673
Spencer, George Frinck, estate of [5]	72236	31	171
Speyer, James	56435	30	517
Sprague & Son Co., C. H.[6]	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 [7]	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.[8]	43416	23	610
Stewart, John B	57531	29	809
Stewart, William Rhinelander, estate of [9, 10]	67776	31	201
Stewart, Jr., et al., William Rhinelander, executors [9, 10]	67776	31	201
Stifel, Arthur C	60738	29	1145
Stifel, Edward W	60739	29	1145

[1] Gift tax decision.

[2] 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 a part of the sale price taxes of the partners paid in 1920 by the vendee.

[3] Nonacquiescence relates to issue whether certain interest in real estate situated in Texas was acquired by petitioner prior or subsequent to his marriage; and that part of decision which holds that delay rentals received are community income notwithstanding that the lands from which they arise may be the separate property of either spouse.

[4] Nonacquiescence relates to issues involving additional compensation, rental interest on additions and betterments, and back mail pay for use of properties during Federal control.

[5] Estate tax decision.

[6] Nonacquiescence relates to statute of limitations issue.

[7] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 67, recalled.

[8] 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.

[9] Estate tax decision; nonacquiescence relates to fair market value of an undivided or fractional interest in certain real property.

[10] Estate tax decision; nonacquiescence relates to fair market value of 3,639 shares of stock of Rhinelander Real Estate Co. as of September 4, 1929. Acquiescence as to this issue published in Bulletin XIV-7, page 1, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Stifel, Henry G	60740	29	1145
Stine, Dollie M	62694	32	482
Stine, M. Josephine	62695	32	482
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 [1]	43830	26	1
Stone, Irving Lee, estate of [1]	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.[2]	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.[3]	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 [4]	64444	27	220
Taylor, Jr., et al., H. Seldon, executors [4]	64444	27	220
Taylor, Jessie Carter	51891	27	65
Taylor, Judson L	51892	27	65
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.[5]	40083 41346	24	958
Texas Pipe Line Co	59457	32	125
Thatcher & Son, John	56888 65545	30	510
The Hub, Inc	46298	26	1201
Thieman, Mrs. Leo	65041	30	562
353 Lexington Avenue Corporation	65089	27	762
Tide Water Oil Co	39936	29	1208
Tillotson Manufacturing Co	44167	27	913
Titus, C. Dickson	20705	24	36
Todd, Willis	37536	24	405
Tolerton & Warfield Co.[6]	45320	23	892
Torrens, James H.[7]	53778	31	787
Towers & Sullivan Manufacturing Co	40508	25	922

[1] Estate tax decision; nonacquiescence relates to issue involving property transferred by trust agreement.
[2] 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.
[3] Nonacquiescence relates to depreciation allowance in computing loss in sale of a boat.
[4] Estate tax decision.
[5] Nonacquiescence relates to affiliation issue.
[6] 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.
[7] Nonacquiescence relates to the trust and dividend issues.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Transatlantic Shipping Co., Inc	61932	31	938
Travelers Bank & Trust Co	62834 71349	31	507
Travelers Fire Insurance Co	62833 71348	31	507
Travelers Indemnity Co	57916 62832 71347	31	507
Trojan Oil Co	33757	26	659
Turney, W. W	65258	31	308
Turney, Mrs. W. W	65257	31	308
Tuttle, Carl B	70558	31	782
Twin Bell Oil Syndicate	45052	26	172
Tyler et al., Sidney F., trustees	56449	28	367
U.			
Uihlein, Joseph E	51234	30	399
Ullmann, Emanuel Solomon	56470	30	764
Ullmann, Jr., Joseph	56471	30	764
Ullmann, Samuel, estate of	56472	30	764
Ullmann et al., Theresa, executors	56472	30	764
Union Guardian Trust Co., executor [1]	44735	26	1321
Union Pacific R. R. Co. et al. [2]	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
Van Vorst & Co., C. B	70366	30	878
Vaughan, William W	67843	31	548
Voelbel, Jacob, estate of [3]	6009	7	276
Voelbel, Walter W., executor [3]	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. [4]	7359	4	915
Walters, John W	70010 71597	29	1255
Ward et al., Daisy M	62644– 62649	29	1251
Wardman, Harry	22348	24	102

[1] Estate tax decision.
[2] 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.
[3] Estate tax decision; acquiescence published in Cumulative Bulletin X–2, page 73, recalled.
[4] Acquiescence published in Cumulative Bulletin X–1, page 68, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Warner Collieries Co. of Delaware	34679	26	1047
Watab Paper Co	24773, 28082, 38685, 41733, 46076, 51387	27	488
Watson-Moore Co	62179	30	1197
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
Whipple, Frank H	57532	29	809
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
Wile, Edwin [2]	54451	31	787
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.[3]	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, Ellen Ayer	65211	29	1050
Wood Furniture Co., J. A	40565	24	564
Wood, Jeremiah	74090, 74688	31	1141
Woodard, John S.[4]	71962	30	1216
Woodward, George [5]	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
Zimmerman and wife, Calvin	71145	31	754
Zobelein, George	45352	28	236
Zobelein, Mrs. Edward	45353	28	236

[1] Nonacquiescence relates to statute of limitations issue.
[2] Nonacquiescence relates to the trust and dividend issues.
[3] Nonacquiescence relates to issue 5 of decision.
[4] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.
[5] Acquiescence published in Cumulative Bulletin X-2, page 78, withdrawn.

INCOME TAX RULINGS.—PART I.

REVENUE ACT OF 1934.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 22(a)–2: Compensation for personal services. XIV–1–7226
I. T. 2842

REVENUE ACT OF 1934.

The amount (2 per cent) deducted from the compensation of employees of carriers under the provisions of the Railroad Retirement Act (Public, No. 485, Seventy-third Congress, 48 Stat., 1283) for the purpose of establishing a retirement fund should be reported as taxable income, for Federal income tax purposes, in the return of the employee for the year in which the deduction is made.

The annuity received by a retired railroad employee is not subject to Federal income tax.

The taxpayer, who is an employee of the M Railroad Co., requests a ruling whether the amount (2 per cent) deducted from the compensation of employees of carriers under the terms of the Railroad Retirement Act should be included as income in his Federal income tax return.

The retirement system for railroad employees was established under an Act of Congress approved June 27, 1934 (48 Stat., 1283), and became effective August 1, 1934. Annuities are provided for employees who have attained the age of 65 years or have completed a service period of 30 years. With respect to contributions to the retirement fund, section 5 of the Railroad Retirement Act provides in part as follows:

SEC. 5. Each employee shall pay an employee contribution in a percentage upon his compensation. Each carrier shall pay a carrier contribution equal to twice the contributions of each employee of such carrier. * * * Until the board shall determine on a different percentage the employee contribution percentage shall be 2 per centum. Employee contributions shall be deducted by the carrier from the compensation of its employees and shall be paid by the carrier, together with the carrier contributions, into the Treasury of the United States quarterly or at such other times as ordered by the board.

Upon retirement the employee is paid an annuity based upon his service period. In the event of his death prior to or after retirement, an amount computed in accordance with the provisions of the Act, less any annuity payments received by him, is to be paid as he may have designated or to his legal representative.

Section 11 of the Railroad Retirement Act provides as follows:

SEC. 11. No annuity or death payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.

The transaction whereby the percentage of the employee's compensation is deducted by the carrier and paid into the railroad retirement fund is regarded, for Federal income tax purposes, as though the employee had actually received the compensation in full and thereafter expended 2 per cent of it as his contribution toward the purchase of an annuity payable to him upon his retirement. Consequently, the amount of the employee's contribution paid into the railroad retirement fund should be reported as taxable income in the return of the employee for the year in which the deduction is made. (Cf. T. D. 3112, C. B. 4, 76.) In other words, the amount of the employee's compensation to be reported in his return should not be reduced by the amount of his contribution.

In view of the specific provisions of section 11 of the Railroad Retirement Act, the annuity received by a retired railroad employee is not subject to Federal income tax.

ARTICLE 22(a)–3: Compensation paid other than in cash. XIV–17–7450 G. C. M. 14710

REVENUE ACTS OF 1928, 1932, AND 1934.

Allowances for living quarters, heat, and light received by officers in the Foreign Commerce Service of the Bureau of Foreign and Domestic Commerce do not constitute additional compensation for Federal income tax purposes.

G. C. M. 13442 (C. B. XIII–2, 119) is revoked.

Reference is made to G. C. M. 13442, in which it was held that allowances for living quarters, heat, and light received by officers in the Foreign Commerce Service of the Bureau of Foreign and Domestic Commerce stationed in a foreign country constitute additional compensation subject to Federal income tax.

It is now stated that officers in the foreign service of the Bureau of Foreign and Domestic Commerce are required by the nature of their official duties to be available for service at their respective posts 24 hours a day, including Sundays and legal holidays. It is also stated that incidents of vital commercial importance require the attention of members of the Foreign Commerce Service greatly in excess of the ordinary exigencies of office duty; and that commercial attachés are required to give counsel and advice to the American ambassador or minister with respect to commercial problems which may arise at any time.

In G. C. M. 12300 (C. B. XII–2, 30) it was held that allowances to foreign service officers of the State Department for living quarters, including heat, fuel, and light, are not compensatory in character and such allowances do not constitute income subject to Federal income tax. As indicated in that memorandum, the prime purpose of Congress in granting the allowances was not to give additional compensation to foreign service officers of the State Department, but to insure more complete service to the United States and its citizens trading or traveling abroad.

It appears from the information submitted that the situation in regard to the foreign service officers of the Bureau of Foreign and Domestic Commerce is substantially the same as that of such officers and employees of the State Department. This office, therefore, after reconsideration of the question has reached the conclusion that allowances for living quarters, heat, and light granted to officers of the foreign service of the Bureau of Foreign and Domestic Commerce must be treated in the same manner for Federal income tax purposes as allowances granted to the State Department officers and employees. Consequently, such allowances granted to foreign service officers of the Bureau of Foreign and Domestic Commerce do not constitute additional compensation for Federal income tax purposes.

G. C. M. 13442 (C. B. XIII-2, 119) is, therefore, revoked.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 22(a)-3: Compensation paid other than in cash. XIV-20-7492 G. C. M. 14836

REVENUE ACTS OF 1932 AND 1934.

Allowances for living quarters granted under the Act of June 26, 1930, to Treasury attachés and their subordinates in the customs agency service stationed in foreign countries should be excluded from gross income for Federal income tax purposes. G. C. M. 11453 (C. B. XII-1, 26) is revoked, together with the statement in G. C. M. 12300 (C. B. XII-2, 30) that the conclusion therein reached is not in conflict with G. C. M. 11453.

Reconsideration is requested of G. C. M. 11453, holding that allowances for living quarters granted under the Act of June 26, 1930 (46 Stat., 818), to an employee of the United States stationed abroad constitute income to the recipient for Federal income tax purposes.

The ruling in question (G. C. M. 11453), which involved compensation of an employee of the customs agency service, was based on the view that such allowances constitute additional compensation for services rendered and are primarily for the benefit of the recipient rather than for the benefit of the United States. In G. C. M. 12300, supra, it was held that allowances for living quarters granted to officers and employees in the foreign service of the State Department under the Act of June 26, 1930, are for the benefit of the United States and not for the benefit of the recipient. It was concluded, therefore, in that case that such allowances are not compensatory in character and are not subject to Federal income tax. Comparing the duties performed by officers and employees in the foreign service of the State Department with those performed by Treasury attachés and their subordinates in the customs agency service, it is contended that there exists no material difference in the character of the services performed by the respective groups, and that there is no basis for distinction for income tax purposes between the allowances which they receive for living quarters. The facts upon which this contention is based are set forth as follows:

Treasury attachés and their subordinates constitute a part of the customs agency service. This service is a mobile force and the officers thereof are

subject to transfer whenever the interests of the service require. (Article 1378, Customs Regulations of 1931.) Therefore, the circumstances under which they are employed render difficult the establishment of homes, and this is particularly true with respect to those officers in the foreign service.

The duties of Treasury attachés consist principally of investigations on matters entering into the administration of the customs and other laws affecting the importation of merchandise into the United States. These investigations cover a wide range of subjects and necessitate contact with exporters, manufacturers, and other business men, as well as foreign government officials. In order that such investigations may be made successfully, the quarters in which the Treasury attaché resides must be suitable and appropriate. Very frequently much information is obtained, directly or indirectly, in the residence of the Treasury attaché and, conversely, at the homes of persons from whom information is sought.

Very little difference, if any, can be drawn between the character of the duties of military and naval attachés and Treasury attachés. The former are concerned with furnishing their respective departments with military and naval information through investigations, or otherwise; the latter perform the same functions, and although it is true that the subject matter in which they are concerned is different, it is just as important and does not affect the common principle applicable to the three classes of services.

With respect to the necessity of Treasury attachés being available for duty at all hours, it is believed that little need be said. It is obvious from the character of their work that they frequently are required to conduct their investigations and perform their other duties without regard to regular office hours * * *. In addition, they must be available at all times to receive information from informers, to give advice on tariff matters to exporters, to confer with consular officers and commercial attachés, etc. Indeed, the availability of Treasury attachés at all times is no less exacting than those governing officers of the Military and Naval Establishments on duty abroad, as well as those governing representatives of the State Department in the foreign service.

With respect to the allowances granted under the substantially similar provisions of the Act of April 12, 1930 (46 Stat., 163, ch. 142), to foreign service officers and employees of the Bureau of Foreign and Domestic Commerce, it was held in G. C. M. 14710 (page 44, this Bulletin) that in view of the facts presented, there is no sound basis for the distinction drawn in G. C. M. 13442 (C. B. XIII-2, 119) between foreign service officers and employees of the Bureau of Foreign and Domestic Commerce and foreign service officers and employees of the State Department. Upon reconsideration the conclusion was reached that allowances for living quarters granted to foreign service officers and employees of the Bureau of Foreign and Domestic Commerce must be treated in the same manner for income tax purposes as allowances paid to foreign service officers and employees of the State Department; and that such allowances should be excluded from gross income for Federal income tax purposes.

It is apparent from the facts now presented that there is no substantial basis for the distinction made between Treasury attachés and their subordinates in the customs agency service and foreign service officers and employees of the State Department. Accordingly, it is the opinion of this office that allowances for living quarters granted to Treasury attachés and their subordinates in the customs agency service under the Act of June 26, 1930, should be excluded from gross income for Federal income tax purposes.

G. C. M. 11453, supra, requiring that such allowances be included in gross income as additional compensation is, therefore, revoked, together with the statement in G. C. M. 12300, supra, that the conclusion therein reached is not in conflict with G. C. M. 11453.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 22(a)–18: Sale and purchase by corporation of its bonds. XIV–11–7368 G. C. M. 14349

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

Where a taxpayer is on the accrual basis, expenses incidental to the issuance of bonds should be amortized over the life of the bonds and allowed as annual deductions irrespective of whether the bonds were issued prior or subsequent to March 1, 1913.

An opinion is requested whether expenses incurred in connection with the issuance of bonds prior to March 1, 1913, should be amortized over the life of the bonds.

The question arises because of the decision of the United States Supreme Court in *Helvering* v. *Union Pacific Railroad Co.* (293 U. S., 282, Ct. D. 901, C. B. XIII–2, 305, affirming 69 Fed. (2d), 67, which reversed 26 B. T. A., 1126), holding that discount and commissions paid or allowed in connection with bonds issued prior to March 1, 1913, should be amortized over the life of the bonds by a taxpayer on the accrual basis. The Supreme Court stated in part as follows:

1. There is no provision in either the 1918 or 1921 Revenue Acts specifically authorizing the deduction from gross income of commissions or discount paid or allowed by the taxpayer upon an issue of bonds. Section 234 of the 1918 and 1921 Acts, like the corresponding provisions of the Acts before and since, allow deduction of expenses paid or incurred, interest paid or accrued, and losses sustained during the taxable year. Sections 212(b) and 213(a) of the 1918 and 1921 Acts, like section 13(d) of the 1916 Act (ch. 463, 39 Stat., 756, 771), authorize the taxpayer to make his income tax returns on the accrual basis where his books are kept on that basis and reflect true income; they require it if he fails or is unable to make his return on a cash receipts and disbursements basis. The taxpayer is thus enabled to charge against income of the taxable period expenses incurred in and properly attributable to the process of earning income during that period, although payable in a later one. (See *United States* v. *Anderson*, 269 U. S., 422, 440 [T. D. 3839, C. B. V–1, 179], * * * *Aluminum Castings Co.* v. *Routzahn*, 282 U. S., 92 [Ct. D. 270, C. B. X–1, 352], *Niles Bement Pond Co.* v. *United States*, 281 U. S., 357 [Ct. D. 185, C. B. IX–1, 295].) * * * It follows that when the return is made on the accrual basis, expenses or obligations incurred by the taxpayer in connection with a bond issue, which are not discharged until the payment of the bonds at maturity, may properly be accrued or amortized over the period of the life of the bonds and allowed as annual deductions from gross income.

* * * * * * *

* * * But even if the commissions, unlike discount, may, as the Government insists, be regarded as a contemporary expense of procuring capital, it is one properly chargeable to capital account. * * *

Here the commissions, when paid, were properly chargeable against capital, and reduced by their amount the capital realized by the taxpayer from the bond issue. They come out of the pocket of the taxpayer only on payment of the bonds at maturity. But, unlike the purchase and sale of property, the transaction contemplated from the beginning a fixed date, the due date of the bonds, at which the difference between the net amount of capital realized upon the issue and the par value of the bonds must be paid to bondholders by the taxpayer. We think that the Revenue Acts, as they have been interpreted by this court and the Treasury regulations upon this and related subjects, require that this difference between receipts and disbursements of the taxpayer should, in some form, enter into the computation of his taxable income. It is a loss to the taxpayer, definite as to its date and amount, and represents a part of the cost of the borrowed capital during each year of the life of the bond issue. (Cf. *United States* v. *Anderson*, supra.) At least where the taxpayer's books are kept upon the accrual basis, its final disbursement may be anticipated by amortization and the amortized amount deducted annually from his gross income.

In the Union Pacific case the Government contended that the amortization of such commissions was inconsistent with the decision in *Old Colony Railroad Co.* v. *Commissioner* (284 U. S., 552, Ct. D. 456, C. B. XI-1, 274), which held that premiums received upon the sale of bonds before March 1, 1913, could not be subjected to income tax in later years. The Supreme Court answered that contention in the following language:

2. Our decision in *Old Colony Railroad Co.* v. *Commissioner*, supra, does not require a different conclusion because the commissions in the present case were allowed before 1913. It was recognized in that case that premiums on a bond issue received after the sixteenth amendment might be prorated over the period of the life of the bonds and taxed annually as income during this period. In refusing to allow premiums received before 1913 to be thus prorated and taxed, the court was moved by the consideration that the premiums, which were received as income and had become a part of the taxpayer's capital before the sixteenth amendment, could not be taxed as income by virtue of that amendment and legislation under it.

No such consideration is presented here, where the question is only of the deduction of an expense incurred before the amendment. Hence, the decision in the Old Colony case can militate against our conclusion here only if returns, prepared in conformity to it, would fail to reflect true income if the rule announced in the Old Colony case were also complied with. Plainly such is not the case. There can be no question of receipt of a premium where the bonds are sold at a discount. When sold at a premium, as in any other case, commissions must be deducted from gross proceeds in arriving at the capital realized upon the bond issue. There is no occasion for deduction of commissions from gross income at a later time unless the total amount realized by the sale of the bonds is less than their par value. In that case the difference alone is the amount to be amortized and deducted from gross income in the annual returns of the taxpayer. This would reflect his true income, where, as in the present case, his accounts are kept on the accrual basis.

While the Union Pacific case involved commissions paid or allowed to bankers in connection with bonds sold to third parties, this office is unable to draw any valid distinction between expenses of that nature and other expenses incidental to the issuance of bonds, such as printing costs, legal expenses, etc. Such expenditures also represent a part of the cost of borrowed capital and require like treatment under the Revenue Acts. It seems clear from the opinion of the Supreme Court that the date March 1, 1913, has no significance with respect to the proper treatment to be accorded discount, commissions, and other expenses paid or incurred in connection with the issuance of bonds by a taxpayer on the accrual basis.

In view of the foregoing, it is the opinion of this office that in the case of a taxpayer on the accrual basis expenses incidental to

the issuance of bonds should be amortized over the life of the bonds and allowed as annual deductions irrespective of whether the bonds were issued prior or subsequent to March 1, 1913.

Accordingly, any rulings of this office which are inconsistent with this memorandum are revoked or modified to conform herewith.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

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

ARTICLE 22(b)(2)-2: Annuities. XIV-12-7381
I. T. 2874

REVENUE ACTS OF 1926, 1928, 1932, AND 1934.

Taxability for Federal income tax purposes of amounts contributed by the M University toward the purchase of retirement annuities for its teachers.

Advice is requested with respect to the proper treatment for Federal income tax purposes of amounts paid by the M University toward the purchase of retirement annuities for its teachers and amounts received by the teachers as annuities.

The M University offered to its teachers who were eligible an opportunity to obtain retirement annuity contracts with the N Annuity Association under which the teacher and the university each contribute a sum equal to 5 per cent of the teacher's salary. Upon retirement of the teacher, the university will make up from its own funds the difference between the amount of the annuity purchased by the previous payments and an amount necessary to bring the teacher's total annuity up to what he would have received under the original Carnegie scale.

It is held that contributions made by the M University to the fund to provide retirement annuities for its teachers do not constitute income constructively received by the teachers in the years in which such contributions are made. Such payments are not, therefore, required to be included in the gross income of the teacher in the year in which they are made by the M University. The amount contributed by the teacher toward the purchase of a retirement annuity constitutes "the aggregate premiums or consideration paid for such annuity" within the meaning of section 22(b)2 of the Revenue Act of 1934 and the corresponding provisions of the Revenue Acts of 1926, 1928, and 1932. The amount contributed by the M University should not be treated as a part of such "aggregate premiums or consideration paid."

Amounts received by the teacher in the form of annuities are to be returned for Federal income tax purposes in the manner and to the extent provided in section 22(b)2 of the Revenue Act of 1934 and the corresponding provisions of the Revenue Acts of 1926, 1928, and 1932.

ARTICLE 22(b)(2)-2: Annuities. XIV-16-7437
G. C. M. 14593

REVENUE ACT OF 1934.

Taxability of annuities and old-age pensions under the provisions of section 22(b)2 of the Revenue Act of 1934.

Advice is requested with respect to the taxability of annuities and old-age pensions under the provisions of section 22(b)2 of the Revenue Act of 1934.

Under section 22(b)2 of the Revenue Act of 1934, it is provided in part that amounts received as an annuity under an annuity or endowment contract are to be included in gross income, except that there shall be excluded from gross income the excess received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity. The same section further provides that when the amounts received and excluded from gross income equal the aggregate premiums or consideration paid for such annuity, the entire amount thereafter received must be included in gross income.

It is apparent, therefore, that the Revenue Act of 1934 permits the annuitant to recover tax-free the aggregate premiums or consideration paid for the annuity but requires him to include in his annual return of income a portion of the annual payments in an amount equal to 3 per centum of such original cost of the annuity. The aggregate premiums or consideration paid, in the case of an annuity purchased prior to 1934, upon which such 3 per cent return is to be made is the original consideration or premiums paid, not the net worth of the annuity to the annuitant as of the year 1934. In the case of an annuity which is payable in two or more installments over each 12-month period, such portion of each installment shall be included in gross income as is equal to 3 per cent of the aggregate premiums or consideration paid for such annuity (whether or not paid during the taxable year), divided by the number of installments so payable.

Old-age pensions, granted without consideration moving to the grantor other than past services, are not to be regarded as annuities within the meaning of the annuity provisions of the Revenue Act of 1934. Such pensions should be treated as compensation for past services and the entire amount thereof included in gross income.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 22(b)(2)-2: Annuities. XIV-19-7478
I. T. 2891

REVENUE ACT OF 1934.

Taxability for Federal income tax purposes of amounts paid by an employer toward the purchase of retirement annuity contracts for the benefit of his employees.

Advice is requested relative to the treatment under the Revenue Act of 1934 of amounts paid by an employer toward the purchase of retirement annuity contracts for the benefit of his employees.

It is held that contributions made by an employer for the purpose stated do not constitute income constructively received by the employees. Such amounts are not, therefore, required to be included in the Federal income tax returns of the employees for the year or years in which paid. The aggregate of the amounts contributed by the employee beneficiary toward the purchase of a retirement annuity, but not the amount contributed by the employer, constitutes "the aggregate premiums or consideration paid for such annuity" within the meaning of section 22(b) of the Revenue Act of 1934. Amounts received by employees in the form of annuities are to be returned for Federal income tax purposes in the manner and to the extent provided in that section.

ARTICLE 22(b)(4)–4: Interest upon United States obligations. XIV–12–7382
I. T. 2873

REVENUE ACT OF 1934.

Interest on obligations of the Home Owners' Loan Corporation is exempt from taxation only to the extent provided in the Home Owners' Loan Act of 1933, as amended. Such interest is not exempt from surtax.

Advice is requested relative to the taxability under the Revenue Act of 1934 of interest on bonds of the Home Owners' Loan Corporation.

Section 4 of the Home Owners' Loan Act of 1933, as amended (48 Stat., 128), which provides for the creation of the Home Owners' Loan Corporation and (under subdivision (c)) authorizes it to issue bonds, reads in part as follows:

* * * The bonds issued by the Corporation under this subsection 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 any District, Territory, dependency or possession thereof, or by any State, county, municipality, or local taxing authority. * * *

Section 22(b)4 of the Revenue Act of 1934 provides for the exemption from taxation of—

* * * Interest upon * * * (B) obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States; * * * and in the case of obligations of a corporation organized under Act of Congress, 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 from the taxes imposed by this title.

The question has arisen whether interest upon bonds of the Home Owners' Loan Corporation is exempt from both normal tax and surtax on the ground that clause (B) of section 22(b)4 of the Revenue Act of 1934 relates to a class of obligations to which the last sentence of section 22(b)4 does not apply, since such sentence specifies obligations of a corporation organized under Act of Congress without specifying the further limitation included in clause (B), that is, "if such corporation is an instrumentality of the United States."

It is clear from the report of the Committee on Ways and Means and the report of the Committee on Finance relative to section 22(b)4 of the Act that there was no intent to make the distinction

suggested, but that it was intended that the limitation in the last sentence of section 22(b)4 should refer to the obligations specified in clause (B) of such subsection. It follows, therefore, that interest on the obligations of the Home Owners' Loan Corporation is exempt from taxation only to the extent provided in the Home Owners' Loan Act of 1933, as amended, and that such interest is not exempt from surtax.

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

ARTICLE 23(a)-1: Business expenses. XIV-9-7338
G. C. M. 14375

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

Whether a taxpayer (creditor) to whom his debtor has assigned an insurance policy on the debtor's life as security for a debt is entitled to deduct in the year of payment amounts paid by the taxpayer as current premiums on the policy depends upon two factors—(1) whether the taxpayer has a right of reimbursement therefor, and (2), if so, whether such right is worthless.

Recommended that I. T. 1511 (C. B. I-2, 88) be modified.

The question is presented whether a taxpayer to whom his debtor has assigned an insurance policy on the debtor's life as security for a debt is entitled to deduct in the year of payment amounts paid by the taxpayer as current premiums on the policy.

In A. R. R. 7895 (C. B. III-2, 114) it was held that the premiums paid by the assignee-creditor (the debtor being unable to pay) to keep alive insurance policies on the life of the debtor are not deductible as business expenses but should be treated as additional advances which further increase the debt. In that memorandum it was stated in part as follows:

(2) With respect to the deductibility of premiums paid by the estate upon life insurance policies assigned to said estate as securities for a debt due it, the committee is of the opinion that the action of the Income Tax Unit is correct. In view of the financial situation of the debtor the executors have paid the premiums on certain policies which they held as security and in addition have met interest obligations on certain loans against the policies. The interest on the loans has been allowed as a deduction by the Unit; the premiums paid by the estate on the insurance policies have been disallowed. The premiums on the policies paid by the estate are not deductible as business expenses. Payment of the premiums to keep the policies alive should be considered as additional advances to B, which further increase his debt to the estate.

In *Dominion National Bank* v. *Commissioner* (26 B. T. A., 421, acquiescence, C. B. XI-2, 3), the facts stated by the Board were as follows:

In 1922 petitioner held unsecured notes of three Smith brothers, Bert E., Clyde E., and Walter E. Smith, covering the indebtedness of the brothers to petitioner. In that year the Smith brothers assigned to petitioner insurance policies on their lives in the aggregate face amount of $17,000. By 1923 the Smith brothers were badly involved financially and petitioner wrote off a part of their indebtedness to it. In 1928 the balance of their indebtedness to petitioner was $7,096. In that year the cash surrender value of the insurance policies held by petitioner was $3,948.45. Annual premiums on the policies amounted to $596.56 and these have been paid by petitioner each year since the policies were assigned to it. The indebtedness of the Smith brothers to petitioner was ascertained to be worthless in 1928 to the extent that it exceeded the cash surrender value of the insurance policies.

In its return for 1928 petitioner claimed as a bad debt deduction the balance of the Smith brothers' indebtedness of $7,096 and a deduction of $764.09 as life insurance premiums. The respondent restored both of these items to income.

The Board held that the unpaid balance of $7,096 was deductible to the extent that it exceeded the then cash surrender value of the policies, and that the premiums paid in 1928 ($596.56) were deductible as ordinary and necessary expenses.

In the opinion of this office premiums paid under such circumstances are not deductible as a matter of course, but their deductibility depends upon two factors—(1) whether the taxpayer has a right of reimbursement therefor, and (2), if so, whether in the taxable year of payment of such premiums this right is worthless. Such right may rest upon the express contract of the assignor-debtor or it may arise by implication. The express contract may be an agreement to reimburse the creditor at all events regardless of the amount collected from the policy, or it may be merely an express agreement that the assignee may reimburse himself out of the proceeds of the policy.

Where a debtor assigns a life insurance policy as security for his debt and in the agreement of assignment nothing is said as to reimbursing the creditor for premiums paid by him, he has an implied right to pay them and to reimbursement out of the proceeds of the policy. (*Cammack* v. *Lewis*, 15 Wallace, 643; *Page* v. *Burnstine*, 102 U. S., 664; *Morris* v. *Georgia Loan, Savings Bank Co. et al.*, 109 Ga., 12, 34 S. E., 378, 46 L. R. A., 506; *First National Bank of Roanoke* v. *Speece*, 99 Va., 194, 37 S. E., 843; 37 C. J., 571–572, and cases cited in note 12 on page 572.)

As previously stated, the premiums currently paid are deductible in the year of payment only if the right of reimbursement is worthless. Therefore, if there is by contract a personal obligation to reimburse, the facts must show that collection from the debtor is impossible; if the right is merely to reimburse from the proceeds, the facts must show the proceeds insufficient in amount; and if both rights exist, both must be shown to be worthless.

While the reason assigned by the Board in *Dominion National Bank* v. *Commissioner*, supra, for allowing the premiums to be deducted is at variance with this opinion, the result reached is entirely consistent, because, even if there existed both a personal obligation on the part of the debtors to reimburse the taxpayer (creditor) and a right to retain the amount of the premiums from the proceeds of the policies (the then cash surrender value), this right was worthless. Nothing could have been collected from the debtors and the unpaid debt itself exceeded the cash surrender value of the policies.

The facts stated in A. R. R. 7895 are not sufficient to determine whether the premiums there involved would be deductible under the tests laid down in this memorandum. On the other hand, there is nothing in that ruling which is necessarily inconsistent with this opinion. It is deemed unnecessary, therefore, to revoke A. R. R. 7895.

In I. T. 1511 (C. B. I–2, 88) it was stated that "Premiums paid by a taxpayer * * * on an insurance policy, * * * where the policy has been assigned to the taxpayer as security or additional security for a loan granted by the taxpayer to the assignor of the

policy and the taxpayer finds it necessary to pay the premiums in order to protect the loan, are deductible as an ordinary and necessary business expense." Since the conclusion reached in I. T. 1511 that such premiums are deductible as ordinary and necessary business expenses (without regard to the tests mentioned above) is inconsistent with the principles laid down in this memorandum, it is recommended that I. T. 1511 be modified to accord with the conclusions reached herein.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 23(a)–1: Business expenses. XIV–9–7339
I. T. 2866

REVENUE ACT OF 1934.

Deductibility for Federal income tax purposes of reserves and contributions of employers under the Wisconsin unemployment reserves and compensation act.

Advice is requested with respect to the deductibility, for Federal income tax purposes, of reserves and contributions made by employers under the Wisconsin unemployment reserves and compensation act, which became effective July 1, 1934.

For Federal income tax purposes, deductions will be allowed as ordinary and necessary expenses, on account of the liabilities of employers for contributions under the act, as follows:

(1) Amounts paid or incurred during the taxable year (dependent upon the method of accounting regularly employed) to the unemployment administration fund on account of actual and uncontested liabilities, and

(2) Amounts paid or incurred during the taxable year to employees out of or against bookkeeping reserves in the case of "qualified" employers, or amounts paid or incurred during the taxable year to employees out of or against unemployment reserve funds in the hands of the State or other fiduciaries, provided such payments or charges represent actual and uncontested liabilities.

Reserves set up by employers, or contributions made to unemployment reserve funds in the hands of the State or other fiduciaries, are not deductible as such but, as previously stated, the amounts of actual and uncontested liabilities for such expenses paid from or incurred against such reserves or unemployment reserve funds are deductible.

ARTICLE 23(a)–1: Business expenses. XIV–18–7466
I. T. 2888

REVENUE ACT OF 1934.

Certain monthly dues and assessments paid by members of a labor union are deductible. Assessments levied and paid on account of the death of a member are not deductible. Assessments for benefit payments to unemployed members, to the extent applied to "out-of-work" benefit payments, are deductible, but such assessments are nondeductible to the extent used for sick, accident, or death benefits.

Advice is requested whether dues and assessments paid by members of the M Labor Union are allowable deductions in computing net income.

Dues and assessments of members for one month in 1934 were as follows:

	Dollars.
Monthly dues	3.5x
International assessment	x
Local assessment:	
Full time employment on hourly basis	43.2x
Overtime per hour assessment	.5x
Death assessment (for a member who died)	1.2x

The local assessment for that month was based on the shop's weekly schedule of hours and was fixed at — cents per hour for every hour of employment exceeding 20 hours per week. It appears that this assessment was made to provide funds for the payment of benefits to members who were not employed. The rate of such assessment is fixed by the local union each month and is subject to substantial variation. The weekly benefit allowed members in 1934 was 15x dollars per week for the first 20 weeks, 10x dollars per week for the remainder of the first three years of unemployment, 8x dollars per week for the fourth year of unemployment, and 5x dollars per week for the fifth year of unemployment, benefits thereafter being subject to the discretion of the executive board. Payment of all of the above-mentioned dues and assessments was necessary to avoid suspension from the union.

There is no provision in the Revenue Act of 1934 allowing deductions for dues and assessments as such. Accordingly, if the payments in question are deductible, they must qualify as "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business" as provided by section 23(a) of the Revenue Act of 1934. Relative to the meaning of "ordinary and necessary expenses," the Supreme Court of the United States in *Welch* v. *Helvering* (290 U. S., 111, Ct. D. 755, C. B. XII-2, 112), said:

> We may assume that the payments * * * were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful. * * * He certainly thought they were, and we should be slow to override his judgment. But the problem is not solved when the payments are characterized as necessary. * * * There is need to determine whether they are both necessary and ordinary. Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. (Cf. *Kornhauser* v. *United States*, 276 U. S., 145 [T. D. 4222, C. B. VII-2, 267].) The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type.

That the deductibility of contributions or payments to an organization of business associates depends upon the relation of the purpose or use of such funds to the business of the contributor thereto, irrespective of whether such contributions are called contributions, dues, or assessments, is evident from a comparison of such cases as *Appeal of Independent Brewing Co. of Pittsburgh* (4 B. T. A., 870, acquiescence, C. B. VI–1, 3), involving taxpayer's pro rata share of fees paid by a brewers' association to attorneys to test the constitutionality of the eighteenth amendment; *First National Bank of Omaha* v. *Commissioner* (17 B. T. A., 1358, acquiescence, C. B. IX–2, 20), holding that contributions made through a clearing house association should be looked upon as made directly by the taxpayers to the ultimate recipient for the purpose of determining whether they are deductible business expenses; and *The Michigan Central Railroad Co. et al.* v. *Commissioner* (28 B. T. A., 437, 458), holding that an assessment by the Association of Railway Executives for the purpose of establishing at Yale University a chair of transportation is not deductible. These cases are to the general effect that the nature of the association does not control. Upon this point see also *Maurice H. Winger* v. *Commissioner* (6 B. T. A., 945), holding that dues paid by attorneys to a club used by its members for luncheon purposes and for conferences with clients were not deductible; and *Mrs. H. A. Allen et al.* v. *Commissioner* (7 B. T. A., 1256, acquiescence, C. B. X–2, 2), holding that amounts paid by employers of nonunion labor to an association organized to protect such employers against what they conceived to be the dangers of union labor were deductible as business expenses.

Applying the above principles to the instant case, it seems clear that the monthly dues of $3.5x$ dollars and the international assessment of x dollars per month are deductible as business expenses, if such dues and assessments are used to meet the expenses of strictly labor union activities.

Assessments levied and paid because of the death of a member are not allowable deductions, since such assessments are not ordinary and necessary expenses paid or incurred in carrying on a trade or business. The benefits to the family of a deceased member do not have such a direct relationship to either the trade or business of the surviving members as to make the payment of the death assessment deductible as a business expense.

The local assessments for "out-of-work" benefit payments to unemployed members arose as the result of widespread unemployment in the trade. Such assessments, to the extent they are applied to "out-of-work" benefit payments to unemployed members of the trade who are capable of working, are deductible as ordinary and necessary business expenses. To the extent that such assessments are used to provide funds for the payment of sick, accident, and death benefits, they are in the nature of insurance premiums which are nondeductible personal expenses under section 24(a)1 of the Revenue Act of 1934.

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

ARTICLE 23(b)-1: Interest. XIV-14-7409
(Also Section 115, Article 115-1.) I. T. 2878

REVENUE ACT OF 1934.

The interest paid upon income debentures issued by a bank to evidence indebtedness to the Reconstruction Finance Corporation is deductible for Federal income tax purposes.

Distributions on preferred stock issued by a bank to that corporation constitute dividends and are not deductible for Federal income tax purposes.

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

ARTICLE 23(c)-1: Taxes. XIV-2-7240
I. T. 2845

REVENUE ACTS OF 1932 AND 1934.

The import duties imposed on spirits, wines, beer, and other beverages under Schedule 8 of Subtitle 1 of the Tariff and Related Provisions (chapter 3, Title 19, section 121, U. S. C. A.) are deductible as a tax by the importer who pays the duty. In the event the duty is paid by an individual consumer on such articles imported by him for his own use, the amount is deductible as a tax in his Federal income tax return; but if, as an ultimate purchaser, he acquires the imported article on which the duty has been previously paid, the amount of the duty to him is merely an additional cost of the article purchased.

A ruling is requested relative to the deductibility, for Federal income tax purposes, of the import duties on spirits, wines, beer, and other beverages.

The import duties in question are imposed under Schedule 8 of Subtitle 1 of the Tariff and Related Provisions. (Chapter 3, Title 19, section 121, U. S. C. A.) Paragraph 801 states that the duties prescribed in schedule 8 and imposed by Subtitle 1 shall be in addition to the internal revenue taxes imposed under existing law, or any subsequent Act. Duties are imposed as follows:

PAR. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds (except Angostura bitters) containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon; Angostura bitters, $2.60 per proof gallon.

PAR. 803. Champagne and all other sparkling wines, $6 per gallon.

PAR. 804. Still wines, including ginger wine or ginger cordial, vermuth, and rice wine or sake, and similar beverages not specially provided for, $1.25 per gallon: *Provided*, That any of the foregoing articles specified in this paragraph when imported containing more than 24 per centum of alcohol shall be classed as spirits and pay duty accordingly.

PAR. 805. Ale, porter, stout, beer and fluid malt extract, $1 per gallon; malt extract, solid or condensed, 60 per centum ad valorem.

PAR. 806. Cherry juice, prune juice, or prune wine, and all other fruit juices and fruit sirups, not specially provided for, containing less than one-half of 1 per centum of alcohol, 70 cents per gallon; containing one-half of 1 per centum or more of alcohol, 70 cents per gallon and in addition thereto $5 per proof gallon on the alcohol contained therein; grape juice, grape sirup, and other similar products of the grape, by whatever name known, containing or capable of producing less than 1 per centum of alcohol, 70 cents per gallon; containing or capable of producing more than 1 per centum of alcohol, 70 cents per gallon, and in addition thereto $5 per proof gallon on the alcohol contained therein or that can be produced therefrom.

PAR. 807. Ginger ale, ginger beer, lemonade, soda water, and similar beverages containing no alcohol, and beverages containing less than one-half of 1 per centum of alcohol, not specially provided for, 15 cents per gallon.

PAR. 808. All mineral waters and all imitations of natural mineral waters, and all artificial mineral waters not specially provided for, 10 cents per gallon.

PAR. 809. When any article provided for in this schedule is imported in bottles or jugs, duty shall be collected upon the bottles or jugs at one-third the rate provided on the bottles or jugs if imported empty or separately.

Section 23(c) of the Revenue Acts of 1932 and 1934 provides that in computing net income there shall be allowed as deductions taxes paid or accrued within the taxable year, with certain exceptions not here material. Article 151 of Regulations 77, relating to the Revenue Act of 1932, provides that in general taxes are deductible only by the person upon whom they are imposed. Article 152 states that "Import or tariff duties paid to the proper customs officers * * * are deductible as taxes imposed by the authority of the United States, provided they are not added to and made a part of the expenses of the business or the cost of articles of merchandise with respect to which they are paid, in which case they can not be separately deducted."

The import duties on spirits, wines, beer, and other beverages imposed on the articles as stated are deductible as a tax by the importer who pays the duty, provided such duties are not otherwise used to reduce net income. In the event the duty is paid by an individual consumer on such articles imported by him for his own use, the amount is deductible as a tax in his Federal income tax return; but if, as an ultimate purchaser, he acquires the imported article on which the duty has been previously paid, the amount of the duty to him is merely an additional cost of the article purchased.

ARTICLE 23(c)-1: Taxes. XIV-3-7254
G. C. M. 13681

REVENUE ACT OF 1934.

The capital stock tax imposed by section 701 of the Revenue Act of 1934 for the year ended June 30, 1934, accrued on May 10, 1934, the date of the enactment of the Revenue Act of 1934, in the case of a corporation engaged in business on that date. As the tax is levied with respect to (and is contingent upon) carrying on or doing business, the tax for the fiscal year ending June 30, 1935, accrued on July 1, 1934, the beginning of that fiscal year, in the case of a corporation doing business on that date.

An opinion is requested as to the accrual date of the capital stock tax imposed by section 701 of the Revenue Act of 1934.

Section 701 of the Revenue Act of 1934 imposes a capital stock tax upon domestic corporations, unless they are exempt from such

tax under section 701(c) (1), (2), and (3). The pertinent provisions of section 701 read as follows:

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

(c) The taxes imposed by this section shall not apply—

* * * * * * *

(3) to any domestic corporation in respect of the year ending June 30, 1934, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1934, both dates inclusive;

* * * * * * *

(f) 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 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 this section (or as of the date of organization in the case of a corporation having no 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, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I over the amount disallowed as a deduction by section 24(a)(5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to 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. * * *

By section 703 of the Revenue Act of 1934, it was provided that the capital stock tax imposed by section 215 of the National Industrial Recovery Act shall not apply to any taxpayer in respect of any year except the year ended June 30, 1933.

In I. T. 2726 (C. B. XII-2, 42), it was held that the capital stock tax imposed by section 215 of the National Industrial Recovery Act for the fiscal year ended June 30, 1933, accrued on the date of the enactment of the Act (June 16, 1933) where a domestic corporation was engaged in business on that date, and that the tax for the fiscal year ended June 30, 1934, accrued on July 1, 1933, the beginning of that fiscal year. As the pertinent provisions of section 701 of the Revenue Act of 1934 and section 215 of the National Industrial Recovery Act are similar, it follows that the rule announced in I. T. 2726, supra, is applicable in the instant case. The Revenue Act of 1934, which imposed an excise tax upon every corporation with respect to carrying on or doing business measured by the adjusted declared value of its capital stock, was approved on May 10, 1934. Inasmuch as the liability for capital stock tax imposed by section 215 of the National Industrial Recovery Act for the fiscal year ended June 30, 1934, was extinguished by section 703 of the Revenue Act of 1934 and a new capital stock tax was provided for in section

701, which is different in its provisions and under an entirely different Act of Congress, the tax for the fiscal year ended June 30, 1934, must be held to have accrued on May 10, 1934, the date of enactment of the Revenue Act of 1934, provided the corporation was engaged in business on that date. Not until then had the event (the enactment of the Revenue Act of 1934) occurred which would permit the accrual of the new capital stock tax. As the tax is levied with respect to (and is contingent upon) carrying on or doing business, the tax for the fiscal year ending June 30, 1935, accrued on July 1, 1934, the beginning of that fiscal year, in the case of a corporation doing business on that date. (Compare I. T. 2827, C. B. XIII-2, 130.)

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 23(c)-1: Taxes. XIV-3-7255
I. T. 2848

REVENUE ACTS OF 1932 AND 1934.

Deductibility of the tax levied on alcoholic beverages by the State of Maryland.

For Federal income tax purposes, the tax levied on alcoholic beverages by the State of Maryland under chapter 2 of the Laws of Maryland, special session, 1933, approved December 5, 1933, is deductible as a tax only by the manufacturer, wholesaler, or person upon whom it is imposed and by whom it is required to be paid prior to sale or delivery to the retail dealer. The amount, however, may not be deducted separately as a tax if it has been included as a part of the business expense of the one upon whom it is imposed or otherwise used to reduce his net income. If the one upon whom the tax is imposed passes it on to the retail dealer and uses the amount of the tax to reduce his net income, that amount must be included in gross income. If the tax is passed on to the retail dealer, the amount is not deductible by him as a tax but forms a part of his business expense. To the consumer, the amount of the tax is merely additional cost of the article purchased.

ARTICLE 23(c)-1: Taxes. XIV-4-7268
I. T. 2849

REVENUE ACTS OF 1928, 1932, AND 1934.

Real and personal property taxes in the State of Nebraska accrue on April 1 of each year for Federal income tax purposes.

A ruling is requested as to the correct accrual date, for Federal income tax purposes, of real and personal property taxes imposed by the State of Nebraska.

The pertinent provisions of the Nebraska law are found in the following sections of the Compiled Statutes of Nebraska, 1929:

77-1601. Real property, assessment, classification, real estate classification boards. All real property in this State subject to taxation shall be assessed on

the 1st day of April, 1926, and every fourth year thereafter, which assessment shall be used as a basis of valuation for taxation until the next regular assessment * * *.

* * * * * * *

77-1605. Additional lands and improvement, included in return, decreased values. Each assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all real property that shall have become subject to taxation since the last previous listing * * * and shall make return thereof to the county assessor at the same time he is required to make his returns of personal property. * * *

In the syllabus by the court in *Wood, County Treasurer*, v. *McCook Waterworks Co. et al.* (97 Neb., 215, 149 N. W., 417), it is stated that the law as to the assessment of personal property is construed to mean that such property "shall be listed and assessed with reference to the quantity held or owned on the 1st day of April in the year for which the property is required to be listed."

In *United States* v. *Anderson et al.* (269 U. S., 422, T. D. 3839, C. B. V-1, 179), it was stated with respect to the proper accrual date of taxes for income tax purposes that:

* * * 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. * * *

The "event" which determines the liability for property taxes is the ownership of the property on the day as of which the assessment is made under the State law. (See generally G. C. M. 9793, C. B. X-2, 142, and the rulings cited therein.) As liability for real and personal property taxes in the State of Nebraska is incurred by reason of ownership of property on April 1 of each year, such taxes accrue on that date for Federal income tax purposes.

The modifications in the property tax law made by the 1933 session of the Nebraska Legislature do not change either the month or day of the month as of which personal and real property shall be assessed. The foregoing ruling is, therefore, equally applicable to years subsequent to 1929.

ARTICLE 23(c)-1: Taxes. XIV-4-7269
I. T. 2850

REVENUE ACTS OF 1928, 1932, AND 1934.

Real and personal property taxes in the State of South Dakota accrue on May 1 of each year for Federal income tax purposes.

A ruling is requested as to the correct accrual date, for Federal income tax purposes, of real and personal property taxes imposed by the State of South Dakota.

The pertinent provisions of the South Dakota law, Compiled Laws, South Dakota, 1929, are as follows:

SEC. 6671. *When property is assessable.*—All real and personal property in this State subject to taxation shall be assessed every year with reference to its value on the 1st day of May preceding the assessment.

The date for determining taxability, ownership, and value of real and personal property is the same. (*Gaar, Scott & Co.* v. *Sorum, Sheriff*, 11 N. D., 164, 90 N. W., 799, and *State* v. *Minneapolis & N. Elevator Co.*, 6 N. D., 41, 68 N. W., 81.)

The Bureau, in pursuance of the rule laid down in *United States* v. *Anderson et al.* (269 U. S., 422, T. D. 3839, C. B. V-1, 179), has consistently held that the "event" which determines the liability for property taxes is the ownership of the property on the day as of which the assessment is made under the State law. As the liability for real and personal property taxes in South Dakota is incurred by reason of ownership of property on May 1 of each year, such taxes accrue on that date for Federal income tax purposes.

The modifications in the property tax law made by the South Dakota Legislature in 1931 and 1933 do not change either the month or day of the month as of which real and personal property shall be assessed. Consequently, the foregoing ruling is equally applicable to years subsequent to 1929.

ARTICLE 23(c)-1: Taxes. XIV-4-7270
I. T. 2851

REVENUE ACTS OF 1932 AND 1934.

For Federal income tax purposes, the gross income tax imposed by the State of South Dakota under chapter 184, Laws of South Dakota, 1933, is an allowable deduction as a tax under section 23(c) of the Revenue Acts of 1932 and 1934.

A ruling is requested as to the deductibility for Federal income tax purposes of the gross income tax imposed by the State of South Dakota.

The South Dakota gross income tax is levied under the provisions of chapter 184, Laws of South Dakota, 1933, imposing a tax on gross incomes as an emergency measure. The law became effective on the 1st day of July, 1933, and will expire on June 30, 1935. Section 2 of the law provides in part as follows:

SEC. 2. That from and after the 1st day of July, 1933, there is hereby annually levied upon every person, individual, firm, copartnership, joint adventure, association, corporation, trust, estate or other group or combination acting as a unit, located in or transacting business in the State of South Dakota, or receiving a gross income, as defined in this act, a tax with respect to his or its entire gross income, as defined herein, at the rates hereinafter specified, such tax being hereby levied for each taxable year at such specified rate upon and with respect to the entire gross income, as herein defined, for the purposes of taxation * * *

Section 23(c) of the Revenue Acts of 1932 and 1934 provides that in computing net income there shall be allowed as deductions taxes paid or accrued within the taxable year, with certain exceptions not here material. The gross income tax imposed by the State of South Dakota is, therefore, an allowable deduction as a tax in the Federal income tax return of the person upon whom it is imposed and by whom it is required to be paid.

ARTICLE 23(c)-1: Taxes. XIV-14-7410
G. C. M. 14607

REVENUE ACT OF 1934.

The gross receipts tax, effective July 1, 1934, imposed by the State of Kentucky upon the sale of personal property at retail is deductible by the vendee for Federal income tax purposes.

Recommended that I. T. 2840 (C. B. XIII-2, 53) be revoked.

Reconsideration is requested with respect to the ruling published as I. T. 2840, in which it was held that for Federal income tax purposes the gross receipts tax, effective July 1, 1934, imposed under the law of the State of Kentucky is deductible by the vendor at retail. The attention of the Bureau has been invited to a recent decision of the Court of Appeals of Kentucky in which it was held that the tax is a tax on the purchaser.

The deductibility of the Kentucky gross receipts tax, which is imposed upon sales of personal property at retail, was considered by the Bureau in I. T. 2840, supra, which reads as follows:

> For Federal income tax purposes, the gross receipts tax imposed by the law of the State of Kentucky (enacted by the general assembly, special session, 1934, effective July 1, 1934, and expiring June 30, 1936), is deductible as a tax under section 23(c) of the Revenue Act of 1934 by the vendor at retail, the payor of the tax, provided the amount collected by him as taxes has been included in his gross income and the tax has not been refunded to him, has not been added to or made a part of his business expense, or otherwise used to reduce his net income.
>
> In the case of a vendor whose books are kept on the accrual basis, the amount of the tax accrued during the period covered by his Federal income tax return, less the 3 per cent allowance granted the vendor under section 4 of the gross receipts tax act, may be deducted in determining his net income. If 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.

The nature of the tax was considered by the Court of Appeals of the State of Kentucky in *City of Covington* v. *State Tax Commission* (77 S. W. (2d), 386). After discussing the provisions of the State law, the court made the following statement in its opinion handed down December 21, 1934:

> In the light of such requirements contained in the act, as expressed and embodied in such plain and unambiguous language, there would appear to be no room for the theory that the tax is primarily one levied on the *business of selling* the taxed commodities, notwithstanding the levying sections would appear to so indicate, since under the rule supra the statute should be interpreted in the light of what the legislature unmistakably provided for therein, rather than on expressions found in it indicating a contrary purpose. That being true, the trial court properly interpreted the statute (though not so stated in express terms) as imposing the tax on the purchaser of the taxed articles by requiring the seller to add the amount thereof to the purchase price, and in turn, making the latter the collector of the tax from the purchaser.

Inasmuch as the Court of Appeals of the State of Kentucky, which is the highest tribunal of the State, has decided that the gross receipts tax in question is imposed upon the vendee instead of the vendor and that the latter is merely a collecting agent, it is held that for Federal income tax purposes the tax is deductible as a tax under section 23(c) of the Revenue Act of 1934 by the vendee. It is recommended that I. T. 2840, wherein the Bureau took the position that the tax is deductible by the vendor, be revoked.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 23(c)-1: Taxes. XIV-14-7411
I. T. 2879

REVENUE ACT OF 1934.

I. T. 2840 (C. B. XIII-2, 53), which holds that the gross receipts tax, effective July 1, 1934, imposed by the State of Kentucky, is deductible for Federal income tax purposes by the vendor, is revoked, in view of G. C. M. 14607. (See page 62.)

ARTICLE 23(c)-1: Taxes. XIV-15-7421
I. T. 2882

REVENUE ACT OF 1934.

For Federal income tax purposes, the sales tax imposed by the Ohio retail sales tax act of December 13, 1934, is deductible in the return of the consumer as a tax under section 23(c) of the Revenue Act of 1934.

ARTICLE 23(c)-1: Taxes. XIV-16-7438
I. T. 2885

REVENUE ACTS OF 1928, 1932, AND 1934.

Under the laws of Missouri the liability for real and personal property taxes is incurred by reason of ownership of property on the 1st day of June of each year. Such taxes accrue on that date for Federal income tax purposes.

Advice is requested relative to the accrual date for Federal income tax purposes of real and personal property taxes in the State of Missouri by taxpayers whose books of account are kept on the accrual basis.

The pertinent provisions of the State law are found in the following sections of the Revised Statutes of Missouri, 1929, Volume II, chapter 59:

SEC. 9746. *Property held June 1 liable for taxes.*—Every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year. * * *

* * * * * * *

SEC. 9779. *Real estate, when assessed.*—Real estate shall be assessed at the assessment which shall commence on the 1st day of June, 1893, and shall be required to be assessed every year thereafter. * * *

Under the foregoing sections, the person who owns the property on the 1st day of June is liable for the tax for the ensuing year. (*State ex rel. Haydes* v. *Snyder*, 139 Mo., 549, 41 S. W., 216.) If a person owns land on the 1st day of June and subsequently conveys it, he is liable on his covenant against encumbrances for the taxes assessed for that year. (*Blossom* v. *Van Court*, 34 Mo., 390, and *McLaren* v. *Sheble*, 45 Mo., 130.) Under the statute both real and personal property taxes in the State of Missouri are assessed as of the 1st day of June annually, though they are not due and payable until some time within the following calendar year.

The Bureau, in pursuance of the rule laid down in *United States* v. *Anderson* (269 U. S., 422 [T. D. 3839, C. B. V-1, 179]), has consistently held that the event which determines the liability for

property taxes is the ownership of the property on the day as of which the assessment is made under the State law. As the liability for real and personal property taxes in Missouri is incurred by reason of ownership of property on the 1st day of June of each year, such taxes accrue on that date for Federal income tax purposes.

ARTICLE 23(c)-1: Taxes. XIV-18-7467
I. T. 2889

REVENUE ACT OF 1934.

Deductibility for Federal income tax purposes of the cotton ginning tax imposed under the provisions of the Cotton Act (Public, No. 169, Seventy-third Congress, effective April 21, 1934, 48 Stat., 598).

Advice is requested as to the deductibility of the cotton ginning tax for Federal income tax purposes. If the tax is deductible, the question is presented as to the basis to be used where exemption certificates have been purchased at 4 cents a pound.

The tax in question is imposed under the provisions of the Cotton Act (Public, No. 169, Seventy-third Congress, effective April 21, 1934, 48 Stat., 598), pursuant to the provisions of which Regulations 84, relating to the tax on cotton ginning, were promulgated. The sections of the law pertinent to the questions under consideration read in part as follows:

SEC. 4. (a) There is hereby levied and assessed on the ginning of cotton * * * a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound. * * *

* * * * * * *

(c) Every person ginning any cotton subject to tax under this Act * * * and every other person liable for tax under this Act shall make monthly returns * * * and pay the taxes imposed by this Act to the collector for the district in which the ginning is done * * *. The tax shall * * * be due and payable to the collector at the time so fixed for filing the return. * * *

* * * * * * *

(e) No tax shall be imposed under this Act with respect to—

* * * * * * *

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

* * * * * * *

(f) The tax shall not be collected upon the ginning of cotton which is to be stored by the producer thereof either on the farm or at such other place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for such cotton. Bale tags may be secured for any of such cotton at any time after ginning (1) upon the payment to such person as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. * * * The right to postponement of the payment of the tax * * * shall be established in accordance with such regulations as the Secretary of Agriculture and the Secretary of the Treasury may prescribe. * * *

The pertinent provisions of Regulations 84 are as follows:

ART. 4. *Nature of the tax.*—The tax is an excise tax, not a property tax. It is a tax on the ginning of cotton.

ART. 8. *Liability for the tax.*—Except where payment of the tax is postponed, as provided for in article 13, liability for the tax attaches to the ginner immediately upon the ginning of cotton. Where payment of the tax is postponed, as provided for in article 13, liability for the tax does not attach to the ginner. (See article 21.)

ART. 13. *Postponement of time of payment.*—Where a producer intends to store lint cotton resulting from the ginning of cotton produced by him, * * * the tax shall not be collected upon the ginning of such cotton, but payment may be postponed until the time fixed for the producer to file his return covering such cotton. * * *

ART. 21. *Returns of producers.*—Every producer who has had cotton returned to be stored by him in accordance with the provisions contained in article 13 shall, at least 15 days prior to transporting, selling, or opening any bale of such cotton, file a return on the prescribed form.

* * * * * * *

At the time of filing the return, the producer may surrender exemption certificates covering any part of the cotton covered by the return, and shall pay the tax on any part of such cotton not covered by such exemption certificates. * * *

Article 23(c)-2, Regulations 86, provides in part as follows:

Federal duties and excise taxes.—* * * excise, * * * taxes paid to internal revenue collectors, are deductible as taxes imposed by the authority of the United States, provided they are not added to and made a part of the expenses of the business or the cost of articles of merchandise with respect to which they are paid, in which case they can not be separately deducted. * * *

The tax in question is an excise tax on the ginning of cotton, liability for which attaches to the ginner immediately upon the ginning of cotton, except where payment of the tax is postponed as provided in article 13, in which event liability therefor attaches to the producer. In general, taxes are deductible from gross income only by the person upon whom they are imposed. (Article 23(c)-1, Regulations 86.) It follows that where payment of the tax is postponed as provided in article 13, Regulations 84, the producer is the taxpayer who, if anyone, is entitled to the deduction, and that in all other cases the ginner is the taxpayer who, if anyone, is entitled to the deduction. It is observed that no tax is imposed on the ginning of cotton which is not in excess of the allotment for the farm on which it was harvested. The right to exemption from the tax is to be evidenced by exemption certificates, the transfer of which is authorized by section 9(d) of the Cotton Act, effective April 21, 1934. When a ginner gins cotton not in excess of the amount for which a producer has exemption certificates, the producer surrenders to the ginner exemption certificates in the correct amount, which are then turned over to the collector by the ginner in lieu of the tax. Likewise, when a ginner gins cotton in excess of the amount for which a producer has exemption certificates, the ginner collects from the producer an amount over and above the regular ginning charge equal to the tax for which the ginner became liable upon the ginning of the cotton.

Accordingly, it is held for Federal income tax purposes that the producer of cotton who had the payment of tax postponed as provided in article 13, Regulations 84, may deduct the amount paid or accrued as a tax under section 23(c) of the Revenue Act of 1934 in determining his net income. The tax paid by the producer may not, however, be deducted separately as a tax if it has been included as a part of his business expenses or otherwise used to reduce his net income. The ginner of the cotton which was not stored by the producer as provided in article 13, Regulations 84, may deduct the

amount paid or accrued as a tax under section 23(c) of the Revenue Act of 1934 in determining his net income, provided he reported in his gross income the total amounts collected from the producers, including the amounts collected over and above the regular ginning charge to indemnify him for his ginning tax liability, and provided further that the tax paid was not included as a part of his business expenses or otherwise used to reduce his net income.

Relative to the inquiry as to the basis to be used where exemption certificates have been purchased at 4 cents a pound, exemption certificates, whether original allotment certificates or certificates which have been purchased, are used, as the name implies, in lieu of the payment of tax; therefore, the consideration paid in exchange for exemption certificates can not be considered a tax in any sense of the word. It is, accordingly, held that no tax is paid upon the surrender of exemption certificates; consequently, the provisions of the law relating to deductions from gross income have no application.

ARTICLE 23(c)-1: Taxes. XIV-25-7553
I. T. 2899

REVENUE ACT OF 1934.

Deductibility of the tax on transfers of interests in silver bullion imposed by Title VIII, Schedule A, subdivision 10, of the Revenue Act of 1926, as added by section 8 of the Silver Purchase Act of 1934 (48 Stat., 1178).

Advice is requested whether the tax paid on transfers of interests in silver bullion under Title VIII, Schedule A, subdivision 10, of the Revenue Act of 1926, as added by section 8 of the Silver Purchase Act of 1934, is deductible for Federal income tax purposes.

The Silver Purchase Act of 1934, approved June 19, 1934 (48 Stat., 1178), provides in part as follows:

SEC. 8. Schedule A of Title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. *Silver, and so forth, sales and transfers.*—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. * * *"

Section 23(c) of the Revenue Act of 1934 provides that in computing net income there shall be allowed as deductions:

(c) *Taxes generally.*—Taxes paid or accrued within the taxable year, except—

(1) Federal income, war-profits, and excess-profits taxes;

(2) income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States; but this deduction shall be allowed in the case of a taxpayer who does not signify in his return his desire to have to any extent the benefits of section 131 (relating to credit for taxes of foreign countries and possessions of the United States);

(3) estate, inheritance, legacy, succession, and gift taxes; and

(4) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall not exclude the allowance as a deduction of so much of such taxes as is properly allocable to maintenance or interest charges.

The 50 per cent tax imposed by the Silver Purchase Act on all transfers of interests in silver bullion does not come within any of the exceptions specified in section 23(c) of the Revenue Act of 1934.

While the tax is "50 per cent of the amount by which the price for which the interest in silver bullion is or is to be transferred exceeds the total of the cost thereof plus the allowed expenses" (article 40, Regulations 85), it is in effect a documentary stamp tax. For Federal income tax purposes, this stamp tax constitutes an allowable deduction from the gross income of a taxpayer whose accounts are kept on the cash receipts and disbursements basis to the extent of the total amount of the stamps actually affixed to the documents which are subject to the tax and canceled during the taxable year, and also to the extent of the tax paid in cash during the taxable year on transfers of silver bullion during the period May 15, 1934, to June 19, 1934, inclusive. If the taxpayer's accounts are kept on the accrual basis, only the amount of the tax accrued during the period covered by his tax return may be deducted from the gross income for such period. A deduction for the tax is allowable only if the amount claimed has not been included as a part of the business expense of the taxpayer or otherwise used to reduce his net income. No deduction may be taken as to any amount refunded. Where either the transferor or the transferee takes such a deduction and subsequently collects the amount of the tax from the other party to the transfer, the party so collecting must include the amount of such tax in his gross income.

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

ARTICLE 23(e)-1: Losses by individuals. XIV-7-7311
G. C. M. 14207

REVENUE ACT OF 1934.

The stockholders of the M Company, which was in liquidation in 1932, surrendered their stock in that corporation in that year and received the principal assets of the company together with participation certificates in the remaining assets. Final payment on the participation certificates was received in 1934. If the total amount realized by a stockholder was less than the basis of his stock, a loss was sustained by him in 1934.

An opinion is requested relative to the year in which a deduction for losses resulting from the liquidation of the M Company may be claimed by its stockholders for Federal income tax purposes.

It is stated that in 1932 the assets of the M Company consisted of bonds of another company and cash. Pursuant to the plan of liquidation, the stockholders in that year surrendered their stock and received from the corporation the bonds of the other company together with participation certificates entitling the stockholders to proportionate interests in final distribution. It was estimated that the amount of — cents per share would be paid to holders of the participation certificates and that amount was paid on January —, 1934. The question is whether the stockholders sustained losses due to liquidation of the corporation in 1932 or 1934.

Section 23(e) of the Revenue Acts of 1932 and 1934 provides that certain losses sustained by individuals during the taxable year, including losses incurred in any transaction entered into for profit, shall be allowed as deductions. Section 115 of the Revenue Acts of 1932 and 1934, relating to distributions by corporations, including

distributions in liquidation, does not specify the taxable year in which a loss is sustained by a stockholder due to liquidation of a corporation, but provides that amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and that the gain or loss to the distributee resulting from such exchange shall be determined under section 111 of those Acts, but shall be recognized only to the extent provided in section 112.

The taxable year in which a loss is sustained by a stockholder due to liquidation of a corporation was considered by the Court of Claims in *Dresser et al.* v. *United States* (55 Fed. (2d), 499, C. B. XI–1, 267, certiorari denied, 287 U. S., 635). In that case the stockholder contended that he had sustained a deductible loss at a time when the corporation had not disposed of all its assets and there was no proof of the value or lack of value thereof at that time, but the court held that the alleged loss was not at such time susceptible of determination since the stock was not without value. (Compare article 174, Regulations 77.) The Revenue Act of 1918 which governed that case contains provisions for loss deductions substantially the same as the provisions of later Acts. The court said in that case:

* * * But we are of opinion that when it appears, as here, that it is reasonably certain that the stockholders will receive a further liquidating dividend, a loss may not be allowed under the taxing Act until there is a distribution of such dividend in property or money. Until this is done the stock has a value to its owner, and the mere fact that because the corporation is in process of liquidation its value has declined in a particular taxable year to a figure which is less than cost does not entitle the stockholder to elect in which year he will take his loss. * * *

* * * Losses are sustained within the meaning of the taxing Act when the events definitely occur which give rise thereto. * * * The statute allows the deduction of a loss when it has been sustained, and we think it is the clear purpose of the Act to allow the *deduction in the year in which it may appear that the taxpayer has received from the property all that it is possible for him to receive.* A stock loss is no different from a loss on any other property, and if a taxpayer acquires property at a certain cost which has not been disposed of he may not take a deduction from gross income as a loss of any amount merely because it may appear that when the property is finally disposed of he will receive less than what he paid for it. * * * *Partial losses are not allowable as deductions from gross income so long as the stock has a value and has not been disposed of.* Of course, where a corporation is in process of liquidation and there are assets of substantial value upon which large amounts may be realized by the liquidating trustees, a loss may be taken by the stockholder upon definite proof that outstanding liabilities and claims superior to those of the stockholder will more than absorb the maximum amount that can be received from the disposition of the assets, thereby leaving nothing for the stockholder. * * * But such a situation is just the reverse of the claim presented by the plaintiffs in this case. * * *

The petition is dismissed. * * * [Italics supplied.]

In that case it does not appear definitely whether the stock was surrendered or canceled or whether the stockholder received a participation certificate in lieu of his stock, but in the view taken by this office that factor is not conclusive. The stockholder who received bonds and a participation certificate in the instant case had a continuing interest which was not worthless and which was terminated either when the participation certificate was disposed of or when he received the final distribution in liquidation in 1934. At such time the stockholder sustained a loss if the total amount realized was less

than the basis of his stock. Until then his "property" was not "disposed of," and only then, did he receive from the property "all that it is possible for him to receive," within the meaning of the decision in the Dresser case. Only then was there a closed transaction. (Article 171, Regulations 77.) This result is not changed by the fact that the final distribution in liquidation was previously correctly estimated.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 23(e)-1: Losses by individuals. XIV-24-7546 I. T. 2898

REVENUE ACT OF 1934.

A taxpayer may not deduct as a loss in computing his net income the cost or other basis of property turned over by him to a trustee in bankruptcy to be applied in payment of his indebtedness in accordance with the provisions of the National Bankruptcy Act.

Advice is requested relative to the deductibility as a loss by a bankrupt taxpayer of the cost or other basis of assets transferred by him to the trustee in bankruptcy.

A was adjudicated bankrupt in the year 1934. In that year he transferred to the trustee in bankruptcy real estate, stocks, and bonds to be applied in payment of his indebtedness and desires to deduct as a loss for that year the cost or other basis of the property so transferred.

In the opinion of this office, the fact that in a particular year a taxpayer goes into bankruptcy under the provisions of the National Bankruptcy Act for the purpose of applying his property in satisfaction of his unpaid obligations through the medium of a bankruptcy court, and for the further purpose of obtaining a discharge from such indebtedness, does not affect the computation of his net income, which involves merely the current receipt or accrual of items of income and the payment or incurring of items of expenses and other statutory deductions. Accordingly, it is held that the taxpayer may not deduct as a loss in computing his net income, either for the year in which he was adjudicated bankrupt or for the year in which he received a discharge in bankruptcy under the National Bankruptcy Act, the cost or other basis of the property turned over by him to the trustee in bankruptcy to be applied in payment of his indebtedness in accordance with the provisions of that Act.

SECTION 23(m).—DEDUCTIONS FROM GROSS INCOME: DEPLETION.

ARTICLE 23(m)-1: Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements. XIV-16-7447 T. D. 4540

INCOME TAX.

Percentage depletion—Amendment of the definition of "gross income from the property" in the case of oil and gas—Article 221(*g*), Regulations 77, and article 23(m)-1(*g*), Regulations 86.

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

To Collectors of Internal Revenue and Others Concerned:

Article 221(*g*) of Regulations 77 and article 23(m)-1(*g*) of Regulations 86 are amended by making the last two sentences thereof a paragraph, and by inserting immediately before such paragraph a new paragraph as follows:

In the case of oil and gas, if the crude mineral product is not sold on the property but is manufactured or converted into a refined product or is transported from the property prior to the sale, then the "gross income from the property" shall be assumed to be equivalent to the market or field price of the oil or gas before conversion or transportation.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved April 12, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

ARTICLE 23(m)-10: Depletion—Adjustments of accounts based on bonus or advanced royalty.

REVENUE ACT OF 1934.

Restoration of bonus depletion deduction on percentage of income basis to income at termination of lease in case of no production from leased premises. (See G. C. M. 14448, page 98.)

SECTION 23(o).—DEDUCTIONS FROM GROSS INCOME: CHARITABLE AND OTHER CONTRIBUTIONS.

ARTICLE 23(o)-1: Contributions or gifts by individuals.

REVENUE ACT OF 1934.

Contributions made by a partnership. (See I. T. 2854, page 130.)

ARTICLE 23(o)-1: Contributions or gifts by individuals. XIV-11-7369 I. T. 2872

REVENUE ACT OF 1934.

Application of the 15 per cent limitation on contributions.

The limitation of 15 per cent prescribed by section 23(o) of the Revenue Act of 1934 on the amount of contributions deductible from net income is in respect of the contributions of each individual and is based on the separate net income (before deducting contributions) of the spouse making the contributions, regardless of whether the husband and wife file a joint return or separate returns.

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 25-1: Credits of individual against net income. XIV-6-7295 I. T. 2855

REVENUE ACT OF 1934.

Credits under section 25(a) of the Revenue Act of 1934 in the case of husband and wife.

The earned income credit under section 25(a) of the Revenue Act of 1934 is against the net income of each individual in the case of a husband and wife and their earned income credits under that Act may be computed separately even though they file a joint return.

The credit for interest on United States obligations under section 25(a) of the Revenue Act of 1934 may also be computed separately in the case of husband and wife even though a joint return is filed.

In order to permit allowance of separate earned income credits in joint returns, the earned income, earned income deductions, earned net income, and net income of husband and wife must be shown separately. Likewise, complete information must also be contained in the return with reference to interest on United States obligations.

ARTICLE 25-2: Earned income credit. XIV-4-7271 I. T. 2852

REVENUE ACT OF 1934.

Where the net income of a taxpayer, including income subject only to surtax, is not more than $3,000, the earned income credit should be computed on the entire net income.

Advice is requested relative to the application of section 25(a)5(C) of the Revenue Act of 1934 to net incomes of $3,000 or less when a portion of such net income consists of income subject only to surtax.

The particular inquiry involves the case of a taxpayer who received a salary of $2,800 and dividends of $200 from a domestic corporation subject to taxation. The net income of the taxpayer was $3,000. The question is asked whether the earned income credit is 10 per cent of $2,800 or 10 per cent of $3,000.

Section 25(a)5(C) of the Revenue Act of 1934 reads as follows:

* * * "Earned net income" means the excess of the amount of the earned income over the sum of the earned income deductions. If the taxpayer's net income is not more than $3,000, his entire net income shall be considered to be earned net income, and if his net income is more than $3,000, his earned net income shall not be considered to be less than $3,000. In no case shall the earned net income be considered to be more than $14,000.

Inasmuch as in the instant case the net income of the taxpayer, including dividends, did not exceed $3,000, his entire net income must be considered to be *earned* net income under the specific provisions of the statute. Accordingly, the earned income credit is 10 per cent of $3,000. In other words, in the illustration given the earned income credit should be computed on the entire net income of the taxpayer, including dividends of $200, regardless of the fact that such dividends are not subject to normal tax.

ARTICLE 25-2: Earned income credit.

REVENUE ACT OF 1934.

Earned income credit of husband and wife filing joint returns. (See I. T. 2875, page 81.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 41-1: Computation of net income. XIV-8-7327
I. T. 2863

REVENUE ACT OF 1934.

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, 1934:

Country or city.	Monetary unit.	Value in terms of United States money.	Country or city.	Monetary unit.	Value in terms of United States money.
Argentina	Peso (gold)	$0.747443	Hungary	Pengo	$0.296675
Argentina	Peso (paper)	.328875	India	Rupee	.371430
Australia	Pound (sterling)	3.915000	Italy	Lira	.085705
Austria	Schilling	.187810	Japan	Yen	.287290
Belgium	Belga	.234853	Mexico	Peso	.277625
Brazil	Milreis	.081825	Netherlands	Florin	.677892
Bulgaria	Lev	.012125	New Zealand	Pound (sterling)	3.938437
Canada	Dollar	1.005482	Norway	Krone	.248133
Chile	Peso	.102125	Peru	Sol	.240000
China (Shanghai)	Yuan Dollar	.345312	Philippine Islands	Peso	.500000
Colombia	Peso	.645200	Poland	Zloty	.189200
Cuba	Peso	.999200	Portugal	Escudo	.045006
Czechoslovakia	Koruna	.041856	Rumania	Leu	.010050
Denmark	Krone	.220466	Spain	Peseta	.127125
England	Pound (sterling)	4.940416	Straits Settlements	Dollar	.578500
Finland	Markka	.021831	Sweden	Krona	.254600
France	Franc	.066156	Switzerland	Franc	.324685
Germany	Reichsmark	.402838	Union of South Africa	Pound (sterling)	4.856500
Greece	Drachma	.009375	Uruguay	Peso (gold)	.803000
Hong Kong	Dollar	.426875	Yugoslavia	Dinar	.022718

ARTICLE 41-1: Computation of net income. XIV-20-7493
G. C. M. 14839

REVENUE ACTS OF 1918, 1921, 1924, 1926, 1928, 1932, AND 1934.

Solicitor's Memorandum 3820 (C. B. IV-2, 32) is modified to hold that discounts and commissions are income to banks, loan companies, etc., employing the cash receipts and disbursements method of accounting, when and to the extent that the discounts and commissions are actually received or realized upon the payment, sale, or other disposition of the notes in the face amounts of which the discounts and commissions are included.

The question is presented whether in view of the decision rendered by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Central Republic Trust Co. and McKey, Trustee in Bankruptcy of Noel Securities Corporation* (75 Fed. (2d), 708, decided February 23, 1935), Solicitor's Memorandum 3820 (C. B.

IV–2, 32) should be modified in so far as it holds that commissions or fees, charged by banks for their services in making interest-bearing loans and deducted from the face amounts of the loans when made, are income at the time the loans are made in the case of banks which employ the cash receipts and disbursements method of accounting.

In the above-mentioned decision, which affirmed memoranda opinions of the Board of Tax Appeals dated February 8, 1933, and January 23, 1934, the court said in part:

> The Commissioner sought to charge the amount of such commissions as a part of the annual gross income for each of those years, irrespective of how much of the same had been realized in cash. The Board held that inasmuch as the taxpayer kept its books upon a cash basis, it had properly accounted for the items, in reporting only such part of the commissions as had been realized in cash during the year. The correctness of that ruling is the only question submitted.
>
> In two cases the precise question has been decided adversely to the contention of petitioner. In *Blair* v. *First Trust & Savings Bank* (39 F. (2d), 462 (C. C. A. 5), March 25, 1930), in deciding a similar question, the court said:
>
> "It is plain that until the loan is paid or rediscounted the respondent has earned no profit, but has simply parted with its funds on the faith of the security. The commission is not actually received until respondent gets back what it has previously paid out plus the commission. The deduction of the commission from the face of the loan brings nothing into the coffers of the bank."
>
> Certiorari was denied by the Supreme Court on October 13, 1930 (* * * 282 U. S., 851 * * *).
>
> In *Helvering* v. *Martin-Stubblefield, Inc.* (71 F. (2d), 944) (C. C. A. 8), meeting a similar situation, the court said:
>
> "The Board of Tax Appeals held that the Commissioner erred in increasing respondent's gross income by the amount of the commissions here in controversy, and redetermined the tax liability for the years 1927 and 1928 accordingly. The sole question presented is whether the commissions so deducted when the loans are made constitute taxable income as of that year. * * *
>
> "It is evident that income from this source is uncertain until the notes are paid or sold before maturity. The evidence establishes that it was respondent's practice to rediscount these notes before the loans matured. It seems clear, therefore, that the income actually earned could not be definitely ascertained at the time the loan was made, but only when the loan was actually repaid or the notes were sold."
>
> We are in thorough accord with the reasoning of these cases.

In Solicitor's Memorandum 3820, supra (paragraph 2), it was held that under both the cash receipts and disbursements and the accrual methods of accounting such commissions are income at the time the loans are made. It was also held in that memorandum (paragraph 1) that discounts on noninterest-bearing loans deducted from the face amounts of the loans when made are not income under the cash receipts and disbursements method of accounting until the loan is paid. The conclusion reached in Solicitor's Memorandum 3820 (paragraph 2) that commissions on loans deducted from the face amounts of the loans when made are income at that time under the accrual method of accounting has been sustained in *Columbia State Sav. Bank* v. *Commissioner* (41 Fed. (2d), 923, Ct. D. 210, C. B. IX–2, 332, affirming 15 B. T. A., 219); *Southern Abstract & Loan Co.* v. *Commissioner* (72 Fed. (2d), 130, affirming 25 B. T. A., 1095); and *Bonded Mortgage Co. of Baltimore* v. *Commissioner* (70 Fed. (2d), 341, affirming on this issue 27 B. T. A., 965).

It is doubtless true, as stated in Solicitor's Memorandum 3820, that discounts, being charges for the use of money loaned and constituting

interest on the loans, are distinguishable from commissions in that the latter constitute compensation for services in arranging, obtaining, handling, and/or making the loans; and that commissions are earned when the loans are made whereas discounts are not earned at that time. However, where discounts and commissions are merely deducted from the face amounts of the loans, neither the commissions nor the discounts are received when the loans are made. Therefore, under the cash receipts and disbursements method of accounting, neither the discounts nor the commissions are income until actually received. Although such commissions, as distinguished from discounts, are earned when the loans are made, they are not available so that they may be drawn at any time since they are included in notes payable in the future and are not, therefore, constructively received.

When such discounts and commissions should be included in the gross income of a taxpayer who employs the cash receipts and disbursements method of accounting is not governed by the time such items are earned in whole or in part but by the actual receipt thereof. As previously stated, neither the discounts nor the commissions in question are received actually or constructively when the loans are made. Accordingly, such commissions and discounts should be included in the gross income of taxpayers employing the cash receipts and disbursements method of accounting only when and to the extent that the items are actually received or realized upon the payment, sale, or other disposition of the notes in the face amounts of which they are included.

In view of the foregoing, Solicitor's Memorandum 3820, supra, is modified to hold that discounts and commissions are income to banks, loan companies, etc., employing the cash receipts and disbursements method of accounting, when and to the extent that the discounts and commissions are actually received or realized upon the payment, sale, or other disposition of the notes in the face amounts of which the discounts and commissions are included.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 41-2: Bases of computation and changes in accounting methods. XIV-2-7252 T. D. 4508

INCOME TAX.

Bases of computation of net income under Revenue Act of 1934; and changes in accounting methods.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 41 (Title I—Income Tax) of the Revenue Act of 1934 provides:

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 48 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. (For use of inventories, see section 22(c).)

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of the Act the following regulations are hereby prescribed:

Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. In general, all items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. For instance, in any case in which it is necessary to use an inventory, no accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. On the other hand, appreciation in value of property is generally not an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property.

The true income, computed under the Revenue Act of 1934 and, where the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases be entered in the return. If for any reason the basis of reporting income subject to tax is changed, the taxpayer shall attach to his return a separate statement setting forth for the taxable year and for the preceding year the classes of items differently treated under the two systems, specifying in particular all amounts duplicated or entirely omitted as the result of such change.

A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of these regulations, a change in the method of accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa; a change involving the basis of valuation employed in the computation of inventories; a change from the cash or accrual method to the long-term contract method, or vice versa; a change in the long-term contract method from the percentage of completion basis to the completed contract basis, or vice versa; or a change involving the adoption of, or a change in the use of, any other specialized basis of computing net income such as the crop basis.

Application for permission to change the method of accounting employed and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return, except that in respect of the first taxable year beginning after December 31, 1933, in the case of a corporation which is not permitted by the Revenue Act of 1934 to be included in a consolidated return under section 141 of that Act, but which was properly included in a consolidated return under section 141 of the Revenue Act of 1932, as amended by the National Industrial Recovery Act, for the last period for which it was required to make a return under the Revenue Act of 1932, as amended, such application shall be filed within 90 days after the beginning of the taxable year to be covered by the return or within 30 days after the date of the weekly Internal Revenue Bulletin in which this Treasury decision is published, whichever is later. The application shall be accompanied by a statement specifying the classes of items differently treated under the two methods and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change. Permission to change the method of accounting will not be granted unless the taxpayer and the Commissioner agree to the terms and conditions under which the change will be effected.

The foregoing requirements relative to a change of accounting method are not applicable if a taxpayer desires to adopt the installment basis of returning income, but are applicable if a taxpayer desires to change from such basis to a straight accrual basis. In cases where permission to make such change is granted, the taxpayer will be required to return as additional income for the taxable year in which the change is made all the profit, not theretofore returned as income, pertaining to the payments due on installment sales contracts as of the close of the preceding taxable year.

WRIGHT MATTHEWS,
Acting Commissioner.

Approved January 9, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 43.—PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

ARTICLE 43–1: "Paid or incurred" and "paid or accrued." XIV–1–7227 I. T. 2843

REVENUE ACTS OF 1928, 1932, AND 1934.

Where a bank is in liquidation and assessment is made against the stockholders because of their statutory liability under the State banking law, the assessment is deductible in the year in which paid by a stockholder who keeps his accounts and computes his income on the cash receipts and disbursements basis. Where the accounts of a stockholder are kept on the accrual basis and his net income is computed on that basis, such an assessment is deductible in the year of assessment provided liability is admitted rather than denied or contested. If liability is denied or contested, the assessment is deductible when liability is finally admitted or adjudicated.

A ruling is requested relative to the deductibility of amounts assessed against stockholders of the M Bank because of their statutory liability under the State banking law.

It appears that on December —, 1930, the superintendent of banks of the State of R took possession of the business and property of the M Bank and in 1931 began to liquidate the affairs of the bank. He determined that the assets of the bank, based on a reasonable value, were insufficient by a sum in excess of 600x dollars to pay its creditors in full, and decided that an assessment against stockholders of 100 per cent of their statutory liability under the State banking law was necessary to provide money for the payment of creditors. On or about July —, 1932, he made a demand upon the stockholders for the payment on August —, 1932, of the respective amounts of their liabilities as stockholders of the bank. Partial payments upon these liabilities have been made by taxpayers in 1932 and subsequent years.

Under section 43 of the Revenue Acts of 1928, 1932, and 1934 deductions of losses must be taken in the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting regularly employed by the taxpayer in keeping his books and computing his net income, unless in order to clearly reflect the income the deduction should be taken as of a different period. (See also section 41 of the Revenue Acts of 1928, 1932, and 1934; S. R. 84, C. B. IV–1, 118; and *M. A. Burns Mfg. Co.* v. *Commissioner*, 59 Fed. (2d), 504.) A stockholder of the M Bank keeping his accounts on the cash receipts and disbursements basis is entitled to deduct as a loss the amount of his liability actually paid during the taxable year. A stockholder of the M Bank who regularly employs the accrual method of accounting and computes his net income upon that basis may deduct his stockholder's liability which accrued during the taxable year. Assessment reasonably evidences the existence of the liability and the amount thereof. If the liability is admitted in the year of assessment and the amount thereof is accrued as a loss (as distinguished from a denial or a contest of the alleged liability), the deduction is allowable (on the accrual basis) in such period even though payment is made in a later year. If liability is denied or contested, the assessment is deductible when liability is finally admitted or adjudicated.

I. T. 2617 (C. B. XI–1, 29), which recognizes the deductibility of a loss sustained by a taxpayer by reason of his liability as a stockholder of an insolvent bank which is in liquidation, contains the following statement:

> * * * Of the amount paid by the stockholders because of their additional liability, only the portion determined to be necessary to pay creditors may be deducted as a loss for the year in which such determination is made.

The conclusion reached in I. T. 2617, supra, is modified in so far as it is inconsistent with this ruling.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 51.—INDIVIDUAL RETURNS.

ARTICLE 51-1: Individual returns. XIV-3-7265
T. D. 4512

INCOME TAX.

Returns of individuals.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 51 (Title I—Income Tax) of the Revenue Act of 1934 provides:

INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) *Persons under disability.*—If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(d) *Fiduciaries.*—For returns to be made by fiduciaries, see section 142.

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of the Act, the following regulations are hereby prescribed with respect to income returns of individuals:

ARTICLE 1. *Individual returns.*—For each taxable year every single person and every married person not living with husband or wife for any part of the taxable year, whose gross income as defined in sections 22 and 116 of the Revenue Act of 1934 is $5,000 or over, or whose net income as defined in section 21 of the Revenue Act of 1934 is $1,000 or over, must make a return of income. Every married person living with husband or wife for any part of the taxable year, but not at the close of the taxable year, must make a return if his gross income for the taxable year is $5,000 or more, or his net income is equal to, or in excess of, the credit allowed him by section 25(b) (1) and (3) of the Revenue Act of 1934 (computed without regard to his status as the head of a family). A husband and wife living together for the entire year need make no returns unless their aggregate gross income for the taxable year is at least $5,000, or their aggregate net income is at least $2,500. If their aggregate net

income for the taxable year is $2,500 or more, or their aggregate gross income is $5,000 or more, either each must make a return, or the income of each must be included in a single joint return. A husband and wife living together at the close of the taxable year but not during the entire taxable year must make a return or returns if their aggregate gross income for the taxable year is $5,000 or more, or their aggregate net income is equal to, or in excess of, the credit allowed them by section 25(b) (1) and (3) of the Revenue Act of 1934 (computed without regard to the status of either of them as the head of a family). If the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions and credits to which either is entitled shall be taken from such aggregate income. A joint return of husband and wife may be filed only if they were living together at the close of their taxable year. If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year.

The joint return of a husband and wife (if not made by an agent other than husband or wife, see article 2) must be signed by both spouses, except that one spouse may sign the return as the agent for the other, if the return is accompanied by a power of attorney on Form 936, authorizing such action. The spouse acting as agent shall, with the principal, assume the responsibility for making the return, and incurs liability for the penalties provided for erroneous, false, or fraudulent returns.

The joint return of a husband and wife must be sworn to before an officer duly authorized to administer oaths (see article 4) by the spouse preparing the return. The spouse who fills out the return shall be considered to have prepared the return within the meaning of this paragraph. If the return is prepared by both spouses, or is prepared by neither spouse, then both spouses shall swear to the return, except where one spouse acts for the other spouse under a power of attorney submitted on Form 936, or the return is made by an agent by reason of illness or absence, as provided in article 2.

Whether or not an individual is the head of a family or has dependents is immaterial in determining his liability to render a return.

ART. 2. *Form of return.*—The return shall be on Form 1040, except that it may be on short Form 1040A if the net income does not exceed $5,000, and is derived chiefly from salaries and wages. The forms may be had from the collectors of the several districts. The return may be made by an agent if, by reason of illness, the person liable for the making of the return is unable to make it. The return may also be made by an agent if the taxpayer is unable to make the return by reason of continuous absence from the United States for a period of at least 60 days prior to the date prescribed by law for making the return. Whenever a return is made by an agent it must be accompanied by the prescribed power of attorney, Form 935. The taxpayer and his agent, if any, are responsible for the return as made and incur liability for the penalties provided for erroneous, false, or fraudulent returns.

ART. 3. *Return of income of minor.*—An individual, although a minor, is required to render a return of income if he has a net income of his own of $1,000 or over, or a gross income of $5,000 or over, for the taxable year. If he is married, see article 1. If under the laws of a State the earnings of a minor belong to the minor, such earnings, regardless of amount, are not required to be included in the return of the parent. If the aggregate of the net income of a minor from any property which he possesses, and from any funds held in trust for him by a trustee or guardian, and from his earnings which belong to him, is at least $1,000, or his gross income is at least $5,000, a return, as in the case of any other individual, must be made by him or for him by his guardian, or other person charged with the care of his person or property. In the absence of proof to the contrary, a parent will be assumed to have the legal right to the earnings of the minor and must include them in his return.

ART. 4. *Verification of returns.*—All income tax returns must be verified under oath or affirmation. The oath or affirmation may be administered by any officer duly authorized to administer oaths for general purposes by the law of the United States or of any State, Territory, or possession of the United States, wherein such oath is administered, or by a consular officer of the United States. Persons in the naval or military service of the United States may verify their returns before any official authorized to administer oaths for the purposes of those respective services. Income tax returns executed abroad may be attested free of charge before United States consular officers. If a foreign notary or other official having no seal shall act as attesting officer,

the authority of such attesting officer should be certified to by some judicial official or other proper officer having knowledge of the appointment and official character of the attesting officer.

ART. 5. *Use of prescribed forms.*—Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. A taxpayer will not be excused from making a return, however, by the fact that no return form has been furnished to him. Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the Act. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time the statement so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is supplemented by a return made on the proper form.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 12, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

ARTICLE 51-1: Individual returns. XIV-13-7395
(Also Section 25, Article 25-2.) I. T. 2875

REVENUE ACT OF 1934.

What constitutes a joint return; earned income credit allowable in the case of a husband and wife.

A statement in an income tax return to the effect that the return is a joint return does not necessarily constitute it a joint return. In order for a joint return, properly classified as such, to be filed by a husband and wife, both spouses must have had some income or deductions in the year for which the return is filed and the return must include the income and deductions of both spouses. A joint return of husband and wife may be filed only if they were living together at the close of their taxable year.

Where a husband and wife are living together, either spouse may make a return and claim the total joint personal exemption of $2,500, regardless of the fact that the other spouse had no income or deductions.

A statement on a return to the effect that the return is a joint return raises the presumption that income and deductions of both the husband and wife are included in the return, and, hence, it must be signed by both spouses. However, if it is shown that the income and deductions of only one spouse are included in the return, it is necessary that the return be signed by that spouse only.

The earned income credit allowable (for the purpose of the normal tax, but not for the surtax) under the Revenue Act of 1934 is against the net income of each individual and is based on the earned net income of the respective individual even though a husband and wife file a joint return. Accordingly, in such a case, where only the husband had income but the wife had an allowable deduction or

deductions, the husband only is entitled to an earned income credit and it is based on his earned net income.

The rule that the earned income credit allowable under the Revenue Act of 1934 is against the net income of each individual and is based on the earned net income of the respective individual applies also to the case of a husband and wife domiciled in a community property State. Accordingly, the earned income credit allowable to each spouse in a joint return is the same as is allowable to each spouse in separate returns.

However, in order to permit allowance of separate earned income credits in a joint return, the earned income, earned income deductions, earned net income, and net income of each spouse must be shown separately in the return.

SECTION 53.—TIME AND PLACE FOR FILING RETURNS.

ARTICLE 53-2: Extensions of time for filing returns. XIV-10-7366 T. D. 4529

(Also Section 56(c), Article 56-2.)

SURTAX—PERSONAL HOLDING COMPANIES.
INCOME TAX—MUTUAL INSURANCE COMPANIES OTHER THAN LIFE.

Extensions of time for filing returns and payment of the taxes.

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

To Collectors of Internal Revenue and Others Concerned:

In accordance with the provisions of section 53 and section 56(c) of the Revenue Act of 1934, extensions of time for such periods as may be necessary, but not later than April 15, 1935, are granted to—

(1) Personal holding companies for the filing of surtax returns, Form 1120H, "Return of personal holding company subject to surtax under section 351 of the Revenue Act of 1934," and for the payment of the tax shown to be due thereon, for the calendar year 1934;

(2) Mutual insurance companies other than life for the filing of income tax returns, Form 1030, "Income return of a mutual insurance company other than life," and for the payment of the tax shown to be due thereon, for the calendar year 1934.

In accordance with the provisions of section 295 of the Revenue Act of 1934, interest on one-fourth of the amount of the tax shown on any return, for the payment of which an extension of time is herein granted, will accrue at the rate of 6 per cent per annum from March 15, 1935, to the date of payment.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 7, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

ARTICLE 53–2: Extensions of time for filing returns. XIV–17–7457
T. D. 4543
(Also Section 56, Article 56–2.)

INCOME TAX—MUTUAL INSURANCE COMPANIES OTHER THAN LIFE.

Further extension of time for filing returns and payment of the tax.

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

To Collectors of Internal Revenue and Others Concerned:

In accordance with the provisions of section 53 and section 56(c) of the Revenue Act of 1934, a further extension of time for filing income tax returns, Form 1030, "Income return of a mutual insurance company other than life," and for the payment of the tax shown to be due thereon, for the calendar year 1934, is hereby granted for such period as may be necessary, but not later than May 15, 1935.

In accordance with the provisions of section 295 of the Revenue Act of 1934, interest on one-fourth of the amount of the tax on any return, for the payment of which an extension of time is herein granted, will accrue at the rate of 6 per cent per annum from March 15, 1935, to the date of payment.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 19, 1935.
L. W. ROBERT, Jr.,
Acting Secretary of the Treasury.

ARTICLE 53–2: Extensions of time for filing returns. XIV–21–7514
T. D. 4548
(Also Section 56, Article 56–2.)

INCOME TAX—MUTUAL INSURANCE COMPANIES OTHER THAN LIFE.

Further extension of time for filing returns and payment of the tax.

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

To Collectors of Internal Revenue and Others Concerned:

In accordance with the provisions of section 53 and section 56(c) of the Revenue Act of 1934, a further extension of time for filing income tax returns, Form 1030, "Income return of a mutual insurance company other than life," and for the payment of the tax shown to be due thereon, for the calendar year 1934, is hereby granted for such period as may be necessary, but not later than June 15, 1935.

In accordance with the provisions of section 295 of the Revenue Act of 1934, interest on one-fourth of the amount of the tax shown

on any return, for the payment of which an extension of time is herein granted, will accrue at the rate of 6 per cent per annum from March 15, 1935, to the date of payment.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 20, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 54.—RECORDS AND SPECIAL RETURNS.

ARTICLE 54–1: Aids to collection of tax. XIV–6–7297
I. T. 2856

Form 1090, "Statement of income, and profit and loss accounts."

Form 1090, "Statement of income, and profit and loss accounts," has been revised and is now in process of being printed. It is expected that the distribution of these forms will be made to collectors of internal revenue in the near future.

The major change in the form is in regard to depreciation, which must conform to the provisions of Treasury Decision 4422 (C. B. XIII–1, 58) and Mimeograph 4170 (C. B. XIII–1, 59). Forms 1090 must be filed by all railroad corporations filing consolidated returns and also by railroad corporations filing single returns, in the event such corporations are required to file annual reports with the Interstate Commerce Commission. Form 1090 should be compiled for each railroad company included in the income tax return on Form 1120 and filed therewith.

ARTICLE 54–1: Aids to collection of tax. XIV–13–7396
G. C. M. 14509

REVENUE ACT OF 1934.

The affidavit required by Treasury Decision 4476 (C. B. XIII–2, 57) and Department Circular 230 (C. B. XIII–2, 593) to be filed by a person preparing a return for another person is designed to make the attorney or agent preparing the return responsible for an accurate, true, and complete report in the return of all the information of which the attorney or agent has any knowledge; but it is not intended to make him responsible for the truth and accuracy of information furnished to him for use in preparing the return where the verification of the information by the attorney or agent was not embraced in his employment to prepare the return.

Advice is requested relative to the form of affidavit required by Treasury Decision 4476 and section 2(h) of Department Circular 230 where returns are prepared for a taxpayer by an attorney or agent.

It appears that A, an attorney enrolled to practice before the Treasury Department, is reluctant to execute the required affidavit in certain cases, stating that in his opinion the form of affidavit tends to indicate greater knowledge than he actually has or could have under the character or purpose of the particular employment,

and that it makes him responsible for the correctness of information which he is not permitted to verify.

The modification by Treasury Decision 4476 of the affidavit provided for in Treasury Decision 4416 (C. B. XIII–1, 68) was made after due regard and consideration for the limitations of responsibility properly to be placed upon attorneys or agents preparing returns for taxpayers. The affidavit is designed to make such attorneys or agents responsible for an accurate, true, and complete report in the return of all information of which the attorney or agent has any knowledge; but it is not intended to make him responsible for the truth and accuracy of information furnished to him for use in preparing the return where the verification of the information by the attorney or agent was not embraced in his employment to prepare the return.

It appears that the attorney's reluctance to execute the affidavit is induced by the construction which he places upon the word "knowledge" contained in the affidavit. The term is not used in a technical sense but is to be considered in the light of, and as qualified by, the provisions of paragraphs (*c*) and (*d*), article 2, of Treasury Decision 4476, which require the taxpayer to make a statement in his return showing (1) the nature and extent of the assistance or advice (if any) received and the items or schedules in respect of which the assistance or advice was received, and (2) the source of the information reported in the return and the manner in which it was furnished to or obtained by the person or persons preparing the return.

The affidavit in question is to be executed only in those cases where the return is actually prepared by an attorney or agent. In this connection, attention is invited to question 11, page 1, of Form 1040, and question 8, page 3, of Form 1120. The requirements of the returns appear to afford ample opportunity for statements or explanations of the character which the attorney desires to make.

With respect to the attorney's statement that in some cases it would be a physical impossibility to review, examine, and consider the items in an audit made by some other individual as an incident to the preparation of a tax return, it is deemed sufficient to call attention to the provision in the affidavit for more than one signature.

Treasury Decision 4476 does not require the taxpayer to employ an attorney or agent to make a complete audit in the preparation of his return, or deny to the attorney or agent the privilege of rendering service in cases where a complete audit is not made. Furthermore, it does not appear that there is any provision of Treasury Decision 4476 which makes it impossible or inadvisable on the part of an attorney or agent to serve a client to any degree, no matter how limited, on a legitimate basis.

In view of the foregoing, it does not appear that any undue or unreasonable burden is placed upon the attorney or agent by requiring the execution of the affidavit in the form provided. Accordingly, the affidavit should be executed in the form provided and explanation thereof should be made in the statements required by article 2 of Treasury Decision 4476.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

ARTICLE 54–1: Aids to collection of tax. XIV–15–7422
I. T. 2883

REVENUE ACT OF 1934.

An accountant, B, who made an audit and report for the specific purpose of the preparation by A of the income tax return of C, should execute with A the affidavit required by Treasury Decision 4476 (C. B. XIII–2, 57).

Advice is requested relative to the affidavit required by Treasury Decision 4476 to be executed by a person or persons preparing income tax returns for taxpayers.

A is employed in the tax department of a partnership. The Federal income tax return of C was prepared by A from an audit report made by B, an accountant assigned to the particular case. The accountant also prepared the taxpayer's balance sheet, income and expense statement, and supporting schedules required by the return. A states that if the wording of Treasury Decision 4476 is to be taken literally, then it would appear that the signing by him of a return prepared under such circumstances would be within the provisions thereof, but that if the provisions are to be interpreted to mean that he had access to the books and records and personally saw them, the question arises whether he should sign such a return even though he prepared it and believed the statements of fact contained in the audit report were true.

Treasury Decision 4476 clearly contemplates the execution by A of the affidavit prescribed thereby. It also contemplates execution of the affidavit by anyone who worked in conjunction with him in the preparation of the tax return. Inasmuch as it appears from A's statement that the accountant made the audit and report for the specific purpose of the preparation by A of a particular income tax return, the accountant, B, is deemed to have worked in conjunction with A and should execute with him the prescribed affidavit.

SECTION 55.—PUBLICITY OF RETURNS.

SECTION 55(a). XIV–1–7236
(Also Sections 701 and 702.) T. D. 4504

Income, capital stock, and excess-profits tax returns.—Use of original returns and furnishing of copies of returns, made under sections 215 and 216 of the National Industrial Recovery Act and under the Revenue Act of 1934.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 257, Title II, of the Revenue Act of 1926, provides, in part:

(a) Returns upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section and section 1203, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

* * * * * * *

(c) The proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe.

(d) All bona fide shareholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. * * *

PAR. B. Section 215(e) of the National Industrial Recovery Act makes the above-quoted provisions applicable to capital stock tax returns under the National Industrial Recovery Act.

PAR. C. Section 216(b) of the National Industrial Recovery Act, and section 55 of the Revenue Act of 1932, make the above-quoted provisions applicable to excess-profits tax returns under the National Industrial Recovery Act.

PAR. D. Section 55(a) and section 351 of the Revenue Act of 1934 make the above-quoted provisions applicable to income tax returns made under the Revenue Act of 1934, and sections 701 and 702 of the Revenue Act of 1934 make the same provisions applicable, respectively, to capital stock tax returns and excess-profits tax returns.

PAR. E. Section 62, Title I—Income Tax, of the Revenue Act of 1934 provides:

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of law, the following regulations are hereby prescribed with respect to the use of original, or the furnishing of copies of, income tax returns made under the provisions of the Revenue Act of 1934, and capital stock tax and excess-profits tax returns made under the provisions of section 215 or 216 of the National Industrial Recovery Act or section 701 or 702 of the Revenue Act of 1934, and with respect to access to and examination by State officers and shareholders of returns of corporations made under these Acts:

ARTICLE 1. *Definition of "return."*—As used in these regulations, the term "return" means the original return, or a copy thereof, made for income tax purposes, under the provisions of Title I or IA of the Revenue Act of 1934, or for capital stock tax or excess-profits tax purposes, made pursuant to the provisions of section 215 or 216 of the National Industrial Recovery Act or the provisions of section 701 or 702 of the Revenue Act of 1934.

ART. 2. *Furnishing of copies of income returns.*—(1) The original return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished by the Commissioner to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result, or for use in the preparation for such litigation, or to an attorney connected with the Department of Justice, designated to handle such matters, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. When a return or copy thereof is thus furnished, it must be limited in use to the purpose for which it is furnished and is under no conditions to be made public except where publicity necessarily results from such use. If the return is in the custody of a collector or of an internal revenue agent in charge, a copy thereof may be furnished by the collector or by the internal revenue agent in charge to a United States attorney for use as evidence before a United States grand jury or in litigation in any court where the United States is interested in the result, or for use in the preparation for such litigation. Where a photostat is requested and the collector or the internal revenue agent in charge has not the available facilities for making such copy, written request for the copy must be sent to the Commissioner at Washington. In case the

original return is necessary, it shall be placed in evidence by the Commissioner or by some other officer or employee of the Internal Revenue Bureau designated by the Commissioner for that purpose, and after it has been placed in evidence it shall be returned to the files from which it was withdrawn. An original return will be furnished only in exceptional cases, and then only when it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of the return desired for use in litigation in court will be furnished, where the United States Government is not interested in the result and where such use might result in making public the information contained therein, whether or not the request for the copy is contained in an order of the court. This provision is not a limitation on the use of copies of returns by the persons entitled to such copies under the provisions of the succeeding paragraph.

(2) A copy of a return may be furnished by the Commissioner to the person who made the return or to his duly constituted attorney; or if the person is deceased, to his executor or administrator; or if the property of the person is in the hands of a receiver, trustee in bankruptcy, guardian, or similar legal custodian, to such receiver, trustee, guardian, or other similar custodian upon written application for same, accompanied by satisfactory evidence that the applicant comes within this provision. "The person who made the return," as herein used, refers in the case of an individual return to the individual, a copy of whose return is desired, and in the case of a return of a corporation or fiduciary, to the corporation or fiduciary, a copy of whose return is desired. A corporation may designate by proper action of its board of directors or other similar governing body, the officer or individual to whom a copy of a return made by the corporation may be furnished, and upon sufficient evidence of such action and of the identity of the officer or individual, a copy may be furnished to such person. A copy of a partnership return may be furnished to any individual (or his duly constituted attorney in fact or legal representative) who was a member of such partnership during any part of the time covered by the return, upon satisfactory evidence of such fact being furnished. A copy of a corporation return may be furnished to a shareholder entitled to inspect the return upon submission of the evidence required by article 4. The copy of the return will, however, be furnished only to the shareholder and he will not be permitted to delegate another to receive it in his behalf. In the case of a corporation which has been dissolved, a copy of the return of the corporation may be furnished to any person who could have received a copy at the date of dissolution. A copy of a return in the custody of a collector or of an internal revenue agent in charge may be furnished by the collector or by the internal revenue agent in charge to a person entitled to receive a copy of such return under this paragraph upon written application for same, accompanied by satisfactory evidence that the applicant comes within its provisions. Where a photostat is requested and the collector or the internal revenue agent in charge has not the available facilities for making such copy, the written request for the copy must be sent to the Commissioner at Washington.

(3) A copy of a return may be furnished to any person who may be permitted to inspect such return.

(4) Certified copies of returns will be furnished to the persons entitled thereto only upon written request for same sent to the Commissioner at Washington.

(5) The Commissioner may prescribe a reasonable fee for furnishing copies of returns.

ART. 3. *Access to returns by State officers.*—(1) The proper officers of a State are entitled as of right upon the request of its governor to have access to the returns of a corporation or to an abstract thereof, showing its name and income.

(2) The request or application of the governor must be in writing, signed by him under the seal of his State, and must show: (*a*) The name and address of the corporation making the returns to which access is desired; (*b*) why access is desired; (*c*) the names and official positions of the officers designated to have the access.

(3) The request or application of the governor may be addressed either to the Secretary of the Treasury or to the Commissioner, but should be transmitted to the Commissioner, who will set a convenient time and place for the access to the returns (or to an abstract thereof as he may determine).

(4) Access shall be given only in the office of the Commissioner, unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge, in which event the return may be inspected in the office of such collector or agent, but only in the presence of an internal revenue officer designated by the collector or agent for that purpose.

(5) The officers designated by the governor will not be permitted to name another person or persons to examine the returns (or abstracts) for them.

(6) The officers designated may have access to lists furnished to supplement and become a part of the returns to which they are given access.

ART. 4. *Examination of returns by shareholder.*—A bona fide shareholder of record owning 1 per cent or more of the outstanding stock of a corporation shall be entitled as of right, upon making request of the Commissioner, to examine the annual returns of such corporation and of its subsidiaries. His request for permission to examine such returns must be made in writing, and must be in the form of an affidavit showing his address, the name of the corporation, the period of time covered by the return he desires to inspect, the amount of the corporation's outstanding capital stock, the number of shares owned by him, the date when he acquired them, and whether he has the beneficial as well as the record title to such shares. It must also show that he has not acquired his shares for the purpose of the examination of the returns of the corporation. If he has acquired them for such purpose, he is not a bona fide shareholder within the meaning of the statute. The application must be supported by satisfactory evidence showing that the applicant is a bona fide shareholder of record of the required amount of stock of the corporation. The supporting evidence may be partly in the form of a certificate signed by the president or vice president of the corporation and countersigned by the secretary under the corporate seal. Upon being satisfied from the evidence presented that the applicant has fully met these conditions, the Commissioner will grant the permission to examine the returns and set a convenient time and place for the examination. This privilege is personal and will be granted only to the shareholder, who can not delegate it to another.

ART. 5. *Penalties for disclosure of returns.*—A shareholder who examines the return of a corporation and reveals without express authority of law any particular thereof is guilty of a misdemeanor and liable to fine and imprisonment. Section 3167 of the Revised Statutes, as amended by the Revenue Act of 1918 and reenacted without change by section 1115 of the Revenue Act of 1926, provides as follows:

"It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

An internal revenue officer discovering in the course of his duty information leading him to suspect a possible violation of any law with the enforcement of which he is not directly concerned should immediately report the matter to the Commissioner, who is authorized to communicate with the proper department involved.

GUY T. HELVERING,
Commissioner.

Approved December 29, 1934.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 55(a). XIV-25-7554

Executive order—Authorization of Special Committee Investigating the Munitions Industry, United States Senate, to inspect income and profits tax returns and capital stock tax returns.

By virtue of and pursuant to the authority vested in me by section 55 of the Revenue Act of 1932 (ch. 209, 47 Stat., 169, 189), as amended by section 218(h) of the National Industrial Recovery Act (ch. 90, 48 Stat., 195, 209), and section 55(a) of the Revenue Act of 1934 (ch. 277, 48 Stat., 680, 698), it is hereby ordered that income and profits tax returns made under the National Industrial Recovery Act, the Revenue Act of 1932, as amended by the National Industrial Recovery Act, and the Revenue Act of 1934, and capital stock tax returns made under the Revenue Act of 1934, 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 in Treasury Decision 4440 (C. B. XIII-1, 305), and approved by the President June 15, 1934.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 14, 1935.

ARTICLE 55(b)-1: Definitions. XIV-24-7547
G. C. M. 14987

REVENUE ACT OF 1934.

Form 1094, "Statement of items shown upon income return," is not required to be filed with an income tax return for the calendar year 1934, filed after April 19, 1935 (the date of the amendment of section 55(b) of the Revenue Act of 1934), under an extension of time.

Such statements (Form 1094) filed for the year 1934 in accordance with the provisions of section 55(b) of the Revenue Act of 1934 as originally enacted may not be made available for examination and inspection by any persons who are not given the right to examine returns by other provisions of the statutes and regulations.

Inquiry is made whether Form 1094, "Statement of items shown upon income return," must be filed with a return for the calendar year 1934, filed after April 19, 1935 (the date of the amendment of section 55(b) of the Revenue Act of 1934), under an extension of time, and whether such statements filed with returns for the year 1934 in accordance with the provisions of section 55(b) of the Revenue Act of 1934 as originally enacted may be made available for public examination and inspection.

Form 1094 is the form prepared for the use of taxpayers in filing the statements of gross and net income, deductions, credits, and tax payable required by section 55(b) of the Revenue Act of 1934 as it originally appeared in that Act. That section was amended by the

Act approved April 19, 1935 (Public, No. 40, Seventy-fourth Congress, H. R. 6359), which provides:

* * * That section 55(b) of the Revenue Act of 1934 relating to filing and making public certain income statements is amended to read as follows:

"(b) (1) All income returns filed under this title for any taxable year beginning after December 31, 1934 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purposes of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in paragraph (2) * * *."

The bill covering the Act of April 19, 1935, as it was introduced, merely provided for the repeal of section 55(b) of the Revenue Act of 1934. After passage in that form by the House, the bill was amended in the Senate by striking out all provisions following the enacting clause and inserting the matter now appearing in the Act. The amending Act contains none of the provisions which were in the original section 55(b). It appears throughout the debate on the amended bill in both the Senate and the House that the primary purpose of the bill was to repeal such provisions. Moreover, it is a well established rule of law that where a section expressly amendatory of another section of a statute purports to set out in full all it is intended to contain, any matter which was in the original section, but not in the amendatory section, is repealed by the omission. (See Sutherland on Statutory Construction (2d ed.), section 237; 59 Corpus Juris, 923, section 524.)

In *Great Northern Ry. Co.* v. *United States* (155 Fed., 945), this rule is stated as follows:

Generally speaking, where a statute is amended "so as to read as follows," or is reenacted with changes, or is in terms repealed and simultaneously reenacted with changes, the amendatory or reenacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation. * * *

In *Continental Ins. Co.* v. *Simpson* (8 Fed. (2d), 439), it is stated that:

* * * The rule is well established, and the reason for it plain, that the first amendment of a statute is repealed when the statute referred to is again amended and wholly reenacted with the omission of the first amendment.

The rule is applied in *United States ex rel. Brown* v. *Prentis* (182 Fed., 894, 897), wherein it is stated:

Where the legislative body, in amending an act, omits certain limitations expressed in the original act in simple language, plain in its meaning, the presumption of law is that the limitation no longer exists, at least in the absence of other express words showing that it was intended to continue. Neither ambiguous nor uncertain language will prevail against such an express omission. (Quoted with approval in *United States* v. *One Ice Box* (37 Fed. (2d), 120.)

There is no doubt, therefore, that the original section 55(b) was repealed by the Act of April 19, 1935, and the only question is whether

the repealed provisions control as to the filing of such statements with returns for 1934, which, because of extensions of time, are not filed until after April 19, 1935, the date of approval of the repealing Act, and as to the examination of such statements filed prior to the repeal of section 55(b) as originally enacted.

In *Hertz* v. *Woodman* (218 U. S., 205), it is stated:

> There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute. * * *

It might be argued that the provision in the amending Act, making its provisions applicable only to returns filed for any taxable year beginning after December 31, 1934, indicates an intent to leave the repealed provisions applicable to all returns for 1934. It appears, however, throughout the debates on the bill that the reason for the repeal of the provision for publicity of the information contained in the statements required by section 55(b) as originally enacted was the belief that such publicity would produce harmful results. That reason applies just as strongly to income returns for 1934 as to returns for subsequent years, and it is evident that Congress intended by the repealing Act to prevent the making of the statements for 1934 available to public examination and inspection. The repealing Act became effective before the statements required by the repealed section had been made available to public examination and inspection in a manner to be determined by the Commissioner, and there is now no provision of law which authorizes the making of the statements available to such examination and inspection.

It is, therefore, the opinion of this office that the statements required by section 55(b) of the Revenue Act of 1934 as originally enacted need not be filed with returns for 1934, filed after April 19, 1935, under granted extensions; and that such statements filed in accordance with the provisions of section 55(b) of the Revenue Act of 1934 as originally enacted may not be made available for examination and inspection by any persons who are not given the right to examine returns by other provisions of the statutes and regulations.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 55(b)–2: Form of statement. XIV–5–7283
Mim. 4281

Preparation of Form 1094, "Statement of items shown upon income return."

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 22, 1935.

Collectors of Internal Revenue:

In view of the numerous questions arising as to the items shown upon income returns which should be entered on Form 1094, there

is shown below a schedule of the various forms in question, together with the number of the items thereon which correspond to the items on Form 1094:

Forms.	Items on forms.				
	Total gross income.	Total deductions.	Net income.	Credits, etc.	Tax payable.
Form 1094	2	3	4	5	6
Form 1040	12	19	20	Total of 22, 23, 25, 26, and 27.	34
Form 1040A	5	9	10	Total of 11, 12, and 13.	18
Form 1040B	12	21	24	Total of 26, 27, 29, 30, and 31.	37
Form 1040C	5	9	10	Total of 12 to 15.	19
Form 1041	9	16	17	Not taxable	None.
Form 1065	12	23	24	Not taxable	None.
Form 1120	14	26	27	29	Total of 34 and 38.
Form 1120L	4	14	15	17 or 23	21 or 27.

Collectors may use the schedule shown above for the purpose of advising taxpayers relative to the preparation of Form 1094, "Statement of items shown upon income return."

Correspondence in regard to the procedure outlined herein should refer to the number of this mimeograph and to the symbols A&C: Col.

WRIGHT MATTHEWS,
Acting Commissioner.

ARTICLE 55(b)-2: Form of statement. XIV-9-7350
Mim. 4299

Preparation of Form 1094, "Statement of items shown upon income return"—Form 1120H. (Supplementing Mim. 4281.)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 26, 1935.

Collectors of Internal Revenue:

Reference is made to the schedule contained in Mimeograph 4281 [page 92, this Bulletin], dated January 22, 1935, showing by number the items on various income returns which correspond to the items on Form 1094. Form 1120H, "Return of personal holding company subject to surtax under section 351 of the Revenue Act of 1934," was not included in that schedule for the reason that the final draft of the form had not been completed at the time the mimeograph was issued.

The preparation of Form 1120H has been completed and there is given below a schedule showing by number such of the items on that form which correspond to items on Form 1094, and the notation to

be made in the blank spaces opposite items 2, 3, and 5 on Form 1094, for which there are no corresponding items shown on Form 1120H:

Forms.	Items on forms.				
	Total gross income.	Total deductions.	Net income.	Credits, etc.	Tax payable.
1094	2	3	4	5	6
1120H	(1)	(1)	1	(2)	23

[1] Personal holding company. [2] None allowed.

Collectors may use the schedule shown above for the purpose of advising taxpayers relative to the preparation of Form 1094, "Statement of items shown upon income return," required to be filed with Form 1120H.

It is anticipated that Form 1120H will be printed and distributed at an early date. However, in view of the comparatively short time remaining before March 15, 1935, consideration is being given to the granting of a general extension of time for filing returns on that form for the calendar year 1934.

Correspondence in regard to the procedure outlined herein should refer to the number of this mimeograph and to the symbols A&C: Col.

GUY T. HELVERING,
Commissioner.

ARTICLE 55(b)–3: Persons required to file Form 1094. XIV–8–7328 I. T. 2864

REVENUE ACT OF 1934.

Form 1094, "Statement of items shown upon income return," is not required to be filed with Form 1013, annual return of income tax to be paid at the source on bond interest, and Form 1042, annual return of income tax to be paid at the source on salaries, etc.

SECTION 56.—PAYMENT OF TAX.

ARTICLE 56–2: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1934.

Extension of time for payment of tax of personal holding companies shown to be due on Form 1120H and tax of mutual insurance companies other than life shown to be due on Form 1030 for calendar year 1934. (See T. D. 4529, page 82.)

ARTICLE 56–2: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1934.

Rules governing consideration of application for extension of time to pay installments of income tax. (See Mim. 4303, page 133.)

ARTICLE 56-2: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1934.

Further extension of time for payment of tax of mutual insurance companies other than life shown to be due on Form 1030 for calendar year 1934. (See T. D. 4543, page 83.)

ARTICLE 56-2: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1934.

Further extension of time for payment of tax of mutual insurance companies other than life shown to be due on Form 1030 for calendar year 1934. (See T. D. 4548, page 83.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUBTITLE A.—RATES OF TAX.

SECTION 101.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 101(7)-1: Business leagues, chambers of commerce, real estate boards, and boards of trade. XIV-14-7412 I. T. 2880

REVENUE ACT OF 1934.

The M Board, Inc., and the O Code Authority are not engaged in a business ordinarily carried on for profit but are primarily engaged in activities directed to the improvement of business conditions and the promotion of the general objects of their line of business. They are not engaged in particular services for individual persons. No part of the net income inures to the benefit of any private shareholder or individual.

Held, the organizations are exempt from Federal income tax under the provisions of section 101 of the Revenue Act of 1934.

The question is presented whether certain code authorities, namely, the M Board, Inc., which is incorporated in the State of R, and the O Code Authority, which is unincorporated, are exempt from Federal income tax.

The essential functions of each of these code authorities are the same. Each is organized pursuant to codes of fair competition as provided in section 3 of Title I of the National Industrial Recovery Act (Public, No. 67, Seventy-third Congress, 48 Stat., 195). The code authorities are an integral part of the code system and are quasi public and semiofficial bodies to aid in the enforcement of the respective codes and to cooperate with the National Recovery Administration in its activities. The code authorities are not operated for profit. Their only income is derived from assessments upon members of a particular industry and their expenditures are solely to assist in

planning for the industry and insuring equitable administration of, and compliance with, the code for such industry. The code authorities collect reports required by the Federal administrator. Their expense budgets and the basis of contribution by the members are submitted to the administrator for approval. Certain cost and sales figures are collected by the code authorities and made available to the industry as a whole. In the case of the M Board, Inc., the corporation is organized specifically as a nonprofit corporation without shares of stock.

Since these two code authorities are not engaged in business ordinarily carried on for profit but are primarily engaged in activities directed to the improvement of business conditions and the promotion of the general objects of their line of business, are not engaged in particular services for individual persons, and no part of the net income inures to the benefit of any private shareholder or individual, it is held that they are entitled to exemption as business leagues organized to promote the common interests of the particular industry.

It is stated that there are more than 540 basic and 180 supplemental codes which have been approved by the National Recovery Administration with a code authority representing each trade or industry involved. In so far as the code authorities are essentially engaged in the same character of functions and activities as the organizations here under consideration, they are entitled to exemption.

Under article 101-1 of Regulations 86, it is incumbent upon each of these code authorities, in order to be relieved of the duty of filing returns of income, to file an affidavit with the collector for the district in which the particular code authority is located setting forth the information required in that article of the regulations.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 112(b).—RECOGNITION OF GAIN OR LOSS: EXCHANGES SOLELY IN KIND.

ARTICLE 112(b)(1)-1: Property held for productive use in trade or business or for investment. (Also Section 117, Article 117-2.) XIV-22-7520 I. T. 2896

REVENUE ACT OF 1934.

Where under a refunding plan the M Trust Co., a holder of defaulted bonds of the city of R, exchanged such bonds and unpaid interest coupons for new bonds of that city having a market value below the cost of the old bonds and not "substantially identical" with the old bonds, a deductible loss was sustained, limited by section 117(d) of the Revenue Act of 1934 to "$2,000 plus the gains from such sales or exchanges."

Advice is requested relative to the proper treatment for Federal income tax purposes of the exchange by the M Trust Co. of bonds of the city of R for other bonds of that city under a refunding plan adopted by the city.

The plan provided in general for the refunding of bonds maturing on or before June —, 1943, by the issuance of new bonds dated as of

the interest payment date next preceding June —, 1933, and maturing on February —, 1963, subject to redemption at an earlier date at par and accrued interest. The plan was adopted by reason of the failure of the city to pay the principal of any of its bonded indebtedness which matured on or after February —, 1933, and by reason of the default in the payment of interest from that date on all its outstanding bonds except street railway bonds. The M Trust Co. was the holder of bonds of the city of R which were exchanged for new bonds of the same par or face value bearing the same rate of interest but having a later maturity date. The market value of the new bonds as of the date of the exchange was less than the cost of the old bonds exchanged therefor. New bonds totaling $9x$ dollars, representing unpaid interest coupons which became due on or before August —, 1934, were also received under the terms of the plan. The question involved is whether a deductible loss was sustained from the exchange.

Under the provisions of section 112(a) of the Revenue Act of 1934, every exchange results in a gain or loss for income tax purposes unless the exchange comes within one of the statutory exceptions. The instant exchange does not come within any of the exceptions enumerated in section 112(b) of the Revenue Act of 1934. Furthermore, section 118 of that Act, which denies a deduction for losses in the case of wash sales, is not applicable, since the bonds received were not "substantially identical" with those exchanged within the meaning of that section. (See I. T. 1365, C. B. I-1, 151, and I. T. 2672, C. B. XII-1, 72.) Accordingly, the transaction in the instant case must be recognized as resulting in a gain or loss for income tax purposes. Since the value of the new bonds received in exchange was less than the cost of the old bonds, the transaction resulted in a loss in the amount by which the cost of the old bonds exceeded the market value of the new bonds as of the effective date of the exchange.

The amount of the loss which is deductible for income tax purposes remains to be considered. Section 117(d) of the Revenue Act of 1934 reads as follows:

> (d) *Limitation on capital losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. If a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, sells any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, any loss resulting from such sale (except such portion of the loss as does not exceed the amount, if any, by which the adjusted basis of such instrument exceeds the par or face value thereof) shall not be subject to the foregoing limitation and shall not be included in determining the applicability of such limitation to other losses.

In accordance with the provisions of the first sentence of section 117(d), the loss which was incurred upon the exchange of a "capital asset" is limited to "$2,000 plus the gains from such sales or exchanges." The loss may not be taken in full under the provisions of the second sentence of that section for the reason that the exemption of banks and trust companies from the limitation on capital losses applies only in the case of a *sale* and not in the case of an exchange.

The new bonds of the par or face value of $9x$ dollars received in payment of interest should be treated as interest income. The amount thereof is to be determined by taking the new bonds into account at their market value on the date of their receipt in payment of the interest. The market value of such bonds as of the date of receipt constitutes the basis on which to compute gain or loss from their subsequent sale or other disposition.

SECTION 114.—BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 114–1: Basis for allowance of depreciation and depletion. XIV–12–7383 G. C. M. 14448
(Also Section 23(m), Article 23(m)–10.)

REVENUE ACTS OF 1926, 1928, 1932, AND 1934.

Where a bonus payment is received by a lessor for an oil and gas lease, a depletion deduction on the percentage of income basis is allowable against such payment in the year of receipt although in such year there was no extraction of oil or gas, and no practical assurance of production in the future. In such a case, if there is no production from the leased premises, the taxpayer must restore the amount of the deduction to income as of the year of the termination of the lease.

G. C. M. 11384 (C. B. XII–1, 64) is revoked.

Advice is requested relative to bonus depletion allowances computed on the percentage of income basis in the case of bonus payments received by lessors for oil and gas leases in advance of the actual production of oil or gas. The request requires reconsideration of G. C. M. 11384 (C. B. XII–1, 64) in the light of the opinion of the United States Supreme Court in *William E. Herring* v. *Commissioner*, decided December 3, 1934 (293 U. S., 322, Ct. D. 904, page 303, this Bulletin).

I.

The opinion of the court in *William E. Herring* v. *Commissioner*, supra (which arose under the Revenue Act of 1926), may be summarized as follows:

1. A bonus is payment in advance for oil and gas to be extracted (advance royalty) and is, therefore, taxable income (*Burnet* v. *Harmel*, 287 U. S., 103, Ct. D. 611, C. B. XI–2, 210; *Murphy Oil Co.* v. *Burnet*, 287 U. S., 299, Ct. D. 619, C. B. XII–1, 231; and *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S., 308); as such, it is a part of the "gross income from the property" as that phrase is used in section 204(c)2 of the Revenue Act of 1926 to designate the *base* for the application of the percentage depletion deduction. Given "gross income from the property," which is the *base*, and the authority as provided in section 204(c)2, in the case of oil and gas wells, to compute the depletion allowance at a per cent of such base, the question whether the amount so computed comes within the *grant* in the statute (section 214(a)9 of the Revenue Act of 1926, for the purposes of this case) of "a reasonable allowance for

depletion" is not controlled by the fact that there was no extraction of oil or gas in the year for which the allowance is claimed, or by the fact that in such year there was no practical assurance of production in the future.

2. The conditions prescribed for the allowance of bonus depletion on the cost basis and on the percentage of income basis must be the same for the reason that "the nature and purpose of the allowance is the same in both cases." (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S., 459.)

3. The grant as a deduction from gross income of a reasonable allowance for depletion "in the case of oil and gas wells" has been the same under all the Revenue Acts, 1916 to 1934, inclusive. As to *cost depletion*, the regulations of the Bureau under the Revenue Act of 1926 and prior Revenue Acts treated a bonus or advance royalty as subject to depletion and those regulations have been approved by the reenactment of the statutory provisions without alteration. (*Murphy Oil Co.* v. *Burnet*, supra.) "It has never been held here [in the Supreme Court] that the existence of a well conditioned the allowance. Nor, until recently, has the Treasury so ruled." The situation presented by recent administrative rulings (including decisions of the Board of Tax Appeals) is that if the taxpayer computes depletion upon the basis of cost or March 1, 1913, value, he may deduct depletion from a bonus payment irrespective of the sinking of a well or the production of any oil or gas (see regulations of the Bureau discussed in *Murphy Oil Co.* v. *Burnet*, supra); but if the taxpayer elects to avail himself of the alternative method of computing the deduction at a per cent of gross income, "though the nature of the deduction is unchanged" (*United States* v. *Dakota-Montana Oil Co.*, supra), he is not entitled to any deduction for depletion unless there is production within the taxable year, no matter how small such production may be. However, if there is a *base* provided by statute for the computation of the allowance, it is improper in the one case, i. e., when computed on the percentage of income basis, to condition the bonus depletion allowance by the test of actual production, or the imminent probability of production, or by any refinements as to the degree of probability of future production, and at the same time to allow the deduction if computed on *the cost basis* "irrespective * * * of the production of any oil or gas." The court concluded that there is no "statutory authority or logical justification for withholding it in the one and granting it in the other."

4. Therefore, a depletion deduction on the percentage of income basis is allowable against a bonus payment in the year of the receipt of the payment irrespective of the fact that in such year "there was no extraction of oil or gas, and no practical assurance of production in the future."

II.

The purpose of the depletion allowance on the *cost* basis is to provide for the return to the owner of mineral deposits, whether freehold or leasehold, *the value of his property on the basic date* (plus subsequent allowable capital additions), "but not including land values for purposes other than the extraction of minerals." (See article 201, Regulations 69, and the corresponding provisions

of subsequent regulations.) Therefore, a condition precedent to the allowance of bonus depletion on that basis (under article 216(a), Regulations 69, and the corresponding provisions of subsequent regulations) is a determination of a mineral value in the property at the date of acquisition (if depletion is to be based on *actual cost*), or at a basic date otherwise prescribed by law (as in the case of depletion based on March 1, 1913, value). If no mineral value in the leased premises can be shown as of the basic date, there is no capital sum returnable through depletion and there is *no base* for the allowance of depletion against a bonus payment or any other income from mineral extraction. From this there was developed the administrative rule set forth in I. T. 2361 (1927) (C. B. VI-1, 73), to the effect that article 216(a), of Regulations 69 (relating to bonus depletion), has no application to a bonus received by the lessor of an *unproven area* and is applicable only to a lease of property in a *proven area* where the mineral content was capable of being estimated at the time the bonus was received even though the property was nonproducing at that time. If, at the time of the execution of the lease, the leased premises were in an unproven area, it follows that a mineral value at the basic date can rarely, if ever, be established. Where a mineral value can be established as of the basic date, a capital sum returnable through depletion can be ascertained at the execution of the lease, and, therefore, a bonus (being royalty in advance of extraction) may be treated as subject to depletion though it is received in advance of actual production. (*Murphy Oil Co.* v. *Burnet*, supra.)

For the computation of depletion on the percentage of income basis, the *base* is the gross income from the property. Since the Supreme Court has held that a bonus received in advance of production is "gross income from the property" in the case of oil and gas wells, within the meaning of section 204(c)2 of the Revenue Act of 1926, and as such is a part of the *base* for the computation of the allowance, it follows that inasmuch as depletion may be allowed in anticipation of production, such a bonus is subject to depletion without the establishment of any other *base*. Under these circumstances, the distinction between bonuses for leases in proven and unproven areas (compare I. T. 2361, supra), which was carried forward by G. C. M. 11384, supra, and applied to claims for bonus depletion deductions on the percentage of income basis, can not now be sustained. A depletion deduction on the percentage of income basis is, therefore, allowable in every case of a bonus payment received in advance of production. G. C. M. 11384 is hereby revoked.

III.

In its opinion in *William E. Herring* v. *Commissioner*, supra, the Supreme Court made the statement that it expresses no opinion as to whether the amount allowed as a depletion deduction from the bonus payment in the year of the execution of the lease may be taxed as income to the lessor in the year of the termination of the lease where there has been no extraction of mineral from the leased premises. The allowance of the deduction in the year of the execution of the lease rests upon an anticipation of production to avoid

"the attendant inconvenience of indefinite postponement," as was said in *Murphy Oil Co.* v. *Burnet*, supra. The grant of the deduction is in any case upon the ground of "a reasonable allowance for depletion." If on the termination of the lease there has been no production, then there has in fact been no depletion. Ordinarily the Government may recoup only by restoring the deduction to income and asserting the tax against the taxpayer in the year of the termination of the lease. *Cost* depletion on an advance royalty has always been allowed on condition that if the anticipated production does not materialize, the taxpayer will restore the amount of the deduction to income as of the year the lease terminates, expires, or is abandoned. (See article 216 (b) and (c), Regulations 69, with which all prior and subsequent regulations are identical.) Since the "nature and purpose of the allowance is the same," as the Supreme Court has pointed out, whether the deduction be computed on the cost basis or on a per cent of the gross income from the property, it follows that the taxpayer must be deemed to have taken the bonus depletion deduction on the percentage of income basis on the condition that he will restore the amount of such deduction to income as of the year of the termination of the lease where there has been no production from the leased premises.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 115-1: Dividends.

REVENUE ACT OF 1934.

Distributions on preferred stock of a bank. (See I. T. 2878, page 57.)

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 116-2: Compensation of State officers and employees. XIV-7-7312 I. T. 2859

REVENUE ACT OF 1934.

Taxability of compensation of officers and employees of State emergency relief administrations.

The compensation of officers and employees of State emergency relief administrations which is paid by the State from its public funds (as distinguished from funds granted to it by the Federal Government) is exempt from Federal income tax. To the extent that such compensation is paid by the State either directly or indirectly from funds granted to the State by the Federal Government under the provisions of the Federal Emergency Relief Act of 1933, approved May 12, 1933 (48 Stat., 55), it is subject to Federal income

tax. The compensation of officers and employees which is paid directly by the Federal Government is also subject to Federal income tax.

If the compensation is paid by the State from a fund composed in part of State funds and in part of Federal grants, that part of the compensation paid from Federal grants is subject to Federal income tax.

ARTICLE 116–2: Compensation of State officers and employees. XIV–10–7351 G. C. M. 14116

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

The compensation received by the taxpayer for services rendered as public administrator of a county in Massachusetts is subject to Federal income tax.

Recommended that I. T. 1693 (C. B. II–1, 72) and I. T. 2030 (C. B. III–1, 117) be revoked.

Advice is requested whether the compensation received by the taxpayer as public administrator of a county in Massachusetts is exempt from Federal income tax.

Pursuant to chapter 194 of the General Laws of Massachusetts for 1921, the Governor of the State appoints a public administrator in each county for a term of five years. The public administrator is required to take an oath of office and to furnish bond. His compensation is not paid by the State or county out of public funds but is paid out of the assets of the estates which he administers.

It was held in G. C. M. 13488 (C. B. XIII–2, 156) that no burden is imposed upon the activities of a State or political subdivision thereof by a Federal income tax upon the compensation of an officer or employee where the compensation is not paid by the State or political subdivision from public funds. It was concluded in that case that the compensation of the State bank liquidator was subject to Federal income tax, such compensation being paid out of the assets of the banks in liquidation.

It is the opinion of this office in the instant case that the compensation of the taxpayer received for his services as public administrator is likewise subject to Federal income tax, as such compensation is paid out of the assets of the estates which he administers.

I. T. 1693 (C. B. II–1, 72) and I. T. 2030 (C. B. III–1, 117) hold that the compensation received by public administrators in Missouri and Montana, respectively, is exempt from Federal income tax. In I. T. 1693, supra, it does not appear how the compensation is paid, nor is the statutory provision definite, but it was held in *Browning et al.* v. *Richardson* (186 Mo., 361, 85 S. W., 518) that the compensation is to be paid out of the assets of the estates. It appears in I. T. 2030, supra, that the compensation of public administrators in Montana is also paid out of the assets of the estates. Since those rulings are in conflict with G. C. M. 13488, supra, it is recommended that they be revoked.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 116–2: Compensation of State officers and employees. XIV–16–7439 I. T. 2886

REVENUE ACT OF 1934.

Profits derived by the State of Virginia from the operation of liquor stores by the State are not subject to Federal income tax. The compensation of employees of the State for services rendered in connection with the operation of liquor stores by the State is subject to Federal income tax.

In G. C. M. 14407 [below], it was held that profits derived by the State of Montana from the operation of its liquor stores are not subject to Federal income tax. In the light of the conclusions reached in that memorandum, it is held that profits derived by the State of Virginia from the operation of liquor stores by the State are not subject to Federal income tax.

Attention is invited to the fact, however, that when a State or political subdivision engages in the operation of liquor stores it is acting in a proprietary capacity. Accordingly, the compensation of employees of the State whose services are rendered in connection with the operation of liquor stores by the State is subject to Federal income tax.

SECTION 116(d). XIV–7–7316 G. C. M. 14407

REVENUE ACT OF 1934.

Profits realized by the State of Montana from the operation of liquor stores by the State are not subject to Federal income tax under the Revenue Act of 1934.

G. C. M. 13745 (C. B. XIII–2, 76) is not to be considered as a ruling on the constitutional issue involved.

The State Liquor Control Act of Montana, approved March 14, 1933 (Laws of Montana, 1933, chapter 105, as amended by chapter 57, Laws of the Extraordinary Session of 1933–34), provides for the creation of the Montana Liquor Control Board, which is given power to buy, possess for sale, and sell liquor; to control its sale and delivery; to determine the location of State liquor stores and to establish such stores; to grant, refuse, or cancel permits for the purchase of liquor; to appoint vendors and officers and employees required for the carrying out of the act; to issue club licenses and special permits for the sale of liquor; and to make regulations for carrying out the provisions of the act. All moneys received from the sale of liquor by the State liquor stores, and from license fees and fees for permits, shall be paid to the board, and no provision is made for segregating the moneys derived from fees from the moneys derived from liquor sales. Out of the profits arising under the act, there is to be created a reserve fund to meet any losses incurred by the State in connection with the administration of the act. When all of the liquor stores which can be established throughout the State have been established and the administration expenses have been paid, the net profits are to be allocated 50 per cent to the emergency relief fund of the State of Montana, and 50 per cent to the general fund of the State until February 1, 1935; thereafter, all such profits are to be allocated 50 per cent to the

general fund of the State and 50 per cent to the general funds of the counties in the proportion that the population of each county bears to the total population of the State.

The questions raised for consideration are (1) whether the Revenue Act of 1934 imposes a tax upon the income derived by the State of Montana from the operation of its liquor stores, and (2) whether, if the Act be found to impose such a tax, the taxation of such income is within the constitutional powers of the Federal Government.

The Revenue Act of 1934 taxes at different rates the income of "individuals" and "corporations," but nowhere in the Act is a tax expressly imposed upon a State. It may be stated with assurance that a State is not an "individual" within the meaning of the Act, if for no other reason than that the credits and exemptions provided for an individual are obviously not applicable to a State. Whether or not a State is a "corporation" depends, to use the language of Mr. Justice Sutherland, "upon the connection in which the word is found." (*Ohio* v. *Helvering* (1934), 292 U. S., 360.)

Clearly, with the possible exception of section 116(d), there is nothing in the Revenue Act of 1934 to indicate that States should be taxed as corporations, and the proper interpretation of that section indicates rather that States should not be so taxed. The first paragraph of section 116(d) of that Act, relating to the "Income of States, municipalities, etc.," provides for the exemption from taxation of the following type of income:

> * * * Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, or income accruing to the government of any possession of the United States, or any political subdivision thereof.

It will be observed that the paragraph quoted refers to the income "derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia." Had Congress meant to include within this exemption income derived by the State itself from an activity which it carries on directly, it is suggested that it would have said "income derived from * * * by any State, Territory, etc.," since the words "accruing to" connote the receipt of income from a contract or investment rather than from an act of the recipient. The use of these words serves, if not to make clear that the income referred to must have been derived by an entity other than a State, Territory, or the District of Columbia, at least to raise an ambiguity which justifies resort to extrinsic evidence for its resolution.

In determining the meaning of a provision which is ambiguous the practical interpretation given that provision by the officers charged with its administration must be given great weight, especially when the practice has been long-continuing and the provision has been frequently reenacted by Congress. (*Brewster* v. *Gage*, 280 U. S., 327; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S., 269.) This rule does not appear to be limited to affirmative and express construction. It would seem that "the neglect of lawfully constituted authorities to assess taxes" will be "persuasive evidence" that a tax law is not applicable if the law is "susceptible of more than one construction." (*State ex rel.*

Koeln v. *St. Louis Y. M. C. A.*, 259 Mo., 233, 168 S. W., 589; *Westerman* v. *Supreme Lodge K. P.*, 196 Mo., 670, 94 S. W., 470.) (See also *Mintz et al.* v. *Baldwin*, 289 U. S., 346; *United States* v. *Farrar*, 281 U. S., 624.) The practice of the Bureau of Internal Revenue over a course of years, in the light of the ambiguity of the legislation under consideration coupled with the frequent reenactment of that legislation without substantial change, supports the inference just suggested that the first paragraph of section 116(d) was intended to refer, not to the income of a State or municipality resulting from its own direct participation in industry, but rather to that part of the income of a corporation engaged in the operation of a public utility or in the performance of some governmental function which accrues to a State or municipality by virtue of its ownership of such corporation. Parenthetically it should be noted that this construction is entirely consistent with the undoubted effect of the second paragraph of that section in exempting from tax that part of the proceeds from the operation of a public utility which accrues to a State or municipality under a contract entered into with "any person."

In the entire period since the enactment of the Tariff Act of 1913, the Bureau has regularly considered section 116(d) and the corresponding provisions of prior Revenue Acts from the standpoint of the taxability of corporations owned by, or operating under contract with, States or municipalities. (See, for example, I. T. 2436, C. B. VII–2, 147; S. M. 2941, C. B. IV–1, 210; O. D. 250, C. B. 1, 92.) (See also *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 Fed. (2d), 920.) Not only has the Bureau failed to tax the direct income of any State or municipality but it has throughout this period of 22 years made no effort to obtain income returns from States or municipalities, or to determine by any other means whether any State or municipality has had income of this nature. This persistent nonenforcement of the tax against States may be reasonably explained only as indicating a tacit construction by the Bureau in accordance with the interpretation which has just been suggested.

To assume that this inaction on the part of the Bureau was due to an oversight is highly unreasonable. Eight years prior to the passage of the 1913 Act, the Supreme Court had declared in *South Carolina* v. *United States* (1905) (199 U. S., 437) that agents of a State operating a liquor dispensary system were subject to the special excise tax on retail liquor dealers, and, for at least three years following 1913, the Bureau was actively engaged in collecting this special excise tax from State liquor dispensaries in South Carolina. This in itself is clear evidence that the Bureau was aware of the participation by States in this class of activities, but even stronger evidence is found in the fact that, during the existence of the income tax laws, questions involving the taxability of the income of employees of a city or State engaged directly in carrying on a nonessential governmental function have frequently been determined by the Bureau. In determining such questions, the Bureau has recognized that the States and municipalities were acting in a proprietary capacity, and that their employees were not exempt from the payment of the Federal income tax; yet no attempt has ever been made to tax the income derived by States and municipalities from these activities. (See, for

example, S. M. 2232, C. B. III–2, 83 (cafeterias in public schools); I. T. 2357, C. B. VI–1, 52 (county hospitals); S. M. 5490, C. B. V–1, 37 (Rural Credit Board).) (See also I. T. 2782, C. B. XIII–1, 83; I. T. 2376, C. B. VI–2, 55; *D. G. Wood et ux.* v. *Commissioner*, 29 B. T. A., 919; *Shelby Wiggins* v. *Commissioner*, 27 B. T. A., 576; *T. P. Wittschen* v. *Commissioner*, 25 B. T. A., 46.)

During the time that the Bureau may be said to have been asserting this construction, the first paragraph of section 116(d) has been reenacted eight times with but a single change and that an inconsequential one. On any of these occasions, Congress could, had it disagreed with the interpretation given the paragraph by the Bureau, have so amended the Act as to make it entirely clear that States and municipalities were to be included within the scope of the Act; yet there is no evidence that such action was ever considered.

Additional support for the conclusion that Congress did not intend to tax the income derived directly by States as such is found in the committee reports and the debates on the floor of Congress preceding the passage of the Tariff Act of 1913 (see Senate Report No. 80 on H. R. 3321, Sixty-third Congress, first session, 50 Congressional Record (part 6), pages 5320–5321). They make it clear that what Congress was concerned with, in considering the enactment of the first paragraph of section II G(a) of the Tariff Act of 1913 (section 116(d) of the Revenue Act of 1934), was that part of the income derived by a corporation from the public utility business or from the performance of a governmental function which would accrue to a State or a municipality by virtue of its possession of a "beneficial interest" in the corporation. The type situations cited were all of such corporations. Nowhere in the report or debates is there consideration of the taxation of the income of States or municipalities which would result to them directly without the intervention of the corporate form and it appears to have been taken for granted that such income would not be subject to tax.

It is suggested that Congress, in not taxing the income of States, may well have been motivated by a desire not to limit the activities in which States might otherwise engage. The line between those revenue-producing activities of a State which are "governmental" and those which are "proprietary" is one which is in its nature difficult to draw and which has as yet been only faintly traced by decisions of the courts. For example, while the conduct or operation of prisons is strictly within the sovereign functions of the State, the revenue derived from the manufacture and sale of prison-made merchandise may or may not be the essential result of a governmental activity. Similarly, such activities as the loaning of State funds or the sale of surplus properties are of a character which makes it difficult to predict in which category they would be placed. It may be assumed that Congress did not desire in any way to restrict a State's participation in enterprises which might be useful in carrying out those projects desirable from the standpoint of the State Government which, on a broad consideration of the question, may be the function of the sovereign to conduct; and it may reasonably be considered that it was the possibility of such restriction which persuaded Congress not to include

State income within the subjects taxed by the various Revenue Acts since 1913. While such speculation has, of course, no conclusive effect, it may be proper as an aid in determining the intention of Congress in order to construe legislation patently ambiguous.

It follows from what has been said that the State of Montana is not a "corporation" within the meaning of the Revenue Act of 1934. This conclusion is reached in the belief that, in interpreting a statute, administrative agencies of the Government should not take the position against their better judgment that a tax is payable. While it is true that the possibilities of a judicial review of such an interpretation are meager, the effect of this position is merely to shift the burden of consideration from the courts to the legislature.

Since the question has been determined on the point of construction, the constitutional question need not be considered.

In G. C. M. 13745, supra, the opinion was expressed that profits derived by the State of Oregon from its liquor stores are not subject to Federal income tax. This opinion was prepared as a reversal of I. T. 2797 (C. B. XIII-2, 74), in which it was held to be within the power of the Federal Government to tax the profits from the Oregon liquor stores; and, in withdrawing I. T. 2797, it was pointed out that the decisions in *South Carolina* v. *United States*, supra, and *Ohio* v. *Helvering*, supra, were not controlling on the question discussed in that opinion. In order to clear up any doubt as to the meaning of G. C. M. 13745, it should be pointed out that that opinion is not to be considered as authority for any ruling other than that the income under consideration is not taxable by the Federal Government under existing legislation. It may not be taken as a determination of the constitutional question involved.

The conclusion is, therefore, that the income derived from the operation of liquor stores by the State of Montana is not subject to Federal income tax under the Revenue Act of 1934.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117-1: Meaning of capital assets. XIV-3-7261
T. D. 4511

Income tax—Capital gains and losses.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 117 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of capital assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (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 to customers in the ordinary course of his trade or business.

(c) *Determination of period for which held.*—For the purpose of subsection (a)—

(1) 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.

(2) 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.

(3) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain was recognized to the distributee under the provisions of section 112(g) of the Revenue Act of 1928 or the Revenue Act of 1932, 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.

(4) 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 section 118 of the Revenue Act of 1928 or the Revenue Act of 1932, 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.

(d) *Limitation on capital losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. If a bank or trust company incorporated under the laws of the United States or of any State or Territory, a substantial part of whose business is the receipt of deposits, sells any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, any loss resulting from such sale (except such portion of the loss as does not exceed the amount, if any, by which the adjusted basis of such instrument exceeds the par or face value thereof) shall not be subject to the foregoing limitation and shall not be included in determining the applicability of such limitation to other losses.

(e) *Gains and losses from short sales, etc.*—For the purpose of this title—

(1) gains or losses from short sales of property shall be considered as gains or losses from sales or exchanges of capital assets; and

(2) gains or losses attributable to the failure to exercise privileges or options to buy or sell property shall be considered as gains or losses from sales or exchanges of capital assets held for one year or less.

(f) *Retirement of bonds, etc.*—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of the Act, the following regulations are hereby prescribed with respect to capital gains and losses:

ARTICLE 1. *Meaning of "capital assets."*—The term "capital assets" includes all classes of property not specifically excluded by section 117(b). The term is not limited to stocks and bonds nor to property held for more than two years. In determining whether property is a "capital asset," the period for which held is immaterial.

ART. 2. *Limitations on capital gains and capital losses.*—In computing the net income of a taxpayer, other than a corporation, the amount of the gain or loss, computed under section 111 and recognized under section 112, upon the sale or exchange of a capital asset shall be taken into account only to the extent provided in section 117(a). The percentage of the gain or loss to be taken into account ranges from 100 per cent to 30 per cent, depending upon the period for which the asset was held. For instance, if unimproved real estate which is a capital asset, purchased for $20,000, is sold for $25,000 after having been held for more than 10 years, only 30 per cent of the recognized gain ($5,000), or $1,500, shall be taken into account in computing net income; or if such property was sold for $14,000 only 30 per cent of the recognized loss ($6,000), or $1,800, shall be taken into account.

Section 117(d) provides a limitation on deductions for capital losses affecting all taxpayers including corporations, that is, losses from sales or exchanges of capital assets shall be allowed as deductions only to the extent of $2,000 plus the gains from such sales and exchanges. However, in the case of certain banks or trust companies, this limitation is subject to the modification provided in that section.

The provisions of this article may be illustrated by the following example:

Example: During the taxable year A, an individual, had gains and losses from sales and exchanges of capital assets as follows (the deduction for the losses not being prohibited by any section of the Act other than sections 111, 112, and 117):

Item.	Gain recognized under sections 111 and 112.	Loss recognized under sections 111 and 112.	Time held.	Per cent applicable.	Gain taken into account under section 117(a).	Loss taken into account under section 117(a).
Corporate stock		$5,000.00	9 months	100		$5,000.00
Bonds	$4,000.00		1½ years	80	$3,200.00	
Real estate		1,000.00	2½ years	60		600.00
Government bonds	3,000.00		6 years	40	1,200.00	
Failure to exercise option to buy property.		2,000.00		100		2,000.00
Gains and losses taken into account					4,400.00	7,600.00

Applying the limitation of section 117(d), the losses of $7,600 taken into account are allowable as a deduction only to the extent of $6,400 ($2,000 plus the gains of $4,400 taken into account).

ART. 3. *Determination of period for which capital assets are held.*—Under section 117(c) if property is acquired in certain transactions described in sections 112, 113, and 118, the period for which such property is considered to have been held by the taxpayer is not computed from the date when such property was acquired by the taxpayer but from a prior date. For instance: In the case of stock or securities in a corporation a party to a reorganization received pursuant to a plan of reorganization in exchange solely for stock or securities in another corporation a party to the reorganization, the period for which the stock or securities exchanged were held by the taxpayer must

be added to the period for which the stock or securities received on the exchange were held by the taxpayer. In the case of property acquired by the taxpayer after December 31, 1920, by gift (if under the provisions of section 113, such property has, for the purpose of determining gain or loss from the sale or exchange, the same basis in the hands of the taxpayer as it would have in the hands of the donor), the period for which the property was held by the donor must be added to the period for which the property was held by the taxpayer. In the case of stock or securities the acquisition of which resulted in the nondeductibility (under section 118, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, the period for which the stock or securities, the loss from the sale or other disposition of which was not deductible, were held must be added to the period for which the stock or securities acquired were held by the taxpayer. The period for which the taxpayer has held stock issued to him as a stock dividend shall be determined as though the stock dividend were the stock in respect of which the dividend was issued.

ART. 4. *Application of section 117 generally.*—Section 117 applies only to gains and losses upon the sale or exchange of capital assets and, therefore, has no application to loss of useful value upon the permanent abandonment of the use of property, or loss sustained as the result of corporate stock or debts becoming worthless.

ART. 5. *Application of section 117 in the case of husband and wife.*—In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117(d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.

ART. 6. *Gains and losses from short sales.*—For income tax purposes, a short sale is not deemed to be consummated until delivery of property to cover the short sale, and the percentage of the recognized gain or loss to be taken into account under section 117(a) from a short sale shall be computed according to the period for which the property so delivered was held. Thus, if a taxpayer made a short sale of shares of stock and covered the short sale by purchasing and delivering shares which he held for not more than one year, 100 per cent of the recognized gain or loss would be taken into account under section 117(a), even though he had on hand other shares of the same stock which he held for more than one year. If, however, he covered the short sale by delivering shares which he held for more than one year but not for more than two years, only 80 per cent of the recognized gain or loss would be taken into account. If the short sale is made through a broker and the broker borrows property to make delivery, the short sale is not deemed to be consummated until the obligation of the seller created by the short sale is finally discharged by delivery of property to the broker to replace the property borrowed by the broker.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 12, 1935.

L. W. ROBERT, Jr.,
Acting Secretary of the Treasury.

ARTICLE 117-1: Meaning of capital assets. XIV-5-7284
I. T. 2853

REVENUE ACT OF 1934.

A deposit account in a bank is a capital asset within the meaning of section 117(b) of the Revenue Act of 1934. Any loss sustained on the sale of such a capital asset is subject to the limitation provided in section 117(d) of that Act.

A ruling is requested relative to the deductibility by the M Company for the fiscal year beginning July 1, 1934, of a loss sustained on

the sale of a portion of a deposit account carried with the N Bank at the time of its closing in 1931.

The deposit account, as reduced by amounts previously realized thereon, was in the amount of 8.38x dollars as of the beginning of the taxpayer's fiscal year. A portion of such account in the amount of 5.30x dollars was sold on September —, 1934, to the O Company for 1.73x dollars. It is stated that the price at which such portion of the account was disposed of represented approximately the same amount as will be paid by the bank on final liquidation, and that no portion of the account would have been deductible as a bad debt prior to the date of sale.

The answer to the question presented depends upon whether the deposit account, the sale of which resulted in the loss, is properly to be classed as a "capital asset" as that term is defined by section 117(b) of the Revenue Act of 1934. Section 117(b) reads as follows:

Definition of capital assets.—For the purposes of this title, "capital assets" means property held by the taxpayer (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 to customers in the ordinary course of his trade or business.

In *Twin Ports Bridge Co.* v. *Commissioner* (27 B. T. A., 346), the Board of Tax Appeals held that indebtedness is property in the hands of the creditor, citing in support thereof the decision rendered by the Supreme Court of the United States in *Portuguese-American Bank of San Francisco* v. *Welles* (242 U. S., 7). The deposit account in the present case is indebtedness held by the vendor corporation as creditor against the N Bank and is property which constitutes a capital asset within the meaning of section 117(b) of the Revenue Act of 1934. As the loss in question was sustained on the *sale of a capital asset*, it follows that the deduction for such loss is subject to the limitation provided by section 117(d) of the Revenue Act of 1934.

ARTICLE 117-2: Limitations on capital gains and capital losses. XIV-1-7228 I. T. 2844

REVENUE ACT OF 1934.

The deduction for losses by a trust company from sales of *stock* is subject to the limitation on capital losses prescribed by section 117(d) of the Revenue Act of 1934.

ARTICLE 117-2: Limitations on capital gains and capital losses. XIV-10-7352 I. T. 2868

REVENUE ACT OF 1934.

Where a joint return is filed and the wife takes into account under section 117(a) of the Revenue Act of 1934 a loss of $7,000 in excess of gains on sales of capital assets, she is limited to a de-

duction of $2,000 under section 117(d) of that Act. Where the wife's income from other sources was only $400, the balance of the deductible loss amounting to $1,600 may be applied against the net income of the husband in computing the combined net income of the husband and wife in the joint return. (See T. D. 4511, page 107.)

ARTICLE 117-2: Limitations on capital gains and capital losses.

REVENUE ACT OF 1934.

Bonds of a municipality on which default has occurred exchanged for new bonds of the city. (See I. T. 2896, page 96.)

SECTION 117(f). XIV-2-7241
I. T. 2846

REVENUE ACT OF 1934.

The gain realized by a corporation from the purchase and retirement of bonds issued by it is not a capital gain and may not be offset against losses sustained on the sale or exchange of capital assets in determining the amount of the allowable deduction for such losses under section 117(d) of the Revenue Act of 1934.

A ruling is requested whether the gain realized by the M Company from the purchase and retirement during the year 1934 of collateral trust gold bonds issued by it constitutes a capital gain under section 117 of the Revenue Act of 1934 which may be offset against losses from sales or exchanges of capital assets.

The bonds were purchased in the open market and retired in the principal amount of $27x$ dollars. A gain, computed in accordance with article 63 of Regulations 77, was realized in the amount of $9.66x$ dollars. It appears that losses were sustained by the taxpayer during the year on the sale of capital assets and if the gain realized from the purchase and retirement of its bonds is a capital gain it may be offset against the losses sustained on the sale of capital assets under the provisions of section 117(d) of the Revenue Act of 1934, which provides in part as follows:

(d) *Limitation on capital losses.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. * * *

The question presented in the instant case apparently arises by reason of the provisions of section 117(f) of the Revenue Act of 1934, which reads as follows:

Retirement of bonds, etc.—For the purposes of this title, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

Under the Revenue Act of 1934, it is clear as to the holder of bonds which are retired that the gain derived or loss sustained must be treated as a capital gain or capital loss in view of the provi-

sions of section 117(f) of that Act, which provides that amounts received by the holder upon the retirement of bonds shall be considered as amounts received in *exchange* therefor. Such a gain or loss is a capital gain or capital loss, as the case may be, not by reason of the nature of the transaction itself but because of the specific provisions of section 117(f), supra. However, the statute does not contain any such provision with respect to the transaction as viewed from the standpoint of the *obligor corporation*. There is no *sale or exchange* by the corporation in such a case as required by the statute in order for a transaction to result in a capital gain or a capital loss. (See generally *John H. Watson, Jr.*, v. *Commissioner*, 27 B. T. A., 463, acquiescence, C. B. XII-1, 13.) The gain realized by the M Company from the retirement of its bonds in 1934 does not, therefore, constitute a capital gain but is to be treated as ordinary gain. It follows that such gain may not be offset against losses sustained on the *sale or exchange* of capital assets in determining the amount of the deduction allowable for such losses under section 117(d) of the Revenue Act of 1934.

SECTION 119.—INCOME FROM SOURCES WITHIN UNITED STATES.

ARTICLE 119-4: Compensation for labor or personal services. XIV-10-7353 I. T. 2869

REVENUE ACT OF 1934.

Taxation of foreign wine and liquor concerns and their employees with respect to contracts for the sale of such commodities.

A number of questions relative to liability for Federal income tax of foreign wine and liquor concerns and their employees have been asked which are stated and answered below in the order in which presented:

(*a*) When a salaried representative of a foreign business concern comes to the United States to negotiate business for his employer, is that portion of his salary earned during his stay in the United States subject to income tax?

Under section 119(a)3 of the Revenue Act of 1934, compensation for labor or personal services performed in the United States by a nonresident alien while in the United States to negotiate business for his employer is subject to Federal income tax.

(*b*) Is the profit earned by a foreign concern derived through a contract made in the United States with an American sales agent for the sale of its products subject to income tax, and if so, what procedure is to be followed to ascertain the amount of profit and the assessment of the tax on such income?

The income from sources within the United States derived by a nonresident alien individual (either directly or through a partnership) or a foreign corporation from the sale of personal property in the United States (including liquor) under a contract made in the United States with an American sales agent is subject to Federal

income tax. (See section 119 (a) and (e) of the Revenue Act of 1934.) As to the manner of determining the profit derived from the sale of personal property produced without the United States and sold within the United States, attention is directed to article 682, Regulations 77. The income derived from sources within the United States by a nonresident alien individual or corporation from the sale of personal property within the United States should be reported on income tax returns, Form 1040B or Form 1i20, dependent upon the status of the "foreign concern." Such returns are required to be filed either by the taxpayer or his responsible representative in the United States. In this connection attention is directed to article 1081, Regulations 77.

(*c*) Are the profits from similar contracts made in Europe with American business concerns subject to the income tax laws?

When the sale of wine or liquor is made abroad by a foreign company to an American purchaser, the profit is not subject to Federal income tax. The mere purchase abroad of foreign wine or liquor from a foreign company does not have the effect of making the seller (foreign company) subject to Federal income tax regardless of the fact that the goods are shipped to the United States. If a foreign company purchases wine or liquor abroad and sells it in the United States the entire profit is derived from sources within the United States and is subject to Federal income tax. If, however, the foreign company manufactures such commodities abroad and sells them in the United States, the profit is derived partly from sources within and partly from sources without the United States. In this connection attention is invited to section 119(e) of the Revenue Act of 1934, article 682 of Regulations 77, I. T. 2806 (C. B. XIII–2, 78), and G. C. M. 13475 (C. B. XIII–2, 224).

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131–1: Analysis of credit for taxes. XIV–16–7440
G. C. M. 14625

REVENUE ACT OF 1934.

The absenteeism tax imposed by Mexico under the law promulgated February 22, 1934 (effective March 1, 1934), may be claimed as a credit against United States income taxes, subject to the statutory provisions and limitation of section 131 of the Revenue Act of 1934.

Advice is requested whether the absenteeism tax imposed by Mexico may be claimed as a credit against United States income taxes under section 131 of the Revenue Act of 1934.

From an examination of the provisions of the "absenteeism tax law" of Mexico promulgated February 22, 1934 (effective March 1,

1934), it appears that a tax at the rates of 2 per cent and 4 per cent is levied upon the income originating in Mexico received by persons absent from Mexico, including corporations domiciled abroad. The tax is also levied on income originating in Mexico received by persons (including corporations) domiciled in Mexico, when such income is invested abroad. The administration of the absenteeism tax is intrusted to the "Income Tax Bureau of the Direction General of Revenue." It appears that the M Company has been advised by the local Mexican income tax office that the law affects the O Company, an affiliated company, to the extent that an additional 4 per cent tax must be paid on the net taxable income as shown on the Mexican income tax return.

Inasmuch as the tax is levied on income, it must be considered as an income tax, and may, therefore, be claimed as a credit against United States income taxes, subject to the statutory provisions and limitation of section 131 of the Revenue Act of 1934.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 131–5: Countries which do or do not satisfy the similar credit requirement. XIV–7–7313 I. T. 2860

REVENUE ACT OF 1934.

Great Britain does not satisfy the similar credit requirement of section 131(a)3 of the Revenue Act of 1934.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 141.—CONSOLIDATED RETURNS OF RAILROAD CORPORATIONS.

ARTICLE 11(a), REGULATIONS 89: Consolidated returns required for subsequent years. (Also Section 702.) XIV–8–7329 I. T. 2865

REVENUE ACTS OF 1932 AND 1934.

I. T. 2823 (C. B. XIII–2, 162) is applicable to income tax returns of affiliated groups of corporations for any fiscal year begun in 1933 and ended in 1934. It is not applicable to excess profits tax returns. (See T. D. 4469 (C. B. XIII–2, 110), and Mim. 4241 (C. B. XIII–2, 55).)

SECTION 142.—FIDUCIARY RETURNS.

ARTICLE 142-1: Fiduciary returns. XIV-5-7292
T. D. 4519

INCOME TAX.

Fiduciary returns.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 142 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 142. FIDUCIARY RETURNS.

(a) *Requirement of return.*—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is $1,000 or over;

(5) Every estate or trust the gross income of which for the taxable year is $5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a nonresident alien.

(b) *Joint fiduciaries.*—Under such regulations as the Commissioner with the approval of the Secretary may prescribe a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be sufficient compliance with the above requirement. Such fiduciary shall make oath (1) that he has sufficient knowledge of the affairs of the individual, estate, or trust for which the return is made, to enable him to make the return, and (2) that the return is, to the best of his knowledge and belief, true and correct.

(c) *Law applicable to fiduciaries.*—Any fiduciary required to make a return under this title shall be subject to all the provisions of law which apply to individuals.

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above quoted provisions of the Revenue Act of 1934, the following regulations are prescribed.

ARTICLE 1. *Fiduciary returns.*—Every fiduciary, or at least one of joint fiduciaries, must make a return of income—

(*a*) For the individual whose income is in his charge, if the gross income of such individual is $5,000 or over, or if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife for any part of the taxable year; or if such individual is married and was living with husband or wife for any part of the taxable year but not at the close of the taxable year and his gross income for the taxable year is $5,000

or over, or his net income is equal to, or in excess of, the credit allowed him by section 25(b) (1) and (3) of the Revenue Act of 1934 (computed without regard to his status as head of a family); or if such individual is married and was living with husband or wife for the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is $2,500 or over; or if such individual is married and was living with husband or wife at the close of the taxable year but not during the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is equal to, or in excess of, the credit allowed them by section 25(b) (1) and (3) of the Revenue Act of 1934 (computed without regard to the status of either of them as head of a family), or

(*b*) For the estate or trust for which he acts if the net income of such estate or trust is $1,000 or over, or if the gross income of the estate or trust is $5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a nonresident alien.

The return in case (*a*) shall be on Form 1040 or 1040A. In case (*b*) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with section 162 of the Revenue Act of 1934, and a return on Form 1041 with respect to any income deducted under section 162 (b) or (c) of that Act. If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. A copy of the will or trust instrument sworn to by the fiduciary as a true and complete copy in cases in which the gross income of the estate or trust is $5,000 or over, must be filed with the fiduciary return of the estate or trust, together with a statement by the fiduciary indicating the provisions of the will or trust instrument which, in his opinion, determine the extent to which the income of the estate or trust is taxable to the estate or trust, the beneficiaries, or the grantor, respectively. If, however, a copy of the will or trust instrument, or statement relating to the provisions of the will or trust instrument, has once been filed, it need not again be filed if the fiduciary return contains a statement showing when and where it was filed. If the trust instrument is amended in any way after such copy has been filed, a copy of the amendment, together with a statement by the fiduciary indicating the effect, if any, in his opinion, of such amendment on the extent to which the income of the estate or trust is taxable to the estate or trust, the beneficiaries, or the grantor, respectively, must be filed with the return for the taxable year in which the amendment was made. If, with respect to the first taxable year beginning after December 31, 1933, the copy of the will or trust instrument required by these regulations can not be filed at the time the fiduciary return is made without causing undue hardship to the fiduciary, such copy may be filed as soon as practicable thereafter but not later than six months after the time prescribed by law for the making of the fiduciary return (without regard to any extension of time granted for the filing of such return). In such a case a statement shall be made in the fiduciary return showing the undue hardship which would result to the fiduciary if the copy of the will or trust instrument were filed at the time the fiduciary return is made and stating that the copy will be filed at the earliest practicable date. If the copy of the will or trust instrument is not filed at the time the return is filed, then such copy shall be forwarded directly to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C. If the net income of a decedent from the beginning of the taxable year to the date of his death was equal to, or in excess of, the credit allowed him by section 25(b) (1) and (3) of the Revenue Act of 1934 (computed without regard to his status as head of a family), or if his gross income for the same period was $5,000 or over, the executor or administrator shall make a return for such decedent.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 30, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143–2: Fixed or determinable annual or periodical income. XIV–12–7393 T. D. 4535
(Also Section 144, Article 144–1.)

INCOME TAX.

Articles 143–2, 143–3, and 144–1 of Regulations 86, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The first paragraph of article 143–2 of Regulations 86 is amended by adding at the end thereof the words " and dividends " so that such paragraph will read:

ART. 143–2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. But other kinds of income are included, as, for instance, royalties and dividends.

The last sentence of the first paragraph of article 143–3 of Regulations 86 is amended by striking out the words " subject to taxation under Title I " and inserting in lieu thereof " organized under the China Trade Act, 1922," and by striking out the words " by a corporation organized under the China Trade Act, 1922," so that such sentence will read:

No withholding from dividends paid by a corporation organized under the China Trade Act, 1922, is required unless the dividends are treated as income from sources within the United States under section 119 and are distributed to—

(*a*) A nonresident alien individual other than a resident of China at the time of such distribution;

(*b*) A nonresident partnership composed in whole or in part of nonresident aliens (other than a partnership resident in China); or

(*c*) A nonresident foreign corporation (other than a corporation resident in China).

The next to the last sentence of the first paragraph of article 144–1 of Regulations 86 is amended by striking out the words " except dividends paid by a corporation subject to taxation under Title I " and inserting in lieu thereof " except dividends paid by a domestic corporation subject to taxation under Title I," so that such sentence will read:

Withholding of a tax of 13¾ per cent is also required in the case of payments of other fixed or determinable annual or periodical income from sources within the United States to nonresident foreign corporations, except dividends paid by a domestic corporation subject to taxation under Title I other than dividends distributed by a corporation organized under the China Trade Act, 1922, to a nonresident foreign corporation which is not a resident of China.

GUY T. HELVERING,
Commissioner.

Approved March 16, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

ARTICLE 143-2: Fixed or determinable annual or periodical income. (Also Section 144, Article 144-1; Section 148, Article 148-1.)

XIV-20-7494
Mim. 4323

Liability of foreign corporations to withhold tax or to file returns of information in connection with the payment of dividends.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 27, 1935.

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

Section 143(b) of the Revenue Act of 1934 provides in part:

Nonresident aliens.—All persons, in whatever capacity acting, * * * having the control, receipt, custody, disposal, or payment of * * * fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens (other than income received as dividends of the class allowed as a credit by section 25(a)), shall * * * deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 4 per centum thereof * * *.

Section 144 of that Act provides:

PAYMENT OF CORPORATION INCOME TAX AT SOURCE.

In the case of foreign corporations subject to taxation under this title not engaged in trade or business within the United States and not having any office or place of business therein, there shall be deducted and withheld at the source in the same manner and upon the same items of income as is provided in section 143 a tax equal to 13¾ per centum, and such tax shall be returned and paid in the same manner and subject to the same conditions as provided in that section: *Provided*, That in the case of interest described in subsection (a) of that section (relating to tax-free covenant bonds) the deduction and withholding shall be at the rate specified in such subsection.

Section 25(a) of the Act reads in part:

Credits for normal tax only.—There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

(1) *Dividends.*—The amount received as dividends from a domestic corporation which is subject to taxation under this title. The credit allowed by this paragraph shall not be allowed in respect of dividends received from a corporation organized under the China Trade Act, 1922, or from a corporation which under section 251 is taxable only on its gross income from sources within the United States by reason of its receiving a large percentage of its gross income from sources within a possession of the United States. * * *

Section 119(a) of the Act provides in part:

Gross income from sources in United States.—The following items of gross income shall be treated as income from sources within the United States.

* * * * * * *

(2) *Dividends.*—The amount received as dividends—

* * * * * * *

(B) from a foreign corporation unless less than 50 per centum of the gross income of such foreign corporation for the 3-year period ending with the close of its taxable year preceding the declaration of such dividends (or

for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of this section; but dividends from a foreign corporation shall, for the purposes of section 131 (relating to foreign tax credit), be treated as income from sources without the United States; * * *.

Although the Revenue Act of 1934 does not specifically provide that dividends shall be subject to withholding, section 143(b) by enumerating certain classes of income coming within the definition of "fixed or determinable annual or periodical gains, profits and income" such as interest, salary, rent, etc., inferentially recognizes that dividends likewise come within the definition, for it excepts "dividends of the class allowed as a credit by section 25(a)."

The first paragraph of article 143–2 of Regulations 86, as amended by Treasury Decision 4535, approved March 16, 1935 [page 118, this Bulletin], reads as follows:

Fixed or determinable annual or periodical income.—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments. But other kinds of income are included, as, for instance, royalties and dividends.

In accordance with the above-quoted provisions of the Act, any person having the control, receipt, custody, disposal, or payment of dividends declared by a corporation is required to deduct and withhold income tax at the source when payments are made to the persons enumerated in sections 143(b) and 144, except in the case of dividends of the class allowed as a credit by section 25(a). That section permits a credit for the purpose of the normal tax (in the case of dividends) only of the amount received as dividends from a domestic corporation which is subject to income tax, except a corporation organized under the China Trade Act, 1922, or a corporation entitled to the benefits of section 251 of the Revenue Act of 1934. It follows that dividends paid by a foreign corporation are subject to the deduction of income tax at the source (*a*) if 50 per cent or more of the gross income of such foreign payor corporation for the 3-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119 of the Revenue Act of 1934, and, (*b*) if the dividends were paid to the following classes of taxpayers: (1) a nonresident alien individual, (2) a partnership not engaged in trade or business within the United States and not having an office or place of business therein and composed in whole or in part of nonresident aliens, or (3) a foreign corporation not engaged in trade or business within the United States and not having any office or place of business therein.

The amount of tax required to be withheld must be reported on annual return of income tax to be paid at source, Form 1042. The foreign corporation which pays the dividend should file the withholding return with the collector of internal revenue for the district in which it has its principal office or place of business in the United States. If the foreign payor corporation has no office or place of business in the United States the withholding return should be filed by its fiscal or paying agent in this country.

In order for a foreign corporation to be relieved from its liability to withhold tax under the provisions of sections 143(b) and 144 from dividends paid by it on the ground that such dividends are not income from sources within the United States, it will be necessary for the foreign corporation to submit at the close of its taxable year preceding the year in which its dividends were declared a statement indicating the nature of its business and showing the amounts of its total gross income from all sources for each of the three years preceding the year in which the dividends are declared and the amounts of its total gross income from sources within the United States for such years in such detail as will enable the Commissioner to determine whether the foreign corporation derives less than 50 per cent of its gross income from sources within the United States.

Article 148–1(*a*) of Regulations 86 provides in part:

* * * Every domestic corporation or foreign corporation engaged in business in the United States or having an office or place of business or a fiscal or paying agent in the United States, not specifically exempt from taxation, making payments of dividends and distributions out of its earnings or profits accumulated since February 28, 1913 (not including stock dividends or distributions in liquidation), to any shareholder who is an individual (citizen, resident, or nonresident alien), a fiduciary, or a partnership, amounting to $300 or more during the calendar year, shall render an information return on Forms 1096 and 1099 for the calendar year 1934 and each calendar year thereafter. A separate Form 1099 must be prepared for each shareholder, upon which will be shown the name and address of the shareholder to whom such payment was made, and the amount paid. These forms, accompanied by letter of transmittal on Form 1096 showing the number of Forms 1099 filed therewith, shall be forwarded to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15 of the following year.

A foreign corporation which is required to withhold tax from its dividends under sections 143(b) and 144 is not required to file returns of information on Form 1099 with respect to the dividends from which it withheld the tax, as the information on Form 1042 is sufficient compliance with the requirements of section 148.

A foreign corporation which is not required to withhold tax from its dividends for the reason that such dividends are income from sources without the United States is not required to file returns of information on Form 1099 in connection with the payment of dividends made to the classes of persons enumerated in sections 143(b) and 144.

All inquiries concerning this mimeograph should refer to the number thereon and the symbols IT:E:CTR.

GUY T. HELVERING,
Commissioner.

ARTICLE 143–3: Exemption from withholding.

REVENUE ACT OF 1934.

Amendment of Regulations 86, article 143–3. (See T. D. 4535, page 118.)

ARTICLE 143-5: Ownership certificates for bond interest. (Also Section 144, Article 144-1; Section 147(b), Article 147-4.)

XIV-1-7238
T. D. 4505

Withholding of income tax under the Revenue Act of 1934—Ownership certificates required in connection with interest on bonds of corporations.—Treasury Decision 4460 and Treasury Decision 4478 amended.

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

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4460 (C. B. XIII-2, 83), approved August 4, 1934, as amended by Treasury Decision 4478 (C. B. XIII-2, 88), approved September 29, 1934, is hereby further amended, effective January 1, 1935, by eliminating the paragraph substituted by Treasury Decision 4478 reading:

In accordance with the provisions of section 147(b), citizens, resident individuals and fiduciaries, resident partnerships and nonresident partnerships all of the members of which are citizens or residents, owning bonds, mortgages, or deeds of trust, or other similar obligations issued by a domestic corporation, a resident foreign corporation, or a nonresident foreign corporation having a fiscal agent or a paying agent in the United States, when presenting interest coupons for payment prior to January 1, 1935, shall file ownership certificates where the obligations contain a tax-free covenant and were issued before January 1, 1934, regardless of the amount of the coupons. The amount of interest received on such bonds shall be entered on line 3 of Form 1000, revised July, 1934 (or line 2 of Form 1000, revised June, 1932), except in the case of a citizen or resident the interest shall be entered on line 2 of Form 1000, revised July, 1934 (or line 1 of Form 1000, revised June, 1932), if the net income of such citizen or resident does not exceed the personal exemption and credit for dependents allowed by section 25(b). On and after January 1, 1935, citizens and resident individuals and fiduciaries, owning bonds, mortgages, or deeds of trust, or other similar obligations issued by a domestic corporation, a resident foreign corporation, or a nonresident foreign corporation having a fiscal agent or a paying agent in the United States, when presenting interest coupons for payment shall file ownership certificates where (*a*) the obligations do not contain a tax-free covenant or contain a tax-free covenant but were issued on or after January 1, 1934, and the amount of the coupons is $20 or more for each issue of such obligations; (*b*) the obligations contain a tax-free covenant and were issued before January 1, 1934, and the amount of coupons is $20 or more for each issue and the net income does not exceed the personal exemption and credit for dependents allowed by section 25(b); and (*c*) the obligations contain a tax-free covenant and were issued before January 1, 1934, and the net income of the owner exceeds the personal exemption and credit for dependents allowed by section 25(b), regardless of the amount of the coupons. On and after January 1, 1935, a resident partnership, or a nonresident partnership all of the members of which are citizens or residents, owning such obligations when presenting interest coupons for payment shall file ownership certificates where (*a*) the obligations do not contain a tax-free covenant or were issued on or after January 1, 1934, and the amount of the coupons is $20 or more for each issue; and (*b*) the obligations contain a tax-free covenant and were issued before January 1, 1934, regardless of the amount of the coupons.

and substituting therefor a paragraph reading as follows:

In accordance with the provisions of section 147(b), citizens, resident individuals and fiduciaries, resident partnerships and nonresident partnerships all

of the members of which are citizens or residents, owning bonds, mortgages, or deeds of trust, or other similar obligations issued by a domestic corporation, a resident foreign corporation, or a nonresident foreign corporation having a fiscal agent or a paying agent in the United States, when presenting interest coupons for payment shall file on Form 1000 ownership certificates for each issue of such obligations regardless of the amount of the coupons.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 2, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

ARTICLE 143–5: Ownership certificates for bond interest. XIV–13–7397 I. T. 2876

REVENUE ACT OF 1934.

Interest on farm loan bonds issued by joint stock land banks is not required to be reported on ownership certificates.

SECTION 144.—PAYMENT OF CORPORATION INCOME TAX AT SOURCE.

ARTICLE 144–1: Withholding in the case of nonresident foreign corporations.

REVENUE ACT OF 1934.

Ownership certificates required in connection with interest on bonds of corporations. (See T. D. 4505, page 122.)

ARTICLE 144–1: Withholding in the case of nonresident foreign corporations.

REVENUE ACT OF 1934.

Amendment of Regulations 86, article 144–1. (See T. D. 4535, page 118.)

ARTICLE 144–1: Withholding in the case of nonresident foreign corporations.

REVENUE ACT OF 1934.

Liability of foreign corporations to withhold tax in connection with payment of dividends. (See Mim. 4323, page 119.)

SECTION 147.—INFORMATION AT SOURCE.

ARTICLE 147-1: Return of information as to payments of $1,000. XIV-7-7324 T. D. 4523

Income tax—Information at source.—Information returns for the calendar year 1934 and subsequent calendar years.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 147 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 147. INFORMATION AT SOURCE.

(a) *Payments of $1,000 or more.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in section 148(a) or 149), of $1,000 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(b) *Returns regardless of amount of payment.*—Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and (2) in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by persons undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

(c) *Recipient to furnish name and address.*—When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

(d) *Obligations of United States.*—The provisions of this section shall not apply to the payment of interest on obligations of the United States.

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

SEC. 62. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of the Act, the following regulations are hereby prescribed with respect to returns of information at the source:

ARTICLE 1. *Meaning of terms.*—A foreign corporation engaged in trade or business within the United States or having an office or place of business therein is referred to in these regulations as a resident foreign corporation, and a foreign corporation not engaged in trade or business within the United States and not having any office or place of business therein, as a nonresident foreign corporation.

A partnership engaged in trade or business within the United States or having an office or place of business therein is referred to in these regulations as a resident partnership, and a partnership not engaged in trade or business

within the United States and not having any office or place of business therein, as a nonresident partnership.

The term "foreign items," as used in these regulations, means any item of interest upon the bonds of a foreign country or of a nonresident foreign corporation not having a fiscal or paying agent in the United States, or any item of dividends upon the stock of such corporation.

ART. 2. *Return of information as to payments of $1,000.*—All persons making payment to another person of fixed or determinable income of $1,000 or more in any calendar year must render a return thereof to the Commissioner for such year on or before February 15 of the following year, except as specified in articles 4–6. The return shall be made in each case on Form 1099, accompanied by transmittal Form 1096 showing the number of returns filed. The street and number where the recipient of the payment lives should be stated, if possible. If no present address is available, the last known post-office address must be given. Although to make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical.

Sums paid in respect of life insurance, endowment or annuity contracts which are required to be included in gross income under section 22(b) of the Revenue Act of 1934 come within the meaning of the term "fixed or determinable income" and are required to be reported in returns of information as required by this article, except that payments in respect of policies surrendered before maturity and lapsed policies need not be reported.

For the purpose of a return of information, an amount is deemed to have been paid when it is credited or set apart 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, and which is made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.

ART. 3. *Return of information as to payments to employees.*—The names of all employees to whom payments of $1,000 or over a year are made, whether such total sum is made up of wages, salaries, commissions, or compensation in any other form, must be reported. Amounts distributed or made available under an employees' trust governed by the provisions of section 165 of the Revenue Act of 1934 to any beneficiary in any taxable year, equal to or in excess of his personal exemption, that have been contributed to the fund by the employer or represent earnings of the fund, must be reported by the trustee. But see article 4. Heads of branch offices and subcontractors employing labor, who keep the only complete record of payments therefor, should file returns of information in regard to such payments directly with the Commissioner. When both main office and branch office have adequate records, the return should be filed by the main office.

In the case of payments made by the United States to persons in its service (civil or military) of wages, salaries, or compensation in any other form, the returns of information shall be made by the heads of the executive departments and other United States Government establishments.

If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer. If living quarters such as camps are furnished to employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employees, but if a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax. The value of quarters furnished Army and Navy officers, members of the Coast Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received as commutation of quarters by such officers or members, do not constitute taxable income. Premiums paid by an employer on policies of group life insurance covering the lives of his employees, the beneficiaries of which are designated by the employees, are not income to the employees.

ART. 4. *Cases where no return of information required.*—Payments of the following character, although over $1,000, need not be reported in returns of information on Form 1099:

(*a*) Payments of interest on obligations of the United States;

(*b*) Payments by a broker to his customers;

(*c*) Payments of any type made to corporations;

(*d*) Bills paid for merchandise, telegrams, telephone, freight, storage, professional services, and similar charges;

(*e*) Payments of rent made to real estate agents (but the agent must report payments to the landlord if the amount paid during the year was $1,000 or more to a single person, a partnership, or a fiduciary, or $2,500 or more to a married person);

(*f*) Payments made by branches of business houses located in foreign countries to alien employees serving in foreign countries;

(*g*) Salaries and profits paid or distributed by a partnership to the individual partners;

(*h*) Payments of salaries, rents, royalties, interest (except bond interest required to be reported on ownership certificates), and other fixed or determinable income aggregating less than $2,500 made to a married individual; and

(*i*) Payments of commissions made by fire insurance companies, or other companies insuring property, to general agents, except when specifically directed by the Commissioner to be filed.

If the marital status of the payee is unknown to the payor, or if the marital status of the payee changed during the taxable year, the payee will be considered a single person for the purpose of filing a return of information on Form 1099.

ART. 5. *Return of information as to interest on corporate bonds.*—In the case of payments of interest, regardless of amount, upon bonds and similar obligations of corporations, the ownership certificates, when duly filed, shall constitute and be treated as returns of information.

ART. 6. *Return of information as to payments to other than citizens or residents.*—In the case of payments of fixed or determinable annual or periodical income to nonresident aliens (individual or fiduciary), to nonresident partnerships composed in whole or in part of nonresident aliens, or to nonresident foreign corporations, the returns filed by withholding agents on Form 1042 shall constitute and be treated as returns of information.

ART. 7. *Return of information as to foreign items.*—In the case of foreign items (see article 1), an information return on Form 1099 is required to be filed by the bank or collecting agent accepting the items for collection, if the foreign item is paid to a citizen or resident of the United States (individual or fiduciary), or a partnership any member of which is a citizen or resident, and if the amount of the foreign items paid in any taxable year to a single person, a partnership, or a fiduciary is $1,000 or more, or to a married person is $2,500 or more. Such forms accompanied by Form 1096 should be forwarded to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15 of each year. The term "collection" includes the following: (*a*) The payment by the licensee of the foreign item in cash; (*b*) the crediting by the licensee of the account of the person presenting the foreign item; (*c*) the tentative crediting by the licensee of the account of the person presenting the foreign item until the amount of the foreign item is received by the licensee from abroad; (*d*) the receipt of foreign items by the licensee for the purpose of transmitting them abroad for deposits. See articles 2 and 4.

ART. 8. *Information as to actual owner.*—When the person receiving a payment falling within the provisions of the Revenue Act of 1934 for information at the source is not the actual owner of the income received, the name and address of the actual owner shall be furnished upon demand of the individual, corporation, or partnership paying the income, and in default of a compliance with such demand the payee becomes liable to the penalties provided. Dividends on stock are prima facie the income of the record owner of the stock. Upon receipt of dividends by a record owner, he should immediately execute Form 1087 to disclose the name and address of the actual owner. Form 1087 should be filed with the Commissioner of Internal Revenue, Sorting Section, Washington, D. C. Unless such a disclosure is made, the record owner will be held liable for any tax based upon such dividends.

The filing of Form 1087 is not required (*a*) where stocks are registered in the name of a nominee for a fiduciary required to file a return on Form 1041 in which the dividends from such stocks are reported, and (*b*) where they are

owned by a nonresident alien and are registered in the name of a nominee designated by a bank or trust company which is required to file returns of income for such nonresident alien.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 11, 1935.

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

ARTICLE 147–4: Return of information as to interest on corporate bonds.

REVENUE ACT OF 1934.

Ownership certificates required in connection with interest on bonds of corporations. (See T. D. 4505, page 122.)

ARTICLE 147–8: Information as to actual owner. XIV–6–7298 I. T. 2857

REVENUE ACT OF 1934.

Use of Form 1087 (ownership certificate—dividends on stock) by brokers and nominees of financial institutions.

Advice is requested relative to the filing of Form 1087 under the Revenue Act of 1934.

In view of the provisions of Treasury Decision 4459 (C. B. XIII–2, 95), it will be considered a sufficient compliance with the provisions of section 147 of the Revenue Act of 1934 if Form 1087, disclosing actual ownership of stock and dividends thereon, or a substitute form approved by the Bureau, is filed by brokers for each customer where the individual credit to the customer's account is $75 or more, disregarding the credits of less than that amount. If a broker desires, the forms so prepared may be retained until the end of the calendar year and then forwarded to the Bureau only in those cases where the aggregate amount of the individual dividend credit, as shown by the forms, equals or exceeds $300.

The nominees of banks, bankers, trust companies, and other financial institutions (except nominees of fiduciaries or other persons required to file Form 1041 or Form 1040B) will be required to file Form 1087 only where the individual payment amounts to $75 or more. The forms so prepared may be retained until the end of the calendar year and then forwarded to the Bureau only in cases where the aggregate amount of the individual dividend credit, as shown by the forms, equals or exceeds $300.

SECTION 148.—INFORMATION BY CORPORATIONS.

ARTICLE 148–1: Return of information as to payments of dividends.

REVENUE ACT OF 1934.

Liability of foreign corporations to file returns of information in connection with payment of dividends. (See Mim. 4323, page 119.)

SECTION 149.—RETURNS OF BROKERS.

ARTICLE 149–1: Return of information by brokers. XIV–3–7262 T. D. 4510

Returns of information by brokers and other agents.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 149 (Title I—Income Tax) of the Revenue Act of 1934 provides:

RETURNS OF BROKERS.

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.

PAR. B. Section 62 (Title I—Income Tax) of the Revenue Act of 1934 provides:

RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Pursuant to the above-quoted provisions of the Act, the following regulations are prescribed:

ARTICLE 1. *Returns of information by brokers.*—When directed by the Commissioner, either specially or by general regulation, every person doing business as a broker shall render a return on the prescribed form, 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.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 12, 1935.

L. W. ROBERT, JR.,
Acting Secretary of the Treasury.

ARTICLE 149–1: Return of information by brokers. XIV–5–7285 Mim. 4284

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

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 25, 1935.

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

1. Section 149 of the Revenue Act of 1934 provides that every person doing business as a broker shall, when required by the Com-

missioner, 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.

2. Treasury Decision 4510, approved January 12, 1935 [page 128, this Bulletin], 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 the prescribed form, 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.

3. 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 1934 and each subsequent calendar year, except as provided in paragraphs 4, 5, 6, and 7 of this mimeograph or as otherwise specifically directed. The form shall show the name and address of the customer and the title of the account; the name and address of the broker or agent; 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; and, except as provided in paragraph 6 of this mimeograph, the form shall also show the total of the purchases and the total of the sales made for the customer or account.

4. The making of Forms 1100 by banks and trust companies 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 each year.

5. Forms 1100 will not be required to cover purchases or sales made by banks and trust companies when (*a*) acting for themselves 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 or trust company does not actually give orders to buy or sell securities.

6. Brokers and other agents handling purchases and sales of commodities for customers may report on Form 1100 for each year either the total profit or loss, if $500 or more, on commodity transactions of each customer, or the total purchases or sales of $25,000 or more. A 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.

7. 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.

8. 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 shall be made on the pink form for each name and address, other than the customer, required to be shown on Form 1100.

9. 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 in and executed, shall 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 will be distributed through the collectors of internal revenue for the various collection districts.

10. 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.

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

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

WRIGHT MATTHEWS,
Acting Commissioner.

SUPPLEMENT F.—PARTNERSHIPS.

SECTION 183.—COMPUTATION OF PARTNERSHIP INCOME.

ARTICLE 183-1: Computation of partnership income. XIV-5-7286 I. T. 2854

(Also Section 23(o), Article 23(o)-1.)

REVENUE ACT OF 1934.

Charitable and other contributions (allowable as deductions under section 23(o) of the Revenue Act of 1934) when made by a partnership during any taxable year beginning after December 31, 1933, are deductible from its gross income subject to the 15 per cent limitation prescribed in the Act.

Advice is requested relative to the deductibility for Federal income tax purposes under the Revenue Act of 1934 of charitable and other contributions made by a partnership.

Under the Revenue Act of 1932 (section 183), such contributions were not deductible in computing the net income of a partnership, but section 183 of the Revenue Act of 1934 provides as follows:

COMPUTATION OF PARTNERSHIP INCOME.

The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual.

Section 23(o) of the Revenue Act of 1934 permits a deduction in the case of an individual of charitable and other contributions to an amount not in excess of "15 per centum of the taxpayer's net income as computed without the benefit of this subsection."

In view of the provisions of section 183 of the Revenue Act of 1934, charitable and other contributions (referred to in section 23(o) of the Revenue Act of 1934) when made by a partnership during any taxable year beginning after December 31, 1933, are deductible from its gross income in an amount not exceeding 15 per cent of the partnership's net income as computed without the allowance of any deduction for contributions.

SECTION 188.—DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

ARTICLE 188–1: Different taxable years of partner and partnership. XIV–25–7555 G. C. M. 15062

REVENUE ACT OF 1934.

A partner's distributive share of the partnership net income for its accounting period ending within the calendar year of the partner must be included as income to the partner for the year in which the partnership accounting period ends, regardless of when the income was actually earned.

Advice is requested relative to the proper method of reporting partnership income under the Revenue Act of 1934, where an individual keeping his books on a calendar year basis is a member of a partnership keeping its books on a fiscal year basis.

On February 1, 1934, the taxpayer and others became associated in partnership for the purpose of engaging in the purchase and sale of bonds. The partnership was to continue until December 31, 1934, but by mutual consent of the partners the limitation was extended to January 31, 1935. On that date the partnership was dissolved and its return was rendered on the basis of a fiscal year ended January 31, 1935. The taxpayer, who was a member of the partnership, filed his return for 1934 on the calendar year basis. He desires to report in his return for that year his share of the partnership earnings for the fiscal year ended January 31, 1935, or, if this is not permissible, he desires to report his share of the profits for the 11-month period ended December 31, 1934.

The issue presented is controlled by sections 182 and 188(a) of the Revenue Act of 1934, which read as follows:

SEC. 182. TAX OF PARTNERS.

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.

SEC. 188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

(a) *General rule.*—If the taxable year of a partner is different from that of the partnership, the distributive share of the net income of the partnership to be included in computing the net income of the partner for his taxable year shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1934) ending within the taxable year of the partner.

In enacting the above quoted provisions, Congress gave recognition to situations like the one here involved and adopted the plan of requiring the partners' shares of the partnership net income to be reported by the partners for the year in which the firm's annual accounting period ends. Had Congress failed to specify when the partners should account for their shares of the net income of the partnership for its accounting period, the partners would be required to account for their distributive shares of such income in accordance with the provisions of section 42 of the Revenue Act of 1934, that is to say, their distributive shares would be included in their income for the taxable year in which received, unless, under methods of accounting permitted by section 41 of the Revenue Act of 1934, such income would properly be accounted for as of a different period. Section 41 requires that "the net income shall be computed upon the basis of the taxpayer's annual accounting period," which would require the partners to report as income their distributive shares in the partnership earnings for the 12 months coinciding with their accounting period. If it were not for the provisions of section 188(a), a partner's distributive share in the partnership earnings for the 12 months coinciding with his accounting period would be determined under section 41 by taking an allocable part of his distributive share in the net income of the partnership for each of the partnership's two accounting periods falling partly within the accounting period of the partner. A partner filing his return for 1934 on the calendar year basis and being a member of a partnership having an accounting period ending on June 30, 1935, would be unable to determine his distributive share in the earnings of the partnership for the fiscal year ended June 30, 1935, until after his return for 1934 was due to be filed. Section 42 would be equally inapplicable in such a situation. In recognizing a partnership for accounting purposes Congress realized that the partners can not determine until after the end of the partnership accounting period whether the partnership has any net income. The partnership earnings of the early months may be entirely eliminated by losses sustained in the later months of its accounting period. Obviously, under such circumstances, it would be incorrect to say that any part of such earnings during the early months of the partnership accounting period constitutes income to the partners when the operations of the entire period show no net earnings, or may show a loss.

The language of section 188(a), supra, is unambiguous and conveys but one meaning, and that is that the distributive shares of the partnership net income for its accounting period ending within the calendar year of the partners must be included as income to the partners in the year in which the partnership accounting period ends, regardless of when the income was actually earned.

It is, therefore, the opinion of this office that the taxpayer's entire distributive share of the partnership net income for the fiscal year ended January 31, 1935, constitutes income to him for the calendar year 1935 and must be included in his return for that year. (See *Appeals of J. H. Goadby Mills et al.*, 3 B. T. A., 1245; *Appeal of J. E. Asbury*, 4 B. T. A., 1244; *Appeal of Charles Colip*, 5 B. T. A.,

123; *W. J. Woodruff* v. *Commissioner*, 11 B. T. A., 477; *F. E. Malm* v. *Commissioner*, 11 B. T. A., 859; and Mim. 4138, C. B. XIII-2, 168, construing similar provisions of the Revenue Acts of 1918, 1921, 1924, and 1932.)

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 272.—PROCEDURE IN GENERAL.

ARTICLE 272-3: Extension of time for payment of a deficiency. XIV-16-7441 Mim. 4303
(Also Section 56, Article 56-2.)

Extensions of time to pay deficiencies in or installments of income tax and estate tax.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., March 7, 1935.

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

In order that the policy of the Bureau governing the consideration of applications for extensions of time to pay deficiencies in, or installments of, income tax may be generally understood and uniformly applied by officers and employees of the Bureau of Internal Revenue concerned, the following basic rules are stated:

1. (*a*) Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency or any part thereof on the date or dates prescribed for payment thereof will result in undue hardship to the taxpayer, the Commissioner, with the approval of the Secretary, may grant an extension of time for the payment thereof. The term "undue hardship" means more than financial inconvenience to the taxpayer. Satisfactory proof of "undue hardship" requires sufficient evidence to establish that the taxpayer (1) does not have enough cash and other assets, which assets can be converted into cash at current market prices, over and above the necessary working capital to pay the deficiency, or any part thereof, although he may have assets which could be sold at sacrifice prices; and (2) that the taxpayer is unable to borrow the money to pay the deficiency, or any part thereof, except upon terms which would inflict severe loss and hardship upon him. Where a free and open market exists for property, the sale of such property at the current market prices does not ordinarily constitute "undue hardship" within the meaning of the statute, even though a loss for income tax purposes might result therefrom. Hardship caused through such a sale is not in any proper sense due to payment of the deficiency but must be attributed to the general economic conditions.

(*b*) Where the applicant claims that there is no market for property, or that the property could not be sold except at sacrifice prices,

or that the amount of the liability could not be borrowed on the property except perhaps at oppressive rates of interest, it is necessary that supporting evidence be fully submitted. For example, the applicant should explain when, where, and in what way, he has placed the property on the market for sale, or attempted to find buyers therefor, or to negotiate loans with respect thereto, including the terms of such offers to sell, the basis upon which loans were sought, and the terms upon which offers to buy or loan, if any, were made.

(*c*) Where the taxpayer can pay part of the deficiency on the date due without causing undue hardship, but not the remainder, he shall pay that part, and the question of granting an extension shall be considered with respect to the remainder only. It is important that the part which can be paid without undue hardship be paid before the date the tax is due in order to prevent interest accruing at the rate of 1 per cent per month.

2. An application for an extension of time to pay a deficiency in income tax will not be considered unless made within the 10-day period allowed for payment following notice and demand by the collector, or prior to the date prescribed for payment by any prior extension granted.

3. All applications for extensions of time to pay deficiencies in, or installments of, income tax must be in writing and, wherever possible, under oath. Where a taxpayer makes oral application, otherwise timely, for an extension of time, the collector should advise the taxpayer that such an application must be made in writing, and if possible on the prescribed form (Form 1127), and submitted prior to the date prescribed for payment of the tax. Strict compliance with this rule will avoid unnecessary misunderstanding on the part of taxpayers as to the timeliness of applications. The application, whether or not made on Form 1127, should state the date on which "notice and demand" for payment of the tax was issued in addition to indicating the date of assessment and account number. It is important that all applications for an extension of time to pay deficiencies in tax, whether made by letter or on Form 1127, be stamped with the date of receipt in the collector's office.

4. (*a*) A sworn statement of assets (showing book values and market values) and liabilities, an itemized list of receipts and disbursements for the 3-month period antedating the date prescribed for payment of the liability, and such other facts as may have a material bearing upon the question of undue hardship should be *promptly* secured and accompany the application when transmitted to the Bureau in Washington. In order to prevent unnecessary correspondence and delay in disposition of cases, collectors should make certain that the information is complete to enable the Bureau to pass upon the question of undue hardship, and that the requirements of this mimeograph are complied with, before transmitting the application and accompanying papers. It should not be forgotten that the very process of determining whether an extension shall be granted delays the collection of the tax, and, therefore, the process should be expedited as much as the proper perfection and consideration of the application will permit.

(*b*) Where for any reason action on the application is delayed in the collector's office or in the Bureau for a period of three months or more after the date prescribed for payment, an itemized state-

ment of receipts and disbursements shall be required not only for the 3-month period preceding the date prescribed for payment but also for the 3-month period preceding the current date of consideration. The Department is concerned with the present condition of the taxpayer in order to prescribe terms for installment payments in proper cases.

(*c*) It is often difficult to pass upon the merits of an application because of inadequate information on essential matters. For example, extensions have been requested merely upon a showing by the taxpayer that his salary, or a specific source of income, is or will be unavailable for a certain period of time, without showing whether he has other funds or assets out of which the tax liability could be paid without resulting in undue hardship. Every reasonable effort should be made to encourage the taxpayer to make as complete a record as the situation warrants without leaving the Bureau in doubt on any important phase of the question. Where a taxpayer's statement lists pledged assets, it is necessary to show the present market value thereof as compared with the amount of the loan in order to determine the extent of his equity (if any) in the pledged property. All securities listed among the assets should be itemized as to name, quantity, and values. Although a detailed investigation by the collector is ordinarily not required in connection with an application for an extension of time, to the extent required, where offers in compromise are submitted, the collector should furnish the Bureau with such independent views as he may have in the matter and make such investigation as he deems advisable for this purpose, depending upon the size and circumstances of the case.

5. (*a*) Security will be required in every case as a condition to the granting of an extension of time to pay deficiencies in income tax so that the risk of loss to the Government will not be greater at the end of the extension period than it was at the beginning of such period. Whether this security shall take the form of a bond, or filing of notice of lien, or mortgage, pledge, or deed of trust of specific property or general assets, personal surety, or some other form will depend upon the circumstances in each case.

(*b*) In connection with each application, the collector should carefully analyze the taxpayer's assets for security purposes and select those most satisfactory from the standpoint of value, ease of handling, and liquidation. In the absence of adequate security, it is important that the taxpayer agree to post as security such property as he has even though his tax liability exceeds his present ability to pay. The assets agreed upon for security purposes should ordinarily be posted with the collector upon notice of approval of the application for extension of time. In estate tax cases, where the lien provided by section 315(a), Revenue Act of 1926, as amended, appears adequate, no posting of security will be required; however, this shall not be construed to relieve the estate of the necessity of establishing that undue hardship would result from payment of the tax liability on the prescribed date.

(*c*) The collector's recommendation should be clearly indicated with respect to every application for an extension of time, with a statement of his reasons for approving or disapproving the application, based upon the information in the case. In making his

recommendation, the collector should state his views with respect to appropriate security.

(*d*) Where the taxpayer refuses or fails to submit within a reasonable time the information required by this mimeograph to accompany an application for extension of time, or for any other reason delays unduly in complying with the provisions of this mimeograph, the collector should proceed with the collection of the tax, filing notice of lien or otherwise protecting the interests of the Government. Even if there is no unreasonable delay, the collector should take such steps if the interests of the Government demand it, since a request for an extension is notice in itself that collection of the tax may be in jeopardy.

6. *Installments of tax.*—The Commissioner, at the request of the taxpayer, may extend the time for payment of the amount determined as the tax by the taxpayer, or any part or installment thereof, for a period not to exceed six months from the date prescribed for the payment of such amount, part, or installment. The above instructions relative to application for extensions of time for the payment of deficiencies are equally applicable to applications for extensions of time to pay the tax determined by the taxpayer, or any part or installment thereof.

7. The general rules relative to applications for extensions of time for the payment of deficiencies in income tax, or any part or installment of income tax, are, except where otherwise indicated, equally applicable to applications for extensions of time to pay deficiencies in Federal estate tax, or any part or installment of such tax as determined by the taxpayer. Section 811 of the Revenue Act of 1932 grants the executor of an estate the election (subject to certain limitations) to postpone payment of the part of the Federal estate tax attributable to the inclusion in the gross estate of the value of a reversionary or remainder interest in property; however, in all such instances, it should be observed that the notice of the election meets the requirements of article 82(*b*), Regulations 80.

8. In granting extensions of time in proper cases, the general policy of the Bureau is to require as large a down payment as the circumstances justify and frequent installment payments of the remaining liability at regular intervals rather than deferment of payment of the total liability to the end of the period of the extension.

9. (*a*) Applications for extension of time should not be confused with acts of forbearance in collection on the part of collectors. Where a timely application for an extension of time for payment is made and granted, interest is imposed at the rate of 6 per cent per annum, whereas under an arrangement for forbearance, whether made before or after the due date of the tax, statutory interest usually accrues at the rate of 1 per cent per month.

(*b*) Where part or all of an amount offered in compromise is payable in installments, security will be required as in the case of extensions of time, and where an extension of time is requested in which to pay any sum due under a compromise agreement, essentially the same principles are applicable as in the case of extensions of time to pay deficiencies, including the requirement of security.

10. The foregoing basic rules are effective immediately and any existing instructions, to the extent that they may be in conflict with

such rules, are hereby revoked. Correspondence and inquiries regarding this mimeograph when dealing with income tax matters should refer to the number and symbols C:TS, and when referring to estate tax matters should refer to the number and symbols MT:ET.

GUY T. HELVERING,
Commissioner.

Approved March 7, 1935.
T. J. COOLIDGE,
Acting Secretary of the Treasury.

TITLE IA.—ADDITIONAL INCOME TAXES.

SECTION 351.—SURTAX ON PERSONAL HOLDING COMPANIES.

ARTICLE 351–7: Payment of surtax on pro rata shares. XIV–13–7398 I. T. 2877

REVENUE ACT OF 1934.

Stockholders of the M company (a personal holding company) of record as of the end of the taxable year 1934, in order to comply with the provisions of section 351(d) of the Revenue Act of 1934, must include in their gross incomes for that year their pro rata shares of the company's adjusted net income for the year ended December 31, 1934.

It is stated that the stockholders of the M Company, a personal holding company, desire to include in their returns the entire adjusted net income of the company for the year 1934 in accordance with the provisions of section 351(d) of the Revenue Act of 1934. There were some changes in stock ownership during the year 1934. Inquiry has been made whether the stockholders of record as of December 31, 1934, should include in their returns their pro rata shares of the adjusted net income of the company based on their holdings as of that date, or whether the adjusted net income should be allocated in accordance with the length of time the stock was held during the year by the various stockholders.

It is held that if the accounting period of the M Company ended on December 31, 1934, stockholders of record as of that date must include in their gross income their entire pro rata shares of the company's adjusted net income for that year in order to comply with the provisions of section 351(d) of the Revenue Act of 1934.

EXCESS-PROFITS TAXES.

SECTION 702.—EXCESS-PROFITS TAX.

SECTION 702.

REVENUE ACT OF 1934.

Regulations with respect to the use of original returns and furnishing copies of returns. (See T. D. 4504, page 86.)

Applicability of I. T. 2823 (C. B. XIII–2, 162) to excess profits tax returns. (See I. T. 2865, page 115.)

SECTION 702. XIV–10–7365
Mim. 4301

Excess-profits tax returns for taxable years beginning after December 31, 1933, of members of affiliated groups of railroad corporations as defined in section 141(d) of the Revenue Act of 1934.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., March 5, 1935.

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

1. Under the provisions of Treasury Decision 4469 [C. B. XIII–2, 110], approved September 6, 1934, every corporation which is subject to the capital stock tax imposed by section 701 of the Revenue Act of 1934 shall make an excess-profits tax return for each income-tax taxable year which ends after the close of the first year in respect of which it is subject to such capital stock tax. There is no provision in the Revenue Act of 1934 which authorizes the making of a consolidated return by any affiliated group of corporations for the purpose of the excess-profits tax imposed by section 702 of that Act. Accordingly, every corporation which is liable for the making of an excess-profits tax return under section 702 of the Act for any income-tax taxable year ending after June 30, 1934, must make its excess-profits tax return and compute its net income separately, without regard to the provisions of section 141 of the Revenue Act of 1932, as amended by section 218(e) of the National Industrial Recovery Act, or section 141 of the Revenue Act of 1934.

2. Where an affiliated group of railroad corporations, as defined by section 141 of the Revenue Act of 1934, has exercised the privilege of making a consolidated income tax return for a taxable year beginning after December 31, 1933, each member of the group which is liable for the making of an excess-profits tax return must file such a return and compute its net income separately without regard to section 141 of that Act. No special form has been provided for the use of the members of an affiliated group of railroad corporations in making their separate excess-profits tax returns for taxable years beginning after December 31, 1933. Form 1120, Corporation income and excess-profits tax return, will, therefore, be used by the common parent corporation and each subsidiary corporation of such a group in making their respective excess-profits tax returns for any such year.

3. The parent corporation of the affiliated group should fill in Form 1120 on a consolidated basis with respect to all features of

gross income and deductions and the computation of the income tax liability of the affiliated group for the taxable year. The excess-profits tax block appearing in the lower right-hand corner of page 1 of Form 1120 of the consolidated income tax return of the affiliated group should be left blank. Such return should be filed on or before the 15th day of the third month following the close of the taxable year of the affiliated group with the collector of internal revenue for the district prescribed for the filing of a separate return by the common parent corporation.

4. Each subsidiary corporation must prepare duplicate originals of Form 1122. One of such forms shall be attached to the consolidated income tax return and the other filed at or before the time the consolidated income tax return is filed in the office of the collector of internal revenue for the district prescribed for the filing of a separate return by such subsidiary. (See article 12(b) of Regulations 89, relating to consolidated returns of affiliated railroad corporations.)

5. The common parent corporation and each subsidiary corporation which is liable for the making of an excess-profits tax return for its taxable year is required to file a separate return on Form 1120, and should fill in the excess-profits tax block appearing in the lower right-hand corner of page 1 of that form and complete the return with respect to the affidavit and execution thereof at the bottom of page 4. Such return shall be filed at the time prescribed by law and in the office of the collector of internal revenue for the district prescribed for the filing of a separate income tax return by each of such corporations. Any member of an affiliated group of railroad corporations desiring an extension of time for filing its excess-profits tax return for its taxable year may make application therefor to the collector of internal revenue for its district on or before the due date of the return.

6. If, during its taxable year, a corporation becomes a member or ceases to be a member of an affiliated group of railroad corporations and is included in a consolidated income tax return for a part of its taxable year and makes a separate income tax return for the remainder of such taxable year, its excess-profits tax return shall cover its full taxable year.

7. In preparing the statement on Form 1094, as required by section 55(b) of the Revenue Act of 1934 and Treasury Decision 4500 (C. B. XIII–2, 59), in respect of separate excess-profits tax returns made on Form 1120 as herein provided, items 35 and 38 on Form 1120 should be entered as items 4 and 6, respectively, on Form 1094. There will be no items shown on Form 1120, when used as herein provided, corresponding to items 2, 3, and 5 on Form 1094. Accordingly, the notations "Affiliated R. R. Corp."; "Excess-profits tax return"; and "None," should be made in the blank space opposite items 2, 3, and 5, respectively, on Form 1094.

8. Correspondence in regard to the procedure outlined herein should refer to the number of this mimeograph and to the symbols IT:E:CTR.

GUY T. HELVERING,
Commissioner.

INCOME TAX RULINGS.—PART II.

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. XIV-22-7521
I. T. 2895

REVENUE ACT OF 1932.

In 1933 the M Bank was reorganized and all slow and doubtful assets were placed in trust with an agreement that all future net earnings of the bank should be paid annually to the trustees and that all net funds coming to the trustees should be paid to depositors as soon and as often as sufficient funds were available.

Held, the income of the bank turned over to the trustees for the purpose of paying depositors is subject to Federal income tax.

Advice is requested relative to the treatment for Federal income tax purposes of the income of the M Bank which was transferred to trustees for the benefit of depositors.

The M Bank was reorganized in February, 1933. At that time all slow and doubtful assets of the bank were placed in trust and it was agreed that "all future net earnings of the bank after the deduction of future net losses, if any, shall be paid annually to said trustees with a verified statement of annual income and expenses of said bank." It was further provided that the trustees shall pay pro rata to the depositors "all net funds coming into their hands as trustees, as soon and as often as sufficient funds accumulate." During the period the trust continues no dividends will be paid to stockholders of the bank.

The amount of the net earnings of the bank which is paid to the trustees and turned over by them to depositors in satisfaction of the bank's liability to such depositors is not an allowable deduction in computing the bank's net income subject to Federal income tax. Such payments are not materially different from payments of deposits in the usual course of business for which no deduction is allowable. Accordingly, the income of the M Bank paid to the trustees for the purpose of paying depositors is subject to Federal income tax.

ARTICLE 53: Compensation paid other than in cash.

REVENUE ACT OF 1932.

Allowances for living quarters, heat, fuel, and light, to officers stationed abroad in the foreign service of the Department of Commerce. (See G. C. M. 14710, page 44.)

ARTICLE 53: Compensation paid other than in cash.

REVENUE ACT OF 1932.

Allowances for living quarters granted to Treasury attachés and their subordinates in the customs agency service stationed in foreign countries. G. C. M. 11453 (C. B. XII–1, 26) revoked. G. C. M. 12300 (C. B. XII–2, 30) modified. (See G. C. M. 14836, page 45.)

ARTICLE 63: Improvements by lessees. XIV–15–7431
T. D. 4539

INCOME TAX.—REVENUE ACTS OF 1928 AND 1932.

Improvements by lessees—Article 63 of Regulations 74, as amended by Treasury Decision 4282, and article 63 of Regulations 77, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 63 of Regulations 74, as amended by Treasury Decision 4282 (C. B. VIII–2, 82), approved December 19, 1929, and article 63 of Regulations 77 are amended to read as follows:

ART. 63. *Improvements by lessees.*—If buildings are erected or improvements made by a lessee and such buildings or improvements immediately become the property of the lessor, as, for instance, if they are not subject to removal by the lessee, the lessor may at his option report the income therefrom upon either of the following bases:

(*a*) The lessor may report as income at the time when such buildings or improvements are completed the fair market value of such buildings or improvements subject to the lease.

(*b*) The lessor may spread over the life of the lease the estimated depreciated value of such buildings or improvements at the expiration of the lease and report as income for each year of the lease an aliquot part thereof.

If the lease is terminated so that the lessor comes into possession or control of the property prior to the time originally fixed for the expiration of the lease, the lessor shall report income for the year in which the lease is so terminated to the extent that the value of such buildings or improvements when he becomes entitled to such possession exceeds the amount already reported as income on account of the erection of such buildings or improvements. No appreciation in value due to causes other than the termination of the lease shall be included.

If the buildings or improvements are destroyed prior to the expiration of the lease, the lessor is entitled to deduct as a loss for the year when such destruction takes place the amount previously reported as income because of the erection of such buildings or improvements, less any salvage value subject to the lease, to the extent that such loss is not compensated for by insurance or otherwise. (See articles 130 and 204.)

GUY T. HELVERING,
Commissioner.

Approved April 10, 1935.

L. W. ROBERT, JR.,
Acting Secretary of the Treasury.

ARTICLE 68: Sale and retirement by corporation of its bonds.

REVENUE ACT OF 1932.

Expenses incident to issuance of bonds, taxpayer being on accrual basis. (See G. C. M. 14349, page 47.)

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

ARTICLE 82: Proceeds of insurance—Compensation.

REVENUE ACT OF 1932.

Contributions by the M University toward the purchase of annuities for members of its faculty. (See I. T. 2874, page 49.)

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

ARTICLE 121: Business expenses.

REVENUE ACT OF 1932.

Premiums paid on life insurance by a creditor to whom the policy has been assigned to secure a debt. (See G. C. M. 14375, page 52.)

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

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

Import duties on spirits, wines, beer, and other beverages. (See I. T. 2845, page 57.)

ARTICLE 151: Taxes. XIV-3-7256
G. C. M. 14128

REVENUE ACT OF 1932.

Where husband and wife in Wisconsin own land as joint tenants, each being entitled to one-half of the rents and profits derived from the land, the husband may deduct in his separate Federal income tax return only one-half of the taxes levied upon the land.

An opinion is requested relative to the deductibility by the husband in his income tax return for 1932 of taxes paid on real estate owned by himself and wife as joint tenants.

The deduction claimed for real estate taxes in the amount of $2x$ dollars represents the entire amount of the taxes paid on the property held as joint tenants. The taxes were assessed against the taxpayer and paid by him. In his separate return for 1932, he claimed the

entire amount of such taxes as a deduction from gross income and the examining officer recommended the disallowance of one-half of the taxes, basing his action on G. C. M. 9234 (C. B. X-1, 117).

Section 230.43 of the Wisconsin Statutes of 1929 provides that estates in joint tenancy shall be recognized by the law of the State of Wisconsin. At common law a joint tenant was held to have an undivided interest in the property which was not an ownership of a specific portion but was a pro rata interest in the whole property. A joint tenant was also, at common law, entitled to possession of the entire property although his right to rents and profits was limited to his pro rata share. (*Duncan* v. *Rodecker et al.*, 90 Wis., 1, 62 N. W., 533; *Bassler et al.* v. *Rewodlinski*, 130 Wis., 26, 109 N. W., 1032.)

A taxpayer's tax liability upon a particular property is measurable by the ratio which that proportion of the rents and profits he is entitled to receive bears to the rents and profits of the whole property for the reason that "rents and profits on the one hand, and taxes on the other, are mutual and compensatory," to use the language of the court in *Cobb* v. *Bohm* (1893, 11 Ohio Dec., Reprint, 844; see note in 12 A. L. R., 412). In G. C. M. 9234, supra, the following language appears:

> The ordinary tax on real estate is levied upon the sum as a unit of all the legal interests in the real estate; it is an annual tax and is customarily regarded as the contribution which the land and those owning interests therein must pay to the Government for the protection which the Government has given during that year. * * *
>
> The law charges the cost of such annual protection to the person who gets the annual benefit of the land so protected. So the law ordinarily casts the burden of taxes on real estate on the mortgagor and not on the mortgagee; on the life tenant and not on the remainderman. As two joint tenants or two tenants in common would each get half of the profits of the real property held jointly or in common, such joint tenants and tenants in common would be chargeable with one-half the taxes on the property held by them jointly or in common.

Applying the above principles to the instant case, it is the opinion of this office that, in view of the fact that in Wisconsin each of the two joint tenants is entitled to one-half of the rents and profits of the land, each tenant has imposed upon him or her one-half of the taxes levied upon the land as a whole. Since article 151 of Regulations 77 provides that taxes are deductible only by the person upon whom they are imposed, it follows in the instant case that inasmuch as only one-half of the real estate taxes was imposed upon the taxpayer he may deduct only one-half of such taxes in his separate Federal income tax return for 1932.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

Maryland alcoholic beverage tax. (See I. T. 2848, page 60.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

Accrual date of real and personal property taxes in Nebraska. (See I. T. 2849, page 60.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

Accrual date of real and personal property taxes in South Dakota. (See I. T. 2850, page 61.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

South Dakota gross income tax. (See I. T. 2851, page 62.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1932.

Accrual date of real and personal property taxes, State of Missouri. (See I. T. 2885, page 64.)

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

ARTICLE 171: Losses. XIV–23–7533
(Also Section 23(r), Article 272.) I. T. 2897

REVENUE ACT OF 1932.

Where stock which has been pledged to secure indebtedness is sold by the pledgee in liquidation of such indebtedness, the sale must be treated as a sale by the pledgor.

The limitation on stock losses contained in section 23(r) of the Revenue Act of 1932 is applicable to sales of the stock held for not more than two years.

Advice is requested relative to the deductibility for the year 1932 of a loss sustained by A upon the sale of certain shares of stock.

In 1931 the N Bank was merged with the M Bank. As a condition of the merger, the directors of the N Bank were required to purchase capital stock of the M Bank at —— dollars a share. A loan of 65x dollars was obtained by A, a director, in financing the purchase, the stock of the M Bank being pledged as collateral for the loan. Sales of the stock pledged as collateral were made in 1932 and 1933 at a price less than the cost to A, the pledgor. The sales were forced sales made by, or at the instance of, the pledgee and the amount realized was applied in satisfaction of the loan for which the stock had been pledged. Question has arisen as to the deductibility of the loss by A, the pledgor, and the applicability of the limitation on stock losses prescribed by section 23(r) of the Revenue Act of 1932 to sales of the stock which was not held for more than two years.

The disposition made of the pledged shares in liquidation of the indebtedness which these shares had been pledged to secure was in accordance with the authority granted to the pledgee by the pledgor when he consented to the hypothecation of the shares. Such disposition of the shares, as to which the pledgor retained the beneficial ownership subject to the terms of the pledge, must be treated as made by the pledgor and the resulting loss computed accordingly. (See generally *Hans Pederson et al.* v. *Commissioner*, 14 B. T. A., 1089, acquiescence, C. B. X–2, 55.)

As the loss for the year 1932 resulted from sales of stock which had not been held for a period of more than two years, the limitation provided by section 23(r) of the Revenue Act of 1932 is applicable regardless of the fact that the sales were forced sales made by, or at the instance of, the pledgee.

SECTION 23(l).—DEDUCTIONS FROM GROSS INCOME: DEPLETION.

ARTICLE 221: Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.

REVENUE ACT OF 1932.

Amendment of article 221, Regulations 77. (See T. D. 4540, page 70.)

ARTICLE 230: Depletion—Adjustments of accounts based on bonus or advanced royalty.

REVENUE ACT OF 1932.

Restoration of bonus depletion deduction on percentage of income basis to income at termination of lease in case of no production from leased premises. (See G. C. M. 14448, page 98.)

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. XIV–6–7299 G. C. M. 14012

REVENUE ACT OF 1932.

> In applying the limitation on stock losses prescribed by section 23(r) of the Revenue Act of 1932, a taxpayer may not offset his personal losses from the sale of securities held for a period of two years or less against his share of similar gains of a partnership.

An opinion is requested whether a taxpayer may offset his personal losses from the sale of stocks and bonds against his share of part-

nership gains from similar transactions in view of the limitation on stock losses prescribed by section 23(r) of the Revenue Act of 1932.

The taxpayer is a member of the partnership of A & Co. For the year 1932, the partnership realized a profit of $10x$ dollars from sales of securities held for a period of two years or less. The taxpayer's distributive share of such profit was reported in his individual income tax return for that year. He sustained a loss of x dollars for the year 1932 from the sale of securities held by him for a period of two years or less. The loss so sustained was reported in his income tax return as an offset against his share of the gain realized by the partnership from sales of securities held by it for a period of two years or less. On these facts, the question arises whether the losses of the individual partner from the sale of stocks and bonds held for a period of two years or less may be offset against his share of the partnership profits from such sales in view of the provisions of section 23(r) of the Revenue Act of 1932. The pertinent provisions of that section are 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).

The taxpayer contends that the wording of section 181 of the Revenue Act of 1932, which provides that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity, indicates clearly that it is the individual who is carrying on the business, and, if it is the individual's business he not only may, but he is required, under section 182 of that Act, to include the several classes of income and deductions in his individual return. It is also pointed out that sections 184, 185, 186, and 188 of the Revenue Act of 1932 provide that a partner shall be allowed the benefit of his share of credits for the partnership dividends, exempt interest, earned income, capital net gains and losses, and credits for foreign income and profits taxes, which it is claimed indicates and confirms the long established purpose of the income tax laws to require the several classes of income, deductions, and credits, respectively, of a partnership to be reflected in the return of each partner.

Section 181 of the Revenue Act of 1932 provides that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Under the "general rule" of section 182, however, the "tax of partners" is arrived at by including in the individual partners' returns their distributive shares of the partnership net income, which (under section 183) is "computed in the same manner and on the same basis as in the case of an individual, except that the so-called 'charitable contribution' deduction provided in section 23(n) shall not be allowed." In general, therefore, the items of partnership gross income and deductions do not affect a partner's income immediately as in the case of his nonpartnership income, but only through the medium of the partnership return (section 189) showing his distributive share of the partnership net income or net loss (article 902, Regulations 77).

The express mention of section 184 "credits against net income." section 185 "earned income," section 186 "capital net gains and losses," and section 188 "taxes of foreign countries and possessions of United States" as items which may directly affect the partners' net income without intervention of the partnership return emphasizes the implication that Congress intended the "general rule" of sections 182 and 183 to be otherwise an exclusive method of computing partnership income, thus limiting the exceptions to those specified. (Cf. *Paso Robles Mercantile Co.* v. *Commissioner*, 33 Fed. (2d), 653, certiorari denied 280 U. S., 595, citing *Botany Worsted Mills* v. *United States*, 278 U. S., 282, C. B. VIII–1, 279.) Of course the general method prescribed for reporting partnership income must in many instances produce a different effect than would a direct application of the statutory provisions to the individual taxpayer. For example, notwithstanding the statutory requirements that net income be computed in accordance with the taxpayer's method of accounting (section 41), it is held that a partner's net income from the partnership business must be as shown on the accrual basis of the partnership return rather than according to the cash basis upon which he, as an individual taxpayer, keeps books and makes returns (*Appeal of Percival H. Truman*, 3 B. T. A., 386; *Truman* v. *United States*, 4 Fed. Supp., 447); and he may not deduct on his individual return partnership business expenses paid out of his withdrawals from the partnership, since they were deductible on the partnership return filed on the accrual basis. (See generally *Samuel Kurzman* v. *Commissioner*, 8 B. T. A., 412, acquiescence, C. B. VII–1, 18; *Shearer* v. *Burnet*, 285 U. S., 228; and *Appeal of Charles Colip*, 5 B. T. A., 123.)

Upon careful consideration of the question presented, it is the opinion of this office that a taxpayer may not offset his personal losses from the sale of stocks and bonds held for two years or less against his share of similar gains of a partnership.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

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

XIV–6–7300
I. T. 2858

REVENUE ACT OF 1932.

Put and call transactions come within the meaning of the term "privileges or options" as used in section 23(s) of the Revenue Act of 1932, and losses from such transactions are subject to the limitations prescribed by section 23(r) of that Act.

Advice is requested whether the term "privileges or options" as used in section 23(s) of the Revenue Act of 1932 includes put and call transactions.

Section 23(s) of the Revenue Act of 1932 provides:

* * * For the purposes of this title, gains or losses (A) from short sales of stocks and bonds, or (B) attributable to privileges or options to buy or sell such stocks and bonds, or (C) from sales or exchanges of such privileges or options, shall be considered as gains or losses from sales or exchanges of stocks or bonds which are not capital assets.

Put and call transactions come within the meaning of the term "privileges or options" as used in section 23(s) of the Revenue Act of 1932, and losses from such transactions are subject to the limitations prescribed in section 23(r) of that Act.

ARTICLE 272: Limitations on deductions for losses from sales and exchanges of stocks and bonds. XIV-20-7495 I. T. 2892

REVENUE ACT OF 1932.

Deductibility by the members of a partnership of losses sustained by the partnership from the sale of securities which were not capital assets.

Where the members of a partnership individually realized a gain in the year 1932 from the sale or exchange of stocks and bonds which were not capital assets and the partnership sustained a loss from the sale or exchange of such securities, the members of the partnership are not entitled to offset their pro rata shares of the partnership loss against their personal gains in applying the limitation on stock losses under section 23(r) of the Revenue Act of 1932.

Where the members of a partnership (individually) and the partnership sustained losses in the year 1932 from the sale or exchange of stocks and bonds which were not capital assets, no part of the losses sustained by the partnership is deductible in determining the net income of the partners. (See generally G. C. M. 14012, page 145, this Bulletin.)

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

REVENUE ACT OF 1932.

Forced sales of pledged securities. (See I. T. 2897, page 144.)

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 295: Personal exemption and credit for dependents where status changes. XIV-2-7242 I. T. 2847

REVENUE ACT OF 1932.

Method of computing personal exemption and credit for dependents in the case of A, a subject of a foreign country not contiguous to the United States, who was a nonresident alien for eight months of the taxable year 1932 and a resident alien for the balance of the year.

Advice is requested with respect to the proper method of computing the personal exemption and credit for dependents, for Federal income tax purposes, in the case of A for the taxable year 1932.

A, a subject of a foreign country not contiguous to the United States, during the entire taxable year 1932 had the status of a

married man with two dependent children under 18 years of age. He was a nonresident alien during the period January 1, 1932, to August 31, 1932, and during that period had a net income from sources within the United States of $1,993.14. During the balance of the year he was a resident alien and his net income for that period from all sources amounted to $1,166.65.

Section 25(e) of the Revenue Act of 1932 provides that if the status of the taxpayer, in so far as it affects the personal exemption or credit for dependents, changes during the taxable year, the personal exemption and credit shall be apportioned. In the instant case, the status of the taxpayer changed and it affected the amounts allowable to him as personal exemption and credit for dependents. Section 214 of the Revenue Act of 1932 provides that in the case of a nonresident alien individual the personal exemption allowed by section 25(c) shall be only $1,000, and he shall not be allowed credit for dependents unless he is a resident of a contiguous country. Not being a resident of a contiguous country, the taxpayer's status changed from a nonresident alien who is allowed only $1,000 personal exemption for the full taxable year and no credit for dependents to a resident alien who is allowed $2,500 personal exemption and $800 credit for two dependents. It is necessary, therefore, to apportion the personal exemption and credit for dependents.

Inasmuch as A was a nonresident alien from January 1 to August 31, 1932, and had a net income of $1,993.14 for that period, his total tax liability for the first eight months of the year is $106.12, computed as follows: $1,993.14 minus $666.67 (8/12 of $1,000, personal exemption from January 1 to August 31, 1932), or $1,326.47, which amount is taxable at 8 per cent under section 211 of the Revenue Act of 1932. Inasmuch as he was a resident alien from September 1 to December 31, 1932, and had a net income of $1,166.65 for that period, his total tax liability for the last four months of 1932 is $2.67, computed as follows: $1,166.65 minus $833.33 (4/12 of $2,500, personal exemption from September 1 to December 31, 1932), and minus $266.67 (4/12 of $800, credit for two dependents for the same period), leaving a balance of $66.65 taxable at 4 per cent under section 11 of the Revenue Act of 1932. A's tax liability for the first eight months of the calendar year 1932 being $106.12, and his tax liability for the last four months of that year being $2.67, his total tax liability for the calendar year 1932 is $108.79.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 321: Computation of net income.

REVENUE ACT OF 1932.

Bank discounts and commissions charged by banks on loans. (See G. C. M. 14839, page 73.)

SECTION 43.—PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

ARTICLE 341: "Paid or incurred" and "paid or accrued."

REVENUE ACT OF 1932.

Assessment against stockholders of a bank because of their statutory liability. (See I. T. 2843, page 77.)

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1932.

Authorization of Special Committee Investigating the Munitions Industry, United States Senate, to inspect income and profits tax returns and capital stock tax returns. (See Executive order (ruling 7554), page 90.)

SECTION 56.—PAYMENT OF TAX.

ARTICLE 432: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1932.

Rules governing consideration of application for extension of time to pay installment of income tax. (See Mim. 4303, page 133.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 104.—ACCUMULATION OF SURPLUS TO EVADE INTERNAL REVENUE TAXES.

ARTICLE 541: Taxation of corporation utilized for evasion of internal revenue tax. XIV–14–7413 I. T. 2881

REVENUE ACT OF 1932.

Where at the time of filing their returns the shareholders of a corporation which comes within the provisions of section 104 of the Revenue Act of 1932, relating to accumulation of surplus to evade surtaxes, did not include in their gross incomes their entire distributive shares of the corporation's net income in accordance with the provisions of section 104(d) of the Revenue Act of 1932, amended returns will not avoid imposition of the tax provided by that section.

SECTION 112.—RECOGNITION OF GAIN OR LOSS.

ARTICLE 572: Exchanges of property. XIV–15–7423
I. T. 2884

REVENUE ACT OF 1932.

Where gold notes of the M Corporation were converted into preferred stock of that corporation in January, 1934, the unpaid interest accrued from August 1, 1933, to December 31, 1933, was properly treated as an accrued liability deductible in the return for the year 1933. As the liability which was accrued in 1933 was canceled in 1934, the amount thereof constitutes taxable income for the latter year. The dividend paid on the preferred stock on February 1, 1934, is taxable to the recipient stockholders.

The question is presented relative to the treatment for income tax purposes of the accrued interest on gold notes of the M Corporation which were exchanged for preferred stock of that company in January, 1934, and the taxability of a dividend on the preferred stock.

The gold notes in question are shown to have been issued under a trust instrument dated August, 1932, with the provision that the holders were to have the right at any time up to May 1, 1934, to subscribe for preferred stock of the company of a par value equal to the face or par value of the notes exchanged for such preferred stock. The gold notes surrendered in the exercise of the conversion privilege were required to be accompanied by, or have attached thereto, all unmatured and unpaid interest coupons. The holders of such notes availed themselves of the conversion privilege and acquired preferred stock by an exchange in January, 1934. Accumulated interest from August 1, 1933, to December 31, 1933, was treated by the M Company as an accrued liability and was claimed as a deduction in the income tax return of the company for the calendar year 1933. A semiannual dividend at the rate of 10 per cent was paid on the preferred stock on February 1, 1934.

With reference to the treatment of the accumulated or accrued interest on such notes for the period August 1, 1933, to the close of that year, the notes were outstanding during that period and were subject to the payment of interest during such time. The notes are, therefore, to be treated as interest-bearing obligations of the company for that period. (G. C. M. 9674, C. B. X–2, 354.) It follows that such accumulated interest represents an accrued liability and constitutes an allowable deduction for the year 1933 on the accrual basis of accounting. It appears, however, that upon the exchange of the notes for preferred stock in January, 1934, payment of the accrued interest was not made and that the liability therefor was automatically canceled by the terms of the exchange. The amount of the interest so accrued and claimed as a deduction for the year 1933 was thereby realized by the company and the amount thereof accordingly constitutes taxable income to it for the year 1934.

As to the dividend paid on February 1, 1934, it was specifically provided in the trust agreement that the preferred stock received in

exchange for the notes was to "bear cumulative dividends from * * * the last dividend date preceding the date of issue." It has uniformly been held that dividends do not accumulate or accrue in the sense that interest accrues on bonds and that where stock is acquired between dividend dates the entire amount of the succeeding dividend is income to the shareholder, regardless of the fact that the stock may have been held for only a portion of the period for which the dividend was paid. (See article 51 of Regulations 77.) The dividend on the preferred stock which was paid on February 1, 1934, is, therefore, to be treated as a dividend both by the company and the recipient stockholders. Since the company had on hand at that time earnings or profits accumulated after February 28, 1913, in excess of the amount of the dividend payment, the entire amount of the payment is taxable as a dividend to the recipient stockholders and is not an allowable deduction to the company.

SECTION 114.—BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 611: Basis for allowance of depreciation and depletion.

REVENUE ACT OF 1932.

Revocation of G. C. M. 11384 (C. B. XII–1, 64). (See G. C. M. 14448, page 98.)

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 643: Compensation of State officers and employees.

REVENUE ACT OF 1932.

Compensation for services rendered as public administrator. (See G. C. M. 14116, page 102.)

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 761: Withholding tax at source. XIV–9–7340
G. C. M. 14182

REVENUE ACT OF 1932.

Where a bondholder surrendered his right to receive cash in payment of interest and accepted in lieu thereof a negotiable scrip certificate which bore interest, the debtor corporation should file withholding returns on the basis of the fair market value of the scrip certificates at date of issuance.

Advice is requested whether income tax should be withheld at the source with respect to scrip certificates issued in *payment* of quarterly bond interest due in 1933.

The M Company instead of paying the interest on its bonds in cash issued to the holders thereof scrip certificates which stated that the holder "will be entitled on and after February —, 1938," to —— dollars representing interest on such obligations for the "period ending February —, 1933," together with interest on the principal sum of the scrip certificates at the rate of 7 per cent. The scrip certificate was in the following form:

SCRIP CERTIFICATE.

No. —— $——

FOR INTEREST ON —— OBLIGATIONS ——,
M COMPANY.

This is to certify that ——— as the registered holder on January —, 1933, of $—— principal amount of ——— obligations, ———, of the M Company, a corporation of the State of R (hereinafter called the "Company"), or registered assigns, will be entitled on and after February —, 1938, and upon surrender of this certificate at the office or agency of the company ——— to ——— dollars (representing interest with respect to such ——— obligations, ———, for the quarterly interest period ending February —, 1933), together with interest on the principal sum hereof at the rate of 7 per cent (7%) per annum from the date hereof to February —, 1938, unless this certificate be redeemed, as hereinafter provided, on or before February —, 1936, in which case interest shall be payable at the rate of 6½ per cent (6½%) per annum from the date hereof to the date fixed for redemption. Interest shall be payable at the date of payment of the principal sum hereof, but the company reserves the right at any time to pay to the registered holder hereof all or any part of such interest at the time accrued hereon.

This certificate may, at the option of the company, be redeemed at any time before February —, 1938, after 30 days' previous written notice to the registered holder of this certificate, upon payment to such registered holder, upon surrender hereof at the office or agency of the company ——— of the principal sum hereof and accrued interest (at the rate applicable as hereinabove provided) to the date of redemption specified in said notice, and, anything herein to the contrary notwithstanding, no further interest hereon shall accrue on or after the date of redemption so specified, whether or not this certificate shall be so surrendered.

The rights and interests represented hereby are transferable * * *.

M COMPANY,
By
Vice-President.

The Bureau has held that scrip issued by a corporation to bondholders in payment of interest past due upon its bonds is equivalent to cash payments and is subject to withholding at the rates in force at the time of issuance. (O. D. 279, C. B. 1, 183.) It has also been held that where a corporation defaulted in its bond interest and upon reorganization issued scrip payable at certain fixed dates in the future and bearing interest at 6 per cent, the issuance of the scrip is equivalent to payment in cash and is, therefore, subject to withholding. (O. D. 563, C. B. 2, 193.) Those office decisions are in harmony with article 54 of Regulations 77, which provides that notes or other evidences of indebtedness received in payment for services, and not merely as security for such payment, constitute income to the amount of their fair market value. The rulings referred to are also supported by article 627 of Regulations 77, which provides that scrip dividends are subject to tax in the year in which the warrants are issued.

The question in the instant case is whether the issuance of scrip for interest past due on bonds of the debtor corporation constitutes the payment of interest which is subject to withholding. Scrip may

or may not be the equivalent of cash. Where scrip may be used as a medium of exchange and is issued in *payment* of interest, it must be treated as the equivalent of cash. Where, however, the scrip is merely the recognition of an existing liability for interest which the debtor promises to pay at a fixed date in the future, the fact that tangible written evidence of such liability is given the creditor is not sufficient to constitute the payment of interest. In the instant case, however, the bondholder surrendered his right to receive cash in payment of interest due him February —, 1933, and accepted in lieu thereof an entirely new obligation of the corporation in the form of a scrip certificate which itself bore interest at the rate of 7 per cent. This certificate is property, a thing of value, and is a negotiable interest-bearing obligation similar in some respects to a bond. Presumably it could have been readily disposed of for cash. To the extent of its fair market value, the bondholder has received income in the form of interest. It is concluded, therefore, that the debtor corporation should file withholding returns in accordance with the Revenue Act of 1932 and the regulations issued thereunder, accounting for the income tax required to be withheld on the basis of the fair market value of the scrip certificates at the date they were issued in payment of the interest.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 761: Withholding tax at source. XIV–17–7451
G. C. M. 14549

REVENUE ACT OF 1932.

Under an agreement between the bondholders of the M Corporation and the bondholders' committee, the committee took possession of the property securing bonds of that company maturing November 1, 1933, which bonds contained a tax-free covenant. The committee has collected rentals and made payments therefrom of interest on the bonds since November 1, 1933.

Held, the committee as assignee of the obligor corporation should withhold the tax on the interest payments.

Advice is requested whether income tax should be withheld at the source on interest payments upon certain bonds which matured November 1, 1933.

The bonds were issued by the M Corporation, which company defaulted in the payment of the principal amount on November 1, 1933. Anticipating the default, an agreement was entered into on October 1, 1933 (designated "Deposit agreement"), between the bondholders' committee and the bondholders who deposited their bonds with a trust company, referred to as the "Depositary." Under the agreement the committee was authorized to take possession of the property securing the bonds and operate the property as provided by the agreement. In pursuance of the authority granted by the agreement, the bondholders' committee has collected the rentals from the properties and has made payment of interest on the bonds since November 1, 1933, although the maturity date of the bonds has not been extended. The bonds contain a covenant that the interest will be paid "without deduction for such portion of any income tax now

or hereafter imposed by the United States of America which the company or the trustee under the said first mortgage may be required or permitted to pay thereon, or to deduct or to retain therefrom, under any present or future law or laws of the United States of America, not in excess of two per cent (2%) per annum; all of which taxes the company hereby agrees to pay." The above covenant is the usual covenant contained in so-called tax-free covenant bonds and comes within the withholding provisions of section 143(a) of the Revenue Act of 1932. The question presented is whether the bondholders' committee is required as withholding agent to deduct and pay over to the Government the amount of tax provided for in that section.

The property was taken over by, and the lease thereon assigned to, the bondholders' committee in order that it might operate the property for the benefit of the bondholders. The agreement provided that "Such assignment shall be effective until the retirement of all bonds secured by said mortgage," meaning the mortgage due November 1, 1933. It does not appear that any amounts have been paid to the bondholders except interest on the principal amount of the bonds, although the assignment of the lease was not only for the purpose of paying the interest on the bonds but also for the retirement of the bonds. As stated in the agreement assigning the property to the committee, interest was to be paid first and "surplus rents received by * * * [the committee] in excess of the interest requirements" were to be used to retire the bonds. It is evident, therefore, that the payments from the rentals in so far as they represent interest on tax-free covenant bonds are subject to withholding.

Article 761 of Regulations 77 reads in part as follows:

> Where in connection with the sale of its property, payment of the bonds or other obligations of a corporation is assumed by the assignee, such assignee, whether an individual, partnership, or corporation, must deduct and withhold such taxes as would be required to be withheld by the assignor had no such sale or transfer been made.

That provision of the regulations is applicable here regardless of the fact that there was not a sale of the property securing the bonds but an assignment of the lease on the property for an indefinite period for the purpose of paying the interest on the bonds and their ultimate retirement. The duty to withhold the tax on interest upon tax-free covenant bonds is primarily that of the debtor corporation, the "obligor." In the instant case, however, the payment of interest is being made by an "assignee." Accordingly, the bondholders' committee as assignee of the obligor should deduct the tax required to be withheld and pay the amount thereof to the Government. In other words, the bondholder's committee (the assignee), having taken over the property of the debtor corporation and assumed the payment of the interest and principal of its bonds, should comply with the withholding provisions of the Revenue Act of 1932 and the regulations promulgated thereunder. Any amounts distributed to the bondholders in payment of the principal of the bonds, being a return of capital, are, of course, not subject to withholding.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

SECTION 272.—PROCEDURE IN GENERAL.

ARTICLE 1173: Extension of time for payment of a deficiency.

REVENUE ACT OF 1932.

Rules governing consideration of application for extension of time to pay deficiency in income tax. (See Mim. 4303, page 133.)

TITLE IX.—ADMINISTRATIVE AND GENERAL PROVISIONS.

SECTION 1103.—LIMITATIONS ON SUITS BY TAXPAYERS.

SECTION 1103. XIV-22-7522
Ct. D. 970

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

SUIT—RES JUDICATA.

Judgment entered in a suit based upon a claim for refund of taxes for the year 1919 is a bar to the maintenance of a subsequent suit by the same taxpayer based upon a refund claim for the same taxable year, although the latter claim presented a different ground from that stated in the former suit, where the taxpayer was in no way misled and was free to present to the court the item involved in the latter suit before the previous suit was decided.

COURT OF CLAIMS OF THE UNITED STATES.

Chicago Junction Railways and Union Stock Yards Co., in Consolidation with Union Stock Yard & Transit Co., Chicago Junction Railway Co., Central Manufacturing District, Stock Yard Harness & Saddlery Co., Chicago Junction Railroad Co., and Produce Terminal Corporation, v. *The United States.*

[March 4, 1935.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

The parties are in agreement that plaintiffs overpaid the tax for 1919 in the amount of $3,483.97 in excess of the amount for which the court heretofore entered judgment in a previous suit by plaintiffs against the United States for the same taxable year. The question is whether the judgment in the previous suit operates as a bar to the present suit based upon an item giving rise to an overpayment in the same taxable year for which a timely claim for refund was filed upon a ground different from that stated in the previous suit.

Plaintiffs insist that the present suit is not based upon the same cause of action as the suit heretofore decided by the court involving taxes for the same taxable year, but that the present suit is grounded upon a different claim or demand. In support of this contention it is argued that the statute requires the filing of a claim for refund specifying the ground therefor before suit can be brought; that as the refund claim upon which the previous suit was based did not mention the 2 per cent income tax and that as plaintiffs later filed a timely and sufficient claim for refund for the overpayment, on the ground that it was not liable for 2 per cent of the 10 per cent tax paid, it has a right

under the provisions of section 3226 of the Revised Statutes, as amended by section 1103 of the Revenue Act of 1932, to maintain a separate suit on the second claim for refund. In other words, plaintiffs contend that inasmuch as the statute requires a claim for refund as the basis for suit, and makes the claim the only possible means of bringing suit, the cause of action is confined to the allegations made in the claim for refund and not to a taxable period. In our opinion this contention can not be sustained.

Each taxable year constitutes a separate cause of action and in every suit for a refund one of the questions presented is the amount by which the taxpayer has overpaid his taxes for the year involved. While the court is limited in its consideration of a case to the questions raised before the Treasury Department in a timely refund claim, a decision of a case upon the issues presented is a bar to a subsequent suit in respect to all matters and items that could have been raised and presented for decision in the first case, in the absence of facts and circumstances such as were involved in the case of *Cambridge Loan & Building Co.* v. *United States* (57 Fed. (2d), 936). Cf. *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, decided by this court March 5, 1934.

The fact that the statute makes the filing of a claim for refund a condition precedent to the right to sue the United States for the recovery of an overpayment of tax does not, we think, give the taxpayer a right to bring a second suit where the matter of the tax liability for the same taxable year has been litigated and decided. Moreover, in the present instance, it appears that the plaintiffs were not in any way misled and that they were free to present the item involved in this case to the court before the previous suit was decided. At the time the previous case was briefed and submitted to the court for decision, no representation had been made to plaintiffs that their claim for refund of 2 per cent of the income tax paid would be refunded. No mention was made when the case was submitted that such claim was pending and no motion to amend the petition in the previous case was tendered before the judgment was entered, although the date on which the petition could have been amended so as to raise the question arrived five months before the judgment of the court was entered.

In these circumstances the judgment heretofore entered in a case between the same parties for the same taxable year is a bar to the maintenance of the present action. (*International Curtis Marine Turbine Co.* v. *United States*, 74 C. Cls., 132.) The petition must therefore be dismissed and it is so ordered.

INCOME TAX RULINGS.—PART III.

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.

REVENUE ACT OF 1928.

Effect of decision in *Helvering* v. *Hickman* (70 Fed. (2d), 985, Ct. D. 866, C. B. XIII–2, 274) with respect to G. C. M. 9938 (C. B. X–2, 115) and G. C. M. 9953 (C. B. XI–1, 13). (See G. C. M. 14198, page 261.)

ARTICLE 51: What included in gross income. XIV–23–7534
Ct. D. 974

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

1. INCOME—PROCEEDS FROM RESTRICTED ALLOTMENT OF CREEK INDIAN—EXEMPTION.

Proceeds from funds derived from the restricted allotment of a full-blood Creek Indian, invested and held in trust under direction of the Secretary of the Interior, are subject to Federal tax. Such income is included for taxation in the general terms of the Revenue Act of 1928, and no exemption is provided in any express terms of that Act, in any agreement with the Creeks, or in any Act of Congress dealing with their affairs, or by implication from the trust relationship between the Government and its ward.

2. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Tenth Circuit (75 Fed. (2d), 183), affirming 29 B. T. A., 635, affirmed.

SUPREME COURT OF THE UNITED STATES.

Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263, petitioner, v. *Commissioner of Internal Revenue.*

On certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 20, 1935.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

Sandy Fox, for whom this suit was instituted, is a full-blood Creek Indian. Certain funds, said to have been derived from his restricted allotment, in excess of his needs were invested. The proceeds therefrom were collected and held in trust under direction of the Secretary of Interior. The question now presented is whether this income was subject to the Federal tax laid by the 1928 Revenue Act (ch. 852, sections 11, 12; 45 Stat., 791). The Commissioner, the Board of Tax Appeals and the court below answered in the affirmative.

Petitioner maintains that the court should have followed the rule which it applied in *Blackbird* v. *Commissioner* (38 F. (2d), 976); also that it errone-

ously held Congress intended to tax income derived from investment of funds arising from restricted lands belonging to a full-blood Creek Indian.

Blackbird, restricted full-blood Osage, maintained that she was not subject to the Federal income tax statute. The court sustained that view and declared:

"Her property is under the supervising control of the United States. She is its ward, and we can not agree that because the income statute, Act of 1918 (40 Stat., 1057) and Act of 1921 (42 Stat., 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with."

This does not harmonize with what we said in *Choteau* v. *Burnet* (1931) (283 U. S., 691, 693, 696 [Ct. D. 352, C. B. X–1, 355]):

"The language of sections 210 and 211(a) [Act 1918] subjects the income of 'every individual' to tax. Section 213(a) includes income 'from any source whatever.'[1] The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The Act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. * * * The intent to exclude must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter."

The court below properly declined to follow its quoted pronouncement in Blackbird's case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. (See *Irwin* v. *Gavit*, 268 U. S., 161 [T. D. 3710, C. B. IV–1, 123]; *Heiner* v. *Colonial Trust Co.*, 275 U. S., 232 [T. D. 4112, C. B. VII–1, 207]; *Helvering* v. *Stockholms, etc., Bank*, 293 U. S., 84; *Pitman* v. *Commissioner*, 64 F. (2d), 740.) The purpose is sufficiently clear.

It is affirmed that "inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

The general terms of the taxing Act include the income under consideration and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.

Neither the Creek agreement of 1901, nor the supplemental agreement (1902) conferred general exemption from taxation upon Indians; homesteads only were definitely excluded, although alienation of allotted lands was restricted.

The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat., 137), or May 27, 1908 (35 Stat., 312), is not well founded. The first of these extended restrictions upon the alienation of allotments for 25 years unless sooner removed by Congress, and provided:

"SEC. 19. * * * That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee."

This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one which did not contain the quoted provision, but declared:

"SEC. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes * * *."

We find nothing in either Act which expresses definite intent to exclude from taxation such income as that here involved. (See *Shaw* v. *Oil Corporation*, 276 U. S., 575, 581.)

Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. (*Choate* v. *Trapp*, 224 U. S., 665, 673.) The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

[1] Like provisions are in sections 210 and 211(a), Revenue Acts 1921, 1924, 1926, and sections 11 and 12(a), Act of 1928; section 213(a), Acts 1921, 1924, 1926, and section 22, Act of 1928.

Shaw v. *Oil Corporation*, supra, held that restricted land purchased for a full-blood Creek—ward of the United States—with trust funds was not free from State taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate.
Affirmed.

ARTICLE 53: Compensation paid other than in cash.

REVENUE ACT OF 1928.

Allowances for living quarters, heat, fuel, and light, to officers stationed abroad in the foreign service of the Department of Commerce. (See G. C. M. 14710, page 44.)

ARTICLE 58: Sale of stock and rights. XIV-21-7504
Ct. D. 966

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

1. GAIN OR LOSS—SALE OF STOCK—MARGINAL TRANSACTIONS—"FIRST-IN, FIRST-OUT" RULE—VALIDITY.

In marginal transactions on the Stock Exchange, shares of stock are capable of identification by other means than by stock certificates, and if the margin trader has designated the securities to be sold as those purchased on a particular date and at a particular price the "first-in, first-out" rule prescribed by article 58 of Regulations 74 does not apply. It is only when such a designation was not made at the time of the sale, or is not shown, that the rule is to be applied. Thus construed, the regulation is valid.

2. CIRCUIT COURT OF APPEALS—POWER TO MAKE FINDINGS OF FACT—ERRONEOUS ASSUMPTION OF FACTS—REMAND OF CASE.

The Circuit Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact, and it may not reverse the Board's decision on an assumption of facts not borne out by the facts found by the Board. Where the question whether the Board's finding was without substantial support in the evidence was not considered by the Circuit Court of Appeals nor argued before the Supreme Court, the case must be remanded for further consideration.

3. DECISION REVERSED.

Decision of the Circuit Court of Appeals, Third Circuit (73 Fed. (2d), 9), reversing 26 B. T. A., 1204, reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *James L. Rankin, Executor.*

On certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 29, 1935.]

OPINION.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Revenue Act of 1928 (ch. 852, sections 22, 111, 112, 113) provides, as had earlier Revenue Acts, that in computing income from sales of property purchased after February 28, 1913, any excess of the amount realized over cost shall be gain and that any excess of the cost over the amount realized shall be loss. When gain or loss is to be determined on the sale of stock owned outright as an investment, the identification of the shares sold with those pur-

chased ordinarily presents no difficulty. But when the taxpayer has engaged in marginal transactions on a stock exchange, the identification of sales and purchases is frequently impossible. It was, perhaps, primarily to deal with such cases that the Treasury adopted, in 1918,[1] the so-called "first-in, first-out" rule. That rule appears in article 58 of Regulations No. 74, under Revenue Act of 1928, as follows:

"When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over cost or other basis of the stock will constitute gain."

Applying this rule, the Commissioner of Internal Revenue assessed against Richard B. Turner for the year 1928, a deficiency tax of $11,173.05 on account of gains from his operations on the Stock Exchange in United Gas Improvement Co. stock. Upon a redetermination by the Board of Tax Appeals, the Commissioner's action was sustained. (26 B. T. A., 1204.) The Court of Appeals reversed the Board's decision and directed it to enter a new order in conformity with the court's opinion. (73 F. (2d), 9.) Turner having died during the litigation, his executor, Rankin, was substituted. Writs of certiorari were granted in this case, and in *Snyder* v. *Commissioner of Internal Revenue*, No. 663, decided this day [Ct. D. 967, page 164, this Bulletin], in order to determine questions concerning the effect, validity, and applicability of the regulation. (294 U. S., —.) The facts found by the Board were these:

In 1926, Turner received in distribution of his father's estate $20,000 in bonds. Wishing to change his inheritance into stock, he opened a marginal account with a stock broker; sold the bonds; and, with the proceeds as margin, purchased, from time to time during that year, an aggregate of 1,200 shares of United Gas Improvement Co. stock at a cost of $117,202.50. On this stock the broker received for him later in 1926, 300 shares as a dividend. There were no further operations in 1926 or in 1927. His marginal account became active in 1928. At the beginning of the year he was long 1,500 shares of this stock; in May he sold 300 shares for $44,619 net; in June, he bought 1,000 shares for $143,225; in October he sold 500 shares for $73,865; and, in November, 500 shares for $74,115. Thus, at the close of the year, he was long 1,200 shares.

In none of these transactions did the broker deliver to Turner, or Turner to the broker, any stock certificate. No specific certificate of stock was ever bought or sold by the broker for Turner; and none was earmarked or allocated for him in any manner. The purchases and sales affecting his account were made through the medium of street certificates handled by the broker; and the transactions were evidenced solely by debits and credits in his account on the broker's books. Turner first learned these facts after the deficiency assessment. He had always intended to retain ownership on margin of 1,200 shares of the stock, since he had faith in the company and desired to hold them in lieu of the bonds which he had received from the estate of his father. To his business associates, who acted for him in giving orders to the broker, he had made it plain that the 1,200 shares were in the nature of a permanent commitment on his part. An employee of the broker understood that the decedent desired to retain 1,200 shares of the stock to take the place of the bonds which he had received from his father.

On the above facts the Board concluded, as had the Commissioner, that it was impossible to determine the identity of the lots purchased and sold; and that, consequently, the "first-in, first-out" regulation should be applied. In reversing that order the Court of Appeals said:

"We think the petitioner's (Turner's) communication to his broker of his intention to hold the 1,200 shares first purchased as an investment was in effect an order to his broker not to sell those shares, and when, two years later, he ordered the broker to make two sales in lots of 500 shares each, they were, conformably with the original instructions, the 1,000 shares last purchased. The petitioner's instructions excluding from sale the shares first purchased were in effect an identification of the shares later sold as those last purchased.

[1] Article 4, paragraph 60, Regulations No. 33 (revised), Revenue Acts of 1916 and 1917; article 59, Regulations Nos. 45, 62, 65, and 69, Acts of 1918, 1921, 1924, and 1926, respectively; article 58, Regulations Nos. 74 and 77, Acts of 1928 and 1932, respectively; article 22(a)–8, Regulations No. 86, Act of 1934.

"While the petitioner, in identifying his shares, might have been more specific in his instructions to his broker, those he gave stand uncontradicted; indeed they have not been questioned. We think they were enough to take the case out of the rule and that, in consequence, the deficiency tax in issue is invalid to the extent that it is based on gains in sales of U. G. I. shares reckoned on the purchase price of the original 1,200 shares."

First. The Commissioner contends that Turner's communication to his broker of his intention to keep 1,200 shares of United Gas Improvement Co. stock was ineffective to identify the shares to be sold, because, from the very nature of these marginal operations, the shares were incapable of identification by the broker or anyone else. The basis for this contention are the facts that in such transactions no certificate is issued in the name of the customer, or earmarked for or otherwise allocated to him; that all certificates are in the name of the broker or street names; and that all certificates for stock of the same kind are commingled and held by the broker for the common benefit of all dealing in that particular stock. The fallacy of this argument lies in the assumption that shares of stock can be identified only through stock certificates. It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means. (Compare *Richardson* v. *Shaw*, 209 U. S., 365; *Gorman* v. *Littlefield*, 229 U. S., 19; *Duel* v. *Hollins*, 241 U. S., 523.) Particularly is this so when, as here, the thing to be established is the allocation of lots sold to lots purchased at different dates and different prices.[2] The required identification is satisfied, if the margin trader has, through his broker, designated the securities to be sold as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the "first-in, first-out" rule is to be applied.[3]

Second. The validity of the regulation, thus construed, can not seriously be questioned. The contention advanced by the taxpayers, both here and in the companion case of *Snyder* v. *Helvering*, that the regulation, as applied to marginal transactions, is invalid under the fifth amendment, because it creates a conclusive presumption, must rest wholly on the assumption that the shares traded on margin are incapable of identification. Since that assumption is erroneous, it is clear that no conclusive presumption is established. It is, at most, the burden of proof that is affected. For the margin trader, while being required to establish the identity of the shares in order to avoid the "first-in, first-out" rule, is left free to introduce any relevant evidence. Nor is he arbitrarily deprived of any of the important attributes of ownership, such as the "right to decide which stock he is going to sell." Indeed it is conceded, at least by the taxpayer in this case, that the regulation, as we now interpret it, "provides a useful and reasonable rule for ascertaining what stock was sold in cases where there is no proof, or lack of satisfactory proof, of the fact."

Third. If the facts found by the Board of Tax Appeals had been what the Court of Appeals assumed them to be, there would have been such an identification of shares sold with shares purchased as to preclude the Commissioner from applying the "first-in, first-out" rule. The Court of Appeals assumed that, "What Turner did in this case, acting and speaking through his attorney, was to communicate to his broker his intention to hold for investment the shares of U. G. I. he originally purchased." The facts found by the Board of Tax Appeals do not bear out this assumption of the court. The Board's findings were that, "The decedent (Turner) always intended to retain the ownership on margin of 1,200 shares of the United Gas Improvement Co. stock"; and that, "An employee of the broker understood * * * that the decedent desired to retain 1,200 shares to take the place of the bonds which

[2] The original regulation, article 4, paragraph 60, Regulations No. 33 (revised), read: "When stock is sold from lots purchased at different times and at different prices, and the identity of the lots can not be determined as to the dates of purchase, the stock sold shall be charged against the earliest purchases of such stock." It has been suggested that, "Under the language quoted from Regulations 33 ("as to the dates of purchase," omitted in subsequent regulations), it might be argued that the identification intended could have been accomplished merely by recording 'the dates of purchase,' rather than by requiring physical identification of the certificates." (Wilkins, Identity of Marginal Transactions, Internal Revenue News, volume 4, No. 7, page 5 (1931).)

[3] Compare *Howbert* v. *Penrose* (38 F. (2d), 577); *Skinner* v. *Eaton* (45 F. (2d), 568); *Snyder* v. *Commissioner of Internal Revenue* (54 F. (2d), 57 [Ct. D. 454, C. B. XI–1, 161]); *Commissioner of Internal Revenue* v. *Merchants' & Manufacturers' Insurance Co.* (72 F. (2d), 408).

he had received from his father." The difference between the Board's findings and the court's statement of the facts is obviously vital. The court held that Turner's communication of his intention "was in effect an order to his broker not to sell those shares"; that "when, two years later, he ordered the broker to make two sales in lots of 500 shares each, they were, conformably to the original instructions, the 1,000 shares last purchased." But if the employee was told, as the Board found, merely that Turner "desired to retain 1,200 shares (of the U. G. I. stock) to take the place of the bonds which he had received from his father," he would naturally believe that so long as any 1,200 shares of the stock were retained, it was immaterial to which of the lots the sales in 1928 were attributed; and hence there was no identification. Thus it was only by departing from the facts as found by the Board of Tax Appeals that the court found justification for reversing the Board's decision.

Fourth. The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decisions of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." (*Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S., 716, 725 [Ct. D. 80, C. B. VIII–2, 222].) The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. (See *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S., 589, 599, 600 [Ct. D. 350, C. B. X–1, 264]; *Burnet* v. *Leininger*, 285 U. S., 136, 138; *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S., 289, 294 [Ct. D. 903, page 332, this Bulletin].)[4] Unless the finding of the Board involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board.[5] If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. (Compare *Helvering* v. *Taylor*, 293 U. S., 507 [Ct. D. 912, page 168, this Bulletin]; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 308 [Ct. D. 619, C. B. XII–1, 23].[6]) And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.[7]

Fifth. The Court of Appeals did not comment on the difference between the Board's findings and its own statement of the facts. Apparently it assumed that there was no difference; and reversed the Board's order, believing that it rested upon an erroneous ruling of law. For the court said that the Board made its determination "on the theory that the U. G. I. stock, which from time to time he (Turner) purchased on margin, and later sold, could be identified only by certificates; that as no certificates for shares were ever in his name, the shares sold could not be identified as shares purchased in any particular lot or at any particular time or price and, accordingly, charged the shares sold against those earliest purchased within the 'first-in, first-out' rule."

There is nothing in the opinion of the Board to indicate that its decision was based upon the "theory" stated by the court. There is nothing in the record to indicate that any such contention had been made by the Government before the Board; and Turner's petition for review by the Court of Appeals

---

[4] Compare *Tracy* v. *Commissioner of Internal Revenue* (53 F. (2d), 575, 578–579 [Ct. D. 468, C. B. XI–1, 205]); *Slayton* v. *Commissioner of Internal Revenue* (decided March 26, 1935, by the Circuit Court of Appeals for the First Circuit); *Heywood Boot & Shoe Co.* v. *Commissioner of Internal Revenue* (decided April 1, 1935, by the Circuit Court of Appeals for the First Circuit)

[5] Compare *Bishoff* v. *Commissioner of Internal Revenue* (27 F. (2d), 91, 92); *Washburn* v. *Commissioner of Internal Revenue* (51 F. (2d), 949, 951); *Tricou* v. *Helvering* (68 F. (2d), 280, 285).

[6] Compare *Royal Packing Co.* v. *Commissioner of Internal Revenue* (22 F. (2d), 536, 538); *Commissioner of Internal Revenue* v. *Langwell Real Estate Corporation* (47 F. (2d), 841, 842 [Ct. D. 384, C. B. X–1, 361]); *Independent I. & C. Storage Co.* v. *Commissioner of Internal Revenue* (50 F. (2d), 31, 33 [Ct. D. 471, C. B. XI–1, 308]); *Kansas City Southern Railway Co.* v. *Commissioner of Internal Revenue* (52 F. (2d), 372, 379); *Houston* v. *Commissioner of Internal Revenue* (53 F. (2d), 445 [Ct. D. 475, C. B. XI–1, 209]); *Underwood* v. *Commissioner of Internal Revenue* (56 F. (2d), 67, 73); *Eau Clair Book & Stationery Co.* v. *Commissioner of Internal Revenue* (65 F. (2d), 125, 126).

[7] Compare *Kendrick Coal & Dock Co.* v. *Commissioner of Internal Revenue* (29 F. (2d), 559, 564); *Francisco Sugar Co.* v. *Commissioner of Internal Revenue* (47 F. (2d), 555, 558); *Beldridge Oil Co.* v. *Helvering* (69 F. (2d), 432).

did not claim that the Board had acted upon that "theory."[8] But even if the Board's decision had been based on an erroneous rule of law, that would not have justified its reversal, if the findings of fact, governed by the correct rule of law, were sufficient to sustain the decision and had substantial support in the evidence.[9]

Sixth. The Court of Appeals did not explicitly hold that the Board's finding as to Turner's communication to his broker was without substantial support in the evidence. The court, in its opinion, does state that, "The evidence shows conclusively that Turner was sentimental about keeping the original 1,200 shares as an inheritance from his father; that his 'intention' was to retain as an investment the shares originally purchased and sell in speculation the shares more recently acquired." It does not state that the evidence was equally conclusive as to the communication to the broker of this exact intention. There was, it is true, testimony to the effect that "from the very beginning West & Co. knew Mr. Turner's intentions and knew he was keeping the first purchase of 1,200 shares"; and the failure of the Board so to find, was assigned as error by the taxpayer in his petition for review. But there was also testimony showing that Turner, during 1928, traded heavily in 20 other issues of stock. The Court of Appeals did not consider whether, in view of this and other evidence, the Board might reasonably have concluded that the testimony as to the broker's knowledge of Turner's intention was not entirely accurate, and that the broker's only clear understanding of Turner's intention was that, throughout his extensive trading, 1,200 shares of United Gas Improvement Co. stock were to remain in his account. Since this question was not considered in the court below nor argued here, the case must be remanded to the Court of Appeals for further consideration.

Reversed.

ARTICLE 58: Sale of stock and rights. XIV-21-7508
Ct. D. 967

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

1. GAIN OR LOSS—SALE OF STOCK—MARGINAL TRANSACTIONS—IDENTIFICATION OF STOCK—INTENTION.

In marginal transactions on the Stock Exchange shares traded on margin are capable of identification, but the mere intention of the trader to sell particular shares, without further designation, does not constitute sufficient identification to make the so-called "first-in, first-out" rule inapplicable.

2. GROSS INCOME—PROFITS FROM TRADE OR BUSINESS—MARGINAL TRANSACTIONS.

Marginal transactions on the Stock Exchange do not constitute a trade or business regularly carried on for profit within the meaning of section 22(a) of the Revenue Act of 1928, in the absence of proof that the trader devoted the major part or any substantial part of his business day to his stock transactions or that he might properly be characterized as a trader on an exchange who makes his living in buying and selling securities.

3. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Third Circuit (73 Fed. (2d), 5), affirming 29 B. T. A., 39, affirmed.

---

[8] The Solicitor General stated in his petition to this Court for certiorari, that the question presented was "whether shares of stock held on margin are capable of identification so that a taxpayer selling part of his holdings may select, as his basis for determining gain or loss, the cost of any particular lot"; and counsel for the Government may have contended in the Court of Appeals, as he did here, that such identification is impossible. It is also true that the Board of Tax Appeals in other cases has approved the rule for which the Government is now contending. (See *Stryker* v. *Commissioner of Internal Revenue*, 21 B. T. A., 561; *Leng* v. *Commissioner of Internal Revenue*, 22 B. T. A., 149; *Seelye* v. *Commissioner of Internal Revenue*, 29 B. T. A., 695; compare *Kelchner* v. *Commissioner of Internal Revenue*, 31 B. T. A., 262.)

[9] Compare *Lewis-Hall Iron Works* v. *Blair* (23 F. (2d), 972, 974–975); *Hurwitz* v. *Commissioner of Internal Revenue* (45 F. (2d), 780, 781); *Dickey* v. *Burnet* (56 F. (2d), 917, 918).

SUPREME COURT OF THE UNITED STATES.

John A. Snyder, petitioner, v. *Commissioner of Internal Revenue.*

On certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 29, 1935.]

OPINION.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This case presents further questions regarding the application to marginal transactions on the Stock Exchange of article 58 of Regulations No. 74, as well as some of those already considered in *Helvering* v. *Rankin,* decided this day [Ct. D. 966, page 160, this Bulletin].

Snyder was the salaried secretary of an insurance company. During 1928, as in previous years, he made on his individual account, at different dates and different prices, many purchases and sales on margin of United Gas Improvement Co. stock. In his Federal income tax return for the calendar year 1928 he reported, apparently, no profits from trading on the Stock Exchange. The Commissioner of Internal Revenue concluded that he had made large gains; determined that his net income was $197,495.85; and, after making the appropriate deductions, assessed a deficiency tax of $38,961.22. The large income computed by the Commissioner was the result of applying the sales made in 1928 against purchases in earlier years, in accordance with the "first-in, first-out" regulation and sections 111–113 of the Act. The Board of Tax Appeals (29 B. T. A., 39) and the United States Circuit Court of Appeals (73 F. (2d), 5) affirmed the Commissioner's determination. The facts found by the Board of Tax Appeals, upon which the case was submitted, are these:

Snyder traded in United Gas Improvement Co. stock for profit through brokers on margin; and increased his holdings by the method known as "pyramiding." On January 1, 1928, there stood to his credit 5,300 shares; and his debit balances aggregated $501,865.59. He purchased during the tax year 10,600 shares and sold 7,900. At the close of the year, 8,000 shares stood to his credit, and his debit balances aggregated $932,822.67. Upon rises in the market, paper profits had been used to increase his holdings. Upon declines in the market, when his margin fell below the required percentage, the brokers reduced his debit balances by sufficient sales to make up the deficiency in the margin. The purchases and sales were effected by the brokers transferring so-called "street certificates," each for 100 shares, in the name of some Stock Exchange concern, indorsed by it in blank. At no time was any stock certificate delivered by the brokers to Snyder, or by him to them; nor was any certificate earmarked for him or his account. The certificates were inextricably mingled with other securities pledged with banks. They were at all times incapable of identification as having been bought or sold for the account of Snyder. The transactions between him and the brokers were reflected solely in entries in Snyder's account on the brokers' books; and no entry indicated that any particular lot theretofore purchased had been sold or retained. The only attempt at identification found by the Board, was the uncontradicted testimony of Snyder to the effect that "in each case where a sale was made it was his intention to sell the last acquired stock first and shortly thereafter to buy back an equivalent amount in order to increase his margin and acquire additional shares of the stock."

First. Snyder contends, in the alternative, that his intention to sell the last acquired stock first, constituted sufficient identification to make the "first-in, first-out" rule inapplicable; or else that the regulation as applied to marginal transactions on the Stock Exchange is invalid, because there is no possible means, other than the trader's intentions, of identifying the shares sold. What has already been said in *Helvering* v. *Rankin* is enough to dispose of both of these contentions. It is there determined that shares traded on margin are capable of identification for the purposes of the regulation; but that the mere intention of the trader to sell particular shares, without further designation, does not constitute sufficient identification.

Second. Snyder contends that the "first-in, first-out" regulation may not, consistently with the provisions of the Revenue Act of 1928, be applied to the facts of this case. The argument is that his market operations constituted a trade or business as those terms are used in section 22(a) of the Act; that according to that section, and the applicable decisions of this Court (*Burnet*

v. *Sanford & Brooks Co.*, 282 U. S., 359 [Ct. D. 277, C. B. X–1, 363]; *Woolford Realty Co.* v. *Rose*, 286 U. S., 319 [Ct. D. 493, C. B. XI–1, 154]), gross income from such business, as well as net income under section 23 of the Act, must be computed entirely with respect to transactions within the taxable year; and that sections 111–113, upon which the Government relies, are not applicable because they relate only to "sales of property, including securities, held for investment," and have no application to sales made in the course of a "business of trading on the Stock Exchange." On this assumption, Snyder argues that the income realized during the taxable year from his stock transactions is not the aggregate of the gains and losses on each sale of securities, measured by the difference between the sale and cost prices of the securities sold, but the profit or loss realized as a result of all market operations, purchases as well as sales, made during the taxable year. Such profit or loss, he now suggests, must be computed "by taking the difference between the purchase price and the sales price of shares bought and sold during the year, deducting expenses, such as commissions, taxes and interest." Thus computed, he concludes, his market operations resulted in a gross income of $43,692; and adding his salary, insurance commissions and dividends, and deducting the expenses of his stock operations (interest paid brokers) his net taxable income was $39,682, and his total tax $1,897.77.

Third. Neither in the findings of the Board of Tax Appeals, nor in the facts upon which the case was submitted to it, is there any support for the controverted allegation in Snyder's petition that his market operations constituted a "business regularly carried on for profit."[1] It is true that a taxpayer may be engaged in more than one trade or business, as those terms are used in various provisions of the Revenue Acts; and that, in addition to other business activities, one may be "regularly engaged in the business of buying and selling corporate stocks." (Compare *Dalton* v. *Bowers*, 287 U. S., 404 [Ct. D. 621, C. B. XII–1, 177]; *Burnet* v. *Clark*, 287 U. S., 410 [Ct. D. 620, C. B. XII–1, 175]; *Washburn* v. *Commissioner of Internal Revenue*, 51 F. (2d), 949.) It is also true that the Department has ruled, and the Board has held, that a taxpayer who, for the purpose of making a livelihood, devotes the major portion of his time to speculating on the Stock Exchange may treat losses thus incurred as having been sustained in the course of a trade or business.[2] Snyder, however, did not allege or attempt to prove that he had devoted the major part, or any substantial part, of his business day to his stock transactions. Nor were there any facts adduced to show that he might properly be characterized as a "trader on an exchange, who makes a living in buying and selling securities." (*Bedell* v. *Commissioner of Internal Revenue*, 30 F. (2d), 622, 624; compare *Mente* v. *Eisner*, 266 Fed., 161 [T. D. 3029, C. B. 2, 131].) Indeed, according to his petition, his intention throughout the year 1928, was, by "taking advantage of the turns of the market," not to draw out cash profits from his operations, but "to increase the holdings of U. G. I. stock carried for his account by (his) brokers to as great an extent as the margin of his account permitted." There is no substantial evidence in the record to sustain a finding by the Board, had there been one, to the effect that Snyder's market operations constituted a trade or business within the meaning of section 22 of the Revenue Act of 1928.

Fourth. The attack upon the Commissioner's method of computing income falls with the unsupported allegation that the stock transactions constituted a "business regularly carried on for profit." In his brief in support of his petition to this Court for certiorari, Snyder makes it clear, perhaps for the first time, that he is "insistent upon the point that the operations constitute a trade or business or transaction entered into for profit, not in order to deduct losses, but to emphasize the controlling rule that the law requires the tax to be computed on the segregated transactions of the year." But it is

[1] The answer of the Commissioner denied that the "brokerage accounts * * * constituted a trade or business within the meaning of any provision of the Revenue Act of 1928." The Board of Tax Appeals made no specific finding on this issue; but the Court of Appeals assumed that the Board meant to find against the taxpayer, and concluded that the assumed finding was supported by the evidence.

[2] I. T. 1818 (C. B. II–2, 39); *Schwinn* v. *Commissioner of Internal Revenue* (9 B. T. A., 304); *Elliott* v. *Commissioner of Internal Revenue* (15 B. T. A., 494); *Hodgson* v. *Commissioner of Internal Revenue* (24 B. T. A., 256); *Schermerhorn* v. *Commissioner of Internal Revenue* (26 B. T. A., 1031). Compare *Black* v. *Bolen* (268 Fed., 427); *Rogers* v. *United States* (41 F. (2d), 864 [Ct. D. 227, C. B. IX–2, 302]); *Kunau.* v. *Commissioner of Internal Revenue* (27 B. T. A., 509); *Thiele* v. *Commissioner of Internal Revenue* (32 B. T. A., 134).

now too well settled for argument, that gains realized from sales of property purchased in previous years, measured, as prescribed by sections 111–113 of the 1928 Act, by the excess of proceeds of sale over cost, constitute income taxable in the year in which the sales are made. (*Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 184–185 [T. D. 2723]; *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S., 189, 192; *MacLaughlin* v. *Alliance Insurance Co.*, 286 U. S., 244, 250 [Ct. D. 496, C. B. XI–1, 124].) The contention that the rule is applicable only to the sale of capital assets, and not to sales made in the course of a "business of trading on the Stock Exchange," need not be disposed of on its merits (but see *Gray* v. *Darlington*, 15 Wall., 63, 66; *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S., 509, 520 [T. D. 3173, C. B. 4, 34]), since Snyder has failed to establish that the securities sold were held primarily for sale in the regular course of business.[5] And obviously, whether or not the stock transactions constituted a trade or business, the computation of gross income therefrom by deducting from sales of the current year the cost of securities sold, as determined by the purchase prices of previous years, is not comparable to the unsuccessful attempt in *Burnet* v. *Sanford & Brooks Co.* (282 U. S., 359) to offset gross income of the current year against losses or expenses of previous years.[6]

Fifth. Moreover, Snyder suggests no other practicable method of accounting which would reflect income for the year more fairly than the method adopted by the Commissioner.[7] He concedes that he is not a dealer in securities, in the sense of one who buys securities for the purpose of resale to customers; and that consequently, he is not entitled to compute income on an inventory basis.[8] (Compare *Lucas* v. *Kansas City Structural Steel Co.*, 281 U. S., 264, 268 [Ct. D. 223, C. B. IX–2, 299]; *United States Cartridge Co.* v. *United States*, 284 U. S., 511, 520 [Ct. D. 460, C. B. XI–1, 282].) His suggestion that gross income from trading be computed by deducting purchase prices from sale prices during the year would offer a feasible substitute only if it could be assumed that the number of purchases and sales would be approximately equal each year and that any differences would be averaged out in the course of a number of years. That assumption is unwarranted, particularly in view of Snyder's professed object "to accumulate as many shares of U. G. I. as he could."[9] His alternative suggestion, that, since purchases in fact exceeded sales during 1928, the "first-in, first-out" rule, if applied at all, should be confined to purchases and sales in the course of the year, adds nothing to the contentions that have already been considered in this case or in *Helvering* v. *Rankin*.

Affirmed.

---

[5] Compare *Hutton* v. *Commissioner of Internal Revenue* (39 F. (2d), 459 [Ct. D. 249, C. B. IX–2, 353]), where the deduction of brokers' commissions on purchases of securities, as business expenses, was disallowed. The Board found that the taxpayer was "engaged in the business of buying, holding and selling realty securities, etc."; but regarded the commissions as "capital expenditures." (12 B. T. A., 265.) (Compare *Vaughan* v. *Commissioner of Internal Revenue*, 31 B. T. A., 548; *Keeney* v. *Commissioner of Internal Revenue*, 17 B. T. A., 560.)

[6] Proceeds from sales in the regular course of business constitute gross income of the business only to the extent that they exceed the cost of the goods sold. (See *Spring City Foundry Co.* v. *Commissioner of Internal Revenue*, 292 U. S., 182, 185 [Ct. D. 829, C. B. XIII–1, 281]. Compare *Washington Land Co.* v. *Commissioner of Internal Revenue*, 10 B. T. A., 503; *Atlantic Coast Realty Co.* v. *Commissioner of Internal Revenue*, 11 B. T. A., 416; *Stern* v. *Commissioner of Internal Revenue*, 14 B. T. A., 838. See article 55, Regulations 74, Revenue Act of 1928.)

[7] Snyder does not attempt to bring himself within the general rule of section 41 of the 1928 Act, to the effect that "net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of said taxpayer." Neither does he state that the method he now suggests was followed in his return.

[8] Article 105 of Regulations No. 74 permits dealers in securities to make returns on inventory basis. A dealer is defined as a "merchant of securities, * * * with an established place of business, regularly engaged in the purchase of securities and their resale to customers." (Compare *Harriman National Bank* v. *Commissioner of Internal Revenue*, 43 F. (2d), 950; *Pan-American Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 5 B. T. A., 839; *Adirondack Securities Corporation* v. *Commissioner of Internal Revenue*, 23 B. T. A., 61; *Northeastern Surety Corporation* v. *Commissioner of Internal Revenue*, 29 B. T. A., 297; *Lowell* v. *Commissioner of Internal Revenue*, 30 B. T. A., 1296; *Fried* v. *Commissioner of Internal Revenue*, 31 B. T. A., 638; *Brendle* v. *Commissioner of Internal Revenue*, 31 B. T. A., 1188.)

[9] In Snyder's computation, although he purports to take "the difference between the purchase price and sale price of shares bought and sold during the year," the cost of the last 1,500 shares bought in one of his two brokerage accounts during the year is deducted from the total cost of purchases in that account, because purchases exceeded sales by 1,500 shares.

ARTICLE 58: Sale of stock and rights. XIV-4-7272
Ct. D. 912

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

1. REMAND TO BOARD OF TAX APPEALS—RIGHT OF CIRCUIT COURT OF APPEALS—EVIDENCE—SALE OF STOCK—APPORTIONMENT OF COST—BURDEN OF PROOF.

The taxpayer having submitted evidence before the Board of Tax Appeals to show the details of a transaction whereby a holding company bought certain preferred stock owned by him, and to show that the Commissioner's apportionment of total cost as between preferred and common stock was unfair and erroneous and his determination of the tax arbitrary and excessive, the burden was not upon him to prove that he owed nothing, or, if liable at all, to establish the correct amount that lawfully might be charged against him. Under the circumstances of the case, the Circuit Court of Appeals rightly remanded the case to the Board for a new hearing on the ground that the Commissioner's determination was incorrect, although the taxpayer had failed to prove facts from which a correct determination could be made.

2. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Second Circuit (70 Fed. (2d), 619), affirmed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Walter W. Taylor.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1935.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the Court.

The Commissioner determined a deficiency of $9,156.69 on account of respondent's 1928 income tax. The Board of Tax Appeals made the same determination. The court held it excessive and that the evidence did not show the correct amount, reversed the order of the Board and remanded the case for further proceedings in accordance with the opinion. (70 F. (2d), 619.) The petition for our writ states the question: "Whether the Circuit Court of Appeals erred in remanding this case to the Board of Tax Appeals for a new hearing on the ground that the Commissioner's determination of the amount of income was incorrect, although the taxpayer had failed to prove facts from which a correct determination could be made."

In August, 1927, respondent acquired all the stock of four utilities at a total cost of $96,030, organized a holding company and October 13 transferred to it all the utilities stock and received therefor all the shares of the holding company: 1,000 of preferred having no par value, entitled to a dividend of $6 annually, $100 on liquidation and callable at $105 per share; 2,500 of no par value class A common callable at $35 per share; 5,000 of no par value class B common stock having the voting power. As this transaction was "reorganization" under Revenue Act of 1926, section 203(b)2 (44 Stat., 12), no taxable gain resulted.

In May, 1928, the holding company sold the stock of the four utilities to the Colonial corporation for $194,930.16. Later in that year the holding company bought or retired all the preferred and paid the taxpayer $99,000 therefor. In his 1928 return he assigned the $96,030 for which he procured the utilities to the preferred stock of the holding company, deducted that amount from the $99,000 received therefor, and reported the difference, $2,970, as the gain derived from the sale. The applicable statutory provisions are contained in Revenue

Act of 1928, sections 111 (a), (d), 112(b)3, 113(a)6 (45 Stat., 815–819).[1] They prescribe no rule that is applicable for the ascertainment of the cost of the preferred stock or the apportionment of the total cost between preferred and common. But Regulations 74, article 58, declares: "Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost."

The Commissioner, holding the taxpayer not entitled to charge the cost of all to the preferred, apportioned between the preferred and common. He made his calculation upon the assumption that the cost, in 1927, attributable to the preferred shares bears the same relation to cost of all the shares then acquired as the amount respondent received, in 1928, for the preferred bears to the amount paid the holding company by Colonial corporation for all the utilities shares.[2] On that basis, he found that of the total 1927 cost, $96,030, there was chargeable to the preferred only $48,771.16 which deducted from $99,000 received by respondent for the preferred in 1928, leaves $50,228.84 upon which he determined the deficiency of $9,156.69.

Before the Board of Tax Appeals the taxpayer introduced evidence to show the details of the transaction and that there was no change in value of the utilities stock between the time he got it in August, 1927, and the date, October 13 of the same year, on which he transferred it to the holding company in exchange for its shares and that the entire increase in value came after that transfer. No opposing evidence was offered. On the facts shown, the taxpayer maintained that, as total cost was less than $100 per share for the preferred having prior rights to that extent on liquidation, the common stock had no value. Rejecting that contention, the Board of Tax Appeals filed a memorandum opinion in which it said: "It may well be that the properties acquired or all the classes of stock received by the petitioner were worth only $96,030 * * * and yet the preferred stock * * * may have had the value of $48,771.16 * * *. It is obvious that even if all the securities were worth only $96,030 that the proportionate value of the preferred stock to all the stocks would not necessarily be different from that determined by the Commissioner. * * * The question * * * is one of fact to be determined by testimony and not theory. It is conceivable that common stocks may actually sell on the market when preferred stocks in the same corporation are selling at less than par." It was upon that basis, without specific findings of fact, that the Board made the redetermination at the figure set by the Commissioner.

The only question for consideration is that stated in the petition for the writ of certiorari. (*Gunning* v. *Cooley*, 281 U. S., 90, 98.) That question in effect assumes, and here it is taken as granted, that the court rightly held the evidence sufficient to require a finding that the Commissioner's apportionment of total cost as between preferred and common stock was unfair and erroneous and that therefore the Commissioner's determination was excessive. We also

[1] SEC. 111. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized. * * *

(d) In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

SEC. 112. (b) (3) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance to the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

SEC. 113. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that * * *

(6) If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. (45 Stat., 815–819.)

[2] The figures are: X : $96,030 : : $99,000 : $194,930.17. The calculation stated in the opinion of the Board of Tax Appeals is:

$$\frac{\$99,000.00}{\$194,930.17} \times \$96,030 = \$48,771.16.$$

assume that the total purchase price is susceptible of fair apportionment and that upon another hearing the correct amount may be found. (70 F. (2d), 619, 620.) (Regulations 74, article 58, supra.) The point to be considered is whether, the taxpayer having failed to establish the correct amount to be assigned to the preferred stock as its cost to him, the court erred in reversing and remanding for further proceedings in accordance with its opinion.

The Commissioner does not contend that, in cases where Circuit Courts of Appeals properly reverse determinations of the Board they are without power to remand for further hearing in the nature of a new trial.[3] His contention is that in this case the burden on the taxpayer was not only to prove that the Commissioner's determination is erroneous but to show the correct amount of the tax. In substance he says that, because of the taxpayer's failure to establish facts on which a fair apportionment may be made, the Board's redetermination at the Commissioner's erroneous figure was valid and there being no error of law should have been sustained by the court. And he maintains that, in the absence of error on the part of the Board, the court was without power to remand for further hearing.

He cites Revenue Act of 1926, section 274(e) (44 Stat., 56): "The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing." The purpose of that provision is to define the jurisdiction granted to the Board; it does not prescribe any rule of evidence or burden of proof. Plainly it does not support the Commissioner's contention that the taxpayer, even though he has shown the determination to be arbitrary and excessive, must nevertheless pay the added tax because he has not also shown that he owes nothing or the correct amount, if any, that legally may be laid upon him.

He also cites Revenue Act of 1928, sections 51(a) and 54(a) (45 Stat., 807, 808). Neither gives any support to his contention. The first requires the taxpayer to make under oath a return stating specifically the amount of his gross income and the amounts of deductions and credits allowed. The other requires the taxpayer to keep such records, render under oath such statements, make such returns, and comply with such rules and regulations as the Commissioner may prescribe. These requirements give no support to the Commissioner's contention. They tend rather to suggest that taxpayers' returns are correct and may not arbitrarily be set at naught.

He also cites rule 30 adopted by the Board: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent." But there is nothing in it to suggest intention to require the taxpayer to prove not only that a deficiency assessment laid upon him was arbitrary and wrong but also to show the correct amount. Moreover, the Board held the evidence not sufficient to show the apportionment erroneous and on that ground alone sustained the assessment. Necessarily the Board did not come to the question that is here presented as to burden of proof. The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside. (Cf. *Bruce & Human Drug Co.*, 1 B. T. A., 342; *Acorn Refining Co.*, 2 B. T. A., 253; *Index Notion Co.*, 8 B. T. A., 90.)

The Commissioner cites *United States* v. *Rindskopf* (105 U. S., 418); *United States* v. *Anderson* (269 U. S., 422, 443 [T. D. 3839, C. B. V–1, 179]); *Reinecke* v. *Spalding* (280 U. S., 227, 232–233 [Ct. D. 154, C. B. IX–1, 305]). The first of these may be put aside without discussion as having no bearing upon the point here in controversy. The other two were adequately distinguished by the Circuit Court of Appeals. Each was an action to recover taxes paid. Obviously the burden was on the plaintiff, in order to establish a basis for judgment in his favor, specifically to show not merely that the assessment was erroneous but also the amount to which he was entitled. For like reason the burden is upon the taxpayer to establish the amount of a deduction

[3] Section 1003(b), Revenue Act of 1926 (44 Stat., 110, 26 U. S. C. Supp. VII, section 641(c)1 provides: "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

claimed. (*Burnet* v. *Houston*, 283 U. S., 223, 227 [Ct. D. 328, C. B. X–1, 343]; *Helvering* v. *Independent Life Insurance Co.*, 292 U. S., 371, 381 [Ct. D. 839, C. B. XIII–1, 302]; *New Colonial Co.* v. *Helvering*, 292 U. S., 440 [Ct. D. 841, C. B. XIII–1, 194].)

We find nothing in the statutes, the rules of the Board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower courts may not be harmonious, our attention has not been called to any that persuasively supports the rule for which the Commissioner here contends.[4]

Unquestionably the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid. (*Lucas* v. *Structural Steel Co.*, 281 U. S., 264, 271; *Wickwire* v. *Reinecke*, 275 U. S., 101, 105 [T. D. 4126, C. B. VII–1, 316]; *Welch* v. *Helvering*, 290 U. S., 111, 115 [Ct. D. 755, C. B. XII–2, 112].) Frequently, if not quite generally, evidence adequate to overthrow the Commissioner's finding is also sufficient to show the correct amount, if any, that is due. (See, e. g., *Darcy* v. *Commissioner*, 66 F. (2d), 581, 585 [Ct. D. 814, C. B. XIII–1, 238].) But, where as in this case the taxpayer's evidence shows the Commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the Board should have held the apportionment arbitrary and the Commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax. The rule for which the Commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals.[5] The Circuit Court of Appeals rightly reversed and remanded the case for further proceedings in accordance with its opinion.

Affirmed.

ARTICLE 58: Sale of stock and rights.

XIV–5–7287
Ct. D. 916

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

1. GAIN OR LOSS—SALE OF STOCK.

Where the taxpayer, in anticipation of the acquisition of additional stock through the exercise of stock rights, agreed to and did sell shares equal in number to those subscribed for and delivered to the purchaser certificates for shares of the old stock, the transaction was a sale of the old stock, completed before he had acquired the additional shares, and the basis to be used in determining the profit therefrom is the cost of the old stock, despite the fact that it was his intention and purpose to sell the new stock.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 360) affirmed.

---

[4] The Commissioner cites: *Hubinger* v. *Commissioner* (36 F. (2d), 724); *Sanderson* v. *Commissioner* (42 F. (2d), 160); *Autosales Corporation* v. *Commissioner* (43 F. (2d), 931); *Onondaga Co.* v. *Commissioner* (50 F. (2d), 397); *Darcy* v. *Commissioner* (66 F. (2d), 581, 585); *Saxman Coal & Coke Co.* v. *Commissioner* (43 F. (2d), 556); *Williams* v. *Commissioner* (45 F. (2d), 61; *Alexander Sprunt & Son* v. *Commissioner* (64 F. (2d), 424); *Atlantic Bank & Trust Co.* v. *Commissioner* (59 F. (2d), 363 [Ct. D. 606, C. B. XI–2, 254]); *Lightsey* v. *Commissioner* (63 F. (2d), 254); *Matern* v. *Commissioner* (61 F. (2d), 663); *Atlanta Casket Co.* v. *Rose* (22 F. (2d), 800 [T. D. 4139, C. B. VII–1, 286]); *Becker* v. *United States* (21 F. (2d), 1003 [T. D. 4106, C. B. VI–2, 175]).

Cf. *Collin* v. *Commissioner* (32 F. (2d), 753); *Citrus Soap Co. of California* v. *Lucas* (42 F. (2d), 372); *Russell* v. *Commissioner* (45 F. (2d), 100, 103); *Strother* v. *Commissioner* (55 F. (2d), 626, 632 [Ct. D. 531, C. B. XI–2, 275]). And see, involving deduction, *Underwood* v. *Commissioner* (56 F. (2d), 67, 72).

[5] House Report No. 179, page 7; Senate Report No. 398, pages 8–9, Sixty-eighth Congress, first session. *Warren Mfg. Co.* v. *Tait* (60 F. (2d), 982, 984 [Ct. D. 601, C. B. XI–2, 379]); *Old Colony Trust Co.* v. *Commissioner of Internal Revenue* (279 U. S., 716, 721 [Ct. D. 80, C. B. VIII–2, 222]).

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

W. S. Horner, 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.

[July 26, 1934.]

OPINION.

THOMPSON, Circuit Judge: This is a petition for review of a decision of the Board of Tax Appeals. The petitioner owned stock of the American Rolling Mill Co. On January 10, 1928, the company issued rights to subscribe to additional stock on the basis of one share of new stock for each six shares of old stock at $75 a share. These rights expired on February 10, 1928. In January, 1928, the petitioner subscribed to 1,550 shares and, prior to their delivery, he agreed to and did sell an equal number of shares. He delivered certificates for 1,550 shares of the old stock then owned and held by him. It is undisputed that the sale was made by the petitioner in anticipation of the receipt by him of the new shares of stock, and that it was his intention and purpose to sell the new stock. In his income tax return for 1928 he computed the profit derived from the sale on the basis of the prospective cost of the new stock to be acquired, that is $75 a share.

The Commissioner computed the profit on the basis of the cost of the old stock, which was less than $75 a share, and determined a deficiency. The Board of Tax Appeals found as a fact that the sale was of the petitioner's old stock, representing a transaction completed before he had acquired the additional stock upon his right to subscribe and, therefore, sustained the Commissioner's assessment of a deficiency.

The Board of Tax Appeals held that sections 111(a) and 113(a) of the Revenue Act of 1928 (26 U. S. C. A., 2111a and 2113a) were applicable. These sections provide:

"SEC. 111. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized."

"SEC. 113. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *"

There is nothing in either section which permits gain or loss to be determined on the basis of the intention of the parties. The Board determined from the facts what was actually done rather than what the petitioner intended to do. The petitioner sold the stock he had, not the stock he anticipated obtaining.

The Board concluded that the transaction constituted a sale of the old stock and that the taxable gain was properly computed on that basis. We are in entire accord with the reasoning and conclusions set out in its decision (28 B. T. A., 360).

The decision of the Board of Tax Appeals is sustained.

ARTICLE 58: Sale of stock and rights.

REVENUE ACT OF 1928.

Conclusiveness of Board's finding as to sale of unidentified stock. (See Ct. D. 930, page 231.)

ARTICLE 63: Improvements by lessees.

REVENUE ACT OF 1928.

Amendment of article 63, Regulations 74. (See T. D. 4539, page 141.)

ARTICLE 68: Sale and retirement by corporation of its bonds.

REVENUE ACT OF 1928.

Expenses incidental to issuance of bonds, taxpayer being on accrual basis. (See G. C. M. 14349, page 47.)

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

ARTICLE 82: Proceeds of insurance—Compensation—Pensions.

REVENUE ACT OF 1928.

Contributions by the M University toward the purchase of annuities for members of its faculty. (See I. T. 2874, page 49.)

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

ARTICLE 121: Business expenses.

REVENUE ACT OF 1928.

Premiums paid on life insurance by a creditor to whom the policy has been assigned to secure a debt. (See G. C. M. 14375, page 52.)

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

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Accrual date of real and personal property taxes in Nebraska. (See I. T. 2849, page 60.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Accrual date of real and personal property taxes in South Dakota. (See I. T. 2850, page 61.)

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Accrual date of real and personal property taxes, State of Missouri. (See I. T. 2885, page 64.)

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

ARTICLE 174: Shrinkage in value of stocks.

REVENUE ACT OF 1928.

Assessment against stockholders of a bank because of their statutory liability. Modification of I. T. 2617 (C. B. XI–1, 29). (See I. T. 2843, page 77.)

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

ARTICLE 204: Capital sum recoverable through depreciation allowances. XIV–11–7370 Ct. D. 933

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

DEDUCTION—DEPRECIATION ALLOWABLE TO TRANSFEREE.

A corporation which acquires certain property from an individual in exchange for its stock, no gain or loss being recognized by the parties from the transaction, is entitled to deduction for depreciation of the property only in an amount by which its original cost to the transferor exceeds the aggregate of the depreciation deductions already taken by the corporation and by the transferor.

UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

B. F. Shaw Printing Co., an Illinois Corporation, appellant, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice; ROBB, VAN ORSDEL, and GRONER, Associate Justices.

[June 25, 1934.]

OPINION.

VAN ORSDEL, Associate Justice: This is a petition to review a decision of the United States Board of Tax Appeals, determining a deficiency of $770.67 in appellant's income tax for the year 1929.

It appears, under an agreed statement of facts, that prior to March 1, 1913, Mabel S. Shaw was doing business in Dixon, Ill., under the name of B. F. Shaw Printing Co., as proprietor and publisher; and owned and conducted a newspaper known as the "Dixon Telegraph." Appellant is an Illinois corporation, incorporated in January, 1921. Prior to the date of incorporation, Shaw owned and used in connection with her business certain printing machinery and equipment, which had cost her $45,121.62. Appellant corporation acquired the printing establishment from Shaw, including the machinery and equipment, in consideration of delivering to her all of its capital stock.

It further appears that immediately after such exchange Mabel S. Shaw assumed control of appellant company. No gain or loss was recognized by the parties in this transaction. The business was continued up to and including the whole of the year 1929; and, in the ownership and conduct of publishing the newspaper, the machinery and equipment were used during this period.

In her income tax return for the calendar year 1919, with the consent and approval of the Commissioner of Internal Revenue, Shaw deducted from her taxable income, among other things, the sum of $4,003.79, representing depreciation upon the machinery and equipment. In 1920, she deducted from her taxable income, as depreciation on her machinery and equipment, 10 per cent of the original cost, $4,512.16; making a total deduction for the years 1919 and 1920, on account of depreciation of machinery and equipment, of $8,515.95.

In its income tax return, the corporation, for each of the calendar years 1921, 1922, 1923, 1924, 1925, 1926, 1927, and 1928, with the consent and approval of the Commissioner of Internal Revenue, deducted annually from its taxable income as depreciation on the machinery and equipment, 10 per cent of its original cost, or the sum of $4,512.16; making a total deduction, on account of depreciation, by the corporation, of the sum of $36,097.28. It is agreed that the normal, useful life of machinery and equipment of the character here involved is 10 years.

In its income tax return for the calendar year 1929, appellant deducted, as depreciation upon the machinery and equipment, the sum of $4,512.16, representing 10 per cent of the original cost. The Commissioner of Internal Revenue, however, allowed depreciation only to the extent of $508.37, and disallowed the claim to the extent of $4,003.79; claiming that, except for the sum of $508.37, the assets had been fully depreciated. In other words, the Commissioner took the aggregate sum paid by Shaw prior to the transfer to appellant corporation of $8,515.95, and added it to the total deductions of the corporation, $36,097.28, making a total deducted for depreciation of $44,613.23. Deducting this from the original cost leaves a balance of $508.37, the amount of depreciation allowed by the Commissioner for the year 1929.

The sole question here for determination is whether or not the Commissioner of Internal Revenue was entitled to reduce the depreciation otherwise allowable to the appellant, by the amount of depreciation taken by appellant's transferor, prior to the date of the transfer.

The conclusion reached in this case by the Commissioner and the Board is correct. Section 112 of the Revenue Act of 1928 (45 Stats., 816) defines the exceptions to the general rule under which gain or loss shall be recognized. These exceptions relate to exchanges of property solely in kind. Among the exceptions, in paragraph (5) of subsection (b), it is provided: "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

So far as the record discloses in this case the stock exchanged for the printing plant represented its full value. In other words, the printing establishment merely passed from private to corporate ownership; the private owner becoming the owner of the corporation. It follows, therefore, that so far as computation for depreciation is concerned, the transferee merely steps into the position of the transferor; and, having done so, assumes as a basis for computation of depreciation the cost of the assets to the transferor. Having assumed this position, the transferee, as expressed in the opinion of the Board, "can not then step out of that position in fixing the total amount of depreciation allowable as contended by petitioner. To follow such theory would permit double deduction for the loss of the same capital assets, and be wholly incompatible with the entire rationale upon which is based the deductibility of depreciation in computing income taxes."

In other words, to permit petitioner corporation, when it stepped into the shoes of Shaw, to start anew as a basis of depreciation the original cost of the machinery and equipment, would enable it ultimately to absorb in depreciation the amount of $8,515.95, paid by Shaw in the two years prior to the transfer. This is contrary to the theory of the law. As said by Mr. Justice Brandeis, in *United States* v. *Ludey* (274 U. S., 295, 301 [T. D. 4046, C. B. VI–2, 157]: "The theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it. The depreciation charged is the measure of the

cost of the part which has been sold. When the plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties. Any other construction would permit a double deduction for the loss of the same capital assets."

In other words, when the annual deduction in the present case, of 10 per cent of the original cost equaled in 10 years the original cost, the allowance for depreciation was complete, and no further depreciation allowance for the equipment and machinery could be made; however, if, after this full depreciation, a sale of the property is made, the amount realized for the equipment and machinery would constitute a taxable asset. To permit these 10 per cent deductions to extend beyond the time or period when they equal the cost of the assets, or to be juggled, as is attempted in the present case, would amount to a double deduction for the loss of the same capital assets, in the amount that the depreciation deducted in total exceeds the original cost.

The decision of the Board of Tax Appeals is affirmed.

SECTION 23(l).—DEDUCTIONS FROM GROSS INCOME: DEPLETION.

ARTICLE 236: Depletion—Adjustments of accounts based on bonus or advanced royalty.

REVENUE ACT OF 1928.

Restoration of bonus depletion deduction on percentage of income basis to income at termination of lease in case of no production from leased premises. (See G. C. M. 14448, page 98.)

SECTION 23(m).—DEDUCTIONS FROM GROSS INCOME: BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 241: Depletion in the case of oil and gas wells. XIV-8-7330 Ct. D. 925

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

1. DEDUCTION—DEPLETION.

The percentage depletion allowed to a producer of oil and gas is properly computed upon the gross income from each separate tract of land owned or leased, rather than upon the aggregate gross income from all, under section 204(c)2 of the Revenue Act of 1926 and section 114(b)3 of the Revenue Act of 1928, and the applicable regulations.

2. DEDUCTION—OPERATING EXPENSES—CAPITAL EXPENDITURE.

An oil producing company which has elected to capitalize certain expenditures for drilling and developing wells, and has consistently done so since 1914, is not entitled to deduct such expenditures as an ordinary and necessary business expense in the years 1927, 1928, and 1929, under the regulations applicable to the Revenue Acts of 1926 and 1928.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 549) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied October 15, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Vinton Petroleum Co. of Texas, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of United States Board of Tax Appeals (district of Texas).

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

[June 9, 1934.]

OPINION.

SIBLEY, Circuit Judge: The petitioner, Vinton Petroleum Co. of Texas, during the years 1927, 1928, and 1929 produced oil from wells in Louisiana located on eight different but neighboring tracts acquired at different times, some in fee simple, some under leases. Since 1914 the company had consistently capitalized its expenditures for labor and the like in drilling wells instead of returning them as expenses in carrying on the business, and apparently did this in the returns for the years here in question on which deficiency assessments were made and appeal taken to the Board of Tax Appeals. Before the Board on September 5, 1932, by supplemental petition the taxpayer sought to take credit for such expenditures made during the tax years as expenses of business, but this was denied. The Board also held that the 27½ per cent deduction for depletion which the taxpayer claimed for each year was to be estimated separately on the gross income from each tract of land and not on the aggregate from all, which made a difference unfavorable to the taxpayer. (28 B. T. A., 549.) These two holdings are the subject of this review.

Revenue Act of 1926, section 204(c)2, which introduced the percentage depletion allowance, provided: "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income *from the property* during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) *from the property*, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." That Act by section 234(a)8 authorized the Commissioner with the approval of the Secretary to prescribe rules and regulations under which the depletion allowance was to be made. By Regulations 69, article 221, it was provided: "In general 'the property' as the term is used in section 204(c)2 and this article refers to the separate tracts or leases of the taxpayer." Like statutory language was used in the Revenue Act of 1928, section 114(b)3, and again in the Revenue Act of 1932, section 114(b)3, and the same interpretation was followed in Regulations 74, article 241, and Regulations 77, article 221. This interpretation, which is reasonable and practical, must be regarded as having the approval of Congress. (*Brewster* v. *Gage*, 280 U. S., 327, 337 [Ct. D. 148, C. B. IX–1, 274]; *Murphy Oil Co.* v. *Burnet*, 287 U. S., 299, 307 [Ct. D. 619, C. B. XII–1, 231].)

On the second question, Regulations 69, article 223, gave the taxpayer the option to deduct drilling costs and the like as development expenses or to charge them to capital account returnable through depletion, adding: "An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years." The same provisions occur in Regulations 74, article 243, under the Revenue Act of 1928. This regulation is reasonable, and is supported by congressional noninterference in subsequent legislation. The taxpayer having elected in the development of these properties to capitalize these expenses, that method of procedure must be continued as to them. Vacillation would cause confusion. The taxpayer does not thereby lose his credits. He is to get them distributively through depletion instead of at once as expense. When he elects to take the percentage depletion, as he has the right to do touching any property, that allowance covers all elements of depletion. The taxpayer can not take out this development cost to recoup it additionally as an expense. (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S., 459 [Ct. D. 655, C. B. XII–1, 243].)

The petition for review is denied.

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 282: Capital expenditures. XIV-24-7548
Ct. D. 978

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

GROSS INCOME—DEDUCTIONS—CAPITAL EXPENDITURE—INTEREST—PAYMENTS BY CORPORATION TO LIFE BENEFICIARY OF FORMER OWNER OF REAL ESTATE.

Where the life beneficiary of an annual sum to be paid out of income from the testator's real estate, which was bequeathed to residuary legatees subject to the charge upon it, consented to the closing of the estate and accepted the personal undertakings of the residuary legatees for the continuance of the payments, and the residuary legatees later transferred the real estate to a corporation which thereafter assumed the payments, the corporation was not entitled to deduct from its gross income for 1926, 1927, and 1929 the amount of the payments made in those years. Each of such payments represented a capital expenditure as a part of the purchase price for the real estate, and no part thereof constituted interest.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Corbett Investment Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

On petition for review of decisions of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[January 7, 1935.]

OPINION.

GRONER, Associate Justice: Petitioner is an Oregon corporation. In 1903 Henry W. Corbett, a resident of Portland, Oreg., died testate leaving surviving him a widow and three grandsons. His will bequeathed to the widow $150,000 in cash, the use, tax-free, of certain parcels of real estate, and the annual sum of $12,000 for her natural life, to be paid monthly out of the "income and rents" from the testator's real property. These provisions for the widow were in lieu of dower. The will bequeathed and devised to the three grandsons, subject to the charge upon the rents from the real estate, all the rest, residue, and remainder of the estate. The appraised value of the real estate was $1,230,750. The rentals exceeded $100,000 annually.

After the death of Corbett, his widow received each year the $12,000 provided for her until 1912, when, it having been found burdensome and inconvenient to keep open the estate and continue the activities of the executors, she consented that the estate might be closed, and informed the probate court by petition of her willingness to release the estate and to accept the personal undertaking of the three grandsons for the continued payment of the $1,000 per month bequeathed to her in the will. The language of the agreement is, "We, Henry L. Corbett, Elliott R. Corbett, and Hamilton F. Corbett, our heirs, executors, and assigns, hereby agree that we will jointly during the term of your natural life pay to you the sum of one thousand dollars ($1,000) monthly," and the probate court, in confirming the agreement, decreed that the widow having "for the purpose of facilitating the settlement and distribution of said estate accepted the personal obligation of the residuary legatees and devisees under said will for the payment to be made to her during the term of her natural life as provided in and by item 3 thereof and has discharged said executors— * * * it is now here ordered, adjudged and decreed that said executrix and executors forthwith assign, transfer, dis-

tribute, and turn over to them, the said Henry Ladd Corbett, Elliott Ruggles Corbett, and Hamilton Forbush Corbett, as residuary legatees under said will of Henry W. Corbett, deceased, all and singular the assets, real and personal, choses in action and property of whatever description now in their possession or under their control, being the entire residue of the estate and property of which he, the said Henry W. Corbett died, seized, to be held, owned, used, and enjoyed by them in their own right * * *."

The arrangement so made was carried out by the grandsons until the year 1926, when petitioner was organized. In that year the grandsons transferred their inherited real estate to petitioner, and as a consideration therefor petitioner issued all of its capital stock to the three transferors and assumed their liabilities respecting the $1,000 per month payment to the widow. No other persons have held any of petitioner's capital stock, and the three grandsons have been in full control of the corporation at all times. Pursuant to agreement, petitioner paid to the widow $4,000 during the last four months of 1926, and has paid her $1,000 per month since then. In its income tax returns for the taxable years (1926, 1927, 1929) petitioner claimed as deductions the amounts so paid. The Commissioner disallowed the deductions, and petitioner appealed to the Board of Tax Appeals. The Board sustained the Commissioner's determination, saying, "Manifestly, those monthly payments were in fulfillment of a contractual obligation resting upon the petitioner. In making them the petitioner was not acting as a mere conduit for the transmission, under testamentary provisions, of part of the income from an estate, for that estate had been closed, and the will superseded many years before petitioner was created. Clearly, the payments now in question were part of the purchase price which petitioner paid for the property it had acquired. They should therefore be considered capital items, and as such are not deductible in computing net taxable income."

On appeal to this court, two questions are presented; first, whether petitioner is entitled to deduction from its gross income of the sum paid by it monthly to the widow; second, whether each of the monthly payments represented in part a capital expenditure and in part interest. The applicable statutes are the Revenue Acts of 1926 and 1928, that is to say, the paragraphs defining gross income and the deductions therefrom. Briefly stated, petitioner's position is that the provision in the will for the benefit of the widow created a charge upon the rents and profits of the real estate and this charge was not waived or destroyed by the agreement between the widow and the grandsons, nor was the charge destroyed by the conveyance of the real estate to petitioner. In this view, petitioner contends that the income received by it from the real estate was received subject to the charge originally made against it in the will, and was therefore not taxable income to it. We are unable to agree either in petitioner's premise or its conclusion. It is undoubtedly true that the monthly payment to the widow was secured by a charge upon the rents from the real property owned by the elder Corbett at the time of his death, and it is equally true that until that charge was waived or released, the payments to the widow were not income taxable to the executors of the estate. And this is true because the revenue statutes do not undertake to tax the person who receives income where he receives it wholly as an instrumentality or agency for delivery to another. But in the view we take of this case, the conditions we have just described ended in 1912. In that year the widow agreed on her part to release both the estate and the executors from any and all claims she had on account of the provisions in the will in her favor, and the grandsons, as residuary devisees, agreed jointly to pay her a sum of $1,000 monthly. This release of her equitable lien by the widow was declared by decree of the probate court to discharge and extinguish the right created in her favor through her husband's will, to receive monthly the sum of $1,000 from and out of the rents from the real property. Unless, therefore, we can find in the agreement and in the subsequent court proceedings something to manifest a different or contrary intent, it follows we must give it that effect.

On the contrary, we think there is no doubt that all the parties to the agreement intended to extinguish any and every lien held by the widow on the property of the estate and to substitute the unsecured promise in its stead, and if this is true the transaction between the widow and the grandsons, and equally the transaction between the latter and the petitioner, was one in the nature of purchase, for by the discharge of the lien they acquired a full right in property in which formerly they had only a qualified right; and if this is

true the price they paid was, as the Board said, a capital investment. In this case, from the time of the transfer of the real estate to petitioner from the grandsons, petitioner received all the rents in its own right and, so far as we are told by anything in the record, it had the right and the power to use them without accountability to the widow or anyone else, and the widow's only right was to demand and receive from petitioner a thousand dollars monthly, regardless of the source from which it came. The payments to her, therefore, were clearly taxable to petitioner, even though they were also taxable to her. This proposition seems to us too plain for argument, but see *Scott* v. *Commissioner* (29 F. (2d), 472), *Mastin* v. *Commissioner* (28 F. (2d), 748).

The second question presented is whether each of the monthly payments made to the widow represented in part a capital expenditure and in part interest or the satisfaction of a loss. Petitioner tells us that sound accounting suggests that the amount paid annually be discounted back to September 1, 1926, the date of the assumption of the payments by petitioner, and that only the discounted value on that date of the amount subsequently paid be regarded as a capital expenditure, the remainder being interest and therefore deductible. The correct method, we are told, in arriving at the amount of the liability, i. e., the promise to pay the monthly sums, at the time of its assumption, is to discount the indefinite number of payments to be made at a future date by the use of a reasonable interest rate just as an annuity writer may by a like formula deduct a portion of the annual payment made to the annuitant as interest accrued during the tax year. The cases to which we are referred do not, as we think, shed much light on the question we have to decide. In *Warner* v. *Walsh* (15 F. (2d), 367 [T. D. 4257, C. B. VIII–1, 245]), it was held that a widow who relinquished her dower rights and elected to take under her husband's will occupied the position of the purchaser of an annuity, and that the payments to her were not subject to taxation until her total receipts from the estate amounted to the value of what she had relinquished, namely, the value of her statutory rights. In *Helvering* v. *Butterworth* (290 U. S., 365 [Ct. D. 769, C. B. XIII–1, 151]), the Supreme Court declined to follow the annuity idea and held that payments so received by a widow were received in her capacity as a "beneficiary" within the intendment of the statute and that as such beneficiary she was taxable for all amounts received. In *Commissioner* v. *Moore* (42 F. (2d), 186), a corporation obtained a conveyance of land and buildings in consideration of its payment to the grantor of $10,000 a year for life. The fair market value of the property on the day of the conveyance was $80,000, and on that date the grantor's expectancy was 17.4 years, and the value of a $10,000 annuity for that length of time was $106,173.96. The Board of Tax Appeals in that case adopted the theory of apportionment between capital and interest. The Court of Appeals in the Second Circuit, following the Board, held that the agreed annual payment consisted in part of principal and in part of interest, and that the amount deductible as interest for each year was the difference between the sum of $10,000 and its discounted value as of the date of the agreement. The theory seems to have been that the difference between the cost, calculated on mortality tables showing an average life expectancy, and the estimated aggregate of the annual payments may properly be deemed interest, since such sum would represent the amount paid by the writer of an annuity for the use of the money between the date of purcase and the dates of the periodic payments. But we fail to see the relevancy of the rule applied in either case to the facts here.

Here, it is true, we have a widow who has elected to take under her husband's will in lieu of dower, but that election occurred nearly 20 years ago, and as of that time settled her rights against the estate. From thence on she was entitled to $12,000 a year, and she has never agreed to take less or bargained to get more. The value of the dower which she surrendered years before was not an element in the agreement we are concerned with, and its value could not now be used to calculate the value of the release, nor has the amount of the annual payment any relation to it. What the widow surrendered was not title to property, but the right to hold property in security of payments due her during her lifetime. What the grandsons got was the discharge of an indeterminate equitable interest in property in which they owned the fee. The widow surrendered the lien in exchange for their personal obligation. The consideration to them was the release of the lien. The consideration to her, their obligation to pay the same sum notwithstanding the waiver and

discharge. Therefore, to call any part of the payments made by them "interest" would be pure fiction, and to treat the agreement between the grandsons and the widow as the establishment of an annuity would be to indulge a form of reasoning we are wholly unable to follow. The kind of interest which the law permits to be deducted in ascertaining net income is, as the Supreme Court has said, that which is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and it does not refer to some esoteric concept derived from subtle and theoretic analysis. (*Old Colony R. Co.* v. *Commissioner*, 284 U. S., 561 [Ct. D. 456, C. B. XI–1, 274].) To denominate as interest or loss any part of the annual payments involved here, would require more than subtle and theoretic analysis.

Affirmed.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 321: Computation of net income.

REVENUE ACT OF 1928.

Bank discounts and commissions charged by banks on loans. (See G. C. M. 14839, page 73.)

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

ARTICLE 331: When included in gross income. XIV–19–7479
G. C. M. 14666

REVENUE ACT OF 1928.

> In the case of a taxpayer keeping its books on the accrual basis, the proceeds to be received under a fire insurance policy accrue as income in the year in which the fire occurs where liability is not contested by the insurance company, even though the amount of the liability is undetermined in that year.

An opinion is requested relative to the treatment for Federal income tax purposes of the gain derived by the M Company through the settlement of its claim against certain fire insurance companies under the following facts:

The plant and machinery of the M Company, which kept its books on the accrual basis, were destroyed by fire in November, 1931. The proceeds of the fire insurance covering these assets were received by the M Company in January, 1932. It does not appear that the insurance companies at any time contested liability to the M Company, but the exact amount thereof was not determined until January, 1932. The question has arisen whether the gain realized through the settlement of claims against the fire insurance companies should be reported in 1931, the year of the fire, or 1932, the year of final settlement and payment.

In *Max Kurtz et al.* v. *Commissioner* (8 B. T. A., 679, acquiescence, C. B. X–2, 40), the partnership employed the accrual method of ac-

counting in keeping its books. In 1921 a fire occurred and destroyed certain property fully covered by insurance. The insurance company admitted liability for the loss but at the end of the year 1921 the amount of the loss had not been satisfactorily adjusted and the partnership and the insurance company were not then in agreement. The Commissioner allowed the total loss claimed in the year 1921 and applied against it in that year the amount of the insurance, which was received in 1922 and 1923. The Board sustained the Commissioner's action for the reason that the "insurance due petitioners for the loss sustained accrued in the year 1921 and was properly applied in that year against the amount of the loss by fire."

In the *Appeal of the International Boiler Works Co.* (3 B. T. A., 283, acquiescence, C. B. X–2, 34), the proceeds of insurance were held to accrue to a taxpayer as of the year of the loss irrespective of the fact that an agreement as to the exact amount of the insurance was not reached until a subsequent tax year. Conversely, the Board held in *Appeal of Retailers Fire Insurance Co.* (3 B. T. A., 1186, acquiescence, C. B. X–2, 60) that an amount paid by the taxpayer (an insurance company on the accrual basis) "in settlement of fire losses occurring and reported in the taxable year, but adjusted after the close of the taxable year, is deductible from income of the taxable year." (See also *Equity Fire Insurance Co.* v. *Commissioner*, 7 B. T. A., 618.)

The decision in *Patrick McGuirl, Inc.*, v. *Commissioner* (74 Fed. (2d), 729) reads in part as follows:

* * * As a general proposition, where the right to receive money is certain, namely, the liability to pay is unconditional, and books are kept on an accrual basis, the money actually received is considered income as of the year the right to receive it arose and not as of the year when received, even though the amount to be received is not certain as of the year the right to the money accrued. * * *

In the light of the foregoing, it is held that the proceeds to be received under a fire insurance policy accrue in the year in which the fire occurs, and the fact that the amount is uncertain will not prevent accrual. An exception to this rule arises where the insurance company contests liability under the policy. In the instant case the settlement agreement entered into in 1932 involved only the value of the property insured. The insurance companies did not at any time deny or contest liability under the fire insurance policies. Overtures made by the companies in 1931 for the purpose of arriving at an agreement as to the amount of their liability constituted, in effect, an admission of liability at that time.

This office is, therefore, of the opinion that, since the insurance companies did not contest their liability to pay, the proceeds to be received under the fire insurance policies and the gain which the M Company realized accrued in the taxable year 1931.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 331: When included in gross income. XIV-20-7496 Ct. D. 965

INCOME TAX—REVENUE ACTS OF 1918 AND 1928—DECISION OF COURT.

INCOME—COMMISSIONS ON LOANS—CASH RECEIPTS AND DISBURSEMENTS BASIS.

Where a bank, on the cash receipts and disbursements basis, loans money secured by real estate mortgages, charging each borrower a so-called "commission" which is deducted from the face amount of the loan, such commissions do not constitute income to the bank in the year of the loan, but only when realized in cash at the time the loans are repaid or the mortgage notes are sold.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 5340. *Commissioner of Internal Revenue, petitioner,* v. *Central Republic Trust Co., respondent.*

No. 5359. *Commissioner of Internal Revenue, petitioner,* v. *Frank M. McKey, as Trustee in Bankruptcy of Noel Securities Corporation, respondent.*

Petitions for review of decisions of the United States Board of Tax Appeals.

Before EVANS and FITZHENRY, Circuit Judges, and LINDLEY, District Judge.

[February 23, 1935.]

OPINION.

LINDLEY, District Judge: Petitioner in No. 5340 seeks to review a decision of the United States Board of Tax Appeals affecting the respondent's income taxes for 1920 and 1928. The taxpayer was a bank, a substantial part of its business being the making of loans secured by real estate mortgages. The bank took from each borrower the security of a real estate mortgage and charged the borrower not only interest upon the loan but a so-called "commission," "discount," or "underwriting fee," varying from 1 per cent to 11 per cent of the face amount of the loan, which was deducted from the face amount of the loan. The balance was paid to the borrower. The loans were so prepared as to facilitate their ready negotiation and sale and the taxpayer resold the notes or bonds, secured as aforesaid, as soon as possible after each transaction had been completed. The bank maintained a sales department to promote sales, published prospectuses and lists of its offerings, handled the general advertising and employed a number of salesmen. It did not know in advance how soon or for how much it could sell such loans to investors. Some of the loans it was not able to dispose of and retained as its own property.

The taxpayer, for the year 1928, keeping its books upon a cash basis, did not account for the unrealized amounts of this so-called commission. For the year 1920 it treated 50 per cent of the commissions as realized profits and carried the other 50 per cent as a deferred item to be accounted for when realized in cash.

The Commissioner sought to charge the amount of such commissions as a part of the annual gross income for each of those years irrespective of how much of the same had been realized in cash. The Board held that inasmuch as the taxpayer kept its books upon a cash basis, it had properly accounted for the items, in reporting only such part of the commissions as had been realized in cash during the year. The correctness of that ruling is the only question submitted.

In two cases the precise question has been decided adversely to the contention of petitioner. In *Blair* v. *First Trust & Savings Bank* (39 Fed. (2d), 462 (C. C. A. 5), March 25, 1930), in deciding a similar question, the court said:

"It is plain that until the loan is paid or rediscounted, the respondent has earned no profit but has simply parted with its funds on the faith of the se-

curity. The commission is not actually received until respondent gets back what it has previously paid out, plus the commission. The deduction of the commission from the face of the loan brings nothing into the coffers of the bank."

Certiorari was denied by the Supreme Court on October 13, 1930 (282 U. S., 851).

In *Commissioner* v. *Martin-Stubblefield, Inc.* (71 F. (2d), 944 (C. C. A. 8)), meeting a similar situation, the court said:

"The Board of Tax Appeals held that the Commissioner erred in increasing respondent's gross income by the amount of the commissions here in controversy, and redetermined the tax liability for the years 1927 and 1928 accordingly. The sole question presented is whether the commissions so deducted when the loans are made constitute taxable income as of that year. * * *

"It is evident that income from this source is uncertain until the notes are paid or sold before maturity. The evidence establishes that it was respondent's practice to rediscount these notes before the loans matured. It seems clear, therefore, that the income actually earned could not be definitely ascertained at the time the loan was made, but only when the loan was actually repaid or the notes were sold."

We are in thorough accord with the reasoning of these cases.

It is argued by the petitioner that the case is within *Columbia State Savings Bank* v. *Commissioner* (41 F. (2d), 923 [Ct. D. 210, C. B. IX-2, 332]) and *Rusk* v. *Commissioner* (53 F. (2d), 428), heretofore decided by this court.

In the first of these cases the court had before it a question similar to that here presented except that the taxpayer there was keeping its books upon an accrual basis and Judge Alschuler distinguished the case of *Blair* v. *First Trust & Savings Bank*, supra, by saying that the case is "clearly distinguishable by the there recited fact that 'respondent keeps its books and makes its returns on the cash basis.' And, further, as stated by the Board of Tax Appeals in passing on that case, the taxpayer's books treated the commission as unearned until such time as the notes were paid or sold." The facts here are in accord with those of the Blair case rather than those of the Columbia case.

In the second of said cases, it will be observed, that the court was dealing with a sale of property and the effect of the decision was that in making a sale, a promissory note secured by a mortgage, accepted as payment, should be treated as the equivalent of cash received at the time of the sale and accounted for during the taxable year.

It is obvious that the present situation does not present a case involving the liability to account for notes received in payment of the purchase price of property sold, as the equivalent of cash. The present case does not have to do with the sale of property. Rather, in each instance, the taxpayer made an investment. It acquired a security by the delivery of a certain amount of money. Its transaction was more nearly in effect a purchase than a sale, and the situation is not far foreign to that where a merchant invests in merchandise and has no realized profit until he disposes of the merchandise thus acquired. So, here, the taxpayer invested in certain securities; it acquired the securities. In due course of time, it sold the same, but until it sold and received payment, it could not determine what its profits might be. It dealt in securities and expended moneys for advertising, salesmen and administrative purposes in making sales and in the end realized such profit, if any, as resulted after the deduction of costs of making sales. Logically the case is akin to that which was before the court in *New York Life Insurance Co.* v. *Edwards* (271 U. S., 109 [T. D. 3872, C. B. V-1, 305]), where the court said:

"The result of the venture could not be known until they (the bonds, payable at future dates) were either sold or paid off."

In case No. 5359 the question presented is exactly that as presented in No. 5340, with reference to the year 1920.

Accordingly the decision of the Board of Tax Appeals in each of the cases will be affirmed.

ARTICLE 331: When included in gross income. XIV-24-7549
Ct. D. 979

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

1. INCOME—CONDEMNATION AWARD—YEAR TAXABLE.

Where the taxpayer's property became vested in the city of New York in 1926 under condemnation proceedings, but the final award was not paid until 1929, due to litigation, the profit derived from the award and interest thereon was taxable in 1929, even though the taxpayer was on the accrual basis, since the amount of the award and interest depended upon the course of future events.

2. CERTIORARI DENIED.

Petition for certiorari denied May 6, 1935.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Patrick McGuirl, Inc., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Before MANTON, L. HAND, and CHASE, Circuit Judges.

[January 7, 1935.]

OPINION.

Petition to review a determination of the Board of Tax Appeals. The taxpayer sought to account for profits received in the payment for property taken by eminent domain, for the year in which the property was taken by the city of New York rather than the year in which the money was received. The Commissioner held that the profit was taxable as income for the year when the compensation was received. The taxpayer appeals. Determination affirmed.

MANTON, Circuit Judge: The petitioner's property was taken by the city of New York, on December 1, 1921, through its board of estimate and apportionment adopting a resolution that the title in the fee to the petitioner's property become vested in the city as of December 1, 1926. Thereafter petitioner occupied the premises as a month to month tenant until October 31, 1927. No award for the compensation to be paid petitioner was made until May 31, 1928, when the award was tentatively fixed at $132,000. Petitioner did not contest the action of the city in taking the property, but did contest the amount of the tentative award. April 12, 1929, by a final decree of the State supreme court, the amount was fixed at $131,998 with interest from December 1, 1926. The petitioner was paid this award on July 8, 1929. The interest amounted to $19,927.47.

Petitioner kept its books and filed its income tax returns on an accrual basis. No entry was made on its books respecting the taking of the property prior to July, 1929, when the amount in controversy was received. But on its books, as of January 1, 1926, it showed, as an asset, this property having a present value of $92,822.75 with a mortgage liability of $52,200. Among its assets in lieu of this entry, on December 31, 1926, it referred to "net book value of property taken over by the city December 1, 1926, as $40,429.12; it eliminated in its liabilities the mortgage of $52,200. In the 1929 income tax return, the petitioner reported a profit of $57,336.69 on account of the award from the city; the interest of $19,927.47 was shown as nontaxable income. The Board held that the profit on the award, including interest, was taxable during the year 1929. The taxpayer contends that it is taxable for 1926. The Com-

missioner takes the position that the gain was too uncertain to permit its estimate with any degree of accuracy in 1926, and was properly taxed in 1929.

The statute, Revenue Act of 1928 (ch. 852, 45 Stat., 791), requires the items of gross income to be included in the taxable year in which received by the taxpayer unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

The obligation to pay arose in 1926, when the title vested in the city, but the gain could not have been estimated in 1926 with any degree of accuracy, for the amount depended upon uncertainties of the future. In *Burnet* v. *Huff* (288 U. S., 156 [Ct. D. 640, C. B. XII–1, 220]) it was pointed out that the existence of liability is not enough to establish the gain or loss to be taxable in a year. The gain must be "actual and present, not merely contemplated as more or less sure to occur in the future." (*Weiss* v. *Heiner*, 279 U. S., 333; *Lucas* v. *American Code Co.*, 280 U. S., 445 [Ct. D. 168, C. B. IX–1, 314].) As a general proposition, where the right to receive money is certain, namely, the liability to pay is unconditional, and books are kept on an accrual basis, the money actually received is considered income as of the year the right to receive it arose and not as of the year when received, even though the amount to be received is not certain as of the year the right to the money accrued. But here, though the petitioner was entitled to just compensation for property condemned under eminent domain, the amount of the award was to be determined in judicial proceedings involving values placed upon the real estate by expert testimony. These are indefinite, depending upon the court's conclusion as to values. The amount awarded may not have been as much as the cost of the property to petitioner. The expenses incident to the prosecution of petitioner's claim necessarily were reflected in the net gain to be realized, and interest was to be added as part of the award. The amount of interest was directly dependent upon the duration of the litigation. Thus the amount of award depended upon the course of future events. (*Lucas* v. *American Code Co.*, supra.) Unless all the events which fixed the amount and determined the liability of the city to this taxpayer occurred within the year, it may not be said that this was taxable in the year the right to an award accrued. (*Bauer Bros. Co.* v. *Commissioner*, 46 Fed. (2d), 874 [Ct. D. 361, C. B. X–2, 359].) In *Continental Tie & Lumber Co.* v. *United States* (286 U. S., 290 [Ct. D. 494, C. B. XI–1, 260]), the whole sum to be determined upon in the future was income and the amount was a calculation based upon entries in the taxpayer's book in accordance with the rules and requirements of the Interstate Commerce Commission. In the instant case there was no assurance that there would be any gain. There was no accrual on the petitioner's books of the amount received because the amount had not been determined in 1926, and instead there was the notation above referred to. The petitioner reported no gain or loss for 1926 in its return.

The interest is part of the compensation received and is taxable. (*Seaboard Air Line Railway Co.* v. *United States*, 261 U. S., 299.) It was dependent in amount upon the time expiring between the vesting of title and the final decree as to the amount of the award. It was therefore taxable in 1929.

Order affirmed.

SECTION 43.—PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

ARTICLE 341: "Paid or incurred" and "paid or accrued."

REVENUE ACT OF 1928.

Assessment against stockholders of a bank because of their statutory liability. (See I. T. 2843, page 77.)

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 351: Sale of personal property on installment plan. (Also Section 705.)

XIV-14-7414
Ct. D. 943

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

1. INCOME—INSTALLMENT BASIS—DEALER IN PERSONAL PROPERTY.

An automobile financing corporation which receives practically all of its income from collections under contracts of sale made between dealers and purchasers and assigned by them to the corporation (no sales being made by the corporation except upon a purchaser's default in payments), is not a dealer in personal property on the installment plan within the meaning of section 44 of the Revenue Act of 1928, and therefore is not entitled to the benefit of the relief provision of section 705(a)2 of that Act, which relates to a change to the installment basis in reporting income.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 213) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Iowa Guarantee Mortgage Corporation, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review decision of United States Board of Tax Appeals.

Before GARDNER, WOODROUGH, and VAN VALKENBURGH, Circuit Judges.

[October 11, 1934.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

The petitioner, Iowa Guarantee Mortgage Corporation, appealed to the Board of Tax Appeals to review a determination of the Commissioner of Internal Revenue disallowing deductions from income for the years 1924, 1925, and 1926, in the amounts of $2,155.81, $2,312.70, and $8,328.13, respectively.

The facts were stipulated, and those material may best be set out in the language of the Board of Tax Appeals in its findings:

"The petitioner is a South Dakota corporation, duly authorized to operate in the State of Iowa. Its principal office is at Des Moines, Iowa, where it is engaged in what is commonly known as the automobile financing business.

"Dealers in new and used automobiles accomplish sales on the installment basis approximately as follows: The dealer tentatively negotiates a sale and enters into an arrangement with a buyer, who agrees to make an initial payment in some amount and to pay the remainder of the purchase price in 12 equal monthly installments. Upon agreement between the dealer and the purchaser a written contract embodying the terms upon which the deferred payments are to be made is executed and sold to the petitioner, who pays the dealer the cash selling price, less the initial payment, and takes title to the contract by assignment without recourse from the dealer. The automobile is then delivered to the purchaser, who thereafter makes all payments to the petitioner. If the purchaser defaults in any of his installments the whole of the remaining balance of the purchase price becomes payable and the petitioner may repossess and resell the automobile in satisfaction of its lien thereon.

"The contract provides expressly that all installments thereon shall be paid at the office of the petitioner in conformity with a 'certain negotiable promissory note of even date payable to the order of the purchaser and signed, indorsed and delivered by said purchaser to the dealer. The dates and amounts of payments being as follows * * *.' It also provides that 'The purchaser * * * take notice that the dealer for value received, hereby sells and assigns the contract and all the right, title and interest of the dealer in said property to the Iowa Guarantee Mortgage Corporation.'

"The petitioner's gross income, except from minor sources, is made up of its collections under contracts as above set out and its net income from such collections is the difference between the cash and deferred payment price of the automobile, less the amount that it pays for insurance thereon. It is always possible, therefore, to determine the net profit resulting from any single transaction as well as the net profit from all such transactions in any year, with due allowances for defaults in payments.

"Prior to January 1, 1924, the petitioner kept all its accounts on the accrual basis. In its income tax return for 1923 it included in its gross income the amount of $64,877.11 which represented unrealized profits on installment contracts it had acquired in that year.

"As of January 1, 1924, the petitioner changed its method of accounting for the profit involved in installment contracts and thereafter took into income the realizations therefrom as and when received in cash. In its income tax return for 1924 and all succeeding years, it reported as income only the amounts realized from collections in each of such years. The effects of this change in accounting for and reporting income were that no part of the $64,877.11 collected in 1924 on contracts acquired in 1923 was reported as income in 1924; that no part of the unrealized profits involved in the contracts acquired in 1924 was reported as income in that year; and that the books of the petitioner showed a net operating loss in 1924 in the amount of $10,929.66. Upon audit of petitioner's return for 1924 the respondent added to the income therein reported the amount of $64,679.96, made other minor adjustments, and determined the deficiency for such year that is now in controversy.

"From the inception of its operations the petitioner maintained a reserve for bad and doubtful accounts and annual charges thereto were based on its experience in the collection of installments. In his audit of petitioner's return for the years 1924, 1925, and 1926, the respondent disallowed additions to such reserve in the respective amounts of $2,155.81, $2,312.70, and $8,328.13. The parties have stipulated that one-half of 1 per cent of the face amounts of purchase notes acquired is approximately the collection loss sustained by the petitioner in the years 1920 to 1924, inclusive."

The Board decided its major contention against the petitioner and redetermined deficiencies in tax for the years 1924, 1925, and 1926 in the respective amounts of $7,157.39, $2,035.24, and $1,124.30. From this order petitioner appeals to this court.

That major contention as stated by the Board of Tax Appeals is "that in the circumstances as set out in our findings of fact, it properly changed its method of accounting for and reporting income from receipts and deferred payment contracts at January 1, 1924, and that thereafter it was entitled to report such income on the installment basis. If this contention is sound it follows that, if it then comes within the provisions of section 705(a)2 of the Revenue Act of 1928, no deficiency can be determined against it in respect of the amount of $64,679.96 which was reported as taxable income in a prior year and income tax paid thereon."

As found by the Board, if this $64,679.96 is included in the petitioner's income for 1924, a net profit for that year results and no claim for net loss can be indulged.

Section 705(a)2 of the Revenue Act of 1928 provides:

"If any taxpayer by an original return made prior to February 26, 1926, changed the method of reporting his net income for the taxable year 1924 or any prior taxable year to the installment basis, then, if his income for such year is properly to be computed on the installment basis—

* * * * * * *

"(2) No deficiency shall be determined or found in respect of any such taxes unless the taxpayer has underpaid his taxes for such year, computed by excluding, in computing income, amounts received during such year on account of

sales or other dispositions of property made in any year prior to the year in respect of which the change was made."

The contention of the Government, succinctly stated, is that said section 705(a)2 applies only to a taxpayer who has changed from the cash or accrual basis to the installment basis of reporting income from sales of property. In other words, that the taxpayer must be a vendor to come within this provision of the Act. The Board held that the petitioner is not a merchant, but a money lender; that the property, sold by the dealer, is merely pledged as security for the loans made by the petitioner. This statute has been considered by this court exhaustively in two cases, *J. C. Nichols Land Co.* v. *Commissioner* (65 F. (2d), 437) and *Willcuts* v. *Gradwohl* (58 F. (2d), 587 [Ct. D. 524, C. B. XI-2, 155]). In these cases it was held that this section was intended "to compose and set at rest a situation," due to the confusion and uncertainty that had attended the transition from accrual to installment basis.

"The clearly revealed dominant purpose of the section (705) is to compose and terminate this confusion and uncertainty in so far as it then existed except as to a narrowly defined class." (*Willcuts* v. *Gradwohl*, supra, l. c., page 591.)

The Commissioner is not estopped from making deficiency assessments based on including as taxable income payments received during the taxable year on installment sales made in preceding years, where there has been an unauthorized application of the installment basis, even though a partial double tax results. (*J. C. Nichols Land Co.* v. *Commissioner* (C. C. A. 8), 65 F. (2d), 437.) In other words, as stated by counsel for the Government, "Section 705(a)2 is not a general provision for the relief of double taxation, but is a statute of repose in one type of case only," to wit, where the taxpayer and his methods of accounting and computation come clearly within its terms.

The specifications of error relied upon are:

"1. The Board of Tax Appeals erred in failing to hold that every taxpayer, whether a seller of property or not, whose net income is correctly reflected by the installment method of accounting, and who by an original return filed prior to February 26, 1926, changed to the installment method of accounting for his income for 1924, is entitled to the benefits of section 705(a)2 of the Revenue Act of 1928.

"2. If section 705(a)2 of the Revenue Act of 1928 is limited in its application to sellers of property on the installment plan, the Board of Tax Appeals erred in failing to hold that petitioner was a seller of property on the installment plan within the meaning and spirit of the statutes."

1. Examination of earlier statutes and regulations dealing with payments in installments discloses that they uniformly specify that such payments arise from sales of property. (Revenue Act of 1924, ch. 234, 43 Stat., 253, section 202(e); Revenue Act of 1926, ch. 27, 44 Stat., 9, sections 202(e) and 212(d); article 117 of Regulations 33, promulgated January 2, 1918; article 42 of Regulations 45 and 62, promulgated under the Revenue Acts of 1918 and 1921; Treasury Regulations 65, under the Revenue Act of 1924; Treasury Regulations 69, under the Revenue Act of 1926.) From these citations we gather the consistent purpose of Congress in legislating with respect to installment payments of income and gain or profit taxes. But it is unnecessary to go back of this same Revenue Act of 1928 (ch. 852, 45 Stat., 791) to arrive at the subject matter Congress had under consideration in enacting this comprehensive legislation. On page 805 (45 Stat.), we find the subject of installment payments specifically dealt with thus:

"SEC. 44. INSTALLMENT BASIS.

"(a) *Dealers in personal property.*—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price."

On page 881 of the same volume of the statutes, and a part of this same Revenue Act, is found this section 705 under the heading, "Installment Sales—Retroactive." Beyond question this section refers to the same class of dealers as those specified in section 44, supra; that is to say, those who sell or otherwise dispose of personal property on the installment plan. A taxpayer entitled to the benefit of this Act must be one who sells or otherwise disposes of personal property. The disposition contemplated is alienation of title in the course of trade. The statute, involving a privilege granted by the Government,

must be construed favorably to the governmental purpose. (*Franciscus Realty Co.* v. *Commissioner* (C. C. A. 8), 39 F. (2d), 583; *Bank of Commerce* v. *Tennessee*, 161 U. S., 134, 146.)

We turn next to inquire whether, under the facts before us, petitioner "was a seller of property on the installment plan within the meaning and spirit of the statutes." We agree with the conclusion of the Board of Tax Appeals that it was not. The sale from the dealer to the purchaser was complete when the contract was assigned to petitioner. Its rights under the contract were those of a mortgagee with security for money loaned. In the agreed statement of facts petitioner is described as "engaged in the business commonly known as automobile finance business, financing the sales of automobiles upon installment payments made by the purchaser." In no sense is it one "who regularly sells or otherwise disposes of personal property on the installment plan." The title of the purchaser comes from the dealer. Possession is delivered to him with the intention of passing immediate ownership subject only to the bare reservation of title to the seller as security for the purchase money. Since benefits of the statute under consideration are available only to one who regularly sells or otherwise disposes of personal property on the installment plan, and since petitioner clearly does not come within that definition, the order of the Board of Tax Appeals was right and must be upheld. The order of redetermination of the Board of Tax Appeals is affirmed.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 56.—PAYMENT OF TAX.

ARTICLE 432: Extension of time for payment of the tax or installment thereof.

REVENUE ACT OF 1928.

Rules governing consideration of application for extension of time to pay installment of income tax. (See Mim. 4303, page 133.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 521: Proof of exemption. XIV–17–7452
Ct. D. 953

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

1. EXEMPTION—CORPORATION ORGANIZED FOR EXCLUSIVE PURPOSE OF HOLDING PROPERTY—"ORGANIZED."

Where a corporation, organized in 1920 to conduct a newspaper publishing business, sold the business in 1924, accepting in payment long-term interest-bearing notes, and in 1928 and 1929 paid the income therefrom to a holding company organized by an art museum to which the sole owner of the corporation had bequeathed all his stock (both the museum and its holding company being exempt from tax), it is not exempt from taxation under section 103(14) of the Revenue Act of 1928, even though its activities during the taxable periods were limited to those enumerated in that section. "Organized" as used in the statute means incorporated and not "operated."

2. CERTIORARI DENIED.

Petition for certiorari denied March 4, 1935.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Sun-Herald Corporation, plaintiff-appellee, v. *William Duggan, Collector of Internal Revenue for the Second District of New York, defendant-appellant.*

Appeal from the United States District Court for the Southern District of New York.

[November 5, 1934.]

OPINION.

AUGUSTUS N. HAND, Circuit Judge: The question raised by this appeal is whether, within the meaning of section 103(14) of the Revenue Act of 1928, the plaintiff Sun-Herald Corporation was "organized for the exclusive purpose of holding title to property" and on that ground exempt from income taxes during the years 1928 and 1929.

The statute invoked provided that:

"The following organizations shall be exempt from taxation under this title— * * * (14) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title * * *."

On January 28, 1920, the Sun-Herald Corporation was organized under the business corporations law of the State of New York to conduct a general newspaper publishing business. On March 17, 1924, it sold the "New York Herald" which it then owned and the publishing business connected therewith to the New York Tribune, Inc., receiving therefor notes of the latter company in the sum of $3,150,000 bearing interest at the rate of 5 per cent and payable over a series of years ending in 1939.

Frank A. Munsey at the time of his death on December 22, 1925, owned all the stock of the Sun-Herald Corporation through the medium of a holding company wholly owned by him. He bequeathed his entire residuary estate to the Metropolitan Museum of Art and on March 1, 1928, all of the stock of the Sun-Herald Corporation was turned over by his executors to Museum Estates, Inc., a holding company organized by the Museum of Art for the sole purpose of taking over, holding and liquidating for its account the various assets of the Munsey residuary estate. Both the Metropolitan Museum of Art and Museum Estates, Inc., are exempt by law from income taxes.

The Sun-Herald Co. had wholly discontinued any publishing business prior to March 1, 1928, and it received no income in the year 1928 prior to March 1. All income received by it during 1928 after March 1 of that year, and all income received by it during 1929 was immediately paid over by it to its sole stockholder Museum Estates, Inc. On and after March 1, 1928, the Sun-Herald Co. had no property except the notes that it received upon the sale of its newspaper property, it had no business, no bank account and no employees, and its officers, who served without compensation, performed no duty except to indorse over to Museum Estates, Inc., the checks which it received as principal and interest on the notes of the New York Tribune, Inc., which it held. The plaintiff paid income taxes to the defendant-collector on the interest which it received on these notes during 1928 and 1929 under protest and thereafter filed claims for refund and brought this action against the collector to recover because of the alleged unlawful exaction. The district court sustained the cause of action and judgment was entered that plaintiff recover all the taxes paid under protest, with interest. It reached this conclusion by holding that the word "organized" used in section 103(14) of the Revenue Act of 1928 related to the *actual* activities of the Sun-Herald Corporation which were limited during the taxable periods in question to holding title to property and collecting income therefrom and turning over the entire amount to an organization (in this case Museum Estates, Inc.), which was itself exempt from taxes, and did not relate to the charter powers of that corporation. Inasmuch as during the taxable period the Sun-Herald Corporation was not "equipped" or "manned" in such a way as to do more than hold title to property and turn it over to Museum Estates, Inc., an exempt organization, the trial court held that its power to conduct a newspaper publishing business was to be regarded as "outside the scope of its organization" for the purposes of the Revenue Act. In effect it treated the word "organized" as meaning "operated."

We think it clear that "organized" means incorporated and not "operated." Such seems to have been the meaning given to the word in *Trinidad* v. *Sagrada Orden* (263 U. S., 578, 580 [T. D. 3548, C. B. III–1, 270]); *Von Baumbach* v. *Sargent Land Co.* (242 U. S., 503, 514); *Eliot* v. *Freeman* (220 U. S., 178, 186). The use of the word "operated" in addition to the word "organized" in subdivisions (4), (6), (9), and (12) of section 103 of the Revenue Act of 1928 indicates that "organized" was not intended to have the meaning of "operated" but further to interpret the exemption. In cases of doubt, an exemption provision in a general tax law is to be construed strictly and to be resolved in favor of the taxing power. (*Cornell* v. *Coyne*, 192 U. S., 418, 430, 431; *Riverdale Co-op. Creamery Assn.* v. *Comm.*, 48 Fed. (2d), 711.) Moreover various rulings of the Commissioner of Internal Revenue are to the effect that the right of the corporation to an exemption is to be determined by the powers given it in its charter. In Decision 190 (C. B. 1, 194), relating to section 231 of the Revenue Act of 1918, which was similar to section 103 of the Revenue Act of 1928, the Commissioner ruled that: "In dealing with cases under section 231 the character of the corporation must be judged by its articles of incorporation, constitution, and by-laws, rather than by the declarations of its officers, or the method by which it conducts or has conducted its business." See also Office Decision 60 (C. B. 1, 193); Decision 177 (C. B. 1, 194). Reenactments of the exemption statute in the face of this ruling require us to adhere to the reasonable interpretation of the enactment by the Department. (*Old Colony R. Co.* v. *Commissioner*, 284 U. S., 552, 557 [Ct. D. 456, C. B. XI–1, 274].)

It is argued by the taxpayer that *Slocum* v. *Bowers* (15 Fed. (2d), 400, affirmed 20 Fed. (2d), 350, and 264 U. S., 61 [T. D. 4122, C. B. VII–1, 247]) and *Lederer* v. *Stockton* (260 U. S., 3), govern the present case and that because the Sun-Herald Corporation was a holding company for the Metropolitan Museum of Art (an organization itself exempt from tax) it falls within section 103(14) of the statute. But in both *Slocum* v. *Bowers* and *Lederer* v. *Stockton* it was the income of estate which had accumulated in the hands of executors or trustees that was held to be free from taxation. Here, however, we do not have the case of a fiduciary and a beneficiary who is the equitable owner of income of a trust, but of the Sun-Herald Corporation, a business corporation that is an entity entirely separate from Museum Estates, Inc. We are not justified in treating the two as identical or the income of Sun-Herald Corporation as that of Museum Estates, Inc. The income of the Sun-Herald must be regarded as that of any corporation organized to conduct a newspaper business. Such a corporation is not exempt from income taxes for it was not organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the same to an organization which is exempt from the tax. Indeed, there is legally nothing to prevent it from reengaging in a newspaper publishing business as authorized by its charter.

The defendant relies on *Bingham* v. *Savings Investment & Trust Co.* (101 N. J. Eq., 413) and *Whitman* v. *Northern Central Railway Co.* (146 Md., 590) as giving to the word "organized" the meaning of "operated." But these decisions went no further than to treat "organized" as including corporate powers acquired subsequent to the date of the original charter. Neither held that the character of the corporation was to be determined by its actual activities without regard to its chartered powers. We are not convinced that they have any bearing on the present case. But in any event they can not be regarded as persuasive in view of the other considerations which we have mentioned and that seem to justify the imposition of taxes upon the income of the plaintiff for 1928 and 1929.

Whether the Munsey Estate by some different disposition of the residuary assets might have enabled the Museum to avail itself of exemption from the income taxes, we need not say. To obtain an exemption, the taxpayer claiming it, must come precisely within the terms of the statute and has not done this in the present case. Accordingly, we are forced to conclude that the Sun-Herald was not a corporation "organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax * * *."

Judgment reversed.

SECTION 112.—RECOGNITION OF GAIN OR LOSS.

ARTICLE 577: Definitions. XIV-4-7273
Ct. D. 911

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

1. GAIN OR LOSS—REORGANIZATION—TRANSFER MADE TO AVOID TAX.

A transaction by which stock held by a corporation was transferred to a newly organized corporation and by it transferred to the sole owner of the first corporation (the operation having no business or corporate purpose and the new corporation being dissolved immediately after the transfer), is not a "reorganization." Although the transaction was conducted according to the terms of section 112(i)1 (B) of the Revenue Act of 1928, it was not within its meaning, since its sole purpose was admittedly the acquisition and sale of the stock at an individual profit and the lessening of the amount of tax which would result from a direct transfer. The rule which excludes from consideration the motive of tax avoidance is not pertinent here, because the transaction upon its face lies outside the plain intent of the statute.

2. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Second Circuit (69 Fed. (2d), 809), which reversed the decision of the Board of Tax Appeals (27 B. T. A., 223), affirmed.

SUPREME COURT OF THE UNITED STATES.

Evelyn F. Gregory, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1935.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Petitioner in 1928 was the owner of all the stock of United Mortgage Corporation. That corporation held among its assets 1,000 shares of the Monitor Securities Corporation. For the sole purpose of procuring a transfer of these shares to herself in order to sell them for her individual profit, and, at the same time, diminish the amount of income tax which would result from a direct transfer by way of dividend, she sought to bring about a "reorganization" under section 112(g) of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 818), set forth later in this opinion. To that end, she caused the Averill Corporation to be organized under the laws of Delaware on September 18, 1928. Three days later, the United Mortgage Corporation transferred to the Averill Corporation the 1,000 shares of Monitor stock, for which all the shares of the Averill Corporation were issued to the petitioner. On September 24, the Averill Corporation was dissolved, and liquidated by distributing all its assets, namely, the Monitor shares, to the petitioner. No other business was ever transacted, or intended to be transacted, by that company. Petitioner immediately sold the Monitor shares for $133,333.33. She returned for taxation as capital net gain the sum of $76,007.88, based upon an apportioned cost of $57,325.45. Further details are unnecessary. It is not disputed that if the interposition of the so-called reorganization was ineffective, petitioner became liable for a much larger tax as a result of the transaction.

The Commissioner of Internal Revenue, being of opinion that the reorganization attempted was without substance and must be disregarded, held that petitioner was liable for a tax as though the United corporation had paid her a dividend consisting of the amount realized from the sale of the Monitor shares. In a proceeding before the Board of Tax Appeals, that body rejected the Commissioner's view and upheld that of petitioner. (27 B. T. A., 223.) Upon a review of the latter decision, the Circuit Court of Appeals sustained the Commissioner and reversed the Board, holding that there had been no "reorganization" within the meaning of the statute. (69 F. (2d), 809.) Petitioner applied to this court for a writ of certiorari, which the Government, considering the question one of importance, did not oppose. We granted the writ. (293 U. S., 465.)

Section 112 of the Revenue Act of 1928 deals with the subject of gain or loss resulting from the sale or exchange of property. Such gain or loss is to be recognized in computing the tax, except as provided in that section. The provisions of the section, so far as they are pertinent to the question here presented, follow:

"SEC. 112. (g) *Distribution of stock on reorganization.*—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized. * * *

"(i) *Definition of reorganization.*—As used in this section * * *

"(1) The term 'reorganization' means * * * (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, * * *"

It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them by means which the law permits, can not be doubted. (*United States* v. *Isham*, 17 Wall., 496, 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S., 390, 395-396); *Jones* v. *Helvering*, 71 F. (2d), 214, 217.) But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said.

When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made "in pursuance of a plan of reorganization" (section 112(g)) of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised, it immediately was put to death.

In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is

not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

Judgment affirmed.

ARTICLE 579: Involuntary conversion of property.

XIV-3-7257
Ct. D. 908

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

1. GAIN OR LOSS—CONDEMNATION AWARD—INVOLUNTARY CONVERSION.

Where the taxpayer and his brother acquired property for building purposes, which was subsequently condemned, and, before receipt of the condemnation award, they purchased other properties for the same purposes, the acquisition of the property to replace that to be condemned was not an involuntary conversion within the meaning of section 112(f) of the Revenue Act of 1928, the award not having been expended for the purposes specified by the statute, and the profit realized upon disposal of the property condemned is taxable.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 99) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Louis Bandes, petitioner-appellant, v. *Commissioner of Internal Revenue, respondent-appellee.*

Appeal from the United States Board of Tax Appeals.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[March 13, 1934.]

OPINION.

The taxpayer seeks review of an order of the Board of Tax Appeals adjudging a deficiency in income tax for the year 1928. Order affirmed.

SWAN, Circuit Judge: In 1928 the petitioner received payment of a condemnation award, with interest, for real estate condemned by the city of New York. The sum the petitioner received was largely in excess of the cost of the land to him, and the question presented is whether a taxable gain was realized in view of section 112(f) of the Revenue Act of 1928 (45 Stat., 817). This section reads as follows:

"(f) *Involuntary conversions.*—If property (as a result of its destruction in whole or in part, theft or seizure, or 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 of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. 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."

The Board held that the conditions specified in the statute were not met. This conclusion is here challenged.

It appears that in 1926 the petitioner, his brother and another person acquired a tract of unimproved land for the purpose of building an apartment house thereon. It was intended that Naside Construction Co., a corporation

whose entire capital stock was owned equally by the petitioner and his brother, should erect the building. Before construction was begun the city of New York condemned the land for a school site. Condemnation proceedings were started January 20, 1927, and title passed to the city on February 24, 1927, but not until June, 1928, was the award confirmed. The amount awarded to the brothers, with interest thereon from February 24, 1927, totaled $120,267.93, and was paid on July 6, 1928. Each brother realized thereby a gain over the cost of his interest in the land in an amount of some $42,000. They contend that this gain could not be recognized for taxation because of circumstances now to be stated. After the brothers Bandes learned that condemnation was imminent they looked for other property on which to build an apartment house. Being unable to find a tract of equal size, they bought two separate parcels which together had about the same area as the land condemned. By contracts made in January and February, 1927, before the condemnation award, they agreed to buy a parcel located on Walton Avenue for a price of $58,000. By other contracts dated February 15 and March 18, 1927, they agreed to buy a parcel located on Jerome Avenue for a price of $60,000. Subsequently both parcels were deeded to the brothers and by them were transferred to Naside Construction Co. by deeds recorded May 19, 1927. An apartment house was started on the Jerome Avenue parcel in the fall of 1927, and building construction began on the Walton Avenue parcel in May or June, 1927. When the brothers received payment of the condemnation award, the money was deposited in their joint bank account. Out of the sum so received $4,328.20 was paid to their attorneys for services in the condemnation proceedings, an aggregate of $115,000 was paid to Naside Construction Co. in various sums between July 6 and August 15, 1928, and $939.73 was left in their joint bank account. It was the practice of the brothers, both before and after payment of the award, to make advances to their corporation and to receive money from it, as it obtained money from mortgage loans. At the end of 1927 the corporation had bills payable of $152,000, all or most of which represented advances by the brothers Bandes. At the end of 1928 it owed them $120,000 for moneys advanced.

The petitioner argues that the acquisition of other property by the brothers Bandes to replace the land which the city was threatening to condemn for a school site was an involuntary conversion of the property subsequently condemned "into property similar or related in service or use." We think this is a misconstruction of the statute. The section under consideration recognizes that as a result of destruction, theft, seizure, or condemnation or the threat thereof, a taxpayer's property may be involuntarily converted either into similar property or into money. The former alternative covers cases where the insurer, public authority or person bound to make good the destroyed, stolen, seized or condemned property replaces it in kind with similar property; the latter covers cases where the property is paid for in money, which the taxpayer may forthwith expend to make his own replacement, either by acquiring similar property, or by acquiring control of a corporation owning such property, or by establishing a replacement fund. This construction is supported by the legislative history of the statute and by the Treasury regulations promulgated under it. (See article 1579, Regulations 65; article 1578, Regulations 69; article 579, Regulations 74.) The antecedent of the statute is section 214(a)12 of the Revenue Act of 1921 (42 Stat., 241). This expressly dealt only with an involuntary conversion of property "into cash or its equivalent," and the nonrecognition of taxable gain was conditioned upon the taxpayer's proceeding forthwith to expend the proceeds of such conversion in the manner specified in the statute. In section 203(b)5 of the Revenue Act of 1924 the provision was amended to its present form (43 Stat., 256); it has been reenacted in identical language in the Acts of 1926 and 1928. In reports to the Senate and to the House, the sponsors of the 1924 bill stated that—

"The existing law exempts from tax the proceeds from an involuntary conversion of property but fails to grant an exemption if the property is replaced in kind by the insurance company or similar person. The bill exempts the gain from an involuntary conversion whether the replacement is made by the taxpayer or by the insurance company."

(H. Rept. No. 179, page 13, Sixty-eighth Congress, first session.)

Replacement by the taxpayer must refer to his use of the money paid for the property because if replacement by the taxpayer out of any of his funds were considered a conversion in kind, there would be no conversion into money,

for the two alternatives are mutually exclusive. In the case at bar there was clearly a conversion of the condemned property into the money paid for it by the city, and the inquiry must be whether the petitioner expended the money in the manner required by the statute as a condition precedent to nonrecognition of gain or loss.

It is tempting to say that if a taxpayer buys lot B on borrowed money and pays the debt with the award he gets for the condemnation of lot A, he has acquired lot B with the award. Whether the statute will permit of such a construction we need not now decide. To sustain the petitioner in the present case, we should have to construe it even more broadly and say that a taxpayer may use any of his funds to buy the new property and when he recoups the expense by receipt of the award, regardless of how it is actually expended, the new property may be considered to have been acquired out of the award. This would leave nothing to the statute except that the taxpayer must acquire new property with an intent to substitute it for the old. The language is much too specific to be capable of that construction. Consequently, even if we should disregard the distinction between the brothers Bandes and their Naside company, as the petitioner contends, we can not hold that this award was expended to acquire the new property, or to acquire control of a corporation owning such property, or to establish a replacement fund. The petitioner has failed to bring himself within section 112(f) and so must include as taxable gain the profit realized on the disposal of the property condemned.

Order affirmed.

ARTICLE 579: Involuntary conversion of property. XIV-17-7453
G. C. M. 14693

REVENUE ACTS OF 1918 AND 1928.

A, the testator, devised real property to B, his wife, for life with remainder to his four daughters. In 1929 the property was taken by the United States Government under condemnation proceedings and the amount of the award, which was paid to the wife, was invested in bonds and a savings account, which are held in the name of the wife, who receives the income therefrom.

Held, (1) the securities and savings account are not "property similar or related in service or use" to the property taken, within the meaning of section 112(f) of the Revenue Act of 1928, and (2) any profit derived from the disposition of the property is taxable to the life tenant and remaindermen in their individual capacities and not to the life tenant as trustee.

Recommended that Office Decision 1040 (C. B. 5, 186) be revoked.

An opinion is requested as to the taxability of the profit derived from the disposition of certain real estate. Two questions are involved, (1) whether any taxable profit was derived in view of the provisions of section 112(f) of the Revenue Act of 1928, relating to involuntary conversions, and (2) if a taxable profit was derived, to whom such profit should be taxed.

It appears that A, husband of B, died in the year 1908, leaving a will providing in part as follows:

2. I give, bequeath and devise to my beloved wife, B, my real property at ——— Street in the city of R, to be held and enjoyed by her for the remainder of her natural life * * *.

3. I give, bequeath and devise to my four daughters the remainder interest in my real estate at ——— Street to be theirs absolutely share and share alike.

A was survived by his wife, B, and four daughters. B, the life tenant, received the income from the property so devised until October, 1929, when it was taken by the United States Government under condemnation proceedings in which B and her daughters (and the husbands of such daughters as were married) were made defend-

ants. These defendants were awarded an amount of $15x$ dollars as full compensation to all of them, which amount was paid to B, the life tenant, in December, 1929, with the consent of all parties concerned. The cash (less expenses) received as a result of the condemnation of the property was immediately invested by B in United States Liberty bonds, city of R bonds, and a savings account. This personal property is held in the name of B, the wife, who receives the income therefrom. She filed an individual income tax return for the year 1929 which contained a notation relative to the involuntary conversion of this property but no profit was reported from the transaction either by her or by the remaindermen. Later, a return was prepared by the Commissioner under the provisions of section 3176 of the Revised Statutes for B as trustee for the daughters, in which return a net profit from the disposition of this property was reported in the amount of $11.91x$ dollars (the difference between the selling price of $15x$ dollars and the March 1, 1913, value of $3.20x$ dollars, with proper adjustment for depreciation) and a tax of $1.28x$ dollars was computed thereon. The primary question is whether the tax so computed may properly be assessed against B as trustee. In other words, to whom should the profit from the disposition of the property be taxed? The question has also been raised whether the profit should be subjected to tax in view of the provisions of section 112(f) of the Revenue Act of 1928, which reads as follows:

> (f) *Involuntary conversions.*—If property (as a result of its destruction in whole or in part, theft or seizure, or 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 of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. 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.

In regard to the last stated question, the taxpayer contends that since the real property condemned was used to produce income or for investment purposes and the money received was invested in income-producing personal property, the money was "expended in the acquisition of other property similar or related in service or use to the property so converted" within the meaning of section 112(f), supra. Without entering into a lengthy discussion of this point, it is the opinion of this office that the contention of the taxpayer is without merit. It seems clear that if a person involuntarily converts income-producing real estate into cash which is expended for interest-bearing securities and a savings account, the property acquired may not properly be said to be "similar or related in service or use" to the real property. It is true that both classes of property are used to produce income, but if that general principle were sufficient to bring such a case within section 112(f), the profit derived upon involuntary sales of property would escape taxation in many instances merely because of reinvestment of the proceeds in totally dissimilar property which produces income. The mere fact that the property disposed of and the property acquired are used to produce income clearly does not justify exemption from taxation under section

112(f), which is an exception to the general rule prescribed by section 112(a) of the Revenue Act of 1928 that the gain derived or loss sustained upon the sale or exchange of property shall be recognized. (See generally article 579, Regulations 74; L. O. 914, C. B. 1, 77; I. T. 1378, C. B. I-2, 26; and I. T. 1617, C. B. II-1, 119.)

In connection with the second question, that is, to whom the profit should be taxed, it appears that the proceeds from the sale were paid to B, the wife, who was to receive the income therefrom during her lifetime. She was not, however, entitled to expend the proceeds for her own use for the reason that the corpus or principal must be held intact by the life tenant for the remaindermen. (*Gibbons* v. *Mahon*, 136 U. S., 549; *Hornsby* v. *Hornsby*, 216 S. W. (Ky), 88; *United States Trust Co. of New York* v. *Heye*, 120 N. E., 645.) B, the life tenant, is clearly not taxable as an individual on the entire profit derived regardless of the fact that the proceeds were paid over to her. Is she taxable as a trustee for the remaindermen as proposed by the Bureau or should the profit, which is undoubtedly taxable to some one, be taxed in part to the remaindermen and in part to the life tenant?

Office Decision 1040 (C. B. 5, 186) involved a similar situation. In that case a woman died intestate in the year 1915, leaving real property in the State of New York. She left surviving her a husband and son. During the year 1920 the real estate was sold for cash by a joint conveyance of the husband and son. The former was entitled to curtesy in the property. The proceeds of the sale were placed in a bank in the name of the husband in accordance with an agreement between him and the son. The husband was to receive the income from the proceeds and upon his death the principal was to pass to the son. It was held in that case that the husband as trustee should file a return for the year 1920, reporting the profit arising from the sale as income of a trust. It was pointed out that when the property was sold by the father and son for an amount greater than the value of the property at the time they acquired their interests therein, a profit subject to tax was realized, and that this profit accrued to and constituted a part of the corpus of the estate which was not distributable to anyone but was required to be held during the life of the father in order that he might have the use thereof. As previously indicated, it was concluded that the profit was taxable neither to the father nor to the son but represented the undistributable income of a trust entity. It will be noted that in that case the sale was made by the father and son and *not by a trustee.* In the opinion of this office, the fact that the proceeds of the sale were placed in trust in accordance with an agreement of the interested parties does not affect the true nature of the transaction, that is, a sale by the life tenant and remainderman. (G. C. M. 77, C. B. V-1, 14, involved a somewhat similar state of facts but in that case the sale is stated to have been made by a trustee who was appointed by the court to handle the transaction.)

It is evident that if Office Decision 1040, supra, is followed the profit in the present case will be taxed to the life tenant as trustee. It is extremely doubtful, however, whether the facts in the case justify such a conclusion. The life tenant and the remaindermen (all of whom had vested interests) owned separate legal interests

in the real property and all of them sold such interests. Clearly any one of them could have sold her interest separately and would have been taxable on any gain derived from such a sale. The fact that a joint sale of all interests was made does not shift the liability for the tax on the profit from the sale of each interest from the owner of such interest to any other owner either as an individual or as a trustee, nor does the disposition of the proceeds affect the status of the transaction. Even though it could be said that the life tenant became a trustee for the remaindermen upon payment of the cash to her, nevertheless at the time the sale occurred she clearly was not a trustee and could not have acted in such a capacity. It is true that the relation of the life tenant to the remaindermen is to a certain extent a fiduciary relationship and has frequently been termed an implied or *quasi* trusteeship (Perry on Trusts, sixth edition, volume 2, section 540), but it is not such a trust as is ordinarily recognized for income tax purposes.

In 17 R. C. L., 625, it is stated:

* * * But there is no privity between the tenant for life and the remainderman, and the tenant can not, by his own acts or admissions, defeat or prejudice the rights of the remainderman, nor does he represent the interest of the remainderman in judicial proceedings * * *.

In 21 C. J., 941, it is stated in part that:

* * * There is no tenure nor any privity of contract between a life tenant and a remainderman; nor is there such a fiduciary relation as will prevent the life tenant from purchasing from the remainderman his remainder interest.

The sense in which a life tenant is a trustee for the remainderman is indicated by the court's language in a number of cases. In *Stortz et al.* v. *Voss et al.* (181 Ky., 546, 205 S. W., 610), the court stated in part:

* * * The first of those grounds—that the purchaser, Charles W. Voss, Sr., occupied a fiduciary relation toward the owners of the property—is not founded in fact, since he had only a life interest as surviving husband in it. This in no sense made him a trustee for or a fiduciary of the owners in remainder * * *.

In *Ware et al.* v. *Fronk's, Adm'r et al.* (Ky.) (38 S. W., 1061), it was stated in part that:

* * * We know of no principle of law or rule in equity which prevents a life tenant from purchasing the interest of a remainderman. Certainly, no such fiduciary relations exist between them which could make applicable to their transactions the rules of equity which govern trustees and *cestuis que trustent* * * *.

In *Gibson et al.* v. *Brown et al.* (Indiana Appeals) (110 N. E., 716), the court stated:

There is a sense in which a life tenant is trustee for the remainderman. While he is entitled to the possession of the lands involved, and may use them for his own benefit, and appropriate to himself the proceeds arising from such use, still he holds the corpus of the estate in trust in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remaindermen at the termination of the life estate * * *.

In *German-American Title & Trust Co.* v. *Fidelity Ins., Trust & Safe-Deposit Co.* (132 Pa. St., 36, 18 Atl., 1090), the life tenant failed to pay interest upon the mortgage on the property purchased at foreclosure sale. The court in that case said:

* * * Relations from which dependence and fidelity arise, as in guardian and ward, have a stricter rule. A life tenant stands in no such relation to the remaindermen. * * * If, by his willful neglect or default, the estate is lost, the only redress is an action for damages. * * *

The duties owed to the remainderman by a life tenant which are sometimes characterized as the duties of a trustee or *quasi* trustee are not materially different from those owed to a reversioner by a tenant for years or a joint tenant in possession. They owe duties to the other parties in interest, yet it could not properly be contended that such persons hold property in trust or would be taxable as trustee upon gains resulting from the sale of the fee simple of the property during the term of their possession.

In view of the foregoing, it is the opinion of this office that the profit from the sale of the real estate in the instant case was not derived by B, the life tenant, as trustee and is not taxable to her as trustee. The profit was derived by the life tenant and the remaindermen from the sale of their individual legal interests in the real estate and is taxable to them in their individual capacities.

Since the conclusion reached in Office Decision 1040 that a similar profit should be taxed in its entirety to the life tenant as trustee is not in accord with the conclusion reached herein, it is recommended that Office Decision 1040 be revoked.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

SECTION 113.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 591: Basis for determining gain or loss from sale. XIV–11–7371 G. C. M. 14350

REVENUE ACTS OF 1926 AND 1928.

In 1922 A transferred in trust 520*y* shares of stock of the M Company, the trust agreement providing that the income be paid to his wife during her lifetime. Upon her death the trust was to terminate and the trust property was to be returned to A. The wife died in 1929 and the stock was returned to the taxpayer in that year. He sold the stock in 1931.

Held, the basis to be used by A in determining gain or loss upon the sale of the stock in 1931 is the basis in his hands prior to the creation of the trust. No reduction should be made in the basis by reason of the stock having been held in trust.

Solicitor's Memorandum 4882 (C. B. V–2, 13) is modified in so far as inconsistent herewith.

An opinion is requested relative to the basis to be used by A in determining gain or loss upon the sale of stock in the year 1931.

In 1922 A transferred in trust 520*y* shares of stock of the M Company (which he owned on March 1, 1913), with the provision that the income therefrom should be paid to his wife during her lifetime. Upon her death the trust was to terminate and the stock was to be returned to A, the grantor. The wife (to whom the income from the trust was taxable) died on June —, 1929, and the trustee then delivered to the taxpayer (A) the 520*y* shares of stock of the M

Company. During the year 1931, the taxpayer sold the stock and the question has arisen whether any reduction should be made in the basis to be used by him in determining gain or loss upon the sale by reason of the stock having been held in trust for a number of years.

The case of *Pierre S. du Pont* v. *Commissioner* (18 B. T. A., 1028) is similar in principle to the instant case. The syllabus of the Board's decision (adverse to the Bureau) in the du Pont case reads as follows:

> Petitioner acquired certain stock in 1915. In 1918 he placed this stock in trust under the terms of an agreement by which the stock would be held by a trustee until the income therefrom should aggregate a certain amount, such income to be paid to a hospital therein designated. Upon the termination of the trust agreement in 1922 the stock was returned to the petitioner, who sold some of it in 1922 and some in 1923. *Held*, that in determining gain or loss on the sales no reduction of the cost or acquisition value in 1915 is necessary because of the creation and existence of a trust estate between the dates of acquisition and sale.

The Commissioner nonacquiesced in the decision of the Board (C. B. IX–2, 72) but nonacquiescence was withdrawn and acquiescence announced in Internal Revenue Bulletin XIV–9, page 1 [page 6, this Bulletin].

Following the reasoning of the Board in the du Pont case, it is the opinion of this office that where a precedent estate is created by gift and the donee returns for taxation all the income from the property without any deduction for the shrinkage or exhaustion of the property over the life of the estate, or where the income is not taxed to the donee because of the donee's charitable or educational character, the donor's basis of the property should not be reduced on account of the creation of the precedent estate where the property is returned to the donor and is sold by him after the precedent estate has terminated. As previously stated, the income of the instant trust was taxable to the beneficiary during her life. The beneficiary did not receive a return of any part of the basis tax free nor did the taxpayer (donor) receive such a return. Accordingly, under the facts of this case, no reduction should be made in the taxpayer's (donor's) basis of the 520*y* shares of stock in question by reason of the stock having been held in trust.

Solicitor's Memorandum 4882 (C. B. V–2, 13) is modified in so far as inconsistent with the conclusions herein stated.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 596: Property transmitted at death. XIV–21–7505
G. C. M. 14893

REVENUE ACT OF 1928.

> Where a testator who died in 1910 directed that his estate be held in trust for a period of 10 years after his death and at the end of that period be distributed to certain beneficiaries, securities forming a part of the estate were "acquired" by the beneficiaries at the date of death of the testator. The basis of the securities transferred to the beneficiaries in 1920 is the value of the securities at the date of distribution to the trustee by the executor of the estate or the March 1, 1913, value, whichever is greater.

G. C. M. 11309 (C. B. XII–1, 126) is revoked, G. C. M. 6195 (C. B. VIII–1, 99) is reinstated, and G. C. M. 10260 (C. B. XI–1, 79) is modified. It is recommended that I. T. 2539 (C. B. IX–1, 139) be reinstated, that I. T. 2684 (C. B. XII–1, 127) be revoked, and that acquiescence in *Ralph W. Harbison* v. *Commissioner* (26 B. T. A., 896) be withdrawn.

An opinion is requested relative to the basis to be used in determining gain or loss upon the sale of certain securities in 1930.

A, the father of the taxpayer, died testate in 1910. After providing in his will for the payment of his debts and for certain bequests, the testator directed that all the rest, residue, and remainder of the estate, real and personal, be delivered to the M Trust Co. (which was also named executor), in trust for a period of 10 years, the trustee to pay the net income therefrom to B, the wife, and C, the daughter, share and share alike. The testator also directed that after the expiration of 10 years the trust should terminate and the corpus thereof should be transferred to B and C, share and share alike. Provision was made for the disposition of the estate in the event of the death prior to termination of the trust of either or both of the beneficiaries. The wife and daughter were granted absolute power by last will and testament to dispose of their respective interests in the trust estate. The will was probated in Washington, D. C. The trust terminated in 1920 by virtue of its own provisions, at which time the real and personal property was distributed to the beneficiaries. Certain securities which were transferred to the taxpayer (C) in 1920 were sold by her in the year 1930. The issue involved is the basis to be used in computing the gain or loss from such sale.

Section 113(a) of the Revenue Act of 1928 (which governs the year 1930) prescribes the basis to be used in determining gain or loss from the sale or other disposition of property acquired *after* February 28, 1913, and section 113(b) of that Act prescribes the basis to be used in respect of property acquired *before* March 1, 1913. It becomes necessary, therefore, first to determine when the property in question was acquired.

The Supreme Court of the United States in *Brewster* v. *Gage* (280 U. S., 327, Ct. D. 148, C. B. IX–1, 274) considered the question as to the meaning of the word "acquired" as used in section 202(a) of the Revenue Act of 1921. There the testator disposed of a part of his estate in the residuary clause of his will which made his son the residuary legatee. The father died in 1918 and a final decree of distribution was entered in 1920, pursuant to which distribution was made to the son. The court held that at the time of the father's death in 1918 the son *acquired* a vested right in the residue of the estate and "became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property." The postponement of transfer of legal title to the son was not regarded as important.

In *Chandler* v. *Field* (63 Fed. (2d), 13), the Circuit Court of Appeals for the First Circuit considered the question as to when property was "acquired" within the meaning of section 204(a)5 of the Revenue Act of 1926. In that case the mother died in 1915 leaving her residuary estate to her husband for life and after his death to trustees to pay the principal to the son, one-third when he

became 30, one-third when he became 35, and one-third when he became 40 years of age, with provisions for his children if he died before receiving all the principal. Upon the basis of *Brewster* v. *Gage*, supra, the court held that the son took a vested interest when the mother died and "acquired" the property (stock) in question at that time. Similarly, in *Warner* v. *Commissioner* (72 Fed. (2d), 225, affirming 28 B. T. A., 1178), the Circuit Court of Appeals for the Second Circuit said that the test in such cases is whether or not the interest vested in the taxpayer at the date of death of the testator; and that, if there was a vesting of some recognized sort at the date of death, the taxpayer "acquired" the property at that time. The Board of Tax Appeals in *Daniel Tracy Beers* v. *Commissioner* (31 B. T. A., 117) held that the same meaning should be attributed to the word "acquired" in subdivisions (a) and (b) of section 113 of the Revenue Act of 1928 as that given the same word in corresponding provisions of prior Revenue Acts.

Under the laws of the District of Columbia, where the will was probated, estates shall be held to vest at the earliest possible period unless there is a clear manifestation of intent to the contrary. Adverbs of time, as after, etc., are to be construed to relate to the time of the enjoyment of the estate and not to the time of vesting in interest. (*Fields* v. *Gwynn*, 19 App. D. C., 99.) In *Wills* v. *Maddox* (45 App. D. C., 128), the will created a trust in a certain person for life with the remainder in trust to his children, their share to be paid to them when they reached the age of 25 years. The court held that the estate vested in the children the moment their father died; and that the fact that they were not to receive the estate until they reached the age of 25 years did not defer the vesting but merely postponed actual possession and enjoyment. In *Huggett* v. *Burnet* (64 Fed. (2d), 705), decided by the Court of Appeals of the District of Columbia, the taxpayer's grandmother died in 1912, leaving a life estate in certain securities to the taxpayer's mother with remainder to the taxpayer. The mother died in 1924, at which time the securities were distributed to the taxpayer. The court held that by the bequest in her grandmother's will the taxpayer acquired a vested remainder in 1912, at the date of the testatrix's death, and both her title and the "acquisition of the property at the date of possession" related back to that date.

Upon the authority of the decisions cited, this office is of the opinion that the securities in the instant case vested in the taxpayer in 1910 upon the death of her father, and that she, therefore, "acquired" them at that time.

Section 113(b) of the Revenue Act of 1928 provides as follows:

> (b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:
>
> (1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or
>
> (2) the fair market value of such property as of March 1, 1913,
>
> whichever is greater. * * *

Section 113(b)1 of the Revenue Act of 1928 incorporates by reference section 113(a)5, which specifically governs the basis of property transmitted at death. Since the personal property here in question was not acquired by specific bequest, the basis for determining gain

or loss is governed by the third sentence of section 113(a)5, which provides that "In all other cases * * * the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." In the instant case the executor and the trustee were the same. When the executor distributed the residue of the estate to itself as trustee, its functions as executor in respect of the property ceased and its duties as trustee commenced. The duties of a trustee, even where the trust is created by will and the executor is nominated as the trustee, are to be distinguished from those of the executor. After distribution to the trustee, it acts solely as a donee of a trust power with equitable liabilities to the beneficiaries. Upon distribution by the executor to the trustee, the beneficiaries become entitled to the income from fixed and determined property and ultimately to the possession of such property or its equivalent.

In view of the foregoing, this office is of the opinion that the property sold by the taxpayer in 1930 was distributed to her, within the intent of section 113(a)5 of the Revenue Act of 1928, when the executor relinquished the property to itself as trustee. It therefore follows that the basis of the property for gain or loss purposes, under the provisions of section 113(b) of that Act, is the value at the date of distribution to the trustee, or the March 1, 1913, value, whichever is greater.

G. C. M. 11309 (C. B. XII–1, 126) is hereby revoked, G. C. M. 6195 (C. B. VIII–1, 99) is reinstated, and G. C. M. 10260 (C. B. XI–1, 79) is modified to accord with the views herein expressed. It is recommended that I. T. 2539 (C. B. IX–1, 139) be reinstated, that I. T. 2684 (C. B. XII–1, 127) be revoked, and that acquiescence in *Ralph W. Harbison* v. *Commissioner* (26 B. T. A., 896) be withdrawn.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

ARTICLE 596: Property transmitted at death. XIV–21–7506
I. T. 2893

REVENUE ACT OF 1928.

I. T. 2539 (C. B. IX–1, 139) is reinstated and I. T. 2684 (C. B. XII–1, 127) is revoked, in view of G. C. M. 14893. (See page 202.)

ARTICLE 600: Stock or securities distributed in reorganization. XIV–16–7442
Ct. D. 949

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

GAIN OR LOSS—BASIS—SALE OF STOCK ACQUIRED ON REORGANIZATION—APPORTIONMENT OF COST BETWEEN OLD AND NEW STOCK—AUTHORITY OF COMMISSIONER.

Where a stockholder in a corporation in 1928 acquired stock of another corporation by way of distribution in connection with a nontaxable reorganization and sold the new stock during the same year, the Commissioner had authority, under section 113(a)9 of

the Revenue Act of 1928, to determine the gain from the sale by applying the provisions of Treasury Decision 4274 [C. B. VIII–2, 240] as to apportionment of cost between the old stock and the new, even though that decision was promulgated subsequent to the sale. Treasury Decision 4274 did not impose a tax liability on a transaction already completed, but was promulgated to amend article 600 of Regulations 74 so as to give effect to the intent of Congress to tax upon a basis that clearly reflected income.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Charles Potter Titsworth, 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.

[October 3, 1934.]

OPINION.

THOMPSON, Circuit Judge: This is a petition for review of a decision of the Board of Tax Appeals. The petitioner was a shareholder of the Miehle Printing Press & Manufacturing Co., an Illinois corporation, which had an authorized and issued capital stock of 75,000 shares of no par value. It acquired all of the capital stock of Stonebridge, Inc., also an Illinois corporation, which had an authorized and issued capital stock of 300,000 shares of no par value. The stock of both corporations was of the same character. Neither had preference stock. The acquisition by the Miehle company of all Stonebridge, Inc., capital stock constituted a reorganization. In February, 1928, the Miehle company distributed pro rata to its own stockholders Stonebridge, Inc., stock under the circumstances set out in section 112 (a) (g) (i) of the Revenue Act of 1928 (45 Stat., 816, 818). At that time the petitioner was the owner of 150 shares of the Miehle company stock which he had purchased at a cost of $16,150.

Six hundred shares of Stonebridge, Inc., were allotted to the petitioner but he was not required to surrender his Miehle company stock. In February, 1928, he sold his Stonebridge, Inc., stock for $8,000, but reported no taxable gain on this sale in his income tax return for that year. The Commissioner determined that a profit had accrued from the sale and assessed a deficiency. The Board of Tax Appeals sustained the Commissioner's determination. The petitioner appealed.

The question before us is whether the sale of Stonebridge, Inc., stock resulted in a taxable gain to the petitioner.

Section 112 of the Revenue Act of 1928, supra, provides:

"(a) 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.

* * * * * * *

"(g) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

* * * * * * *

"(i) As used in this section and sections 113 and 115—

"(1) 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, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

It is not contended that, under the terms of that section, any taxable gain accrued to the petitioner because of the receipt by him of Stonebridge, Inc., stock.

The determination of loss or gain from the sale of stock received under the circumstances above described is governed by section 113 of the Revenue Act of 1928, which provides:

"(a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

"(9) If the property consists of stock or securities distributed after December 31, 1923, to a taxpayer in connection with a transaction described in section 112(g), the basis in the case of the stock in respect of which the distribution was made shall be apportioned, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, between such stock and the stock or securities distributed."

Under that statute, Congress has conferred power upon the Commissioner to provide by regulation the basis for the apportionment of the cost between the stock originally owned by the taxpayer and that distributed to him as a result of his ownership. Article 600 of Treasury Regulations 74, which is identical with article 1599 of Regulations 65 and 69, was promulgated by the Commissioner in accordance with this authority and became effective February 15, 1929. It provided:

"In the case of stock or securities acquired by a shareholder after December 31, 1923, in connection with a transaction described in section 112(g) and article 576, the basis in the case of the stock in respect of which the distribution was made shall be apportioned between such stock and the stock or securities distributed to the shareholder. The basis for the old and new shares shall be determined in accordance with the following rules:

"(1) Where the stock distributed in reorganization is all of substantially the same character or preference as the stock in respect of which the distribution is made, the basis of each share will be the quotient of the cost or other basis of the old shares of stock divided by the total number of the old and new shares."

The petitioner in his tax return for 1928 calculated his income by applying the provisions of the above regulation, and reported that the basis of Stonebridge, Inc., stock was $21.40, the selling price $13.33⅓, and that no taxable gain accrued to him as a result of the sale of that stock. In November, 1929, article 600 of Regulations 74 was amended by Treasury Decision 4274, which provides:

* * * * * * *

"(2) Where the stock distributed in reorganization is in whole or in part stock in a corporation a party to the reorganization other than the distributing corporation, * * * the cost or other basis of the stock in respect of which the distribution is made shall be apportioned between such stock and the stock or securities distributed in proportion, as nearly as may be, to the respective values of each class of stock or security, old and new, at the time of such distribution, and the basis of each share of stock or unit of security will be the quotient of the cost or other basis of the class of stock or security with which such share or unit belongs, divided by the number of shares or units in the class. * * *"

The Commissioner, applying the provisions of Treasury Decision 4274, apportioned 29 plus per cent, or $4,612.42 of the cost of the Miehle stock to Stonebridge, Inc., stock, and found that the sale of the latter for $8,000 resulted in a taxable gain to the petitioner of $3,387.56. He therefore assessed a deficiency.

The petitioner contends that the application of Treasury Decision 4274 is invalid because it attempts to affect retroactively transactions completed prior to its promulgation. He argues that the regulations round out and complete the law, that they are legislative in character, and that Congress, by reenacting the taxing statutes without change in 1926 and 1928, adopted the administrative practice found in Regulations 64, 69, and 74. The Commissioner contends that regulations are administrative rules which interpret the taxing statutes and that changes in the regulations merely express a different opinion as to the meaning of taxing statutes. It is our opinion that neither contention is tenable unless qualified, since no amount of legislative reenactment of a statute will validate an unreasonable practice in interpreting it and since regulations may involve in their nature the elements of either declaring or interpreting the laws.

Section 113 of the Revenue Act of 1928 requires the Commissioner to set up rules to determine gain from the sale of stock acquired in tax-free distributions. It provides that the basis shall be apportioned, under regulations, between such stock and the stock distributed. The resulting regulations are more than an administrative understanding or opinion of the law. If they are reasonable, they must be a declaration of the law under the authority given by Congress. The regulations as amended do not impose a tax liability on a transaction already completed. The tax liability arises under section 113(a)9 and that statute imposes upon the Commissioner the duty of providing the means of computing the tax. Whether Regulation 74 was defective in not providing a proper method of spreading the basis of cost or not clear in defining the scope of its application, we see no sound reason why the error should not be corrected. The tax computed was on income received during the taxable year and Congress intended that it should be taxed on a basis that reflected income clearly. (*Cooper* v. *United States*, 280 U. S., 409 [Ct. D. 163, C. B. IX–1, 272].) This intention was given effect in Treasury Decision 4274. In *Burnet* v. *S. & L. Building Corporation* (288 U. S., 406 [Ct. D. 651, C. B. XII–1, 195]), the Supreme Court said:

"The Commissioner and Board of Tax Appeals have practical knowledge of the intricate details incident to tax problems, and their determination in circumstances like those under consideration here should be given effect when not clearly contrary to the will of Congress."

The decision of the Board of Tax Appeals is affirmed.

ARTICLE 604: Readjustment of partnership interests.

XIV–15–7424
Mim. 4311

Sale by partnership of assets contributed in kind by partners—Basis of gain or loss—Taxation to partners.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., March 29, 1935.

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

Reference is made to G. C. M. 10092 (C. B. XI–1, 114), wherein it is held that the basis for computing gain or loss upon the sale by a partnership of an asset contributed in kind to the partnership enterprise is the cost or other basis thereof to the contributing partner, that any gain or loss computed on such basis should be taken into account for income tax purposes at the time of sale of the asset, and any gain should be taxed to the partners in accordance with their distributable shares of the partnership income.

Reference is also made to the decisions of the United States Circuit Court of Appeals for the Second Circuit in *Helvering* v. *Walbridge* (70 Fed. (2d), 683), affirming a memorandum opinion of the Board of Tax Appeals, and *Helvering* v. *Archbald* (70 Fed. (2d), 720), affirming the opinion of the Board of Tax Appeals (27 B. T. A., 837), in respect of which decisions certiorari was denied by the Supreme Court on October 8, 1934 (293 U. S., 594). In those cases the circuit court sustained the Board of Tax Appeals in holding that upon a sale by a partnership of property contributed by a partner at the time of organization at its then value (which was greater than the partner's cost or other basis) for a price greater than the value when contributed, the basis for computing the gain of the partnership is such value, and that neither the individual partner's distributive share of partnership income nor his other income may include as gain the earlier increment.

Since the decisions of the circuit court are contrary to G. C. M. 10092, supra, that memorandum has been carefully reconsidered by the Bureau, and it has been decided that regardless of the decisions to the contrary the rule set forth in that memorandum will be followed pending the outcome of further litigation of the question involved.

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

GUY T. HELVERING,
Commissioner.

SECTION 114.—BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 611: Basis for allowance of depreciation and depletion.

REVENUE ACT OF 1928.

Revocation of G. C. M. 11384 (C. B. XII–1, 64). (See G. C. M. 14448, page 98.)

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 621: Dividends. XIV–17–7454
Ct. D. 952

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

1. GROSS INCOME—DIVIDENDS—DISTRIBUTION BY CORPORATION FROM PROCEEDS OF LIFE INSURANCE.

Where life insurance policies were procured by a corporation on the lives of two of its officers, the corporation being named as sole beneficiary, and it was agreed between the stockholders and directors that, upon the death of either or both of the insured and the receipt of the policy proceeds, the corporation would pay the amount thereof as a dividend to the common stockholders of record, the amounts paid to the stockholders in 1929, when the death of one of the insured occurred, represented a distribution to them of the gains or profits of the company and hence were dividends to be included in gross income under section 22(a) of the Revenue Act of 1928.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 1045) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Edwin L. Cummings et al., petitioners for review, v. *Commissioner of Internal Revenue.*

Appeals from Board of Tax Appeals.

Before BINGHAM, WILSON, and MORTON, JJ.

[November 10, 1934.]

OPINION.

BINGHAM, J.: The Commissioner of Internal Revenue determined deficiencies for the year 1929 in the income tax returns for that year of Edwin L. Cummings, of Providence, R. I., George L. Webb of Boston, Mass., and

William N. Stetson, Jr., of East Milton, Mass. They each petitioned the Board of Tax Appeals for a redetermination of the deficiency, which petitions, as they involved the same facts and legal principles, were consolidated and heard together. The Board in each case sustained the rulings of the Commissioner, and the parties are here on petitions for review by the three taxpayers.

The petitioners were stockholders of Storrs & Bement Co., a Massachusetts corporation engaged in the wholesale paper business.

In the latter part of 1926, or early in 1927, a discussion was had among the officers and directors of Storrs & Bement Co., hereafter referred to as the company, in regard to procuring insurance policies on the lives of some of its officers. On January 10, 1927, policies were procured on the lives of the company's president, William B. Stevenson, and its treasurer, Bryant McQuillen, for $100,000 each. In each policy the company was named as the sole beneficiary. At a meeting of the board of directors held January 10, 1927, the following resolution was adopted:

"Voted: That whereas Storrs & Bement Co., a corporation duly established and existing by law and having its usual place of business in Boston, Suffolk County, Mass., has recently insured the lives of William B. Stevenson and Bryant McQuillen, officers of said company, for the sum of $100,000 each, and

"Whereas it is not practical to have the proceeds of said policies payable in the form and manner intended by Storrs & Bement Co. at the time the lives of the said William B. Stevenson and Bryant McQuillen were insured because of the laws relating to the naming of beneficiaries under insurance policies and because of that fact said policies of insurance are now payable in case of death to the Storrs & Bement Co.;

"Voted: That in order to carry out the agreement and understanding of the officers and common stockholders of Storrs & Bement Co. in regard to said insurance, it is hereby agreed that if and when a policy of insurance so taken shall become payable by reason of the death of either or both the insured and the proceeds of a policy are paid to Storrs & Bement Co., that Storrs & Bement Co. will promptly after receipt of the proceeds of said insurance policy, vote to declare and pay said proceeds as a dividend on the common stock of Storrs & Bement Co., payable to common stockholders of record at the time of the death of said insured; it being understood that the estate of any common stockholder so deceased whose life was insured as aforesaid, shall receive its pro rata share of said proceeds the same as the surviving stockholders previously mentioned."

There was also incorporated in the records of the directors' meeting of the above date a so-called agreement setting forth the matters stated in the resolution quoted with respect to the insurance policies on the lives of the officers and signed by all of the corporation's nine common stockholders. That is, the stockholders agreed that the directors should and authorized them to declare the dividends as above voted.

On February 14, 1928, three other policies totaling $100,000 were procured on the life of William B. Stevenson upon substantially the same terms and conditions as the policy taken out in the prior year.

William B. Stevenson died on January 12, 1929, and soon thereafter the company received payment of $200,000 from the insurance companies on the above policies. Thereafter the company received additional amounts of $1,388.07, representing post mortem dividends, and $6,984.55, representing a payment in settlement of a claim on a $50,000 policy which the company had procured from the Sun Life Insurance Co. of Canada, but which policy was not one of those referred to in the votes and agreements specified above. The amounts received from the insurance policies were credited on the books of the corporation to general surplus. All of the above amounts were deposited by the company in a special bank account, which it opened for that purpose, and were not mixed with the other company funds.

A meeting of the board of directors of Storrs & Bement Co. was held on February 25, 1929, at which time the vice president stated that William B. Stevenson, president of the corporation, deceased on January 12, 1929; that the $200,000 had been received as the proceeds of the first four policies and that "in accordance with the terms and provisions of votes of the directors duly passed at meetings held on January 10, 1927, and February 14, 1928, and in accordance with the provisions of agreements signed by all the common stockholders of the company on said January 10, 1927, and February 14,

1928, it now becomes necessary to pay out the proceeds of said policies of insurance in the amount of $200,000 on the life of William B. Stevenson as a cash dividend on the common stock of Storrs & Bement Co., payable to common stockholders of record at the date of the death of said William B. Stevenson." And:

"Upon motion duly made and seconded and in accordance with and in pursuance of said votes and agreements of January 10, 1927, and February 14, 1928, the following resolution was unanimously adopted:

"That a cash dividend of 50 per cent ($50 a share) on the par value of the common capital stock of $400,000 consisting of 4,000 shares each of the par value of $100, said dividend amounting to $200,000, be paid on February 25, 1929, to common stockholders of record on that date (January 12, 1929)."

By similar corporate actions had on March 12, 1929, and May 27, 1929, authorization was given for distribution to the common stockholders of the further amounts of $1,388.07 and $6,984.55 referred to above.

The surplus of the company on January 1, 1929, was $224,945.78 and on June 30, 1929, $250,307.58. These amounts were exclusive of any proceeds from insurance policies.

At the date of Stevenson's death there were seven common stockholders of Storrs & Bement Co. besides the estate of the decedent, which held 2,200 shares of common stock. The estate sold all of its common stock on March 9, 1929, and by the purchase of this stock six new stockholders were added to the list and the shares of the old surviving stockholders were increased in varying amounts.

All of the premiums on the aforesaid insurance policies were paid by the company.

In their returns for the calendar year 1929 none of the petitioners included the amounts thus received from the company in his taxable income. The Commissioner and the Board determined that such amounts represent cash dividends and are taxable as such to the petitioners.

The Internal Revenue Act of 1928 (ch. 852, 45 Stat., 791), under which these deficiencies were assessed, provides in section 22 as follows:

"SEC. 22. GROSS INCOME.

"(a) *General definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, 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.

"(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

"(1) *Life insurance.*—Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or installments * * *."

The petitioners contend that the amounts paid as above were received by them under a life insurance contract paid by reason of the death of Stevenson and should not be included in the gross income, while the Commissioner's claim is that they represented a distribution among stockholders of the gains or profits of the company and hence were dividends to be included in the gross income under section 22(a). This raises the only question for review.

The petitioners say that in applying for, paying the premiums on and receiving the proceeds of the policies the company acted simply as trustee or agent for the common stockholders, they being the real beneficiaries of the policies.

The evidence, oral and documentary, plainly shows that at the time the policies were taken out, it was intended by the officers of the company and all the common stockholders that the receipts therefrom should finally go to the benefit of certain stockholders—those existing at the time of Stevenson's death. This intention could have been fulfilled in two ways: (1) by taking out the policies in the name of the company as trustee for such stockholders, in which case there would be no question but the amounts received by the petitioners were received under the life insurance contracts; or (2) by a contract or undertaking on the part of the company that these proceeds should be paid to them, not by reason of their interests in the life insurance contracts, but by reason of their interests in the company as stockholders and as a distribution of a part of its surplus, in which case the amounts so distributed would be taxable to the receivers thereof.

It seems to us that the records of the company clearly show that it was the intent of all parties that these proceeds should go to swell the assets of the company. It paid the premiums, took the policies out in its own name, and it was understood both by the officers of the company and the common stockholders that when the proceeds thereof were received they would be so mingled with the other company assets that it would be necessary to declare a dividend in order to separate and give each individual stockholder a right to his proportionate part according to the number of shares in the company he held.

Unless one had an interest in the policy itself, the proceeds thereof received by him as a gift, or by reason of a contract other than the policy, after they came into the hands of the beneficiary would not be "amounts received under a life insurance contract." To put the matter in its most simple form, it seems an analogous case would be one where A, having an insurable interest in the life of B, promises C that he will take out insurance on B's life payable to himself and that, when B dies and the proceeds of the policy are received, he will pay them over to C. It would seem clear in that case that C would have no interest in the policy and its proceeds until the money got into the hands of A, and no legal interest then unless there was a good consideration for A's promise, in which case the right of C to the funds would arise by virtue of his contract with A and not of the policy itself. We find nothing here indicating any interest held by the petitioner in the life insurance contracts. As said by the Board:

"The corporate resolutions of January 10, 1927, and February 14, 1928, both refer to the corporation as the insurer of the life of William B. Stevenson. The agreement between the corporation and the stockholders was not that the corporation would merely receive the proceeds of the insurance policies for the benefit of the stockholders, but that, upon receipt of the proceeds of the policies, it would pay them over to the stockholders as a cash dividend. Nowhere is there any reference to the corporation as a trustee nor are there present any circumstances which can be said to create a resulting trust in favor of the stockholders."

It is also claimed that, if the stockholders were not beneficiaries under the policies "the agreements of January 10, 1927, and February 14, 1928, attached to the insurance fund the moment it was received by the corporation and by virtue of the agreements the corporation became a trustee of the insurance proceeds and the fund (never became assets of the company but) became subject to an equitable lien for the benefit of the stockholders of record as of January 12, 1929." They cite to this proposition *Barnes* v. *Alexander* (232 U. S., 117), where the court, at page 121, says:

"At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right.

"* * * (citing cases). And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. * * *"

We find in the instant case no consideration for the agreements relied on and consider them to have been unenforcible. Had there been a consideration—had the promises of the company been made in consideration of services rendered or to be rendered, as in *Barnes* v. *Alexander*, supra, then on receipt thereof by the stockholders the funds would have gone into their gross incomes, not as dividends, but as "gains, profits, and income derived from salaries, wages, or compensation for personal service." Or had the lien attached and the funds been received by the stockholders on account of transfers of property to the company, the stockholders would have been taxable for their profits, if any, made by the transaction. In other words their gross incomes would have been increased by the amount of gains or profits they received.

Moreover, the petitioners say, "even on the assumption that the corporation was the real beneficiary of these insurance policies, these payments to the petitioners were not dividends, since they were not a distribution out of the surplus or net profits of the corporation."

Section 115(a) of the Revenue Act of 1928 defines "dividend" as follows:

"The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913."

"Earnings or profits" as used in this section must mean the same as "gains or profits" in section 22(a), and a gift to a corporation would be a gain. Nor would it be overstating the transaction here to say, that, the company having invested in the insurance policies by paying the premiums, the receipts therefrom over and above the premiums were profits. If these funds, however derived, belonged to the company when received, they would go to increase its surplus, and it can not be seriously argued that the surplus funds in the hands of the company over and above its stock liability are not the earnings or profits contemplated by the section.

The petitioners also assert that the undertaking of the company to distribute its assets as contemplated by the votes of the directors and the actual declaration of distribution, being made to stockholders not existing at the time of the declaration but some months prior thereto, were illegal and from that argue that the distribution was not intended to be and was not a dividend. The legality or irregularity of the distribution can not be raised here, especially by the petitioners who have retained the benefits of the distribution. If they received a part of the surplus of the corporation, as we hold they did, the Commissioner was justified in including the sums received in the gross incomes.

The orders of the Board of Tax Appeals are affirmed.

ARTICLE 629: Distribution in redemption or cancellation of stock taxable as a dividend. XIV-7-7314 Ct. D. 920

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

1. DIVIDENDS—DISTRIBUTION IN CANCELLATION OR REDEMPTION OF STOCK.

Where the taxpayer, practically the sole owner of a construction company, caused the corporation to cancel and retire 97½ per cent of its stock and immediately organized a new corporation to hold assets accumulated by the construction company which were not necessary to its business, the amount received by the taxpayer for his canceled stock was essentially equivalent to the distribution by the corporation of a taxable dividend to the extent of the earned surplus accumulated after February 28, 1913, within the meaning of section 115(g) of the Revenue Act of 1928.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 1231) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

George Hyman, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

On petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[May 7, 1934.]

OPINION.

GRONER, Associate Justice: Petitioner owned all but two shares of the capital stock of George Hyman Construction Co., a Maryland corporation. The corporation was engaged in the business of general contractor in the construction of public and private buildings. It was incorporated after March 1, 1913, and prior to January 1, 1928, and had issued $200,000 of capital stock divided into 2,000 shares. Petitioner paid into the company in cash $199,800 for the stock issued to him. As of December 31, 1927, the corporation had an accumulated earned surplus of one hundred nineteen thousand some odd dollars, and as of December 31, 1928, one hundred and nine thousand some odd dollars.

Petitioner decided it had too many eggs in one basket and that it was desirable it should dispose of that portion of its assets not necessary in the construction business. The property which it proposed to rid itself of consisted of real estate, stocks, and bonds and so on December 11, 1928, petitioner caused George Hyman Properties, Inc., to be organized under the laws of Maryland with a capital of 2,000 shares of stock of the par value of $100 each. The next day the construction company made its check to petitioner in the sum of $195,000 in consideration of the delivery to it by petitioner of 1,950 shares of stock, which it thereupon retired and canceled, leaving only 50 shares outstanding, of which petitioner held 48. Petitioner turned over the $195,000 to the Hyman Properties Corporation, which in turn paid it to the construction company for the real estate, stocks, and bonds which petitioner had previously decided it was desirable construction company should no longer continue to hold. The result of these transactions was that construction company thereafter had an issued capital stock of $5,000 and other assets of book value of one hundred and nine thousand odd dollars, and Hyman Properties company had an issued capital stock of $195,000 and real estate and bonds and stocks presumably equal in value to its capitalization, and petitioner was the owner of 48 of the 50 shares of stock of Construction company and equally the owner of all, or practically all, of the stock of the Properties company.

Petitioner in his income tax return treated the transaction as nontaxable on the theory that the payment to him of $195,000 by the construction company was in redemption and cancellation of the 1,950 shares of stock which he had delivered to it, and since the amount received by him per share was equal only to the price paid by him per share, there was neither gain nor loss. The Commissioner, however, asserted a deficiency to the extent of the earned surplus of the construction company at the time of the transaction. Petitioner appealed to the Board of Tax Appeals, which sustained the deficiency, and this petition for review followed.

The applicable statute is section 115 of the Revenue Act of 1928 (45 Stat., 822; 26 U. S. C. A., section 2115), as follows:

"(a) The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913. * * *

"(c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *

"(g) If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend. * * *

"(h) 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."

The Treasury regulations are contained in Regulations 74, issued under the Revenue Act of 1928, and particularly article 629, but, as we think, they are not helpful in deciding the question.

The issue is whether the amount of money received by petitioner in redemption of the shares of stock delivered by him to the corporation is a taxable dividend within the purview of (g) of section 115; and the answer to this question depends upon whether or not the transaction in point of time and manner was such a distribution as to make it essentially the equivalent of a taxable dividend.

The term "dividends" is defined by the Treasury regulations (article 621, Regulations 74) to be any distribution in the ordinary course of business, even though extraordinary in amount, and by the Act (section 115(a), supra) to be any distribution whether in money or other property out of its earnings or profits accumulated after February 28, 1913.

To determine the question we must look to the stipulated facts. These show a corporation wholly owned and controlled by petitioner which in the course

of years but after 1913 had accumulated profits of over $109,000, represented largely by investments in stocks, bonds, and real estate. Petitioner in good faith but to avoid the risk of loss of these profits as the result of possible future improvident building contracts, decided to put them out of harm's way by the incorporation of another company to be owned and controlled by him to the same extent; and to accomplish this he reduced the capitalization of the construction company 97½ per cent, leaving it still with sufficient assets, property, and equipment paraphernalia to carry on the business precisely as it had been carried on prior to the transaction to which we refer. It is obvious in this view there was no complete liquidation of the company in the ordinarily accepted meaning of the term, which, as we said in *Hellman* v. *Helvering* (68 F. (2d), 763, 765), means an act or an operation in winding up the affairs of a firm or corporation, a settling with its debtors and creditors, and an appropriation and distribution among its stockholders ratably of the amount of the profit and loss. On the other hand, what was done may perhaps be described as a recapitalization by partial liquidation.

But, in our view, the answer within the intendment of (g) turns not so much upon the question of whether there was or was not liquidation as upon the result. That is to say, if the distribution and cancellation, viewed fairly, made it essentially equivalent to a distribution of profits, it is taxable. The Commissioner and the Board have both held that what occurred was essentially equivalent to a distribution of profits. We have reexamined the facts to see if the conclusion is correct. Undoubtedly the tax law recognizes a distinction between liquidating dividends and dividends out of profits, and provides a different basis on which to tax them. The purpose of Congress in the inclusion of (g) was to narrow the distinction to the end that corporations might not by resort to the device of stock redemption or cancellation make a distribution to its shareholders essentially resulting in a division of profits. In both the House and Senate reports, and in the conference reports, an illustration is given showing the congressional purpose. The illustration supposes, under the tax laws prior to the amendment involved here, the case of two men holding practically the entire stock of a corporation for which each paid $50,000. The corporation, having accumulated a surplus of $50,000 above its cash capital, buys from the stockholders for cash one-half of the stock held by them and cancels it, and the payment is nontaxable because it is a partial redemption of stock. To change this result and make it taxable (g) was written and incorporated into the law. Granted the illustration is an apt one and the object sought accomplished, it will be seen how nearly it fits the facts of this case, for here we have a corporation with large accumulated earnings, which, by means of a purchase of a part of its stock, it transfers to its single stockholder, leaving the corporation precisely in the condition in which it was prior to the transfer, except that its earnings have been distributed to its stockholder without having disturbed his ownership and control of the corporation.

On this statement of facts we need not go to the extent of saying that Congress in the enactment of (g) intended to tax as a dividend every distribution of earnings. The use in the section of the words "at such time and in such manner" must be given some meaning, and we think they show a purpose to qualify the provision and to make time and circumstance elements to be considered in the determination. But, nevertheless, we think it is clear that if a corporation declares a stock dividend to-day and a few months later redeems it by purchase out of earnings, as was the case in *Robinson* v. *Commissioner* (decided by the fifth circuit April 2, 1934), the time element is a factor tending to show that the distribution was a device to avoid the tax. And so also if a corporation invests earnings in plant and equipment, which, in later years, in a policy of contraction of business activities, it decides to sell and to divide the proceeds among its shareholders, the distribution is none the less a dividend, though the device of canceling some of the outstanding shares be adopted as a method of accomplishing the end sought. On the other hand, if the fund for distribution was a part of the capital contributed by the shareholders to be used in the actual business of the corporation, its distribution in whole or in part would, of course, be liquidation, and the same is true of earnings in good faith converted into capital by the declaration of stock dividends, but it is not also true of earnings invested in property used in the business, for in the last-named case the conversion does not create capital and the manner of the utilization can be changed by the corporation's

action and the fund wholly withdrawn, and in such case it would return to its original condition, and in that condition distributed to shareholders, would be a dividend and not a liquidation.

In the present case, if the distribution and cancellation had precisely and exactly equaled the earned and accumulated profits, it could hardly be contended that the manner of the distribution evidenced other than a plan to distribute earnings. Here, however, it is contended that because more stock was redeemed than the total surplus the distribution was of capital and not of earnings, but we think this does not follow, except as to the excess, and the excess the Commissioner did not tax. As to the portion of the distribution taxed, the presumptions are all in favor of the Commissioner's holding; first, because section 115(b) declares "for the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof and from the most recently accumulated earnings or profits," and, secondly, because "capital" is a fund held in trust for the benefit of creditors and can only be returned to the shareholders by proper legislative action. It is frequently said by courts once capital always capital. In this respect it is different from profits, which are wholly within the discretionary control of the directors. In this case the record shows that petitioner offered to sell to his wholly owned corporation 1,950 shares of stock at par. The corporation accepted the offer, and subsequently by amendment reduced its authorized capital stock from $200,000 to $5,000. When the transaction occurred it had on hand in excess of $100,000 of earnings which it had converted into one or another class of property not needed in its business. Its primary purpose was the sale of this property. Nothing that appears indicates that it was intending either to wind up or curtail its regular corporate activities. It is fair under the circumstances to assume that the cancellation of its stock was to the extent of the surplus earnings accomplished out of that fund, and viewed in that aspect it was clearly a dividend within the meaning of paragraph (g).

In reaching our conclusion, we have examined the cases of *Hill* v. *Commissioner* (C. C. A. 4) (66 F. (2d), 45); *Commissioner* v. *Brown* (C. C. A. 7) (decided March 22, 1934); *Robinson* v. *Commissioner* (C. C. A. 5) (decided April 2, 1934); and *Commissioner* v. *Babson* (C. C. A. 7) (decided April 9, 1934); but we think they throw no particular light on the subject, for the reason that each was decided on its own particular facts.

The Hill case involved the redemption of a portion of a corporation's preferred stock issue. The Board had held that while there was no proof of the existence of a relation between the issuance and the redemption, scrutiny of the time and manner of the redemption was convincing of the fact that the distribution was equivalent to a taxable dividend. Precisely how or why is left unanswered. The Fourth Circuit Court of Appeals affirmed the Board on this finding of fact.

In the Brown case there had been an exchange in 1922 of old common stock for new common and preferred stock, followed in 1925 by the redemption of the preferred stock. In passing on the question whether this was a dividend or a liquidation, the seventh circuit held that subdivision (g) does not turn every partial liquidation into a dividend whenever there are undistributed earnings in the corporation but only when the distribution is made under specified circumstances; in other words, that it is the time and manner of the liquidation and not the existence of undistributed earnings which is the test, and the court held the facts found by the Board in that case did not justify the conclusion the redemption occurred under circumstances of time and manner sufficient to make it the equivalent of a taxable dividend.

The Robinson case involved the distribution of new stock by the Coca-Cola Co. with the simultaneous offer on the part of the corporation to purchase from the stockholders 20 per cent of the stock so issued at the time of issue at $50 per share. The facts there were that the corporation had a surplus of earnings in excess of $14,000,000, $5,000,000 of which had been transferred and assigned to the stock distributed as a dividend, and this was used for the repurchase of so much of the stock as was offered for sale. The holding was that this amounted to a pro rata distribution of cash earnings, as doubtless it did.

The Babson case involved an Illinois corporation which had from time to time over a period of 10 to 12 years tremendously increased its capital structure by issuing stock dividends out of earnings. Not only had it increased its capitalization but it had increased its business activities by going into new

lines. After the last increase in capitalization, it was found that the expansion of its business was unprofitable and a process of shrinking was adopted, and in the sale of assets to carry through this program large surpluses were accumulated, which were distributed to stockholders. Some of them occurred prior to 1926, and paragraph (g) of the Act of 1926 had, of course, no application to such payments. As to those after 1926, the Board having decided such payments were in the peculiar facts shown *capital* transactions, the court sustained the Board on the ground there was substantial evidence on which the Board's decision was based.

It will thus be seen that in none of the cases was any definite rule of construction laid down in respect to subsection (g) which we are at liberty to adopt, except that the applicability of the section turns upon the fact whether the distribution is of earnings through the guise of stock redemption. Here, as we have seen, there are ample grounds to place the transaction in that class.

Affirmed.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

SECTION 116(a): Earned income from sources without United States. XIV-8-7331 Ct. D. 924

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

1. INCOME—EXEMPTION—EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES—EVIDENCE.

Sums received in 1926, 1927, and 1928 by the taxpayer, a nonresident citizen, from domestic personal holding corporations of which he was an officer and stockholder, are not exempt from tax as earned income from sources without the United States, in the absence of evidence warranting a finding by the Board of Tax Appeals that the taxpayer actually performed personal services abroad for the corporations.

2. LOSSES—GAMBLING TRANSACTIONS—EVIDENCE.

Gambling losses sustained by the taxpayer in 1925, 1926, and 1927 are not deductible, in the absence of evidence warranting a finding that the gambling transactions were entered into for profit.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (25 B. T. A., 474) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied February 11, 1935.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Louis D. Beaumont, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

[June 30, 1934.]

OPINION.

HITZ, Associate Justice: This is an appeal from a decision of the Board of Tax Appeals, and while a number of questions were argued there, only two are in issue here. These items relate to the petitioner's returns for the years 1925, 1926, 1927, 1928, and the questions are:

(1) Do certain sums received by the petitioner from American corporations while he was residing abroad constitute compensation for services rendered by him without the United States, and thus fall within the class of exempt income?

(2) Do certain losses sustained by the petitioner in gambling at Monte Carlo constitute losses incurred in transactions entered into for profit, and thus fall within a proper category of deductions?

1. COMPENSATION FOR SERVICES.

The petitioner is an American citizen who has resided in France for 18 years, and during the 3 years in question, 1926, 1927, 1928, he made one visit to the United States of about 2 weeks' duration. He was the president and sole stockholder of the Beaumont Investment Co. and the Beaumont Investment Trust (a Massachusetts trust), and was president of the Dayton Securities Co., all of whose stock was owned by the Beaumont Investment Trust until 1928, when it was acquired by the petitioner personally. He was also vice president and minority stockholder of Commercial Investment Trust, Inc., a subsidiary of Commercial Investment Trust Corporation. The first three companies were personal holding companies, and the nature of their business can be inferred from their income-tax returns for the years in question, which show the great bulk of their income derived from dividends on stock, which were exempt from the taxable income of the corporations. For each of the three years in question, the petitioner received the sum of $17,500 from the Dayton Securities Co.; $12,500 from the Beaumont Investment Co.; $5,000 from the Commercial Investment Trust, Inc.; and $10,000 from the Beaumont Investment Trust, except that he received from the last-named company only $5,000 in 1926.

The relevant statutes allow to citizens of the United States who are bona fide nonresidents abroad for over six months of the taxable year an exemption from gross income for amounts received from sources without the United States, if such amounts constitute earned income. (Revenue Act of 1926, ch. 27, 44 Stat., 9; section 209(a), U. S. C. App., title 26, sections 940, 954, 955; section 213; section 214(a); Revenue Act of 1928, ch. 852, 45 Stat., 791, section 22 (a), (b), (g); section 31; section 116(a); section 119(c).)

The petitioner did not include the above-mentioned amounts in his returns, and the Commissioner made a deficiency assessment. The Board of Tax Appeals affirmed the determination of the Commissioner on the ground that the evidence did not show that the sums were "compensation for personal services actually rendered," within the statutory definition of earned income.

The Government concedes that the sums were received from sources without the United States, if they constituted compensation for services performed without the United States. (See *Ingram* v. *Bowers*, 47 Fed. (2d), 925 (S. D. N. Y.) [Ct. D. 306, C. B. X–1, 372].) But the Government contends that the petitioner rendered no services abroad; that the sums claimed represented not reasonable compensation for services rendered, but a distribution of profits; and that the Board rightly decided to this effect.

The petitioner maintains that the decision of the Board of Tax Appeals was erroneous because the Commissioner had determined, in his deficiency letters to the petitioner, that the sums in question were earned income; that this determination is presumed to be correct, and the Commissioner is estopped to deny it; that the uncontradicted and unimpeached testimony of the petitioner shows that the salaries were received as compensation for services actually performed; and that this testimony was confirmed by other evidence.

But it is settled that the findings of the Board of Tax Appeals must be accepted on appeal if there is evidence to support them. (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X–1, 264]; *Kekaha Sugar Co.* v. *Burnet*, 50 Fed. (2d), 322 (App. D. C.).) The petitioner's contention can be supported only on the theory that the Board of Tax Appeals indulged a mistaken presumption as to the correctness of the Commissioner's determination. But this contention can not be supported for several reasons.

First, because it does not clearly appear that the Commissioner determined in his deficiency letters that the sums constituted earned income. For the statement accompanying the letter relating to the 1926 and 1927 returns said: "You are advised that it is necessary that a taxpayer actually earn salaries in foreign countries when residing abroad in order that it may be exempt from income under section 213(b)14 of the Revenue Act of 1926." The statement relating to the 1928 return said: "This office holds that the salaries indicated above are not exempt under section 116(a) of the Revenue Act of 1928, and Solicitor's Memorandum 5446, V–1 Cumulative Bulletin, 49, for the reason that you, a citizen of the United States resided in France by choice, and not in connection with your duties as an officer of the above corporations." It is true that the

Commissioner allowed a credit for earned income on these amounts. Yet the statement of his reasons for denying the exemption is so ambiguous as to negative an inference that such statement was a determination that the sums constituted earned income, but could not be exempted because earned within the United States.

Second, it does not appear that the Board of Tax Appeals gave controlling weight in its decision to a presumption in favor of the determination by the Commissioner that the sums were not exempt.

Third, such a presumption would have been proper even if the Commissioner advanced before the Board of Tax Appeals a reason why the amounts were not exempt which he had not assigned in his deficiency letters. The question of the effect of a change in argument by the Commissioner upon the presumption in favor of his determination of taxability has been considered in at least three circuits. In each it was held that the presumption persists, since it is the Commissioner's determination of taxability and not his reasoning which is presumed to be correct. See *Crowell* v. *Commissioner* (62 Fed. (2d), 51) (C. C. A. 6), where the deficiency letter indicated that the determination of value of stock received as compensation was based on the existence of readily realizable market value, while the decision in the Board of Tax Appeals rested on the ground that such value was immaterial. See *Alex Sprunt & Son* v. *Commissioner* (64 Fed. (2d), 424) (C. C. A. 4), involving the deduction of commissions as an ordinary and necessary expense; the Commissioner disallowed part of the amounts on the ground that they were not reasonable, while the decision in the Board of Tax Appeals was upon the ground that they were a distribution of profits. See also *J. & O. Altschul Tobacco Co.* v. *Commissioner* (42 Fed. (2d), 609) (C. C. A. 5), where the Commissioner found that the corporation did not have a merely nominal capital because it owned a one-half interest in a farm, while the Board of Tax Appeals relied upon the ground that the corporation had a cash surplus which was capital within the meaning of the statute. Compare also *Darcy* v. *Commissioner* (66 Fed. (2d), 581) (C. C. A. 2) [Ct. D. 814, C. B. XIII–1, 238], where the court said: "The burden is upon the petitioner to show the correct amount of the tax in order to show that the Commissioner's determination was wrong. * * * 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."

The petitioner cites a number of cases holding that where new matter is pleaded by the Commissioner the burden of proof, in respect of such matter, shall be upon him. This is the rule of practice in the Board of Tax Appeals. (*Criver Bros.* v. *Commissioner*, 10 B. T. A., 338, 350; *Schilling Grain Co.* v. *Commissioner*, 8 B. T. A., 1048, 1057; *Evangeline Gravel Co.* v. *Commissioner*, 13 B. T. A., 101, 104; *Flack* v. *Commissioner*, 26 B. T. A., 1359.) But these cases clearly demonstrate that the new matter with respect to which the burden rests upon the Commissioner is new matter pleaded to support an additional liability, rather than an additional reason for the liability previously in question. In the present case, no such new matter was pleaded, nor did the Commissioner admit in his answer any of the elements relied upon in the Board of Tax Appeals. The petitioner could not have been surprised by the argument since the statute obviously indicated the necessary elements of his case.

Thus the question reverts to the existence of evidence upon which the decision of the Board of Tax Appeals may rest. Or, as stated by Judge Learned Hand in *Jewett & Co.* v. *Commissioner* (61 Fed. (2d), 471), the question is whether the petitioner's evidence was "so compelling" that the Board should have found the facts in his favor. This petitioner's evidence was largely his own deposition upon written interrogatories, in which he stated that the sums were paid to him "for personal services performed as an officer of the companies. With respect to the first three companies he was directly responsible and handled their business affairs"; and that the services were performed in France and Monte Carlo. Concerning the sums received from Commercial Investment Trust, Inc., in response to the question, "State in some detail the nature of the services which you rendered to this corporation," he testified:

"I am acting in the capacity of their representative in France."

Other evidence was in the form of a written stipulation of facts signed by counsel for both parties. But the whole evidence falls far short of being so compelling that the Board of Tax Appeals should have found the facts in favor of the petitioner. It neither reveals the nature and extent of the business

activities of the corporations abroad, nor the nature and extent of the petitioner's services in connection therewith. His own testimony might be regarded as evasive, and is certainly uninformative touching the ultimate fact which he was obliged to establish, and without supporting facts upon which to rest his conclusion. And the Board was entitled to make its own decision from all the evidence before it, including the petitioner's.

He cites many cases holding that it is error to reject uncontradicted and unimpeached testimony. (*Dempster Mill Manufacturing Co.* v. *Burnet*, 60 App. D. C., 23, 46 Fed. (2d), 604; *Bijur* v. *Bendix*, 52 App. D. C., 240, 285 Fed., 974; *Storck* v. *Reichhelm*, 44 App. D. C., 438, 443; *Boggs & Buhl* v. *Commissioner*, 34 Fed. (2d), 859; *Jewett & Co.* v. *Commissioner*, 61 Fed. (2d), 471; *Lunsford* v. *Commissioner*, 62 Fed. (2d), 740; *Planter's Operating Co.* v. *Commissioner*, 55 Fed. (2d), 583; *Toledo Grain & Milling Co.* v. *Commissioner*, 62 Fed. (2d), 171; *Rookwood Pottery Co.* v. *Commissioner*, 45 Fed. (2d), 43; *Pioneer Pole & Shaft Co.* v. *Commissioner*, 55 Fed. (2d), 861; *Nichols* v. *Commissioner*, 44 Fed. (2d), 157; *Chicago Railway Equipment Co.* v. *Blair*, 20 Fed. (2d), 10.)

The Government cites a number of cases deciding that the Board may reject opinion testimony and reach its own conclusion from the facts. (*Gloyd* v. *Commissioner*, 63 Fed. (2d), 649 (C. C. A. 8); *Bourne* v. *Commissioner*, 62 Fed. (2d), 648 (C. C. A. 4) [Ct. D. 754, C. B. XII–2, 200]; *Adams* v. *Commissioner*, 65 Fed. (2d), 262 (C. C. A. 5), certiorari denied October 9, 1933; *Fidelity Title & Trust Co.* v. *Commissioner*, 64 Fed. (2d), 52 (C. C. A. 3); *Uncasville Manufacturing Co.* v. *Commissioner*, 55 Fed. (2d), 893 (C. C. A. 2), certiorari denied, 286 U. S., 545; *Grand Rapids Store Equipment Corporation* v. *Commissioner*, 59 Fed. (2d), 914 (C. C. A. 6); *Keystone Steel & Wire Co.* v. *Commissioner*, 62 Fed. (2d), 458 (C. C. A. 7).)

But the finding of the Board of Tax Appeals in the present case was not so much a disregard of the petitioner's evidence as a decision that upon all the facts and circumstances of the case the petitioner had not proved that he performed personal services abroad for the corporations. This conclusion is not affected by the fact that the corporations themselves deducted the amounts in question in their own returns as compensation paid to the petitioner. Self-serving evidence derived from another taxpayer need not be accepted as controlling in the present case. And in the converse situation it has been held that the failure of a corporation to deduct certain amounts as compensation to employees does not require a finding that these amounts when received by the employees were gifts rather than earnings. (*Bass* v. *Hawley*, 62 Fed. (2d), 721 (C. C. A. 5) [Ct. D. 693, C. B. XII–2, 169].)

2. Gambling Losses.

The conclusion reached on the first question goes far toward deciding the second, respecting the deductibility of the petitioner's gambling losses, which are claimed in the amounts of $11,300, $9,000, and $9,804 for 1925, 1926, and 1927, respectively. The petitioner makes a similar contention here with respect to the presumption attaching to the Commissioner's finding, on the ground that the deficiency letters indicated that the reason for the assessment was the failure to present proof of the amounts involved rather than a failure to show that the transactions were entered into for profit. But for the reasons previously stated, we are of opinion that the presumption of the correctness of the Commissioner's determination of taxability is not lost because the reason advanced in support thereof changes. The question here again is whether the evidence was so compelling that the Board of Tax Appeals should have found the fact in favor of the petitioner. No evidence was presented directly bearing on the question as to whether or not this gambling was undertaken for profit. The petitioner argues that there is a presumption that gambling transactions are entered into for profit, and cites *Heiner* v. *Tindle* (276 U. S., 582 [T. D. 4212, C. B. VII–2, 272]). That case involved the question whether a house originally built as a dwelling but subsequently rented for profit, if finally sold at a loss, may have such loss deducted as occurring in a transaction entered into for profit. The case presented the meaning of the phrase "any transaction" rather than the necessity of proving the profit motive. It was conceded that, from the time of rental, the house was devoted to a use for profit, and the court held that the previous acquisition of the property for what may have been a nonprofit purpose did not defeat the right of the taxpayer to claim a loss upon the sale after the property had been rented for profit during 19 years. No case has been cited which holds that gambling transactions are pre-

sumed, for tax purposes, to be entered into for profit. In the present case they may have been entered into, as the Board of Tax Appeals suggests, for sport, amusement, or pastime, and in the absence of evidence on this issue, the petitioner can not claim the loss, for the fact that the transactions were entered into for profit is an essential element in claiming a deduction for such a loss. (See *Heiner* v. *Tindle*, supra; *Goldsborough* v. *Burnet*, 46 Fed. (2d), 432 (C. C. A. 4); *Dresser* v. *United States*, 55 Fed. (2d), 499 (Ct. Cl.) [Ct. D. 503, C. B. XI-1, 267].)

The decision of the Board of Tax Appeals is affirmed.

ARTICLE 643: Compensation of State officers and employees.

REVENUE ACT OF 1928.

Compensation for services rendered as public administrator. (See G. C. M. 14116, page 102.)

SECTION 117.—NET LOSSES.

ARTICLE 651: Net losses, definition and computation. XIV-9-7341 Ct. D. 927

(Also Section 275, Article 1201.)

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

1. DEDUCTION—NET LOSS—SUCCESSOR CORPORATION.

A corporation created on February 21, 1928, to take over the assets and liabilities of another corporation may not deduct from its net income for the portion of the taxable year succeeding the transfer a net loss sustained by its predecessor in the first two months of the year. *New Colonial Ice Co., Inc.*, v. *Commissioner* (292 U. S., 435 [Ct. D. 841, C. B. XIII-1, 194]), followed.

2. STATUTE OF LIMITATIONS—SUFFICIENCY OF RETURN.

A return for the year 1928 filed by a corporation created on February 21, 1928, which included but did not segregate the operations of the predecessor corporation for the first two months of the year, is not a sufficient compliance with the provisions of section 52(a) of the Revenue Act of 1928 to start the running of the statute of limitations provided in section 275 of that Act.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 102) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied November 5, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

The Cem Securities Corporation, petitioner, v. Commissioner of Internal Revenue, respondent.

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER and SOPER, Circuit Judges, and COLEMAN, District Judge.

[June 29, 1934.]

OPINION.

SOPER, Circuit Judge: This petition to review involves deficiencies in income tax for the year 1928 in the amount of $31,752.31. The questions at issue are (1) whether the taxpayer, a Delaware corporation, had the right to deduct

from its income for the period February 21 to December 31, 1928, a net loss suffered by a preceding New York corporation in the earlier portion of the year; and (2) whether the income tax return filed by the taxpayer for the year 1928, including, but not segregating the operations of its predecessor for the first two months of the year, was a sufficient compliance with the requirements of the Revenue Act of 1928 to start the running of the statute of limitations.

The petitioner was created as a Delaware corporation on February 21, 1928, under the name of Cem Securities Corporation, to take over the assets and liabilities of a New York corporation of the same name which was organized prior to January 1, 1928. On the later date, upon authorization of the respective stockholders of the two corporations, all the assets of the New York corporation were transferred to the petitioner (except the sum of $13,178.05 retained for the payment of certain New York taxes), in consideration of its assumption of all the liability of the New York corporation. The change from a New York to a Delaware corporation was made because the corporate taxes, under the laws of Delaware, were less than those under the laws of New York. There was no change in the assets and liabilities except for the small amount retained to pay the New York taxes, and this was in effect no change, for if the taxes had not been paid before the dissolution of the New York corporation, the new Delaware corporation would have had to pay them. There were no changes in the stockholders.

On March 13, 1929, the Delaware corporation filed a document purporting to be a Federal income tax return for the calendar year 1928. The return was headed "Corporation Income Tax Return for Calendar Year 1928," "The Cem Securities Corporation (A Delaware Corporation)," "Date of Incorporation 2/21/28." In answer to a question on the first page, it was stated that the document was not a consolidated return of two or more corporations. The affidavit was executed by the president and assistant treasurer of the corporation for which the return was made, and the letter of transmittal stated that the return of the Delaware corporation for the year 1928 was inclosed, showing a deficit of $38,428.27. On the other hand, that part of the return entitled "Schedule K—Balance Sheets" purported to show the assets and liabilities for the beginning of the taxable year 1/1/28 and the end of the taxable year 12/31/28, and at the top of the page, on which this schedule appeared, the name of both corporations were set out as follows: "The Cems Securities Corporation of New York" over the caption, "Beginning of taxable year," and "The Cem Securities Corporation of Delaware," over the caption "End of taxable year." The return also showed that the taxpayer did not file a return under the same name for the preceding taxable year, and that it was the continuation or reorganization of a business since December 31, 1927, through the cancellation of a New York State charter for a Delaware charter without other change. There is no dispute in the case that one reading the return would be led to the conclusion that it covered the activities of both corporations during the taxable year. No segregation of any of the items of income or deduction respectively pertaining to the two corporations, however, appeared in the return; and in computing the deficit shown by the return the petitioner used as a deduction a net loss of $73,715.18 sustained by the New York corporation in the period from January 1 to February 20, 1928.

Certain entries made on the face of the return after it was filed indicated that it was reviewed in the preliminary audit section of the Bureau of Internal Revenue on July 12, 1929. The Commissioner of Internal Revenue on March 29, 1930, sent a form letter to the taxpayer to the effect that its return for the year 1928 had been examined and was considered to be correct, but that the Bureau would be obliged to redetermine the tax liability, should subsequent information be received which would materially change the amount reported.

The deficiency notice from the Commissioner to the taxpayer was sent on March 7, 1932, and received on March 8, 1932. It was stipulated by the parties that there is a deficiency in the income tax of the petitioner for the calendar year 1928 in the sum of $31,752.31, if it be determined from the facts that the statutory period for assessing the deficiency had not expired. That period is fixed as two years by section 275 of the Revenue Act of 1928. The Commissioner determined that the deficiency existed, disallowing the deduction of the net loss sustained by the New York corporation in the first part of the year, and upon appeal, the Board of Tax Appeals affirmed his determination, holding that the purported return was insufficient to put the statute of limitations in motion.

It is not entirely clear that the deduction of the loss of the New York corporation accounts for the entire deficiency of $31,752.31; but it may be conceded that such is the case for our present purposes, for the first contention of the petitioner that it had the right to offset the 2 months' net loss of the New York corporation against the 10 months' net income of the Delaware corporation can not be sustained, in view of the decision of the Supreme Court in *New Colonial Ice Co., Inc.*, v. *Commissioner of Internal Revenue* filed on May 28, 1934 [Ct. D. 841, C. B. XIII–1, 194]. It was there held that a new corporation, organized to take over the assets and business of an older corporation in order to be free from certain difficulties attending the old one, may not deduct from its net income net losses sustained by the older corporation in a preceding period, although the two corporations had the same capital structure and the stock of the new corporation was distributed among the stockholders of the old, share for share. See also the decision of this court rendered this day in *May Oil Burner Corporation* v. *Commissioner of Internal Revenue*.

The question of limitations depends on whether the return filed by the taxpayer on March 13, 1929, may be considered a return within the meaning of section 52 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791), because the limitation of two years, within which an assessment of income taxes must be made under section 275 of that Act, runs from the filing of the return. Section 52(a) requires every corporation, subject to taxation, to make a return, sworn to by certain officers of the company, and stating specifically the items of the gross income and the deductions and credits allowed by the Act. Section 54(a) requires every taxpayer to keep such records, render under oath such statements, make such returns, and comply with the rules and regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury. Treasury Regulations 74, promulgated under the Act, provides in article 391 that a corporation, having an existence during any portion of the taxable year, shall make a return, and that upon liquidation or dissolution of a corporation, it shall show, amongst other things, in its final return, the date and manner of dissolution, and the name and address of every person receiving assets therefrom. (See the text of the statutes and regulation in the margin.[1])

It is obvious that these statutes and regulations, as applied to the circumstances of this case, contemplate a separate return from each corporation for the portion of the year of its existence. The taxpayer, nevertheless, contends that the return filed by the Delaware corporation in this case substantially meets the requirements of the law. It urges that the return specifically sets forth the items of income, deduction and credit of the taxpayer, because these items, although mingled with similar items of the New York corporation, were nevertheless set forth in the return; and that a document filed by a taxpayer, although inaccurate in some particulars, is nevertheless a return if it is filed honestly and in good faith, because the law makes provision for the auditing of returns and for the examination of the books and records of the taxpayer

---

[1] SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By taxpayer.*—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two 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 such period.

Treasury Regulations 74 (promulgated under the Revenue Act of 1928):

ART. 391. *Corporation returns.*—Every corporation not expressly exempt from tax must make a return of income, regardless of the amount of its net income. In the case of ordinary corporations, the return shall be on Form 1120. * * * A corporation having an existence during any portion of a taxable year is required to make a return. * * * Upon liquidation or dissolution of a corporation there shall be attached to the final return a statement showing: (1) The date and manner of dissolution, (2) the name and address of each shareholder at dissolution and the number and par value of the shares of stock held by each of them, (3) a description and the value of the liquidating assets received by each shareholder, (4) the name and address of each individual or corporation other than shareholders and creditors, if any, that received assets at dissolution, (5) a description and the value of the assets received by each such individual or corporation, and (6) the consideration, if any, paid by each of them for the assets received.

from which any inaccuracy will be revealed. So it is said that an audit of the petitioner's records would have disclosed that the items in its return included income, deductions and credits of the New York corporation, and would have led to a correction of the error. The fact that the Bureau of Internal Revenue acknowledged receipt of the document as the taxpayer's return for the year 1928, and made certain audits or inspections thereof on July 12, 1929, and that March 29, 1930, is urged as indicating that on the dates mentioned within the statutory period of limitations the Commissioner assumed an attitude inconsistent with its present position that no return recognized by the law had been made. Reference is made to *United States* v. *Mabel Elevator Co.* (17 F. (2d), 109) and *Valentine-Clark Co.* v. *Commissioner* (52 F. (2d), 346), wherein it was held that an inaccurate return is not necessarily a nullity; and that if a taxpayer makes an honest return which he believes to be in conformity with the law, limitations run from the filing thereof, although the return may be defective in some particular, as, for instance, in claiming an excessive exemption or in being filed for a fiscal instead of a calendar year.

We think, however, that the defect in the return was so fundamental that this argument can not prevail. It may be conceded, notwithstanding some indications to the contrary on the face of the return, that it purported to show the combined income and expenses of the two corporations which successively conducted the business during the taxable year. But it did not even purport to show separately the operations of each corporation. It therefore did not comply, or attempt to comply, with the mandate of section 52(a) of the Act that every corporation subject to taxation under the Act shall make a return, stating specifically the items of the gross income and the deductions and credits allowed by the law. On the contrary, credit for a deduction due one corporation was taken by another, and thereby was frustrated the very purpose of the Act to make available to the Commissioner information from which he could test the correctness of the amount of the tax shown by the return.

The decisions of the Supreme Court emphasize clearly that it is essential to comply with the requirements of the statute governing returns in order to get the benefit of the limitation provisions. It was held in *Lucas* v. *Pilliod Lumber Co.* (281 U. S., 245 [Ct. D. 266, C. B. IX–2, 396]) that the period of limitations under the Revenue Act of 1918 did not begin from the time of the filing of a return not verified by the proper corporate officers of the taxpayer as required by section 239 of that Act. The court said (page 249):

"Under the established general rule a statute of limitation runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. No officer had power to substitute something else for the thing specified. The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in *Florsheim Bros., etc.*, v. *United States*, supra."

In the case of *Florsheim Bros.* v. *United States* (280 U. S., 453 [Ct. D. 167, C. B. IX–1, 260]), the court held that the tentative return devised by the Commissioner of Internal Revenue to meet the emergency caused by the fact that the Revenue Act of 1918 was not approved until February 24, 1919, and yet required returns on or before March 15, 1919, was not a return which would start the period of limitation for the assessment of taxes under the Act. In discussing the contentions of the taxpayer in that case, somewhat analogous to those advanced by the taxpayer here, the court said (page 459):

"We are of opinion that the filing of the document known as Form 1031T, duly executed, did not start the running of the period of limitation. Form 1031T is not an instrument expressly provided for in the Act. It is not in the nature of a 'list,' 'schedule,' or 'return,' commonly required by tax statutes. It was an invention of the Commissioner designed to meet a peculiar exigency. Its purpose was to secure to the taxpayer a needed extension of time for filing the required return, without defeating the Government's right to prompt payment of the first installment. As Form 1031T made no reference to income, or to deductions or credits, it could not have been intended as the return 'stating specifically the items of * * * gross income, and the deductions and credits'—the return required to satisfy the statute.

"Section 3182 of the Revised Statutes (U. S. C., title 26, section 102) provides that the Commissioner shall 'make the inquiries, determinations, and assess-

ments of all taxes * * * and shall certify a list of such assessment * * * to the proper collectors.' Section 250(b) of the 1918 Act required that 'as soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed.' It was to serve these purposes that section 239 required all corporations to make returns 'stating specifically the items of * * * gross income and the deductions and credits.' The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer. And, in providing that the period of limitation should begin on the date when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner. Form 1120 provided for furnishing the data which would enable the Commissioner to make a determination, assessment, and recomputation. Form 1031T furnished no data which could, in any way, aid him in that connection. It is true that even the complete return on Form 1120 need not be accepted by the Commissioner as the sole basis for the determination of the amount of the tax. Assessments are frequently based on audits of the Income Tax Unit. However, the purpose of these audits is not to eliminate the necessity of filing the return, but to safeguard against error or dishonesty.

"The word 'return' is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under section 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period. But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with section 239. And, to have that effect it must honestly and reasonably be intended as such. There is not a pretense of such purpose with respect to Form 1031T." (Page 462.)

(See also *Commissioner* v. *Stetson & Ellison Co.*, 43 F. (2d), 553–554; *Lucas* v. *Colmer-Green Lumber Co.*, 49 F. (2d), 234; *Myles Salt Co., Ltd.*, v. *Commissioner*, 49 F. (2d), 232; *United States* v. *National Tank & Export Co.*, 45 F. (2d), 1005 [Ct. D. 319, C. B. X–1, 420]; *Paso Robles Mercantile Co.* v. *Commissioner*, 33 F. (2d), 653.)

It is the duty of the Commissioner, under the Act of 1928, as under the earlier statutes, to examine a return as soon as practicable after it is filed (section 57 of the Revenue Act of 1928, 45 Stat., 810), and to make assessment of taxes. The returns required by all of the Revenue Acts were designed to serve this end. We do not regard the return in the pending case as one which, despite inaccuracies, may be accepted as a substantial compliance with the Act, but as one which fails completely in an essential element, and did not set in motion the running of the period of limitations.

The decision of the Board of Tax Appeals is affirmed.

SECTION 118.—LOSS ON SALE OF STOCK OR SECURITIES.

ARTICLE 661: Losses in connection with sale and repurchase of securities. XIV–19–7480 I. T. 2890

REVENUE ACT OF 1928.

Where a taxpayer acquires stock through the exercise of subscription rights and within 30 days after such acquisition sells an equal number of shares of the stock with respect to which the rights were issued, the wash sales provisions of section 118 of the Revenue Act of 1928 are applicable.

Advice is requested whether the wash sales provisions of the Revenue Act of 1928 are applicable where a taxpayer acquires stock through the exercise of subscription rights and within 30 days after such acquisition sells an equal number of shares of substantially identical stock held prior to the receipt of the rights.

In 1929 the taxpayer, by virtue of the ownership of $14x$ shares of certain stock, acquired the right to subscribe for $7x$ shares of substantially identical stock in the same company. The rights to subscribe were exercised in that year. Within 30 days after the exercise of the rights, $7x$ shares, identified as part of the original $14x$ shares, were sold at a loss, which was disallowed on the ground that the transaction came within the provisions of section 118 of the Revenue Act of 1928. That section reads in part as follows:

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within 30 days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23(e)2 of this title: * * *.

If a person subscribes for new stock, pursuant to rights or otherwise, to replace other stock sold or intended to be sold at less than cost, there is as much reason for application of the wash sales provisions as though the replacement stock had been purchased in the open market. The fact that the principal motive for a stock subscription is not the replacement of stock which has been sold to realize a loss but is the desire to take advantage of a low price does not affect the status of the transaction. All purchases of substantially identical stock within the specified time are within the rule.

It is, therefore, held that the wash sales provisions of the Act are applicable whether substantially identical stock is acquired by subscription for new stock or by the purchase of old stock.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 142.—CONSOLIDATED RETURNS OF CORPORATIONS—TAXABLE YEAR 1928.

ARTICLE 734: Consolidated net income of affiliated corporations for 1928. XIV-3-7258 Ct. D. 909

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

1. DEDUCTION—NET LOSS—AFFILIATED CORPORATIONS—INTERCOMPANY TRANSACTIONS.

Where the taxpayer, a corporation affiliated with another, filed a single return of consolidated income for each of the years 1926, 1927, and 1928, showing a loss to the taxpayer in 1926 greater than its income for 1927 and 1928, and a loss to the affiliate in 1926 less than the subsequent two years' income, and where a portion of the affiliate's income for 1928 resulted from intercompany transactions, the corporations should be deemed separate entities for the purpose of applying the net loss provisions of the statute and the intercompany transactions should not be eliminated, since, under *Woolford Realty Co.* v. *Rose* (286 U. S., 319 [Ct. D. 493, C. B. XI-1, 154]), the power to carry over a loss from an earlier to a later year can be used only against the separate income of the affiliate which suffered the loss.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (28 B. T. A., 26) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Post & Sheldon Corporation, respondent.*

Appeal by the Commissioner from an order of the Board of Tax Appeals expunging a deficiency in income taxes.

Before MANTON, L. HAND, and AUGUSTUS N. HAND, Circuit Judges.

[June 18, 1934.]

OPINION.

L. HAND, Circuit Judge: This appeal involves a deficiency fixed by the Commissioner in the respondent's income tax for its fiscal year ending October 31, 1928. The facts are as follows: During the years 1926, 1927, and 1928, the respondent was a corporation affiliated with a subsidiary through ownership of all its shares. It filed a single return of the consolidated income of both for each of the three years. The loss of the respondent in 1926 was $183,173.28, of the subsidiary $6,053.88; in 1927 the respondent had an income of $55,946.37, the subsidiary of $5,207.14; in 1928, their incomes were $9,993.90 and $9,377.80 respectively. In 1928 the subsidiary performed services for the respondent "in the amount of" $57,413.85 and at a cost to itself of $50,636.70; it thus made a profit of $6,777.15 out of the respondent; it also received $540 from it as interest upon loans. In the respondent's income for 1928, as just given, these items were included as deductions, and in the subsidiary's as charges; thus if all "intercompany transactions were excluded, the respondent's income for that year would have been $17,311.05 and the subsidiary's, $2,060.65. Under *Woolford Realty Co.* v. *Rose* (286 U. S., 319), the power to carry over a loss from an earlier to a later year can be used only against the separate income of each affiliate, and "intercompany transactions" may thus become important. In the case at bar, for example, if such transactions be eliminated and the respondent's income be thereby increased by $7,317.15, its loss for 1926, would nevertheless still absorb the sum of its incomes for 1927 and 1928. On the other hand the loss which the subsidiary could carry over from 1927 to 1928, would still be less than its income for that year, even after that were reduced by the same amount; it would lose no part of its separate deduction. Thus it became necessary to decide the issue. The Commissioner held that "intercompany transactions" should not be eliminated; the Board that they should; and the Commissioner appealed.

Article 734 of Regulations 74 (Act of 1928) provides that the consolidated taxable income of affiliates shall be their combined income, "subject * * * to the elimination of intercompany transactions." Except for the fact that all such transactions might not always be closed in the same year, it would make no difference for most purposes whether or not they were included. The gain of one affiliate would be the loss of another, and taking one year with another the result would be the same. It was a reasonable regulation to eliminate them at once as they occurred, rather than to treat them as several, and as canceling each other only when they happened to be closed in the same year. But there are occasions when affiliates, despite their consolidation, must still be treated as separate entities, and indeed it is never a priori necessary to treat them otherwise. (*Burnet* v. *Aluminum Co.*, 287 U. S., 544 [Ct. D. 631, C. B. XII-1, 283].) One such occasion is when they can not agree to the division between them of the single tax levied on their joint income, in which case it is to be divided "on the basis of the net income properly assignable to each." In that division, "intercompany transactions" should be included, because affiliates are always separate taxpayers, and because their corporate individuality has been preserved for some deliberate purpose. For instance, it might happen that the whole of the combined income was profits made by one affiliate in sales to another which had itself sold at cost. The first ought to bear the whole tax, and for purposes of the division the incomes would be stated without regard to affiliation.

It appears to us that the situation before us is another such occasion, and that the power to carry over a loss from earlier years should be exercised upon the income of each affiliate computed separately; this because the loss can be used only as an offset against the separate income of the affiliate who suffers it. Were it applicable "horizontally," that is, to the joint income for the following year, this would not be true; it would then be a power to be exercised

as an item in a computation of the joint income from which all "intercompany transactions" would be eliminated. But being a several power only, the income against which a loss can be carried over ought to be computed in conformity with that hypothesis which alone allows it to be carried over at all. Possibly this in the end has nothing better to commend it than consistency, and that is not imperative. Indeed in recent discussions a desire for consistency appears at times to be regarded as a discreditable disposition. That is not true; some such pretension is a condition upon any jurisprudence which can be stated generally; and the implications from its entire absence would be far-reaching. It appears to us that the language of the regulations must be read in subjection to the limitations already imposed upon the "carry-over" sections; and that the position of the Treasury is a corollary of the decision in *Woolford Realty Co.* v. *Rose*, supra (286 U. S., 319).

Order reversed; deficiency restored.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 167.—INCOME FOR BENEFIT OF GRANTOR.

ARTICLE 881: Income of trusts taxable to grantor. XIV-4-7274
Ct. D. 913

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

1. INCOME—TRUST—INCOME IN LIEU OF ALIMONY—TAXABLE TO CREATOR OF TRUST.

A taxpayer who created a trust estate, the income from which was to be paid to his divorced wife in lieu of alimony and any other interest in his property or estate, is taxable upon such income, the payments therefrom being of direct benefit to him in the discharge of a legal obligation which he was bound to fulfill, under the decree of the court.

2. CERTIORARI DENIED.

Petition for certiorari denied January 7, 1935.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Levi M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, appellant, v. *Edward B. Douglas, appellee.*

Appeal from the District Court of the United States for the District of Minnesota.

[September 10, 1934.]

OPINION.

STONE, Circuit Judge, delivered the opinion of the court.

This is an appeal by the collector from a judgment according refund of income taxes.

On the 15th of September, 1923, a decree of divorce was entered in favor of Ida M. Douglas, wife of Edward Bruce Douglas, appellee. Three days prior thereto, the above parties and the Minneapolis Trust Co. entered into a trust agreement whereby appellee deposited certain securities of par or estimated value of $300,000 with the trust company as trustee and further provided for the delivery to the trustee, on November 6, 1927, of further property to be received from his father's estate. The trustee was given full power of control, reinvestment, and change of the securities in the trust fund "subject, however, to the consent and approval" of appellee and the further right in appellee to designate and determine investments subject to the approval of the trustee (acting in that respect for the wife as to the reasonable safety and adequate income producing nature of the securities). The declared purposes of the trust

were to pay to the wife during her life, from the income of the trust estate, $15,000 annually from September 1, 1923, to November 6, 1927, and thereafter $21,000 annually, with a provision that in case the net income from the trust fund should not prove sufficient to make any of the above payments the husband, upon request, should make good such deficiency or, in default thereof, the deficiency should be made up from the principal of the trust fund. In case the net income from the trust fund should exceed the annual payments required the trustee should pay such excess to the husband or his successors, subject to the right of the trustee to reserve therefrom reasonable amounts to fairly insure the prompt meeting of future payments to the wife. "Net income" is defined as meaning income from the trust fund exclusive of profits from sale of items in the fund and exclusive of stock dividends (these exceptions to become a part of the principal of the trust fund) and less income tax paid by the trustee. Power to change the trustee is reserved to the appellee and his successors. The trust is to terminate at the death of the wife and the principal of the trust fund then to revert to appellee or his successors. Another provision is as follows:

"It is expressly agreed by and between the parties hereto, and more especially by the party of the second part, that the provisions herein made for her are in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate of the party of the first part, and in lieu of any and all claims for separate maintenance and allowance for her support."

Besides dissolving the marriage, the decree of divorce provides:

"It is further adjudged and decreed that the defendant provide and create the trust fund as set out in that certain agreement between said parties and the Minneapolis Trust Co. as trustee now on file with said trustee, and that the plaintiff have the provision therein made in lieu of all other alimony or interest in the property or estate of the defendant and that neither party have any costs or disbursements herein."

In his individual income tax returns for the years 1927 and 1928, appellee omitted income realized by the trust estate and paid to the wife thereunder. A redetermination by the Commissioner resulted in the inclusion of this item in each of those years and the tax thereon was paid under protest. Thereafter, proper demand for refund was made and this action seasonably brought. With a small reduction in the tax for 1928, which reduction is not in question here, the court adjudged recovery of the tax paid on account of the inclusion of this item in the above two years. As the matter comes here, the only thing involved is the propriety of including such income from the trust estate in the personal income taxable to appellee.

One contention of the Commissioner is that the entire income from this trust is taxable to the creator thereof because, under its terms, the trust estate is to revert to the creator after it has served the purpose of its creation and also the creator is entitled to the surplus annual income of the trust above the required payments to the wife. We do not see why either or both of these provisions should, of themselves, have such result, however they may bear upon the main contention in this appeal, hereafter to be examined.

The bald fact that after an irrevocable trust has served its purpose, the trust estate is to revert to the creator does not, without more, make the income during the trust period that of the creator for tax or any purposes. The statute is aimed at taxation of *income*. It expressly recognizes trust estates as taxable entities and specifically points out the trustee or the beneficiary as the taxpayer for incomes from such estates. If the creator of the trust is beneficially entirely separated from that income under all allowable tax considerations, he is as though a total stranger thereto. The duration of the trust and the disposition of the corpus at the termination of the trust are, of themselves alone, usually quite immaterial. Also, it is unimportant, of itself, that the surplus income of a trust goes to the creator. If a well disposed person desiring to assure the proper education of the child of a friend by providing an annual fund therefor of $1,000 should create an irrevocable trust of $25,000 with provisions that at the end of 10 years the trust should terminate and the corpus return to him and that during the trust any annual income above $1,000 should be paid by the trustee to him, it would require an inescapably clear expression of congressional intent to believe that a statute meant to tax, as income to the creator during the trust, anything beyond the actually accruing annual surplus income and, if such construction were compelled, the validity of such an imposition would be widely open to question.

The main and more serious contention of the Commissioner is that the creator of this trust is taxable for the income therefrom because that income is "used to pay a legal and adjudicated obligation which he owed, and in so doing conferred the benefit upon him." The argument is that the trust was created to provide an income in lieu of alimony or other interest in his estate and was, by the court granting the divorce, specifically decreed in lieu thereof. Therefore, it is said to follow that since this trust was created to meet a personal and legal obligation he was bound to fulfill and since the income therefrom was devoted to that purpose, it was so used for his benefit as to constitute it his income.

In efforts to avoid income or estate taxes, various devices have come to the courts. From decisions thereon has evolved the general rule that where the creator receives "the substance of enjoyment" (*Burnet* v. *Wells*, 289 U. S., 670, 677 [Ct. D. 688, C. B. XII–1, 261]) of the income it is regarded as his for taxation purposes. Instances where such enjoyment has been held to exist are contracts for assignments of income (*Lucas* v. *Earl*, 281 U. S., 111), assignments of future income (*Burnet* v. *Leininger*, 285 U. S., 136), contracts for payment of obligations of the taxpayer by another (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716 [Ct. D. 80, C. B. VIII–2, 222]; *United States* v. *Boston & Maine R. Co.*, 279 U. S., 732 [Ct. D. 73, C. B. VIII–2, 315]); and payment of premiums of insurance on the life of the taxpayer from income of a trust created by him which was revocable (*Du Pont* v. *Commissioner*, 289 U. S., 685 [Ct. D. 687, C. B. XII–1, 259]) or irrevocable (*Burnet* v. *Wells*, 289 U. S., 670).

Among the devices employed to avoid income and estate taxes none has been more used than trusts dealing with members of a family and the courts have been alert to prevent such avoidance by this means. The question here is whether this trust is of that character—irrespective of whether tax avoidance was an impelling motive or was not. In determining this it is the effect upon rather than the motive of the creator in forming the trust. In the majority opinion in *Burnet* v. *Wells* (289 U. S., 670), the validity of a statutory requirement (section 219(h), Revenue Acts of 1924 and 1926) that insurance premiums on the life of the creator paid from the trust were taxable to him as income was upheld because there was recognized a benefit to the creator there from the performance of a pressing social duty and a usual manner of providing for dependents (page 681). The dissent was grounded on the view that the benefit to the creator must be "something more tangible than a purpose to perform a social duty, or the recognition of a moral claim as distinguished from a legal obligation" (page 683); and that "the distinction to be observed is between the devotion of income to payments which the settlor is bound to make, and those which he is free to make or not make, as he may see fit" (page 684).

The contention here by the Commissioner is that the income of this trust was employed to meet a legal obligation which appellee was bound to make. Whether this was the character of this trust is the determining problem. Before divorce, the legal obligation to provide maintenance for his wife rested upon appellee. Whether that obligation would continue after divorce would depend solely upon the orders of the court granting the divorce. As is not unusual, the parties agreed to a disposition having this situation in view. That disposition was clearly, as revealed in its terms, solely for the purpose of providing an annual *income* for the wife after divorce. It was not a transfer of title to property to the wife in lieu of what the court might order as alimony. The main practical and economic differences between this arrangement and one for decreed or agreed annual alimony payments by appellee are that it segregated a definite portion of his property to which alone the wife could look for annual income from her former husband and made the amount of income to her largely dependent on the income from his property. The purpose and effect of this arrangement was to provide a substitute for alimony. This effect became a finality when the decree of divorce specifically provided that appellee should "provide and create" the above trust fund and that the wife "have the provision therein made in lieu of all other alimony or interest in the property or estate" of appellee.

The only thing the wife received was *income* from the trust estate. She received this only because it was "in lieu of all other alimony" or interest. The trust was created for the sole purpose of furnishing such income. Its function was to provide a method of paying alimony. The payment of alimony

was ordered and this method prescribed by the court. The payment of alimony in this form was a legal obligation which appellee was bound to meet. This took the form of "income." It was taxable as income. It was taxable (under either opinion in *Burnet* v. *Wells*, supra) to appellee because it directly benefited him by discharging a legal obligation he was bound to perform.

The judgment should be reversed and remanded with instructions to proceed in accord with this opinion.

SUPPLEMENT E.—PARTNERSHIPS.

SECTION 182.—TAX OF PARTNERS.

ARTICLE 901: Partnerships. XIV-10-7354
(Also Section 22(a), Article 58.) Ct. D. 930

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

1. INCOME—DISTRIBUTIVE SHARE OF SYNDICATE PROFITS—SIMILARITY OF SYNDICATE AND PARTNERSHIP PROFITS—TAXABLE WHETHER DISTRIBUTED OR NOT.

Where the taxpayer was a member of a stock trading syndicate which ceased to operate in November, 1928, but did not make final determination or distribution of profits until February, 1929, his distributive share of such profits was properly included in his gross income for 1928. The relation of the members to undistributed profits was similar to that of partners to partnership profits which, under section 182 of the Revenue Act of 1928, are required to be included in gross income whether distributed or not.

2. SALE OF UNIDENTIFIED SHARES OF STOCK—FINDING OF BOARD OF TAX APPEALS CONCLUSIVE.

The finding of the Board of Tax Appeals that certain shares of stock sold by a syndicate for the taxpayer's account could not be identified is conclusive, since the statements of evidence and exhibits contained in the motion for review by the Board of its decision were not authenticated nor made a part of the record before the court. On the state of facts found by the Board the net profit from the sale was properly determined by charging the stock sold against the earliest purchases of such stock, in accordance with article 58 of Regulations 74.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 276) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Henry C. Heinz, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of United States Board of Tax Appeals (district of Georgia).

Before BRYAN, FOSTER, and WALKER, Circuit Judges.

[April 25, 1934.]

OPINION.

WALKER, Circuit Judge: This is a petition for a review of the final redetermination by the Board of Tax Appeals of a deficiency of income taxes against the petitioner for the year 1928. That redetermination, so far as it is now complained of, was the result of rulings by the Board mentioned below.

The Board of Tax Appeals made findings of fact, which findings, so far as material to the questions presented, were as follows: "The petitioner * * *

made his income tax return for the taxable year 1928 on the basis of cash receipts and disbursements. * * * Early in 1928 the petitioner became a member of a syndicate or partnership organized primarily to deal in Coca-Cola stock. The members shared in the losses or profits in the proportion of their respective holdings.

"The petitioner delivered to the syndicate 1,000 shares of Coca-Cola stock, indorsed in blank or otherwise transferred to the syndicate or a nominee, and authorized the syndicate to buy and sell said stock on his account to the best advantage, solely in its discretion.

"Included in the 1,000 shares of Coca-Cola stock which the petitioner delivered to the syndicate were 100 shares which petitioner purchased in 1920 at a cost of $2,100, and also 100 shares issued to the petitioner as a stock dividend. Petitioner placed no restrictions whatever in writing on the sale or disposition of this stock, which was indorsed in blank, but understood when he turned it over that the syndicate had the right to dispose of it as it saw fit. There was no earmarking or identification whereby any of the shares delivered by the petitioner to the syndicate could be differentiated or treated differently from any other shares.

"The syndicate continued its operations until November, 1928. Its last sale was made on November 16, 1928, after which date it proceeded to wind up its affairs. On the last mentioned date the syndicate advised petitioner by letter that 800 shares of Coca-Cola stock had been sold for his account, check for the proceeds being inclosed therewith. The syndicate also advised the petitioner that 200 shares of said stock would be returned to him, and requested him to advise in whose name he wished the certificate for the 200 shares to be issued.

"On December 26, 1928, the syndicate again wrote to the petitioner, advising that it had been necessary to purchase 45 shares of Coca-Cola stock in order to deliver to him the 200 shares referred to in the prior letter, and inclosing check in settlement of those transactions. In the same letter the syndicate stated that it hoped to send petitioner a check in final settlement of 'interest and dividend adjustment' prior to January 1, 1929. Petitioner actually received a check from the syndicate on February 26, 1929, for $4,391.60 in settlement of said 'interest and dividend adjustments,' which amount respondent included in the petitioner's gross income for the taxable year 1928." The record does not contain the evidence adduced before the Board of Tax Appeals.

The Board decided that the above mentioned amount of $4,391.60, for which petitioner received a check on February 26, 1929, and which represented "interest and dividend adjustments," and was the final distribution of profits upon termination of the syndicate's operations, constituted income to the petitioner for the year 1928. In support of his challenge of that ruling the petitioner invokes the decisions in the cases of *Wild* v. *Commissioner* (62 Fed. (2d), 777) and *Glenmore Securities Corporation* v. *Commissioner* (id., 780). In the first cited case the court decided that earned, but undistributed, income of a member of an investment syndicate using contributions of its members to buy, hold, and sell securities and land, was not taxable against the member. The facts of that case are materially different from those of the instant one. The syndicate which was under consideration in that case derived its funds from the contributions of its members, those funds being made subject to use by the syndicate manager, a corporation, to buy and "manage" specified securities, and for whatever else it thought "advisable," and the syndicate was to last until the manager ended the venture at its pleasure, when it should distribute all the capital and profits, though it might make "partial distribution" earlier. The manager did not distribute all the profits made in the years in question, 1923 and 1925, and retained the undistributed profits for future investment, or eventual distribution. The facts of the other cited case were similar. In the instant case the syndicate was organized in 1928, and its operations were discontinued in November of that year. What it thereafter held was not held for future investment or trading, but was held for the purposes of settling the business of the syndicate and making distributions among its members. From the time the syndicate ceased to be a going concern, the undistributed profits were owned by the members of the syndicate, and were held by the syndicate head or manager as agent for the members. Whether the syndicate was or was not a partnership the relation of the members of

the syndicate to its undistributed profits was quite similar to that of partners to profits of the partnership. If technically a partnership relation existed among the members of the syndicate, by express provision of the statute (section 182, Revenue Act of 1928, 45 Stat., 791) such partner's distributive share of the net income, whether distributed or not, was required to be included in his gross income. Even if, while the operations of the syndicate were in progress, property belonging to it was held in trust, and the head or manager of the syndicate was a fiduciary, within the meaning of section 161 of the Revenue Act of 1928 (45 Stat., 833, 26 U. S. C. A., section 2161), after the termination of the operations of the syndicate, the undistributed profits were not taxable against the syndicate or its head, because they were not, within the meaning of that section, "income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated." Whether, while the syndicate was in operation, the existence of it did or did not stand in the way of the petitioner having title to a share of the undistributed profits, upon the termination of the syndicate's operations during the year 1928, the petitioner was the beneficial owner of his share of the undistributed profits. Whether the syndicate was a partnership or another kind of joint venture prior to the end of the year 1928 the petitioner, as to sharing in the undistributed profits, had the actual benefit for which the tax was assessed. (*Corliss* v. *Bowers*, 281 U. S., 376 [Ct. D. 188, C. B. IX–1, 254].) The petitioner's beneficial ownership of his share of the undistributed profits having attached during the year 1928, the amount thereof was properly included in his gross income for that year, though that amount was not definitely ascertained until after the expiration of that year. (*Dickey* v. *Commissioner*, 50 Fed. (2d), 917, certiorari denied, 287 U. S., 606.) It was not open to the petitioner or his agent, the syndicate or its manager, to avoid the inclusion in his gross income for 1928 of his share of the syndicate's undistributed profits by postponing beyond the end of that year the ascertainment of the exact amount of that share of the actual delivery to the petitioner of the amount of profits to which he was entitled. (*Wright* v. *Commissioner*, 50 Fed. (2d), 727 [Ct. D. 428, C. B. X–2, 324]; *Newman* v. *Commissioner*, 41 Fed. (2d), 743; *Webb* v. *Commissioner*, 67 Fed. (2d), 859.)

The petitioner contributed to the syndicate 1,000 shares of Coca-Cola stock. The syndicate sold 800 shares of that stock for petitioner's account, and returned to petitioner 200 shares of that stock. The Board of Tax Appeals, after finding as a fact that the particular shares of stock which were sold for petitioner's account could not be identified, approved the action of the respondent in determining the net profit from that sale by applying the following provision of article 58 of Treasury Regulations 74, which is usually referred to as the "first in, first out" rule: "When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. * * *" After the decision of the Board was promulgated, by a motion for a review by the Board of that decision the petitioner challenged the findings of fact upon which was based the Board's ruling as to the determination of the net profit on the sale of 800 shares of stock for petitioner's account. The ground of that challenge stated in that motion was that those findings were not in accord with the evidence adduced in the hearing before the Board. That motion contained sundry statements as to testimony given in the hearing, and to that motion was attached an exhibit which purported to be a written record of, or account book entries as to Coca-Cola stocks purchased and sold by the petitioner in the year 1928. The transcript before us contains that motion and the exhibit thereto. Neither the statements in that motion as to evidence, nor what is contained in the mentioned exhibit, was in any way authenticated by the Board of Tax Appeals nor made a part of the record to be reviewed by this court. Papers or documents called to the attention of the tribunal below are not before this court for consideration unless they are made part of the record by bill of exceptions, statement of evidence, or in some other proper mode. (*Bassing* v. *Cody*, 208 U. S., 386; 4 C. J., 59.) The statements or showings of evidence contained in the above mentioned motion and the exhibit thereto are not considered by this court, because they are wholly unauthenticated and in no proper way were made part of the record presented for review. As the record does not contain the evidence which was before the Board of Tax Appeals when it made its finding that the particular shares of stock sold by the syndicate for

the account of the petitioner could not be identified, we must accept that finding as conclusive. (*Commissioner of Internal Revenue* v. *Continental Screen Co.*, 58 Fed. (2d), 625 [Ct. D. 667, C. B. XII–1, 218].) The record furnishes no basis or support for the petitioner's contention that that finding was not in accordance with the evidence. It is not controverted that on the state of facts found by the Board its determination of the gain derived from the sale of petitioner's shares of stock was proper.

The petition for review is denied.

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 272.—PROCEDURE IN GENERAL.

ARTICLE 1173: Extension of time for payment of a deficiency.

REVENUE ACT OF 1928.

Rules governing consideration of application for extension of time to pay deficiency in income tax. (See Mim. 4303, page 133.)

SECTION 275.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

ARTICLE 1201: Period of limitation upon assessment of tax.

REVENUE ACT OF 1928.

Return of successor corporation including but not segregating operations of predecessor corporation. (See Ct. D. 927, page 221.)

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 1251: Authority for abatement, credit, and refund of tax. XIV–17–7455 Ct. D. 954

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

SUIT—OVERPAYMENT—DEDUCTIONS—ESTOPPEL.

Where the taxpayer, reporting on the accrual basis, in its return for the fiscal year ended January 31, 1929, deducted rent on business property for 13 months (improperly including the month of February, 1929) and in its return for the fiscal year ended January 31, 1930, claimed a deduction for rent for only 11 months of the year (omitting the month of February, 1929), and the Commissioner acquiesced in that method of adjusting the tax liabilities for the 2 years, the taxpayer is estopped from asserting a claim for overpayment for the year 1930 after the statute of limitations had run against the Commissioner's right to make an additional assessment for the year 1929.

COURT OF CLAIMS OF THE UNITED STATES.

Stern Bros., a New York Corporation, v. *The United States.*

[November 5, 1934.]

OPINION.

WILLIAMS, Judge, delivered the opinion of the court.

The plaintiff's books of account were kept and its income tax returns prepared on the accrual basis of accounting. In its corporation income tax return for the fiscal year ended January 31, 1930, plaintiff took a deduction for rent on business property for only 11 months of the year, omitting the month of February, 1929, which was a part of the fiscal year. The rent for the month of February amounted to $15,460.84. By reason of plaintiff's failure to take a deduction of this amount an overassessment and an overpayment of taxes in the sum of $1,713.57 resulted. The suit is for the recovery of the amount of this overpayment.

Plaintiff relies upon the statutory provision that "the deductions and credits * * * shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed * * *."

If what has been said in respect to the year 1930 presented a complete picture of the case, plaintiff, under the statute and regulations, is clearly entitled to recover, but such is not the case. For the preceding fiscal year ended January 31, 1929, plaintiff took a deduction for rent on business property for 13 months, in which was improperly included the month of February, 1929, a month not within the fiscal year. By reason of the erroneous deduction of $15,460.84 rent for February, plaintiff underpaid its taxes for the year 1929 in the sum of $1,842.41. Recognizing that it had underpaid its 1929 taxes by taking an erroneous deduction for rent for the month of February, plaintiff sought to correct the error in its return for the year 1930 by taking a deduction for rent for only 11 months of the year and restoring to surplus account on its books the $15,460.84 erroneously deducted in the preceding year. That it was the plaintiff's intention and desire to correct the errors in respect to deductions in the two returns and have its tax liabilities for the two years adjusted in this manner can not be doubted. That the Commissioner so understood the matter, and that he acquiesced in the method of adjustment proposed by plaintiff, is also free from doubt. Otherwise it must be assumed he would have made a deficiency assessment for the amount of the underpayment in the year 1929 and refunded the amount of the overpayment for the year 1930, the usual and proper method in such cases. There is only a few dollars difference between the amount of taxes plaintiff would have paid for the 2-year period had the returns been corrected to conform to the facts as to allowable deductions for rent and the amount actually paid by it on the erroneous returns, and that difference is to the advantage of the plaintiff. The Government has no money belonging to plaintiff. Its 1930 tax liability has been adjusted on the basis of the suggestion set forth in its tax return for that year, a suggestion that is, under all the facts and circumstances of the case, tantamount to request and consent. The correctness of the adjustment was in no way questioned by plaintiff until after the statute of limitations had run against the Commissioner's right to make additional assessments for the year 1929. In these circumstances plaintiff is estopped from now asserting a claim for the overpayment claimed for the year 1930. (*R. H. Stearns Co.* v. *United States*, 291 U. S., 54 [Ct. D. 780, C. B. XIII–1, 321]; *Commissioner* v. *Liberty Bank & Trust Co.*, 59 Fed. (2d), 320; *Askin & Marine Co.* v. *Commissioner*, 66 Fed. (2d), 776 [Ct. D. 806, C. B. XIII–1, 229]; *Moran* v. *Commissioner*, 67 Fed. (2d), 601; *Crane* v. *Commissioner*, 68 Fed. (2d), 640 [Ct. D. 852, C. B. XIII–2, 247].)

Plaintiff's petition is dismissed.

It is so ordered.

TITLE IV.—ADMINISTRATIVE PROVISIONS.

SECTION 601.—BOARD OF TAX APPEALS—PROCEDURE.

SECTION 601.

REVENUE ACT OF 1928.

Effect on equity receivership proceedings against transferee of decision of Board of Tax Appeals that collection was barred from original corporation. (See Ct. D. 936, page 355.)

SECTION 606.—CLOSING AGREEMENTS.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes.

XIV–2–7243
Ct. D. 906

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

CLOSING AGREEMENT—VALIDITY—EXECUTION BY ACTING COMMISSIONER AND APPROVAL BY ACTING SECRETARY.

A closing agreement signed by the Acting Commissioner of Internal Revenue and approved by the Acting Secretary of the Treasury is valid. Congress has prescribed the conditions under which subordinates may act in the place and stead of the Commissioner, the Secretary or Undersecretary of the Treasury, and in the absence of a contrary showing it must be presumed that those conditions existed and that the Acting Commissioner and the Acting Secretary had authority to execute and approve the closing agreement.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

James H. Anderson, Individually and as Collector of Internal Revenue for the District of Utah, appellant, v. *P. W. Madsen Investment Co., appellee.*

[August 18, 1934.]

OPINION.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

On March 14, 1927, the Madsen company filed its income tax return for the year 1926. On September 28, 1928, it executed and delivered to the collector of internal revenue a closing agreement as to the final determination of its tax liability for 1926, fixing it at $19,613.66. On December 28, 1928, H. F. Mires as Acting Commissioner signed the agreement, and on December 31, 1928, it was approved by Henry Herrick Bond as Acting Secretary of the Treasury. On January 3, 1929, the Commissioner forwarded one copy of the agreement to the Madsen company.

In its return the Madsen company included $97,340 received as dividends from a building and loan association.

In *United States* v. *Cambridge L. & B. Co.* (278 U. S., 55 [T. D. 4252, C. B. VII–2, 290]), decided November 19, 1928, the court held that earnings of a building and loan association were exempt under the provisions of section 231(4), Revenue Act, 1926 (26 U. S. C. A., section 982(4)). It follows that the dividends returned were deductible under section 234(a)6, Revenue Act. 1926 (26 U. S. C. A., section 986(a)6).

The Madsen company filed a claim for a refund of $13,040.90 setting forth that there was included in its return $97,340 received as dividends from a building and loan association, which should have been allowed as a deduction. After more than six months had elapsed without any action being taken on the claim, this action was filed to recover $13,040.90, as an overpayment.

In his answer the collector pleaded the closing agreement as a defense.

In its reply the Madsen company alleged that the closing agreement was executed by it because of certain representations made by an internal revenue agent which were contrary to fact and law, that it was not executed in accordance with section 606, Revenue Act, 1928;[1] and that it lacked the necessary prerequisites prescribed by that section.

Mires was not authorized in writing by the Commissioner to execute the agreement.

At the trial the collector offered the closing agreement in evidence. The trial court held that, absent an authorization in writing by the Commissioner to an officer or employee of the Bureau, only the Commissioner could execute the agreement and only the Secretary or Undersecretary could approve it, and rejected the offer.

Judgment for the Madsen company followed, and the collector appealed.

To be valid a closing agreement must be entered into in accordance with the formal requirements of section 606, supra. (*Botany Mills* v. *United States*, 278 U. S., 282, 288–289 [Ct. D. 39, C. B. VIII–1, 279].) When a statute limits a thing to be done in a particular manner, it includes the negative of any other mode. (*Botany Mills* v. *United States*, supra; *Raleigh, etc., R. R. Co.* v. *Reid*, 13 Wall., 269, 270.)

It is plain that Congress did not intend to intrust the making of closing agreements, which preclude both the taxpayer and the Government from thereafter reopening the case as to matters agreed upon, except upon a showing of fraud or malfeasance or misrepresentation of a material fact, to the action of subordinate officials in the Bureau.

Does the statute prescribe that only the Commissioner may execute such an agreement or designate in writing an officer or employee of the Bureau to do so, and that only the Secretary or Undersecretary may approve such an agreement? Or may one who is authorized to perform the duties of Commissioner during a vacancy in that office or during the absence or inability of the Commissioner to act, during the existence of one of those conditions, execute the agreement; and may one who is authorized to perform the duties of Secretary or Undersecretary during a vacancy in those offices or during the absence or inability of such officers to act, during the existence of one of those conditions, approve such an agreement?

While the Congress intended to make formal action by the head of the Bureau or Department essential to the validity of such agreements, and to definitely fix the responsibility therefor, we do not think it intended that times should exist when, because of vacancies in the offices of Commissioner, Secretary, and Undersecretary, or in the absence of such officials, the Department would be unable to execute or approve such agreements. Vacancies do occur in those offices, and there are times when such officers are absent or ill, or unable to act. The Congress provided that in such cases, as we shall presently see, subordinates may act in their place and stead, and exercise their authority and perform their duties. Such persons become temporarily the Commissioner and Secretary, and are invested with their powers, including the authority to execute and approve closing agreements.

---

[1] Section 606, Revenue Act 1928 (45 Stat., 874), 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 * * * 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."

R. S., section 322 in part reads as follows:

"There shall be in the office of the Commissioner of Internal Revenue a Deputy Commissioner * * *."

R. S., section 323 reads as follows:

"The Deputy Commissioner of Internal Revenue shall be charged with such duties in the office of the Commissioner of Internal Revenue as may be prescribed by the Secretary of the Treasury, or by law, and shall act as Commissioner of Internal Revenue in case of the absence of that officer."

See Acts of March 3, 1863 (12 Stat., 725), June 30, 1864 (13 Stat., 224), and July 13, 1866 (14 Stat., 170).

Under the latter section the Deputy Commissioner became Acting Commissioner during the absence of the Commissioner.

The Act of January 29, 1874 (18 Stat., 6), provided:

"That the office of Deputy Commissioner of Internal Revenue, made vacant by the death of Gen. B. J. Sweet, be, and the same is hereby, abolished; and that the Secretary of the Treasury may, upon the recommendation of the Commissioner of Internal Revenue, designate one of the two remaining deputy commissioners as First Deputy Commissioner, who shall perform the duties and be paid only the salary prescribed for the office of deputy commissioner hereby abolished."

This Act abolished the office of deputy commissioner, and delegated the duties of that office to the First Deputy Commissioner.

The Act of October 3, 1913 (38 Stat., 180), provided for an additional deputy commissioner, bringing the number up to three.

The Act of October 6, 1917 (40 Stat., 348), reads in part as follows:

"The Commissioner of Internal Revenue is authorized to assign to deputy commissioners such duties as he may prescribe, and the Secretary of the Treasury may designate any one of them to act as Commissioner of Internal Revenue during the Commissioner's absence."

After the passage of the last mentioned Act, any deputy commissioner designated so to do by the Secretary, could act as Commissioner during the latter's absence.

On February 24, 1919 (40 Stat., 1140), Congress provided that:

"Hereafter there may be employed in the Bureau of Internal Revenue, in lieu of the deputy commissioners * * * five deputy commissioners and an assistant to the Commissioner, * * *."

This Act was in part superseded by section 1201(b) of the Revenue Act of 1926 (44 Stat., 126), which in part provides:

"There shall be in the Bureau of Internal Revenue the following officers who shall be appointed by the President, by and with the advice and consent of the Senate, * * *

"2. One Assistant to the Commissioner who shall receive a salary at the rate of $8,000 per annum. The office of Assistant to the Commissioner provided by existing law is abolished to take effect at such time as the Assistant to the Commissioner first appointed under this section takes office."

On July 23, 1868 (15 Stat., 168; 5 U. S. C. A., section 5), Congress passed an Act which reads in part as follows:

"In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau, shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease."

It was clearly the purpose of the Congress in passing this Act so to provide, that at all times there should be some one to exercise the authority and perform the duties of the head of a bureau.

We are inclined to the opinion that the Acts above set out, dealing specifically with the Bureau of Internal Revenue, would take precedence over this

general Act, and that the latter would apply only to situations not provided for by such specific Acts. However, that question is not here presented, and need not be decided.

Under the general Act the Assistant to the Commissioner could act as Commissioner during the latter's absence. Under the specific Acts any deputy commissioner, designated by the Secretary of the Treasury so to do, could act as Commissioner during the latter's absence. See Act of October 6, 1917. The office of first deputy having been abolished, in the absence of such a designation, the specific Acts would not cover the situation, and the general Act would apply.

There is no proof in the record that the Commissioner was not absent at the time in question, or that a first deputy commissioner had ever been designated by the Secretary to act as Commissioner during the latter's absence. There is a presumption of authority for official action rather than want of authority, and where the statute prescribes conditions under which the subordinate may act as head of a bureau and the subordinate acts as such, the existence of those conditions will be presumed in the absence of a contrary showing. (*Perry* v. *Page* (C. C. A. 1), 67 F. (2d), 635; *United States* v. *Peralta*, 19 How., 343, 347; *United States* v. *Chemical Foundation* (D. C. Del.), 294 Fed., 300, 326; *Young* v. *Wempe* (C. C. Cal.), 46 Fed., 354; *United States* v. *Royer*, 268 U. S., 394, 398; *MacKusick* v. *Johnson* (C. C. A. 1), 3 F. (2d), 398, 401; *Keyser* v. *Hitz*, 133 U. S., 138, 146; *United States ex rel. Petach* v. *Phelps* (C. C. A. 2), 40 F. (2d), 500.)

Furthermore after Congress provided for an Assistant to the Commissioner, to be appointed by the President and confirmed by the Senate, it is reasonable to presume that the Secretary would leave to him the performance of the duties of Commissioner during the latter's absence, and would not designate a subordinate deputy to perform such duties. We must presume therefore on this record that Mires had authority to execute the closing agreement as Acting Commissioner. (*Perry* v. *Page* (C. C. A. 1), 67 F. (2d), 635; *Semmes* v. *United States* (C. Cl.), 6 F. Sup., 119.)

In *Perry* v. *Page*, supra, the court in a well considered opinion, held that Bond as Acting Secretary of the Treasury had authority under the provisions of 5 U. S. C. A., sections 4 and 22, to approve a closing agreement during the absence or illness of the Secretary, and that such absence or illness would be presumed in the absence of a showing to the contrary. We agree with the views therein expressed. (See also *Semmes* v. *United States* (C. Cl.), 6 F. Sup., 119.)

We conclude that the action of the Acting Secretary must be presumed to have been lawful and regular until the contrary is shown.

The cause is reversed and remanded for a new trial.

SECTION 613.—LIEN FOR TAXES.

XIV–21–7507
I. T. 2894

REVENUE ACT OF 1928.

The act of May 3, 1933, enacted by the Legislature of the Territory of Alaska (chapter 94, Session Laws of Alaska, 1933, page 179), effective from that date, is accepted by the Bureau of Internal Revenue as the legislation authorized under section 3186, Revised Statutes, as amended by section 613 of the Revenue Act of 1928, authorizing the filing of notices of Federal tax liens with certain designated county or other local officials.

TITLE V.—GENERAL PROVISIONS.

SECTION 701.—DEFINITIONS.

ARTICLE 1314: Association distinguished from trust. XIV-4-7275 Ct. D. 914

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

1. TRUST—ASSOCIATION—DEFINITION—CEMETERY COMPANY—DIVIDEND.

A cemetery company which canceled its stock, previously issued illegally, made a declaration of trust, issued to the stockholders trust certificates in proportion to their holdings, carried on an active cemetery business, bought land and sold lots, operated a greenhouse and other incidental businesses, and invested in securities, is an association within the meaning of section 701 of the Revenue Act of 1928, and distribution of profits to the holders of the trust certificates constitutes a dividend under the provisions of section 115 of that Act.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 607) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

May Kimball Smith, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

[March 14, 1934.]

OPINION.

DAVIS, Circuit Judge: In 1869, the West Laurel Hill Cemetery Co. was incorporated in Pennsylvania for the purpose of acquiring lands to be used for a cemetery and it issued 3,000 shares of stock of a par value of $50 each in exchange for its premises. The stock was issued illegally and in 1881, the company canceled its stock and made a declaration of trust for the benefit of its stockholders who received trust certificates to evidence their share in the company.

By the terms of the trust as much as one-fifth of the company's income could be used for permanent requirements for the upkeep and operation of the cemetery. The trust further provided that the company was "to apply, appropriate and divide the annual net income and moneys from time to time received from said sales, not required for the aforesaid purposes, to and among the contributors aforesaid, and heirs, executors, administrators and assigns, in proportion to their respective interests and shares in the same and for which they shall hold certificates to be issued by the said company * * * which said net income out of the proceeds of said sales to be paid by the West Laurel Hill Cemetery Co., aforesaid, is the consideration for the conveyance of the said premises to the company for the aforesaid purposes."

The holders of the trust certificates were declared to have the status of stockholders with one vote for each share that the certificate represented and were eligible as managers of the company.

The business has been profitable and active. A distribution of profits, a matter lying in the discretion of the managers, has been made annually but also a substantial and increasing surplus has been maintained. In 1929, the taxable year involved here the company received the following income: $277,558 for burial rights, for which the value on March 1, 1913, was $150,698.04; $97,261.37 from a greenhouse operated by it; and $35,470.82 from certain investments. The company's operating expenses for 1929 were $172,182.19 plus $22,006.26 for depreciа-

tion and obsolescence. The company distributed $105,000 to its certificate holders in 1929, $4,514 of that amount being the portion received by the petitioner.

The petitioner did not include the $4,514 in her gross income for 1929. The Commissioner of Internal Revenue determined that the sum should be included in the petitioner's income as dividends distributed by an association within the meaning of the term "corporation" as defined in the revenue laws. The Board of Tax Appeals sustained the Commissioner's determination and the petitioner brought this petition for review.

The questions here are whether or not the cemetery company is an association included within the meaning of the term "corporation" in section 701 of the Revenue Act of 1928 and if so, whether or not the distribution by the "corporation" to those participating therein in 1929 was a dividend as defined by section 115 of the Act of 1928. The petitioner contends that the distribution was a deferred part payment for the sale of the cemetery premises to the petitioner in 1869.

The statute includes in the term "corporation" for the purpose of income taxation, association, joint-stock companies, and insurance companies. Whether or not a trust is taxable as an association has been subject to considerable discussion. (Klien, Federal Income Taxation, page 1139; Supplement, page 610). The test laid down by this court in *Little Four Oil Co.* v. *Lewellyn* (35 Fed. (2d), 149 [Ct. D. 118, C. B. VIII–2, 264]), is that if the trust is a business concern and if the shareholders or trustees, or both combined, are operating it in active business for profit, the trust is in effect an association taxable as a "corporation."

It is not difficult in view of this test to determine from the facts that the Board did not err in its decision. The petitioner, through its managers, selected from and elected by the certificate holders, carried on an active cemetery business, selling lots, buying land, operating a greenhouse and other incidental businesses and investing in securities. It is evident that this company was a business concern operated for profit and therefore taxable.

The petitioner also insists that the distribution by the petitioner in 1929 was not a dividend. Section 115 of the Revenue Act of 1929 provides that a dividend is any distribution of a corporation to its stockholders out of earnings and profits accumulated after February 28, 1913, and that every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

The record shows that the company had accumulated a large surplus since February 28, 1913, and under section 115 the distribution was made out of the most recent accumulations of profits. The petitioner is entitled to the return of the value of her certificate as of March 1, 1913, but there is no evidence here to determine whether or not her share of the 1929 distribution was a return of capital.

Consequently the order of the Board of Tax Appeals is affirmed.

SECTION 703.—DEDUCTION OF ESTATE AND INHERITANCE TAXES—RETROACTIVE.

SECTION 703.

REVENUE ACT OF 1928.

State transfer taxes paid in 1923 by the estate. (See Ct. D. 959, page 316.)

SECTION 705.—INSTALLMENT SALES—RETROACTIVE.

SECTION 705.

REVENUE ACT OF 1928.

Automobile financing corporation. (See Ct. D. 943, page 187.)

INCOME TAX RULINGS.—PART IV.

REVENUE ACT OF 1926 AND PRIOR ACTS.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 201.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 1541: Dividends. XIV-9-7342
(Also Section 204, Article 1596.) Ct. D. 929

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. INCOME—DIVIDEND.

An amount paid to the petitioner in 1923 by a corporation which had accumulated sufficient earned surplus subsequent to February 28, 1913, was not a distribution of capital, but payment of a taxable dividend under the provisions of section 201 (a) and (b) of the Revenue Act of 1921 even though authorized as a distribution of capital.

2. GAIN OR LOSS—BASIS—SALE OF STOCK ACQUIRED UPON EXCHANGE FOR PARTNERSHIP INTEREST.

Where the taxpayer and his partner in 1922 formed a corporation to take over the partnership business and each acquired one-half of the stock issued by the corporation, conceding that that transaction was a nontaxable exchange, the sale of his stock by the taxpayer in 1924 resulted in a taxable profit, measured by the difference between the cost to him of his partnership interest and the amount for which he sold the stock, in accordance with section 204(a)6 of the Revenue Act of 1924.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 496) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

W. A. Faris, petitioner, v. *Guy T. Helvering, as Commissioner of Internal Revenue, respondent.*

Upon petitions to review an order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and NORCROSS, District Judge.

[June 4, 1934.]

OPINION.

WILBUR, Circuit Judge: The petitioner seeks a review of the decision of the Board of Tax Appeals affirming the determination by the Commissioner of Internal Revenue of his income taxes for the years 1923 and 1924, claiming that an item of $100,000 determined by the Commissioner to be income for 1923 was in fact a distribution of capital, and that an item of $539,706.06 profit on the sale in 1924 of the petitioner's stock in Faris-Walker, a corporation, should be eliminated.

With reference to the claim that $100,000 paid to the petitioner by Faris-Walker, a corporation, was capital, the Commissioner in his deficiency letter

stated his reasons for treating the payment as a dividend from profits as follows:

"In view of the fact that the corporation's books show an earned surplus (accumulated during 1922 and 1923) of more than $700,000 at the time the distribution was made, it is clear that the $200,000 distributed should have been treated as a dividend from profits accumulated subsequent to February 28, 1913, and that said distribution was subject to tax, and that your share should have been included in your income tax return for 1923, the year in which distribution was made."

This finding of the Commissioner is presumed to be correct unless overcome by evidence. (*Fesler* v. *Commissioner*, 38 F. (2d), 155; *Burnet* v. *Houston*, 283 U. S., 223 [Ct. D. 328, C. B. X–1, 343].) The only evidence offered to overcome this presumption was the fact that application was made to the State commissioner of corporations for permission to distribute $200,000 of its capital assets. It is contended that the distribution made in pursuance of that authorization must be presumed to be a part of its capital assets and not its earned income. Neither the action of the State commissioner of corporations nor of the corporation is decisive of the matter which is controlled by the revenue laws of the United States. (*Osburn California Corporation* v. *Welch*, 39 F. (2d), 41 [Ct. D. 173, C. B. IX–1, 250]; *Angelus Bldg. & Inv. Co.* v. *Commissioner*, 57 F. (2d), 130 [Ct. D. 576, C. B. XI–2, 293]; *Weiss* v. *Wiener*, 279 U. S., 333 [Ct. D. 60, C. B. VIII–1, 257]; *Burnet* v. *Harmel*, 287 U. S., 103, 110 [Ct. D. 611, C. B. XI–2, 210].)

Section 201(a) and section 201(b) of the Revenue Act of 1921 (ch. 136, 42 Stat., 227), under which the tax involved was computed, provides as follows:

"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, * * *.

"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; * * *."

Under these sections (201(a), 201(b)), if the corporation had on hand any undistributed earnings or profits accumulated since February 28, 1913, the payment of $100,000 to the petitioner by the corporation must be deemed to be made therefrom. (See *Lincoln National Bank* v. *Burnet*, 63 F. (2d), 131; *Hadley* v. *Commissioner*, 36 F. (2d), 543 [Ct. D. 153, C. B. IX–1, 266]; *Christopher* v. *Burnet*, 55 F. (2d), 527 [Ct. D. 530, C. B. XI–2, 167]; *Helvering* v. *Canfield* [Ct. D. 783, C. B. XIII–1, 176]; *Thorsen* v. *Helvering*, 291 U. S., 163, 54 S. Ct., 368 [Ct. D. 783, C. B. XIII–1, 176].) The Commissioner found that there were such profits and that the distribution was of such profits. The petitioner offered no evidence to the contrary and the Board of Tax Appeals therefore properly affirmed the action of the Commissioner holding that the payment of $100,000 to the petitioner by the corporation was a taxable dividend.

The next question for consideration is the item of profits derived by petitioner from the sale of $1,500,000 of his stock in the corporation. The corporation was formed January 3, 1922, by the petitioner and his partner Walker to take over the business of the copartnership, and it issued all its stock (20,000 shares of the par value of $100 per share) to the copartners, one-half to each, in payment for the copartnership business which was transferred to it by the copartnership. Petitioner sold his stock in 1924 for $1,500,000. He claims that he made no profit from the sale but a loss as the market value of the partnership interest transferred to the corporation was $1,700,000. The Commissioner claims that the profit of the petitioner from this sale was $1,037,618.02, being the difference between the cost to him of the partnership interest transferred to the corporation for the stock and the amount for which the stock was sold. It is conceded that the transfer of the partnership property to the corporation for all its stock was nontaxable under the provision of section 203 (a), (b)(4) of the Revenue Act of 1924 (ch. 234, 43 Stat., 253), which is as follows:

"SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

"(b)(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more

persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

The tax was levied by the Commissioner under section 204(a), sub. (6), of the Revenue Act of 1924, but the petitioner claims that this section does not apply and that the usual rule of taxing profit should apply, namely, that the taxable profit is the difference between the sale price of the stock and the cost to the seller of the stock. Paragraph (6) of section 204 is as follows:

"(6) If the property was acquired upon an exchange described in subdivision (b) * * * of section 203, the basis shall be the same as in the case of the property exchanged, * * *."

This part of paragraph (6) clearly provides that in view of the nontaxable exchange of the partnership interest for corporate stock the exchange must be ignored in computing the profit by the taxpayer at the time of the sale of his stock and the sale of the corporate stock treated for taxation purposes as a sale at that time of the partnership interest for which it had been exchanged. In other words, the actual profit of the taxpayer in the entire transaction was determined at the time he sold his stock instead of being determined in whole or in part at the time of the nontaxable exchange of one form of ownership for another. The difficulty in interpreting paragraph (6) arises from the concluding sentence of the paragraph which the petitioner claims modifies the entire paragraph so as to make the whole paragraph inapplicable to the exchange in the case at bar. We italicize and quote the concluding sentence of paragraph (6) of section 204, as follows:

"* * * *This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.*"

The Commissioner claims that this last sentence of paragraph (6) of section 204 merely excludes therefrom the taxation of the profit derived or to be derived by the corporation from the sale of the partnership property acquired by it, and leaves the section applicable to the sale by the stockholder of his stock, and that the exception in paragraph (6) is made because paragraph (8) (of section 204) expressly provides for the method of taxing the profit to the corporation derived from the sale of its property received in exchange for its stock upon a nontaxable exchange. That paragraph is as follows:

"(8) If the property * * * was acquired after December 31, 1920, by a corporation by the issuance of its stock or securities in connection with a transaction described in paragraph (4) of subdivision (b) of section 203 * * * then the basis shall be the same as it would be in the hands of the transferor, * * *."

That this paragraph (8) applies to the sale by a corporation of its property acquired by it in a nontaxable exchange of its stock for the property has been decided by this court (*Osburn Cal. Corp.* v. *Welch*, 39 F. (2d), 41) and by other courts; *Newman, Saunders & Co.* v. *United States*, 36 F. (2d), 1009; *T. W. Phillips, Inc.*, v. *Commissioner*, 63 F. (2d), 101), and it has been held that the method of taxing the corporate gain so provided is not unconstitutional because it taxes the corporation at the time of the sale of its assets for that portion of the increase in value which occurred while the transferor owned the property. (*T. W. Phillips, Inc.*, v. *Commissioner*, supra.) It would seem clear then that the method of ascertaining the gain or loss upon the sale of property acquired by a corporation in a nontaxable exchange is covered by paragraph (8) of section 204, and this would be a sufficient reason for the proviso of the concluding sentence of paragraph (6), supra, providing that it should not apply to property acquired by the corporation. Otherwise the paragraph would apply to both the corporation and the stockholder because both have received "property" in a nontaxable exchange, and hence both would come within the terms of paragraph (6) had the corporation not been excluded therefrom by the concluding sentence. The reason for dealing with the stockholder in one paragraph (6) and the corporation in another (8) probably arises from the fact that both paragraphs provide for the contingency that there may have been other property or money in addition to the capital stock on the one hand and business or property on the other involved in the exchange. We have omitted from our quotation from both paragraphs (6) and (8) these provisions which are not involved in the case at bar.

This construction of the two paragraphs, (6) and (8), of section 204 of the Revenue Act of 1924, apparent enough upon their faces, the petitioner would avoid upon the ground that the application thereof might result in both the corporation and the stockholder paying a tax upon the increase in value of the property of the stockholder transferred to the corporation during the time it was owned by the transferor, because in the case of the sale of the stock the original cost of the property exchanged therefor to the transferor is taken as a basis for determining his profit and in the case of the sale of the property by the corporation the same basis is taken, thus relating the transaction back to the same original cost and covering the gain during the period it was held by the transferor. That this might be the effect of the statute is apparent and is conceded by the respondent. While it is true that in construing a statute, a construction that would result in double taxation should be avoided in case of ambiguity or uncertainty, this consideration does not justify a court in ignoring the plain intent of Congress. We are not here concerned with a case of double taxation, but at the most of a possibility thereof. The petitioner has received his profit, and it is a part of his income for the year in which it was received. The corporation may never realize a taxable profit upon the sale of its assets acquired from petitioner. It may not sell them. They may decrease in value to less than the cost to petitioner, and be sold at a loss. If the property acquired by the corporation should be sold by it at a price which would realize a taxable gain under paragraph (8) it will be time enough to then consider whether the stockholder has not already paid all or part of the tax. The question as to the constitutional power of Congress to tax the increased value of the property while it was in the hands of the transferor, as well as to the corporation, sought to be raised by the petitioner can not be raised by him or considered until that time. (*T. W. Phillips, Inc.*, v. *Commissioner*, 63 F. (2d), 101, supra.) See, however, as to the power of Congress to tax the same income to two persons, *Hellmich* v. *Hellman* (276 U. S., 233, 237 [T. D. 4217, C. B. VII–2, 238]). Petitioner advances an alternate proposition that the cost to him of his partnership interest should have been fixed at $600,000 instead of $460,493.94. This claim is based on a showing of the book value of the partnership assets of $1,200,000 at the time of the exchange, and the testimony of C. N. Reynolds, that "the merchandise inventory was based upon cost or market whichever was lower, that the fixtures were shown on the books at cost less depreciation, and the cash surrender value of life insurance policies." This is not a showing of the cost of the partnership assets to the petitioner, that is, his captial investment therein, hence the finding of the Commissioner was properly sustained by the Board of Tax Appeals.

The order of the Board of Tax Appeals is affirmed.

SECTION 203.—RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES.

ARTICLE 1574: Exchanges in connection with corporate reorganizations. XIV–10–7355 Ct. D. 931

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GAIN OR LOSS—BASIS—COST TO TRANSFEROR—REORGANIZATION.

Where a corporation in 1923 acquired all the stock and assets of another, which then ceased to exist, the sole stockholder of the old corporation becoming the sole stockholder of the new, the transaction was a reorganization within the meaning of section 203(h)1 of the Revenue Act of 1926, and the basis for determining gain or loss upon sale of a portion of the real property in 1925 and 1926 is its cost to the transferor, in accordance with section 204(a)7 of that Act.

2. CERTIORARI DENIED.

Petition for certiorari denied November 5, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Ahles Realty Corporation, petitioner-appellant, v. *Commissioner of Internal Revenue, respondent-appellee.*

Petition to review a determination of the Board of Tax Appeals. Taxpayer appeals. Order affirmed.

Before MANTON, SWAN, and CHASE, Circuit Judges.

[June 4, 1934.]

OPINION.

MANTON, Circuit Judge: The income taxes of the petitioner for the fiscal years 1925 and 1926 are here asked to be reviewed. Sections 1001, 1002, 1003 of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 109, 110); section 603 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 873); section 1011, Revenue Act of 1932 (ch. 209, 47 Stat., 286).

The petitioner, a New York corporation organized November 30, 1923, received a conveyance of real estate from a New York corporation of the same name about the same time. This new corporation transferred to the old corporation (vendor) which had been organized February 6, 1922, under the New York law, its authorized capital stock of par value of $500,000 and income debenture bonds of the par value of $500,000 in exchange for all the capital stock of the old corporation. The property which the old corporation conveyed was the real estate which had passed to Louis J. Snyder, trustee of the estate of J. W. Ahles, deceased, who had owned all the capital stock of the old corporation.

The offer to make the exchange reads:

"The old corporation will transfer to the new corporation * * * all of the assets of the old corporation including name and good will as a going concern. * * * This exchange of securities I find to be convenient and desirable for the operation of the properties confided to me as such trustee.

"All of the liabilities of the old corporation are to be assumed by the new one.

"By operation of law, the company organized in January, 1922, will cease to exist on or about December 9, 1923."

November 30, 1923, the old corporation was dissolved by the new corporation and the latter thereupon received its entire assets. The real property was placed on the books of the new corporation at an appraised value. It later sold two parcels of its property during the fiscal years of 1925, and a third parcel in 1926. In ascertaining the gain or loss on these sales for tax purposes, the Commissioner used as a basis, the cost basis to the old corporation. The petitioner contends that in determining the gain or loss, the fair market value of the property on November 30, 1923, the date of the transfer from the old corporation to it should be used.

Section 203(h)1 of the Revenue Act of 1926 is applicable and the exchange of the corporate securities in the new corporation for the transfer of the assets of the old corporation followed by the dissolution of the old corporation was a reorganization. Reorganization as used in section 204(a)7 is defined in section 203(h)1 as (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 of 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; or (C) a recapitalization; or (D) a mere change of identity, form, or place of organization, however effected. In the instant case, the petitioner acquired all the capital stock of the old company and took over all its property, whereupon the old company ceased to exist. When this transaction was completed, it was found that the sole stockholder of the old, the sole stockholder of the new, had a 100 per cent control over and interest in the identical assets. This was a reorganization within the statute. (*Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 57 Fed. (2d), 188 (C. C. A. 5); affirmed 287 U. S., 462 [Ct. D. 630, C. B. XII–1, 161]; *Cortland Specialty Co.* v. *Commissioner*, 60 Fed. (2d), 937 (C. C. A. 2) [Ct. D. 668, C. B. XII–1, 164]; *Helvering* v. *Gregory*, 69 Fed. (2d), 802 (C. C. A. 2).)

It is argued that the taking over of the assets of the old company and its dissolution by the new company are separate transactions and therefore there was no reorganization. There certainly was no merger for the essence of a merger is the absorption by one corporation of the properties and franchises of another whose stock it has acquired, whereupon the merged corporation ceases to exist and the merging corporation alone survives. Indeed, Snyder in his letter of November 26, 1923, referred to, says: "This exchange of securities I find to be convenient and desirable for the operation of the properties confided to me as such trustee." The exchange was duly effected pursuant to this writing. Snyder stated: "I own all of the capital stock of the Ahles Realty Corporation organized in January, 1922, and have caused your new corporation to be formed as a reorganization of the prior one." This leaves little doubt of the intent to reorganize. There was a continuity of interest in the transaction, a continuance of the business conducted by the old corporation under the modified corporate form. After reorganization, the sole stockholder became the sole stockholder of the new, and the new corporation at completion was possessed of the same assets as the old. As stated in section 203(h)1(D), it was "a mere change of identity, form, or place of organization, however effected."

A single transaction may not be broken up into various elements to avoid a tax. (*West Texas Refining & Development Co.* v. *Commissioner*, 68 Fed. (2d), 77 (C. C. A. 10); *Prairie Oil & Gas Co.* v. *Motter*, 66 Fed (2d), 309 (C. C. A. 10) [Ct. D. 767, C. B. XIII–1, 183].)

The real estate was not acquired by the petitioner in liquidation proceedings, but in connection with a reorganization. The basis of determining the gain or loss from the sales made in 1925 and 1926 is fixed by section 204(a)7 of the Revenue Act of 1926. Thus the basis is the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor upon such transfer, under the law applicable to the year in which the transfer was made. (*Securities Co.* v. *Commissioner*, 64 Fed. (2d), 330 (C. C. A. 2).) The basis to be used is the same as it would be with the same property in the hands of the old corporation. (*Mente* v. *Commissioner*, 24 B. T. A., 401; *Piedmont Financial Co., Inc.*, v. *Commissioner*, 26 B. T. A., 1221.)

The parties have stipulated that the Commissioner in his deficiency notices of December 18, 1928, and March 21, 1929, has correctly determined the taxable profits from these sales if the new corporation is compelled to use the cost basis of the old corporation and "If the Board finds that the new corporation is compelled to use the cost basis of the old corporation in determining the gain or loss from the sales accruing in the years 1925 and 1926, then the Board should enter judgment for the respondent and approve the deficiencies as proposed in the deficiency notices."

This stipulation is controlling and makes it unnecessary to refer the matter back for computation and further consideration by the Board. (*Tait* v. *Western Maryland Railway Co.*, 289 U. S., 620 [Ct. D. 683, C. B. XII–1, 351].)

Order affirmed.

SECTION 204.—BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

ARTICLE 1594: Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequenst, devise, or inheritance. XIV–5–7288 Ct. D. 915

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GAIN OR LOSS—BASIS—PROPERTY ACQUIRED BY BEQUEST—"DATE OF ACQUISITION" BY REMAINDERMAN.

Where property was bequeathed in trust, the income therefrom to be paid to a life tenant with remainder over to the taxpayer and others, provided, however, the remaindermen were to receive neither income nor principal until they reached a certain age, the "date of acquisition" by the taxpayer, under the provisions of section 204 of

the Revenue Act of 1926, was the date of the death of the testator, at which time his remainder vested in interest, and the basis for determining gain or loss upon his subsequent sale of the property was its fair market value at such date.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 845) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Farley Hopkins, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before ALSCHULER, EVANS, and SPARKS, Circuit Judges.

[January 26, 1934.]

OPINION.

SPARKS, Circuit Judge: This petition for review of a decision of the Board of Tax Appeals presents much the same issue as that involved in the case of *Molter* v. *Commissioner*, decided by this court, January 22, 1934. In that case the question was whether the petitioner took a vested or a contingent remainder in the residue of her father's estate under the provisions of his will, and argument was confined to that point as determining the date of acquisition of the estate. Petitioner, however, insists that that case and a number of similar cases have emphasized the wrong point. The cases referred to have to do with the construction of section 204 of the Revenue Acts of 1924 and 1926, which is as follows:

"The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. * * *"

There have been a number of cases in which the foregoing section was considered. Thus in *Brewster* v. *Gage* (280 U. S., 327 [Ct. D. 148, C. B. IX–1, 274]) it was held that a residuary legatee under a will had a vested interest in the property acquired by him under the will, so that as to him, the date of acquisition of the property was the date of decedent's death. In *Huggett* v. *Burnet* (64 F. (2d), 705) it was held that a provision in a will leaving one-half of the income of the estate to testator's daughter during her lifetime, and at her death, one-half of the estate to certain named granddaughters created a vested remainder in the granddaughters so that the value of the properties subsequently turned over to the petitioner, one of the granddaughters, was to be calculated as of the date of death of the testator. In *Chandler* v. *Field* (63 F. (2d), 13) it was held that the interest of a remainderman under a will vested upon the death of the testator, in spite of the fact that the property was not to be distributed to him until the death of the life tenant, and then only upon his reaching the ages of 30, 35, and 40 years, at which times distribution was to be made in three equal installments. In *Molter* v. *Commissioner*, supra, this court held that the interest of a remainderman under a will which provided for distribution of the remainder in four equal installments to be paid two years apart following the death of the life tenant vested upon the death of the testator. In *Lane* v. *Corwin* (63 F. (2d), 767) it was held that where the termination of a trust was to occur upon the death of the two youngest of four beneficiaries of the trust, or at an earlier date at the discretion of the trustees, the interest of the beneficiaries was a contingent one which did not vest until the property was actually conveyed to them, hence the date of acquisition was the date of distribution rather than the date of decedent's death.

It will be noted that in all of these cases, the question involved was the same, namely, what was the date of acquisition of property, acquired under a will, the sale of which property following distribution gave rise to a fund subject to taxation. In all the cases, it was considered that the controlling factor was whether

the interest created by the will was a vested or a contingent one, thereby determining whether the date of death or the date of distribution was to be taken as the basis for ascertaining gain or loss from the sale of the estate properties.

Petitioner in the case at bar, however, contends that the foregoing distinction is an altogether arbitrary one, and should not be permitted to control the decisions in these cases. He argues that it is very unfortunate that the amount of taxes payable should be made to depend upon such doubtful questions as the time of the vesting of interests for the reason that in cases which involve such questions the courts lean to a construction in favor of vesting in order to sustain the validity of the interests created; that the question of whether an interest is vested or contingent often turns upon the form in which the gift is expressed, although as a matter of practical fact, the vested legatee obtains no more actual dominion over the property where another estate intervenes than the contingent legatee obtains. He argues that since taxes present a very practical problem, and courts have held that substance rather than form should control decisions involving that problem, for taxing purposes, the date which should be fixed as a basis for ascertaining value is the date at which the interest of the legatee becomes indefeasible, or the date of distribution of the property to him.

While this precise question has not yet been considered by the Supreme Court, we think that the language used by it in the case of *Brewster* v. *Gage*, supra, is broad enough to answer petitioner's contention. There it was argued by counsel for the taxpayer that "to hold that the property sold was acquired at the date of the testator's death would result in increasing or decreasing a taxpayer's income on account of changes in value of property before it is subject to the disposition and control of such taxpayer. This should not be done in the absence of clearly expressed congressional intent." In answering this argument, the court said, "But immediately upon the death of the owner there vests in each of them the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. * * * The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. * * * Petitioner's right later to have his share * * * vested immediately upon testator's death. At that time petitioner became enriched by its worth, which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution." While this language was used in deciding as to the date of acquisition of property by a residuary legatee, we see no reason why it should not be equally applicable in the case of a remainderman whose interest vested upon the death of the testator, even though possession was to be postponed for an indefinite period. Congress had a right to fix such date as the basis for determining gain or loss to the legatee. "Date of acquisition" has been held to have a certain specific meaning, differing in the cases of the vested and the contingent remainderman. The fact that a difference in the amount of taxes payable results from following such a distinction will not permit us to adopt a different rule from that provided for by Congress.

Petitioner further argues that in the event that this court holds that this case is to be decided on the question of whether he took a vested or contingent interest under the will of his grandfather, it should be held that it was the latter. The will provided that—

"My said trustees shall pay over to my wife * * * one-half of the net annual income * * * so long as she shall live; and upon her death they shall pay one-half of the income which she would have received if living * * * to each of my grandsons * * * provided such grandson has attained the age of 25 years; and until he shall attain the age of 25 years my said trustees shall after the death of said (wife), accumulate and set apart one-half of the income * * * for the benefit of each of my said grandsons; and after the death of (wife) and when each of my said grandsons attains the age of 30 years or as soon thereafter as (wife) shall die, my said trustees shall pay over to each of said grandsons respectively one-fourth of the trust estate to be his absolutely together with any accumulations of income directed to be made for his benefit."

An identical provision was made with respect to the other half of the estate which was left in trust for his daughter, with remainder over for his grandsons.

Petitioner cites the case of *O'Hare* v. *Johnston* (273 Ill., 458) as holding that an interest in a grandchild after a life estate in a parent, comparable to petitioner's interest in the case at bar, was a contingent one. This construction of the case is, however, in error. The facts in it were that testator created a trust for 30 years for the benefit of his son and daughter who were to receive the income from the fund semiannually, and the corpus of it in equal shares at the end of the period. As to that provision of the will the court held that considering all the circumstances it was clear that the postponement of possession was for the benefit of the estate rather than for reasons personal to the legatees, hence their interest was vested rather than contingent. The will further provided that in case either the son or daughter died without issue during the trust period, the survivor was to have the entire estate at the end of the period, but that if either had children, those children were to receive the share to which their parent would have been entitled, if still living. The court held that the legacy vested in the grandchildren at the death of their parent and not at the time of the distribution of the estate at the end of the trust period. It seems unnecessary to point out that the facts of that case are in no way comparable to those of the case at bar, nor is the conclusion as stated by petitioner.

We have found no Illinois case in which this particular form of bequest was construed, namely, in trust with the income to be paid to a life tenant, with remainder over to named persons, provided, however, they were to receive neither income nor principal until they reached a certain age. It was held in the case of *Hoblit* v. *Howser* (338 Ill., 328) that a devise, "to have and to hold in fee simple, provided, however (devisee) lives to be 50 years of age," and in case she died before, over to her children, or if none, to the other children of the testator, vested the fee in the devisee, subject to being divested upon her death under the prescribed age. Authorities were cited for the holding that "A devise to A when or if he attains a certain age, with a devise over dependent upon his death before he attains that age or without issue * * * is not subject to a condition precedent that the devisee shall attain the age fixed, but it creates a vested estate, subject to a condition subsequent, by the happening of which it may be divested." We think it can make no difference in principle that an intermediate life estate intervenes in the case at bar. As stated in the case of *Lane* v. *Corwin*, supra, "Whether a given remainder is vested or contingent turns on testamentary intent, and where the intention is that the distribution of the estate shall be postponed until a future time to persons then to be ascertained, it is contingent, as distinguished from the instance in and where the ultimate takers are capable of identity at the date of death."

Decision affirmed.

ARTICLE 1594: Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.

REVENUE ACT OF 1926.

Modification of Solicitor's Memorandum 4882 (C. B. V-2, 13). (See G. C. M. 14350, page 201.)

ARTICLE 1594: Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.

XIV-23-7535
Ct. D. 975

INCOME TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF SUPREME COURT.

1. GAIN OR LOSS—BASIS—SALE—DEPLETION OR DEPRECIATION—PROPERTY IN HANDS OF EXECUTOR.

The basis for computing gain or loss on the sale of property, and its depletion or depreciation, for purposes of taxing income returned by an executor under the Revenue Acts of 1924 and 1926 is the value of the property at the date of the decedent's death, rather than the cost to the decedent, or the value on March 1, 1913, if acquired before that date.

2. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Eighth Circuit (72 Fed. (2d), 352), affirming 27 B. T. A., 952, affirmed.

SUPREME COURT OF THE UNITED STATES.

Cavour Hartley, Executor of the Estate of G. G. Hartley, petitioner, v. *Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[April 29, 1935.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

The Court of Appeals for the Eighth Circuit (72 F. (2d), 352) affirmed a ruling of the Board of Tax Appeals (27 B. T. A., 952) and held that under section 202 of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 229) and section 204 of the Revenue Act of 1924 (ch. 234, 43 Stat., 253, 258), the basis for computing gain or loss on the sale of property, and its depletion or depreciation, for purposes of taxing income returned by the petitioner, an executor, is its value at the date of the decedent's death, rather than the cost to the decedent, or the value on March 1, 1913, if acquired before that date.

We granted certiorari (— U. S., —), to resolve a conflict of the decision below, and of the like decision, under section 202 of the 1918 Revenue Act (ch. 18, 40 Stat., 1057, 1060), of the Court of Appeals for the Sixth Circuit in *Eldredge* v. *United States* (31 F. (2d), 924, 930), with that of the Court of Claims in *McKinney* v. *United States* (62 C. Cls., 180). See *Elmhirst* v. *United States* (38 F. (2d), 915), *Myers* v. *United States* (51 F. (2d), 145); compare *McCann* v. *United States* (48 F. (2d), 446 [Ct. D. 349, C. B. X-1, 348]), each decided by the Court of Claims.

Petitioner's tax returns[1] were for the calendar years 1924 and 1925. Sections 202 (a), (b) and 214(a) (8), (10) of the 1921 Act, and section 204 (a), (b), (c) of the Revenue Acts of 1924 and 1926 (ch. 77, 44 Stat., 9), provide that the basis for computing gain or loss on the sale of property, and depreciation and depletion, shall be its cost, or its value on March 1, 1913, if acquired before that date. None of the Acts specifically provides a basis for making the computations where return is made of income received by the estate of a decedent in the course of administration. But in the case of property acquired by "bequest, devise, or inheritance" section 202(a)3 of the 1921 Act and section 204(a)5 of the 1924 and 1926 Acts provide that the basis shall be the fair market value "at the time of acquisition."

The Revenue Acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate taxpayer. By section 2 of the 1921, 1924, and 1926 Acts the estate of a decedent is embraced within the term "taxpayer." Each Act specifically provides for taxation of the income of an estate during administration. (Section 219 of the 1921, 1924, and 1926 Acts.) Each includes profits from the sale of property by the taxpayer in taxable income (section 213 of the 1921, 1924, and 1926 Acts), and provides for the deduction of losses from gross income in arriving at taxable income (section 214 of the 1921, 1924, and 1926 Acts). (See *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S., 509, 516, 517 [Ct. D. 6, C. B. 4, 34].) Each makes provision for the imposition of a tax upon the estates of deceased persons, and the "gross estate" which is the basis for computing the tax is the value of the decedent's property at the time of his death. (Section 402, 1921 Act; section 302, 1924 and 1926 Acts.)

The Court of Claims held that the time of acquisition, indicated by section 202(a) of the 1921 Act and section 204(a) of the 1924 and 1926 Acts as the controlling date for calculating gain or loss to the estate in the course of administration, must be taken to be the date of acquisition by the decedent rather than the time of acquisition by the executor or administrator on the decedent's death. This conclusion, it was thought, was compelled by the statutory command that the basis of computation shall be "cost," which could have no application to the acquisition by the executor or administrator, who is not a pur-

[1] As permitted by section 702 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 879), petitioner elected to have his tax determined "in accordance with the law properly applicable" (section 702(b)), rather than "in accordance with the regulations in force at the time such return was filed" (section 702(a)).

chaser of the estate which he administers. (*McKinney* v. *United States*, supra, 188.) But this specification is not enough to restrict the effect of the general provisions of these Revenue Acts which impose a tax on the income, including capital gains, of taxpayers. The use of the word cost does not preclude the computation and assessment of the taxable gains on the basis of the value of property, rather than its cost, where there is no purchase by the taxpayer, and thus no cost at the controlling date. (See *Heiner* v. *Tindle*, 276 U. S., 582, 585, 586 [T. D. 4212, C. B. VII–2, 272]; *Lucas* v. *Alexander*, 279 U. S., 573, 578, 579 [Ct. D. 76, C. B. VIII–2, 273].)

No plausible reason has been advanced for supposing that Congress intended the capital gains or losses of the estate of a decedent to be treated any differently from those resulting from the sale of property taken by "bequest, devise, or inheritance," as provided in section 202(a)3 of the 1921 Act and section 204(a)5 of the 1924 and 1926 Acts, or that it intended to bring gains or losses, accruing between the date of decedent's acquisition of the property and his death, into the computation of both the estate tax and the income tax assessed upon his administrator or executor. When it had a different purpose in the case of gifts inter vivos, not subject to a gift tax, it specifically directed that gains or losses to the donee should be computed on the basis of the cost of the property at the date of acquisition by the donor. (Section 202(a)2, 1921 Act; section 204(a) (2), (4), 1924 and 1926 Acts; see *Taft* v. *Bowers*, 278 U. S., 470 [Ct. D. 49, C. B. VIII–1, 226]; *Helvering* v. *New York Trust Co.*, 292 U. S., 455, 462.) The conclusion seems inescapable that the intended date of acquisition by an executor or administrator, where the estate is the taxpayer, is the date of the decedent's death. (*Brewster* v. *Gage*, 280 U. S., 327, 335 [Ct. D. 148, C. B. IX–1, 274].)

Possibility of doubt was removed by Treasury regulation. Article 343 of Regulations 45, under the 1918 Act, prescribed that gains or losses of an estate should be computed on the basis of the value of the property at the date of the decedent's death. This was carried forward by article 343 of Regulations 62 under the Act of 1921, of Regulations 65 under the Act of 1924, and of Regulations 69 under the Act of 1926. Following the decision of the Court of Claims in *McKinney* v. *United States*, supra, and with the purpose of conforming to it, the ruling was amended by Treasury Decision 4011 (C. B. VI–1, 77), on April 6, 1927, so as to make the cost to the decedent the basis of the computation. Doubts having been raised as to the ruling in *McKinney* v. *United States*, supra, by later decisions,[2] the amendment was revoked and article 343 restored to its original form (T. D. 4177, C. B. VII–2, 134) on July 7, 1928. The substance of the regulation in its original and final form was carried into section 113(a)5 of the Revenue Act of 1928 (ch. 852, 45 Stat., 791, 819), which directed that the basis for the computation of gains or losses upon property acquired by the decedent's estate from the decedent should be its value at the time of the decedent's death.

The reenactment of the pertinent provisions of section 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the Treasury regulations, which gave them the force of law. (*Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S., 289, 293, 294 [Ct. D. 903, page 332, this Bulletin]; *Brewster* v. *Gage*, supra, 337.) The incorporation of the regulation in section 113(a)5 of the 1928 Act was intended to clarify, but not to change the law. See report of House Committee on Ways and Means, No. 2, Seventieth Congress, first session, page 18; report of Senate Committee on Finance, No. 960, Seventieth Congress, first session, page 26; report of Joint Committee on Internal Revenue Taxation, H. R. Doc. 139, Seventieth Congress, first session, pages 17, 18.

Affirmed.

ARTICLE 1596: Property acquired upon an exchange.

REVENUE ACT OF 1924.

Sale of stock acquired upon exchange for partnership interest. (See Ct. D. 929, page 242.)

[2] *Nichols* v. *United States* (64 C. Cls., 241); *Bankers' Trust Co.* v. *Bowers* (23 F. (2d), 941) (S. D. N. Y.); *Straight* v. *Commissioner* (7 B. T. A., 177).

ARTICLE 1602: Basis for allowance of depletion and depreciation.
(Also Section 234, Article 561.)

XIV-1-7229
Ct. D. 905

INCOME TAX—REVENUE ACT OF 1926—DECISION OF SUPREME COURT.

1. DEDUCTION—DEPLETION—OIL AND GAS LEASE.

The basis for computing the depletion allowed by sections 204(c)2 and 234(a)8 of the Revenue Act of 1926, in the case of an assignee of an oil and gas lease who agreed to pay royalties in cash or in kind, is 27½ per cent of the gross income from production less the royalties paid, and in the case of the assignor and lessor, respectively, 27½ per cent of the royalties they received. Such apportionment has regard to the economic interest of each of the parties entitled to participate in the depletion allowance.

2. DECISION REVERSED.

Decision of the Circuit Court of Appeals, Ninth Circuit (70 Fed. (2d), 402), which reversed the decision of the Board of Tax Appeals (26 B. T. A., 172), reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Twin Bell Oil Syndicate.*

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1934.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

Under the Revenue Act of 1926 the taxpayer is entitled, in the case of oil and gas wells, to deduct from gross income an allowance for depletion. The relevant sections of the Act are copied in the margin.[1] The present litigation

[1] Revenue Act of 1926 (44 Stat., 9, 14, 42).

TITLE II.—INCOME TAX.

* * * * * * *

PART III.—CORPORATIONS.

* * * * * * *

DEDUCTIONS ALLOWED CORPORATIONS.

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

(8) 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; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee. (U. S. C. App., Title 26, section 986.)

TITLE II.—INCOME TAX.

* * * * * * *

PART I.—GENERAL PROVISIONS.

* * * * * * *

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204. (c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that—

* * * * * * *

(2) In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph. (U. S. C. App., Title 26, section 935.)

calls for decision as to the total allowance permitted and its apportionment between lessor and lessee where the income is derived from operation under an oil and gas lease.

During 1925, 1926 and 1927 the respondent, as assignee of the lessee named in an oil and gas lease, extracted substantial quantities of oil. By the terms of the lease and the assignment it was obligated to pay royalties in cash or in kind, totaling one-quarter of the oil extracted. The respondent claimed that the gross proceeds of all the oil produced should form the basis for the computation of the allowance for depletion granted by section 204(c)2, but the petitioner ruled that the deduction should be limited to 27½ per cent of gross production less royalties paid. The Board of Tax Appeals sustained the ruling.[2] The Circuit Court of Appeals reversed the Board.[3] The case is here on writ of certiorari.[4]

The petitioner construes section 204(c)2 in *pari materia* with section 234(a)8, and asserts the percentage deduction permitted by the former is subject to the requirement of equitable apportionment between the lessor and lessee required by the latter. The respondent urges that section 204(c)2 is an independent and complete provision, to be applied without reference to section 234(a)8, and that to attempt to apportion the allowance granted by section 204(c)2 in the manner indicated by section 234(a)8 would violate the plain terms of the statute.

Reference to the structure of the successive income tax laws will aid in a solution of the problem. The Revenue Act of 1916[5] imposed an income tax by Title I. It divided the provisions as to tax into two parts, Part I on individuals, and Part II on corporations. In each part the statute first lays the tax and in a subsequent section grants certain deductions, those enumerated in section 5 of Part I being available to individuals, and those specified in section 12 of Part II to corporations. Both sections include a reasonable allowance for depletion in the case of oil and gas wells. In the drafting of the Revenue Act of 1918[6] a new arrangement of the subject matter was adopted. Title I is composed of definitions, Title II treats of income tax. Part I of this title consists of general provisions applicable alike to individual and corporate taxpayers. Sections under this part define taxable years and dividends, and section 202 prescribes the "basis for determining gain or loss," but makes no reference to depletion of mines, timber, or oil and gas wells. Additional sections have to do with inventories, net losses, and other general matters. Part II levies the tax on individuals, defines net and gross income, and in section 214 specifies the deductions allowed from gross income. The opening sentence of subsection (a)10 is:

"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, based upon cost including cost of development not otherwise deducted."

Then follow two provisos, one directing how cost shall be ascertained in the case of properties acquired prior to March 1, 1913, and the other allowing an alternative method of calculating depletion upon the basis of discovery value of mines and oil and gas wells. The paragraph ends with the sentence:

"In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

In Part III, levying the corporation tax, section 234(a)9 allows a deduction for depletion in the identical phraseology employed with respect to individual taxpayers in section 214(a)10.

The same method was followed in the Revenue Act of 1921.[7] The general provisions contained no reference to depletion, but under Parts II and III of Title II the tax is fixed for individuals and corporations and the allowable deductions from gross income are set forth. The paragraphs of the prior Act as to depletion of oil and gas wells are literally reenacted, but there is inserted in section 214(a)10 as to individuals and section 234(a)9 as to corporations, an additional proviso with respect to discovery value.

In the framing of the Revenue Act of 1924[8] the same arrangement was observed. General definitions are found in Title I; Title II treats of income tax,

[2] 26 B. T. A., 172.
[3] 70 F. (2d), 402.
[4] 293 U. S., 540.
[5] 39 Stat., 756.
[6] 40 Stat., 1057.
[7] 42 Stat., 227.
[8] 43 Stat., 253.

and in Part I of that title are included general provisions applicable to both individual and corporate taxes. Amongst such general provisions in the earlier Acts there had been a section entitled "Basis for determining gain or loss." In the 1924 Act the draftsman embodied paragraphs similar to those of the earlier Act in section 204, but enlarged the caption to read "Basis for determining gain or loss, *depletion, and depreciation*," and transferred to this section that portion of the depletion provision dealing with the basis of the allowance which had formerly appeared under the heading "Deductions" in Part II, Individuals, and Part III, Corporations. This added to the old section 204 a new subsection (c), which permits the use of cost or discovery value as the basis of depletion in the case of mines and oil and gas wells. Having transferred these provisions from sections 214(a)9 and 234(a)8, respecting individual and corporate deductions, there remained in those sections the language first found in the Act of 1918, above quoted, including the concluding sentence relating to equitable apportionment between lessor and lessee. The thought apparently was that the authority for the deduction should remain in the sections dealing with all deductions and the formulæ for calculating the deduction should be relegated to a general provision applicable alike to corporations and individuals.

The depletion allowance based on discovery value was found difficult of administration, since it required a separate valuation of each well,[9] and was abandoned in the Revenue Act of 1926.[10] There was substituted a flat allowance of 27½ per cent of gross income. In this Act the same arrangement was followed as in that of 1924. Under Title II, Income Tax, Part I was devoted to general provisions. As the basis for determining gain or loss, depletion and depreciation, had been embodied in section 204 of the general provisions of the Act of 1924, in which was the permitted use of discovery value as a basis for depletion, when that method was discarded in favor of the flat percentage of gross income it was logical to insert the substituted paragraph in the place where the discarded one had been. Thus we find the new formula inserted as paragraph (c)2 of section 204. The authority for deduction of depletion remains where it has always been since the Act of 1918, namely, in section 214(a)9 of Part II, Individuals, and section 234(a)8 of Part III, Corporations, and naturally there still remains in these paragraphs the limitation that the allowance shall be apportioned between lessor and lessee.[11]

This outline of the framework of the legislation demonstrates that Congress did not insert section 204(c)2 as an independent section *granting* an allowance or deduction for depletion. In the earlier Acts both the grant and the method of computation were embraced in a subsection under the title "Deductions." In the later Acts of 1924 and 1926 the grant remained in the deduction section and the taxpayer was referred to a general provision in section 204 for the method of ascertaining its amount.

Respondent emphasizes the last clause of section 204(c)2, which is: "except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." It is argued that as this exception gives the taxpayer an option to compute the allowance either on the cost basis or by the flat percentage method, if he elects the former he proceeds under 234 (a)8. Thus it is said that section applies only in case the cost basis is chosen. But an examination of the statute demonstrates the error of this position. No basis or formula for computation of the allowance is found in section 234; on the contrary all permissible procedures are covered by section 204, whether cost depletion of mines and oil wells (paragraph (c)); discovery value basis in the case of mines ((c)1); or flat percentage of gross income in the case of oil and gas wells ((c)2). If, therefore, the taxpayer does not compute under (c)2 he

[9] See Senate Report No. 52, Sixty-ninth Congress, first session, page 17.

[10] 44 Stat., 9.

[11] In framing the Revenue Act of 1928 (45 Stat., 791) the draftsman reverted to an arrangement similar to that found in the Revenue Act of 1916. Thus under Title I an income tax is laid on both individuals and corporations, and in subsequent portions of the Act general provisions are contained. In this Act the deductions from gross income are found in section 23 under Part II, "Computation of Net Income," and the language of section 214(a)9 and section 234(a)10 of the Revenue Act of 1926 is found only in this section, applicable to both sorts of taxpayers, corporate and individual, as subsection (l). A new subsection (m) is added, which states: "The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114." Section 114 is found in Supplement B, and so far as material here is the same with respect to gas and oil wells as the analogous portions of section 204(c) of the Act of 1926.

It is quite clear, therefore, from this cross-reference, that the framers of the Act understood the deduction was allowed by section 23(l) but the method of calculating it was to be ascertained by reference to a general provision on that subject, section 114.

must do so in accordance with the cost method prescribed by the earlier paragraph (c) of the same section, and not, as contended, under 234(a)8.

It follows that whichever method outlined in section 204 is chosen for computing the allowance granted by section 234, the deduction must be apportioned between lessor and lessee.

We come, then, to consider the propriety of the procedure followed by the Commissioner. What he did, in effect, was to treat the gross production less royalties as the measure of the respondent's depletable interest in the property, and the royalties as the measure of the depletable interest of those entitled to receive them. The respondent says, however, that under section 213 the gross production of the wells is respondent's gross income from the property, must be reported as such, and section 204(c)2 permits him an allowance of 27½ per cent thereof. It must follow that the royalties (one-fourth of the same gross production) are gross income to those receiving them and are subject to depletion at the rate of 27½ per cent. The result would be a total allowance of 27½ per cent of five-fourths of the total production. Certainly this would not be a single allowance, apportioned between lessor and lessee. And we think section 204(c)2 does not require such a result. The words used are, "the allowance for depletion shall be 27½ per centum of the *gross income from the property* during the taxable year." Is the italicized phrase synonymous with the taxpayer's gross income as defined in section 213? It can not be if "property" signifies the tract of land in all its uses, others as well as the extraction of oil and gas. (*Darby-Lynde Co.* v. *Alexander*, 51 F. (2d), 56.) The phrase, we think, points only to the gross income from oil and gas. (Compare *United States* v. *Dakota-Montana Oil Co.*, 288 U. S., 459, 461 [Ct. D. 655, C. B. XII–1, 243]; *Greensboro Gas Co.* v. *Commissioner*, 30 B. T. A., 1361.) So restricted it presents no difficulty where the owner of the land is also the operator, and there is none where the lessee turns over royalty oil in kind to the lessor, for the retained oil, in that case, is the base for the lessee's computation of depletion and the royalty oil that for the lessor's. We think Congress did not intend a different result where, as here, the lessee sells all the oil and pays over the royalty in the form of cash.

At all events, as the section must be read in the light of the requirements of apportionment of a single depletion allowance, we are unable to say that the Commissioner erred in holding that for the purpose of computation "gross income from the property" meant gross income from production less the amounts which the taxpayer was obliged to pay as royalties. The apportionment gives respondent 27½ per cent of the gross income from production which it had the right to retain and the assignor and lessor respectively 27½ per cent of the royalties they received. Such an apportionment has regard to the economic interest of each of the parties entitled to participate in the depletion allowance. (Compare *Palmer* v. *Bender*, 287 U. S., 551, 558 [Ct. D. 641, C. B. XII–1, 235].)

The respondent insists that, so applied, the section may work unjust and unequal results; but it is to be remarked that this is likely to be so wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer. No doubt, as the petitioner points out, equally illogical results might ensue the application of the section as the respondent construes it. And it is also to be remembered that depletion upon cost or March 1, 1913, value is optional with the taxpayer, if that procedure is more favorable to him.

Finally the respondent says that in the Revenue Act of 1932 [12] the section corresponding to 204(c)2 was amended so as to authorize such a procedure as the petitioner adopted in this case, and therefore the section as it stood in the Act of 1926 could not have supported the Commissioner's ruling. The amendment alters the section to read: [13] "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year, *excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property* * * *." The petitioner says that the amendment was merely clarifying in purpose and declaratory of the existing law as administered. We think this is so. When it was offered the chairman of the committee having the bill in charge so stated,[14] and the conference report is to the same effect.[15]

The judgment is reversed.

[12] 47 Stat., 169.
[13] Section 114(3) (47 Stat., 202).
[14] Congressional Record, volume 75, part 10, pages 11629–11630.
[15] House Conference Report No. 1492, Seventy-second Congress, first session, page 14.

ARTICLE 1602: Basis for allowance of depletion and depreciation.

REVENUE ACT OF 1926.

Percentage allowance for depletion where no production of oil in taxable year. (See Ct. D. 904, page 303.)

ARTICLE 1602: Basis for allowance of depletion and depreciation.

REVENUE ACT OF 1926.

Revocation of G. C. M. 11384 (C. B. XII-1, 64). (See G. C. M. 14448, page 98.)

SECTION 206.—NET LOSSES.

ARTICLE 1622: Claim for allowance of net loss. (Also Section 234, Article 561; Sections 1003 and 1004.) XIV-7-7315 Ct. D. 921

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. DEDUCTION—NET LOSS—AFFILIATED CORPORATIONS.

Net losses sustained in 1922 and 1923 by certain members of an affiliated group may not be deducted from the total net income of the group or from the net income of another affiliate, in computing consolidated net income for 1924. The statute intends that the right to deduct a loss sustained by an affiliated corporation in an earlier year should be limited to the income of the corporation sustaining the loss.

2. DEDUCTION—AFFILIATED CORPORATIONS—INTERCOMPANY DIVIDEND.

A dividend received by the taxpayer from another member of an affiliated group can not be treated as earnings of the taxpayer on the ground that the affiliate earning it performed functions formerly performed by the taxpayer. The affiliate being a separate entity and taxpayer, its income can not be treated as that of the taxpayer for taxation purposes.

3. BOARD OF TAX APPEALS—DENIAL OF REHEARING.

The Board of Tax Appeals properly denied the taxpayer's request for a rehearing in order to permit it to charge itself rent for the years 1922, 1923, and 1924 for the use of plants belonging to two of its affiliates and to charge a third affiliate for the use of taxpayer's facilities and good will, where the purpose of such charges and payments (which were not in fact made) was to reduce the taxable income of the affiliated group.

4. CERTIORARI DENIED.

Petition for certiorari denied November 5, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Seiberling Rubber Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN and HICKS, Circuit Judges, and TAYLOR, District Judge.

[May 8, 1934.]

OPINION.

MOORMAN, Circuit Judge: During the years 1922 and 1923 the petitioner, a Delaware corporation, was affiliated with the Portage Rubber Co. and the

Lehigh Rubber Co. within the meaning of section 240(c) of the Revenue Acts of 1921 and 1924 (42 Stat., 260; 43 Stat., 288). The affiliates filed a consolidated income tax return for those years. In 1922 each of them sustained a loss. In 1923 the petitioner made a profit, but each of the other two affiliates sustained a net loss. On February 18, 1924, the Seiberling Rubber Co., an Ohio corporation, was brought into the affiliation. In 1924 the Portage and Lehigh companies had net losses, but the petitioner had a net income of $291,395.32 and the new Ohio corporation had a net income of $713,427.26. In the 1924 consolidated return the petitioner deducted the unabsorbed 1922 and 1923 net losses of the three original affiliates from the total net income of the group. The Commissioner disallowed the deductions and made the deficiency assessment here in issue. The Board of Tax Appeals sustained the assessment, holding that under section 206(b) of the Revenue Act of 1924 (43 Stat., 260) a net loss suffered by an affiliate in a prior year may not be deducted from the total net income of the group or the net income of another affiliate for a subsequent year. (25 B. T. A., 234.)

The ruling of the Board of Tax Appeals is in accord with *Woolford Realty Co.* v. *Rose* (286 U. S., 319 [Ct. D. 493, C. B. XI–1, 154]). The only difference between that case and the case at bar is that the loss there sought to be deducted was sustained by a corporation in the year preceding its affiliation, while here the losses were sustained by corporations which were affiliated at the time. The court did not, however, place its decision on the ground that the loss was sustained prior to the affiliation, but broadly held that the loss of one affiliate could not be set off against the net income of another in a subsequent year, pointing out that while it is proper for affiliated corporations to file consolidated returns, the tax, when computed, is assessed, in the absence of agreement to the contrary, upon the respective affiliates on the basis of the net income assignable to each, and that it was intended by the statute that the right to deduct a loss sustained by an affiliated corporation in an earlier year should be limited to the income of the corporation sustaining the loss. The doctrine thus announced has been accepted as the settled law [*Delaware & Hudson Co.* v. *Commissioner*, 65 Fed. (2d), 292 (2d C. C. A.) [Ct. D. 801, C. B. XIII–1, 197]; *Beneficial Loan Soc.* v. *Commissioner*, 65 Fed. (2d), 759 (3d C. C. A.)] and is controlling in the case at bar.

The Commissioner deducted from the petitioner's gross income a dividend of $600,000 which it received from the Ohio corporation in 1924. This he was required to do by statute. [26 U. S. C. A., section 986(a)6.] The result was a reduction in like amount of petitioner's net income, subject to absorption by its earlier losses. The petitioner contends that the dividend should be treated in its hands as earnings, because the Ohio corporation earned it by performing functions formerly performed by the petitioner. A sufficient answer to this is that the Ohio corporation was a separate entity and taxpayer, and being so, there is no reason in fact or law why its income should be treated as the petitioner's income for the purpose of taxation.

The final contention is that the Board erred in denying the petitioner's request for a rehearing. In the petition for rehearing the petitioner claimed that for the taxable years 1922, 1923, and 1924 it had used the plants of the Portage and Lehigh companies in its business, for which it had paid them nothing; and further, that it had not charged the Ohio corporation for the use of its good will and certain facilities in selling its product. What it desired to do was to charge itself rent for plants belonging to the Portage and Lehigh companies and to charge the Ohio company $600,000, the amount of the dividend, for the use by that company of its facilities and good will. Thus it desired to make charges and payments for intercompany transactions in order to reduce the taxable income of the affiliation. The charges and payments were not in fact made and were only sought to be made for the purpose of gaining an advantage in taxation. In our view, the Board did not err in refusing to reopen the case to permit such action.

The order of the Board is affirmed.

PART II.—INDIVIDUALS.

SECTION 212.—NET INCOME OF INDIVIDUALS DEFINED.

ARTICLE 22: Computation of net income. XIV-13-7400
Ct. D. 939

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

SUIT—BASIS FOR COMPUTATION OF TAX—ESTOPPEL—BENEFITS RECEIVED.

A taxpayer which fully acquiesced in the redetermination of its taxes for the years 1916 to 1920, in accordance with a decision of the Board of Tax Appeals (for the year 1921) that computation should be made on the fiscal rather than the calendar year basis, and accepted the benefit of a substantial refund resulting from such redetermination, is estopped to claim that the Board's decision was erroneous and to repudiate its previous approval of the transactions.

COURT OF CLAIMS OF THE UNITED STATES.

Stevens Manufacturing Co. v. *The United States.*

[November 5, 1934.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

For the years 1919, 1920, and 1921, plaintiff filed its returns and paid its taxes on a calendar year basis. For the year 1921, the Commissioner of Internal Revenue proposed a deficiency and the plaintiff appealed to the Board of Tax Appeals on the ground that the Commissioner erroneously computed the tax by determining its income on a calendar year basis. On the evidence presented the Board held that the taxpayer's income should be computed on a fiscal year basis ending September 30, and determined that there was no deficiency for the year 1921.

Thereafter the plaintiff filed claims for refund for the years 1916 to 1919, inclusive, based on the decision of the Board that the income should be computed on a fiscal year basis. The Commissioner acquiesced in the decision of the Board, recomputed the taxes for the years 1916 to 1920, and presumably for the purpose of ascertaining whether the taxpayer had any objections thereto sent plaintiff a statement showing deficiencies and overpayments as follows:

Years.	Deficiency in tax.	Overassessment.
1916		$814.08
1917		116,517.66
Period Jan. 1 to Sept. 30, 1918	$16,256.33	
Fiscal year ended Sept. 30, 1919	37,468.77	
Fiscal year ended Sept. 30, 1920		
Total	53,725.10	117,331.74
Net overassessment		63,606.64

Plaintiff responded that it "acquiesces in full" in the overassessments and deficiencies shown in the statement, executed and returned a waiver of right to file a petition before the Board of Tax Appeals with reference to the deficiencies, agreed to the assessment of the deficiencies, and further stated: "The case, therefore, may be closed completely for all years in question."

Shortly after the receipt of this communication from plaintiff, the Commissioner assessed deficiencies with interest as set out in the statement above and executed certificates of overassessment in accordance therewith, which overassessments were found to be overpayments. Part of the overpayments were applied in satisfaction of the deficiencies for 1919 and 1920 and refunds were made to plaintiff of the balance of the overpayments for those years and 1921 amounting to about $250,000. These refunds resulted from a determination that plaintiff's tax should have been computed on a fiscal year basis instead of on the calendar year basis on which the return was filed.

Later, the plaintiff filed timely claims for refund for the years 1919 and 1920 in the respective amounts of $16,256.33 and $37,468.77, which were the amounts of deficiencies assessed for the years 1919 and 1920, as shown by the statement sent plaintiff, and which were paid out of the overassessment. The ground of these claims for refund was that the amount of plaintiff's tax should have been computed on a calendar year basis, its books not having been closed on the last day of any month other than December.

The defense set up by defendant is that the facts in the case show that plaintiff is estopped from making any claims for refund. The plaintiff contends that there can be no estoppel for the reason that it made no misrepresentations to defendant and that defendant was not misled by plaintiff's actions, also that if there was any mistake on defendant's part it was not as to the facts in the case but was one of law which would not give rise to an estoppel.

We think that plaintiff misapprehends the law which is applicable to the facts in this case. The estoppel set up is an equitable estoppel. In *Mahoning Investment Co.* v. *United States* (78 C. Cls., 231) (certiorari denied), we said:

"The doctrine of equitable estoppel, or more properly as we think *quasi* estoppel, is gradually being extended by the modern courts to prevent a wrong being done 'wherever, in good conscience and honest dealing,' a party ought not to be permitted to repudiate his previous statements and declarations," and cited the case of *Rothschild* v. *Title Guarantee & Trust Co.* (204 N. Y., 458), in support of the doctrine, quoting the following therefrom:

"When a party with full knowledge, or with sufficient notice of his rights and of all the material facts, freely does what amounts to a recognition or adoption of a contract or transaction as existing, or acts in a manner inconsistent with its repudiation, and so as to affect or interfere with the relations and situation of the parties, he acquiesces in and assents to it and is equitably estopped from impeaching it, although it was originally void or voidable. (*Vohmann* v. *Michel*, 185 N. Y., 420; 2 Pomeroy's Equity Jurisprudence (3d ed.), sections 816–821, 965.)"

We think this language is particularly applicable to the case now before the court. In the Rothschild case, supra, the party held to be estopped made no misrepresentation to the other party. All she did was to recognize a certain transaction as valid which she afterwards sought to repudiate. If the other party had known of her position it might have availed itself of certain remedies. We think the instant case is even stronger against the plaintiff because it received large benefits from the transaction which it ratified and approved in advance. After the Board of Tax Appeals had decided plaintiff's appeal on the taxes of 1921 and held that plaintiff's taxes should be computed on the basis of a fiscal year ending September 30, the Commissioner, as the findings show, acquiesced in this decision and proposed to apply it to other years. Presumably for the purpose of ascertaining whether the plaintiff had any objection thereto, he sent to plaintiff the statement set out above. Plaintiff apparently was greatly pleased with the information that in accordance with the decision of the Board of Tax Appeals it would be entitled to a refund of about a quarter of a million dollars. It hastened to express its approval thereof in the language set out above which, as will be seen, was in the most positive terms and stated in substance that the years in question might be "closed completely." Accordingly the Commissioner proceeded to close the case by making assessments and certifying to overpayments in accordance with the statement. This showed, as above stated, a large refund due which was accordingly paid and accepted by plaintiff.

Plaintiff now comes into this court and urges that the decision of the Board of Tax Appeals was wrong, and that the facts show that its income should be computed on a calendar year basis under the decision of this court in *Swift & Co.* v. *United States* (69 C. Cls., 171). The case cited by plaintiff is so different in its facts as to have no application, and in any event we do not need to determine the somewhat complicated question of whether the income of plaintiff should be computed on a calendar year basis or that of a fiscal year. If the estoppel is sustained by the evidence, it is immaterial whether the Commissioner acted in accordance with the law in computing the income on a fiscal year basis for in such event the plaintiff can not avail itself of this plea. We are clear that "good conscience and honest dealing" prevent the plaintiff from repudiating its previous statements and declarations. It is not necessary in order to create an equitable estoppel that there should be any misrepresentation as to the facts. It is sufficient if the party against whom an equitable estoppel is set up acquiesced in the transaction in such a manner as to change the relationship of the parties and make its repudiation of the proceedings contrary to equity and good conscience. Here the plaintiff was sent a statement of how the defendant proposed to settle its account for taxes of the years in controversy. It gave its unqualified assent to the application of the taxes in the manner contained in the statement received and assured the defendant that the case was closed. We are not required to determine what might have been the law if the plaintiff had kept silent. In other words, it is not necessary to support the estoppel that it should be shown that defendant would not have made the refund if plaintiff had not approved the proceedings. The estoppel is based upon the action of the plaintiff. It is merely necessary that we should pass on the effect of its having consented to the deficiency assessments, ratified the overassessments, stated that the case might be closed in that manner, and accepted the refund which resulted from a transaction to which it had given its unqualified approval. We are clear that in equity and good conscience plaintiff is estopped from now alleging the invalidity of the transactions which it had so emphatically approved.

It is urged on behalf of plaintiff that there was no mistake of facts on the part of the defendant but a mistake as to the law which determined the kind of return which should be filed. As we have stated above, it is not necessary to determine whether there was any mistake as to the law on the part of the Board of Tax Appeals or the Commissioner. This is not the matter upon which the equitable estoppel in this case is based, which is the conduct of plaintiff in giving the defendant to understand that it ratified and consented to the manner in which defendant proposed to treat plaintiff's taxes and its promise in effect that the whole controversy would be settled thereby. After it had obtained a refund resulting from proceedings which it had ratified in advance, it was clearly estopped from denying their validity.

Plaintiff's petition must be dismissed, and it is so ordered.

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income. XIV–13–7399
G. C. M. 14198

REVENUE ACTS OF 1921 AND 1928.

The decision of the Circuit Court of Appeals in *Helvering* v. *Hickman* (70 Fed. (2d), 985, Ct. D. 866, C. B. XIII–2, 274), holding that under California law compensation received by the wife in 1923 should not be treated as community income and taxed to the husband where there was an agreement that the wife's earnings should be her separate property, is not to be considered as revoking G. C. M. 9938 (C. B. X–2, 115) and G. C. M. 9953 (C. B. XI–1, 13).

Advice is requested relative to the decision of the Circuit Court of Appeals for the Ninth Circuit in *Helvering* v. *Hickman*, supra, in which the court held that where an agreement was entered into in 1907 between husband and wife, residents of California, that com-

pensation received by the wife for personal services should be her separate property, the wife's compensation received during the year 1923 should not be treated as community income and taxed to the husband. That decision sustained the decision of the Board of Tax Appeals in *Howard C. Hickman* v. *Commissioner* (27 B. T. A., 807, nonacquiescence, C. B. XII–2, 20).

The question now presented is whether the decision of the Circuit Court of Appeals in the Hickman case, which is contrary to the general principles contained in G. C. M. 9938 (C. B. X–2, 115) and G. C. M. 9953 (C. B. XI–1, 13), should be considered as revoking those published memoranda.

In G. C. M. 9938 it was held (syllabus):

> Under section 161(a) of the Civil Code of California, which became effective July 29, 1927, a husband's earnings in California constitute community income. An agreement between husband and wife domiciled in California, executed August 1, 1927, which provides that the husband's personal earnings and salary are his separate property and income, is not effective to preclude the taxation of his salary as community income.

To the same effect is G. C. M. 9953, where the salaries of both husband and wife were involved.

The question whether in California the entire community income should be taxed to the husband prior to the amendment to the civil code effective July 29, 1927, was settled by the United States Supreme Court in *United States* v. *Robbins et al.* (269 U. S., 315, T. D. 3817, C. B. V–1, 188). In that case it was held that the wife under the law as it then existed had a mere expectancy and that the community income should be taxed to the husband. In a later case (*Lucas* v. *Earl*, 281 U. S., 111), decided March 17, 1930, it was held that regardless of a contract between the husband and wife to the effect that all property thereafter acquired, including earnings of either spouse, should be held as joint tenants, the husband's salary should nevertheless be taxed to him. The Board of Tax Appeals in construing similar agreements (in cases which involved the wife's compensation) has held that the wife's salary is taxable to her, either because under the laws of California the wife's salary had by agreement become her separate property, or because she earned it. For example, it was stated in *Andrew B. C. Dohrmann* v. *Commissioner* (19 B. T. A., 466, nonacquiescence, C. B. XIII–1, 21) as follows:

> Under the *Earl* case, we hold that the salary in question was correctly returned by the *wife who earned it.* [Italics supplied.]

The Earl case, however, involved the earnings of the husband, not of the wife, and the conclusion reached is in harmony with *United States* v. *Robbins*, supra. In other words, the husband's salary in the Earl case having been received in 1920 and 1921, would, under the Robbins decision, properly have been taxable to the husband not because he "earned it" but because under the laws of California it was community income. This office, therefore, is unable to agree with the construction placed on the Earl case by the Board to the effect that the wife's salary, under the California law (prior to the amendment of July 29, 1927), is taxable to her merely because she "earned it."

The Supreme Court in *Poe* v. *Seaborn* (282 U. S., 101, Ct. D. 259, C. B. IX–2, 202), which involved the community property laws of

Washington where the wife has a vested interest, discussed both the Robbins case and the Earl case in the following language:

> In the *Robbins* case, we found that the law of California, as construed by her own courts, gave the wife a mere expectancy and that the property rights of the husband during the life of the community *were so complete that he was in fact the owner.* * * *
> * * * *But here the husband never has ownership.* That is in the community at the moment of acquisition.
> In the *Earl* case a husband and wife contracted that any property they had or might thereafter acquire in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, "shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants * * *." We held that, assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, were his individual income, "derived from salaries, wages, or compensation for personal services" under sections 210, 211, 212(a), and 213 of the Revenue Act of 1918. [40 Stat., 1062–1065.] The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. * * * [Italics supplied.]

In *Blair* v. *Roth* (22 Fed. (2d), 932, T. D. 4152, C. B. VII–1, 215, certiorari denied, 277 U. S., 588), there was an agreement between the husband and wife that the earnings of both should be contributed to a common fund of which they should be the owners, share and share alike. The court held that the agreement did not prevent the earnings of the wife from being taxed to the husband as community income under the Revenue Act of 1921 on the basis of *United States* v. *Robbins*, supra. (See also *Wehe* v. *McLaughlin*, 30 Fed. (2d), 217.) Furthermore, in *Blair* v. *Roth*, supra, the court stated that it concurred in the view of the Commissioner that "at the instant they were received, the salaries were, by the law, impressed with the status of community property and were taxable with reference to that status * * *." The court also commented that the obligation to pay the tax could not be escaped under that agreement any more than it could be escaped under a similar agreement between one member of the community and a third person.

Under the laws of California as interpreted by the State courts, salaries being the "product of toil or talent" of either husband or wife are community property. (McKay on Community Property (2d ed.), sections 201 and 296; *Martin* v. *Southern Pac. Co.*, 130 Cal., 285, 62 Pac., 515; *Fennell* v. *Drinkhouse*, 131 Cal., 447, 63 Pac., 734.) It is undisputed that they may by contract change such property from community to separate property. (*Wren* v. *Wren*, 100 Cal., 276, 34 Pac., 775; *Title Ins. & Trust Co.* v. *Ingersoll*, 153 Cal., 1, 94 Pac., 94; *Kaltschmidt* v. *Weber*, 145 Cal., 596, 79 Pac., 272; *Perkins et ux.* v. *Sunset Telephone & Telegraph Co.*, 155 Cal., 712, 103 Pac., 190, etc.) But these agreements, although valid in so far as they seek to change property rights of husband and wife in California, may not be availed of for the purpose of avoiding income tax liability. (*Blair* v. *Roth*, supra; *Wehe* v. *McLaughlin*, supra; *Lucas* v. *Earl*, supra.)

The Bureau has consistently held that regardless of any agreement between husband and wife in California seeking to change the status of their personal earnings from community to separate property compensation earned by either spouse prior to July 29, 1927 (the effective date of the amendment to the California Civil Code known

as section 161(a)), is taxable to the husband in accordance with the rule laid down in *United States* v. *Robbins*, supra; and that compensation earned by either spouse on and after July 29, 1927, is taxable one-half to each, where separate returns are filed, in accordance with the principles contained in I. T. 2457 (C. B. VIII–1, 89) and *United States* v. *Malcolm* (282 U. S., 792). A change in that position is not deemed proper in the light of the decisions above discussed.

In view of the foregoing, the decision of the Circuit Court of Appeals in *Helvering* v. *Hickman*, supra, is not to be considered as revoking G. C. M. 9938 and G. C. M. 9953.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

ARTICLE 39: Sale of stock and rights.

REVENUE ACT OF 1926.

Commissioner's apportionment of cost between preferred and common stock. (See Ct. D. 912, page 168.)

ARTICLE 42: Sale of personal property on installment plan. XIV–12–7384 Ct. D. 937

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

NET INCOME—INSTALLMENT SALE—STATUTE OF LIMITATION.

Where a taxpayer in 1918 sold certain stock on the installment plan, received payments in 1918, 1919, and 1920, but did not refer to the transaction in his returns for those years and in 1924 reported the entire profit in an amended 1918 return, executed a waiver for that year, and paid the tax upon that basis, he is not entitled to the benefit of section 212(d) of the Revenue Act of 1926 (made retroactive by section 1208), which allows the profit to be reported over the years in which installment payments are received, since no waivers had been filed for the years 1919 and 1920. It would be grossly inequitable to permit the payment of tax on the small portion of the profit received in 1918, allocate the balance to 1919 and 1920 where it would be free from liability under the statute of limitations, and by recovery in an assumpsit action evade taxation upon more than 96 per cent of the entire profit.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

Frank W. Howbert, as Collector of Internal Revenue, appellant, v. *Charles M. Norris, appellee.*

Appeal from the District Court of the United States for the District of Colorado.

[September 20, 1934.]

OPINION.

BRATTON, Circuit Judge, delivered the opinion of the court.

In August, 1918, Charles M. Norris sold certain shares of capital stock in the Scully-Norris Co., a Colorado corporation. The purchaser paid $600 in cash and executed three promissory notes evidencing the balance of the purchase

price. The first was for $5,000 and matured 6 months after date; the other two were for $7,236.02 each and fell due 12 and 18 months after date, respectively. Each note was paid when due, that is the first and second in 1919 and the third in 1920. Norris received a net profit of $14,712.54 in the transaction, but failed to make any reference to it in his income tax returns for the years 1918, 1919, and 1920.

In June, 1924, a deputy collector called on Norris, investigated the situation and prepared an amended return for the taxable year 1918, in which the entire profit was included. Norris executed and caused the return to be filed, also a waiver consenting to the assessment and collection of any tax due under any return made for the year 1918, irrespective of any period of limitation provided by law for its assessment and collection. After protesting and challenging the validity of the tax reflected by the amended return, and following a reaudit of the books resulting in reduction of the amount due, he paid $2,338.78. That was done in January, 1926. At about the same time he executed an offer to compromise the claimed interest and penalties for $140, which offer was subsequently accepted.

In November, 1929, a claim for refund of $2,309.15 for the taxable year 1918 was filed. It is set forth in the complaint and contains the following which reflects the theory and method of computation upon which the cause of action herein is predicated:

"It will be readily seen that the initial payment received by me during the calendar year 1918, other than evidences of indebtedness of the purchaser, totaled $600, which was paid in cash, which initial payment is approximately 3¼ per cent of the finally adjusted sale price of $18,462.54. Further, an examination will reveal that the profit realized or to be realized is 79.69 per cent of the sale price and the cost is 20.31 per cent of the sale price. Applying 79.69 per cent of $600 actually collected by me in cash during 1918 will bring about a taxable profit to me for 1918 of $478.14 instead of $14,712.54.

"An adjusted statement of income and deductions and resultant tax liability for 1918 would then appear as follows:

"Salary received from Scully-Norris Motor Co. of Denver, Colo			$4,780.53
"Pro rata profit on sale of stock of Scully-Norris Motor Co			478.14
"Rents, net			47.50
"Interest			2.16
"Total			5,308.33
"Interest paid		$76.00	
"Taxes paid		55.94	
"Contributions:			
"National Red Cross Society	$27.00		
"United War Societies	50.00		
"Boy Scouts	5.00		
		82.00	
			213.94
"Net taxable income			5,094.39
"Less personal exemption			2,000.00
"Balance taxable at 6 per cent			3,094.39
"Normal tax at 6 per cent on $3,094.39		$185.66	
"Surtax at 1 per cent on $94.39		.94	
"Total tax liability		186.60	
"Tax previously paid during 1919	$156.97		
"On January 25, 1926	2,338.78		
		2,495.75	
"Tax overpaid under statements set forth in second petition			2,309.15"

Norris was advised by letter from the Commissioner that the claim had been allowed, but was subsequently informed in like manner that it was disallowed. This suit followed to recover the amount of the claim as an overpayment of taxes for the year 1918. A jury was waived and the cause submitted to the court. Judgment was rendered for Norris.

The sale was a casual one and the asserted right to report the income therefrom on the installment plan is founded upon the provisions of section 212(d) of the Revenue Act of 1926 (made retroactive by section 1208 of the same Act). (26 U. S. C. A., 953(d).) That statute is in this language:

"Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed bears to the total contract price. In the case (1) of a casual sale or other casual disposition of personal property for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed one-fourth of the purchase price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner prescribed in this subdivision. As used in this subdivision the term 'initial payments' 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."

Prior to the Revenue Act of 1926 Congress had authorized only the cash and the accrual bases for income tax returns. However, recognizing the obvious hardship in applying either of those methods to sales upon the installment plan, the Commissioner by regulations authorized the vendor to distribute the purchase price through the years during which it was actually received. But in 1926 the Board of Tax Appeals disapproved that policy because it was outside the two permitted methods. Thereupon Congress enacted section 212(d) referred to, in order to empower the Commissioner to resume the previous policy. (*Burnet* v. *S. & L. Building Corporation*, 288 U. S., 406 [Ct. D. 651, C. B. XII–1, 195].)

The statute contemplates payment of income taxes on a different basis from that theretofore existing, not the escape of taxes in any form. The formula provided is that such proportion of each installment payment shall be returned for the taxable year during which it is actually received as the total profit realized or to be realized when payment is completed bears to the total sale price. But it is not sought to apply that formula here. Norris asserts that 79.69 per cent of the sale price represents profit; he seeks to pay taxes on $478.14, being that proportion of the $600 received in 1918, and to exclude from consideration the remainder of such profit, exceeding $12,000, thereby rendering it immune from taxation in any amount because the time within which an assessment for the years 1919 and 1920 could be made and payment enforced expired five years after the return was due. We think Congress did not intend to create such a haven against payment of taxes in any form. No such asylum of immunity was contemplated. To permit a tax debtor to make the attempted use of the statute long after the bar of limitation has precluded assessment and collection would constitute a plain distortion of the legislative object and purpose. The retroactive provision of the statute indicates clearly a legislative intent that one having already paid his taxes on a cash basis may invoke the installment method and receive a refund for the difference resulting from the change due to smaller sums returned and lower rates, but that intent does not go to the extent of empowering a taxpayer to employ the procedure as a vehicle to escape taxes in toto upon more than 96 per cent of a net realized profit.

This is an action in assumpsit to recover money had and received. But an assumpsit of this kind is governed by equitable principles. (*United States* v. *Jefferson Electric Co.*, 291 U. S., 386 [Ct. D. 803, C. B. XIII–1, 393]; *New York Life Insurance Co.* v. *Anderson*, 263 F., 527; *Champ Spring Co.* v. *United States*, 47 F. (2d), 1 [Ct. D. 323, C. B. X–1, 446]; *Duffin* v. *Lucas*, 55 F. (2d), 786; *Hartwell Mills* v. *Rose*, 61 F. (2d), 441; *Ralston Purina Co.* v. *United States*, 58 F. (2d), 1065 [Ct. D. 584, C. B. XI–2, 340].) It would be grossly inequitable to permit the payment of the tax on $478.14, representing less than 4 per cent of the enjoyed profit, allocate the balance to the years 1919 and 1920 where it would be free from liability under the statute of limitation, and by means of recovery herein evade all taxation on it. For that reason such a shift can not be made. (*Commissioner* v. *Moore*, 48 F. (2d), 526 [Ct. D. 407, C. B. X–2, 233].)

The judgment is reversed and the cause remanded for further proceedings in harmony herewith.

Reversed and remanded.

ARTICLE 50: When included in gross income. XIV-6-7301
Ct. D. 918

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. GAIN OR LOSS—SALE—CONTRACT TO CUT AND REMOVE TIMBER.

Under a contract whereby the taxpayer and others agreed to the cutting and removal of merchantable timber from lands owned by them, the vendees agreeing to incorporate and to pay specified amounts for timber cut and sold, and to divide one-half of their stock among the timber owners as soon as the earnings equaled their capital investment, the sale was not of the timber as a whole at the time of execution of the contract, but occurred only as the timber was cut and removed, and the taxpayer's share of the accumulated profits from timber cut and sold, as represented by her share of the corporate stock received in June, 1921, accrued and was taxable to her in that year.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 781) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Carrie Lutcher Brown, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of United States Board of Tax Appeals (district of Texas).

Before BRYAN, SIBLEY, and WALKER, Circuit Judges.

[March 22, 1934.]

OPINION.

SIBLEY, Circuit Judge: The taxpayer received in June, 1921, shares of corporate stock having a fair market value at that time of $116,800, which the Board of Tax Appeals held to be a taxable gain in that year. The ruling is complained of. The stock came to the taxpayer because of a contract made in 1917 by herself and others with one Wier, whereby the former parties agreed to the cutting and removal of merchantable timber on 86,000 acres of their land in Texas by Wier, who on his part was to erect and equip sawmills and to incorporate a company with $400,000 capital to take over the contract and the sawmills. The timber was to be cut at an average rate of 40,000,000 feet annually. For the timber cut $6 per thousand feet was to be paid each month, and in addition every six months 25 per cent of the selling price of the lumber at the mill in excess of $13.50 per thousand feet. It was further provided that the corporation should pay out its net profits as cash dividends, and so soon as the earnings equaled the fixed investment of Wier and the other incorporators all the stock should be surrendered and one half of it be reissued to the surrendering stockholders and the other half divided among the timber owners. This taxpayer accordingly got each year her part of the fixed price of $6 per thousand feet of timber cut, and her part of the price of the lumber above $13.50 per thousand feet, and in June, 1921, her part of the accumulated profits of the corporation as represented in the redistribution of its stock. The standing timber which was acquired before March 1, 1913, was worth on that date $5.80 per thousand, so that the fixed price for it of $6 yielded a little gain on the timber cut, and the sharing in the profits of milling it were all gain if to be attributed only to the timber that had then been cut. The taxpayer, however, contends that the timber as a whole was exchanged for the stock, and that the value of the whole body of the timber must be returned before a gain on the stock is determined; and if this be not the case, that the gain represented by the stock did not accrue in 1921.

The contract says: "The parties of the first part, for the consideration and upon the terms and conditions hereinafter mentioned, by these presents do

hereby give and grant unto the party of the second part the exclusive right to enter upon with teams, trams and in other proper ways, to turpentine and cut and remove all the merchantable pine timber measuring 10 inches in diameter and upwards at the stump at the time of removal, on and from all lands" fully described. The $6 per thousand feet to be paid each month is expressed to be " for the timber cut the preceding month, and the 25 per cent herein provided for (the profits over $13.50 per thousand feet of lumber) shall be determined and estimated at the end of each six months of operations." No special payments for the turpentining are provided. The legal effect of this grant depends upon its terms. Texas law is controlling. In *Houston Oil Co.* v. *Hamilton* (109 Texas, 270, 206 S. W., 817) the instrument involved for a cash consideration bargained, sold, transferred and delivered the standing merchantable pine timber on described land, to have and to hold it, with the right of way to go on and across the land for the purpose of removing it, forever. Ten years later the privies of the grantors began cutting the timber and the privies of the grantee were held to be the owners of the growing timber whose rights had not been forfeited by not removing it in a reasonable time. By contrast in the companion case of *Houston Oil Co.* v. *Boykin* (109 Texas, 276, 206 S. W., 815) it was held that an instrument which for a cash consideration bargained and sold the merchantable timber standing and growing on land and provided that the vendee have liberty to go upon the land to cut and carry it away in such manner as should be convenient to him was not a perpetual grant of the trees but the implication was that they were to be removed within a reasonable time. This case fully asserts the rule that where a time is stipulated for the removal title passes only to such trees as are in fact removed within that time. In the present case the literal words are not a grant of the timber but of the exclusive right to go on the land and turpentine, cut and remove the timber. Payment is to be made only for such timber as is cut. The contract does not expressly limit the time for which this right shall last except that the cutting must average 40,000,000 feet per year, but at the end of 12 years it is provided that under stated conditions the grantors may themselves begin to cut and remove the remaining timber. Cancellation of the entire contract for defaults continuing 30 days after notice and for unexcused failure for 6 months to operate the sawmill is provided for. We are of the opinion that the timber was not sold as a whole, that a sale of none of it occurred upon the execution of the contract, but that sales were accomplished only as the timber was cut and removed. (*Foster* v. *Commissioner*, 57 Fed. (2d), 516; *Houston Oil Co.* v. *Boykin*, supra.) Therefore the money received under the contract was received for timber theretofore cut and not for that remaining to be cut. This is true, not only as to the $6 per thousand feet paid each month, but also as to the share of profits accruing each six months from its manufacture, and the share of profits accumulated by the corporation and realized by the timber owners in the issuance to them of stock in the corporation. The timber owners had from the beginning an inchoate half interest in the profits of the corporation, but it was realizable only if and when the profits should in dividends redeem the capital investment. This happened in 1921. Thereupon the timber owners' half interest in the accumulated profits was turned over to them in the shape of half the corporate stock. One-half of the profits to accrue in the future from manufacturing the remaining timber would come to them as future dividends on the stock. The remaining timber was in nowise represented in the distribution of stock made in 1921. No new or more absolute disposition of it was then made. The stock represented profits on the timber cut and thereby sold prior to June, 1921. The taxpayer's capital investment in that timber had been more than returned in the $6 per thousand feet paid for it, so that all else was gain. The gain represented by her share in the accumulating corporate net profits did not accrue to and was not taxably realized by her until the condition of full reimbursement of the investment of the old stockholders was fulfilled, and until she received some separate disposable thing which had a market value. The market value of the stock was realized income in 1921 and was then taxable. The capital invested in uncut timber is not to be compensated from it, for that timber was not yet sold. The petition to revise the conclusion of the Board of Tax Appeals is therefore denied.

ARTICLE 50: When included in gross income.

REVENUE ACT OF 1918.

Commissions charged by banks on loans. (See Ct. D. 965, page 183.)

ARTICLE 50: When included in gross income.

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

Bank discounts and commissions charged by banks on loans. Solicitor's Memorandum 3820 (C. B. IV-2, 32) modified. (See G. C. M. 14839, page 73.)

ARTICLE 52: Examples of constructive receipt. XIV-14-7415
Ct. D. 944

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. GROSS INCOME—UNCOLLECTED INTEREST COUPONS—CONSTRUCTIVE RECEIPT.

Interest coupons which matured between December 31, 1922, and September 18, 1923, the date of decedent's death, but which were not clipped and cashed during that period because of his physical and mental disability, constituted income constructively received by him in the year 1923, although not reduced to actual possession and realization.

2. DECISION AFFIRMED.

Decision of District Court, Western Division of Western District of Missouri (4 Fed. Supp., 375, Ct. D. 745, C. B. XII-2, 182), affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Ella C. Loose, as Executrix of the Last Will and Testament of Jacob L. Loose, Deceased, and Individually, appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the Western District of Missouri.

Before STONE, Circuit Judge, and JOYCE and BELL, District Judges.

[November 17, 1934.]

OPINION.

JOYCE, District Judge, delivered the opinion of the court.

Appellant, plaintiff below, is the executrix of the estate of her husband Jacob L. Loose, who died on September 18, 1923. At his death and for some years prior thereto Loose owned certain coupon-bearing bonds. Coupons in the amount of $34,687.50 matured between December 31, 1922, and September 18, 1923, and had not been clipped and cashed at the time of his death. Plaintiff as executrix clipped and cashed them after his death. Plaintiff did not report these coupons as income to the deceased for the year 1923 but did report them as assets of Loose's estate subject to the Federal estate tax. The Commissioner determined that the proceeds were a part of the income of deceased and subject to taxation as such. The Commissioner's finding was upheld by the Board of Tax Appeals in 15 B. T. A., 169. Plaintiff then paid the tax and accrued interest. This appeal is from the judgment of the court below entered against plaintiff on

suit for refund of the tax. The case was tried upon a stipulation of facts and three affidavits dealing with the physical and mental condition of Mr. Loose.

Prior to 1918 it was Mr. Loose's custom to go to New York twice each year where he kept a safety deposit box and he would clip and cash the matured coupons on these bonds. During that year he suffered a paralytic stroke followed by two months of illness and thereafter he was able to be about with the assistance of a nurse until May, 1923, when a second stroke occurred followed by severe illness culminating in his death. After the stroke in 1918 he discontinued the semiannual trips to New York and between that time and the second stroke he would stop in New York in June and September en route to and from his summer home in Gloucester, Mass. After the last attack in May, 1923, deceased was not able, physically or mentally, to attend to any business or to stop at New York on his way to Gloucester in June of that year or at any time thereafter. After 1918 the safety deposit box was rented in the name of Mrs. Loose with power of attorney for access to Mr. Loose, and upon all trips to the box between the first and second illnesses he was accompanied by Mrs. Loose, who performed the actual operation of clipping the bonds and attending to his other business affairs in New York. He never gave anyone else authority to open the safety deposit box and his wife never went to it without him. It further appears that following the second stroke in May, 1923, Mrs. Loose "was never away from her husband a half an hour," because his condition was so serious that his death might occur at any time, and for that reason she did not go to the box during the last trip to Gloucester in 1923 or thereafter before his death.

Deceased made tax returns upon a cash receipts and disbursements basis and the solvency of the corporations issuing the bonds was stipulated.

While various matters are argued under numerous headings, the broad question presented in the case is whether the interest represented by the coupons on these bonds, which matured before but were not clipped and presented until after the death of Mr. Loose, constituted his income or a part of the estate.

The Revenue Act of 1921 and the applicable regulations authorized thereunder govern this case. Section 213 of said Act (42 Stat., 237) defined gross income to include "gains, profits, and income derived * * * also from interest, rent, dividends, securities * * *. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in 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. * * *"

Section 201(e) of that Act (42 Stat., 228) reads:

"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 of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

By section 1303 of the Act (42 Stat., 309) the Commissioner was authorized to make all needful rules and regulations for the enforcement of the provisions of the Act, pursuant to which authority the following regulations, among others, were promulgated:

Article 52 of Regulations 62:

"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. * * *"

Article 53 of Regulations 62:

"When interest coupons have matured and are payable, but have not been cashed, such interest payment, though not collected when due and payable, is nevertheless available to the taxpayer and should therefore be included in his gross income for the year during which the coupons matured."

There are two major contentions urged by appellant: First, that Congress did not intend to apply the income taxing statute to constructive receipt of income; and second, that if such was its intention it should not be applied in the peculiar situation presented by the above facts.

Considering only the statute and the regulations issued thereunder, it would seem to follow that the coupons were income of the deceased as of the year 1923. They represented interest and fall flatly within the definition of gross income. Cases involving stock dividends afford an interesting analogy. The situation where a dividend was declared and checks sent out on December 31 so that none would be delivered before January 2 of the following year have presented the problem whether the income represented by said dividends was received in the year of declaration or in the year of receipt of the check. Some decisions favored the former date. (*Commissioner* v. *Bingham* (C. C. A. 6), 35 Fed. (2d), 503, cert. den., 281 U. S., 729 [Ct. D. 207, C. B. IX-2, 289]; *Shearman* v. *Commissioner* (C. C. A. 2), 66 Fed. (2d), 256 [Ct. D. 770, C. B. XIII-1, 118].) Others favored the latter date. (*Commissioner* v. *Adams* (C. C. A. 1), 54 Fed. (2d), 228; *Appeal of Georgia State Savings Assoc.*, 4 B. T. A., 748.) The Adams and Shearman cases discuss the intent of the statute to cover constructive receipt of income, the former negativing and the latter affirming the principle. Among other cases which throw light upon the matter are *Avery* v. *Commissioner* (292 U. S., 210 [Ct. D. 828, C. B. XIII-1, 131]); *North American Oil Consolidated* v. *Burnet* (286 U. S., 417, 423 [Ct. D. 499, C. B. XI-1, 293]); *Massachusetts Mutual Life Insurance Co.* v. *United States* (288 U. S., 269 [Ct. D. 638, C. B. XII-1, 286]); *Union Guardian Trust Co.* v. *Burnet* (64 Fed. (2d), 712, 715) (App. D. C.); *Darcy* v. *Commissioner* (66 Fed. (2d), 581 (C. C. A. 2) [Ct. D. 814, C. B. XIII-1, 238]); *Schoenheit* v. *Lucas* (44 Fed. (2d), 476, 480) (C. C. A. 4); *Hadley* v. *Commissioner* (36 Fed. (2d), 543 (App. D. C.) [Ct. D. 153, C. B. IX-1, 266]); *Brooks* v. *Commissioner* (35 Fed. (2d), 178); *Burns* v. *Commissioner* (31 Fed. (2d), 399, 401 (C. C. A. 5), cert. denied 280 U. S., 564); *Raleigh* v. *United States* (5 Fed. Supp., 622) (Ct. Cl.); *Freeman* v. *United States* (3 Fed. Supp., 301) (D. C. Pa.); *Kales* v. *Woodworth* (20 Fed. (2d), 395, 401 (D. C. Mich.), affirmed in 32 Fed. (2d), 37 (C. C. A. 6), cert. denied 280 U. S., 570 [T. D. 4080, C. B. VI-2, 149]); *Park* v. *Gilligan* (293 Fed., 129, 131) (D. C. Ohio); *Eakins* v. *United States* (36 Fed. (2d), 961) (D. C. N. Y.); *Nichols* v. *United States* (64 Ct. Cl., 241). (Also, see *Maryland Casualty Co.* v. *United States*, 251 U. S., 342; *American National Co.* v. *United States*, 274 U. S., 99 [T. D. 4099, C. B. VI-2, 193]; *Old Colony Trust Co.* v. *United States*, 279 U. S., 716 [Ct. D. 80, C. B. VIII-2, 222]; *United States* v. *Boston & Maine Railroad Co.*, 279 U. S., 732; *Rouss* v. *Bowers*, 30 Fed. (2d), 628 (C. C. A. 2), cert. denied 279 U. S., 853, and *Great Northern Railway Co.* v. *Lynch*, 292 Fed., 903 (D. C. Minn.) [T. D. 3147, C. B. 4, 277]; *Eldridge* v. *Commissioner*, 30 B. T. A., 202.)

In many of the above cases expressions like the following appear:

"The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." (*Corliss* v. *Bowers*, 281 U. S., 376, 378 [Ct. D. 188, C. B. IX-1, 254].)

In the Avery case the Supreme Court came to the conclusion reached in the Adams case, namely, that stock dividend checks although mailed December 31 are, when not received until January 2 of the following year, income of the new year. It was noted that "* * * there is nothing to show that petitioner could have obtained payment on December 31. * * * Nothing indicates that it recognized an unrestricted right of stockholders to demand payment except through checks sent out the usual way. The checks did not constitute payments prior to their receipt."

This language applies with peculiar force to the instant case. Here, aside from deceased's physical handicap, there was nothing to prevent his obtaining payment of the coupons in 1923. He had an unrestricted right to demand payment.

Not recognizing constructive receipt of income as income realized would open the door to fraud by leaving it within the power of the taxpayer to reduce income to possession at such time as would best suit his taxation purposes. Such right of selection does not rest with the taxpayer, nor does it find approval in the cases. (*Newman* v. *Commissioner* (C. C. A. 10), 41 Fed. (2d), 743; *Freeman* v. *United States*, 3 Fed. Supp., 301 (D. C. Pa.) [Ct. D. 708, C. B. XII-2, 176]; *Security First Natl. Bank* v. *Commissioner*, 28 B. T. A., 289.)

For some years prior to the enactment of the revenue law here involved the Commissioner had promulgated and enforced administrative rules to the general effect that income subject to control and possession should be regarded

as received or realized for income tax purposes, although not actually reduced to possession. The subsequent enactment of statutes without substantial change therein raises a strong presumption that the Congress viewed the regulations as in accord with its intent. (See *Skinner* v. *Eaton*, 45 Fed. (2d), 568; *Brewster* v. *Gage*, 280 U. S., 327 [Ct. D. 148, C. B. IX–1, 274].)

Our conclusion as to the first of the two matters urged is that the statutes involved should be construed as covering constructive receipt of income when applied to taxpayers on the cash basis. As bearing on this conclusion see *In re Booth's Estate* (248 N. Y. S., 264), decided by the Surrogate's Court of Kings County, N. Y., which involved a State tax and a situation where a dividend was declared and available before death but not reduced to possession, the court holding that a dividend declared before death becomes the property of the deceased and passes to his estate by his death.

We then come to a consideration of appellant's contention that even though the constructive receipt of income be within the intent of the statute, it does not apply in that respect to the peculiar situation here brought about by the physical handicap under which the deceased labored, which condition rendered him powerless to avail himself of the actual receipt of the income within his lifetime. If the sole basis and reason for constructive receipt of income were the avoidance of fraud in tax evasion, this argument would carry much force because there was obviously no thought of tax evasion here. However, the strongest reason for holding constructive receipt of income to be within a statute is that for taxation purposes income is received or realized when it is made subject to the will and control of the taxpayer and can be, except for his own action or inaction, reduced to actual possession. So viewed, it makes no difference why the taxpayer did not reduce to actual possession. The matter is in no wise dependent upon what he does or upon what he fails to do. It depends solely upon the existence of a situation where the income is fully available to him. Here the circumstances are peculiar and perhaps harsh in their consequences, but "That it was not convenient and was perhaps physically impossible for him to appear at the offices of the various corporations before the year closed and demand the cash did not destroy his legal right to do so." (*Commissioner* v. *Bingham* (C. C. A. 6), 35 Fed. (2d), 503, 504, cert. denied, 281 U. S., 729.)

So far as the income itself was concerned it was entirely available to him and could have been reduced to actual possession and realization.

We have not undertaken to discuss each of the matters urged by appellant but only the two issues which seem to us to be of most importance and controlling.

The judgment is affirmed.

ARTICLE 52: Examples of constructive receipt. XIV–15–7425
Ct. D. 946

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—ROYALTIES—TITLE—TRUST AGREEMENT.

An oil and gas lease owned by M Company, which was in process of liquidation, was transferred to the majority stockholders, who, to satisfy creditor banks to which their stock was pledged, conveyed the lease to the president of one of the banks, as trustee. By a separate instrument, M Company assigned to the trustee all its right, title, and interest in and to the lease. N Company was then organized to take over the property (its president being the individual named as trustee), the majority stockholders of M Company became the stockholders of N Company, and the trustee executed, but did not physically deliver, a deed of the property to N Company in consideration of the capital stock of the latter, which was held by the trustee as collateral to the carrying out of a trust agreement entered into by all the interested parties. The trustee collected the royalty payments from the lease and applied

them to the liquidation of the indebtedness of M Company before making distribution to N Company's stockholders. Under the circumstances, there was sufficient delivery of the deed, N Company was the owner of the lease, and was liable for the tax upon the income therefrom. The trustee was merely a conduit through which the income was collected and disbursed.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 960) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 9902. *Marquette Oil Distribution Co., petitioner,* v. *Commissioner of Internal Revenue, respondent.*

No. 9903. *Marquette Oil Distribution Co., petitioner,* v. *Commissioner of Internal Revenue, respondent.*

On petitions to review decision of United States Board of Tax Appeals.

Before BOOTH, Circuit Judge, and MUNGER and BELL, District Judges.

[October 3, 1934.]

OPINION.

BOOTH, Circuit Judge, delivered the opinion of the court.

There are here two petitions for review of one decision of the Board of Tax Appeals, which decision covered two matters: (1) the alleged deficiency in the income taxes of the Marquette Oil Distribution Co. for the year 1925; (2) the alleged similar deficiency for the years 1926 and 1927.

The Board of Tax Appeals, by its order of redetermination (in its case No. 39127) found a deficiency for the year 1925; and by a similar order (in its case No. 48743) found a deficiency for the years 1926 and 1927. The two orders were made pursuant to the one decision above mentioned.

Petitions for review followed and were consolidated for hearing in this court.

The facts in the controversy are largely undisputed and are substantially as follows:

"The petitioner is a South Dakota corporation, organized on September 24, 1924, with its principal office in St. Paul, Minn. It was organized to take over a certain oil and gas property from the majority stockholders of the Iowa Oil & Refining Co. which was in process of liquidation.

"Prior to 1924 the Iowa Oil & Refining Co. and certain individuals, who were the majority stockholders of that company, became indebted to the First National Bank of Sioux City, Iowa, the Sioux Falls Trust & Savings Bank of Sioux Falls, S. Dak., and the Midland National Bank of Minneapolis. As collateral security for such indebtedness the individuals deposited their stock of the Iowa company. Early in 1924 dissension arose among the stockholders and it was determined to liquidate by transferring to the majority stockholders a certain oil and gas property known as the Horton lease, the minority stockholders receiving certain other property. Before the proposed liquidation could be effected, it was necessary to satisfy the creditor banks. Under date of June 12, 1924, the individuals executed and delivered a warranty deed covering the Horton property to C. B. Mills, who was president of the Midland National Bank, which was one of the creditors. On September 5, 1924, the Iowa company assigned to Mills all of its right, title and interest in and to its oil and gas lease on the Horton property."

Mills thus became the holder of the legal title to the Horton property.

On December 10, 1924, a trust agreement was entered into between C. B. Mills as trustee, party of the first part; the three banks mentioned above, parties of the second part; the individuals mentioned above, parties of the third part; and the petitioner corporation, party of the fourth part.

The provisions of the trust agreement, so far as here material, are set out in the margin.[1]

Before the trust agreement was entered into, and apparently before Mills had obtained title to the Horton property, he executed on February 5, 1924, a special warranty deed covering the property to the Marquette company. The deed was acknowledged February 5, 1925.

After the trust agreement was entered into, and on April 16, 1927, Mills executed a special warranty deed of the Horton property to the Marquette company. This deed was acknowledged April 16, 1927. Neither this deed nor the deed of February 5, 1924, was ever recorded nor was physical delivery

[1] Whereas, A. D. Horton, John J. Large and the estate of F. E. Watkins, deceased, are jointly and severally indebted to the banks, in various amounts hereinafter set forth, and

Whereas, heretofore there had been deposited with the trustee certain stock of the Iowa Oil & Refining Co. belonging to some of the parties of the third part, as collateral security for the payment of said obligations, among other things, and

Whereas, there are certain other obligations existing on the part of the Iowa Oil & Refining Co. to be paid, which obligations are hereinafter specifically described, and

Whereas, there are certain other obligations existing as between some of the parties of the third part, to which specific reference is hereinafter made, and

Whereas, it was desired by all the parties hereto that arrangements be made for the purpose of reducing and discharging all of said indebtedness under the terms and conditions hereinafter set forth, and

Whereas to that end and purpose the Iowa Oil & Refining Co. transferred certain properties located in the State of Oklahoma, described as the Horton lease, to some of the parties of the third part, in consideration among other things, of the surrender by said third parties of their stock in the Iowa Oil & Refining Co. hereinbefore described, and

Whereas, said property was afterwards deeded to the company, for the sum of one hundred thousand ($100,000) dollars, paid in and by the capital stock of said company which stock was duly issued and is now held in the following amounts:

* * * * * * *

Whereas, said stock, except certain qualifying shares thereof has been transferred to the trustee for the purposes and under the terms and conditions hereinafter set forth and contained, and

Whereas, there will be from time to time paid to the company certain royalty payments upon said Horton lease (under and pursuant to certain written instruments covering such payments) which royalty payments as hereinafter provided, are to be applied against said indebtedness before any distribution thereof shall be made to the stockholders of the company, and

Whereas, the parties hereto desire to enter into this indenture defining, determining and limiting the various rights and interests of the parties hereto existing and growing out of the premises and by reason of the facts hereinbefore recited and to that end and purpose have entered into this indenture.

Now therefore, for and in consideration of one ($1) dollar and other valuable consideration paid and received by each of the parties hereto, to and from each of the other parties, the receipt and sufficiency whereof is by the execution of these presents acknowledged by each and all the parties hereto, and in further consideration of the promises, agreements and undertakings of the parties hereto to be kept and performed as hereinafter contained, and in consideration of other valuable consideration paid and received by each of the parties hereto, the parties hereto do promise and agree, to and with each other, as follows, that is to say:

ARTICLE I.

The trustee does hereby promise and agree:

1. That he will receive and hold as the same are paid him from time to time by the company, during the existence of this indenture, said royalty payments, in trust nevertheless, for the following uses and purposes:

(*a*) To apply the same upon the indebtednesses in the next succeeding paragraph hereof described and which indebtednesses are defined immediately in the terms of the obligees thereof, but which indebtednesses are to be paid in the sequence hereafter in this indenture provided and not otherwise:

* * * * * * *

3. To account from time to time to the parties to this indenture for his receipts and disbursements in connection herewith, provided that such accounting need not be rendered more often than once every three (3) months.

4. To return the stock of the parties of the third part now indorsed in blank and held by him as collateral hereunder, to the respective owners thereof, or to persons duly designated by them in writing upon the termination of this indenture by the discharge of the indebtedness herein described, but not otherwise.

ARTICLE II.

The banks, and each of them, do hereby promise and agree, for themselves, as the case may be, and individually but not jointly:

1. To forbear any enforcement at law, or by action or other procedure of any of the obligations or notes hereinbefore described of which they are the respective owners and holders so long as they shall receive payments from said trustee under the terms and conditions hereof, provided, however.

* * * * * * *

of either ever made. Mr. Mills, who executed these deeds, testified: "I executed them, in order that they might be used in case of my death."

At the time of the execution of the later deed, Mr. Mills was trustee under the trust agreement of December 10, 1924, and was also president of the Marquette company.

One of the findings of fact of the Board of Tax Appeals is that the provisions of the trust agreement were carried out.

Mills acted as trustee until the latter part of 1927, when he was succeeded by A. D. Horton, who was vice president of the Marquette company.

ARTICLE III.

The parties of the third part, and each of them, do hereby promise and agree:

1. To indorse in blank and deposit with the trustee their respective stock in the company as collateral security for the payment of the obligations hereinbefore described, but said collateral shall be held by the trustee as security for said obligations in the same sequence as said obligations are described in paragraph (1) of Article (I) hereof and not equally or ratably for all of said obligations, and the execution by the trustee of a copy of this indenture will be an acknowledgment by the trustee of the receipt and deposit of all of said stock.

2. To, and by the execution of this indenture do jointly and severally consent that no distribution of the funds of the company shall be made to the stockholders of the company as dividends or other distribution, regardless of form (except, however, expenses of the company) until all of said obligations and the accrued interest thereon shall have been paid and the terms of this indenture performed and discharged.

3. To vote their stock at any meeting of the stockholders of the company during the term of this indenture as the trustee shall indicate * * *

* * * * * * *

5. To, and by the execution of this indenture do hereby consent to the payment by the company to the trustee of any and all sums received by the company as royalties or otherwise from time to time, during the existence of this indenture, without further action by the stockholders or directors of the company, and all such payments made by the company to the trustee and all acts of the officers of the company under the provisions hereof, are in all respects ratified, confirmed and adopted.

The company does hereby promise and agree

1. To pay to the trustee from time to time, as the same shall be received, its income, less all expenses, charges, deductions, taxes and other disbursements necessary in the course and conduct of its business, but such payments made to the trustee are made without any liability whatsoever on the part of the company as to the distribution thereof by the trustee; and provided further, that the company shall be under no liability, or duty to account to the trustee for its income, but the amount to be paid by the company to the trustee hereunder shall be determined solely and exclusively by the company.

ARTICLE IV.

It is further understood and agreed, by all the parties hereto:

1. That if the trustee is subject to any expenses of any kind or nature, he shall first have the right to deduct such expenses from any and all sums received by him, and said expenses shall be deemed to include the employment of counsel in connection with any matters arising under the administration or construction of this indenture, or by reason of any suit or action which may arise therefrom.

* * * * * * *

That no salaries shall be paid to its officers so long as this indenture shall remain in force and effect, and the entire income of the company from said Horton lease, less its taxes and other expenses and deductions, shall be paid to the trustee until this trust shall have been fully administered.

* * * * * * *

That the trustee shall not be in any way personally liable for any act or omission on the part of any of the parties hereto, nor for any error of judgment or mistake of fact or law, nor for anything whatsoever, except for his own individual, willful malfeasance or neglect; and nothing in this indenture shall be in any way construed as requiring the trustee to take any steps at law or equity or otherwise to carry out and perform the terms of this indenture, except those to be performed by himself; but in the event any of the parties hereto shall for any reason fail or refuse to perform any part of this indenture to be carried out or performed by such party or parties the trustee shall, upon written request of a majority of the banks, if the default be on part of any of the third parties or of the fourth party, but in the event the indebtednesses to the banks have been fully satisfied, then, upon the written request of a majority of the remaining beneficiaries hereunder, or if the default be on the part of the banks or any of them, then, upon written request of the majority of the third parties, and upon being furnished with assurance sufficient to the trustee of proper indemnification to the trustee, for all purposes, proceed to employ counsel and to take such action against such defaulting party or parties as may be necessary or advisable, and as often as the same may occur.

* * * * * * *

A majority of the beneficiaries hereunder shall have at all times the right to remove any trustee hereunder, if in their judgment such action shall be deemed expedient or necessary; and in the event and as often as the same may occur that any of the indebtednesses to be paid to any beneficiary hereunder shall have been paid, such beneficiary or beneficiaries shall no longer have any right as to the removal or appointment of a trustee, and for the purposes of this indenture, "beneficiaries" shall be construed and held to mean the individuals, representatives and/or corporations named as creditors in subdivisions 1 to 8, both inclusive of section (*a*) of paragraph 1 of Article I hereof.

A deed and also an assignment of royalty were thereupon executed and delivered by Mills to Horton covering the Horton property.

The main duties of the trustee consisted in collecting the royalties under the Horton lease and in making payments out of the proceeds in accordance with the terms of the trust agreement.

The royalty checks were made payable to Mills as trustee, and were placed in a bank account in the name of the Marquette company. The proceeds were then transferred to a personal account of Mills, and he gave his checks on that account to the beneficiaries of the trust.

The Marquette company had no income except the royalties from the Horton lease.

Mills knew that the stock of the Marquette company represented the ownership of the Horton lease and that the lease constituted the asset behind the stock.

The Marquette company reported the income from the Horton lease for the calendar year 1925, in its income tax return for that year, but the Commissioner made certain corrections and determined a deficiency in tax of $521.27.

For the calendar years 1926 and 1927, the Marquette company made no return of income from the Horton lease, but the returns for those years contained the statement: "This company has no income nor expense on its own account." No items of income or deduction were shown. The Commissioner determined the deficiencies for those years respectively at $4,509.31 and $2,316.89. The Board of Tax Appeals redetermined the deficiencies for the three years at the same figures.

The sole main question involved in the petitions for review is whether the petitioner, the Marquette company, is liable for income tax upon the income made up of the royalties from the Horton lease.

The relevant statutes are set out in the margin.[2]

There is no question involved as to the construction of the language of the statutory provisions, but the contention of petitioner, the Marquette company, is that it is not taxable on the income so made up during the taxable years in controversy, because it was not the owner of the Horton lease, but that Mills was the owner thereof.

We can not agree with this contention for several reasons. First, the whole theory of the structure of the trust agreement is that the Marquette company was the owner of the Horton lease. We think that this is demonstrated by the provisions of the instrument itself. One of the recitals of the trust agreement is:

"Whereas, there will be from time to time paid to the company certain royalty payments upon said Horton lease (under and pursuant to certain written instruments covering such payments) which royalty payments as hereinafter provided, are to be applied against said indebtedness before any distribution thereof shall be made to the stockholders of the company."

---

[2] Section 230 of the Revenue Act of 1924:

"In lieu of the tax imposed by section 230 of the Revenue Act of 1921 there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax * * *."

Section 230 of the Revenue Act of 1926:

"(a) In lieu of the tax imposed by section 230 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax * * *."

Section 233 of the Revenue Acts of 1924 and 1926:

"(a) In the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in sections 213 * * *."

Section 213 of the Revenue Acts of 1924 and 1926:

"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 service * * * 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, 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."

Article I of the trust agreement provides:

"The trustee does hereby promise and agree:

"1. That he will receive and hold as the same are paid him from time to time by the company, during the existence of this indenture, said royalty payments, in trust nevertheless, for the following uses and purposes."

Paragraph 3 of Article I provides that the trustee shall "account from time to time to the parties to this indenture for his receipts and disbursements."

Paragraph 4 of the same article provides that the trustee shall return to the owners thereof, upon termination of the trust, the stock of the Marquette company held by him as collateral.

Article III also provides that the owners of the stock in the Marquette company shall indorse their stock to the trustee to be held by him as collateral to the carrying out of the trust agreement.

Paragraph 2 of Article III provides that there shall be no distribution of funds of the Marquette company to its stockholders until discharge has been made of the obligations mentioned in the trust agreement. The same paragraph provides for payment of the expenses of the company out of the funds of the company.

Paragraph 5 of Article III provides that the stockholders of the Marquette company "do hereby consent to the payment by the company to the trustee of any and all sums received by the company as royalties or otherwise from time to time, during the existence of this indenture."

It is also provided in Article III that the Marquette company shall "pay to the trustee from time to time, as the same shall be received, its income, less all expenses, charges, deductions, taxes and other disbursements necessary in the course and conduct of its business * * * provided * * * that the company shall be under no liability or duty to account to the trustee for its income, but the amount to be paid by the company to the trustee hereunder shall be determined solely and exclusively by the company."

Article IV, paragraph 1, provides: "That if the trustee is subject to any expenses of any kind or nature, he shall first have the right to deduct such expenses from any and all sums received by him."

In the addenda to the trust agreement it is provided:

"That no salaries shall be paid to its officers so long as this indenture shall remain in force and effect, and the entire income of the company from said Horton lease, less its taxes and other expenses and deductions, shall be paid to the trustee until this trust shall have been fully administered."

Also in the addenda it is provided:

"A majority of the beneficiaries hereunder shall have at all times the right to remove any trustee hereunder, if in their judgment such action shall be deemed expedient or necessary."

Many of these quoted provisions would be meaningless unless the Marquette company was the owner of the Horton lease; they are harmonious and pregnant with meaning, however, if the Marquette company was the owner of that lease.

Second, we think that ownership by the Marquette company of the Horton lease is shown by the acts of the various interested parties after the making of the trust agreement.

The Board of Tax Appeals has found that the provisions of the trust agreement were carried out. This finding includes, among other matters, the collection of the royalties under the Horton lease; the placing of the same (less expenses of the Marquette company) in the hands of the trustee; the disbursement of the same (less expenses of the trustee) by the trustee in accordance with the terms of the trust. All of these steps were taken during the taxable years in controversy.

It is true that instead of the collections being made by the Marquette company and turned over to the trustee, the collections were made by the trustee; but this was simply a short hand method of getting the funds into the hands of the trustee.

The funds were treated by the trustee not as his own but as belonging to the Marquette company; and for the year 1925 an income tax return for that company was made, verified by Mills and covering the collections of royalties from the Horton lease for that year, and items of expense amounting to $3,457 of the Marquette company as deductions from those collections.

In the face of these acts and admissions, the later claim that Mills was the owner of the Horton property takes on a feeble aspect.

Third, in support of the contention that the Marquette company was not the owner of the Horton lease, the claim is made that the title which at one time was vested in Mills never passed from Mills to the Marquette company because there was no delivery of the deeds executed by Mills which purported to convey the property from him to the company.

We think that the claim of nondelivery of the deeds can not be sustained.

In reference to this matter, the Board of Tax Appeals found as follows:

"By warranty deed dated '_____ day of February, 1924,' but bearing an acknowledgment under date of February 5, 1925, Mills conveyed the Horton property to petitioner. There was no physical delivery of the deed to it."

Counsel for petitioner apparently takes the position that this finding is equivalent to one that there was no delivery of the deed mentioned, and hence that the title remained in Mills. We do not so construe the finding of the Board of Tax Appeals.

It is, of course, elementary that as a general rule the delivery of a deed is essential to its validity; but whether or not there has been a delivery must be determined upon the facts of each particular case. A manual handing the instrument over by the grantor to the grantee is not indispensable. Such we understand to be the general law, and also the law in Oklahoma, where the land covered by the Horton lease was situated. (*In re Jackson Brick & Tile Co.*, 189 F., 636; *Johnson* v. *Craig*, 37 Okla., 378; *Hall* v. *Dollarhide*, 116 Okla., 180.)

What are the facts as to delivery disclosed by the record in the case at bar?

In an attempt to liquidate and settle the affairs of the Iowa Oil & Refining Co., the Horton lease was transferred by that company to its majority stockholders. Later, in the same attempt and for the same specific purpose, those stockholders and the Iowa company, by separate instruments, conveyed the Horton lease to Mills. Still later in the same attempt, and for the same specific purpose, the trust agreement of December 10, 1924, was entered into. This agreement was signed, among others, by Mills and by the Marquette company. The trust agreement recited that the Horton lease had been conveyed to the Marquette company and that company had paid $100,000 of its stock for the same. There is no question that the stock was issued, and that it was placed by the owners thereof in the hands of Mills as collateral to the carrying out of the trust agreement.

A deed of the Horton lease had, in fact, been executed by Mills to the Marquette company. Mills was president of that company. The delivery of the deed by Mills, grantor, to Mills, president of the Marquette company (grantee), could be nothing but a gesture plus an intent on the part of Mills, grantor. Did he have such intent?

The various provisions above set out of the trust agreement give a conclusive answer to the question. To hold that Mills had no intent to deliver the deed to the Marquette company, in view of all the facts and circumstances, would be to hold that several of the various parties to the trust agreement had stultified themselves.

The fact that the deed from Mills to the Marquette company was not recorded does not affect its validity as between the parties. This matter is expressly covered by section 5251, Compiled Oklahoma Statutes (1921).

We have no hesitation in holding that there was a sufficient delivery of the deed from Mills to the Marquette company covering the Horton lease.

It is further contended on behalf of the Marquette company that even though the title to the Horton lease was held by the company, yet in view of the trust agreement, the company was a mere conduit through which the income from the lease passed to the beneficiaries under the trust.

The case of *Central Life Assur. Soc., Mut.*, v. *Com'r* (51 F. (2d), 939) (C. C. A. 8) is cited. We think the facts in that case, when properly understood, do not support the contention of petitioner in the case at bar.

In the case at bar, the conduit was Mills, the trustee—confessedly so by the terms of the trust agreement and by his own testimony. The Marquette company had a real and substantial interest in the royalty payments, *first*, to deduct any expenses properly incurred in connection therewith, as was done by that company in 1925; *second*, after the obligations mentioned in the trust agreement were liquidated, the whole of the royalty payments under the Horton lease belonged to the Marquette company. The Marquette company was the earner of the income through its ownership of the Horton lease. (See *Van Meter* v. *Commissioner of Internal Revenue*, 61 F. (2d), 817 (C. C. A. 8) [Ct. D. 675, C. B. XII-1, 207].)

This is not a case of conflicting legal rights between the grantee of a recorded deed and the grantee of a prior unrecorded deed; but a case involving the question of allocation of income taxes to the owner of the income. The burden of proof was upon the petitioner to show that the determination of the Commissioner was not correct. We think this burden has not been sustained. (*Burnet* v. *Houston*, 283 U. S., 223, 227 [Ct. D. 328, C. B. X–1, 343]; *Crowell* v. *Commissioner*, 62 F. (2d), 51.)

Our conclusion is that the petitioner, the Marquette company, was the owner of the property in question, and that it was liable for the tax upon the income therefrom for the taxable years in controversy.

The decision and order of the Board of Tax Appeals are confirmed.

ARTICLE 52: Examples of constructive receipt. XIV–18–7468 Ct. D. 956

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—TESTAMENTARY TRUST—ASSIGNMENT OF FUTURE INCOME.

Where the life beneficiary of the net income from a testamentary trust executed declarations of trust in favor of her two children, authorizing the testamentary trustees to retain one-half of the dividends from certain stock included in the trust corpus and to pay them into the trusts established for her children, and by a second instrument released all claim to that portion of the dividends, there was no valid assignment of a property right but merely an anticipatory assignment of future income, and the beneficiary is not relieved from tax liability upon that part of the income released by her to the trustees for the children.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 1308) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Edith R. Wood, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before HICKS, SIMONS, and ALLEN, Circuit Judges.

[December 14, 1934.]

OPINION.

ALLEN, Circuit Judge: The Commissioner determined a deficiency of $3,097.02 in income tax against the petitioner for the year 1926. The Board of Tax Appeals sustained the Commissioner (27 B. T. A., 1308), and petitioner appeals.

The sole legal question is whether one-half of the dividends paid by Edington & Co., Inc., in 1926, on shares of stock held by the trustees of the estate of William M. Wood, Jr., was income to petitioner who received, under the decedent's will, the right to the net income from such estate for life, or whether such sum was income to petitioner's children, to whose trustees she had released one-half of the net income resulting from the investment in Edington & Co., Inc.

The facts are conceded, and so far as material for the purposes of this case, are as follows:

The petitioner's husband in his will established a trust in the residue of his estate. The petitioner was named life beneficiary of the net income arising therefrom and her two children were named remaindermen. Upon the death of the husband, the estate possessed certain stock in Edington & Co., Inc., a corporation which paid large dividends but was subject to fluctuation in profits. The trustees, who were given broad authority to invest and reinvest under the will, had the power to sell this stock.

Petitioner desired to have the stock retained in the estate, and therefore on November 29, 1922, executed a written declaration in which she agreed to establish trusts for each of her two children and to pay over to the trustees of such

trusts one-half of all income paid to her under the trust established by the will, derived from the investment in Edington & Co., Inc., "said payments by me to be made simultaneously with the receipt by me, from time to time, of any income derived from the investment * * * in said Edington & Co., Inc." This document authorized the trustees of her husband's estate to retain one-half of such future income, and to pay it in equal shares into the trusts established for the children. The consideration stated was that the trustees agreed that the investment in Edington & Co., Inc., should not be immediately liquidated, but bound the trustees to continue the investment for the period of six months only. This document, which was not signed by either of the trustees, was considered by the United States Court of Claims in a proceeding brought by the petitioner with reference to the determination of a deficiency in income tax for the year 1925. (*Porter* v. *United States*, 52 Fed. (2d), 1056 (Ct. Cl.) [Ct. D. 452, C. B. XI–1, 160].) The question involved in that case, so far as the document of November 29, 1922, is concerned, was identical with that presented here. The Court of Claims held that the assignment of income as it is received does not relieve from tax thereon the person to whom the income was payable in the first instance.

This decision was correct. (*Rosenwald* v. *Commissioner*, 33 Fed. (2d), 423 (C. C. A. 7); *Bing* v. *Bowers, Collector*, 26 Fed. (2d), 1017 (C. C. A. 2).)

Subsequently the petitioner, in a second document executed January 1, 1926, purporting to clarify the first, agreed that "in consideration that the said trustees will not immediately liquidate the said investment in Edington Co., Inc., but will hold said investment under the terms of this agreement, said Edith R. Wood, individually, does hereby release all claim to one-half (½) of the net income received by the trustees from said investment, and the said trustees agree to pay over one-half (½) of the said net income from said investment to said Edith R. Wood, and to pay over the other one-half (½) of the said net income to the trustees" of the trusts created for the children. In this document the trustees reserved the right at any time they deemed it beneficial to the estate to dispose of the investment in Edington & Co., Inc.

The petitioner's main contention is that this second instrument constitutes a valid assignment of a property right, and that she hence is relieved from liability for tax upon that part of the income from Edington & Co., Inc., released by her to the trustees of her two children. The Commissioner urges that this document merely embodied an anticipatory assignment of future income. With this contention we are in accord. The property held in the trust estates created by petitioner for the children originally consisted of a relatively small amount, namely, $1,488.75 for each child, presumably income already received from the investment in Edington & Co., Inc. All future payments into the trust estates were of anticipatory income. The trustees could at any time dispose of the stock in Edington & Co., Inc. The dividends attempted to be released might never be received. There was no assignment, release or transfer of the property right which produced the income. Every case cited on this point for the petitioner depends for its decision upon a finding that an existing property right had been assigned. We search this record in vain for an assignment *in praesenti*, and find only a release of income that might or might not be earned in the future. Such an arrangement could not relieve the petitioner of the tax. (*Lucas, Commissioner*, v. *Earl*, 281 U. S., 111; *Burnet, Commissioner*, v. *Leininger*, 285 U. S., 136; *Van Meter* v. *Commissioner*, 61 Fed. (2d), 817 (C. C. A. 8) [Ct. D. 675, C. B. XII–1, 207]; *Bishop* v. *Commissioner*, 54 Fed. (2d), 298 (C. C. A. 7) [Ct. D. 477, C. B. XI–1, 164]; *Leydig* v. *Commissioner*, 43 Fed. (2d), 494 (C. C. A. 10).)

The order of the Board of Tax Appeals is affirmed.

ARTICLE 52: Examples of constructive receipt. XIV–21–7509
Ct. D. 968

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—TESTAMENTARY TRUST—ASSIGNMENT OF FUTURE INCOME.

The beneficiary of a testamentary trust who assigned a portion of the trust income to his wife, pursuant to a separation agreement in settlement of their respective property rights, and directed the

trustees of the estate to pay specified sums out of the income, as it accrued, directly to his wife, did not assign a present property ownership in the corpus of the trust fund or the income therefrom, and the amounts paid to the wife by the trustees constituted taxable income to the beneficiary.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (28 B. T. A., 1234) affirmed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

James McDonald, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[December 10, 1934.]

OPINION.

MARTIN, Chief Justice: An appeal from a decision of the Board of Tax Appeals (28 B. T. A., 1234), affirming a determination by the Commissioner of Internal Revenue of a deficiency of $12,681.70 in petitioner's income tax return for the year 1927.

The question arises upon the disallowance by the Commissioner of a deduction claimed by petitioner in the amount of $25,000, because of the payment of that sum to petitioner's divorced wife from his share of his father's estate, the payment being made by the trustee of the estate by authority of an agreement between petitioner and his divorced wife.

The controlling facts in the case are as follows:

The petitioner and his wife, Beulah McDonald, were married on April 17, 1912. They have two sons, namely, James McDonald, Jr., born September 10, 1913, and Robert Alexander McDonald, born May 12, 1915, both of whom are living.

The petitioner's father, James McDonald, Sr., died testate on January 13, 1915, while a resident of the District of Columbia, and his last will was duly admitted to probate in the District. By the terms of the will the estate was to be held by the testator's executors and trustees who were to pay certain annuities to petitioner and others until the petitioner's oldest surviving child should reach the age of 30 years, at which time the petitioner was to receive one half of the estate and the other half was to be divided between his children.

On May 6, 1922, petitioner brought suit in the District of Columbia to have the will declared void on the ground that it violated the rule against perpetuities. The case was dismissed by the court, and an appeal was taken to this court.

On December 11, 1924, while the suit and the administration of the estate were still pending, the petitioner and his wife, with a view of effecting a permanent separation between them, entered into a written agreement for the purpose of "fixing, settling, and determining their respective property rights." The petitioner agreed, in the event of a decision in the pending suit adjudging him to be the sole heir of the estate of his father to assign and transfer for the use of his two sons an undivided one-half interest in all of the estate which he might so inherit, and, in present terms, assigned and transferred such interest, in trust, for their use and benefit. In paragraph 7 of the agreement it was provided that the petitioner should pay to his wife the sum of $400,000 in full settlement of all claims and demands of every kind or character then existing or which but for this agreement might thereafter arise. This payment of $400,000 was to be made by petitioner to his wife when he became entitled to his share of the estate of his father, whether pursuant to the provisions of the will, or as his heir at law, or prior thereto if petitioner so elected. For the purpose of assuring the payment of such $400,000 to the wife, the petitioner "does hereby assign, transfer, and set over to the said party of the second part an interest in his share of the property of the estate of James McDonald, Sr., in the amount of four hundred thousand

dollars ($400,000) and directs the trustees named in the will of James McDonald, Sr., or their successors, to pay and deliver to the party of the second part, whenever such payment may be by such trustees lawfully made, the said sum of four hundred thousand dollars ($400,000), and in the event that the trust provisions of said will shall hereafter finally be declared void or the said party of the first part shall for any other reason succeed to the estate of James McDonald, Sr., then the executor of said last will and testament and the court in which the administration of said estate is then pending are, and such executor, and such court is hereby authorized, empowered, and directed to cause to be distributed and paid to the said party of the second part the said sum of four hundred thousand dollars ($400,000)."

It may be noted at this point that by a subsequent agreement, next hereafter referred to, the provisions of this paragraph were "novated and reformed, by the elimination of" the provisions therein contained, except the provision that petitioner should pay his wife the sum of $400,000 in full settlement.

After December 11, 1924, and prior to December 21, 1925, the petitioner and his wife were divorced and she resumed her maiden name of Beulah Martin. On December 21, 1925, the parties entered into a second written contract providing that in event the court of appeals should hold that one-half of the accumulated income then in the hands of the executors and trustees should be paid over to petitioner, then and in such event out of the accumulated income payable to petitioner there should be paid to Beulah Martin the sum of $150,000 to be applied as a credit on the contract dated December 11, 1924, under the terms of which she was to be paid $400,000; and after the application of such payment as a credit on the contract, Beulah Martin was to accept the sum of $25,000 per year to be paid directly to her until the balance of the $400,000 should be liquidated. The second contract also contained the following provision eliminating paragraph 7 of the first contract, as above stated: "It is further agreed in the event said decree is entered that said contract of December 11, 1924, will be novated and reformed by the elimination of all of paragraphs 5, 6, and 7, and the copy of said contract now on file with the Fulton Trust Co. of New York will be withdrawn and another contract executed and filed in its stead in accordance with the stipulation herein."

On February 2, 1926, petitioner entered into a third written agreement with his former wife, Beulah Martin, which provided that there should be paid to her the sum of $100,000 (instead of $150,000 as provided by the prior agreement) out of accumulated income payable to petitioner, and that such payment should be applied as a credit on the contract entered into by and between the parties on the 11th day of December, 1924, under the terms of which she was to be paid the sum of $400,000. After the application of the payment of $100,000 as a credit on said contract, Beulah Martin agreed to accept the sum of $25,000 per year without interest on such contract until the sum of $400,000 shall have been fully paid; and an order was given to the Fulton Trust Co., trustee of the estate, to pay to Beulah Martin $25,000 per annum until the balance of the sum of $400,000 should be fully paid. The payment of $25,000 per year was to be made to Beulah Martin for the period of 12 years unless within that period the one-half of the property of the estate should be delivered to petitioner, and in that event the Fulton Trust Co. was then to pay to Beulah Martin such sum as would complete the total of $400,000.

On May 3, 1926, this court entered a decree in *McDonald* v. *Maxwell* (12 F. (2d), 822), holding that upon the death of James McDonald, Sr., the petitioner took a present vested interest in the undivided one-half of the testator's estate, to be paid to him by the executors when his oldest child living at the testator's death should reach the age of 30 years; that pending the payment to petitioner of the principal of his one-half interest in the estate the executors and trustees were to pay him in addition to the annuity provided for him by the will, the cash income accrued upon his one-half interest to date and the future cash income thereon from time to time as the same should thereafter accrue.

Pursuant to this decree there was paid to the petitioner in 1926 by the Fulton Trust Co., as trustee, a sum in excess of $500,000 representing the cash income accrued upon his one-half interest in the estate to that date as provided in the decree. Out of the $500,000 thus paid to petitioner he paid to Beulah Martin the $100,000 in cash provided for in the agreement of December 21, 1925, as modified by the agreement of February 2, 1926.

In the fiduciary return of the Fulton Trust Co., as trustee, for the year 1927 it charged itself with the full amount of income received by it in that year, and reported that one-half of this amount had been paid to the petitioner and one-half retained by the trustee for petitioner's children in accordance with the terms of the will. Out of the sum thus charged to petitioner the trustee paid the sum of $25,000 directly to Beulah Martin.

The petitioner, in filing his income tax return for the year 1927, reported as dividends the sum $90,552.20, being the full amount charged to him as distributee in the account of the trustee as aforesaid, and claimed the following deduction: "Division of income, former wife Beulah Martin $25,000" representing the sum which the trustee pursuant to the agreements of December 21, 1925, and February 2, 1926, had paid to Beulah Martin in that year.

The Commissioner of Internal Revenue in arriving at the petitioner's taxable net income for the year 1927 disallowed the $25,000 deduction thus taken by the petitioner on his return. Upon appeal the Board of Tax Appeals entered judgment for the Commissioner, affirming the disallowance of the deduction claimed by petitioner. The present proceeding was brought to review this decision of the Board of Tax Appeals.

We are of the opinion that the decision of the Board of Tax Appeals is correct. As appears from the statement of facts, the petitioner was entitled to be paid annually the income from the one-half of the trust estate held by the trustee under the order of this court in the case of *McDonald* v. *Maxwell*, supra. The question presented in the instant case is whether the petitioner assigned and transferred to his wife a present property ownership in petitioner's income in the amount of $25,000 a year. If such a transfer was actually made by petitioner to his wife, he would not be subject to income tax upon the transferred interest. However, we are of the opinion that no such transfer was made as would invest petitioner's wife with the actual title to any present interest or estate in any part of the corpus of the trust property or the income therefrom.

A review of the contracts executed by the petitioner and his wife discloses as their central purpose that petitioner should pay to his wife the sum of $400,000 in settlement of all claims existing between them.

In the first contract the petitioner, for the purpose of assuring the payment of such $400,000, assigned, transferred, and set over to his wife an interest in his share of the property of the trust estate. It must be observed that this assignment was not made for the purpose of extinguishing the debt of $400,000 by a transfer of an interest in the trust property. The debt was to continue, and the transfer was made as security for its payment. The transfer served no purpose except to secure the payment of that amount by petitioner to his wife. Even this transfer, however, was rescinded by the subsequent agreement between them.

In the second contract the indebtedness of $400,000 from petitioner to his wife was recognized as the basis of settlement between them. And it was provided that under certain conditions the petitioner was to pay his wife the sum of $150,000, to be applied as a credit on the contract for the payment of $400,000, as provided in the first agreement. And it was stipulated that after the application of such payment as a credit on the indebtedness the wife was to accept the sum of $25,000 per year to be paid to her directly by the trustee until the balance of the $400,000 should be liquidated.

In the third contract it was stipulated that the cash payment provided for in the preceding contract should be reduced from $150,000 to $100,000, which was to be applied as a credit upon the $400,000 debt, after which the wife was to accept the sum of $25 000 per year without interest on "said contract until the sum of $400,000 shall have been fully paid."

There is no provision in the second and third contracts, which are in fact the existing contracts between the parties, for an assignment by the petitioner to his wife of any interest in the trust fund. An order, however, was filed with the trustee to pay these sums to the wife out of the income of the husband, as it accrued in the hands of the trustee.

These provisions all implied that the debt of $400,000 first agreed upon by the parties continued to exist throughout their different transactions and that the wife in fact never relinquished her claim to the full amount of such indebtedness. This manifestly was the construction placed upon the agreement of the parties by the Fulton Trust Co., trustees, for in the accounts of that company the full amount of income due to petitioner was credited to him although in conformity with the order filed with the trustee the amount of $25,000 was paid to the wife

and charged to petitioner. In other words, there was no division of the trust fund held by the trustee or of the income arising therefrom between petitioner and his wife. The petitioner therefore never divested himself of any interest in the trust fund or its income, but remained at all times the true legal owner thereof. The total income accordingly was credited to the petitioner although part of it upon his order was paid to his wife. The determination of the Commissioner was correct. (*Lucas* v. *Earl*, 281 U. S., 111; *Corliss* v. *Bowers*, 281 U. S., 376 [Ct. D. 188, C. B. IX–1, 254]; *Burnet* v. *Leininger*, 285 U. S., 136; *Luce* v. *Burnet*, 55 F. (2d), 751; *Lansill* v. *Burnet*, 58 F. (2d), 512.)

The decision of the Board of Tax Appeals is affirmed.

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 71: Exclusions from gross income. XIV–8–7334 Ct. D. 926

INCOME TAX—REVENUE ACTS OF 1916 AND 1921—DECISION OF COURT.

INCOME—EXEMPTION—PUBLIC UTILITY CORPORATION.

Income earned by a public utility corporation operating a transportation system under a contract with a city, whereby the latter shared equally in the net earnings above a fixed percentage on the capital stock of the corporation and had certain other rights in its management and policies, is not exempt from Federal income tax under the provisions of section 11(b) of the Revenue Act of 1916 and section 213(b)7 of the Revenue Act of 1921, upon the portion thereof to which the corporation was entitled under the contract.

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Philadelphia Rapid Transit Co. v. *United States.*

[September 5, 1934.]

OPINION.

KIRKPATRICK, J.: The petitioner, Philadelphia Rapid Transit Co., filed with the Commissioner of Internal Revenue claims for refund of the entire amount of income and profits taxes paid by it for the calendar years 1917, 1922, and 1923, amounting in all to $591,906.62, and upon rejection of the claims brought this action to recover the taxes paid.

The petitioner contends that its income for the years in question was wholly exempt from taxation under the provisions of section 11(b) of the Revenue Act of 1916, and section 213(b)7 of the Revenue Act of 1921. The two enactments are substantially alike, and the pertinent portions of section 213(b) of the Act of 1921 may be taken as controlling the question involved. That section enumerates various kinds of income excluded from gross income and consequently exempt, among which is the following:

"(7) Income derived from any public utility * * * accruing to * * * any political subdivision thereof.

"Whenever * * * any political subdivision of a State or Territory * * * prior to September 8, 1916, entered in good faith into a contract with any person, the object and purpose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such * * * political subdivision; but this provision is not intended and shall not be construed to confer upon such person any financial gain or exemption or to relieve such person from the payment of a tax as provided for in this title upon the part or portion of such income to which such person is entitled under such contract."

The facts material to the issue are the following: In 1907 the city of Philadelphia entered in good faith into a contract with the petitioner, the object and purpose of which was to operate and maintain and, possibly, to acquire the transportation system then serving it. Under this contract (article 6) the city shares with the stockholders equally in all net earnings of the company, payable in dividends, over and above a return of 6 per cent, cumulative from 1907, upon the paid-in capital stock of the company. There is a provision (article 9) for a sinking fund to be in the custody of the city into which monthly payments in graduated amounts are to be made by the company to be treated by the company as fixed charges, reducing the income applicable to dividends to the stockholders and to the city. When the sinking fund amounts to $5,000,000 the city may require it to be paid into the city treasury and thereafter all payments upon it are to be made directly into the city treasury. Another provision (article 11) gives the city the option to purchase the petitioner's entire system on or after July 1, 1957, upon six months' notice, for an amount equal to the company's capital stock outstanding at that time, the sinking fund, if not already paid into the city treasury, to be available to the city for such purpose. Several other provisions give the city certain rights in the management and policies of the company, including the right to pass upon changes in its capital structure, leases, obligations, guarantees, extensions, additions or betterments, requiring additional capital, also giving the city the right of representation upon the board of directors.

Without going more elaborately into the relations between the city and the petitioner (since the conclusion reached makes it unnecessary), I am satisfied that, by reason of the nature of the contract, the payment of these taxes from the income and profits of the petitioner will result in imposing a burden upon the city within the meaning of the Act, and I so find. The fact is that both parties to the contract have an interest in the income in question. The utility's interest is direct and immediate. It collects it and uses it for its own purposes, and of course is "entitled" to its income under the contract. The city's interest is remote and contingent, but nevertheless is a real interest which taxation will burden, since taxation might operate to postpone the time when the city would be entitled to receive direct payments of money out of income or to decrease the value of the plant if, and when, the city came to acquire it under its option.

This brings us directly to the interpretation of the Acts of Congress involved. The first paragraph of the quoted excerpt apparently was intended to exempt the city from taxation upon income which it actually receives (the words are "derived from" the public utility and "accruing" to the city) from public utility companies, a wholly unnecessary provision since no tax could be constitutionally imposed upon the city, but probably inserted to avoid possible misunderstanding of the succeeding paragraph. No one would question that income which is paid by a utility to the city, thus becoming part of the latter's revenue, must be free from taxation.

In enacting the second paragraph, Congress undoubtedly had in mind certain income of utilities in whose operations the city has some interest, but which income is not paid to the city and therefore does not become any part of the city's revenue. So far as the taxing power is concerned this was debatable ground, and it is quite clear that Congress meant to relinquish it in part, as will be seen, but by no means entirely.

The second paragraph has two clauses. The purpose underlying the first of these is to avoid any taxation of public utilities which adversely affects the city financially and the words in which that thought is embodied are "so far as the payment thereof would impose a loss or burden upon such * * * political subdivision * * *." If the paragraph ended at this point there would be no doubt, in view of the finding made, that the petitioner's income would all be exempt because the payment of any tax reduces it and, pro tanto, burdens the city. However, a second clause is added which appears to be in the nature of a construction clause or interpretation by the Legislature of its own enactment. It amounts to a declaration by Congress that, when, in the preceding clause, it exempted the utility's income of all taxation which would impose a burden upon the city, it did not mean to exempt such part of it as the utility was entitled to keep for itself, or, to put it in another way, Congress was declaring that when, in the first clause, it said "no tax shall be levied * * * upon income derived from the operation of such public utility, so far as the payment thereof will

impose a * * * burden," etc., it meant by "income derived," income derived by the city, paid to it and thus a part of its revenues. And this regardless of whether the payment of the tax would actually impose a burden on the municipality or not. The language is too plain to admit of any dispute as to what it means—"this provision * * * should not be construed * * * to relieve such person from the payment of a tax * * * upon the part or portion of such income to which such person is entitled under such contract." It is not to be questioned that the legislature passing an act may declare its meaning and construction, and such declaration is binding by the courts. In this case, the construction clause may be the equivalent of an exception from the general terms of the first clause and, to that extent, in conflict with it, but from either point of view it supersedes it at all points of conflict.

The petitioner argues that the result of giving this effect to the last clause is to nullify the preceding one—to write it out of the Act entirely. It may be that the effective margin of the first clause left standing is not a wide one. But there might be situations which, even as so cut down, it would still govern. For example: Suppose under the contract the utility was bound to expend a percentage of its own income for street repairs in relief of a municipal duty, which otherwise the city would have to perform at its own expense. I should say that the portion of its income so expended would not be "the part or portion of such income to which such person (the utility) was entitled under such contract," and I should also say that the taxation of that percentage of income would impose a burden upon the city and therefore would be exempt under the earlier clause. It may be that other illustrations could be found. The point is that the clauses can stand together and the later is not necessarily in hopeless conflict with the earlier. If it were, there might be a somewhat different question to decide, though I do not say that the same result would not be reached.

It follows from the construction adopted that the income in question here is taxable and the petition must be dismissed.

The agreed statement of facts and the supplemental additional statement of facts, and the facts set forth in the supplemental agreed statement of facts are all adopted by the court as special findings of fact.

Petitioner's requests for conclusions of law are refused, and the petitioner's motion for judgment denied.

The respondent's motion for judgment is granted.

ARTICLE 72: Proceeds of insurance—Compensation—Pensions.

REVENUE ACT OF 1926.

Contributions by the M University toward the purchase of annuities for members of its faculty. (See I. T. 2874, page 49.)

ARTICLE 88: Compensation of State officers and employees.

XIV-3-7259
Ct. D. 910

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—EXEMPTION—COMPENSATION OF ATTORNEY EMPLOYED FOR SINGLE LITIGATION.

Compensation received by an attorney under appointment as special deputy attorney general to represent the State of New York in a particular case pending before the American-British Arbitral Tribunal is not exempt from Federal income tax under the provisions of article 88 of Regulations 69, relating to the Revenue Act of 1926.

2. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. Charles F. Murphy, respondent.

Appeal from the United States Board of Tax Appeals.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[May 21, 1934.]

OPINION.

Petition by the Commissioner of Internal Revenue to review an order determining a deficiency in the income tax of the respondent for the year 1926. Order reversed.

SWAN, Circuit Judge: The respondent is an attorney at law engaged in general practice in New York City. In the year 1926 he received compensation from the State of New York for services in representing the State in a case pending before the American-British Arbitral Tribunal. He claims that such compensation was exempt from Federal income tax, and the Board of Tax Appeals so held. The Commissioner seeks to reverse this ruling.

The principles which must govern our decision are expounded in *Metcalf & Eddy v. Mitchell* (269 U. S., 514 [T. D. 3824, C. B. V-1, 218]). If the respondent was an officer or employee of the State, his pay as such was immune from Federal taxation; but if he was merely employed as legal counsel in a special case, the compensation paid for his services must be included in taxable income. (*Lucas v. Reed*, 281 U. S., 699; *Lucas v. Howard*, 280 U. S., 526.) These principles are not disputed; the dispute relates to the application of them to the facts at bar.

On January 8, 1925, the attorney general of the State of New York sent the respondent the following letter:

"You are hereby appointed a special deputy attorney general for the purpose of representing the State of New York in all matters pertaining to the claim made by the Government of Great Britain in behalf of certain members of the Cayuga Nation of Indians in respect to certain alleged rights of said Cayuga Nation of Indians against the State of New York now pending before the American-British Arbitral Tribunal and to confer with the agent of the United States before that tribunal as to the defense and proofs to be advanced in the answer to the memorial filed by the Government of Great Britain in support of the claim and to arrange with him for such further participation in the arbitral proceedings which may be for the interest of the State of New York or for the mutual interest of the United States and the State of New York, and to perform all such other duties in connection with said matter as may be proper and appropriate for the attorney therein for the State of New York, and for those purposes only.

"This appointment is to take effect January 8, 1925."

On January 28, 1925, he took an oath of office as special deputy attorney general, which was filed with the secretary of state of New York. During 1925 and 1926 the respondent, assisted by members of the staff of his law office, spent a considerable amount of time on the Cayuga Indian case. After decision of the case by the arbitral tribunal in 1926, he was paid $7,000 by the State of New York. This was but a small fraction of his professional earnings during the years 1925 and 1926.

The respondent contends that he was appointed under section 61 of the executive law (L., 1919, ch. 165), which authorizes the attorney general to "appoint such deputies as he may deem necessary and fix their compensation, within amounts appropriated therefor by the legislature"; while the Commissioner contends that the appointment was made under section 65, which authorizes the attorney general to "designate and employ such additional attorneys or counsel as may be necessary to assist in the transaction of any legal business mentioned in section 62 of this chapter," and provides for payment to them of "a reasonable fee." It seems probable that the deputies whose appointment is authorized by section 61 are the regular members of the staff of the attorney general who succeed in prescribed order to his statutory duties in the event of his death. (See section 9, public officers law.) But however this may be,

the present record does not enable us to determine under which section the attorney general purported to act. (Cf. *People ex rel. Osborne* v. *Board of Supervisors*, 168 N. Y. App. Div., 765.) It does not disclose how or when the amount of the respondent's compensation was fixed, nor whether it was paid out of the appropriation referred to in section 61, or from the source mentioned in section 65. The respondent's testimony refers to his compensation as "salary," but this is scarcely significant. He argues that the amount paid him would not be "a reasonable fee" for the work done, but that implies there was no agreement in advance, as to which we know nothing. Nor can much importance be attached to his title; he secured the same designation, without salary, for a clerk in his own law office who was assisting him in the case. In *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514, 520), the tests relied upon as indicating that the engineers, whose status was there involved, were not public officers, were stated as follows:

"They took no oath of office; they were free to accept any other concurrent employment; none of their engagements was for work of a permanent or continuous character; * * * Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute."

The definition of article 88, Regulations 69, is to similar effect in specifying that the position must be one "the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement."

The respondent in the case at bar does not satisfy these tests. It is true that he took an oath of office, but this can scarcely be deemed conclusive, and particularly where, as here, it does not appear that he was required by law to do so. (See *People* v. *Knox*, 231 N. Y. App. Div., 490.) He had no position of permanent or continuous tenure, was free to carry on concurrently his general law practice, and was employed for a single litigation. His own office employees assisted him in the preparation and presentation of the case, just as in any ordinary piece of litigation. We can see no distinction between his employment and that of the attorney held not to be an officer in *Lucas* v. *Reed* (281 U. S., 699). The respondent does not claim to have been an "employee" of the State, and certainly is not within the definition of that word in article 88 of the regulations.

For the foregoing reasons we think the Board erred in excluding the $7,000 fee from the respondent's income. The order is reversed and the cause remanded.

ARTICLE 88: Compensation of State officers and employees. XIV–10–7356 I. T. 2870

REVENUE ACT OF 1921.

I. T. 1693 (C. B. II–1, 72), which holds that the compensation of a public administrator in the State of Missouri is exempt from Federal income tax, is revoked, in view of G. C. M. 14116. (See page 102.)

ARTICLE 88: Compensation of State officers and employees. XIV–10–7357 I. T. 2871

REVENUE ACT OF 1921.

I. T. 2030 (C. B. III–1, 117), which holds that the compensation of a public administrator of a county in Montana is exempt from Federal income tax, is revoked, in view of G. C. M. 14116. (See page 102.)

ARTICLE 88: Compensation of State officers and employees.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Compensation for services rendered as public administrator. (See G. C. M. 14116, page 102.)

ARTICLE 88: Compensation of State officers and employees. XIV-13-7401 Ct. D. 941

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS INCOME—EXEMPTION—SALARY OF MANAGER OF MUNICIPALLY OWNED WATERWORKS SYSTEM.

A municipality is not exercising an essentially governmental function in the ownership and operation of a waterworks system which supplies water both to the city and to private consumers (about 40 per cent of the water furnished being used by the city), and the salary of the manager of the system is not exempt from Federal income tax.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 256) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

M. S. Denman, Executor of the Estate of C. S. Denman, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review decision of United States Board of Tax Appeals.

Before GARDNER, WOODROUGH, and VAN VALKENBURGH, Circuit Judges.

[October 11, 1934.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

This is an appeal from orders of redetermination of the Board of Tax Appeals, affirming the rulings of the Commissioner of Internal Revenue, and deciding that there were deficiencies in income taxes for the years 1925, 1926, and 1927. The amounts are not in controversy. Decedent, during these years, was employed as manager of the waterworks system of the city of Des Moines, Iowa, and the only question presented is whether his salary as such manager is exempt from payment of Federal income tax. The original petitioner, now deceased, was first employed as general manager of the Des Moines Water Co. in 1892, before the city bought the plant. The purchase was made in 1919, and decedent was retained in the same position by the city under the board of waterworks trustees. His salary was $8,000 per annum during the years in question. The Municipal Des Moines Waterworks was organized under acts of the General Assembly of the State of Iowa, providing for a board of waterworks trustees to be appointed by the city council, such board having power to appoint the general manager, treasurer and accountants. Decedent's compensation was paid by the city through the board of waterworks trustees. The municipal waterworks supplies all the water used by the city for all purposes, and by private consumers. About 40 per cent of the water furnished is used by the city. The board was empowered to determine the rates to private consumer and to the city, and the latter was authorized to levy a tax sufficient to pay for the water used by it for public purposes. Any surplus remaining after payment of operation expenses, interest of the debt of the plant, depreciation, and sinking fund for the payment of purchase bonds might be used for the improvement, extension and betterment of the waterworks. So far as appears from the record, decedent's duties and services, and the conduct of the enterprise, were substantially the same after the purchase by the city as they were before.

The claim of the petitioner is that an employee of a water company owned and operated by a municipality is engaged in the exercise of an essential governmental function and that his salary is exempt from the payment of Federal income tax. The question is not a new one in this circuit, and the controlling principle, now firmly established, is that only the instrumentalities, means and operations, whereby the States exert the governmental powers belonging to them, are exempt from taxation by the United States.

In *Illinois Trust & Savings Bank* v. *City of Arkansas City* (76 F., 271, 282) this court stated the distinction between the governmental or public, and

the proprietary or business, powers of a municipality—a subdivision of a State. Judge Walter H. Sanborn, speaking for the court, said:

"A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality."

The same principle was reiterated in *Pikes Peak Power Co.* v. *City of Colorado Springs* (C. C. A. 8) (105 F., 1, 10). In *Omaha Water Co.* v. *City of Omaha* (147 F., 1), this court was still more explicit. It held that:

"Municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office, the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations.

"A city exercises its business or proprietary power in purchasing waterworks or contracting for their construction or operation."

In *City of Winona* v. *Botzet* (C. C. A. 8) (169 F., 321) the distinction between the two classes of powers of municipalities is again expressly stated.

In *Blair* v. *Byers* (35 F. (2d), 326 [Ct. D. 146, C. B. IX–1, 247]), this court had before it this same municipality-owned waterworks system. An attorney, seeking to be declared an employee of the system, claimed immunity from Federal taxation. It was held that he was not such an employee, but the court properly had occasion and jurisdiction to consider the merits of the contention from all angles. We held that the building and operation of a waterworks system by a municipality constitutes the exercise of a proprietary, rather than a governmental, function. In support of this holding we cited the decision of the Supreme Court in *Flint* v. *Stone Tracy Co.* (220 U. S., 107, 172), that "it is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." It was pointed out that these objects are often accomplished through the medium of private corporations. The means and instrumentalities employed in carrying on the governmental operations of a State, which the cases unite in exempting from taxation, are of a nature such as the establishment of a judiciary to administer justice through the courts, and the employment of all necessary agencies for legitimate purposes of State government. (*Collector* v. *Day*, 11 Wall., 113.) But in *Flint* v. *Stone Tracy Co.*, supra, it was held that the rule to be deduced from the previous cases of the court is that "the exemption of State agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character."

To this distinction the Supreme Court of the United States has consistently adhered. (*South Carolina* v. *United States*, 199 U. S., 437, 461; *Metcalf & Eddy* v. *Mitchell*, 269 U. S., 514, 523 [T. D. 3824, C. B. V–1, 218]; *Willcuts* v. *Bunn*, 282 U. S., 216 [Ct. D. 280, C. B. X–1, 309]; *Fox Film Corporation* v. *Doyal*, 286 U. S., 123, 128; *Burnet* v. *Jergins Trust*, 288 U. S., 508, 516 [Ct. D. 653, C. B. XII–1, 214]; *Board of Trustees* v. *United States*, 289 U. S., 48, 59; *State of Ohio* v. *Helvering*, 292 U. S., 360, decided May 21, 1934 [Ct. D. 836, C. B. XIII–1, 531].)

It is true, as stated in *Metcalf & Eddy* v. *Mitchell*, supra, and as quoted in *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393, 399 [Ct. D. 485, C. B. XI–1, 265]), that:

"Just what instrumentalities of either a State or the Federal Government are exempt from taxation by the other can not be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other."

And the courts, in their desire to preserve unburdened the right of the States to administer their governmental affairs within their own sphere, have exercised extreme caution in drawing the line "which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune." (*Metcalf & Eddy* v. *Mitchell*, supra, l. c., 523.) Compare, upon this point, *South Carolina* v. *United States*, supra, and *Ambrosini* v. *United States* (187 U. S., 1). But in substantially all cases, whatever the decision, care has been taken to restate the principle that the limitation upon

the taxing power of the Government applies only to such instrumentalities, means and operations whereby the States exert their strict governmental powers, and it is uniformly held that, to entitle the State to immunity, the Federal taxes levied must not be in their bearing so indirect or remote as to place them outside this established principle. (*Indian Motocycle Co.* v. *United States*, 283 U. S., 570 [Ct. D. 354, C. B. X–1, 439]; *Willcuts* v. *Bunn*, 282 U. S., 216, 225; *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466.) The question before us seems to be very well answered by the language of Chief Justice Hughes in *Fox Film Corporation* v. *Doyal*, supra (l. c., 128):

"The principle of the immunity from State taxation of instrumentalities of the Federal Government, and of the corresponding immunity of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat., 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertion.' (*Indian Motocycle Co.* v. *United States*, 283 U. S., 570, 576, 579.) Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland*, 254 U. S., 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' (*Willcuts* v. *Bunn*, 282 U. S., 216, 225.)"

The danger which would menace the revenues of the United States if the immunity from Federal taxation here claimed should be indulged, is thus well stated by Justice Brewer in *South Carolina* v. *United States*, supra (l. c., 455):

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government."

A like warning has been issued from this court in *State of North Dakota* v. *Olson* (33 F. (2d), 848).

Our attention has been directed to the decision of the District Court for the Eastern District of Michigan in *Frey* v. *Woodworth* (2 F. (2d), 725), which holds that a city operating a street railway is engaged in a governmental function, and that the employees thereof are not subject to Federal taxation; and to the decision of the Circuit Court of Appeals for the First Circuit in *Powers* v. *Commissioner* (68 F. (2d), 634). An examination of the facts stated in the opinions, and the bases of the conclusions reached, suggests that those cases may be readily distinguished from the case at bar. But if it be insisted that those conclusions should be deemed applicable to the facts of the instant case, we must respectfully reject them as in conflict, not only with the uniform holdings in this circuit, but also with the principles established by the Supreme Court of the United States.

It follows that the orders of the Board of Tax Appeals are affirmed.

ARTICLE 89: Additional exclusions from gross income.

REVENUE ACT OF 1926.

Earned income of nonresident citizen. (See Ct. D. 924, page 217.)

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 101: Business expenses. XIV–9–7343
(Also Section 215, Article 293.) I. T. 2867

REVENUE ACT OF 1921.

I. T. 1511 (C. B. I–2, 88) is modified, in view of G. C. M. 14375 (see page 52).

ARTICLE 101: Business expenses.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Premiums paid on life insurance by a creditor to whom the policy has been assigned to secure a debt. (See G. C. M. 14375, page 52.)

ARTICLE 101: Business expenses. XIV-20-7497
Ct. D. 963

INCOME TAX—REVENUE ACT OF 1924—DECISION OF SUPREME COURT.

1. DEDUCTION—ATTORNEY'S FEE—ORDINARY AND NECESSARY BUSINESS EXPENSE—GUARDIAN AND WARD.

An attorney's fee paid by a guardian for conducting litigation to secure trust income for his ward is not deductible from the ward's gross income as a business expense within the meaning of section 214(a)1 of the Revenue Act of 1924. The ward, not the guardian, was the taxpayer and the ward was not engaged in any business.

2. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Fifth Circuit (69 Fed. (2d), 299), affirmed.

SUPREME COURT OF THE UNITED STATES.

Catherine Llewellyn Van Wart, by Roy Van Wart, Natural Tutor, petitioner, v. Commissioner of Internal Revenue.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 29, 1935.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

The sole question for determination is whether an attorney's fee paid by the guardian for conducting litigation to secure income for his ward, was a business expense within section 214(a)1, Revenue Act, 1924, and therefore deductible from the minor's gross income. The facts, as stated by the court below, were these—

"Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, La., after being confirmed by order of the district court for that parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the Federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided in favor of the plaintiff, it being held that the guardian was entitled to receive from the trustees his ward's accumulated income and future income as it annually accrued. (*Van Wart* v. *Jones*, 295 F., 287.) Accordingly, in 1924 the trustees paid over to Dr. Van Wart as guardian the accumulated income of $160,000 and current income of $80,000; and Dr. Van Wart, acting as guardian and by authority of the court of his appointment, paid out of

the funds so received by him a fee of $30,000 to the attorneys who brought the suit for their services in the litigation. In the income tax return for 1924, which was filed by the guardian on behalf of his ward, a deduction of the attorneys' fee was claimed."

Pertinent provisions of the Revenue Act of 1924 are in the margin.[1]

The Board of Tax Appeals held the attorney's fee was deductible as an ordinary and necessary expense in carrying on business. (Section 214(a)1.) The Commissioner claimed it was personal expense of the minor taxpayer, excluded from deduction by section 215(a)1, and the court below upheld this view. It declined to follow *Commissioner* v. *Wurts-Dundas* (Circuit Court of Appeals, Second Circuit, 54 F. (2d), 515). Because of this conflict the cause is here.

We agree with the conclusion that the ward, not the guardian, was the taxpayer. The return was filed by him in her behalf; the taxable income was hers, not his. The attorney's fee arose out of litigation conducted in the name of the ward. It was paid for her benefit out of her income.

In *Freuler* v. *Helvering* (291 U. S., 35, 44 [Ct. D. 782, C. B. XIII–1, 242]), we said: "The whole of the minor's income received by his guardian is taxable to the minor irrespective of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. * * * 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."

The ward was not engaged in any business. So far as appears the same thing is true of the guardian. (See *Kornhauser* v. *United States*, 276 U. S., 135 [T. D. 4222, C. B. VII–2, 267]; *Commissioner* v. *Field*, 42 F. (2d), 820; *Hutchings* v. *Burnet*, 58 F. (2d), 514; *Walker* v. *Commissioner*, 53 F. (2d), 351; *Lindley* v. *Commissioner*, 63 F. (2d), 807 [Ct. D. 724, C. B. XII–2, 108].) Moreover, guardianship is not recognized by the statute as a taxable entity.

The judgment under review must be affirmed.

Affirmed.

ARTICLE 112: When charges deductible.

XIV–12–7385
Ct. D. 938

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. DEDUCTION—LOSSES NOT COMPENSATED FOR BY INSURANCE.

A loss of property by fire, not compensated for by insurance or otherwise, is deductible only in 1921, when the fire occurred, and is not deductible partially in 1921, when, as the result of a tort action for damages, a judgment was obtained for a portion of the loss, and the remainder in 1925, when the judgment was reversed.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (28 B. T. A., 792) reversed.

3. CERTIORARI DENIED.

Petition for certiorari denied January 7, 1935.

---

[1] Revenue Act of 1924 (ch. 234, 43 Stat., 253):

SEC. 2. (a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

SEC. 214. (a) 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, * * *.

SEC. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses.

SEC. 225. (a) Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Highway Trailer Co., respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before ALSCHULER, EVANS, and SPARKS, Circuit Judges.

[July 25, 1934.]

OPINION.

SPARKS, Circuit Judge: This petition to review a decision of the Board of Tax Appeals presents the very troublesome question as to the year in which the taxpayer should be allowed to take a deduction for loss by fire under the statute which provides that deductions shall be allowed for losses sustained during the taxable year and not compensated for by insurance or otherwise. (26 U. S. C. A., section 986(4).)

Respondent, a Wisconsin corporation engaged in the manufacture of trailer and steel dump bodies, suffered a fire in 1921 which destroyed property to the value of $165,739 not covered by insurance. It claimed that the greater part of the loss resulted from the negligence of the Janesville Electric Co., which was under contract to supply the power needed to operate the water pumps, in cutting off the power just as the fire department was getting the fire under control. In 1921 respondent brought suit against the Electric company for the entire amount of the loss not covered by insurance. In the trial court a demurrer to the complaint was sustained which ruling was, however, reversed by the Wisconsin Supreme Court in 1922. In the hearing which followed, respondent obtained a judgment for $47,703 damages in 1924. It thereupon wrote off its books the difference between the total uninsured loss and the amount of damages allowed by the court, and claimed the deduction for the difference, $118,036, in its return for the year 1924. The company, however, appealed from the judgment, and in 1925 it was reversed by the Supreme Court of Wisconsin, and the action dismissed. Respondent thereupon claimed a deduction of the $47,703 for the year 1925. The Commissioner disallowed both these deductions, holding that the entire deduction should have been claimed for the year 1921 when the fire occurred. On appeal to the Board of Tax Appeals, the majority of the Board sustained the contention of the respondent, holding that since the amount of the loss actually suffered by the taxpayer did not become fixed until the outcome of the litigation over the loss, it was correct to allow the deduction as of the years in which the loss was finally ascertained.

There have been many cases before the courts involving this question, and it must be admitted that the decisions do not appear always to be consistent.[1] It is difficult, therefore, to deduce a rule from which to decide this case. The Board relied upon a number of cases which allowed the deduction for the later year in which the loss was finally determined. These included the three Supreme Court cases, *Lucas* v. *American Code Co.* (280 U. S., 445 [Ct. D. 168, C. B. IX–1, 314]), *Burnet* v. *Huff* (288 U. S., 156 [Ct. D. 640, C. B. XII–1, 220]), and *Lewellyn* v. *Electric Reduction Co.* (275 U. S., 243). In the Lucas case the taxpayer sought a deduction for 1919 in which year a liability for a breach of contract arose, the amount of which was not settled until judgment was rendered in 1922 which it paid in 1923. The court held that a loss occasioned by the taxpayer's breach of contract is not deductible in the year of the breach unless where within the tax year there is a definite admission of liability, negotiations for settlement are begun, and a reasonable estimate of

[1] See *Douglas County Light & Water Co.* v. *Commissioner* (43 F. (2d), 904); *Central Trust Co.* v. *Burnet* (45 F. (2d), 922); *Darling* v. *Commissioner* (49 F. (2d), 111); *Ferguson* v. *Commissioner* (59 F. (2d), 893); *First National Bank of Sharon, Pa.*, v. *Heiner* (66 F. (2d), 925); *Ledger Co.* v. *United States* (37 F. (2d), 775); *Dresser* v. *United States* (55 F. (2d), 499 [Ct. D. 503, C. B. XI–1, 267]); *Consolidated Tea Co.* v. *Bowers* (19 F. (2d), 382 [T. D. 4020, C. B. VI–1, 214]); *Pike County Coal Corporation* v. *Commissioner* (4 B. T. A., 625); *Allied Furriers Corporation* v. *Commissioner* (24 B. T. A., 457); *Martin Veneer Co.* v. *Commissioner* (5 B. T. A., 207); *Peterson Linotyping Co.* v. *Commissioner* (10 B. T. A., 542); *Edward H. R. Green* v. *Commissioner* (19 B. T. A., 904); *Lane Construction Corporation* v. *Commissioner* (17 B. T. A., 826).

the amount of the loss is accrued on the books. In the Huff case it was likewise held that where one partner had to make good the defalcation of another partner, he was entitled to the deduction only in the year in which he actually paid the money, and not in the year in which he discovered the loss. The court there said, "If there is liability on his part for the misappropriation, it does not create a certainty of loss, as the defalcation may be made good by the one who caused it, or the liability of the taxpayer may be enforced only to a limited extent or not at all. The requirement that losses be deducted in the year in which they are sustained calls for a practical test. The loss 'must be actual and present.'" In the Lewellyn case, the court refused to allow a buyer who had paid in advance for certain goods which in fact were never delivered, to deduct for its loss in the year in which the payment was made where it continued to carry the item on its books in its bills receivable account until the outcome of litigation which indicated that it would not be able to recover from the seller or a guarantor, whereupon it sought to amend its return for the year in which the prepayment was made and sued to recover an alleged overpayment of its tax for that year.

It seems to us that none of the above cases is as nearly in point as another Supreme Court case which was not considered by the Board, and which we think controls the decision in this case. We refer to the case of *United States* v. *S. S. White Dental Manufacturing Co.* (274 U. S., 398 [T. D. 4059, C. B. VI-2, 198]). There the taxpayer sued to recover for overpayment of a tax for the year 1918 claiming a deduction in the amount of its investment in a subsidiary German corporation the entire property of which, valued at $130,000, was seized by the German Government in that year as enemy property. The property was returned in 1920, and sold in 1922 for $6,000, which amount was returned as income by the taxpayer in that year. Subsequently a claim for $70,000 was allowed by the Mixed Claims Commission, no part of which had been paid. The taxpayer had charged off its entire investment in 1918 and claimed its deduction for that year, paying its tax under protest when the Commissioner disallowed the deduction. The court held that the loss was so evidenced by a closed transaction as to authorize its deduction from gross income for the year in which it occurred, saying:

"* * * The statute obviously does not contemplate * * * the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer. * * * But with equal certainty they do contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property * * * or caused by its destruction or physical injury * * *.

* * * * * * *

"We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German Government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery."

It seems to us that the three cases relied upon by the Board, all of which were decided after the White Dental case, do not overrule it, but merely represent quite different states of fact. Where, as in the case at bar, an actual physical loss occurs, resulting in a certain definite, fixed amount of damage, it seems better practice to allow the deduction for that entire amount of damage (not covered by insurance) in the year in which the loss actually occurs, according to the rule in the White Dental case, rather than to defer it until subsequent events indicate whether or not a recovery is to be had from other parties for a part of the loss. We think that this does not conflict with the rule of the Huff case, supra, that "the loss must be actual and present," because the loss is actual and present as soon as the physical damage occurs, as distinct from the situation where the loss claimed arises from a liability which may or may not ever materialize.

The decision is reversed, and the cause remanded to the Board of Tax Appeals for further proceedings in harmony with this opinion.

ARTICLE 112: When charges deductible. XIV-23-7537
Ct. D. 976

INCOME AND PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

DEDUCTION—RESERVES FOR FREIGHT ALLOWANCES AND CASH DISCOUNTS—ACCRUAL BASIS—ESTOPPEL.

A taxpayer on the accrual basis was allowed a deduction for 1917 on account of a reserve for freight allowances and cash discounts on 1917 sales which were reflected in accounts receivable at the end of the year, and a deduction for 1918 for similar allowances and discounts in the amount actually allowed to customers during that year, less the difference between the reserve set up at the end of 1917 and allowed as a deduction for that year and the reserve set up at the end of 1918 and allowed as a deduction for the latter year. The deduction for 1917 having been made at the taxpayer's request and in accordance with the reserve set up on its books under its established basis of accounting, the taxpayer, after the statute of limitation has expired for the collection of 1917 taxes, is estopped to claim that the accrual method employed in its returns and accepted by the Commissioner was erroneous and that the amount of discounts actually allowed customers during 1918 should be deducted in its return for that year.

COURT OF CLAIMS OF THE UNITED STATES.

Giant Furniture Co., a Body Duly Incorporated Under the Laws of the State of North Carolina, v. *The United States.*

[January 14, 1935.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

The plaintiff seeks to recover the sum of $5,685.01 with interest as refund of payments made to the defendant for corporation income and profits taxes for the calendar year 1918.

June 14, 1919, the plaintiff duly filed its income and profits tax return for 1918 which showed a net income of $16,215.18 and that the tax due thereon was $1,987.11. Plaintiff paid this tax and its recovery is not now in controversy. The Commissioner audited the return and on December 25, 1925, assessed an additional tax for 1918 of $10,120.91 which was paid by the plaintiff in installments from May, 1926, to March, 1927. On April 28, 1930, the plaintiff filed a claim for refund, one of the grounds of which and the one upon which the suit is based was the refusal of the Commissioner to allow $6,899.29 as a deduction from gross income for discounts allowed plaintiff's customers. This claim for refund was rejected and the issue in the case is the amount of deduction to which the plaintiff is entitled for the year 1918 on account of discounts allowed its customers.

The net charges for discount on plaintiff's books for 1918 were $71,417.35. Of this amount, $17,107.64 was allowed as a deduction for 1917 having been set up on plaintiff's books as a reserve for discount at the end of that year. If this amount was a proper deduction for 1917 it would leave $54,309.71 as the proper deduction for 1918 plus such a reserve as was set up at the end of that year. This reserve which was allowed by the Commissioner was $10,208.35. The actual deduction allowed by the Commissioner for discount for 1918 was the sum of the last two amounts specified above, namely, $64,518.06 and this was the exact amount claimed by plaintiff in its return. The additional amount now claimed by plaintiff, namely, $6,899.29 is the difference between the reserve set up at the end of 1917 and allowed as a deduction for that year and the reserve set up at the end of 1918 and allowed by the Commissioner for that year. As the amount claimed by plaintiff was allowed as a deduction for 1917 and not allowed for 1918, it is apparent that the controversy between the parties is as to the year for which this deduction should be taken.

As shown in the findings, the plaintiff provided in its invoices for certain discounts conditioned on payment within specified periods. The bills were rendered for the full amount which was included in the gross sales. When the customer paid his bill within a given discount period and took advantage of

the discount allowable, the remittance would be for the net amount of the bill. In some instances the sales were made with the understanding that the plaintiff would pay the freight thereon and accordingly in making payment the plaintiff deducted the amount of the freight. The amount of the freight and discount was charged on plaintiff's books to an account entitled "Freight and discount" and plaintiff set up an amount each year to take care of possible future discounts or adjustments on sales for which collections had not been made. Originally this amount was charged to "Profit and loss" and credited to "Reserve for discount." After 1918 the method used was to make a charge to "Reserve for discount" and a credit to "Freight and discount." The plaintiff now claims that to the extent of the amount in controversy the discounts made were contingent upon the payment of cash at a specified time and consequently could only be deducted in the year in which they were actually allowed and that the fact that a reserve had been set up upon its books in the previous year to take care of such allowances is immaterial.

The question upon which the decision in the instant case turns has often been raised, but neither the practice of the Bureau, the rulings of the Board of Tax Appeals, nor the decisions of the courts have been uniform, and both plaintiff and defendant have no difficulty in finding authorities which support their respective positions. The Board of Tax Appeals seems to have finally settled upon the rule that deductions for cash discounts which are contingent in their nature can be allowed only for the year in which they are made. The defendant relies upon the comparatively recent case of *Virginia-Lincoln Furniture Corporation* v. *Commissioner* (56 Fed. (2d), 1028), in which the Circuit Court of Appeals reversed the Board and held that a taxpayer keeping books on an accrual basis was entitled to deduct a reserve properly set up to meet discounts anticipated in the future in accordance with previous experience. But since the decision in *Brown* v. *Helvering* (291 U. S., 193 [Ct. D. 786, C. B. XIII-1, 223]), the Virginia-Lincoln case, supra, can not be taken as an authority as it is disapproved by the Supreme Court in so far as it is inconsistent with its opinion written in *Brown* v. *Helvering*, supra. In that case the Supreme Court laid down the general rule—

"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."

The court, however, approved the Treasury regulation of January 8, 1917 (No. 2433), that—

"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."

When we come to consider this regulation in connection with the facts in the instant case the matter is still left somewhat in doubt as plaintiff had set up in its reserve what presumably was the amount "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." As was said in *Lucas* v. *American Code Co.* (280 U. S., 445 [Ct. D. 168, C. B. IX-1, 314]):

"The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test. And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the Act;"

and it was held in substance that the interpretation of the statute and the practice adopted by the Revenue Bureau "should not be interfered with unless clearly unlawful." In the Lucas case, supra, the Commissioner disapproved the accounting practice used by the taxpayer. In *Brown* v. *Helvering*, the method

of the taxpayer was approved. In the case now before this court the Commissioner approved the accounting method used by the taxpayer and the taxpayer now claims that the Commissioner erred. It might be argued that the Commissioner's act in so doing was not "clearly unlawful," but it is not necessary for us to decide this point and we prefer to rest our determination of the case upon another matter.

In this connection it should be noted that the discounts involved in the instant case were not all for cash payments. Part of them were for payments of freight which could not be properly held to be contingent. If plaintiff agreed to pay the freight it was liable for it if the customer paid it; and in case of advance payment by plaintiff in accordance with the agreement there was no liability on the part of the customer. In cases where plaintiff agreed to pay the freight and did not, the customer must have paid it on arrival of the goods and as a matter of course would deduct it from the bill for the goods shipped.

We think that the defendant has another defense independent of the question which we have discussed above. The findings show that the additional amount now claimed by plaintiff, namely, $6,899.29, is the difference between the reserve set up at the end of 1917 and allowed as a deduction for that year and the reserve set up at the end of 1918 and allowed by the Commissioner for 1918. It thus appears that the plaintiff claims it should be allowed an amount for 1918 which has already been allowed for the year 1917. The allowance for 1917 was made in accordance with the reserve set up on the books of the taxpayer and in accordance with the taxpayer's return. In other words, the taxpayer requested that this allowance be made for 1917 and the request was granted. The taxpayer now, after the statute of limitations has expired for collection of the taxes of 1917, comes into court and asks that another allowance based on the same matters be made for 1918. When the plaintiff in its return for 1917 listed the discounts involved herein as a deduction and obtained a credit thereby, the defendant's officials had reason to believe that it would not also claim a credit for the same discounts in computing its tax for 1918.

In the case of *Mahoning Investment Co.* v. *United States* (78 C. Cls., 231) we discussed at some length the doctrine of equitable estoppel and quoted from *Dickerson* v. *Colgrove* (100 U. S., 578, 580), where it is said:

"There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on."

See also *Naumkeag Steam Cotton Co.* v. *United States* (76 C. Cls., 687).

We think the rule laid down in these cases applies to the case at bar and that plaintiff is estopped from claiming the deduction or allowance which it seeks to have made and which would reduce its taxes for 1918.

It follows that plaintiff's petition must be dismissed and it is so ordered.

SECTION 214(a)4, 5, 6.—DEDUCTIONS ALLOWED INDIVIDUALS: LOSSES.

ARTICLE 141: Losses.

XIV–6–7302
Ct. D. 919

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—LOSS—VOLUNTARY PAYMENT TO CREDITORS.

A member of a partnership which compromised the claims of its creditors in 1905 with money advanced by a third party, to whom the creditors assigned their claims and the partners gave notes as security for the money advanced, is not entitled to deduct as a loss in 1927 the amount of payments he voluntarily made in that year to the persons who had been creditors of the partnership in 1905.

2. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Thomas E. Donnelley, Thorne Donnelley, and Eleanor Donnelley Erdman, Co-Executors of the Estate of Reuben H. Donnelley, Deceased, petitioners, v. Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals.

Before EVANS, SPARKS, and FITZHENRY, Circuit Judges.

[January 24, 1934.]

OPINION.

EVANS, Circuit Judge: This appeal involves the deductibility of an alleged loss by a voluntary payment made by taxpayer in 1927 to persons who had been his creditors in 1905, and whose claims had been extinguished in 1905 for sums less than the full amount of the indebtedness. Both the Commissioner and the Board of Tax Appeals disallowed the deduction and assessed a deficiency tax of $68,439.34.

Reuben H. Donnelley and one Knight were in partnership in the brokerage business in 1905. Bankruptcy proceedings were instituted against the firm and the members, which proceedings were dismissed before a discharge was ordered, because of the settlement of all the firm's debts. One Morris, an attorney, negotiated the settlement of all claims of the bankrupts' creditors for from 26 cents to 100 cents on the dollar. The money used was furnished by Mr. Thorne, brother-in-law of Donnelley. The creditors executed assignments of claims in blank or running to Morris or to Thorne or to "some one else." In addition to the meager assets of the firm, Donnelley and his partner each gave his note for $300,000, due in 10 years, to Thorne, as security for his advances. There is no evidence as to whether Donnelley's note was paid. In 1927, Donnelley, having become affluent, paid $141,687.82, as principal, and $131,856.53, as interest, to the old creditors of the firm. These sums, totaling $273,544.35, constitute the item in issue. Their payment in 1927 constitutes the basis of a deduction in said year from the taxpayer's income.

It is petitioners' contention that Donnelley was fulfilling a moral obligation to pay his old creditors 100 cents on the dollar; that Thorne merely loaned the settlement money to Donnelley so that he might effect a settlement; that the payment of the balance of the principal was deductible under section 214(a)(4), (6), as a loss sustained in 1927; and that the interest item was deductible under section 214(a)2.

The Commissioner denies that this payment was a deductible loss, as that term is used in section 214(a) of the Revenue Act. He further says that there was no composition with creditors of the firm because the claims were sold to Thorne, and since the payments in 1927 were gratuitous, there should be no allowance for interest payment.

Section 214(a) provides:

"In computing net income there shall be allowed as deductions:

* * * * * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

* * * * * * *

"(6) Losses sustained during the taxable year of property not connected with the trade or business * * * if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise. * * *"

While confessing to a desire to reward such action as is here under review, we find no justification for declaring the transaction to be a loss which might be deducted from the taxpayer's income. The debts of the old firm were assigned by the creditors to a third party. The bankrupts settled the claim of said third party for moneys advanced by giving their notes therefor. There was no debt from the taxpayer to the original creditors. The sums which he paid them in 1927 were gifts which, though the legitimate object of commendation, can not be converted into losses by the taxpayer.

More justification exists for calling it the payment of a debt than a loss, on the theory that a debtor occasionally pays an obligation which has been legally

satisfied by a discharge in bankruptcy or by the statute of limitations or by compromise. We have endeavored, though unsuccessfully, to evolve a theory upon which a deduction might be predicated. None has been found.

The instant case involves no such consideration for the payment of the satisfied obligations of the taxpayer as existed in the case of *Welch* v. *Helvering, Commissioner*, decided November 6, 1933 (290 U. S., 111 [Ct. D. 755, C. B. XII–2, 112]). Nevertheless, the court in that case disallowed the deduction.

The decree is affirmed.

ARTICLE 141: Losses.

REVENUE ACT OF 1926.

Gambling losses. (See Ct. D. 924, page 217.)

ARTICLE 141: Losses.

XIV–13–7402
Ct. D. 940

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—LOSS—PURCHASE OF STOCK.

Where a bank, for the purpose of acquiring and operating a branch bank, purchased all the stock and then took over at book value all the assets of another and in the same year received from it as a final liquidating dividend an amount less than that paid for the stock, the events connected with the purchase were, in effect, one transaction, and the bank was not entitled to deduct as a loss the difference between the cost of the stock and the liquidating dividend.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (29 B. T. A., 176) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Security Savings & Commercial Bank, respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER and NORTHCOTT, Circuit Judges, and CHESNUT, District Judge.

[October 2, 1934.]

OPINION.

NORTHCOTT, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals (29 B. T. A., 176), involving Federal income taxes for the years 1927 and 1928, in the amount of $4,450.79.

The respondent, hereinafter referred to as the bank, is a corporation, incorporated under the laws of West Virginia, and during the year 1927 was engaged in the banking business in Washington, D. C. On June 14, 1927, the president of the bank obtained an option from the then president of the Central Savings Bank, a District of Columbia corporation, engaged in the banking business in Washington, for the acquisition by purchase of 1,001 of the 2,000 shares of the capital stock of the Central Savings Bank at a price of $140 per share. At a special meeting of the board of directors of the bank, held June 24, 1927, the board voted to take over the option for the bank and took steps to apply to the Comptroller of the Currency for authority to establish a branch bank at the place of business then used by the Central Savings Bank and to take over all the assets and liabilities of the Central Savings Bank for the purpose of operating said branch bank. The bank's vice president was authorized to vote

the stock of the Central Savings Bank for the purpose of liquidating that bank and canceling its charter. Authority to establish and operate the branch bank was granted.

On June 25, 1927, a contract was entered into between the bank and certain stockholders of the Central Savings Bank for the purchase of 1,701 shares of the capital stock of the last named bank at the same price of $140 per share. By June 30, 1927, the bank had acquired additional shares of the stock of the Central Savings Bank and on that date owned 1,839 shares of such stock, for all of which the price of $140 per share had been paid. By the contract of June 25, 1927, it was agreed that before making final payment for the stock, agents of the bank might inspect the books and records of the Central Savings Bank, and such inspection was made before the purchase of the stock was completed.

At a meeting of the board of directors of the Central Savings Bank held on June 30, 1927, the then acting directors of that bank resigned and were replaced by nominees of the bank. The president, vice president and treasurer of the Central Savings Bank also resigned and the vacancies were filled by the election of nominees of the bank. On the same day the Central Savings Bank, with the approval of its stockholders, entered into an agreement with the bank by which the Central Savings Bank sold and delivered to the bank all of its "* * * notes, ledgers and other accounts, choses in action, bills receivable, real estate and any and all other assets, real, personal and mixed of every nature, kind and character whatever * * *," for the sum of $250,006.07.

The statement of the Central Savings Bank at the close of business on June 30, 1927, the date of the sale, showed that that bank had savings deposits of over $600,000. At the time of the sale (June 30, 1927), there remained outstanding and not owned by the bank 161 shares of the capital stock of the Central Savings Bank. These shares were acquired by the bank between July 1 and October 18, 1927, at the same price as that paid for the other shares, $140 per share. On November 9, 1927, the stockholders of the Central Savings Bank directed the payment of a final liquidating dividend of $124.21 on each of the 2,000 shares of stock or a total dividend of $248,420. By this payment the Central Savings Bank divested itself of all its assets and no further distribution to stockholders was ever made by it.

Immediately after the transaction of June 30, 1927, the bank took possession of all the assets of the Central Savings Bank and of its banking house and conducted a branch banking business at that location for a period of 10 months, after which the location of the branch bank was moved. On December 28, 1927, in conformity with resolutions duly adopted by its board of directors, the bank charged to profit and loss, on its books, the sum of $31,580, the loss claimed to have been sustained by it through the purchase and liquidation of 2,000 shares of Central Savings Bank stock.

In computing net income for the calendar year 1927 the bank claimed as a deduction the sum of $31,580, representing the difference between the cost of the 2,000 shares of the Central Savings Bank stock, purchased at $140 per share, and the amount distributed by the Central Savings Bank as a liquidating dividend, namely, the sum of $248,420. This deduction was disallowed by the Commissioner of Internal Revenue, and upon petition of the bank the Board of Tax Appeals held against the Commissioner.

The sole question presented here is whether the bank sustained a deductible loss where it bought all of the stock of another bank, took over all the tangible and intangible assets of that bank at a price equal to the book value of its stock, which price was less than the bank paid for the stock of the purchased bank, when the object was to obtain the business of a rival concern with a large amount of deposits and to establish a branch bank at the place of business of the purchased bank.

A survey of the transaction as a whole leads us to the conclusion that the course of events connected with the purchase of the stock and assets of the Central Savings Bank were, in effect, one transaction. The record discloses the fact that the only object the bank had in paying a greater value for the stock of the Central Savings Bank than it was shown to be worth on the books, was the acquisition of the business, including the location of the purchased bank; that these intangible assets had a value to the purchasing bank is not to be doubted, else the transaction in itself would have been a foolish one, without excuse. That the bank thought it was purchasing something of value in addi-

tion to the tangible assets is shown by the fact that it paid $140 per share for the 161 shares of stock it did not own on June 30, 1927, when it was definitely known that the liquidating dividend would only amount to $124.21 per share. In other words, after having purchased all the assets of the Central Savings Bank at a figure that would give to the stockholders only $124.21 for a share of stock, it continued to pay $140 a share. The sale of the assets was made by its own officers acting as officers of the Central Savings Bank and was nothing more than a formality that was gone through with the purpose of carrying out the plan as originally conceived; the bank knew that it would not get back in actual dividends the amount paid for the stock but unquestionably expected to get value received for the difference by the acquisition of the business and location of the purchased bank and, as it was still in possession of the business and location at the time the return was made, for the purposes of taxation, for the year 1927, there could have been, at that time, no definitely ascertained loss upon the transaction. The value of the assets tangible and intangible which the bank acquired should be treated, for the purposes of taxation, as equal to the cost of the stock. (*Prairie Oil & Gas Co.* v. *Motter*, 66 Fed. (2d), 309 [Ct. D. 767, C. B. XIII–1, 183].)

The series of acts corporate and otherwise leading up to the purchase of the stock and of the business of the Central Savings Bank constituted only a single transaction in which the bank purchased certain assets tangible and intangible for the price paid for the stock. The whole transaction constituted the means with which to carry out the plan and in the application of income tax laws the substance and not the form should control. (*S. A. MacQueen Co.* v. *Commissioner*, 67 F. (2d), 857 [Ct. D. 830, C. B. XIII–1, 266]; *Prairie Oil & Gas Co.* v. *Motter*, supra; *Tulsa Tribune Co.* v. *Commissioner*, 58 F. (2d), 937; *West Texas Refining & Development Co.* v. *Commissioner*, 68 F. (2d), 77.)

It is not necessary to cite authority to the effect that intangible assets, while not usually carried on the books of banks, can be of great value and it is a recognized fact that the good will of a going concern has a definite value however difficult it may be to accurately estimate that value.

The bank purchased the stock at a certain fixed price knowing all the circumstances connected with its value and it is settled that the fair sale of stock is the best evidence of its market value. (*Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S., 146; *Muser* v. *Magone*, 155 U. S., 240; *Tabor Manufacturing Co.* v. *Commissioner*, 34 F. (2d), 140.) Moreover, after the absorption of the purchased bank the bank had everything that it had before and it had lost nothing because of the purchase made of the assets of the Central Savings Bank. Paper transactions of this kind do not of themselves prove a loss. (*Alpha Portland Cement Co.* v. *United States*, 261 Fed., 339; *Gulf Oil Corporation* v. *Lewellyn*, 248 U. S., 71.)

Respondent relies upon the decision of this court in the case of *Burnet* v. *Riggs National Bank* (57 Fed. (2d), 980), but that case is easily distinguishable from the instant case. In the Riggs National Bank case, that bank, at the solicitation of the Comptroller of the Currency for a commendable purpose, took over the assets and business of the Hamilton Savings Bank. The transaction was not entered into with any hope of gain by the acquisition of the Hamilton Savings Bank but was done solely to avoid a disorganization of the banking business in the District of Columbia. The Riggs Bank conducted the business of the purchased bank at a loss and we properly held that such a loss as was shown to have been incurred in the transactions was a deductible loss under the income tax laws. Here no such condition existed; the bank purchased the Central Savings Bank stock with the hope and expectation of making a profit by the transaction and so far as the facts disclosed by the record go, no loss has been shown. While it is true, as we said in the Riggs National Bank case, that separate corporate entities are not to be entirely ignored in considering questions of taxation, where, as here, the sale of the assets was made between two banks with identical officers and practically identical stockholders, separate corporate entities become so merged that the line of demarcation is scarcely visible.

The loss claimed was not proven and the action of the Commissioner in determining a deficiency in the income tax against the bank was correct. The decision of the United States Board of Tax Appeals is accordingly reversed.

SECTION 214(a)9.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPLETION.

ARTICLE 204: Amount returnable through depletion and depreciation deductions in the case of lessor. XIV-1-7230 Ct. D. 904

(Also Section 204, Article 1602.)

INCOME TAX—REVENUE ACT OF 1926—DECISION OF SUPREME COURT.

1. DEDUCTION—DEPLETION—ADVANCE ROYALTY OR BONUS.

In computing net income under the Revenue Act of 1926 lessors are entitled to deduct from advance royalties or bonuses received upon execution of oil and gas leases the statutory percentage allowance for depletion under sections 214(a)9 and 204(c)2 of that Act, even though there was no production of oil when the leases were made or at any time within the taxable year.

2. DECISION REVERSED.

Decision of the Circuit Court of Appeals, Fifth Circuit (70 Fed. (2d), 785), affirming memorandum opinion of the Board of Tax Appeals (28 B. T. A., 1349), reversed.

SUPREME COURT OF THE UNITED STATES.

No. 176. *William E. Herring, petitioner,* v. *Commissioner of Internal Revenue.*

No. 177. *Eula Day Herring, petitioner,* v. *Commissioner of Internal Revenue.*

On writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 3, 1934.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

The petitioners are husband and wife and the income which gives rise to this controversy is derived from community property. We are to determine whether in computing net income under the Revenue Act of 1926 they were entitled to deduct from advance royalty or bonus received upon the execution of oil and gas leases the statutory percentage allowance for depletion, it appearing that there was no production when the leases were made, or at any time within the taxable year.

The petitioners' community estate held a half interest in a partnership whose principal business was cattle raising. The firm owned a tract near Amarillo, Tex. In 1926 it leased portions of this land for the purpose of mining and operating for oil and gas. In that year the lessees paid an aggregate of $683,793.75 as advance royalties or bonuses, and were obligated to pay additional royalties of one-eighth of the product or its value as oil and gas were extracted. The leases were for terms of five years and so long thereafter as oil and gas should be produced. When the instruments were executed there was no oil well within 3½ miles of the demised land. The lessors had no right to compel the drilling of wells and none were put down during 1926. In 1930 four were drilled which proved to be commercial gas wells, all made a showing of oil, and one produced from 8 to 10 barrels a day.

In their tax returns for 1926 the petitioners each claimed a pro rata share of a depletion allowance of $188,043.28, being 27½ per cent of the bonus payments to the partnership. The Commissioner disallowed the claim. The Board of Tax Appeals sustained his decision. The Circuit Court of Appeals affirmed the Board's action.[1] We granted certiorari.[2]

The pertinent sections of the Revenue Act of 1926 are 214(a)9 granting a reasonable deduction for depletion in the case of oil and gas wells, and 204(c)2 permitting computation of the allowance at 27½ per centum of the gross income from the property.[3]

[1] 70 F. (2d), 785.
[2] 293 U. S., 541.
[3] 44 Stat., 9, 14, 26–27; U. S. C. App., Title 26, sections 935, 955.

A bonus is not proceeds from the sale of property, but payment in advance for oil and gas to be extracted, and is therefore taxable income.[4] As such it is a part of the "gross income from the property" as the phrase is used in section 204(c)2 to designate the base for the application of the percentage deduction. From these premises the petitioners argue that the bonus received does not lose its character as income subject to depletion, merely because it happens that in the year of receipt there was no production of the depletable asset.

The respondent replies that the allowance for depletion is a matter of grace, not of right, and that the Act fails to grant any allowance on income such as that here involved. The argument is that in both the relevant sections of the Act, the statute says "in the case of * * * oil and gas wells" and this expression necessarily excludes a case where no well exists. In support of this asserted statutory exclusion it is urged that a depletion allowance is essentially and exclusively reimbursement for wastage or exhaustion of assets, and Congress could not have meant to permit an allowance in any year in which there was no extraction of oil or gas, and no practical assurance of production in the future. We think these arguments can not prevail to defeat the petitioners' right to the deduction.

Each of the Revenue Acts, 1916 to 1934, inclusive, has granted as a deduction from gross income a reasonable allowance for depletion "in the case of * * * oil and gas wells."[5] The regulations under the 1926 Act and its predecessors dealing with cost depletion treated bonus or advanced royalty as subject to depletion,[6] and these have been approved by reenactment of the statutory provision without alteration. That under the law and the regulations a lessor is entitled to a depletion allowance on bonus payments is settled by the decisions of this court.[7] It has never been held here that the existence of a well conditioned the right to depletion. Nor, until recently, has the Treasury so ruled. After the decision of the Murphy Oil Co. case, supra, there arose a doubt as to how the flat percentage allowance first permitted by the Act of 1926 should be applied to bonus payments. In answer to a request, the General Counsel of the Bureau of Internal Revenue rendered an opinion[8] in which he said:

"The four situations to which attention is called are as follows:

"(1) No oil being produced when the bonus was received, but future production practically assured because of near-by wells and geological indications.

"(2) No oil being produced when the bonus was received, but property became productive within the taxable year.

"(3) No oil being produced when the bonus was received, and not more than a speculative prospect of future oil production at that time, but property is now known to have become productive after the taxable year.

"(4) Property has never become productive."

and held that depletion should be allowed in situations (1) and (2) and denied in situations (3) and (4).

In the present case the Board of Tax Appeals followed an earlier decision in which it had referred to portions of the General Counsel's opinion with disapproval, but found it unnecessary to decide whether it was sound.[9] In that case no well had been drilled on the leased property within the taxable year in which the bonus was paid, and the Board, saying that depletion could not be allowed except as an incident of actual production, refused the claimed percentage deduction. In a later case[10] where it appeared the whole of the petitioner's land was proved oil and gas territory and a gas well had been drilled in a prior year and shut in for lack of pipe-line facilities, so that there was no actual production during the taxable year in which the bonus was received, the Board overruled the taxpayer's claim for depletion, adhering to its position that production during the year was prerequisite to any allowance and refusing to follow General Counsel's opinion.

The situation presented by the administrative rulings is this: A bonus is not a receipt from a sale of a capital asset and may not be returned as such; it is

[4] *Burnet* v. *Harmel* (287 U. S., 103 [Ct. D. 611, C. B. XI–2, 210]); *Murphy Oil Co.* v. *Burnet* (id., 299 [Ct. D. 619, C. B. XII–1, 231]); *Bankers Coal Co.* v. *Burnet* (id., 308).

[5] See *United States* v. *Dakota-Montana Oil Co.* (288 U. S., 459); *Helvering* v. *Twin Bell Oil Syndicate*, No. 170, October term, 1934, decided this day; Revenue Act 1932, section 23(l) (47 Stat., 169, 181); Revenue Act 1934, section 23(m); Session Laws, Part I, 680, 689.

[6] *Murphy Oil Co.* v. *Burnet* (287 U. S., 299, 303).

[7] *Burnet* v. *Harmel*, supra; *Murphy Oil Co.* v. *Burnet*, supra; *Palmer* v. *Bender* (287 U. S., 551 [Ct. D. 641, C. B. XII–1, 235]).

[8] G. C. M. 11384 (C. B. XII–1, 64).

[9] *Glide* v. *Commissioner* (27 B. T. A., 1264). See also *Umsted* v. *Commissioner* (28 B. T. A., 176, affirmed, 72 F. (2d), 328).

[10] *Sneed* v. *Commissioner* (30 B. T. A., 1121).

income in the year received; if any depletion is to be allowed against the receipt, the allowance must be claimed for the year of receipt; it can not be allowed in any later year;[11] if the taxpayer computes depletion upon the basis of cost or March 1, 1913, value he may deduct depletion from a bonus payment, irrespective of the sinking of a well or the production of any oil or gas;[12] if, however, he elects to avail himself of the alternative method of computing deduction at a per cent of gross income, though the nature of the deduction is unchanged,[13] he may not have any unless there be production within the taxable year; if the production be but trifling he may take a full percentage deduction upon the entire bonus, however disproportionate the allowance to the actual extraction of oil during the year. To condition the allowance on actual production, however small, or the imminent probability of production, and to deal in refinements as to the degree of probability of future production is in many cases to deny any deduction where the taxpayer elects to compute it under 204(c)2 (flat percentage of gross income from the property) and permit it where he elects to compute it under 204(c) (on the basis of cost). But the nature and the purpose of the allowance is the same in both cases, and we find neither statutory authority nor logical justification for withholding it in the one and granting it in the other; much less for making the decision turn upon the circumstance that no production is obtained within the year in which the bonus is paid.

As to income tax liability in the year of termination of the lease, on account of bonus paid at the execution of the lease, if no mineral has then been extracted, we express no opinion.

The judgments are reversed.

ARTICLE 216: Depletion—Adjustments of accounts based on bonus or advanced royalty.

REVENUE ACT OF 1926.

Restoration of bonus depletion deduction on percentage of income basis to income at termination of lease in case of no production from leased premises. (See G. C. M. 14448, page 98.)

ARTICLE 221: Depletion in the case of oil and gas wells.

REVENUE ACT OF 1926.

Whether percentage depletion should be computed on gross income from each separate tract rather than aggregate gross income from all. Attempt to change from method of capitalizing drilling and development expenses to deducting such expenditures as business expenses. (See Ct. D. 925, page 176.)

ARTICLE 223: Charges to capital and to expense in the case of oil and gas wells. (Also Section 1113, Article 1351.)

XIV-22-7523
Ct. D. 971

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—REVISED STATUTES—DECISION OF COURT

1. DEDUCTION—DEPLETION—CASING-HEAD GAS CONTRACTS.

Certain individuals entered into contracts, which cost nothing, with oil producing companies to purchase their casing-head gas, and began construction of a plant to extract the gasoline. It was then decided to incorporate, and the partially constructed plant, the contracts, some money, and some accounts receivable were turned over to the corporation for its nonpar stock. Under the cir-

[11] Compare *Burnet* v. *Thompson Oil & Gas Co.* (283 U. S., 301, 306).
[12] See the regulations cited in *Murphy Oil & Gas Co.* v. *Burnet*, supra, at page 303.
[13] *Dakota-Montana Oil Co.* v. *United States*, supra, at page 467.

cumstances of the case, the corporation is not entitled to a deduction for depletion, since the contracts did not vest in it any interest in the gas reserves or in the gas "in place," and since the evidence is insufficient to show that the contracts had any cost or fair market value at the time they were acquired by the corporation.

2. SUIT—STATUTE OF LIMITATION.

Suit to recover payments of income tax is not barred, under the provisions of section 3226, Revised Statutes, if brought within five years after payment of the tax although more than two years after denial of a timely claim for refund.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

J. W. Hurley, Receiver of Hurley Gasoline Co., a Corporation, plaintiff, v. *United States of America, defendant.*

Action at law to recover income taxes for the years 1920, 1921, and 1922. Judgment for defendant.

[January 14, 1935.]

OPINION.

MCDERMOTT, Circuit Judge: This is an action at law to recover $16,527.42 income taxes for the years 1920, 1921, and 1922. In the original returns for those years the plaintiff took certain deductions for depletion, which the Commissioner disallowed upon an audit, and assessed a corresponding deficiency. The tax as assessed was paid in installments, the last two installments being paid on April 6, 1929, in the amount of $5,383.27, and on April 10, 1929, in the amount of $1,040.89. Whereupon a seasonable claim for refund was made, and seasonably denied, and this suit follows.

By an amended answer, and also by an objection to the introduction of any evidence, the defendant raises the question of the statute of limitations.

The applicable statute (R. S., 3226, 26 U. S. C. A., section 156) provides that "no such suit or proceeding shall be begun * * * after the expiration of five years from the date of payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit or proceeding relates." The plaintiff concedes that this statute bars recovery except for the two payments made in 1929, which were made within five years from the date the suit was filed. The Government contends that the suit must be brought not only within five years from the date of the payment of the tax, but also within two years after the claim for refund is denied. The statute does not so read. The statute gives five years after the payment of the tax for the bringing of such suits as these in any case, and further provides that suits may be brought after the expiration of the 5-year period, if within two years from the disallowance of the claim. I conclude, therefore, that the statute of limitations is no bar to a recovery of the sums paid in 1929, which was within five years of the date of the filing of this suit on October 5, 1933.

The facts are not seriously in dispute. One J. W. Hurley came to Oklahoma from California in 1919 with the idea of making some contracts for the purchase of casing-head gas, and the construction of a casing-head gasoline plant for the purpose of recovering the gasoline from the gas. He spent several months time in looking over the field, and in negotiating contracts for such casing-head gas. Later on his brother, who was in the casing-head gasoline business, came on from California, and his brother spent some time in a similar investigation. After an investigation of the field, and tests of the casing-head gas available, both for quality and amount, six contracts were acquired from large oil producing companies, by the general terms of which Hurley agreed to take their casing-head gas, transport it to a casing-head gasoline plant, there recover the casing-head gasoline, and return the dry or residue gas to the lease for the use of the oil lessee. In the manufacture of casing-head gasoline large compressors are constructed at the gasoline plant, which are connected with the mouth of the oil well, which serve the double purpose of transporting the gas from the wells to the gasoline plant, and of

increasing the production of oil and casing-head gas by the vacuum method. Where the oil well producing the casing-head gas was located at a considerable distance from the central compressing plant, it was necessary to set up a booster station, with compression power, to transport the gas.

After these contracts were negotiated, but before all of them were executed, Mr. Hurley and his brother interested others, and among them cash to the amount of $93,000 was raised for the purpose of constructing a casing-head gasoline plant and laying the necessary lines to and from the wells. Before the plant was completely constructed and all of the contracts executed, and in July, 1920, it was decided to incorporate, and the partially constructed plant, with the gas contracts, and some money left in the hands of the associates, was turned over to the new corporation, and stock was issued to the associates representing their previous interests.

Neither Mr. Hurley, nor his associates, paid anything to the oil companies with whom they made these contracts for casing-head gas. The corporation issued 7,500 shares of nonpar stock to the associates for the plant, the money turned over, and the contracts. Stock was not issued for the contracts as a separate transaction. The plant, the contracts, some money, and some bills receivable were turned over for the 7,500 shares of stock. The evidence does not show the value of the time, or the expense involved, in negotiating the contracts.

The determination by the Commissioner that the corporation was not entitled to any deduction for depletion is prima facie correct, and the burden is upon plaintiff to overcome his finding. The statute in force during the taxable years in question is section 234(a)9 of the Revenue Act of 1921, and the corresponding provision in the 1918 Act. It reads as follows:

"(a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(9) 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, based upon cost including cost of development not otherwise deducted."

There is no question here involved as to an allowance for the depreciation of the casing-head gasoline plant. The sole question involved is whether the plaintiff is entitled to a deduction for depletion of the gas reserves from which the oil companies had agreed to sell it gas. Any allowance for depletion is a matter of grace, and unless Congress has provided for depletion, there can be no deduction therefor. (*Darby-Lynde Co.* v. *Commissioner* (C. C. A. 10), 51 F. (2d), 32.) In order to come within the quoted section the plaintiff's business must fall within the category of "mines, oil and gas wells." The plaintiff was operating a plant designed to extract gasoline from gas; it was not operating a mine, nor an oil or gas well. It is true that, as incidental to the transportation of the gas from the well to the casing-head plant, the compressor served to increase the production of oil and gas from the well owned by the oil lessees, but in no other sense can it be said that the plaintiff was operating a gas well; it did not own a gas well; it had no interests in the lease, nor in the gas reserves, save and except that if the gas reserves became exhausted it would be necessary for it to find another gas supply, if it was to operate its plant. It seems to me that this situation is closely analogous to that of an oil refinery, which is constructed for the purpose of refining crude oil. It buys the crude oil from others, but the ordinary refinery could hardly claim a right to depletion because the fields from which it was purchasing its oil were being exhausted, and thus in an indirect way jeopardizing its investment in the refinery. By the same token, it seems to me, the plaintiff, as the operator of the casing-head gas plant, is not entitled to a depletion because of the exhaustion of gas reserves which belong to another.

In determining who is entitled to depletion, the courts do not concern themselves with niceties of legal title, but bring within the statute those who have any interest in the minerals "in place"; that is, a right to share in the minerals produced and an economic interest in the minerals "in place." (*Palmer* v. *Bender*, 287 U. S., 551 [Ct. D. 641, C. B. XII–1, 235]; *Reynolds, Coll.*, v. *Cooper* (C. C. A. 10), 64 F. (2d), 644, affirmed, 291 U. S., 192 [Ct. D. 785, C. B. XIII–1, 250].) In these cases, the taxpayer had an interest in the minerals "in place"—as lessor, lessee, or the assignee of some interest in the lease, and

the court was particular twice to limit its holding to oil "in place." One who buys the oil at the mouth of the well owns the oil, but has no interest in it "in place." A pipe line carrier, a refiner, has an economic interest in the life of the fields they serve, in that their investment becomes junk when the fields play out. But no case has been found where a pipe line company or an oil refinery has been allowed a credit for depletion of the fields from which they buy their oil. So here; the taxpayer buys gas as it is produced; he has no interest in the gas "in place." It may also be pointed out that any allowance for depletion to a manufacturer must either be deducted from the allowance to the lessor or the lessee, or the depletion will run more than 100 per cent. I do not believe the statute contemplates any such allowance.

However, the Commissioner ruled otherwise during the years in controversy. Article 223 of the applicable regulations (45 and 62) reads in part:

"* * * Casing-head gas contracts have been construed to be tangible assets and their cost may be added to the capital account returnable through depletion, following the rate set by the oil wells from which the gas is derived, or, if the life of the contract is shorter than the reasonable expectation of the life of the wells furnishing the gas, the capital invested in the contract may be written off through yearly allowances equitably distributed over the life of the contract."

This regulation was dropped in 1926. Counsel relies upon *Signal Gasoline Corporation* v. *Commissioner* (C. C. A. 9) (66 F. (2d), 886), which may be distinguished on the facts, since in that case the taxpayer pumped gas after the wells ceased producing oil, a condition not here present. Here, the vacuum pressure which increased recovery was incidental to the transportation of the gas. The sole authority for this decision is *Palmer* v. *Bender*, but the court overlooked entirely the qualifying words "in place" twice used in that opinion. Some early decisions of the Board of Tax Appeals are cited, but the Board later decided to the contrary, as disclosed by the Signal case, supra. Two other cases cited, *Pugh* v. *Commissioner* (C. C. A. 5) (49 F. (2d), 76) and *Alexander* v. *Continental Petroleum Co.* (C. C. A. 10) (63 F. (2d), 927), have no bearing, for each involves an interest in minerals in place.

If necessary, I would be strongly inclined to hold that the Commissioner has no power to allow depletion to manufacturing plants where Congress limited it to "mines, oil and gas wells," for by so doing, he must take depletion from the owner of the minerals in place and give it to a manufacturer, or allow more than 100 per cent of the reserves to be recovered through depletion.

But it is not necessary to hold the regulation invalid, for the unsatisfactory proof of costs of the contracts—which was the basis of depletion under these statutes—is not sufficient to overturn the finding of the Commissioner. In a case involving the question of whether reserve steel was a part of current inventory or of plant equipment, the Supreme Court held that the Court of Appeals could not overturn the Commissioner's finding except upon clear and cogent proof, saying in conclusion:

"The company's case falls far short of meeting the heavy burden of proving that the Commissioner's action was plainly arbitrary." (*Lucas* v. *Structural Steel Co.*, 281 U. S., 264, 271.)

It will serve no useful purpose to detail the evidence. After hearing the witnesses, I concluded that the oil companies selling the gas had made a good bargain, as had the plaintiff; that plaintiff had not, by superior powers of negotiation, talked the able managers of these great oil companies out of contracts of great value without any consideration. It is true that one oil lease would not justify the construction of a casing-head gas plant or an oil refinery, but that contracts from many leases would. But that does not give to contracts to buy oil or gas a large cash value. One expert for plaintiff testified that the contracts were worth from nothing to $100 a gallon of daily capacity less the cost of the plant, which amounts to no evidence. Another expert had not even read the contracts. Another built up a value based on estimates of reserves multiplied by an estimated value of natural gasoline—found later to be erroneous—less an estimated cost of manufacture, discounted by 50 per cent as a margin of safety. If this prophecy had been half-way correct, plaintiff would not be in the hands of a receiver. Such wizardry with

figures is of value in a stock-selling campaign, but is too hypothetical to support court decrees. In *United Gas Co.* v. *R. R. Commission* (278 U. S., 300, 317), such conjectures as to the value of gas reserves were rejected, and cost was taken as value instead. See, also, *Wichita Gas Co.* v. *Public Service Commission* (2 F. Supp., 792). The only satisfactory evidence here of the value of these contracts is their cost, which was nothing. I therefore find the fact to be that these contracts had no fair market value when the corporation acquired them.

If the taxpayer were the associates who incorporated, it would be apparent that no depletion would be allowable. The argument is that since they incorporated, their corporation paid a price for the contracts, to wit, its stock. If the Standard Oil Co. issues stock with a market value for property, it has paid an ascertainable price. And there are occasions, such as noticed in *O'Meara* v. *Commissioner* (C. C. A. 10) (34 F. (2d), 390) and *Champlin* v. *Commissioner* (C. C. A. 10) (71 F. (2d), 23), where the value of the property transferred may be resorted to in order to fix the value of the stock. But here neither the stock nor the property transferred had a market value. Nor does this record disclose how much stock was issued for these contracts. All the record discloses is that 7,500 shares of stock were issued for the plant, contracts, accounts receivable, and money. Plaintiff undertakes to cover this gap by proving that an established casing-head gas plant, as a going concern, has a market value of somewhere between $50 and $100 a gallon of daily capacity; from that value the plaintiff then subtracts the cost of the plant, the value of the bills receivable, and the cash, and says that the balance represents the cost to the corporation of these contracts.

But there is no need of such roundabout methods of arriving at the value of contracts acquired practically contemporaneously with the transfer to the corporation. Cost in the market, arrived at by negotiation between able business men familiar with values and not compelled to buy or sell, is excellent evidence of value. That cost was nothing except the time spent in negotiating them.

The truth about this case, as I get it, is this: The contracts negotiated by plaintiff with the capable business men representing the oil companies, retained to the oil companies such a large royalty, and put upon plaintiff such burdensome conditions of operation, that the contracts when made were fair to both parties, but were worth just what they cost, and that is nothing. If a refinery entered into contracts to buy crude oil from leases adjoining the refinery at the prevailing market price of crude oil, the contracts have a value in the sense that they enable the refinery to run, but it could not fairly be said that the contracts had a fair market value.

In any event the evidence is not at all of that character or probative force which would justify the court in overturning the deliberate judgment of the Commissioner on this question of fact.

There is still another reason which to my mind bars recovery. Section 203(b)4 of the Revenue Act of 1924 provided that where a group of persons incorporated their holdings, no taxable gain shall arise from the transaction, and under that Act clearly there would be no cost to the corporation arising from such a transaction. (*Darby-Lynde Co.* v. *Commissioner* (C. C. A. 10), 51 F. (2d), 32.) That section of the 1924 Act does not appear in the earlier Acts. However, in *O'Meara* v. *Commissioner*, supra, our court held there was no taxable gain under the 1921 Act where a group of associates incorporated their interests in property. The O'Meara case parallels this one on its facts. A group of associates incorporated for convenience. There is no proof here, as there was none in the O'Meara case, of any market value of the stock when issued. The value of the properties transferred in both instances was speculative.

Our Court of Appeals held, in both the O'Meara and the Champlin cases, that the incorporation gave rise to no taxable gain. Clearly in this case, too, no taxable gain arose, and it is not intimated that any taxable gain was returned by the associates. It seems to me to be essentially fair to hold that no taxable deduction can arise from a transaction which can give rise to no taxable gain.

Judgment will be entered for defendant for costs.

SECTION 215.—ITEMS NOT DEDUCTIBLE.

ARTICLE 292: Capital expenditures.

REVENUE ACT OF 1926.

Payments by corporation to life beneficiary of former owner of real estate. (See Ct. D. 978, page 178.)

ARTICLE 293: Premiums on business insurance.

REVENUE ACT OF 1921.

Modification of I. T. 1511 (C. B. I-2, 88). (See I. T. 2867, page 291.)

SECTION 218.—PARTNERSHIPS.

ARTICLE 336: Distributive shares of partners. XIV-21-7510
(Also Section 284, Article 1305.) Ct. D. 969

ESTATE TAX—INCOME TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

1. INCOME—GROSS ESTATE—PARTNERSHIP PROFITS PAID AFTER DEATH—PARTNERSHIP AGREEMENT.

The decedent, who died February 13, 1920, was a member of a personal service partnership, the partnership agreement providing that in the event of the death of any partner the survivors should be at liberty to continue the business for one year after such death, and, if continued, the estate of the deceased partner should participate in profits or losses to the same extent as the deceased partner would, if living; or, the estate should have the option of withdrawing the deceased partner's interest within 30 days after probate of the will, all adjustments of profits or losses to be made as of the date of such withdrawal. The surviving partners elected to continue the business until December 31, 1920, and the executor did not exercise his option to withdraw. Under these circumstances, the profits resulting from the new relationship between the executor and the surviving partners during the period from February 13, 1920, to December 31, 1920, constituted income to the estate, but formed no part of the decedent's gross estate for Federal estate tax purposes.

2. SUIT—INCOME TAX—RECOUPMENT OF ESTATE TAX—STATUTE OF LIMITATIONS.

The executor of the will of a deceased member of a partnership paid a deficiency in estate tax in 1921 determined by treating as part of the estate partnership profits earned subsequent to the decedent's death, and in 1928 paid a deficiency in income tax, assessed in 1925, upon the same profits. In a suit for recovery of the latter payment, brought in 1930, the estate is entitled to recoupment of the overpayment of estate tax by way of credit against the income tax deficiency, notwithstanding the statute of limitations had barred an independent suit therefor.

SUPREME COURT OF THE UNITED STATES.

Ernest M. Bull, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased, petitioner, v. The United States.

On writ of certiorari to the Court of Claims.

[April 29, 1935.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

Archibald H. Bull died February 13, 1920. He had been a member of a partnership engaged in the business of ship brokers. The agreement of association provided that in the event a partner died the survivors should continue the business for one year subsequent to his death, and his estate should "receive the same interests, or participate in the losses to the same extent," as the deceased partner would, if living, "based on the usual method of ascertaining what the said profits or losses would be. * * * Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within 30 days after the probate of will * * * and all adjustments of profits or losses shall be made as of the date of such withdrawal." The estate's representative did not exercise the option to withdraw in 30 days, and the business was conducted until December 31, 1920, as contemplated by the agreement.

The enterprise required no capital and none was ever invested by the partners. Bull's share of profits from January 1, 1920, to the date of his death, February 13, 1920, was $24,124.20; he had no other accumulated profits and no interest in any tangible property belonging to the firm. Profits accruing to the estate for the period from the decedent's death to the end of 1920 were $212,718.79; $200,117.90 being paid during the year, and $12,601.70 during the first two months of 1921.

The Court of Claims found:

"When filing an estate tax return, the executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of death, whereas the Commissioner, in 1921, valued such interest at $235,202.99, and subjected such increased value to the payment of an estate tax, which was paid in June and August, 1921. The last-mentioned amount was made up of the amount of $24,124.20 plus the amount of $212,718.79, hereinbefore mentioned. The estate tax on this increased amount was $41,517.45.[1]

"April 14, 1921, plaintiff filed an income tax return for the period February 13, 1920, to December 31, 1920, for the estate of the decedent, which return did not include, as income, the amount of $200,117.09 received as the share of the profits earned by the partnership during the period for which the return was filed. The estate employed the cash receipts and disbursements method of accounting.

"Thereafter, in July, 1925, the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified plaintiff of a deficiency in income tax due from the estate for that period of $261,212.65, which was due in part to the inclusion of that amount as taxable income and in part to adjustments not here in controversy. No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death."

September 5, 1925, the executor appealed to the Board of Tax Appeals from the deficiency of income tax so determined. The Board sustained the Com-

[1] It will be noted there is an error in the figures set out in this finding, the total of the two smaller sums being $236,842.99, but the discrepancy is not material to any issue in the case.

missioner's action in including the item of $200,117.99 without any reduction on account of the value of the decedent's interest in the partnership at the date of death,[2] and determined a deficiency of $55,166.49, which, with interest of $7,510.95, was paid April 14, 1928.

July 11, 1928, the executor filed a claim for refund of this amount, setting forth that the $200,117.99, by reason of which the additional tax was assessed and paid, was corpus; that it was so originally determined by the Commissioner and the estate tax assessed thereon was paid by the executor; and that the subsequent assessment of an income tax against the estate for the receipt of the same sum was erroneous. The claim was rejected May 8, 1929. September 16, 1930, the executor brought suit in the Court of Claims, and in his petition, after setting forth the facts as he alleged them to be, prayed judgment in the alternative (1) for the principal sum of $62,677.44, the amount paid April 14, 1928, as a deficiency of income tax unlawfully assessed and collected, or (2) for the sum of $47,643.44 on the theory that if the sum of $200,117.99 was income for the year 1920 and taxable as such, the United States should have credited against the income tax attributable to the receipt of this sum the overpayment of estate tax resulting from including the amount in the taxable estate—$34,035,[3] with interest thereon.

The Court of Claims held that the item was income and properly so taxed. With respect to the alternative relief sought it said: "We can not consider whether the Commissioner correctly included the total amount received from the business in the net estate of the decedent subject to the estate tax for the reason that the suit was not timely instituted." Judgment went for the United States.[4] Because of the novelty and importance of the question presented we granted certiorari.[5]

1. We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; and that it was also corpus of his estate and as such to be included in his gross estate for computation of estate tax. We also agree that the sums paid his estate as profits earned after his death were not corpus, but income received by his executor and to be reckoned in computing income tax for the years 1920 and 1921. Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and payments made to the estate are for the account of the survivors. It results that the surviving partners are taxable upon firm profits and the estate is not.[6] Here, however, the survivors have purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it. The portion of the profits paid his estate was, therefore, income and not corpus; and this is so whether we consider the executor a member of the old firm for the remainder of the year, or hold that the estate became a partner in a new association formed upon the decedent's demise.

2. A serious and difficult issue is raised by the claim that the same receipt has been made the basis of both income and estate tax, although the item can not in the circumstances be both income and corpus; and that the alternative prayer of the petition required the court to render a judgment which would redress the illegality and injustice resulting from the erroneous inclusion of the sum in the gross estate for estate tax. The respondent presents two arguments in opposition, one addressed to the merits and the other to the bar of the statute of limitations.

On the merits it is insisted that the Government was entitled to both estate tax and income tax in virtue of the right conferred on the estate by the partnership agreement and the fruits of it. The position is that as the contract gave Bull a valuable right which passed to his estate at his death the Commissioner correctly included it for estate tax. And the propriety of treating the share of profits paid to the estate as income is said to be equally clear. The same sum of money in different aspects may be the basis of both forms of tax. An example is found in this estate. The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his lifetime and his executor was bound to return it as such. But the sum

[2] 7 B. T. A., 993.
[3] As appears from the quoted finding, the Court of Claims found the overpayment was $41,517.45.
[4] 6 F. Supp., 141.
[5] 294 U. S., —.
[6] *Hill* v. *Commissioner* (38 F. (2d), 165); *Pope* v. *Commissioner* (39 F. (2d), 420).

was paid to the executor by the surviving partners, and thus became an asset of the estate; accordingly the petitioner returned that amount as part of the gross estate for computation of estate tax and the Commissioner properly treated it as such.

We are told that since the right to profits is distinct from the profits actually collected we can not now say more than that perhaps the Commissioner put too high a value on the contract right when he valued it as equal to the amount of profits received—$212,718.99. This error, if error it was, the Government says is now beyond correction.

While, as we have said, the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. The identical money—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other—was the basis of two assessments. The double taxation involved in this inconsistent treatment of that sum of money is made clear by the lower court's finding we have quoted. The Commissioner assessed estate tax on the total obtained by adding $24,124.20 the decedent's share of profits earned prior to his death, and $212,718.79, the estate's share of profits earned thereafter. He treated the two items as of like quality, considered them both as capital or corpus; and viewed neither as the measure of value of a right passing from the decedent at death. No other conclusion may be drawn from the finding of the Court of Claims.

In the light of the facts it would not have been permissible to place a value of $212,718.99 or any other value on the mere right of continuance of the partnership relation inuring to Bull's estate. Had he lived his share of profits would have been income. By the terms of the agreement his estate was to sustain precisely the same status quoad the firm as he had, in respect of profits and losses. Since the partners contributed no capital and owned no tangible property connected with the business, there is no justification for characterizing the right of a living partner to his share of earnings as part of his capital, and if the right was not capital to him, it could not be such to his estate. Let us suppose Bull had, while living, assigned his interest in the firm, with his partners' consent, to a third person for a valuable consideration, and in making return of income had valued or capitalized the right to profits which he had thus sold, had deducted such valuation from the consideration received, and returned the difference only as gain. We think the Commissioner would rightly have insisted that the entire amount received was income.

Since the firm was a personal service concern and no tangible property was involved in its transactions, if it had not been for the terms of the agreement, no accounting would have ever been made upon Bull's death for anything other than his share of profits accrued to the date of his death—$24,124.20—and this would have been the only amount to be included in his estate in connection with his membership in the firm. As respects the status after death the form of the stipulation is significant. The declaration is that the surviving partners "are to be at liberty" to continue the business for a year, in the same relation with the deceased partner's estate as if it were in fact the decedent himself still alive and a member of the firm. His personal representative is given a veto which will prevent the continuance of the firm's business. The purpose may well have been to protect the good will of the enterprise in the interest of the survivors and to afford them a reasonable time in which to arrange for their future activities. But no sale of the decedent's interest or share in the good will can be spelled out. Indeed the Government strenuously asserted, in supporting the treatment of the payments to the estate as income, that the estate sold nothing to the surviving partners; and we agree. An analogous situation would be presented if Bull had not died, but the partnership had terminated by limitation on February 13, 1920, and the agreement had provided that, if Bull's partners so desired, the relation should continue for another year. It could not successfully be contended that, in such case, Bull's share of profit for the additional year was capital.

We think there was no estate tax due in respect of the $212,718.79 paid to the executor as profits for the period subsequent to the decedent's death.

The Government's second point is that if the use of profits accruing to the estate in computing estate tax was wrong, the statute of limitations bars correction of the error in the present action. So the Court of Claims thought. We hold otherwise.

The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profit accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate. The Commissioner apparently held a contrary view. The petitioner appealed to the Board of Tax Appeals from the proposed deficiency of income tax. His appeal was dismissed April 9, 1928. It was then too late to file a claim for refund of overpayment of estate tax due to the error of inclusion in the estate of his share of firm profits.[7] Inability to obtain a refund or credit, or to sue the United States, did not, however, alter the fact that if the Government should insist on payment of the full deficiency of income tax, it would be in possession of some $41,000 in excess of the sum to which it was justly entitled. Payment was demanded. The petitioner paid April 14, 1928, and on June 11, 1928, presented a claim for refund, in which he still insisted the amount in question was corpus, had been so determined and estate tax paid on that basis, and should not be classified for taxation as income. The claim was rejected May 8, 1929, and the present action instituted September 16, 1930.

The fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent claim of deficiency of income tax was of no force, can not avail to toll the statute of limitations, which forbade the bringing of any action in 1930 for refund of the estate tax payments made in 1921. As the income tax was properly collected, suit for the recovery of any part of the amount paid on that account was futile. Upon what theory, then, may the petitioner obtain redress in the present action for the unlawful retention of the money of the estate? Before an answer can be given, the system of enforcing the Government's claims for taxes must be considered in its relation to the problem.

A tax is an exaction by the sovereign, and necessarily the sovereign has an enforcible claim against everyone within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of Federal estate and income taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action

[7] Revenue Act of 1924, sections 1012 and 281 (43 Stat., 342 and 301); Revenue Act of 1926, sections 1112 and 319 (44 Stat., 115 and 84).

at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim can not obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. Nevertheless he may be without a remedy. But we think this is not true here.

In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred congressional action would have been the sole avenue of redress.

In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, can not, as against the claim of an innocent party hold his money which has gone into its Treasury by means of the fraud of their agent. (*United States* v. *State Bank*, 96 U. S., 30.) While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Bank case applies with equal force to this situation. "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. * * * In these cases (cited in the opinion), and many others that might be cited, the rules of law applicable to individuals were applied to the United States" (pages 35, 36).[8] A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. (*United States* v. *Macdaniel*, 7 Pet., 1, 16, 17; *United States* v. *Ringgold*, 8 Pet., 150, 163–164.) In the latter case this language was used: "No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such a claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States."[9] If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.[10]

The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score.

[8] See also *McKnight* v. *United States* (98 U. S., 179, 186).
[9] See also *The Siren* (7 Wall., 152, 154).
[10] *Williams* v. *Neely* (134 Fed., 1); *Conner* v. *Smith* (88 Ala., 300); *Stewart* v. *Simon* (111 Ark., 358); *Beecher* v. *Baldwin* (55 Conn., 419); *Blackshear* v. *Dekle* (120 Ga., 766); *Aultman* v. *Torrey* (55 Minn., 492); *Kaup* v. *Schinstock* (88 Neb., 95); *Campbell* v. *Hughes* (73 Hun (N. Y.), 14).

To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax.

The pleading was sufficient to put in issue the right to recoupment. The Court of Claims is not bound by any special rules of pleading;[11] all that is required is that the petition shall contain a plain and concise statement of the facts relied on and give the United States reasonable notice of the matters it is called upon to meet.[12] And a prayer for alternative relief, based upon the facts set out in the petition may be the basis of the judgment rendered.[13]

We are of opinion that the petitioner was entitled to have credited against the deficiency of income tax, the amount of his overpayment of estate tax with interest and that he should have been given judgment accordingly. The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts. XIV-19-7481
Ct. D. 959

INCOME TAX—REVENUE ACTS OF 1921 AND 1928—DECISION OF COURT.

1. INCOME—TESTAMENTARY TRUST—TAXABLE TO BENEFICIARY.

Income paid to the beneficiary of a testamentary trust during the period of administration is taxable to the beneficiary and not to the trust estate under the provisions of section 219 (c), (d), and (e) of the Revenue Act of 1921.

2. DEDUCTION—STATE TRANSFER TAX—RETROACTIVITY.

Where both the estate and the beneficiary claim deduction for State transfer taxes paid in 1923, and the tax was actually paid by the estate, the deduction is properly allowed to the estate, under the provisions of section 703(a)3 of the Revenue Act of 1928. Congress had the right to legislate retroactively in such cases as that section was intended to meet.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Rickard C. Jackson, plaintiff-appellee, v. *Warren G. Price, Former Collector of Internal Revenue for the First District of New York, defendant-appellant.*

[January 7, 1935.]

OPINION.

Appeal from the District Court for the Eastern District of New York. Suit to recover income taxes paid under coercion. Judgment for plaintiff; defendant appeals. Reversed.

MANTON, Circuit Judge: William P. Talbot died February 18, 1923, leaving a will granting many legacies and bequests. The residue of his property was devised and bequeathed to his executors in trust, to pay the income thereof

---

[11] *United States* v. *Burns* (12 Wall., 246, 254); *District of Columbia* v. *Barnes* (197 U. S., 146, 153–154).
[12] *Merritt* v. *United States* (267 U. S., 338, 341).
[13] *United States* v. *Behan* (110 U. S., 338, 347).

to the appellee until he reached the age of 40 years by which time he would receive the corpus of the trust. During the year 1923, the estate, still unsettled, received an income of over $73,000. The appellee received $59,595.62 from the estate during the year. In 1923, the New York State transfer tax amounting to $60,000 was paid by the executors. The record does not disclose what the total transfer tax on the total of the legacies provided for in the will amounted to nor is there sufficient information furnished by the record as to what, if any, part of the $60,000 was paid on account of the appellee's legacy as distinguished from other legacies provided for by the decedent. Out of the $73,000 gross income for 1923, there was paid by the estate loss of principal, interest charges, and transfer tax, amounting in all to $85,020.50.

In the appellee's income tax return for 1923, he showed gross income of $4,385.84, with deductions leaving a net income of $3,855.15, from which was deducted the exemption and credit of $2,900, and a net taxable income of $955.15.

The Commissioner added to the taxpayer's income, as reported for this year, the income which he received from the estate amounting to $59,595.62, and increased his tax accordingly. This assessment was paid February 28, 1928, and the present action is to recover this additional tax.

In a refund claim filed March 8, 1928, it was contended that the income received by the taxpayer from the estate was not taxable to him, or, in the alternative, it was contended that appellee was entitled to deductions from the $60,000 of New York transfer tax which became due and was paid in 1923. It was the last alternative which was urged in this suit as the complaint reads (paragraphs 15, 18, 19, 22). The opinion rendered below (6 Fed. Sup., 182) seems to rest upon the basis that the income received from the estate was not taxable. The refund claim was rejected by the Commissioner.

The question presented is whether the income received by the appellee from the estate came to him tax free. The court indicated that the income paid over to the appellee was identical with the income of the estate, and the estate having already been subjected to the tax on its income, the income of the appellee was exempt from taxation. The court below was in error in concluding that the estate was taxed for this income.

When the terms of section 219 of the Revenue Tax of 1921 (42 Stat., 227) and section 703 of the Revenue Act of 1928 (45 Stat., 791) are considered, it is clear that the income paid over to the appellee is subject to a tax. Section 219 provides, in part, as follows:

"(a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of 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, * * *.

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any * * * beneficiary. * * *

"(d) In cases under paragraph (4) of subdivision (a), and in case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, 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 * * *, is distributable to such beneficiary, * * *.

"(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, * * * 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."

The amount received by the appellee from the estate was, when in the hands of the estate, within the class described in paragraph (1) of subdivision (a) of section 219. It was "income received by estates of deceased persons during the period of administration." It might also be designated as being in the class described by paragraph (4) of subdivision (a) of section 219, that is, "income which is to be distributed to the beneficiaries periodically." If the income paid here is embraced within either class the estate is exempted from tax liability and the appellee is liable for the tax.

Subdivision (c) provides that the estate shall pay a tax on the net income of the estate, but that in computing the net income of the estate amounts paid to beneficiaries may be deducted. Subdivision (d) provides that the tax on income which either is to be paid to beneficiaries periodically ((a)(4)) or which constitutes an item permissibly deductible by the estate under subdivision (c), shall not be paid by the estate, but that such income shall be considered part of the net income of the beneficiaries. Subdivision (e) provides that the estate shall pay a tax on its net income as computed under subdivision (c), except that an additional deduction in computing the net income of the estate may be made for that part of its income described in paragraph (4) of subdivision (a). Also provided for by subdivision (e) is the inclusion in the net income of the beneficiary of that part of the income of the estate which he receives from the estate.

When these sections are applied here, section 219 forbids a payment by the estate of a tax on the $59,595.62 and requires that the appellee make the payment of the tax thereon. Subdivision (d) by its terms provides that a tax on income described in subdivision (a), paragraph (4) or which is permissibly deductible under subdivision (c) "shall not be paid by the fiduciary." The income received by the appellee was permissibly deductible under subdivision (c) and the estate is to pay no tax on it. This being so, it is unnecessary to decide whether the $59,595.62 was income of the class described in subdivision (a)(4). Also subdivision (d) provides that in computing the net income of the beneficiary, there shall be included that part of the income of the estate which is distributable to him. The income appellee received was part of the income of the estate which was distributable to the appellee and therefore must be included in computing his net income. Section (e) contains the same provisions.

Consequently, the estate was not to pay a tax on the $59,595.62 since it did not constitute a part of its net income. The appellee is obliged to pay a tax on this sum since under the provisions of section 219 it constitutes a part of his net income. Section 219 provides for the taxation of net income—not income. The $59,595.62 was part of the net income of the appellee but not part of the net income of the estate. It is this distinction which the district judge failed to observe. It is true that part of the gross income of the appellee was identical with the gross income of the estate, but no part of the income of the appellee which is taxable under section 219 as being part of his net income, is taxable to the estate as part of its net income.

The question remains whether or not the appellee is entitled to deduct from his net income that which the collector refused to deduct, namely, the transfer tax payment. This transfer tax was paid by the executors in 1923. Whether it was a tax on the transfer of the entire estate, or for only the transfer of that part of the estate going to the appellee, or partly for his and partly for other parts of the estate, is not disclosed by the record. In the absence of definite findings as to this affirmance of the district court will be impossible even though it were correct in its construction of the law. Apart from this, however, even if the findings of fact have been so drawn as to show that the $60,000 was paid entirely on the appellee's share of the estate, the lower court could not have ruled that such sum was deductible by the appellee.

Section 703 of the Revenue Act of 1928 (45 Stat., 791) reads, in part, as follows:

"*Deduction of estate and inheritance taxes—Retroactive.*

"(a) In determining the net income of an heir, devisee, legatee, distributee, or beneficiary * * * or of an estate for any taxable year, * * *, the amount of estate, * * * taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

"(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;

"(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary;

"(3) If the deduction has been claimed by the estate and also by the beneficiary, it shall be allowed to the estate (and not to the beneficiary) if the tax was actually paid by the legal representative of the estate to the taxing authorities of the jurisdiction imposing the tax; and it shall be allowed to the beneficiary (and not to the estate) if the tax was actually paid by the beneficiary to such taxing authorities; * * *."

Paragraph 3 makes it clear that where, as here, both the estate and the appellee claim the deduction and the tax was actually paid by the estate, the deduction "shall be allowed to the estate (and not to the beneficiary)."

The district court held that section 703, having been approved in May, 1928, "over four years after the income in question had been received" and "not relied upon when the assessment was made" could be "of no assistance in deciding the case." True it is that, at the time the additional assessment against the appellee was made, the Treasury was endeavoring to apply article 134 of Regulations 62 in the light of the then decisions. (*Keith* v. *Johnson*, 271 U. S., 1 [T. D. 3864, C. B. V–1, 236]; *Farmers' Loan & Trust Co.* v. *United States*, 9 Fed. (2d), 688.) But there is no doubt that Congress had the right to legislate retroactively in such situation as section 703 was intended to meet. (*Cooper* v. *United States*, 280 U. S., 409 [Ct. D. 163, C. B. IX–1, 272]; *MacLaughlin* v. *Alliance Insurance Co.*, 286 U. S., 244 [Ct. D. 496, C. B. XI–1, 124]; *Phipps* v. *Bowers*, 49 Fed. (2d), 996 [Ct. D. 365, C. B. X–2, 348].)

Judgment reversed.

ARTICLE 342: Method of computation of net income and tax. XIV–17–7456 I. T. 2887

REVENUE ACT OF 1918.

Office Decision 1040 (C. B. 5, 186) is revoked, in view of G. C. M. 14693. (See page 197.)

ARTICLE 347: Income of trusts taxable to grantor.

REVENUE ACT OF 1926.

Trust created by grantor to provide income to divorced wife in lieu of alimony and interest in his estate. (See Ct. D. 913, page 228.)

PART III.—CORPORATIONS.

SECTION 233.—GROSS INCOME OF CORPORATIONS DEFINED.

ARTICLE 545: Sale and retirement of corporate bonds. XIV–5–7289 Ct. D. 917

INCOME TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

1. INCOME—PURCHASE AND RETIREMENT OF SERIAL NOTES.

Where a corporation in 1922 acquired a fleet of ships, giving as part payment therefor serial notes secured by mortgage on the ships, and in 1924 and 1925 retired some of the notes, purchasing them at less than their face value, the gain realized by the lessening of its obligations was taxable income.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (28 B. T. A., 725) reversed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Commissioner of Internal Revenue, petitioner for review, v. *Coastwise Transportation Corporation.*

Appeal from Board of Tax Appeals.

Before BINGHAM, WILSON, and MORTON, JJ.

[May 18, 1934.]

OPINION.

BINGHAM, J.: The Coastwise Transportation Corporation acquired a fleet of ships from the American Hawaiian Co. in 1922 and gave, as part payment therefor, serial notes of the face value of $608,400 secured by mortgage on the ships. In 1924 the corporation purchased for $75,000 two of these notes having a face value of $152,000, thereby making a gain of $77,100; and in 1925 by negotiations through a syndicate, acquired $456,300 of the notes in exchange for bonds having a par value of $375,000, thus making a gain of $81,300. The mortgage notes were retired by the corporation. In making a deficiency return for the years 1924 and 1925 the Commissioner assessed these two amounts of $77,100 and $81,300 as taxable income for the respective years, from which assessments the corporation appealed to the Board of Tax Appeals. The Board reversed the ruling of the Commissioner and the case came before us on his petition for review. It also appeared that in 1924, without taking into consideration the gain for that year by the purchase of the two notes, the corporation suffered a net loss of $100,338.25, which it took as a deduction in its return for 1925.

Upon these facts we held when the case was previously before us (62 F. (2d), 332) that it was governed by the decision in *United States* v. *Kirby Lumber Co.* (284 U. S., 1 [Ct. D. 420, C. B. X–2, 356]), and that the Commissioner was correct in treating the gains realized by the purchase of the notes for less than their face value as taxable income. The case, however, was remanded to the Board of Tax Appeals to find further facts as to the depreciation of the assets of the corporation through losses in operation and by depreciation, whether the negotiations with reference to these notes amounted to a reorganization of the corporation, and "for further proceedings not inconsistent with our opinion."

On rehearing the Board found no evidence of a reorganization of the corporation. It also found that from the time the vessels were purchased in 1922 down to December 31, 1924, they had depreciated in value from $1,267,500 to $1,083,419.73, or to the extent of $184,080.25; that as of December 31, 1923, the balance sheet of the corporation showed a deficit of $73,340.24, and as of December 31, 1924, after taking into consideration the mortgage notes, a deficit of $113,883.31, and applying the $81,300 by which the liabilities were further reduced, there would still remain a deficit of $32,583.31, which was not likely to have been wiped out during the first part of January, 1925; that this was in addition to the loss by depreciation of the vessels, which in itself amounted to more than the gains made from the purchase of the notes; and that at the close of 1925 there was a surplus of $49,452.52.

The Board, in its findings gives the details of the negotiations with the American Hawaiian Co. and the syndicate resulting in retiring the mortgage notes for less than their face value and comes to the concluson that "The transactions merely amounted to a reduction in the purchase price of the fleet of vessels, that there was no release of free assets by the transactions involved, and that the operation in 1924 resulted in a loss." It was therefore of the opinion that *United States* v. *Kirby Lumber Co.*, supra, did not apply and the gains were not taxable income.

We have carefully reviewed these transactions and can find nothing therein that indicates they had anything to do with the purchase price of the vessels. The parties dealt solely about the notes and their value and not about the ships or their value. The offer of the Coastwise corporation and the acceptance of the American Hawaiian Co. were in writing and were for the purchase and

sale of the notes at a reduced price and not an agreement that the Hawaiian company should reduce the purchase price of the ships. The gains came about from a reduction in the value of the notes. The contract being in writing, its construction and meaning are for the court.

We still are of the opinion that the principles upon which the Kirby Lumber Co. case was decided apply here, and especially so in view of the decision of the Supreme Court in *Helvering, Commissioner,* v. *American Chicle Co.* (291, U. S., 426 [Ct. D. 809, C. B. XIII–1, 265]). In the latter case, if not in the former, the taxpayer assumed the obligations of the seller as a part of the purchase price of the assets (which were not cash), but the Supreme Court reversed the decision of the Circuit Court of Appeals for the Second Circuit, which affirmed the Board of Tax Appeals, and held that the gain realized by the purchase of the obligations of the Chicle company was taxable income, thereby affirming the ruling of the Commissioner. It is true that in both the Kirby and the Chicle company cases the notes or bonds were purchased in the open market and not, as here, from the seller of the property. But this can make no difference in the character of the gains. In each of those cases, as in this, the liabilities of the taxpayer were diminished without a diminution of the assets.

The Board also ruled and the Coastwise corporation here contends that, because of the losses in operation since the purchase of the vessels, the depreciation of the vessels, and the general deficit at the end of 1924 and the first of 1925, which was more than the amount of the gains in question, the case does not come within the Kirby company or the Chicle cases, where no such losses were shown, but that *Bowers* v. *Kerbaugh-Empire Co.* (271 U. S., 170 [T. D. 3881, C. B. V–1, 199]), controls. That case deals with a completed transaction, and, although the debt incurred by the borrowing of gold German marks or their equivalent in dollars, was paid in depreciated marks and to that extent a gain was realized, there was a net loss, the money borrowed having been lost in the business of the company. Here the operation of the vessels had not ceased and they were still in the possession of the Coastwise corporation. While as a mere matter of bookkeeping the assets had shrunk, no one could say what the ultimate result would be, for the market value of the ships at the end of 1924 and the first of 1925 may or may not have been equal to the purchase price. The corporation, in 1925, made a large net gain and evidently there were prospects of wiping out the losses. All that could have been said with positiveness was that the property mortgaged to secure the notes (which were only a small part of the purchase price) was of a value more than sufficient to pay the indebtedness of $608,400 and was, by the payment of $450,000, released therefrom—a clear gain of $158,400.

The taxing statute does not contemplate awaiting the sale of the ships and the winding up of the business to determine whether the transactions on the whole brought about a gain or a loss. The year was the taxing period specified and any income from any source whatever within that year was taxable. The gains in 1924 and 1925 lessened the obligations of the corporation by $150,400, thereby increasing its free or net assets by the same amount and we hold they were taxable income.

The ruling of the Board of Tax Appeals is reversed and that of the Commissioner is affirmed.

ARTICLE 545: Sale and retirement of corporate bonds.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Expenses incidental to issuance of bonds, taxpayer being on accrual basis. (See G. C. M. 14349, page 47.)

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions.

REVENUE ACTS OF 1921, 1924, AND 1926.

Contributions by a corporation to community chest. (See Ct. D. 903, page 332.)

ARTICLE 561: Allowable deductions.

REVENUE ACT OF 1926.

Apportionment of depletion between lessee and assignor and lessor. (See Ct. D. 905, page 253.)

ARTICLE 561: Allowable deductions.

REVENUE ACT OF 1924.

Dividends received by one affiliate from another. (See Ct. D. 921, page 257.)

ARTICLE 561: Allowable deductions. XIV-10-7358
Ct. D. 932

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—LOSS—ORDINARY AND NECESSARY EXPENSE—CAPITAL EXPENDITURE.

Where the lessee of railroad property agreed to pay as rental all net earnings derived from operation of the leased property, and in the event such net earnings were not sufficient therefor, to pay all taxes, insurance, etc., it being further agreed that any amounts paid by the lessee in excess of net earnings should be deemed advances to the lessor, and where the amounts advanced during the years 1909–1920 were regularly deducted as operating expenses in excise and income tax returns for those years, they may not be allowed as a loss in 1920, when the lessee transferred the lease to another company, on the ground that they were capital expenditures.

2. DEDUCTION—ORDINARY AND NECESSARY EXPENSE—MAINTENANCE—REIMBURSEMENT BY DIRECTOR GENERAL.

Where the Director General of Railroads reimbursed the taxpayer, whose property was taken over and operated by the United States Government during the period of Federal control, for undermaintenance of its properties while under Federal control, amounts expended to rehabilitate the properties are not deductible to the extent of the reimbursement.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (26 B. T. A., 1229) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The New York, Chicago & St. Louis Railroad Co., Successor Corporation to the Lake Erie & Western Railroad Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

The New York, Chicago & St. Louis Railroad Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

On petitions for review of decisions of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[June 4, 1934.]

OPINION.

GRONER, Associate Justice: Petitioner is a railroad company formed in 1923 by the consolidation of five railroad companies, one of which was Lake Erie & Western Railroad Co., hereinafter referred to as Lake Erie. The case

involves the tax liability of Lake Erie for the taxable year 1920. Petitioner admits liability for whatever tax may be found to be due by Lake Erie for the year in question.

The Board's findings of fact cover 61 pages of the printed record, and the opinion 57 printed pages. Many of the items dealt with in the findings of fact and much of the discussion in the opinion we think unnecessary, either to a correct understanding of the facts or to a decision of the case. The relevant facts are these: In 1895 Lake Erie leased the properties of Northern Ohio Railway Co. in perpetuity and as a part of the same transaction acquired all of that company's common stock. The stock was acquired without cost, but Lake Erie agreed to pay as rental all the net earnings derived from the operation of the leased railroad, and in the event the net earnings were not sufficient therefor, all taxes, insurance, organization expenses to the extent of $1,000 a year, and interest on the Northern Ohio's bonds. Lake Erie also undertook to maintain the properties in good order and repair. The amount paid by Lake Erie in excess of the net earnings was to be deemed an advance "on the part of the lessee to the lessor."

For the 18-year period from 1895 to 1913, the cost to Lake Erie over and above the net operating revenue was nearly two and a half million dollars, and from 1913 (March 1) to the end of Federal control (March 1, 1920) the out-of-pocket cost to Lake Erie was in excess of a million and a quarter. Lake Erie charged these items to operating expenses, and of the amount expended or advanced prior to March 1, 1913, nearly three-quarters of a million were taken as deductions from income in its excise tax returns for the years 1909–1912. The entire sum advanced from 1913 to 1920, inclusive, was deducted in Lake Erie's income tax returns for those years.

Lake Erie never received back any of the advances, nor anything on account of them, but on March 1, 1920, it transferred the stock of the Northern Ohio and the lease to the Akron, Canton, & Youngstown Railway Co., and the latter assumed all of the obligations and liabilities of Lake Erie which would thereafter accrue under the lease. On March 1, 1920, Lake Erie's books showed a net balance due from the Northern Ohio Railway Co. of $92,661.33. This item represented in part cash outlays, the dates of which do not appear, and in part an amount at which the Director General of Railroads inventoried the materials and supplies on the Northern Ohio lines at the date of the termination of Federal control. From the total of these items certain credits were deducted, leaving the item as above stated. In its income tax return for 1920 Lake Erie deducted this amount as a loss for that year. The Commissioner disallowed it, and the Board of Tax Appeals sustained his action. On the appeal to the Board and likewise in this court, petitioner claimed and claims an additional deduction in the amount of at least a million and a half dollars, as a further loss, based on the contention that the expenditures under the lease were capital expenditures and should be treated as the cost for acquiring the lease and the Northern Ohio's stock. The Board likewise disallowed this claim.

The sum of a million and a half, which we have just mentioned as claimed by Lake Erie as deductible in the year 1920, is an arbitrary figure. As a matter of fact, the record shows the total net expenditures of the Lake Erie on account of its lease of the railroad of the Northern Ohio amounted to nearly two and a half millions for the period prior to March 1, 1913, and a million and a quarter after March 1, 1913, or in all approximately three and three-quarter million dollars. All of this total advanced after Federal excise and income taxes were in force was currently deducted by Lake Erie in its tax returns. For some reason, not quite clear, petitioner capitalized in its account with the Northern Ohio Co. the $92,000 item to which we have referred, and this item it charged to profit and loss at the time of disposing of its lease and stock interest in the Northern Ohio. The Commissioner, in disallowing the $92,000 item, treated the sums entering into it as rental due by the Lake Erie for its lease of the Northern Ohio. The Board held that these as well as all other sums expended by the Lake Erie in excess of the revenue derived from the operation of the leased property were advances, and said it was clear from the contract and the manner of dealing between the lessor and lessee that it was contemplated by the parties that such advances should be deducted from subsequent earnings derived from the operation of the property; that such earnings were the only source of income from which such advances could be repaid, and in this view the Board held the entire indebtedness of the Northern Ohio to Lake Erie became worthless and uncollectible before 1920, and hence concluded that since the statute requires the deduction to be made in the year in which the worthlessness and uncollectibility are ascer-

tained, the failure to take them in the appropriate year would not justify a later deduction.

We are unable to say from anything which appears in the record, or to which our attention has been called, that the Board was not correct in this holding and conclusion. The evidence shows that the revenues were insufficient from the beginning to meet the expenditures required to be made by Lake Erie under the lease. As far back as 1899, the chairman of the board of Lake Erie stated that the lease was a serious drain upon the earnings of that company and that there was no hope of getting rid of it. This liability continued unabated and undiminished for the quarter of a century during which the property was operated by Lake Erie, and the final disposition of the lease and of the stock was without monetary consideration. The argument before us is that the amounts expended by Lake Erie under the lease were capital expenditures and should be treated as the cost of acquisition of the stock and lease, but no valid grounds upon which this theory can be sustained are suggested to us. The Lake Erie treated this outgo as an operating expense during the whole period of the lease, and regularly deducted the expense in its excise tax and income tax returns for the years 1909 to 1920, inclusive. To treat these expenses now as capital expenditures and permit their deduction in the year 1920 would be, in the first place, a duplication of deductions, and, in the second place, would be to treat as capital expenditures operating losses which have no relation, so far as we can see, to the acquisition of the stock or the lease. We think it clear that the consistent treatment by Lake Erie of these annual outlays was the correct one—deductible, as they were deducted, under section 234(a)1, of the Revenue Act of 1918. The finding of the Board that they were *advances* is abundantly supported by the admitted facts, and the finding that when made they were known to be uncollectible and a loss to the company making them, is a finding of fact also supported by the record. We feel this finding should not be disturbed.

There is, however, another question in the case which we must decide. In computing its taxable net income in its return for 1920, the Lake Erie deducted from gross income, as an ordinary and necessary expense of business, the sum of $4,401,355.90. Of the total sum so deducted, the Commissioner disallowed $459,356.19 on the ground that the Lake Erie was reimbursed to that extent by the Director General in the final settlement by him on account of undermaintenance of the properties of the Lake Erie during the period of Federal control. The evidence shows that the four million odd thousand dollar expenditure for maintenance in the 10 months' period was *more* than sufficient to make up the undermaintenance during the period of Federal control. The Board sustained the Commissioner in his disallowance of the sum received by Lake Erie from the Director General.

The properties of the Lake Erie were under Federal control and operation for the period, January 1, 1918, to February 29, 1920. In the succeeding 10 months the Lake Erie, as we have seen, expended over $4,000,000 in the maintenance of its properties and deducted that sum in its tax return as an ordinary and necessary business expense (section 234(a)1, Revenue Act of 1918, ch. 18, 40 Stat., 1077). The Commissioner disallowed the deduction to the extent of $459,000, on the ground that to this extent petitioner's ostensible maintenance cost was really not its own, but the result of an obligation assumed and discharged by the Director General.

It is not disputed that the Director General failed in his contractual duty to maintain petitioner's property in accordance with the contract during Federal control, nor is it seriously disputed that when the settlement was made, the amount paid by the Director General was an allowance for undermaintenance arising out of his failure to discharge his contractual duty. When settlement was made, separate and independent accounting entries were made by the Director General and by petitioner, in which the four hundred fifty-nine thousand odd dollar item was charged to deferred maintenance account. Nor is it disputed that petitioner's books were on the accrual basis and that the item accrued to petitioner in 1920.

We have, therefore, here a case in which although the Lake Erie spent more than $4,400,000 for maintenance in 1920, this expenditure included the cost of restoring the undermaintenance which occurred during the Federal control period. On behalf of the Commissioner it is insisted that of the total sum spent in 1920 for maintenance, $459,356.19 was spent for the account of the Director General and was in fact paid by him, and it is argued from this premise that in such circumstances a railroad may not deduct payments the

burden of which is borne by another. The question of the treatment of allowances made by the Director General for undermaintenance has been before the courts and before the Board of Tax Appeals a number of times, but the facts in each of the cases which we have examined are different and in large measure the decisions, especially the decisions of the courts, turn upon facts not present here, and so we have not much help from any of them. But without regard to what may have been decided before, we think it is too clear for argument that petitioner should not be allowed any deduction for the expense of restoring undermaintenance in the year in which the undermaintenance was restored, when the cost of restoring it is borne by the Director General. If the latter had complied with his contract and maintained the Lake Erie's properties during Federal control, as he contracted to do, it is perfectly obvious the four hundred odd thousand dollars of additional expenditure by the railroad in 1920 would have been unnecessary. It would in that case have made its normal expenditure for maintenance, and under the statute would have rightly deducted the whole of that amount, but in the case we are considering, it was required to expend in 1920 four hundred odd thousand dollars more money than was the normal depreciation or maintenance cost for those 10 months. The difference between the normal and the actual is represented by the payment made by the Director General. The effect of the payment was compliance by him with his contract. The result was to reimburse the railroad company to the extent of the amount paid by him, and to that extent its payment for maintenance was not an expense of Lake Erie. There is nothing in this conclusion at all different from the decision in *Tunnel Railroad* v. *Commissioner* (61 F. (2d), 166), for in that case the point was one of fact, namely, whether the allowance made by the Director General *was* for undermaintenance, and the court found it was not. Nor is it at all different from that of *Commissioner* v. *Norfolk Southern R. Co.* (63 F. (2d), 304), for in that case the question was whether the amount paid by the Director General for undermaintenance was gross income which the taxpayer was required to report, and the court very properly held it was not.

The only case, to which our attention has been called, in which the conclusion appears to be different from that reached by us is *Chicago & N. W. Ry. Co.* v. *Commissioner* (66 F. (2d), 61). There the railroad had received over $6,000,000 from the Director General for undermaintenance and had expended over half of it in excess of normal maintenance, in the year in question. The Court of Appeals appears to have decided that the fact of payment by the Director General would not affect the right to deduction as an ordinary expense. Apparently the court took the view that to hold otherwise would be to classify the money received from the Director General as income, but, with great deference to the views expressed there, we think the question involved in this case need not be complicated by a discussion of whether the effect of disallowance of the deduction would be the equivalent of defining the payment made by the Director General as income; for that question is not pertinent to the facts here, nor are we concerned with the other question, whether it may or may not be designated as a restoration of capital. It is not, we think, deductible in the circumstances we have narrated above. It is perfectly clear that if the Railroad Administration had expended the amount in question and had returned the properties to Lake Erie free of any undermaintenance, there could be no claim to a deduction on that account, for in that case obviously it had not been expended by petitioner. That here it was expended by petitioner is wholly due to the failure of the Railroad Administration, prior to the return of the properties, to expend it, and in recognition of this failure and in discharge of its default, it paid the agreed amount to the railroad in cash. When the railroad got it and expended it, it expended it, to all intents and purposes, for the account of the Director General. It came out of the pocket of the Government and not out of the pocket of the railroad, and it was to that extent not an ordinary and necessary expense in carrying on its business, and this, as we think, because the deduction which the applicable section of the income tax law permits, contemplates an expense only out of the funds and property of the person claiming the deduction. On the other hand, if the Lake Erie had shown that the money expended in the 10 months' period of 1920 was only normal maintenance, the deduction of the full amount expended would have been permissible, and the payment would not have been taxable as income. In such case it would have been expending only its own funds and the payment from the Director General would have been held by the railroad company in the place and instead of its capital depreciation, and

that is just what was decided in the Norfolk Southern case, supra; but here, as we have said already several times, the railroad as found by the Board, spent not only the amount of money ordinarily required for its maintenance account, but in addition the money which it received from the Director General. As to the former, it was a deductible expense. As to the latter, it was money paid subject to a contract of reimbursement, and, so far as we know, such an outlay has never been considered to be deductible. (See *Glendinning* v. *Commissioner*, 61 F. (2d), 950 [Ct. D. 681, C. B. XII–1, 279].)

The conclusion we have reached, therefore, is that the decisions of the Board of Tax Appeals should be, and are, affirmed.

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 611: Credit for foreign taxes. XIV–1–7231
G. C. M. 14021

REVENUE ACT OF 1926.

Method of computing the credit for foreign income tax paid for the taxable year 1925 by a foreign subsidiary of a domestic corporation where all the accumulated profits of the foreign subsidiary are received as a dividend during the taxable year 1925.

An opinion is requested relative to the method of computing the credit for foreign income tax paid for the taxable year 1925 by a foreign subsidiary of a domestic corporation.

Section 238(e) of the Revenue Act of 1926, which is applicable to the taxable year 1925, provides in part that for the purposes of that section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits.

The same provision of law designated as section 131(f) of the Revenue Act of 1932 has been held in G. C. M. 12882 (C. B. XIII–1, 89) to mean that 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. The term "accumulated profits" means the amount of the foreign corporation's income in excess of its foreign tax upon such income.

The following illustration on this point appears in article 698, Regulations 77, page 234:

Income and profits taxes deemed under section 131(f) to have been paid, computed as follows:

Dividend received on December 31 of the taxable year	$50,000
Income of French corporation earned during taxable year	200,000
Income and profits taxes paid to France on $200,000	30,000
Accumulated profits ($200,000 minus $30,000)	170,000
French taxes applicable to accumulated profits distributed $\left(\frac{50,000}{170,000} \text{ of } \left(\frac{170,000}{200,000} \text{ of } \$30,000\right)\right)$	7,500
Limitation under section 131(f) $\left(\frac{50,000}{330,000} \text{ of } \$45,375\right)$	6,875

In G. C. M. 12882, supra, it was held that inasmuch as 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, the formula quoted above from article 698, Regulations 77, should be applied under those Acts.

The specific question in the instant case is whether the foregoing formula should be applied where all the accumulated profits of the foreign subsidiary are received as a dividend during the taxable year 1925.

In the opinion of this office, the formula contained in article 698, Regulations 77, page 234, should be applied regardless of whether all or a portion of the accumulated profits of the foreign subsidiary are received as a dividend during the taxable year by the domestic parent corporation. If, in the illustration given, the entire accumulated profits of $170,000 were distributed to the domestic corporation, the amount of tax deemed to have been paid on the profits of the French subsidiary would be $\frac{170,000}{170,000}$ of $\left(\frac{170,000}{200,000}\right.$ of $\left.\$30,000\right)$, or $25,500. The amount of tax deemed to have been paid would, of course, be subject to the limitation contained in section 238(e) of the Revenue Act of 1926, namely, that it can not exceed that proportion of the United States tax ($45,375) against which the credit is taken which the amount of dividends ($170,000) received from the French subsidiary bears to the entire net income ($330,000) of the domestic corporation (from sources within and without the United States) in which such dividends are included. In other words, the limitation under section 238(e) of the Revenue Act of 1926 would be $\frac{170,000}{330,000}$ of $45,375, or $23,375.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 632: Consolidated returns. XIV-7-7317
Ct. D. 922

INCOME AND EXCESS PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. INCOME—AFFILIATED CORPORATIONS—AGREEMENT AS TO ALLOCATION OF TAX—EVIDENCE.

Upon the evidence in the case the Board of Tax Appeals was warranted in holding that there was an agreement among certain affiliated corporations that the entire tax against the group should be paid by the parent, which owned all the stock of the subsidiaries and derived all its income from dividends upon their stock and from commissions as their selling agent; the subsidiaries, whose officers were the same as those of the parent (with one exception), having filed separate returns for 1917, 1918, and 1919, the parent later filing consolidated returns for those years, and claims for abatement and refund making no mention of improper allocation of tax

but being based upon other grounds. The statute does not require that such an agreement should be made with the Commissioner, nor that it be in writing, nor that it be filed.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (23 B. T. A., 670) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 8, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

American Textile Woolen Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Appeal to review an order of the United States Board of Tax Appeals.

Before MOORMAN, HICKS, and HICKENLOOPER, Circuit Judges.

[February 16, 1934.]

OPINION.

HICKS, Circuit Judge: Petition by American Textile Woolen Co. to review a decision of the Board of Tax Appeals in assessing on redetermination deficiencies of $53,376.62 and $39,362.70 in income and excess-profits taxes for the years 1917 and 1918, respectively; and in establishing an overassessment of $120,317.48 for the year 1919, which overassessment the parties are agreed was equivalent to a deficiency against the petitioner in the amount of $38,990.79.

Petitioner is a Delaware corporation with its principal office at Sweetwater, Tenn. For itself and its four affiliates (*a*) Sweetwater Woolen Mills, Sweetwater, Tenn., herein called the Sweetwater company; (*b*) Athens Woolen Mills, Athens, Tenn., herein called the Athens company; (*c*) Park Woolen Mills, Rossville, Ga., herein called the Park company; and (*d*) Louisville Woolen Mills, Louisville, Ky., herein called the Louisville company, it filed a consolidated and amended excess-profits tax return for 1917, and a consolidated income and excess-profits tax return for 1918 and 1919. Upon the basis of these consolidated returns the Commissioner assessed the taxes against petitioner alone; and the Board confirmed the assessments (23 B. T. A., 670) with certain modifications not necessary to consider here, stating—

"We are * * * of opinion that there existed among the petitioner and its subsidiaries an agreement that consolidated tax liabilities of the affiliated group for the years 1917, 1918 and 1919 should be allocated for assessment to petitioner alone."

The Board reached its conclusion upon stipulated facts and the additional testimony of F. A. Carter, president and general manager, C. L. Clark, secretary and treasurer, of petitioner, and Lee H. Battle, a certified public accountant and auditor of petitioner. Acting thereupon it based its order upon the authority of Revenue Act of 1918 (40 Stat., 1057) section 240 (a), in connection with Treasury Regulations 41, article 78, and Treasury Regulations 45 (1920 edition), article 632. Such portions of the statute and of Treasury Regulations 41, article 78, as are here involved are printed in the margin.[1]

Considering only such facts as are material to the present issue, our sole question is, whether they are sufficient to sustain the order of the Board. (*Phillips* v. *Commissioner*, 283 U. S., 589, 600 [Ct. D. 350, C. B. X–1, 264]; *Tracy* v. *Commissioner*, 53 Fed. (2d), 575, 579 (C. C. A. 6) [Ct. D. 350, C. B. X–1, 264].)

[1] Revenue Act of 1918 (ch. 18, 40 Stat., 1057):

"SEC. 240. (a) * * * In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. * * *"

Treasury Regulations 41:

"ART. 78. *When affiliated corporations may be required to make consolidated return.*— * * * In cases where consolidated returns are accepted, the total tax will be computed in the first instance as a unit upon the basis of the consolidated return and will be assessed upon the respective affiliated corporations in such proportions as may be agreed among them. If no such agreement is made the tax will be assessed upon each such corporation in accordance with the net income and invested capital properly assignable to it."

Petitioner was the dominant corporation, and the four other companies, subsidiaries, and during the years involved petitioner owned all their capital stock and acted as their selling agent. The officers of each of the five companies were F. A. Carter, president, James May, vice president, and C. L. Clark, secretary and treasurer, with the exception of the Athens company, which had a separate secretary and treasurer, C. A. Beard. Lee H. Battle was the common auditor and accountant. These officers, common to petitioner and all the affiliates, handled all their tax matters.

Petitioners' income was derived from dividends upon the stock of the four subsidiaries and from commissions as their selling agent.

For the year 1917 each company filed separate income and excess-profits tax returns. For the year 1918 each filed separate, combined income and excess-profits tax returns. These returns seem to have been treated temporarily by the Commissioner as sufficient.

On March 14, 1920, each company filed separate tentative returns for 1919 and on May 14, 1920, each filed separate, complete income and profits tax returns for that year.

On May 15, 1920, petitioner filed a consolidated return for 1919 on behalf of itself and the four subsidiaries and transmitted it to the appropriate collector at Nashville along with the separate complete returns of petitioner and the Athens company, and in the transmitting letters it was stated that the parent company (the American company) was filing a consolidated return for the group and that "the tax will be paid on the consolidated return."

In the letters of May 14, 1920, transmitting to the proper collectors the separate 1919 returns above referred to of the Sweetwater, Louisville and Park companies, each advised that petitioner, as the parent company of the consolidated group, was filing a consolidated return for 1920 but it is proper to state that these letters made no mention of the basis upon which the tax would be paid. Each of these letters, except that of the Louisville company, was written upon the stationery of petitioner.

The Louisville company paid $17,250 of the assessment against it for 1919; and thereupon filed an abatement claim for the balance, $51,098.98, upon the ground that a consolidated return had been filed for the group with the collector at Nashville. No proceeding by court action or otherwise has ever been commenced by the Commissioner for the collection of this balance.

On August 27, 1920, the Sweetwater company on Form 1122 (see Treasury Regulations 45, 1920 edition, article 632) filed an information return for the year 1919. This Form 1122 contained question 7 as follows:

"7. In case of all consolidated returns, the Department prefers that the total tax assessed against the affiliated group be paid by the parent or principal reporting company, instead of being apportioned among the affiliated companies.

"If apportionment is made state the amount of income and profits tax for the taxable year to be assessed against the subsidiary or affiliated company making this return —— $——."

The Sweetwater company left blank the space provided for the answer, indicating that nothing was to be assessed to it. This information return was signed by Carter as president and Clark as secretary and treasurer, both of the Sweetwater company, and petitioner. At the same time the Sweetwater company filed an abatement claim signed by Clark upon the ground that a consolidated return for the group had been filed by the parent company whose tax payment on June 15, 1920, "includes the tax assessed against the Sweetwater Woolen Mills."

On August 28, 1920, the Athens company filed an information return on Form 1122 for 1919 and also left blank the space provided thereon for an answer to question 7. This return was signed by Carter, president, and Beard, treasurer of the Athens company. At the same time it filed an abatement claim signed by Clark, who was not an officer of the Athens company, for the taxes shown on its separate return for that year, stating that petitioner was affiliated with the Athens company, and that the tax assessed against the latter "is being paid by the parent company."

On March 14, 1920, the Park company paid to the collector for the district of Georgia $5,750 of the 1919 assessment against it and later filed an abatement claim for the balance, upon the ground that petitioner had filed a consolidated return and that the remaining installments of the tax were being paid by the petitioner to the collector at Nashville on the consolidated return. This abatement claim was signed by Clark, secretary and treasurer. The Park company

also filed an information return for 1919 on Form 1122 and inserted in the space provided for an answer to question 7 the figures $26,324.23.

During 1920 petitioner paid to the collector at Nashville $162,381.91. This represented the tax due upon the consolidated return for 1919. Afterwards, on December 15, petitioner filed an abatement claim for the taxes paid for that year by the Louisville and the Park companies, to wit, $23,000, upon the ground that these payments should apply on petitioner's consolidated return.

On October 26, 1920, the Commissioner wrote petitioner that the five companies would be required to file a consolidated excess-profits tax return for 1917 and consolidated income and excess-profits returns for 1918 and 1919. On November 2, 1920, petitioner replied that a consolidated return for 1919 had already been filed and that such returns would be filed for 1917 and 1918 and on February 12, 1921, forwarded to the Commissioner for itself and the four subsidiaries (1) a consolidated excess-profits tax return for 1917 disclosing a tax liability of $18,128.15; (2) a consolidated income tax return for 1917 disclosing a liability of $27,908.26; and (3) a consolidated income and profits tax return for 1918 disclosing a liability of $351,034.14. Each of these returns bore the petitioner's name on its face and the accompanying schedule showed the names and addresses of the subsidiaries.

On October 28, 1921, petitioner received from the Internal Revenue Department a notice of a tentative assessment against it of $400,885.61 covering the years 1917, 1918, and 1919. Petitioner made no contention that any part of this amount should have been allocated to its subsidiaries but wrote the collector at Nashville that it felt that this tentative assessment was far in excess of any additional taxes which might be found to be due and that it desired to have a hearing before the Commissioner to show that the taxes were excessive. With this letter it mailed to the collector a check for $100,000 as a voluntary payment to be applied to any taxes which might be found due for the years stated and two days later petitioner notified the Commissioner of this payment. To make the payment petitioner borrowed $30,000 of the amount from the Louisville company. The collector advised the Commissioner that this payment had been deposited in its "unidentified account 9–D" to "await the assessment to be made by your office"; and it was finally credited upon the taxes due for the year 1918.

On November 21, 1921, petitioner's secretary and treasurer, Clark, wrote to the Commissioner and asked for a new assessment of the income and excess-profits tax for 1917, 1918, and 1919, under section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Act of 1918.

On June 13, 1924, petitioner wrote the Commissioner relative to its taxes for 1917 to 1919 inclusive and asked a correction in respect to invested capital and stated that "we will rely entirely for any further relief on our request for consideration under the provisions of section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Act of 1918."

On March 13, 1924, petitioner filed with the collector at Nashville refund claims for taxes for the years 1917 and 1918 in the amount of $45,000 each, but made no mention in either claim that the deficiencies assessed upon the consolidated returns for those years had been improperly allocated.

On September 24, 1924, petitioner executed and filed with the Commissioner an appeal from the preliminary determination of the consolidated tax liabilities for the years 1917 to 1919 inclusive and again made no mention of any allocation of the deficiencies.

On October 7, 1925, the Commissioner mailed to petitioner and its subsidiaries the final deficiency letter for the years 1917, 1918, and 1919 herein complained of and in response thereto no claim was made by petitioner of improper allocation.

On September 8 and 9, 1925, the collector wrote to the Park company asking it to execute waivers extending the period for the assessment and collection of the taxes shown to be due on the separate returns of that company for the years 1918 and 1919 respectively. Carter, president and general manager of petitioner, answered these letters on the stationery of petitioner and said:

"* * * In regard to these two claims would state, this claim for abatement was made when our income tax reports were made by the individual mills. The Income Tax Department afterwards required us to file a consolidated return which covered the returns for the Park Woolen Mill with our other mills and we understand that this did away with the individual mill returns and should have done away with these claims.

"Our whole income tax matter for the years 1918 and 19 is being handled in Washington as a consolidated return for these years. * * *"

On September 12, 1928, petitioner wrote the collector at Louisville as follows: "* * * We are at a loss to know why we can not get this $51,000 cleared out at your office as no doubt you remember that we filed individual report and then the Government came along and made us file consolidated report and all the tax has been paid on the consolidated report. Therefore the Government should clear us of this 1919 tax as it has been settled."

No issue involving the improper allocation of deficiency assessments was ever raised until 1928 when petitioner became represented by new counsel. It was at his suggestion that on January 30, 1929, an amended petition was filed which raised for the first time that question.

We think there can be little doubt upon the facts stated that petitioner intended that the taxes for the years in question should not only be assessed against it but that they should be paid by it; and if this be true it necessarily follows that the subsidiaries were in accord because all five corporations had the same officers and agents in charge of its tax matters with the one exception above noted. It is inconsistent to say that the officers and agents acting for the parent company have agreed for it that a thing should be done and at the same time say that these same officers and agents acting for the subsidiaries have intended otherwise. We think there is substantial evidence, in the course followed by these officers in representing all the companies throughout the whole controversy, to show an agreement among them all that the entire tax against the group should be assessed and paid by the parent company. (See *In re Temtor Corn & Fruit Products Co.*, 299 Fed., 326, 329.) It is difficult to think otherwise. We think, without a reiteration of the facts, that the Commissioner was justified in making the assessment from this inference.

Essex Coal Co. v. *Commissioner* (39 Fed. (2d), 892) (C. C. A. 6) is urged upon us in support of the contrary view. In that case it is true the officers of the two corporations involved were the same individuals. (See *Essex Coal Co.* v. *Commissioner*, 12 B. T. A., 994, 998.) But this court in its opinion gave no consideration to that feature. In this case the identity of officials is a fact which should be considered along with all the other facts and circumstances. We recognize that the court in that case did say, "The statute clearly contemplates the existence of an agreement or the absence of one at the time of the filing of the return and the making of the assessment." But the statute does not contemplate nor require that such an agreement should be made with the Commissioner, nor that it be in writing nor that it be filed. It requires only that the agreement be among the affiliates. We see no reason why it may not, like many other agreements, be implied from circumstances. It is a forced interpretation to say that the statute requires the common officers of all the companies to enter into a formal and express contract with themselves as to the allocation of the taxes.

Petitioner itself never raised the point, that there was any lack of understanding that the taxes involved should be assessed against it, until new counsel made the suggestion in 1928. Upon the other hand, on June 13, 1924, it wrote the Commissioner that it would rely entirely for further relief upon another and different statute. When it filed the consolidated return for 1919 it wrote the collector that "the tax will be paid on the consolidated return" and when it filed the consolidated return for 1917 and 1918 it voluntarily paid $100,000 of the tax even before it was finally assessed. The history of the case, with little to the contrary, indicates that the affiliates themselves acted upon the assumption that after the consolidated returns were filed the tax would be assessed against and paid by petitioner.

The abatement claims filed by the four subsidiaries can be explained upon no other hypothesis than that after the consolidated returns were filed they each understood and expected that the taxes would be assessed against the parent company.

Petitioner urges that the Board did not make a finding of fact that the agreement required by the statute existed. But, as stated at the outset, the Board did so find in its opinion and that is all that is required. (*Sheppard & Myers* v. *Commissioner*, 45 Fed. (2d), 50, 51 (C. C. A. 3).)

The order of the Board of Tax Appeals is affirmed.

ARTICLE 635: Consolidated net income of affiliated corporations. XIV-1-7232 Ct. D. 902

INCOME TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF SUPREME COURT.

1. DEDUCTION—AMORTIZATION OF BOND DISCOUNT—AFFILIATED CORPORATIONS—INTERCOMPANY TRANSACTION.

Where a parent corporation acquired all the bonds of a subsidiary, the latter corporation having sold them at a discount at various dates between 1913 and 1916 and having amortized the amount of the discount over the remaining life of the bonds, the annual amortized discount for the years 1924 to 1926, inclusive, may not be deducted in computing the consolidated net income of the group, which filed consolidated returns on the accrual basis, for those years. The transaction, being between affiliated corporations, was properly eliminated from consolidated net income, in accordance with article 636 of Regulations 65 and article 635 of Regulations 69, pertaining to the Revenue Acts of 1924 and 1926, respectively.

2. DECISION AFFIRMED.

Decision of the United States Court of Appeals for the District of Columbia (Ct. D. 879, C. B. XIII-2, 278; 71 Fed. (2d), 953), affirming decision of the Board of Tax Appeals (22 B. T. A., 233), affirmed.

SUPREME COURT OF THE UNITED STATES.

Gulf, Mobile & Northern Railroad Co., petitioner, v. *Guy T. Helvering, as Commissioner of Internal Revenue.*

On writ of certiorari to the United States Court of Appeals for the District of Columbia.

[December 3, 1934.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

Certiorari was granted in this case "limited to the question of the right of the taxpayer to deductions on account of amortization of bond discount." (293 U. S., 548.) At various dates between 1913 and 1916, Meridian & Memphis Railway Co. sold its 30-year 5 per cent gold bonds at a discount. During the years 1924 to 1926, inclusive, while petitioner was the owner and holder of the entire bond issue, it joined with the Meridian & Memphis in filing consolidated income tax returns as affiliated corporations. In each year the latter deducted from gross income the amortized bond discount. The deductions were disallowed by the Commissioner. His action was sustained by the Board of Tax Appeals (22 B. T. A., 233) and by the Court of Appeals for the District of Columbia. (71 F. (2d), 953.) The question presented is the same as that decided this day in No. 107, *Old Mission Portland Cement Co.* v. *Helvering* [Ct. D. 903, below]. The judgment of the court below was therefore right and is affirmed.

Mr. Justice BUTLER and Mr. Justice ROBERTS think the judgment should be reversed.

ARTICLE 635: Consolidated net income of affiliated corporations. (Also Section 234, Article 561.) XIV-1-7233 Ct. D. 903

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF SUPREME COURT.

1. DEDUCTION—AMORTIZATION OF BOND DISCOUNT—AFFILIATED CORPORATIONS—INTERCOMPANY TRANSACTION.

Where a parent corporation purchased bonds of one of its affiliates, the affiliate having issued them at a discount in 1912 and having deducted from gross income the amortized discount on the

bonds during each of the years 1923 to 1926, inclusive, the amount of amortization applicable to the bonds purchased by the parent may not be deducted in computing the consolidated net income of the group, which filed consolidated returns on the accrual basis for those years. The transaction, being between affiliated corporations, was properly eliminated for consolidated net income, in accordance with article 636 of Regulations 62 and 65 and article 635 of Regulations 69, pertaining to the Revenue Acts of 1921, 1924, and 1926, respectively.

2. DEDUCTION—CONTRIBUTIONS TO COMMUNITY CHEST—ORDINARY AND NECESSARY BUSINESS EXPENSE.

Contributions made by a corporation to the community chest are not deductible as ordinary and necessary business expense, under section 234(a)1 of the Revenue Acts of 1921, 1924, and 1926, in the absence of evidence of any direct benefit therefrom flowing to the corporation's employees or business, such as is contemplated by the regulations interpreting the above section.

3. DECISION AFFIRMED.

Decision of the Circuit Court of Appeals, Ninth Circuit (69 Fed. (2d), 676), affirming decision of the Board of Tax Appeals (25 B. T. A., 305), affirmed.

SUPREME COURT OF THE UNITED STATES.

Old Mission Portland Cement Co., petitioner, v. *Guy T. Helvering, as Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1934.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

In this case certiorari was granted (293 U. S., 544), "limited to the question of the right of the taxpayer to deductions (*a*) on account of amortization of bond discount, and (*b*) on account of contributions to the San Francisco Community Chest."

During each of the years 1923 to 1926, inclusive, petitioner and two corporations affiliated with it filed consolidated income tax returns on the accrual basis. In each year one of the affiliated corporations deducted, from gross income, amortized discount allowed upon an issue of its bonds in 1912. In computing the taxable income to be assessed to petitioner, the parent corporation, under the applicable Revenue Acts of 1921 (ch. 136, 42 Stat., 227), 1924 (ch. 234, 43 Stat., 253), and 1926 (ch. 27, 44 Stat., 9), the Commissioner refused to allow the deduction of so much of the amortized discount as was applicable to bonds, issued by its affiliate, which petitioner had acquired by purchase. He also refused to allow credit for the contributions to the community chest as not an ordinary and necessary expense, deduction of which the statute permits. His action was sustained both by the Board of Tax Appeals (25 B. T. A., 305) and the Court of Appeals for the Ninth Circuit (69 F. (2d), 676).

1. It is no longer open to question that amortized bond discount may be deducted in the separate return of a single taxpayer. (See No. 51, *Helvering* v. *Union Pacific Railroad Co.* [Ct. D. 901, C. B. XIII–2, 305], decided this day.) But the Government insists that the deduction by one affiliate, in a consolidated return, of amortized discount upon its bonds, which are owned by another affiliate, involves an "intercompany transaction" which, under the applicable statutes and regulations, must be eliminated from the computation of the tax in order to arrive at the true taxable income.

Section 240 of the Revenue Acts of 1921, 1924, and 1926 extends to affiliated corporate taxpayers the privilege of making a consolidated tax return, subject to such restrictions as may be imposed by Treasury regulations. The purpose of the section was to provide a method of computing the tax upon the true net income of what is in practical effect a single business enterprise, with substantially common ownership, as though it were that of a single taxpayer, despite the fact that it is carried on by separate corporations whose tax would otherwise be independently computed. (See *Burnet* v. *Aluminum Goods Manu-*

facturing Co., 287 U. S., 544, 547 [Ct. D. 631, C. B. XII–1, 283]; *Handy & Harman* v. *Burnet*, 284 U. S., 136, 140 [Ct. D. 425, C. B. X–2, 370]; *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S., 152, 154 [Ct. D. 637, C. B. XII–1, 281]; *Woolford Realty Co., Inc.*, v. *Rose*, 286 U. S., 319 [Ct. D. 442, C. B. XI–1, 145]; *Appeals of Gould Coupler Co.*, 5 B. T. A., 499, 514–516; cf. Treasury Regulations 62, article 636, under the 1921 Act; Treasury Regulations 65, article 636, under the 1924 Act; Treasury Regulations 69, article 635, under the 1926 Act.)

Each of the regulations controlling consolidated returns, under the applicable Revenue Acts, directs that only one specific credit of $2,000, which section 236(b) allows to each individual taxpayer, shall be allowed to the consolidated group, and provides that "subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated." It is by the elimination of intercompany transactions from the computation, in order to ascertain "the combined net income of the several corporations consolidated," that the purpose of the statute is effected. (See *Burnet* v. *Aluminum Goods Manufacturing Co.*, supra, 549, 550.) The Government, having thus conferred upon groups of affiliated taxpayers the privilege of computing their tax as though they were a single tax-paying entity, it would require plain language in statute and regulations to support the conclusion that it was also intended that they should retain the advantages which, before affiliation, attached peculiarly to their status as independent tax computing entities. The regulations are aimed at the prevention of a double advantage, to be secured only if affiliated taxpayers are allowed to treat themselves, at the same moment, as one or many, according to their convenience for purposes of tax computation.

Amortized bond discount is deductible from the taxpayer's gross income only by way of anticipation of payment of the bonds at maturity. It is then that the taxpayer pays the difference, between the amount realized upon the sale of the bonds and their par value, which is the subject of the amortization. (*Helvering* v. *Union Pacific Railroad Co.*, supra.) Here the payment anticipated is from one affiliate to another, an intercompany transaction. If we eliminate it from the computation of income upon the consolidated return, as the regulation directs, there is no anticipated payment of the discount to be amortized and no basis for the deduction.

A single taxpayer who had purchased his own bonds before maturity could not afterwards deduct, from gross income, the amortized discount on the bonds, in anticipation of their payment at maturity. This is equally the case where the obligor and obligee are affiliated corporations claiming the benefit of a statute which permits them to compute their tax as though they were one. It is true that in either case the bondholder may sell his bonds before maturity, and thus renew his obligation to pay them. But in neither is the taxpayer in a position to require the Government to anticipate an event which may never occur, by conferring upon him the benefit of a deduction to which, without its occurrence, he would not be entitled. Having elected to take the benefit of affiliation, the taxpayer can not complain of a burden which is inseparable from the benefit and which finds its source in the very method of computing the tax from which the benefit is derived.

2. The privilege of deducting charitable donations from gross income, conferred on individual taxpayers by section 214(a) of the Revenue Acts of 1921, 1924, and 1926, has not been extended to corporations. A proposal to extend it to them was rejected by Congress pending the passage of the Revenue Act of 1918. (Congressional Record, House, volume 56, part 10, 10426–10428.) Section 234(a)1 of the Revenue Acts of 1921, 1924, and 1926 authorizes corporations to deduct from gross income "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Article 562 of Treasury Regulations 62, interpretative of the 1921 Act, declared that corporations were not entitled to deduct charitable donations. But it recognized the right to deduct donations "made by a corporation for purposes connected with the operation of its business * * * when limited to charitable institutions, hospitals or educational institutions conducted for the benefit of its employees," and also donations "which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business." These provisions were retained, without substantial change, in the regulations promulgated under the 1924, 1926, and 1928 Acts. (Article 562 of Treasury

Regulations 65, 69; article 262 of Treasury Regulations 74.) As section 234(a)1 to which they pertain has been reenacted in several Revenue Acts, the regulation now has the force of law. (*McCaughn* v. *Hershey Chocolate Co.*, 283 U. S., 488, 492 [Ct. D. 345, C. B. X–1, 444]; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S., 269, 273 [Ct. D. 638, C. B. XII–1, 286].)

It is a question of fact in each case whether a donation is made to an institution conducted for the benefit of the donor's employees or is consideration for a benefit flowing directly to the donor as an incident of its business. Here the ruling of the Commissioner, that the deduction was not permissible under the statute and regulations, presumably rests upon a correct determination of the facts. (*Welch* v. *Helvering*, 290 U. S., 111, 115 [Ct. D. 755, C. B. XII–2, 112].) The Board of Tax Appeals found that the gifts to the San Francisco Community Chest were apportioned among the charitable organizations of the city and that the gifts of petitioner were made in the belief that "they resulted in good will toward the petitioner and increased its business." But the Board made no finding of any direct benefit to petitioner's employees or business which the regulations contemplate. Nor was there evidence before it to support such a finding. Our review of determinations by the Board is limited to questions of law raised by its findings or its failure to make findings required by the statute. (See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716, 728 [Ct. D. 80, C. B. VIII–2, 222]; *Phillips* v. *Commissioner*, 283 U. S., 589, 599, 600 [Ct. D. 350, C. B. X–1, 264]. Compare *Kendrick Coal & Dock Co.* v. *Commissioner*, 29 F. (2d), 559, 564 (C. C. A. 8); *Commissioner* v. *Langwell Real Estate Corporation*, 47 F. (2d), 841, 842 (C. C. A. 7) [Ct. D. 348, C. B. X–1, 361].)

Affirmed.

Mr. Justice BUTLER and Mr. Justice ROBERTS think that so much of the judgment as sanctions the Commissioner's refusal to deduct the bond discount should be reversed.

ARTICLE 635: Consolidated net income of affiliated corporations.

XIV–2–7244
Ct. D. 907

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. DEDUCTION — LOSSES — AFFILIATED CORPORATIONS — BURDEN OF PROOF.

A parent and its subsidiary having made separate and consolidated returns for the years 1920–1923, inclusive, paid income taxes on the consolidated return basis and used large net losses of the subsidiary to reduce the parent's taxed income, the parent was not entitled to a deduction in its consolidated return for the year 1923 for losses on liquidation of the subsidiary in that year, where the Commissioner determined that such further deduction would reflect directly or indirectly the same losses and the parent failed to sustain the burden of proving the essential fact that the allowance of the deduction would not amount to twice subtracting the same losses.

2. DECISION REVERSED.

Decision of the Circuit Court of Appeals, Ninth Circuit (66 Fed. (2d), 895), reversed.

SUPREME COURT OF THE UNITED STATES.

John P. McLaughlin, Collector of Internal Revenue for the First District of California, petitioner, v. *Pacific Lumber Co.*

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 10, 1934.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the Court.

Respondent brought this action in the District Court for Northern California to recover $143,122.23 it had paid as income tax for 1923. The complaint alleges

facts upon which respondent claims to have been overassessed in that sum as a result of failure to take into account deductible losses. One loss ($479,625) resulted from the liquidation in 1923 of A. F. Thane & Co., a wholly owned subsidiary. The other ($953,134.49) was the indebtedness of that company to respondent, ascertained to be worthless and charged off by the latter in that year. Petitioner's answer put in issue some and admitted other allegations of the complaint. The parties stipulated for trial by the court without a jury. The evidence consisted of an agreed statement of facts and the separate and consolidated tax returns for 1920 to 1923, inclusive, of respondent, Thane & Co., and Pacific Lumber Co. of Illinois. At the close of the evidence each party moved for judgment. The court denied petitioner's motion, granted that of respondent and gave it judgment in the amount sued for with interest and costs. The Circuit Court of Appeals affirmed. (66 F. (2d), 895.)

The allegations of the complaint admitted by the answer, the agreed statement and the tax returns show:

During 1918 A. F. Thane & Co. had outstanding 600 shares of capital stock of the par value of $100 each; respondent owned 540 for which it had paid $31,500 and A. F. Thane owned 60. In 1920, the company increased its capital to 5,000 shares, respondent subscribed and paid to the company par value, $100 per share, for 3,960 and Thane took the remaining 440 shares. In 1921 respondent bought these shares for $52,125 and so became the owner of all, for which it had paid $479,625. At the close of 1923, Thane & Co. was dissolved and its remaining assets were transferred to respondent. Between March 17, 1921, and the end of 1923, respondent had advanced to it and paid for its account large sums. After deducting the amount repaid plus the value of the assets transferred at liquidation, Thane & Co. was indebted to respondent in the sum of $953,134.49. Before the end of 1923, respondent charged this off as a debt ascertained to be worthless in that year.

From 1920 to 1923, inclusive, respondent, Thane & Co. and the Pacific Lumber Co. of Illinois made separate income tax returns and also consolidated returns as affiliated corporations. Their income taxes were paid on the latter basis. In each year respondent had a large net income and Thane & Co. lost heavily; the Pacific Lumber Co. of Illinois lost in the first and had relatively small net income in each of the other years.[a] Their separate returns for 1923 respectively showed net income of $1,379,494.78, net loss of $229,942.15, and net income of $8,809.83. The consolidated return reported net income of $1,158,362.46 on which respondent paid $144,795.31 as the total income tax. Upon examination and audit in the Bureau, a greater deduction was made for depreciation than was claimed in the return, overpayment was found in the amount of $1,673.08 and that was refunded.

Insisting that the losses here in question were deductible, respondent filed a claim for refund of the balance, $143,122.23. The letter of the deputy commissioner notifying it that the claim would be rejected stated that, since Thane & Co. was affiliated with respondent and allowance was made, in computing consolidated net income, for all deductible losses sustained by the subsidiary during the several years, a further deduction reflecting directly or indirectly the same losses was not allowable. And the claim was disallowed.

Petitioner's motion at the close of the evidence for judgment in his favor raised the question of law whether the evidence is sufficient to warrant judg-

[a] See following table:

	1920.	1921.	1922.	1923
Pacific Lumber Co. of Maine, respondent	$2,262,959.39	$379,624.88	$1,266,450.51	$1,379,494.78
A. F. Thane & Co	[1] 443,821.95	[1] 548,166.82	[1] 344,791.49	[1] 229,942.15
Pacific Lumber Co. of Illinois	[1] 23,052.35	18,314.97	31,198.03	8,809.83
Consolidated	1,796,085.09	[1] 150,226.97	952,857.05	1,158,362.46

[1] Net loss.

The consolidated net loss of $150,226.97 for 1921 was allowed as a deduction from the consolidated net income for 1922, resulting in a consolidated net income for the latter year of $802,630.08, upon which the tax was paid.

ment for respondent and the trial court's decision of that question was reviewable in the Circuit Court of Appeals and is here for decision. (*United States* v. *Jefferson Electric Co.*, 291 U. S., 386, 407 [Ct. D. 803, C. B. XIII–1, 393].)

Section 240(a) of the Revenue Act of 1921 declares: "That corporations which are affiliated within the meaning of this section may * * * make separate returns or under regulations prescribed * * * make a consolidated return of net income * * * in which case the taxes thereunder shall be computed and determined upon the basis of such return." (42 Stat., 227, 260.) Treasury Regulations 62 provide: "Consolidated returns are based upon the principle of levying the tax according to the true net income and invested capital of a single enterprise * * *. [Article 631.] Subject * * * to the elimination of intercompany transactions * * * the consolidated taxable net income shall be the combined net income of the several corporations consolidated." (Article 636.)

If not inconsistent with its obligation under the statute accurately to report taxable income for 1923, respondent may deduct the losses it sustained in that year as the result of its investment in the stock of Thane & Co. and its advances to or for that company. (*Burnet* v. *Aluminum Goods Co.*, 287 U. S., 544, 550 [Ct. D. 631, C. B. XII–1, 283].) But a consolidated return must truly reflect taxable income of the unitary business and consequently it may not be employed to enable the taxpayer to use more than once the same losses for reduction of income. Losses of Thane & Co. that were subtracted from respondent's income are not directly or indirectly again deductible. (*Handy & Harman* v. *Burnet*, 284 U. S., 136, 140 [Ct. D. 425, C. B. X–2, 370]; *United States* v. *Ludey*, 274 U. S., 295, 301 [T. D. 4046, C. B. VI–2, 157]; *Ilfeld Co.* v. *Hernandez*, 292 U. S., 60, 68.) Respondent voluntarily paid the tax. When disallowing the claim for refund, the Bureau notified it that losses in 1923 reflecting other deductions would not be allowed. Presumably respondent had within its control the records showing facts that would fully disclose the relations between such losses and those reported in the returns of Thane & Co. The Circuit Court of Appeals states that there is no evidence of double deduction or any specific instance of such deduction. But that absence of proof does not support the judgment. Respondent had the affirmative of the issue, and the burden was on it to show that allowance of the deduction claimed would not amount to twice subtracting the same loss. That is an essential fact which can not be assumed. Respondent may not rely on mere assertion or speculation. (*Cochran* v. *United States*, 254 U. S., 387, 393; *Fidelity Title Co.* v. *United States*, 259 U. S., 304, 306 [T. D. 3353, C. B. I–2, 344]; *United States* v. *Anderson*, 269 U. S., 422, 443 [T. D. 3839, C. B. V–1, 179]; *Compañia General* v. *Collector*, 279 U. S., 306, 310; *United States* v. *Jefferson Electric Co.*, supra, 400.)

The evidence not only fails to establish that essential fact but is little, if any, less than enough to show that the allowance of the deductions claimed would be a second use of the same losses. The details, given in the tabular statement printed in the margin of an earlier page of this opinion, show that the losses of Thane & Co., which operated through consolidated returns to reduce respondent's income taxed, amount in all to more than respondent's asserted 1923 losses and to more than its income taxed in that year. Thane & Co.'s statements attached to its separate tax returns show liabilities in excess of assets in each year of the affiliated period increasing annually until by the end of 1923 the deficit had become $1,453,134.49. Prior to 1920 Thane & Co. had outstanding only $60,000 of capital stock, 90 per cent of which was acquired by respondent for less than par. During the affiliated period its deductible losses amounted to more than three times its capital. While it is conceivable that, as suggested by respondent, the losses do not necessarily indicate that thereby Thane & Co. became unable to pay its debts, the circumstances tend strongly to indicate that they did cause its breakdown resulting in respondent's 1923 losses here claimed. If these losses did not cause, or are not reflected in, those sustained by respondent in 1923 as the result of its investment in and advances to that company, it reasonably may be presumed that respondent would have shown that fact.

The trial court should have granted petitioner's motion for judgment in his favor.

Reversed.

ARTICLE 635: Consolidated net income of affiliated corporations. XIV-11-7372 Ct. D. 934

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. INCOME—CONSOLIDATED NET INCOME—AFFILIATED CORPORATIONS—DEALINGS BY SUBSIDIARY IN STOCK OF PARENT.

Profits derived by a subsidiary corporation from the purchase of stock of the parent corporation from nonmembers of the affiliated group and its sale to other nonmembers constitute income of the subsidiary which must be included in the consolidated net income of the group.

2. CERTIORARI DENIED.

Petition for certiorari denied November 20, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *General Gas & Electric Corporation, respondent.*

Petition to review a decision of the Board of Tax Appeals. Reversed.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[July 16, 1934.]

OPINION.

The issue presented is whether a subsidiary member of an affiliated corporate group which owned some of the capital stock of the parent corporation it had acquired from third parties and sold such stock at a profit in 1924 to third parties thereby received taxable income.

CHASE, Circuit Judge: The facts are not in dispute. The respondent owned all of the capital stock of its subsidiary, General Finance Corporation, during 1924. In that year, General Finance Corporation sold 7,300 shares of the convertible preferred stock of the respondent to purchasers other than members of the affiliated group. It had previously acquired this stock from nonmembers of the group for $227,662.26 less than the price for which it sold the stock. The Commissioner included in gross income this excess of the sale price over the cost or basis of the stock to the General Finance Corporation and so computed the tax. The Board of Tax Appeals held that such excess was not taxable income and the matter is here on petition to review that decision.

The Board based its decision on several of its previous holdings to the effect that the affiliated group was the taxpayer and treated the dealings of General Finance Corporation in the stock of its parent, the respondent, the same as though a corporation had legally dealt in its own stock. Under Treasury regulations such transactions would result in neither taxable gain or deductible loss. (Treasury Regulations 65; article 543.) Among its own decisions to that effect was Van Camp Packing Co., Inc. (26 B. T. A., 256), which has since been reversed. (*Commissioner of Internal Revenue* v. *Van Camp Packing Co., Inc.*, 67 Fed. (2d), 596 (C. C. A. 7).)

It has now been settled that an affiliated group is not a taxpayer but a tax-computing unit and that the corporations themselves are the taxpayers. (*Woolford Realty Co.* v. *Rose*, 286 U. S., 319 [Ct. D. 493, C. B. XI-1, 154]; *Commissioner* v. *Ben Ginsburg Co.*, 54 Fed. (2d), 238 (C. C. A. 2) [Ct. D. 479, C. B. XI-1, 151]; *Delaware & Hudson Co.* v. *Commissioner*, 65 Fed. (2d), 292 (C. C. A. 2).) The respondent's affiliate, General Finance Corporation, clearly had, as the result of its purchase and sale of the respondent's stock, a profit in the amount of the difference between what it paid for the stock and its sale price. This profit was within the definition of income in the statute. (Section 213 of the Revenue Act of 1924.) (*Eisner* v. *Macomber*, 252 U. S., 188 [T. D. 3010, C. B. 3, 25]; *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S., 509 [Ct. D. 6, C. B. 4, 34].) It was income derived by one corporation from dealings in the stock of another unless, because the respondent owned all of its stock, we should disregard the corporate identity of General Finance Corporation for purposes of taxation. Congress, however, has never seen fit to treat a wholly owned affiliate as identical with the parent corporation for

tax purposes and it is incumbent upon the courts to follow the scheme of taxation prescribed by Congress save only when it may contravene the Constitution. It has been held, moreover, that the gain derived by a corporation from lawful dealing in its own stock is taxable income. (See *Commissioner* v. *S. A. Woods Mach. Co.*, 57 Fed. (2d), 635 [Ct. D. 666, C. B. XII–1, 275].) That is not, however, the issue in this case.

Since the amount involved was income to General Finance Corporation, it was properly taken to be such by the Commissioner in computing the net income of that unit in the group and then carried into the computation of the net taxable income payable by any corporation or corporations in the affiliation. Only to this extent were they entitled to benefit by the filing of a consolidated return. (*Commissioner of Internal Revenue* v. *Van Camp Packing Co., Inc.*, supra.)

Decision reversed and cause remanded to the Board of Tax Appeals for further proceedings consistent with this opinion.

SECTION 245.—TAXES ON INSURANCE COMPANIES.

ARTICLE 681: Reserve funds. XIV–16–7443
Ct. D. 950

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. DEDUCTIONS—LIFE INSURANCE COMPANY—"RESERVE FUNDS REQUIRED BY LAW"—MATURED COUPON LIABILITY.

Assets held by a life insurance company against liabilities on matured coupons attached to 20-payment life coupon nonparticipating policies are not "reserve funds required by law" within the meaning of section 245(a)2 of the Revenue Act of 1921. Amounts held against the contingency that the life insurance will mature by reason of the death of the insured, alone constitute the base on which the deduction is to be computed. Reserves against matured coupons are excluded.

2. DECISION REVERSED.

Decision of the Circuit Court of Appeals, Tenth Circuit (71 Fed. (2d), 962), reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Inter-Mountain Life Insurance Co.*

On writ of certiorari to the United States Circuit Court of Appeals for the Tenth circuit.

[April 1, 1935.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the Court.

The question for decision is whether assets held by the company in 1922 against matured and unpaid coupons attached to 20-payment life coupon nonparticipating policies constituted a reserve fund required by law within the meaning of section 245(a)2 of the Revenue Act of 1921.[1]

That section declares that net income means gross income less, among other permissible deductions, an amount equal to 4 per cent of the mean of the "reserve funds required by law" held at the beginning and end of the taxable year. Respondent, a stock company, incorporated under Utah law and commenced business in 1911. The laws of that State require, as a condition of doing life insurance business, that the assets of the company shall equal or exceed all liabilities for losses reported, expenses, taxes and other outstanding

[1] SEC. 245. (a) That in the case of a life insurance company the term "net income" means the gross income less—* * * (2) An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subdivision, of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year * * *." (42 Stat., 261.)

liabilities including the legal reserves. And they prescribe the rate of interest to be assumed and the mortality table to be used for the purpose of making valuations of life insurance policies and determining the reserves required to be maintained.[2]

The record contains a specimen policy for $10,000 applicable to age 35 issued in consideration of 20 annual premiums of $420.90. Attached are 19 coupons maturing serially on anniversary dates of the policy beginning with the first and ending with the nineteenth. Each coupon is a promise that at its maturity the company will pay the amount specified to the owner of the policy.

The policy states: The company will credit insured the face amount of any matured coupon as it becomes due and pay compound interest thereon, thereby creating a fund to the credit of the insured which may be applied to the payment of premiums or at any time withdrawn in cash; and, if not so applied or withdrawn prior to his death, it will pay the coupon values with interest to date of death to the beneficiary in addition to the face amount of the policy. The insured during the first year or within a month after the due date of the second annual premium may elect to convert the coupons as they mature into paid-up life additions to the policy which are only reconvertible into cash surrender value.

At the end of 20 years if all premiums have been paid in cash and if the amount of each matured coupon has been left with the company to accumulate at interest, then upon surrender of the policy and all coupons the insured shall select one of the following options: A guaranteed cash payment of $8,000; a paid-up policy for $14,130, subject to insurability; a guaranteed annual income of $490 for at least 20 years and as many more as the insured shall survive; a paid-up policy for $10,000 and an annual income of $174.40 during life. At the end of 15 years the company will issue a fully paid-up policy of $10,000 upon surrender of the original policy and the first 14 coupons representing values left on deposit at compound interest.

The mean of the company's reserve funds in 1922 set up against liabilities other than matured coupons was $942,751.40. Later herein these are referred to collectively as "insurance reserves." The company claimed and the Commissioner allowed as a deduction 4 per cent of that amount. It carried a separate reserve against matured, unsurrendered and unpaid coupons, the mean of which in that year was $136,523.39. In its return the company deducted 4 per cent of that amount but the Commissioner disallowed the item. The Board of Tax Appeals, in harmony with its prior constructions of the clause in question,[3] held the coupon reserve deductible. It was sustained by the court, following cases in that and other Circuit Courts of Appeals.[4] (71 F. (2d), 962.) That being in conflict with a recent decision of the Court of Claims,[5] this court granted a writ of certiorari. (293 U. S., 553.)

In the reserves required by the laws of Utah and of the other States in which the company issues policies of the described class, there is included an amount sufficient to cover not only all elements of insurance but also the coupon liability. We are not here dealing with reserves in relation to solvency of the company. The thing to be ascertained is the meaning that Congress intended by the language "4 per centum of the mean of the reserve funds required by law." The clause to be construed relates exclusively to life insurance companies. It is intended to define a deduction which they are permitted to make in the calculation of the net amount to be taxed. The rule that ambiguities in statutes imposing taxes are to be resolved in favor of taxpayers does not

[2] Revised Statutes of Utah, 1933, title 43, chapter 3, section 4: "No stock company shall do any insurance business in this State before its capital is fully paid up. Said capital must be unimpaired, that is, the assets of such company must equal or exceed all liabilities for losses reported, expenses, taxes and other outstanding liabilities, including the legal reserves as provided in sections 43–3–12 * * *." Section 12: "For the purpose of making valuations of life insurance policies and of determining the reserves required to be maintained therefor under the provisions of this title the rate of interest assumed shall be 3½ per cent per annum, and the rate of mortality shall be established by the table known as the 'American Experience Table of Mortality' for policies issued after January 1, 1910, * * *."

[3] *Standard Life Insurance Co. of America* (13 B. T. A., 13); *Reserve Loan Life Insurance Co.* (18 B. T. A., 359); *Farmers Life Insurance Co.* (27 B. T. A., 423); *Missouri State Life Insurance Co.* (29 B. T. A., 401); *Atlas Life Insurance Co.* (29 B. T. A., 750).

[4] *Commissioner* v. *Standard Life Insurance Co. of America* (C. C. A. 3) (47 F. (2d), 218); *Commissioner* v. *Western Union Life Insurance Co.* (C. C. A. 9) (61 F. (2d), 207); *Commissioner* v. *Great American Life Insurance Co.* (C. C. A. 10) (70 F. (2d), 133).

[5] *Continental Assurance Co.* v. *United States* (8 F. Supp., 474). Cf. *Minnesota Mutual Life Insurance Co.* v. *United States* (66 C. Cls., 481); *Massachusetts Mutual Life Insurance Co.* v. *United States* (56 F. (2d), 897 [Ct. D. 502, C. B. XI–1, 296]).

apply. Deductions are allowed only when plainly authorized. (*Ilfeld Co.* v. *Hernandez*, 292 U. S., 62, 66 [Ct. D. 819, C. B. XIII–1, 139]; *New Colonial Co.* v. *Helvering*, 292 U. S., 435, 440 [Ct. D. 841, C. B. XIII–1, 194].)

The word "reserve" has many meanings. Accounts creating reserves are set up in almost every line of business and funds evidenced by the book entries are held for many and widely different purposes. As the Act does not permit corporations other than insurance companies to make deductions of the kind here under consideration, "reserve funds" may not reasonably be deemed to include values that do not directly pertain to insurance. In life insurance the reserve means the amount, accumulated by the company out of premium payments, which is attributable to and represents the value of the life insurance elements of the policy contracts. The premiums include enough, over and above what is needed to maintain proper insurance reserves, to provide for the discharge of coupon liability according to the terms of the policy. The coupon values are the equivalent of cash and may be used to pay premiums on the face amount of the policy, to procure additional insurance, to lessen the number of annual premiums or otherwise to obtain insurance protection. The amounts so applied cease to exist as coupon liabilities and automatically become a part of the life insurance reserves. These differ essentially from coupon liability. Life insurance matures only upon the death of the insured and the life reserve is based upon that contingency, whereas liability on the matured coupons depends upon no contingency. It follows that the insurance reserves alone constitute the base on which the deduction is to be computed. Reserves against matured coupons are excluded. (*McCoach* v. *Insurance Co. of North America*, 244 U. S., 585, 589; *United States* v. *Boston Insurance Co.*, 269 U. S., 197, 202 [T. D. 3792, C. B. V–1, 300]; *New York Insurance Co.* v. *Edwards*, 271 U. S. 109 [T. D. 3872, C. B. V–1, 305]; *Duffy* v. *Mutual Benefit Co.*, 272 U. S., 613, 618–619 [T. D. 3959, C. B. VI–1, 278]; *Continental Assurance Co.* v. *United States*, 8 F. Supp., 474.)

Reversed.

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTION 270.—DATE ON WHICH TAX SHALL BE PAID.

ARTICLE 1202: Extension of time for payment of the tax or installment thereof.

REVENUE ACTS OF 1921, 1924, AND 1926.

Rules governing consideration of application for extension of time to pay installment of income tax. (See Mim. 4303, page 133.)

ARTICLE 1206: Compromise of tax cases. XIV–16–7444 Ct. D. 951

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1918, 1921, AND 1924—DECISION OF COURT.

1. ASSESSMENT AND COLLECTION—OFFER IN COMPROMISE—STATUTE OF LIMITATION—DURESS—FRAUD—BURDEN OF PROOF.

Where additional taxes for 1918 were assessed under the Revenue Act of 1921 and partially collected within six years from the date of assessment (in the erroneous belief that section 278(d) of the Revenue Act of 1924 was applicable), and where, after demand for payment of the balance and threat of distraint, the balance was paid and an offer in compromise of interest and penalties was executed

and accepted, the compromise agreement bars recovery even though the tax was paid and the agreement was made after the expiration of the statute of limitation, the taxpayer not having sustained the burden of proving that the offer was submitted under duress or as the result of misrepresentation and fraud on the part of the Government.

2. SUIT—CLAIM FOR REFUND—DURESS—FRAUD—LACHES.

Suit based upon duress and fraud, brought more than two and one-half years after an offer in compromise had been made and accepted, was barred by laches even though in the meantime a refund claim had been filed, where the claim alleged only errors in assessment and collection and made no reference to duress or fraud.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Staten Island Hygeia Ice & Cold Storage Co., plaintiff, v. *United States of America, defendant.*

[August 17, 1934.]

OPINION.

CAMPBELL, D. J.: This case was brought on the law side of this court, under the provisions of section 24, paragraph 20, of the Judicial Code, as amended by the Act of February 24, 1925 (ch. 309, 43 Stat., 972), to recover income and excess profits taxes alleged to have been overpaid by the plaintiff for the year 1918.

Such taxes were the result of an additional assessment levied by the Commissioner of Internal Revenue, and collected in 1926, 1928, and 1929.

On November 16, 1933, an order was made by another judge of this court transferring the case to the equity calendar.

The case was heard before me on April 30, 1934, and the last brief submitted on June 21, 1934.

This case was tried on a stipulation of facts and oral and documentary evidence offered on the trial.

The facts are as follows:

At all the times hereinafter mentioned and at the time of the trial, the plaintiff was a domestic corporation, organized and existing under the laws of the State of New York, with its principal place of business at No. 23 Gordon Street, Stapleton, Staten Island, Borough of Richmond, City and State of New York, and Eastern judicial District of New York, and at such time was engaged in the manufacture, sale and distribution of ice.

On June 16, 1919, plaintiff filed with the collector of internal revenue, for the first collection district of New York, its corporation income and profits tax return for the calendar year 1918, which return showed an income of $8,278.84, and an income and profits tax of $765.45.

The sum of $480 was paid on account of said tax on March 20, 1919, and the balance of $285.45 was paid on June 16, 1919.

During the year 1919, plaintiff pursuant to Chapter IV of the Laws of 1918, as amended by Chapter 84 of the Laws of 1918, of the State of New York, paid to Benjamin B. Odell, ice comptroller of the State of New York, the sum of $4,336.75. Plaintiff contended that this sum was ordinary and necessary in the operation of its business of manufacture of artificial ice, and deducted it from the income reported in the return filed by plaintiff on June 16, 1919.

Plaintiff during the year 1918 expended the sum of $4,622.27, which it contends was for certain repairs and replacements to its plant. It contends that no part of that sum was taken as a deduction when reporting income for the year 1918, in the return filed June 16, 1919.

Plaintiff during the year 1918 paid $3,720 dividends on its capital stock.

It contends that no part of the sum paid as dividend was taken as a deduction by plaintiff in its return filed June 16, 1919.

In 1924, a review and audit of plaintiff's said return for 1918 was had, and the Commissioner of Internal Revenue determined that the plaintiff was liable for additional income and profits taxes for that year in the sum of $5,303.83, and notice of this determination by the Commissioner was sent to plaintiff under date of January 3, 1924.

Plaintiff contends that the additional tax was arrived at by disallowing as a deduction the sum of $4,336.75 paid to the ice comptroller, and by further

increasing income by $4,622.27 replacement costs, and $3,720 dividends, on the ground that such replacement costs and dividends had been deducted from income when they were not proper deductions.

The total additions to income were $10,214.08.

On May 13, 1924, the Commissioner of Internal Revenue assessed against plaintiff an additional tax for the year 1918, in the sum of $5,303.83, as detailed in his letter of January 3, 1924.

Under date of June 4, 1924, plaintiff communicated with the Commissioner of Internal Revenue, protesting against the assessment, pointing out that the charges incurred for replacements and dividends had never been deducted, or the result would have been a loss, and that the payment to the ice comptroller represented a proper deduction.

At the time of the 1918 assessment, viz, May 13, 1924, the Revenue Act of 1921 was in force.

On January 25, 1924, plaintiff filed an income and profits tax waiver for the years 1917 and 1918.

No part of the additional tax so assessed was paid on or before January 25, 1925.

During the year 1926, five payments, totaling $1,000, were made by plaintiff on account of this tax assessment, such payments being based on an arrangement entered into between plaintiff and two Government representatives, Abe Doischen and Mr. Johnson, deputy collectors of internal revenue, who had demanded payment of that tax under threat that if such payment were not made, the plant would be closed up.

Under date of May 27, 1926, plaintiff communicated with the Commissioner of Internal Revenue requesting a reexamination of the books, and indicating that the additional tax was erroneous, since plaintiff had not been allowed all it was supposed to be allowed.

In July, 1927, an officer of the plaintiff read in the newspapers about the statute of limitations, and under date of July 28, 1927, inquired from the collector of internal revenue whether the tax collection in question was barred.

Under date of February 4, 1928, plaintiff communicated with the Commissioner of Internal Revenue, to the effect that it had been requested to sign waivers for the years 1918 and 1919; that it had refused to sign such waivers, on the ground that the Government claim was unjust, and that it had requested a correct audit by the Government office and had been unable to get it, and requested that the Commissioner do everything he could to help plaintiff out.

Under date of February 18, 1928, the collector of internal revenue wrote the plaintiff stating: "The tax question had been gone into very carefully and that plaintiff is advised that all of the taxes are legally due; that this statement is made lest plaintiff has a misapprehension as to one or two older items."

Under date of February 28, 1928, plaintiff wrote to the Treasury Department calling attention to the 1918 and 1919 tax assessment, and to payments previously made, and insisting that only the expenses for conducting the business were deducted, and requesting help by having an auditor sent to plaintiff's plant to go over the matter thoroughly and to make a correct return. Thereafter, the Government representative, Abe Doischen, a deputy collector of internal revenue, came to the office of plaintiff and stated, that they would not accept any more installments but that the payment had to be made in full; that unless such payment is made, the plant would be closed.

Throughout the entire period under review, plaintiff employed no one, either attorney or accountant, who was familiar with tax laws, and the president of the plaintiff had no experience or special knowledge, or anything similar, in connection with the tax law, other than the regular routine of business man's knowledge of the tax laws.

Plaintiff relied upon the statements made in the said letter of February 18, 1928, as well as on the explanations furnished by the Government representative, Abe Doischen.

After September, 1926, and until March 28, 1928, no payments were made by plaintiff on account of the alleged 1918 tax liability, and on March 28, 1928, some $4,000 with interest thereon was unpaid.

On March 28, 1928, the plaintiff paid the Government $5,000, which was allocated $4,303.83 to the balance of the tax unpaid, and $696.17 toward interest, at the rate of 12 per cent per annum from date of assessment.

Further payments of interest were made on August 14, 1928, and January 18, 1929, so that the total interest paid by plaintiff was $1,979.60, representing

interest at the rate of 12 per cent per annum on the additional tax of $5,303.83.

During 1929, the Government representative, a deputy collector of internal revenue, came to plaintiff for additional payments. The president of the plaintiff had believed that payments had been made in full, but was informed that plaintiff still owed some interest or penalty.

The Government representative and the president of the plaintiff had quite an argument, the president of the plaintiff contending that it did not owe the money, and the Government representative contending that it did, and the Government representative stated, "If you give me $25, that will straighten out the whole business." He also stated, "Sign that paper and that will clear you." The president of the plaintiff signed the paper but did not read it.

The president of the plaintiff was told that they owed $600 or six hundred and odd dollars, and if he would pay $25, they would compromise. He then paid the $25 and signed the paper, with the idea that doing that, they were getting rid of the whole thing.

The president of the plaintiff consulted no lawyer, accountant, or tax expert, but relied on the contents of the collector's letter of February 18, 1928.

The paper which was called an offer of compromise was signed by Chas. Remert, as president of plaintiff, on September 11, 1929.

The said offer was accepted October 18, 1929.

The Revenue Act of 1928 became a law on May 29, 1928, and had been in force for over a year and one-half at the time.

Under date of April 28, 1930, a claim for refund was filed by plaintiff, alleging, among other things, that the tax was barred when collected, and that arbitrary adjustments and additions to income were made.

This claim for refund was rejected on August 12, 1931.

This action was commenced on June 7, 1932.

The plaintiff attempts in this case to raise an issue on the merits of the additional assessment.

This it seems to me requires no extended consideration, for the reason that if the agreement of compromise is sustained, there can be no recovery, and if the agreement of compromise be vacated the decree must be for plaintiff.

The questions presented therefore are:

1. Does the evidence in this action establish that the plaintiff submitted the offer in compromise under duress, or as a result of misrepresentation and fraud on the part of the defendant?

2. Is this action barred by laches?

This court has jurisdiction of this action under the provisions of section 24 of the Judicial Code as amended by the Act of February 24, 1925 (ch. 309, 43 Stat., 972).

The alleged compromise agreement was made under the provisions of section 3229 of the Revised Statutes (Title 26, section 158, U. S. C.), which provides as follows: (Statute omitted.)

The Revenue Act of 1921, section 250(d), provides as follows: (Statute omitted.)

The Revenue Act of 1924, section 277(a)2, provides as follows: (Statute omitted.)

The Revenue Act of 1924, section 278(d), provides as follows: (Statute omitted.)

The Revenue Act of 1924, section 278(e), provides as follows: (Statute omitted.)

The Revenue Act of 1928, sections 506 (a), (b), 606(a), 606(b), and 607, provides as follows: (Statute omitted.)

Section 278(b) of the Revenue Act of 1926 is further amended by adding, at the end thereof, a new subdivision to read as follows: (f) (Statute omitted.)

Regulations 65, promulgated under the Revenue Act of 1924, reads as follows:

"ART. 1272. *Period of limitation upon collection of tax.*—" (Article omitted.)

The Acts referred to in such regulations as the Acts enumerated were the Revenue Act of 1924, and all prior Acts, and reference should also be had to article 1271 of said regulations.

Under the facts as found and the statutes cited, supra, it seems to me that but for the fact that offer in compromise has been accepted, in lieu of the unpaid interest and penalty, they would be refundable.

At the times the payments were made the collectors of internal revenue were working, under the provisions of the regulations of the Treasury Depart-

ment, interpreting section 278(d) of the Revenue Act of 1924, as giving the Government the right to collect the tax within six years from the date of the assessment, and it was not until the decision of the Supreme Court in *Russell* v. *United States* (278 U. S., 181 [T. D. 4260, C. B. VIII–1, 206]), on January 2, 1929, that it was finally determined that such construction was erroneous.

In *Russell* v. *United States*, supra, it was held that the provisions of section 278(d) were not retroactive and therefore could not apply to assessments made prior to June 2, 1924, on which date the Revenue Act of 1924 was enacted.

The assessments here in question were made prior to that date, accordingly the provisions of section 250(d) of the Revenue Act of 1921 were applicable. Under the provisions of that section, the periods both for assessment and collection expired five years from the date of filing of the return, or such period as extended by waivers, therefore the period within which the tax should have been collected in this case expired January 25, 1925.

This brings us to a consideration of the effect of the offer in compromise.

There can be no question but that all collections of the tax, interest, or penalty, made prior to the payment of the $25 on the offer in compromise, were made under the construction then placed by the Government on the Revenue Act of 1924, and the most that can be said as to that construction is that it was an error of law.

There is no evidence whatever to show that the representatives of the Government, with whom the president of the plaintiff discussed the question orally, and to whom he gave the offer in compromise, knew that the Government had no right to collect or retain the amounts paid by the plaintiff or its taxes for 1918, therefore on their part it was simply an error of law.

There is no evidence to show that the collector of internal revenue, when he wrote the letter to plaintiff, under date of February 18, 1928, knew that the tax against plaintiff for the year 1918 was not collectible but should be refunded. On the contrary, it is evident that the statements contained in that letter were based on Regulations 65, and the decision of the Circuit Court of Appeals of the Fifth Circuit, in *United States* v. *Russell* (22 Fed. (2d), 249 [T. D. 4107, C. B. VI–2, 133]), and that he was acting under the honest belief, though erroneous in law, that the Government had six years from the date of assessment to collect the tax. There is no evidence that the officer approving the offer in compromise made any representations or did anything other than to approve what on its face appeared to be a voluntary offer in compromise, and I can see no fraud in that.

I am unable to follow plaintiff's argument, that it is entitled to be relieved from the effects of the compromise agreement by reason of the defendant's misrepresentation of a material fact, which induced the making of such compromise agreement. (*Bloomquist* v. *Farson*, 222 N. Y., 375, 380; *Knight* v. *Kitchin*, 237 App. Div., 506, 510; *Wood* v. *Dudley*, 188 App. Div., 136; *Kramer* v. *Bjerrum*, 19 App. Div., 332; Williston on Contracts, section 1490, page 2651, section 1494, page 2657, section 1495, pages 2659 and 2660, section 1500, page 2668; *Cooke* v. *Nathan*, 16 Barbour, 342; *Berry* v. *American Central Insurance Co.*, 132 N. Y., 49; *Haviland* v. *Willets*, 141 N. Y., 35; *Green* v. *Smith*, 160 N. Y., 533; *Hudson* v. *Glens Falls Insurance Co.*, 218 N. Y., 133; 2 Pomeroy's E. Juris. (2d ed.), section 847), cited by plaintiff are not in point.

No misrepresentation of fact was made, nor did any representative of the Government, the defendant, knowingly misrepresent the law. At most they are statements of opinions on matters of law which were erroneous, and they did not constitute fraud, nor are they grounds for estoppel. (*Mutual Life Insurance Co.* v. *Phinney*, 178 U. S., 327, 342–343; *Coddington* v. *Railroad Co.*, 103 U. S., 409, 410; *Cleveland* v. *Richardson*, 132 U. S., 318, 319.)

The fact that the taxpayer paid the principal amount of the tax, and part of the penalties and interest and then submitted an offer in compromise of the remainder of the penalties and interest claimed by the Government, which was duly accepted by the Commissioner of Internal Revenue, even though such payments had been made after the expiration of the statute of limitations, does not give the taxpayer the right to recover. (*Russell* v. *United States*, 278 U. S., 181; *Trumbull Steel Co.* v. *United States*, 1 Fed. Supp., 762 [Ct. D. 656, C. B. XII–1, 152]; *Hord* v. *United States*, 59 Fed. (2d), 125 [Ct. D. 582, C. B. XI–2, 144].)

The fact that the taxpayer did not agree with the Commissioner's determination, and made repeated protests against the assessment, furnishes no ground for setting aside the compromise in this case.

The determination of the Commissioner was made after examination of the books and returns of the plaintiff and is binding. The plaintiff under the statutes had its remedies; it could have filed a claim in abatement, supported by a bond, and had the assessment reviewed by the United States Board of Tax Appeals, or it could have paid the tax and obtained judicial review.

It did not, however, avail itself of either of these remedies, but paid the principal amount of the assessment and part of the penalties and interest, and compromised the balance of the penalties and interest, concluding the entire matter.

The offer in compromise specifically stated that it was voluntarily made, and waived any and all claims to refunds or overpayments, and the benefit of any statute of limitation.

The president of the plaintiff who signed the offer in compromise testified that he did not read it at the time he signed it, but that does not change the situation, as he was afforded full opportunity to read the paper if he desired so to do, and if he failed to read it, equity should furnish no relief for his lack of diligence.

Undoubtedly he was not deceived as to the contents of the paper, nor was he induced by any false representation as to its contents to sign the same, on the contrary his testimony as to his understanding of the contents of the paper was that the acceptance of the offer would finally conclude the matter of plaintiff's tax liability for the year 1918, and that is exactly what was accomplished by the same, and the compromise settlement is not reviewable. (*Luchs* v. *United States*, 6 Fed. Supp., 222.)

There was no relation of trust or confidence between the parties, and plaintiff had the same opportunity to acquire knowledge as to the proper construction of the law as the representatives of the defendant, and the compromise should not be overthrown or vacated. (*Walker* v. *Alamo Foods Co.*, 16 Fed. (2d), 694 [T. D. 3984, C. B. VI–1, 274], cert. denied 274 U. S., 741; *Backus* v. *United States*, 59 Fed. (2d), 242, cert. denied 288 U. S., 610 [Ct. D. 504, C. B. XI–1, 299].)

The burden of proof rested upon the plaintiff to show that the plaintiff was induced to make the offer in compromise by reason of misrepresentation on the part of the defendant, and plaintiff has failed to bear that burden.

The evidence upon which plaintiff relies to show duress is that of the president and two of the employees of plaintiff, who testified that two representatives of the defendant, who it appears were deputy collectors of internal revenue, had called at the office of the plaintiff and had stated that unless the balance of the 1918 account was paid, or an offer in compromise submitted, they would "close up the plant." Whereupon the offer in question was submitted.

This could mean nothing more than that it would be necessary for them to distrain upon the plaintiff's property to effect the collection, which would be exactly what the law would require, if their construction of it was correct.

The fact is, however, that the plaintiff had been treated with the utmost consideration, payments having been made in installments over a period of years.

The amount of the balance claimed was ascertained, and payment of the amount involved would certainly not have ruined the plaintiff, therefore *Snyder* v. *Rosenbaum* (215 U. S., 261), in which a statute of the Territory of Oklahoma was in question, is not in point, nor is *Radich* v. *Hutchins* (95 U. S., 210, 213).

The following cases cited by the plaintiff, *Pictorial Printing Co.* v. *Commissioner of Internal Revenue* (38 Fed. (2d), 563); *Panther Rubber Mfg. Co.* v. *Commissioner of Internal Revenue* (45 Fed. (2d), 314); and *Cline* v. *Collector* (unreported in Federal Reporter, but reported by Commerce Clearing House, 1931, Volume III, page 8540), relate to waiver of the statutory period for collection, not to an offer in compromise stated to be voluntary, and are not in point.

The threat of the deputy collectors to do that which under the law they believed to be their duty, distrain, and which if their construction of the law had been the correct one, would have been their duty, did not constitute duress. (*Shaw & Truesdell* v. *United States*, 1 Fed. Supp., 834 [Ct. D. 625, C. B. XII–1, 289].)

Plaintiff in the offer in compromise stated that the offer was tendered voluntarily, in the following language: "The sum $25 is hereby tendered voluntarily with the request that it be accepted as a compromise offer, and that the

release be granted the undersigned from the following liability from the violation of failure specified."

The grounds stated by plaintiff in the offer in compromise, for acceptance of the offer, "Financial embarrassment," do not constitute duress. (*Shaw & Truesdell* v. *United States*, supra.)

Plaintiff has failed to bear its burden and show duress.

The offer in compromise is not a waiver as contemplated by section 278 of the Internal Revenue Act of 1926, as amended by section 506(b) of the Internal Revenue Act of 1928.

First, because a waiver is not a contract. (*Florsheim Bros. Co.* v. *United States* (280 U. S., 453 [Ct. D. 167, C. B. IX–1, 260].)

Second, because an offer in compromise is a contract.

Third, because section 506(b), supra, by its terms refers to statutory waivers and not to compromises, when it says: "Any agreement which would be within the provisions of subdivision (c) or (d)," which subdivisions provide for statutory waivers.

The offer in compromise having been accepted, there is no necessity of considering what would have been the effect, in case of rejection of the waiver by plaintiff, of any statute of limitation.

Whether the offer in compromise has the effect of a closing agreement need not be considered, but it is well established that a compromise of interest is a compromise of the entire tax liability. (*Big Diamond Mills Co.* v. *United States*, 51 Fed. (2d), 721.)

Even if this court is in error and the offer in compromise was executed under duress, the plaintiff, in order to obtain a recession on the ground of duress, must have acted with due diligence and not stood by for a long period of time before attempting such action. (*Strong* v. *Strong*, 102 N. Y., 69; *Schiffer* v. *Dietz*, 83 N. Y., 300; *Kahn* v. *Matz*, 88 Ark., 363; *Wood* v. *Telephone Co.*, 223 Mo., 537.)

The additional tax in this case was assessed against the plaintiff on May 13, 1924. By arrangement with the collector, plaintiff paid the tax and the better part of the interest, in a series of installments between May 20, 1926, and January 18, 1929, at which time there was claimed to be unpaid a balance of interest in the amount of $260.98, and a penalty for delinquency of $259.19.

On September 11, 1929, plaintiff submitted an offer in compromise of the balance of its tax liability. On October 18, 1929, the Commissioner of Internal Revenue accepted the offer and so notified the plaintiff, by letter of November 5, 1929.

This suit was instituted June 7, 1932, over two and one-half years after the offer in compromise had been accepted.

While it is true that plaintiff had endeavored during that time to have the tax refunded, the plaintiff, on May 1, 1930, about seven months after the acceptance of the offer in compromise, having filed a claim for refund which it based upon alleged errors in assessment and collection of the tax, but did not make any reference to the alleged duress or fraud under which the offer in compromise is now claimed to have been procured.

No claim of fraud or duress was made by plaintiff until the petition was filed in this case, and the attempt to set aside the offer in compromise seems to me to be an afterthought.

The plaintiff has been guilty of laches.

A decree may be entered in favor of the defendant against the plaintiff dismissing the petition on the merits, with costs.

Settle decree on notice.

Submit proposed findings of fact and conclusions of law in accordance with this opinion, for the assistance of the court, as provided by rule 70½ of the equity rules and rule 11 of the equity rules of this court.

SECTION 274.—DEFICIENCY IN TAX.

ARTICLE 1234: Extension of time for payment of a deficiency.

REVENUE ACTS OF 1921, 1924, AND 1926.

Rules governing consideration of application for extension of time to pay deficiency in income tax. (See Mim. 4303, page 133.)

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1271: Period of limitation upon assessment of tax. XIV-11-7373 Ct. D. 935

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1918 AND 1926—DECISION OF COURT.

ASSESSMENT—LIMITATION—COMMENCEMENT OF STATUTORY PERIOD—INDIVIDUAL AND CONSOLIDATED RETURNS.

Where a corporation filed its individual income and excess profits tax return on May 15, 1920, for the calendar year 1919, and, pursuant to a ruling by the Commissioner that it and another company were affiliated within the purview of section 240 of the Revenue Act of 1918, the affiliates filed a consolidated return on October 14, 1921, for the fiscal years ended June 30, 1919, and June 30, 1920, the 5-year period of limitation prescribed by section 277(a)3 of the Revenue Act of 1926 did not begin to run until the date of the filing of the consolidated return, and a deficiency assessment covering the fiscal year ended June 30, 1920, notice of which was mailed on April 22, 1926, was not barred. The individual return did not start the running of the statutory period, since it was not the return required by the statute and regulations, and did not cover the entire period for which the deficiency was asserted.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Krein Chain Co. and The Cleveland Chain & Manufacturing Co., respondents.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN, HICKS, and ALLEN, Circuit Judges.

[June 29, 1934.]

OPINION.

ALLEN, Circuit Judge: The question presented herein is whether or not the statute of limitations bars the assessment of the deficiency determined by the Commissioner against the respondents for the fiscal year ended June 30, 1920. Upon that point the following facts were agreed:

On May 15, 1920, in accordance with previously existing practice, the Cleveland Chain & Manufacturing Co. filed its individual income and excess profits tax return for the calendar year 1919. The total tax upon the net income therein shown was paid in due course.

Subsequently the Commissioner ruled that the Cleveland Chain & Manufacturing Co. and the Krein Chain Co. were affiliated within the purview of section 240 of the Revenue Act of 1918. The respondents accordingly, on October 14, 1921, filed a consolidated return for the fiscal years ended June 30, 1919, and June 30, 1920, as the Krein Chain Co., the parent company, kept its books and filed its return on the basis of a fiscal year ended June 30. Treasury Regulations 45, article 638.

On April 22, 1926, the Commissioner mailed to the respondents respectively notices of deficiency in income and excess profits tax for the fiscal year ended June 30, 1920, amounting to $7,537.59, which deficiency was allocated to the Cleveland Chain & Manufacturing Co. It was conceded by the Commissioner before the Board of Tax Appeals that this deficiency should be reduced by the sum of $4,557.34, being one-half of the tax previously paid by the Cleveland Chain & Manufacturing Co. for the calendar year 1919.

The Board of Tax Appeals decided that the return filed by the Cleveland Chain & Manufacturing Co. on May 15, 1920, for the calendar year 1919, started the running of the statute of limitations as to the deficiency assessment for the fiscal year ended June 30, 1920, and that the 5-year statutory period expired on May 16, 1925. (25 B. T. A., 1450.) The Commissioner contends that the statute did not commence to run until the date of the filing of the consolidated

return, namely, October 14, 1921, and that the deficiency notices sent to the respondents on April 22, 1926, suspended the running of the statute. (Revenue Act of 1926, section 277(a)3 and (b), ch. 27, 44 Stat., 9.)

We agree with the Commissioner upon the ground (1) that the individual return filed May 15, 1920, was not the return required by law, and (2) that such return did not cover the entire period for which this deficiency is asserted. The assessment is barred "within five years after the return was filed." (Revenue Act of 1926, section 277(a)3, ch. 27, 44 Stat., 9.) The express provisions of the statute and the regulations promulgated thereunder and their underlying purpose demonstrate that the individual return was not the return required by law.

Section 240 of the Revenue Act of 1918 (ch. 18, 40 Stat., 1057), in its pertinent portion provides as follows:

"(a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income * * *."

The statute in mandatory terms required affiliated corporations to make a consolidated return of net income. No action of the Commissioner except the promulgation of the regulations with the approval of the Secretary was necessary to place the taxpayer under the duty of filing a consolidated return. The respondents do not question the fact that they were affiliates at that time.

Pursuant to this statute Treasury Regulations 45 were promulgated by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on April 16, 1919, over a year prior to the filing of the individual return. (21 Treasury Decisions Internal Revenue, January to December, 1919.) They outlined in full the steps to be taken by affiliates.[1] Being in full force, expressly authorized by statute, and not in conflict therewith, the regulations had the force and effect of law. (*United States* v. *Smull*, 236 U. S., 405; *United States* v. *Grimaud*, 220 U. S., 506; *United States* v. *Birdsall*, 233 U. S., 223, 235; *Maryland Casualty Co.* v. *United States*, 251 U. S., 342, 349.)

Under these regulations all affiliates were required to give information not disclosed by individual returns. In addition to individual income, the combined net income of the affiliated corporations had to be shown after intercompany transactions had been eliminated. (Treasury Regulatons 45, article 637.) While Form 1120 was used both for returns of ordinary corporations (Treasury Regulations, article 621), and for returns of affiliated corporations (Treasury Regulations, article 632), if the answers to Form 1120 disclosed affiliation, all affiliates were then required to answer a so-called "affiliated corporations' questionnaire," Form 819, which was filed as a part of the return. An additional form, namely, 1122, was also required to be filled out by all other affiliates than the parent corporation.

Under the excess profits credit provision (Treasury Regulations 45, article 791), only one specific exemption was allowed to affiliated corporations making a consolidated return.

The purpose of section 240 of the Revenue Act of 1918 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, Commissioner*, 284 U. S., 136, at 140 [Ct. D. 425, C. B. X–2, 370].) To effect this purpose it was necessary not that an affiliate should make an individual return of individual income, but that together with its affiliates it should make a consolidated return of consolidated net income, that the affiliation should be accurately and definitely stated, and that the entire interlocking relationship should be revealed. A consolidated return was required for so much of the period as the companies were affiliated. (*American Paper Exports, Inc.*, v. *Bowers*, 54 Fed. (2d), 508 (C. C. A. 2); *Fidelity National Bank* v. *Commissioner*, 39 Fed. (2d), 58 (C. C. A. 8); *Trustees for*

[1] ART. 632. Affiliated corporations, as defined in the statute and in article 633, are required to file consolidated returns on Form 1120. The consolidated return shall be filed by the parent or principal reporting corporation in the office of the collector of the district in which it has its principal office. Each of the other affiliated corporations shall file in the office of the collector of its district Form 1122, along with the several schedules indicated thereon. * * * (21 Treasury Decisions Internal Revenue, 306.)

It was not until the enactment of the Revenue Act of 1921 that the affiliate could elect to file consolidated or individual returns. (Revenue Act of 1921, section 240(a), ch. 136, 42 Stat., 227.)

Ohio & Big Sandy Coal Co. v. *Commissioner*, 43 Fed. (2d), 782 (C. C. A. 4).) The ultimate purpose was to eliminate evasion of taxation. (Treasury Regulations 45, articles 631 and 632, 1919 ed.)

The respondents, being affiliates, could not reveal their relationship and comply with section 240, supra, except by filing a consolidated return and giving the other information required by the regulations. Hence the decisions cited by the respondents to the effect that where several corporations in good faith file a consolidated return in which the separate gross income and deductions of each corporation are reported, the filing of such return will start the statute of limitations running with respect to each corporation included therein, have no application here.

The individual return made by the Cleveland Chain & Manufacturing Co. on May 15, 1920, was not the return required by law. (Compare *Commissioner* v. *National Land & Construction Co.*, 70 Fed. (2d), 349 (C. C. A. 6), and *Lucas, Commissioner*, v. *The Pilliod Lumber Co.*, 281 U. S., 245 [Ct. D. 266, C. B. IX–2, 396].) The first return in compliance with the statute was made on October 14, 1921. Hence the deficiency assessment set forth in the notices of April 22, 1926, was not barred by the statute of limitations.

The individual return was also ineffective to start the running of the statute because it did not cover the entire taxable period in controversy here. It covered the calendar year 1919, and no part of the year 1920. The deficiency asserted is for the fiscal year from June 30, 1919, to June 30, 1920.

The respondents urge that *Clinchfield Navigation Co.* v. *United States* (66 Ct. Cl., 589) requires an affirmance of the order of the Board of Tax Appeals. However, that case involved the Revenue Act of 1917 as to returns by affiliates. Also there the individual return was filed for the calendar year 1917, while the consolidated return was filed for the six months period ending June 30 of the same year. Hence this decision is not persuasive.

The rule applicable here is that declared in *National Shirt Shops, Inc.*, v. *United States* (57 Fed. (2d), 925 (Ct. Cl.) [Ct. D. 518, C. B. XI–2, 332]), namely, that a return sufficient to start the running of the statute of limitations must be one that covers the entire taxable period. In accord with this holding are *Paso Robles Mercantile Co.* v. *Commissioner* (33 Fed. (2d), 653 (C. C. A. 9)); *United States* v. *National Tank & Export Co.* (45 Fed. (2d), 1005 (C. C. A. 5) [Ct. D. 319, C. B. X–1, 420]); *Myles Salt Co., Ltd.*, v. *Commissioner* (49 Fed. (2d), 232 (C. C. A. 5)).

The order of the Board of Tax Appeals is reversed and the cause is remanded with instructions to sustain the Commissioner's assessment.

ARTICLE 1272: Period of limitation upon collection of tax. (Also Section 1113, Article 1351.)

XIV–18–7469
Ct. D. 955

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1917, 1918, AND 1926—DECISION OF COURT.

1. CREDIT OF OVERASSESSMENT AGAINST ADDITIONAL TAXES—WAIVERS—VALIDITY—DISSOLVED CORPORATION—ESTOPPEL—ACCEPTANCE OF BENEFIT.

An overassessment of 1918 taxes against a dissolved corporation having been credited upon additional taxes for 1917 and 1919 after the dissolution had occurred, waivers of the statute of limitation upon assessment and collection having been executed on behalf of the corporation, and a check in settlement of the tax account having been accepted by the treasurer of the dissolved corporation and the proceeds turned over to its successor, the statutory trustees of the dissolved corporation are estopped to deny the validity of the transactions.

2. SUIT—CLAIM FOR REFUND—STATUTE OF LIMITATION.

A certificate of overassessment crediting an overpayment of 1918 taxes against additional taxes due for 1917 and 1919 does not give rise to a new cause of action, and under the circumstances stated, suit for recovery of the overpayment is barred by the statute of limitation.

COURT OF CLAIMS OF THE UNITED STATES.

Edmond C. Breene, Samuel S. Bryant, Arthur F. Seep, and George N. Meissner as Statutory Trustees of the Winona Oil Co., a Corporation Dissolved, v. *The United States.*

[November 5, 1934.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

This suit is brought by the plaintiffs as statutory trustees of the Winona Oil Co., a dissolved corporation, to recover $14,612.95 with interest, being a part of an overassessment paid on the taxes of the year 1918 which was credited on additional assessments for the years 1917 and 1919 made April 27, 1926.

The Winona Oil Co., of which the plaintiffs are statutory trustees, was dissolved December 27, 1922, and an affidavit of dissolution filed February 20, 1923. The plaintiffs herein were at the time this suit was commenced the sole surviving members of the board of directors as it existed at the date of dissolution. At the time this company was dissolved the Winona Oil Co. of Delaware became the owner of all of the assets and assumed all of the liabilities of the Winona Oil Co., becoming thereby liable for all of the Federal taxes due from the Winona Oil Co. for the years 1917 to 1919, inclusive, and also entitled to receive the proceeds from any refund thereof which might be paid to the Winona Oil Co. or its lawful trustees. The directors of the two companies were the same persons except that on the board of the Delaware corporation was one Kirol R. Holm, who was secretary of the Missouri company, but not a member of the board of directors. He continued as secretary of the Delaware company and Arthur F. Seep was treasurer of both companies. The same parties were evidently in control of both corporations.

Plaintiffs contend that the assessments of additional taxes upon which the credits were applied, as above stated, were not made until after the period of limitation upon assessment for 1917 and 1919 had expired, and also that the collection of taxes for these years was barred at the time when the Commissioner made the credits. On behalf of the defendant it is conceded that the statutory period for the assessment and collection of these taxes had expired when the credits were made, but it is urged that by virtue of a number of waivers filed the period for assessment and collection thereof was extended, and that in any event plaintiffs' action was not begun in time and is barred by the statute of limitations.

Under the facts shown by the evidence and set out in the findings, we think it is so clear that plaintiffs are not entitled to recover that it is unnecessary to enter into an extended discussion of the law applicable thereto. The fact that the company was dissolved and the plaintiffs became trustees for the purpose of settling its affairs did not prevent the Government from proceeding with the assessment of taxes. (*Wonder Bakeries Co.* v. *United States*, decided by this court June 4, 1934 [Ct. D. 861, C. B. XIII–2, 348].) And if the dissolution did not prevent the plaintiffs from bringing this suit, it also did not prevent proceedings for the settlement of debts and claims against the Winona Oil Co. The plaintiffs must have known of the filing of the waivers, the last of which was executed in behalf of the Winona Oil Co. by its vice president and, under the rules laid down in *Helvering, Commissioner*, v. *The Newport Co.* (291 U. S., 485 [Ct. D. 804, C. B. XIII–1, 318]), was valid. Upon the same principle we think the consent which was filed on behalf of the Winona Oil Co. to the assessments in controversy was also valid. But it is not necessary to rest the decision on these matters.

The Commissioner having received the assent of the Winona Oil Co. to the assessments in controversy proceeded to make them accordingly. Thereafter he sent the Winona Oil Co. a certificate of overassessment for the year 1918 which stated that part of this overassessment had been applied in satisfaction of the deficiency assessments for 1917 and 1919 and transmitted therewith a check payable to the Winona Oil Co. for the balance of the overassessment. This check was indorsed "Winona Oil Co., by Arthur F. Seep, treasurer," and the proceeds turned over to the Winona Oil Co. of Delaware. It is immaterial that the evidence does not show that all the plaintiffs participated

directly in this transaction. If they did not have knowledge of it they are chargeable with knowledge and must be held to have ratified the disposition of the check and the proceedings which led up to its issuance. The company which plaintiffs represented having received the benefits of these transactions, they are now estopped to deny their validity, and as a result thereof the tax account between the defendant and the Winona Oil Co. was settled. (Cf. *R. H. Stearns Co.* v. *United States*, 291 U. S., 54 [Ct. D. 780, C. B. XIII–1, 321].)

This is not all. Several claims for refund were made but plaintiffs base their suit upon two which were filed May 28, 1930. One of these claims was for the refund of $11,476.64 which was applied on the taxes of 1917, as stated above, and the other for the refund of $3,136.31 which had been applied on the taxes of 1919. Both were based on the ground that the statutory period for the assessment and collection of the taxes for the respective years had expired. If we are correct in what has been stated above, the statutory period had been extended by the waivers; but even if the waivers were invalid and there was no estoppel, there is another fatal objection to plaintiffs' case. The petition was not filed until more than four years after the payment of the taxes for 1917 and 1919 upon which a refund is now claimed. Plaintiffs contend that when the Commissioner credited part of the overassessment for 1918 upon the taxes of 1917 and 1919 he thereby created a new cause of action for the recovery of the overpayment on the taxes of 1918, that its refund claims are based upon this cause of action, and the suit having been brought within two years from the time the refund claims were rejected is in time. This theory in somewhat different form was considered in *Rosenstadt & Waller, Inc.*, v. *United States*, decided by this court June 4, 1934, and the majority of the court held that it had no support in the statutes.

Plaintiffs' petition must be dismissed, and it is so ordered.

SECTION 280.—CLAIMS AGAINST TRANSFERRED ASSETS.

ARTICLE 1291: Claims in cases of transferred assets. XIV–9–7344 Ct. D. 928

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. ASSESSMENT—TRANSFEREE—LIABILITY—TAXES AS DEBTS.

A corporation which acquired all the property and assets of another and agreed to pay all the lawful debts of the vendor is a transferee within the meaning of section 280 of the Revenue Act of 1926, and the Federal income tax may be assessed against it without an attempt first to collect from the transferor or its stockholders, even though the tax had not accrued at the time the agreement was made. The agreement to pay the lawful debts of the vendor was broad enough to include the payment of taxes.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (27 B. T. A., 927) reversed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 15, 1934.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Wheeling Mold & Foundry Co., respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before NORTHCOTT and SOPER, Circuit Judges, and PAUL, District Judge.

[June 11, 1934.]

OPINION.

SOPER, Circuit Judge: This case relates to the liability of Wheeling Mold & Foundry Co., a Delaware corporation, to pay the sum of $48,077.86 for income

and excess profits taxes for the year 1919 assessed against a West Virginia corporation of the same name. The Delaware corporation was organized on September 30, 1919, for the purpose of taking over the assets and business of the West Virginia corporation, and the latter was dissolved on May 22, 1920. The transfer was made as of October 1, 1919, in accordance with a written contract of October 7, 1919, under which a sale of the assets was made by the West Virginia corporation, as vendor, to the Delaware corporation, as vendee. The contract recited that the vendor had, for some time past, been carrying on the business of manufacture of steel and iron products at Wheeling, W. Va., and that the Delaware corporation, as vendee, had been organized with a capital of $1,200,000 preferred stock, divided into 12,000 shares, of the par value of $100 each, and 50,000 shares of common stock without par value. Under the agreement, all of the property and assets of the vendor, as a going concern, were sold to the vendee in consideration of (1) all the preferred stock and 10,000 shares of the common stock of the vendee; (2) the sum of $1,600,000, consisting of $1,300,000 in cash and a note of the vendee for $300,000, payable on demand with interest at 6 per cent per annum; and (3) as the balance of the consideration, the vendee agreed to carry out all the pending contracts of the vendor and "to undertake to pay, satisfy and discharge all the lawful debts of the vendor, including the reasonable expense of the vendor incurred and to be incurred in connection with the pending reorganization." The assets transferred were carried on the books of the West Virginia corporation and set up in the books of the Delaware corporation at the gross value of $3,859,693.91. The liabilities shown by the books of the West Virginia corporation were in the sum of $1,009,693.91, and this sum did not include any liability for the Federal income tax for the year 1919 which had not then accrued. The value of the 12,000 shares of preferred stock of the Delaware corporation was $1,021,308, and the value of the 10,000 shares of common stock transferred was $10,000. These assets, together with the cash and the promissory note of the vendee, were immediately distributed to the stockholders of the vendor in liquidation of their shares of stock therein.

On October 7, 1919, when the contract was signed and the transfer was made, the same individuals were president and secretary-treasurer respectively of both corporations, and 3 of the 11 directors of the old corporation became members of a board of 9 directors of the new.

Upon this state of facts, the Board of Tax Appeals held that the Delaware corporation was not liable as a transferee under section 280(a)1 of the Revenue Act of 1926[1] (44 Stat., 9), for the income taxes imposed for the year 1919 upon the West Virginia corporation. This section contemplates the collection from the transferee of a taxpayer's property of the tax imposed upon the taxpayer by any prior income, excess profits or war profits tax Act when the liability of the transferee to pay the same arises, either at law or in equity. The Board held that the vendee in this case was not liable at law for the taxes under the contract to pay the lawful debts of the transferor, because a tax is not a debt in the ordinary sense; and the Board also held that the vendee was not liable in equity because there was no intent to defraud the creditors and the vendor received in the transaction, amongst other things, $1,300,000 in cash, a sum exceeding all of its liabilities, and was therefore not insolvent; and hence its assets did not become a trust fund for the benefit of the creditors, under such cases as *McDonald* v. *Williams* (174 U. S., 397), *Fogg* v. *Blair* (133 U. S., 534). The Commissioner of Internal Revenue brings the case here by a petition to review the conclusions of the Board.

It will have been noticed that the old corporation received for distribution amongst its stockholders all of the preferred stock of the new, valued at the sum of $1,021,308, and also 10,000 out of 50,000 shares of common stock valued at $1 per share. The record does not show whether or not the preferred stock had voting power; but even if the stockholders of the old corporation lost voting control of the enterprise, they owned a very large majority of the bene-

[1] SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, 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 this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

ficial interest therein. Moreover, all of the assets received in consideration of the transfer, including $1,300,000 in cash, and the shares of stock, were immediately distributed amongst them, and it is a fair inference that this action was known to and contemplated by both of the parties to the contract of sale, in view of the substantial similarity of the stock interest in the two companies, and the further fact that the executive officers of both corporations were the same. The result was that the old company was knowingly stripped of all of its assets and left without any means of paying the income taxes to the United States which were bound to accrue. If it was the intention of the parties to distribute the assets of the old corporation amongst its stockholders and to make no provision for the discharge of its obligations to the Government either by the vendee or any other person, it would be difficult to conclude that the transaction was free from fraud, or that the Government was without power to enforce against the transferee and the property in its hands the tax liability of the transferor. The case would differ from those in which, the transfer being free from fraudulent intent and the transferor receiving means to respond to its obligations, it is held that no liability upon the transferee to discharge those obligations can arise. (See *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. (2d), 77.)

However, we do not so interpret the contract between the parties, for we think that the agreement of the vendee to pay the lawful debts of the taxpayer was broad enough to include the assessment against it for income taxes. It is true that a tax is not a debt in the ordinary sense of the word resting upon a contract, express or implied, but a burden imposed by the Government in the exercise of its power to raise money for public purposes. (*Lane County* v. *Oregon*, 7 Wall., 71; *Meriwether* v. *Garrett*, 102 U. S., 472, 513.) Nevertheless, a tax may be considered a debt within the meaning of a statute, if the legislative intent can be plainly inferred. Thus it was held in *Price* v. *United States* (269 U. S., 492 [T. D. 3820, C. B. V–1, 318]) that the word "debts" includes taxes in Revised Statutes section 3466, which provides that whenever any person indebted to the United States is insolvent, or the estate of a deceased debtor is insufficient to pay all the debts due by the deceased, the debts due the United States shall be first satisfied; and it was pointed out that in the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or may be made certain. It was thought that the purpose of the statute should not be defeated by unnecessarily restricting the application of the word within a narrow or technical meaning, as was done under different circumstances in the cases cited.

Similarly, in construing the contract of sale in this case, the word "debts" should be given such a meaning as will carry out the purpose of the parties to transfer to the new corporation all of the assets and all of the liabilities of the old, and to make a distribution to the stockholders that would be free from attack. This could not be done unless provision was made not only for ordinary creditors but for the obligations of the Government later to accrue, and hence it is far more reasonable to suppose that the parties intended to use the word "debts" in the broad, rather than in the narrow and technical sense. We find that a like conclusion was reached in *Trevander* v. *Ruysdael* (299 F., 746, 753), where the court construed a decree and order of judicial sale which provided that at the sale the purchaser should assume all existing debts against the business. It was concluded that the word "debts" was intended to include income taxes. The court said:

"The word 'debt' in its technical meaning as applied to common-law actions, is not synonymous with the word 'tax.' (*Lane County* v. *Oregon*, 74 U. S. (7 Wall.), 71, 19 L. Ed., 101.) But the word 'debt' is not always used with this limited technical meaning. A 'tax' may or may not be a debt under a particular statute, according to the sense in which the word is found to be used. (*United States* v. *Chamberlin*, 219 U. S., 254, 31 Sup. Ct., 155, 55 L. Ed., 204.) The word 'debt' is frequently used in its well-recognized sense as that which is due from one person to another; that which one person is bound to pay another; a thing owing; an obligation; a liability. The character of a tax is well known. It is a charge or burden laid upon persons or property for public purposes; a forced contribution authoritatively imposed. When it is imposed annually—that is, when the law provides for its imposition—it is, before its due date, a liability in futuro, imposed by law, and when finally imposed it becomes a fixed liability, a thing owing, a matured obligation.

"It is apparent from the language used that the parties intended that the purchaser should assume all obligations or liabilities of the business. The

parties knew that the law imposes income taxes. All parties knew that at the time of the sale the income taxes were liabilities in futuro; that they would become, when imposed, a fixed liability, a thing owing to the Government. The purchaser, therefore, by assuming the debts of the business, included income taxes of the business."

The provision in the contract in the pending case was made for the benefit of the Government as well as all other creditors, and the Government has the right to enforce it against the Delaware corporation as a transferee within the meaning of section 280 of the Revenue Act of 1926 without first attempting to collect the tax from the transferor or its stockholders. (*American Equitable Association* v. *Helvering*, 68 F. (2d), 46 [Ct. D. 822, C. B. XIII–1, 336].)

We have not overlooked the suggestion in the opinion of the Board that in the stipulation of facts, the sum of $1,009,693.91 is stated to be the amount of liabilities of the West Virginia corporation which the Delaware corporation assumed; but it is obvious that this statement refers to the amount of liability shown by the books of the West Virginia corporation at the time the transfer of October 7, 1919, took place, and before the income tax had accrued. Reference is also made in the opinion of the Board to a resolution of the West Virginia corporation, passed in April, 1920, wherein its board of directors was directed to convert its property into cash and pay off all debts and obligations, and divide the remainder among the stockholders pro rata after publication of the resolution in a newspaper of general circulation. This resolution was doubtless passed as part of the formal proceedings of dissolution. It did not correctly recite the facts, for at that time, the corporation having already made the distribution to its stockholders, had no assets out of which its obligations could be paid.

The finding and conclusions of the Board of Tax Appeals are reversed.

ARTICLE 1291: Claims in cases of transferred assets. (Also Section 601.)

XIV–12–7386
Ct. D. 936

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

1. ASSESSMENT—LIMITATION—TRANSFEREE—VALIDITY OF WAIVERS—ESTOPPEL.

An assessment made against a transferee corporation within one year from the expiration of the period of limitation against the original company, as extended by waivers executed by the transferee in the name of the original company, is timely, under the provisions of section 280 of the Revenue Act of 1926, despite a decision by the Board of Tax Appeals that collection from the original company was barred and that the waivers had not been authorized by it. The transferee, having represented that it had authority to execute the waivers in behalf of the original company, is estopped to deny that proper authority existed.

2. DECISION OF BOARD OF TAX APPEALS—RES JUDICATA—IDENTITY OF ISSUES.

A decision of the Board of Tax Appeals that waivers executed by a transferee corporation were not authorized by the original corporation, and that consequently collection of tax from the latter corporation was barred by the statute of limitations, is not a binding determination as to the collectibility of the initial and additional taxes from the transferee in equity receivership proceedings, there being no identity of issues in the two cases.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

American Steamship Co., plaintiff, v. *Wickwire Spencer Steel Co., defendant.*

[August 17, 1934.]

OPINION.

PATTERSON, D. J.: The defendant is in equity receivership on creditor's bill. The United States filed a claim for $303,752.19 as additional income tax for

the year 1918, claimed as due from Morgan Spring Co. originally and from the defendant as transferee. The receivers rejected the claim. The matter was referred to a special master to take testimony and report. The special master had made findings of fact and has reported in favor of the United States.

The Morgan Spring Co., a Massachusetts corporation and the original taxpayer, transferred all its assets in June, 1919, to Wickwire Spencer Steel Corporation (then known as Clinton Wright Wire Co.), which agreed to assume and pay all obligations of the Morgan company then outstanding. The Wickwire Spencer Steel Corporation had already acquired the entire capital stock of the Morgan company, and after the transfer of assets the latter was an empty shell, without assets or business. It was not formally dissolved, however, until March 31, 1924. In February, 1925, the defendant, pursuant to a plan of reorganization, took over all the assets and assumed all the liabilities of Wickwire Spencer Steel Corporation, such assets including part of the original Morgan company assets. The Morgan assets thus acquired in succession by the Wickwire Spencer Steel Corporation and by the defendant had a value in excess of the alleged tax deficiency of the Morgan company.

The Morgan company had filed its 1918 tax return on May 20, 1919. The limit of time for additional assessment of tax for 1918, five years, would normally expire on May 20, 1924. On March 18, 1924, the Commissioner made an additional assessment of $44,695.99 against the Morgan company. The Wickwire Spencer Steel Corporation then filed a claim for abatement in behalf of the Morgan company and requested that collection be deferred until the merits of the alleged deficiency should be decided. Collection was deferred. Thereafter three statutory waivers were signed, purporting to extend the Government's time for assessing and collecting the 1918 tax. All of these waivers named the Morgan company as the taxpayer. The first was on May 8, 1924, and was for one year; it was signed "Morgan Spring Company, Wickwire Spencer Corporation, successor, G. V. Pach, Assistant Treasurer." This waiver was not signed by the Commissioner; it was referred to, however, in a letter signed by the Commissioner on December 3, 1924, and sent to the Morgan company. The second waiver was on January 31, 1925, and was an extension to December 31, 1925; it was signed "Morgan Spring Company, Taxpayer, G. V. Pach, Treasurer of Suc. Co." The third was on November 17, 1925, and was an extension to December 31, 1926; it was signed "Wickwire Spencer Steel Company, Successor, G. V. Pach, Treasurer." The second and third waivers were signed by the Commissioner in due course. During this entire period of 1924–1926, the Wickwire Spencer Steel Corporation and later the defendant were negotiating with the Commissioner and protesting against the additional assessment of $44,695.99 and a proposed further deficiency of $228,752.15 for the same year also said to have been due from the Morgan company. A formal deficiency letter on the $228,752.15 was sent by the Commissioner to the Morgan company on February 12, 1926.

It appears that on December 31, 1927, the Commissioner turned his attention to the defendant and made an assessment against it as transferee of the Morgan company. It is this assessment against the defendant that is sought to be enforced in the present claim. The assessment was for $303,752.99, made up of the earlier assessment of $44,695.99 against the Morgan company, the alleged additional deficiency of $228,752.15, and interest on both amounts to December 31, 1927.

Meanwhile there had been instituted a proceeding in the name of the Morgan company before the Board of Tax Appeals, the determination of which is relied on by the receivers as a binding adjudication against the present claim of the United States. The proceeding, though nominally brought by the Morgan company, was directed and controlled by the defendant and later on by its receiver. A petition was filed by the Morgan company on April 26, 1926, to review the alleged deficiency of $228,752.15. The petition set forth, among other grounds of alleged illegality, that the period for assessment and collection of tax for 1918 had expired prior to the deficiency notice, and that no waivers had been signed by the taxpayer. A hearing was held on June 19, 1928, before a member of the Board sitting as a division. The petitioner withdrew all matters assigned as errors except those based on the statute of limitations. At the conclusion the division held orally that the taxpayer had sustained the defense of limitations; that the Commissioner had not established that the three waivers had been executed by authority of the Morgan company; that the waivers were therefore not binding on it; that accordingly there was no deficiency due from

the Morgan company. These findings and conclusions were recorded in the stenographic minutes. The next day the member who heard the case entered in the records a decision whereby it was adjudged "that there is no deficiency for 1918." The United States took no proceedings to have the decision reviewed on appeal.

Prior to the hearing on this petition the 1928 Act had become effective. By that Act certain changes in procedure relative to cases before the Board were adopted. It was provided that the report of a division on a case "shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board" (section 906(b); 26 U. S. C. A., section 1217(b)); and that the decision of a case "shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board" (section 907(a); 26 U. S. C. A., section 1219(a)).

Other facts are set forth in the findings of the special master. Neither the United States nor the receivers offered any proof as to the correct amount of the 1918 tax of the Morgan company.

1. The assessment of the tax is *prima facie* correct, casting on the party resisting the claim the burden of showing that the Commissioner's computation was erroneous. (*United States* v. *Rindskopf*, 105 U. S., 418; *Wickwire* v. *Reinecke*, 275 U. S., 101 [T. D. 4126, C. B. VII–1, 316]; *Brunton* v. *Commissioner*, 42 Fed. (2d), 81 (C. C. A. 9), certiorari denied, 282 U. S., 889; *Burnet* v. *Petroleum Exploration*, 61 Fed. (2d), 273 (C. C. A. 4) [Ct. D. 612, C. B. XI–2, 262], affirmed 288 U. S., 467.) There being no evidence either way as to the actual tax liability of the Morgan company, it must be concluded that the Morgan company failed to pay its proper tax for the year 1918 by the amount here in dispute. The question is whether the deficiency may be collected from the defendant as transferee.

2. The defendant as transferee of the taxpayer's property incurred liability for payment of the deficiency in tax. For one thing, the defendant's predecessor made an express agreement to assume and pay the liabilities of the Morgan company, and the defendant in turn assumed the liabilities of its predecessor. (*Warner Collieries Co.* v. *United States*, 63 Fed. (2d), 34 (C. C. A. 6) [Ct. D. 703, C. B. XII–2, 227].) Independently of express assumption, the defendant succeeded to the entire assets of the Morgan company, and those assets had a value substantially in excess of the tax liability. (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X–1, 264]; *Hatch* v. *Morosco Holding Co.*, 50 Fed. (2d), 138 (C. C. A. 2), certiorari denied 284 U. S., 668; *United States* v. *Garfunkel*, 52 Fed. (2d), 727 (D. C. N. Y.) [Ct. D. 405, C. B. X–2, 384].) The United States therefore had a cause of action against the defendant enforceable by suit in equity or action at law, or it might proceed by summary administrative measures under section 280 of the 1926 Act (26 U. S. C. A., section 1069). (*Phillips* v. *Commissioner*, supra.) The Commissioner adopted the latter course when he made the assessment of December 31, 1927, against the defendant as transferee.

3. The assessment of December 31, 1927, must be deemed a timely one. Under the Act of 1926 (section 280) as well as under subsequent Acts, the period of assessment against a transferee does not expire until one year after expiration of the period of limitation for assessment against the original taxpayer. The return having been filed on May 20, 1919, the time for assessment against the Morgan company would ordinarily have expired May 20, 1924. But a series of waivers of time for assessment of tax was signed by Wickwire Spencer Steel Corporation and by the defendant, both of them acting ostensibly for the Morgan company, and these successive waivers purported to bring the time for assessment against the Morgan company down to December 31, 1926. It is unnecessary here to determine whether these waivers were authorized by the Morgan company or were in any way binding on it. The defendant represented that it had authority to sign them in behalf of that company and is equitably estopped now to maintain the contrary. On this feature *Lucas* v. *Hunt* (45 Fed. (2d), 781) (C. C. A. 5) is directly in point. There the Commissioner made an assessment against Hunt as transferee of the assets of a dissolved corporation which owed the tax. Hunt was one of the liquidators and signed a waiver in the name of the corporation after expiration of his authority to act for the corporation. The court said (page 782):

"If the waiver was valid, then it is rightly conceded by counsel for Hunt that the assessment was not barred; but it is contended on his behalf that,

the time within which he was authorized to act as liquidator having expired, the waiver had no binding force or effect. We are of opinion that Hunt by signing the waiver estopped himself to question its validity, with the result that he was bound to respond to the assessment to the extent of funds in his hand which belonged to the dissolved corporation taxpayer. The circumstances all show that the Commissioner relied on the waiver and is therefore entitled to claim the equitable estoppel asserted by counsel in his behalf."

As between the parties now before the court, therefore, the assessment must be deemed to have been made before the time when assessment and collection from the transferee would have been barred.

The efficacy of the waivers in other respects is plain. It is true that the first one was not signed by the Commissioner. It was, however, referred to in a later writing signed by him, and this is a good equivalent. (*R. H. Stearns Co.* v. *United States*, 291 U. S., 54, 62 [Ct. D. 780, C. B. XIII–1, 321].) In any event, the two subsequent waivers were unexceptional as to signature of the Commissioner and were of themselves sufficient extensions of the time. (See *Stange* v. *United States*, 282 U. S., 270 [Ct. D. 274, C. B. X–1, 414]; *McDonnell* v. *United States*, 288 U. S., 420 [Ct. D. 654, C. B. XII–1, 294].)

4. The receivers say that the decision of the Board of Tax Appeals in the proceeding instituted by the Morgan company is a binding determination against the collectibility of the claim now being tried. This argument must be rejected.

The rule of *res judicata* is that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on the points and matters determined in the former suit. (*Russell* v. *Place*, 94 U. S., 606; *Johnson Co.* v. *Wharton*, 152 U. S., 252; *Lander* v. *Mercantile Bank*,, 186 U. S., 458.)

The Board of Tax Appeals, while not a court (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716, 725 [Ct. D. 80, C. B. VIII–2, 222]), has by statute been endowed with capacity to render decisions final and binding on both Commissioner and taxpayer unless reversed on appeal. (Act of 1926, section 1005; 26 U. S. C. A., section 1228.) Its decisions in matters over which it has jurisdiction are therefore not open to collateral attack, and it can not be doubted that in this sense a decision of the Board is comparable to the judgment of a court. (See *Donald* v. *J. J. White Lumber Co.*, 68 Fed. (2d), 441, 442 (C. C. A. 5).)

It may be assumed, without deciding the point, that the decision in the Morgan company case was a final decision of the Board, despite the fact that it was entered only one day after the report of the division that heard the case. The statutory provisions in effect since the 1928 Act doubtless contemplate that between the report of a division and the final decision of the Board there shall be an interval of 30 days, during which the report of the division shall ripen into the report of the Board unless upset by the Board as a whole; but it may well be that the premature entry of the decision was no more than an irregularity and does not open up the proceeding to collateral attack. (*Fourniquet* v. *Perkins*, 7 How., 160; *Cooper* v. *Reynolds*, 10 Wall., 308; *Gunn* v. *Plant*, 94 U. S., 664; *Throckmorton* v. *Hickman*, 279 Fed., 196, 200 (C. C. A. 3).) The further assumption may be made that the parties to the present proceeding are privies to those in the proceeding before the Board. The parties there were the Commissioner and the Morgan company. The United States is certainly in privity with the Commissioner. (*Tait* v. *Western Maryland Railway Co.*, 289 U. S., 620 [Ct. D. 683, C. B. XII–1, 351].) And it is quite possible that the defendant, transferee and sole stockholder of the Morgan company and liable only by derivation from that company, is in privity with it. (See *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S., 111, 127; *Portland Coal Mining Co.* v. *Stratton's Independence*, 158 Fed., 63 (C. C. A. 8); *City of New York* v. *New York City Railway Co.*, 193 N. Y., 543.)

But the receivers' argument fails because there is no identity of issues in the two cases. The point decided in the case before the Board was that the waivers had not been authorized by the Morgan company, and that consequently the collection of the tax from that company was barred by limitations. The decision of "no deficiency" means nothing more. There was no decision as to the initial tax liability; that issue was withdrawn from the case by the Morgan company and faded out of the picture altogether. The Supreme Court said of a similar decision by the Board: "The effective scope of the decision rendered is no broader than the issue, opinion and findings."

(*Gulf States Steel Co.* v. *United States*, 287 U. S., 32, 44 [Ct. D. 608, C. B. XI–2, 314].) In the present case the United States contends as to the waivers, first, that the Morgan company did in fact authorize the defendant to execute them in its behalf, and second, that in any event the defendant held out to the United States that it had authority to execute them for the Morgan company and therefore is estopped by its own representation to deny that proper authority existed. On the first contention the decision of the Board in the former case would seem to be a binding adjudication against the United States. But that decision manifestly does not touch the second contention and can not be deemed an adjudication of it. And the second contention, as a ground of holding that collection from the defendant is not barred, is fully as effective as the first. (*Lucas* v. *Hunt*, supra.)

It may be granted that the Board's decision is a conclusive determination that collection of the $228,752.15 deficiency from the transferor was barred. It does not follow that collection from the transferee is barred. (*City National Bank* v. *Commissioner*, 55 Fed. (2d), 1073 (C. C. A. 5) [Ct. D. 548, C. B. XI–2, 356], certiorari denied 286 U. S., 561.) There nothing was done by the Government to collect the tax from the transferor until after expiration of the 5-year statute of limitations. A deficiency notice was sent to the transferee, however, within the extra year permitted by section 280 as to transferees. It was held that the tax could be collected from the transferee.

5. The receivers call attention to section 906(e) of the 1926 Act (26 U. S C. A., section 1217(e)) and urge that by force of that statute all liability for the tax on the part of anyone became extinguished when the Board held that collection against the original taxpayer was barred. Section 906(e), as amended by the 1928 Act, reads:

"If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

A similar argument was held untenable in *Gulf States Steel Co.* v. *United States*, supra. There the United States sued on a bond by the taxpayer and a surety to pay so much of the tax as should not be "abated." Thereafter the taxpayer, on rejection of the claim for abatement, had taken the case to the Board of Tax Appeals and had obtained a decision that collection of the tax was barred by limitations and that consequently there was no deficiency. It was argued that this decision was transformed, by force of section 906(e), into a decision that there never had been a deficiency in tax. The Supreme Court affirmed a judgment in favor of the United States on the bond. It was held that such a literal construction of the statute would lead to consequences "manifestly unjust, if not absurd" (page 45); that no such intention would be imputed to Congress; that the statute would be given only its normal application in preventing distraint by the Commissioner on a tax the collection of which by suit was barred by limitations.

It may further be noted that section 1106 of the 1926 Act (26 U. S. C. A., section 1249) to the effect that the bar of limitations should not only bar the remedy but also extinguish the tax liability, was repealed in the 1928 Act, to take effect retroactively. In view of that repeal, it is scarcely conceivable that Congress would have allowed the section under discussion to remain in force if it had the effect now attributed to it by the receivers, of converting a decision that collection of tax was barred by lapse of time into a decision that there never had been any liability for the tax.

It follows that the claim of the United States against the defendant is a valid one. The findings of fact of the special master will be confirmed, except those relative to the actual authority of the Wickwire Spencer Steel Corporation and the defendant to act as agents of the Morgan Spring Co. in signing the waivers; as to the latter no findings will be made. The report of the special master will stand, except as to the conclusion that the decision entered as that of the Board of Tax Appeals is not a final adjudication by the Board, and as to the conclusion that the Wickwire Spencer Steel Corporation and the defendant had actual authority from Morgan Spring Co. to execute waivers in its behalf. With these two conclusions omitted, the report will be confirmed. The priority of the claim is not now in issue and will not be determined. Settle order on two days' notice.

SECTION 284.—CREDITS AND REFUNDS.

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid.

REVENUE ACT OF 1918.

Estate tax paid where partnership profits treated as part of the estate and deficiency in income taxes paid on same profits. (See Ct. D. 969, page 310.)

TITLE X.—BOARD OF TAX APPEALS.

SECTIONS 1003 AND 1004.—JURISDICTION.

SECTIONS 1003 AND 1004.

REVENUE ACT OF 1926.

Request for rehearing in order to permit taxpayer to make charges and payments for intercompany transactions so as to reduce taxation of the affiliation. (See Ct. D. 921, page 257.)

SECTIONS 1003 AND 1004. XIV-19-7482
Ct. D. 961

INCOME AND PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. BOARD OF TAX APPEALS—FINDINGS OF FACT—EVIDENCE.

Where the Board of Tax Appeals had held that the taxpayer corporation realized a taxable profit from the transfer of its assets to a newly organized corporation in exchange for the latter corporation's stock, but did not support its opinion by findings as to two facts prerequisite to the determination of profit under section 202 (a) and (b) of the Revenue Act of 1918, namely, the cost to the taxpayer of the property transferred and the value of the stock it received in exchange, and upon appeal to the Circuit Court of Appeals only a portion of the evidence was contained in the transcript and there was no certificate by the Board as to the completeness of the transcript, the opinion of the Board was properly reversed as not sustained by the findings. It is not the duty of the court to resort to the Board's opinion to eke out the findings of fact, nor to examine the evidence and make findings additional to those of the Board.

2. DECISION REVERSED.

Decision of the Board of Tax Appeals (6 B. T. A., 1092) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Kendrick Coal & Dock Co., appellant, v. *Commissioner of Internal Revenue, appellee.*

On petition to review decision of United States Board of Tax Appeals.

Before BOOTH, Circuit Judge, and POLLOCK and DEWEY, District Judges.

[November 7, 1928.]

OPINION.

BOOTH, Circuit Judge, delivered the opinion of the court.

This is a proceeding seeking a review of an order of the Board of Tax Appeals which redetermined a deficiency in the income tax of the Kendrick

Coal & Dock Co. for the year 1920. The proceeding in its initial stages was called a petition for review, later on appeal. The order of the Board of Tax Appeals fixed the deficiency of the tax at $18,804.01, the same amount as found by the Commissioner of Internal Revenue.

The record discloses that the matter was heard by the Board of Tax Appeals upon the pleadings of the respective parties and evidence introduced. Assignments of error and a portion of the evidence are contained in the transcript. There is, however, no certificate by the Board of Tax Appeals as to the completeness of the transcript, as provided by Rule II of this court relating to review of decisions of the Board of Tax Appeals.

The findings of fact of the Board of Tax Appeals are as follows:

"FINDINGS OF FACT.

"The petitioner is a Minnesota corporation engaged in the wholesale coal business. It was organized June 24, 1916, with a capital stock of $50,000, divided into 500 shares of a par value of $100 each. Its entire capital stock was issued, with the exception of qualifying shares of directors, to Edward S. Kendrick, Jr. Kendrick had been engaged in the coal business for a number of years prior to the organization of the petitioner, first in Philadelphia, then in Cincinnati, and then in Minneapolis. He came to Minneapolis in 1911 and became associated with the Berwind Fuel Co. as its sales manager of the Northwestern territory adjacent to Minneapolis. For about five years subsequent and until May, 1916, Kendrick remained in this position. During this period he became acquainted with industries in the Northwest which were large purchasers of coal, and also with various coal companies which sold coal in that territory. In May, 1916, he severed his connection with the Berwind Fuel Co., and went into the coal jobbing business individually under the name of the Kendrick Coal & Dock Co.

"Kendrick continued his individual business for a period of about two months when the petitioner was incorporated. During this period he secured numerous orders for the sale of coal including both orders for single shipments and orders for shipments extending over a period of several months. None of the orders which were on hand and unfilled in June, 1916, provided for shipments extending beyond one year. On the organization of the petitioner, Kendrick turned over his individual coal business, including all of the unfilled orders on hand, for the entire capital stock of the petitioner.

"The books of account as of December 31, 1917, show assets and liabilities as follows:

ASSETS.		LIABILITIES.	
Cash	$22,504.45	Accounts payable	$48,163.82
Accounts receivable	77,582.75	Accrued expenses	5,083.78
Liberty bonds	12,000.00	Surplus	60,865.35
Corporate stocks	2,025.75		
Total	114,112.95	Total	114,112.95

"In 1918 Kendrick was mustered into the military service of the United States and was not mustered out until April, 1919. He returned to Minneapolis and continued the conduct of his coal business.

"Owing to keen competition, Kendrick saw that if his business was to become a large business, it would be necessary for the corporation to acquire a dock at Duluth and for it to make arrangements whereby it could get coal by water transportation from the Eastern coal fields. Prior to June, 1920, Kendrick had been negotiating with certain Eastern coal interests for the enlargement of his business. These negotiations were carried on with A. W. Thompson of the Wilson Transit Co. and F. E. Taplin of the Cleveland & Western Coal Co. In May, 1920, at a special meeting of the stockholders of the petitioner, its officers were authorized to enter into an agreement with the above-named individuals under the terms of which the petitioner was to agree in consideration of $50,000 of the stock of the Inland Coal & Dock Co. (corporation to be formed) to convey to Thompson and Taplin acting for and on behalf of such corporation 'all the office furniture and fixtures, office supplies and equipment, also the good will and all of the benefits to be derived in the way of profits from the contracts which this corporation has for the purchase or sale of coal, and the contracts themselves, profits in which are estimated at $40,000 by the officers

of the company, and it being understood that the purchaser is to assume all liabilities or losses which may arise in connection with said coal contracts.' Pursuant to such authorization, Kendrick proceeded to Cleveland, Ohio, for the purpose of entering into the agreement referred to. Objection was raised by the attorney for the Inland Coal & Dock Co. to the issuance of any of its capital stock in payment for the above referred to assets of the petitioner. It was then agreed that the transfer should be made for $50,000 in cash, and that the petitioner should thereupon subscribe for 500 shares without nominal or par value of the common stock of the Inland Coal & Dock Co. to be paid for in cash. This change in the plan of the transaction was agreed to by Kendrick and the petitioner and a resolution in accordance therewith was duly passed by the directors of the petitioner.

"The following is the agreement entered into between Taplin and Thompson and the petitioner by E. S. Kendrick as president under date of June 1, 1920:

"Memorandum of agreement made and entered into this 1st day of June, 1920, by and between A. W. Thompson and F. E. Taplin, acting for and on behalf of a corporation to be formed to take over and operate the Island Creek Coal Co.'s dock at Duluth, Minn., parties of the first part, and Kendrick Coal & Dock Co., a corporation of Minneapolis, Minn., party of the second part.

"Witnesseth:

"Whereas, a corporation is to be formed under the laws of the State of Ohio to take over and operate the Island Creek Coal Co.'s dock at Duluth, Minn.; and

"Whereas, it is desirable that said dock company so to be formed shall have the benefits to be derived from the going organization of second party and the good will connected therewith, and also from certain contracts now held by the second party, and shall further secure the benefit of the services of E. S. Kendrick, now president of the second party.

"Now, therefore, it is agreed as follows:

"(1) Parties of the first part agree to purchase, and party of the second part agrees to sell, all of second party's office furniture and fixtures, supplies and equipment, also the good will of said company, and all of the benefits to be derived in the way of profits from the contracts which second party has for the purchase or sale of coal, it being understood that said corporation so to be formed shall assume all liabilities or losses to arise in connection with said coal contracts.

"(2) In full payment for said property, party of the second part agrees to accept, and parties of the first part agree to pay, the sum of fifty thousand dollars ($50,000) in cash.

"(3) It is understood between the parties that while said coal contracts are not to be assigned or transferred to the new dock company, nevertheless, from and after the date hereof, all operations of second party in connection with said contracts are for the sole use and benefits or loss, as the case may be of said new dock company.

"(4) Party of the second part agrees upon request to execute any and all papers necessary or proper to effect the transfer of the property hereby purchased by parties of the first part, it being understood that said transfer shall be made to the corporation before mentioned when duly organized. All physical assets covered by this agreement of purchase and sale shall be transferred free of liens or encumbrances of any sort.

"(5) It is understood that it is part of this agreement, supported by the consideration herein named, that the corporation to be formed shall employ the said E. S. Kendrick as vice president in charge of sales and management of the Duluth Coal Dock and of the Northwestern business of the corporation, at a salary of fifteen thousand dollars ($15,000) a year and expenses, said employment to continue so long as said E. S. Kendrick shall retain his stock ownership in said corporation.

* * * * * * *

"A bill of sale or assignment was then executed by the petitioner, in which it transferred to the Inland Coal & Dock Co. its office furniture and fixtures, good will and all the profits to be derived from certain described contracts of the petitioner for the sale of coal. The contracts were 35 in number, had all been acquired by the petitioner subsequent to January 1, 1920, and were for the sale of 174,850 tons of coal. None of the orders or contract on hand at that time were included in the orders or contracts transferred by Kendrick to the petitioner upon its organization in 1916. None of the accounts receivable or cash in the treasury of the petitioner were transferred to the Inland Coal

& Dock Co. The surplus of the petitioner at the date of transfer was between $60,000 and $70,000.

"A check of the Inland Coal & Dock Co. for $50,000 was on June 12, 1920, delivered to the petitioner as the consideration for the transfer. On the same date the petitioner issued its check for $50,000 to the Cleveland & Western Coal Co. which had advanced the original subscription to the stock of the Inland Coal & Dock Co. in payment for 500 shares of the common stock of the last-mentioned company. The checks were passed simultaneously.

"The Inland Coal & Dock Co. was organized on June 1, 1920, with an authorized capital stock of 4,000 shares of preferred stock of a par value of $100 per share, and 6,000 shares of common stock of no par value. All of the common stock was subscribed for at $100 per share. The petitioner acquired 500 shares in the manner above described. It also purchased 700 shares giving its note for $70,000 in payment therefor, $60,000 of the principal being paid as its accounts receivable were collected. E. S. Kendrick, Jr., individually subscribed for 600 shares of the stock at $100 per share. The balance of the common stock was subscribed for by the Cleveland & Western Coal Co. and the Wilson Transit Co. The company immediately acquired the dock of the Island Creek Coal Co. at Duluth. The certificates of the common stock issued provided that the transfer of them was subject to the provisions of the 'code of regulations' of the company and that the shares of stock were 'accepted and held subject to all provisions of the code of regulations and to the designations, preferences and voting powers, or restrictions or qualifications thereof, of the preferred stock, which are set forth on the reverse side' of each certificate. None of the common stock of the Inland Coal & Dock Co. has ever been sold and no dividend has ever been paid by the company.

"The certificate for 500 shares of common stock acquired by the petitioner with its check for $50,000 bears date of June 12, 1920, and was made out and is in the name of 'E. S. Kendrick.' This was retained by the petitioner up to December 31, 1920. At some time prior thereto a special meeting of the stockholders of the petitioner was called, a 100 per cent stock dividend was declared (the authorized capital stock having been increased to $200,000) and 3 shares of stock were issued to E. S. Kendrick for $300 in cash. The stockholders then voted to accept the offer of E. S. Kendrick to exchange 500 shares of the capital stock of the petitioner owned by him for the 500 shares of common capital stock of the Inland Coal & Dock Co. owned by it. The exchange was made accordingly. The petitioner returned no income for 1920 from the transaction above described. The Commissioner added $50,000 to the gross and net incomes for 1920, as the profit therefrom. The deficiencies arise from such adjustments of the petitioner's return."

In reviewing the decisions of the Board of Tax Appeals, this court considers questions of law only. It does not review questions of fact. (*Avery* v. *Commissioner*, 22 F. (2d), 6 [T. D. 4116, C. B. VII–1, 155]; *Royal Packing Co.* v. *Commissioner*, 22 F. (2d), 536; *Mastin* v. *Commissioner* (C. C. A. 8), opinion filed September 29, 1928.)

Whether a particular finding of fact is supported by any substantial evidence is a question of law, and this question of law can not be reviewed unless all of the evidence bearing upon it is returned. (*United States* v. *Copper Queen Mining Co.*, 185 U. S., 495; *Nat. Masonic Acc. Association* v. *Shryock*, 73 F., 774 (C. C. A. 8); *C. G. W. Ry. Co.* v. *Price*, 97 F., 423, 434 (C. C. A. 8); *Lesser Cotton Co.* v. *St. L. I. M. & S. Ry. Co.*, 114 F., 133, 143 (C. C. A. 8); *Bolen-Darnall Co.* v. *Hicks*, 190 F., 717 (C. C. A. 8).)

These rules are well established, and are recognized by the parties in the case at bar. Counsel for appellant say, "The principal, underlying question in the case is whether under the provisions of Revenue Act of 1918, sections 202(a) and 202(b), appellant realized a profit of $50,000 from the transaction of June, 1920." Counsel for respondent say, "* * * the sole question is the amount of the profit realized upon the transfer of the petitioner's assets to the Inland company."

The conclusion of law reached by the Board of Tax Appeals in the case was that the Kendrick Coal & Dock Co. realized a profit of $50,000 on the transaction of June, 1920, which is set out in their findings.

The statute which has a direct application reads as follows:

"SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

"(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

"(b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged. * * *" (Section 202 of the Revenue Act of 1918 (40 St., 1057, 1060).)

Article 1566 of Regulation 45 (1920 edition) promulgated by the Treasury Department under the Revenue Act of 1918 is also pertinent:

"ART. 1566. *Exchange of property and stock.*—Where property is transferred to a corporation in exchange for its stock, the exchange constitutes a closed transaction and the former owner of the property realizes a gain or loss if the stock has a market value, and such market value is greater or less than the cost or the fair market value as of March 1, 1913 (if acquired prior thereto), of the property given in exchange. For the rule applicable where a corporation, in connection with the reorganization, merger or consolidation, exchanges property for stock, see article 1567."

As the findings of fact show that the property sold or exchanged in June, 1920, was acquired after March 1, 1913, its cost is one of the facts which must be determined as a basis for the legal conclusion. The other fact necessary is the fair market value of the property received in the transaction as a consideration for the property sold or exchanged. That these two facts are necessary is conceded. Counsel for respondent, in discussing the method of determining the question of profit in the transaction, say, "* * * this in turn involves a determination of the cost to the petitioner of the assets transferred by it and the value of the consideration received in exchange therefor."

The findings of fact disclose that the property sold or exchanged by the Kendrick company in June, 1920, consisted of (1) office furniture and fixtures; (2) good will of the business; and (3) profits to be derived from 35 contracts for the sale of coal. What was the cost of these three separate items of property, or of all three together? A careful examination of the findings of fact reveals that there is no finding whatever as to the cost of this property.

The property received in exchange was 500 shares of the capital stock of the Inland Coal & Dock Co. What was the market value of this stock at the time of the transaction? Again, a careful examination of the findings of fact reveals that there is no finding of the market value of this stock.

It thus appears that there is no finding of either of the two facts which are indispensable prerequisites to the conclusion of law that there was a profit realized in the transaction. It is true that in the opinion of the Board of Tax Appeals which accompanies the findings, there is a discussion as to the cost of the items of property sold or exchanged by the Kendrick company; and also a discussion as to the value of the stock received in exchange by that company; and from this discussion it would appear probable that the Board of Tax Appeals was of the opinion that the cost of the items of property sold was nothing, and that the market value of the stock received was $60,000.

Whether such opinion was well grounded we are not called upon to inquire. Resort may not be had to the opinion to eke out the findings of fact. (*Crocker* v. *United States*, 240 U. S., 74, 78; *City of Goldfield, Colo.*, v. *Roger*, 249 F., 39 (C. C. A. 8); *Highway Trailer Co.* v. *City of Des Moines*, 298 F., 71 (C. C. A. 8); *Lahman* v. *Burnes National Bank*, 20 F. (2d), 897 (C. C. A. 8).)

It is argued by counsel for respondent that the Board of Tax Appeals occupies a peculiar legal position, and that the rule that an appellate court will not look to the opinion of a fact finding court or body to eke out findings of fact, does not apply to the Board of Tax Appeals. We are not persuaded to that view.

Respondent's counsel also argues that the intention of Congress as indicated by the amendment (contained in section 601 of the Revenue Act of 1928) to section 907(b) of the Revenue Act of 1926 is that it is to be optional with the Board of Tax Appeals whether it shall file findings or an opinion or a memorandum. A sufficient answer to this contention is that the amendment of 1928 can

not rule the present appeal. We may add, moreover, that we do not agree with counsel's construction of that amendment when applied to cases such as the one at bar.

It would seem but just that the taxpayer in cases of this kind should be entitled to have findings made as such, so that if he deems advisable, he may clearly and distinctly challenge them individually. This he can not fairly do if the findings must be inferred or picked out from a discussion embodied in an opinion or memorandum.

Finally, we do not consider it our duty to examine the evidence and make findings additional to those made by the Board of Tax Appeals. That Board is primarily a fact finding body, and we consider it good practice that the appellate court should not, unless under very exceptional circumstances, inject itself into the field which properly belongs to that fact finding body. Such is the rule in respect to law cases tried to the court, a jury having been duly waived. (*Insurance Company* v. *Folsom*, 18 Wall., 237, 248; *St. Louis* v. *Rutz*, 138 U. S., 226, 241; *Lehmen* v. *Dickson*, 148 U. S., 71, 77; *Packer* v. *Whittier*, 91 F., 511; *United States* v. *Penn. & Dock Co.*, 272 F., 839; *Border Gas Co.* v. *Windrow*, 3 F. (2d), 974; *Wessel* v. *Seminole Phos. Co.*, 13 F. (2d), 999.)

The same rule holds true as to law cases taken to the Supreme Court for review of decisions of the Court of Claims. (*United States* v. *New York Indians*, 173 U. S., 464, 470–471; *Stone* v. *United States*, 164 U. S., 380; *Crocker* v. *United States*, supra.)

It is also true of cases coming up for review under the Interstate Commerce Act. (*Texas, etc., Railway* v. *I. C. C.*, 162 U. S., 197, 238; *L. & N. R. Co.* v. *Behlmer*, 175 U. S., 648, 675; *I. C. C.* v. *Chic. & R. Co.*, 166 U. S., 320, 341–342; *I. C. C.* v. *L. & N. R. Co.*, 190 U. S., 273, 284–285; see *I. C. C.* v. *L. & N. R. Co.*, 73 F., 409.)

The same rule is applied in other allied classes of cases. (*Flint* v. *City of Eldon*, 183 N. W., 344 (Iowa).)

Furthermore, in the present appeal the evidence as a whole is not returned.

Our conclusion is that the order of the Board of Tax Appeals should be reversed as not sustained by the findings, and that the case should be remanded with instructions for such further proceedings as may be deemed advisable not inconsistent with the views herein expressed.

It is so ordered.

SECTIONS 1003 AND 1004. XIV–19–7483
Ct. D. 962

INCOME AND PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. BOARD OF TAX APPEALS—REMAND OF CASE—FINDINGS OF FACT—EVIDENCE.

Where the taxpayer corporation appealed from a decision of the Board of Tax Appeals holding that a profit was realized upon an exchange of its assets for stock of a newly organized corporation, and the Circuit Court of Appeals remanded the case to the Board on the ground that its decision was not sustained by the findings of fact (there being no findings as to the cost to the taxpayer of the property transferred or as to the fair market value of the stock received in exchange therefor), the action of the Board in making new findings and a different decision on the original record of evidence was not contrary to the mandate of the court, in view of the fact that on rehearing both parties waived the right to introduce further evidence.

2. GAIN OR LOSS—EXCHANGE OF PROPERTY—FAIR MARKET VALUE—EVIDENCE.

Where the evidence showed that the taxpayer corporation had had a successful history and had transferred its profitable contracts and its good will to a newly organized corporation, all of whose stock had been subscribed for at $100 a share, a finding by the Board of Tax Appeals that the stock of the new corporation had no fair market value at the time of its exchange for the assets of the old corporation was not supported by the evidence, which conclusively established to the contrary.

3. CERTIORARI DENIED.

Petition for certiorari denied February 18, 1935.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Kendrick Coal & Dock Co., respondent.*

On petition to review decision of United States Board of Tax Appeals.

Before GARDNER, WOODROUGH, and VAN VALKENBURGH, Circuit Judges.

[June 18, 1934.]

OPINION.

WOODROUGH, Circuit Judge, delivered the opinion of the court.

This is a petition to review a decision of the United States Board of Tax Appeals, which found the respondent taxpayer not liable for an asserted income and profits tax for the year 1920.

The opinion of this court on the first review is reported in 29 Fed. (2d), 559. The first opinion of the Board of Tax Appeals appears in 6 B. T. A., 1092.

Respondent is a Minnesota corporation organized in July, 1916, with a capital stock of $50,000 divided into 500 shares of a par value of $100 each. Its entire capital stock was issued to Edward S. Kendrick, Jr., with the exception of qualifying shares to directors. Mr. Kendrick operated and managed the business of the corporation, the sale of coal at wholesale, at Minneapolis, Minn. Prior to June, 1920, Mr. Kendrick considered expansion, particularly through obtaining water transportation as necessary to the successful operation of the corporation, and began negotiations with that end in view. In May, 1920, at a special stockholders' meeting, the officers of respondent were authorized to enter into an agreement with certain other persons interested in the organization of a new corporation to be known as the Inland Coal & Dock Co., under the terms of which the respondent would transfer all of its furniture, fixtures, good will, contracts and profits to be derived from existing contracts for the sale of coal with estimated profits of $40,000 in exchange for $50,000 worth of stock in the new company, the latter to assume all liabilities or losses which might arise in connection with the coal contracts. The agreement for the exchange of stock for assets was later changed so that respondent should sell its assets to the new company for $50,000 cash and respondent would buy for cash $50,000 of the capital stock of the new company, and as so modified it was carried out; a bill of sale was executed by respondent transferring to the other corporation its office furniture and fixtures, good will, and all profits to be derived from certain described contracts of respondent for the sale of coal. None of the accounts receivable or cash in the treasury were transferred; the surplus of the taxpayer at the date of the transfer was between $60,000 and $70,000 in cash and accounts receivable. As consideration for the transfer the Inland Coal & Dock Co. delivered to respondent on June 12, 1920, a check for $50,000 and on the same date respondent issued its check for $50,000 in payment for 500 shares of common stock of the Inland Coal & Dock Co.

The Inland Coal & Dock Co. was incorporated in Ohio with an authorized capital stock of 4,000 shares of preferred stock of $100 a share and 6,000 shares of common stock of no par value. All of the common stock was subscribed for at $100 a share. Respondent itself purchased 700 shares for $70,000 in addition to the 500 shares acquired as above indicated. Kendrick individually purchased 600 shares of the common stock for $60,000.

Certificates of common stock provided that their transfer was subject to the provisions of the "code of regulations" of the company and that the shares were "accepted and held subject to all the provisions of the code of regulations and to the designations, preferences and voting powers, or restrictions or qualifications thereof, of the preferred stock, which are set forth on the reverse hereof." There is nothing in the record to disclose the nature of the "code of regulations."

None of the common stock has ever been sold by the original purchasers and no dividend has been paid by the Inland Coal & Dock Co.

Immediately after its incorporation the Inland Coal & Dock Co. acquired a dock at Duluth, Minn., which Kendrick testified was, at the time, essential to a large seller of coal as was also an association with a steamboat company.

The consideration formed through incorporation of the Inland Coal & Dock Co., he testified, rounded out the chain, "coal mines, steamship, dock and selling organization."

The Kendrick Coal & Dock Co. had been operated successfully and had made money.

The respondent returned no income from this transaction for 1920. The Commissioner determined a deficiency based on a profit of $50,000 from the transaction and respondent appealed to the Board of Tax Appeals. The Board sustained the Commissioner. On the prior appeal in this case the decision of the Board of Tax Appeals was reversed, because there was no finding of fact as to the cost to respondent of the property which it transferred, nor of the market value of the stock which it had received in the exchange. These matters were discussed in the opinion of the Board, but this court held that resort could not be had to the opinion to "eke out the findings of fact." The conclusion of the opinion of the court is as follows:

"Our conclusion is that the order of the Board of Tax Appeals should be reversed as not sustained by the findings, and that the case should be remanded with instructions for such further proceedings as may be deemed advisable not inconsistent with the views herein expressed."

The mandate of the court contained substantially similar language.

The Board after the mandate went down to it, heard no new evidence. Upon a rehearing the parties agreed that the case might be resubmitted to the Board upon the reporter's minutes taken before the Board at the original hearing, together with the exhibits then offered and received on behalf of either party. The Board thereupon made additional findings of fact, in which it found that the 500 shares of stock transferred to respondent had no fair market value at the time of transfer. It also found in substance that the property transferred to the Inland Coal & Dock Co. by respondent, aside from the office furniture and fixtures, had not cost respondent anything and that the value of the furniture and fixtures had been adjusted through allowance for depreciation. The Board concluded that respondent had not received any income from the transaction, and that there was no tax liability. This petition for review has followed.

The Commissioner contends: (1) That the action of the Board in making new findings and a different decision on the original record of evidence was not in conformity with the mandate of this court. (2) That there was no sufficient evidence to sustain the finding of the Board that the stock received by respondent on the exchange was of no value.

1. Obedience to the mandate of an appellate court is undoubtedly required. (26 U. S. C. A., section 1226(a)(b); *In re Sanford Fork & Tool Co.*, 160 U. S., 247; *H. P. Coffee Co.* v. *Reid, Murdoch & Co.* (C. C. A. 8), 60 Fed. (2d), 387; *Great Northern Railway Co.* v. *General Railway Signal Co.* (C. C. A. 8), 57 Fed. (2d), 457; *Guaranty Trust & Co.* v. *M. & St. L. R. Co.* (C. C. A. 8), 52 Fed. (2d), 418.)

But no disobedience of the mandate is here reflected. The opinion and mandate clearly left to the Board of Tax Appeals to perform completely the duty which, the opinion held, had been imperfectly performed. This court expressly held that it was not its function but that of the lower tribunal to make the omitted findings. The record shows a waiver by both parties of the right to introduce further evidence on the issues, and so petitioner's contention that further evidence should have been taken is without merit.

2. The parties on the prior appeal and on this appeal properly treat the transaction in June, 1920, as an exchange of property. Although the respondent purchased 500 shares of stock in the Inland Coal & Dock Co. and the latter purchased the assets of respondent, the substance of the transaction (which alone is to be regarded) (*Commissioner* v. *Moore* (C. C. A. 10), 48 Fed. (2d), 526) was an exchange of properties.

The relevant portion of the Revenue Act of 1918 (ch. 18, 40 Stat., 1057, section 202(b)) is:

"When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; * * *."

Article 1566 of Treasury Regulations 45 under the Revenue Act of 1918 provides in part:

"Where property is transferred to a corporation in exchange for its stock, the exchange constitutes a closed transaction and the former owner of the

property realizes a gain or loss if the stock has a market value, and such market value is greater or less than the cost * * * of the property given in exchange."

Article 1564 as amended by Treasury Decision 3206 (C. B. 5, 57) provides in part:

"The amount of income derived from an exchange of property, as of stock for a bond, is the excess of the fair market value at the time of exchange of the property received in exchange, over the original cost of the property exchanged for it."

Article 1563, as amended by Treasury Decision 2971 (C. B. 2, 38), provides in part as follows:

"Property received in exchange for other property has no 'fair market value' for the purpose of determining gain or loss resulting from such exchange when, owing to the condition of the market, there can be no reasonable expectation that the owner of the property, though wishing to sell and any person wishing to buy will agree upon a price at which to trade unless one or the other is under some peculiar compulsion. It does not follow that property has no 'fair market value' merely because there is no price therefor established by public sales or sales in the way of ordinary business."

The question is whether the stock received by respondent had a market value at the time respondent received it.

It does not necessarily appear that the reference to the "code of regulations" influenced the Board in arriving at its decision. This reference to a selling compact of some nature does not prevent the stock from having a fair market value. (*Newman* v. *Commissioner* (C. C. A. 10), 40 Fed. (2d), 225, and 41 Fed. (2d), 743; *Rodriques* v. *Edwards* (C. C. A. 2), 40 Fed. (2d), 408; *Wright* v. *Commissioner*, 50 Fed. (2d), 727 [Ct. D. 428, C. B. X-2, 324].)

To ascertain the fair market value of property, as the Treasury regulations above quoted import, it is not necessary that the property actually shall have been sold in a market. Where personal property is sold in a definite and established market, or changes hands for money so regularly that a market price for it is created or maintained, it is obvious that it must have a fair market value. When the question arises as to its fair market value in litigation, the question merely is as to the price it commanded in the market at the particular time. Where, however, there is no such market, but the property has an intrinsic value, then, the evidence must show what price that intrinsic value would command on a market where willing buyer and willing seller met. (Wigmore, Evidence, section 717 (2d ed.); Chamberlayne, Evidence, sections 2099h, 2099i; *North American Telegraph Co.* v. *N. P. Railway Co.* (C. C. A. 8), 254 Fed., 417; *Old Colony Co.* v. *Commissioner* (C. C. A 1), 59 Fed (2d), 168; *Cromwell* v. *Commissioner* (C. C. A. 6), 62 Fed. (2d), 51; *Commissioner* v. *Swenson* (C. C. A. 5), 56 Fed. (2d), 544 [Ct. D. 555, C. B. XI-2, 184]; *Chicago Railway Equipment Co.* v. *Blair* (C. C. A. 7), 20 Fed. (2d), 10; *McClory* v. *Dodge* (Cal. App.), 4 Pac. (2d), 223.)

In *North American Telegraph Co.* v. *N. P. Railway Co.*, supra, it is said:

"The term 'market value,' as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price. Proof of such a market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it. The term is, however, frequently used in a figurative sense, as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt. This is the meaning which the term usually has when applied to real property. To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the fair and reasonable value of property which is not so traded in as to give a market value in the primary sense of the term. Private dealings in property can never be used to show market value in the primary sense, and when

used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value."

In *Old Colony Co.* v. *Commissioner*, supra, it is said:

"It is not essential that there be a sale to determine the fair market value of the stock of a corporation. The nature of its business, and the other elements that go to make up the value of the stock to a purchaser who is willing and desirous of buying may be considered. It is a question of the sound judgment of the Board of Tax Appeals."

In *Cromwell* v. *Commissioner*, supra, it is said:

"Intrinsic value may be resorted to for the purpose of establishing market value where from proven facts and circumstances there could be no doubt of the existence of a market if the same were offered for sale."

In *McClory* v. *Dodge*, supra, it is said:

"There is no merit in the contention that there is no evidence showing that the respondent's stock was not worth $13,000. The Hool note was for $13,000. The stock cost respondent $13,000, and all of the parties especially Hool, Boyd, and respondent treated the stock as being worth $13,000 and there is absolutely no testimony in the record to the contrary."

In *Chicago Railway Equipment Co.* v. *Blair*, supra, it is said:

"Market value, speaking very generally, may be said to be the price which one, under no compulsion, is willing to take for property which he has for sale, and which another, under no compulsion, is willing to pay for the article."

The most persuasive authority, because of the similarity of fact situation, is *Commissioner* v. *Swenson*, supra. A corporation was organized for the purpose of drilling for oil. Nine men owned the stock. The corporation had financial difficulties, and an increase of stock was decided on. Eleven thousand additional shares were to be issued. Swenson, an original shareholder, transferred an oil lease to the corporation for 2,400 shares of stock. The balance of the stock sold for par. The question was whether the 2,400 shares had a market value. It was held they did despite the speculative character of the venture, the somewhat troubled financial history of the corporation preceding and that the sale of the balance of the new issue of stock was not made on the general market, but was sold to acquaintances of one or more of the old stockholders. A finding of the Board to the contrary was held to be contrary to the evidence.

In this case, the Kendrick Coal & Dock Co. had had a successful history. It transferred contracts to the new corporation with an estimated profit in them of $40,000; it transferred its good will. Expansion of the business through acquisition of dock and transportation facilities was reasonably to be expected. All of the stock was subscribed for at $100 per share by experienced business men, and respondent purchased 700 shares at that price in addition to the 500 shares transferred to it in the exchange. There is the contemporary record exhibiting a confidence in the future prosperity and success of the company and of the value in the stock which should not be disregarded. (*Sioux City Stock Yards Co.* v. *Commissioner* (C. C. A. 8), 59 Fed. (2d), 994; *Planters' Operating Co.* v. *Commissioner* (C. C. A. 8), 55 Fed. (2d), 583.)

The Board's determination that the 500 shares of stock of the Inland Coal & Dock Co. which the taxpayer received in exchange for its assets in 1920 had no fair market value in 1920 is a determination of an issue of fact, and if supported by any substantial evidence can not be reversed by this court. (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X-1, 264]; *Powers Mfg. Co.* v. *Commissioner*, 34 Fed. (2d), 255 (C. C. A. 8); *Franciscus Realty Co.* v. *Commissioner* (C. C. A. 8), 39 Fed. (2d), 583; *Gloyd* v. *Commissioner* (C. C. A. 8), 63 Fed. (2d), 649, certiorari denied, October 9, 1933.)

But we are persuaded that the Board's finding that the shares of the capital stock of the Inland Coal & Dock Co. had no fair market value at the date of the receipt is unsupported by any substantial evidence, and the evidence conclusively establishes to the contrary, and the determination of the Board on that issue of fact should be reversed. (*Gloyd* v. *Commissioner*, 63 Fed. (2d), 649; *Russell* v. *Commissioner*, 45 Fed. (2d), 100; *Toledo Grain & Milling Co.* v. *Commissioner*, 62 Fed. (2d), 171.)

The decision of the Board of Tax Appeals should be and is reversed.

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTION 1113.—LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XIV-14-7416 Ct. D. 945

INCOME TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

SUIT—CERTIFICATE OF OVERASSESSMENT—ACCOUNT STATED—ACCOUNT SETTLED.

A taxpayer who through his duly authorized representative agreed to the Commissioner's determination of a deficiency for 1924 and an overassessment for 1925, and accepted payment of the balance shown on the certificate of overassessment without objection to the settlement for over four years, can not recover the amount of the overpayment for 1925 in a suit based upon an alleged implied contract as evidenced by the certificate of overassessment. There was not only an account stated, but also an account settled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Harold E. Atkinson, appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the District of Minnesota.

[October 11, 1934.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

The facts essential to the determination of this controversy may be briefly stated. Appellant filed income tax returns with the collector of internal revenue for the years 1924 and 1925, paying tax thereon of $300.90 for the year 1924, and $13,591.62 for the year 1925. The report of an examining internal revenue agent indicated a deficiency in tax of $10,352.88 for the year 1924, and an overassessment of $12,123.10 for the year 1925. March 26, 1927, the Commissioner of Internal Revenue mailed to appellant a registered letter in accordance with section 274(a) of the Revenue Act of 1926, advising him of the deficiency and overassessment above stated. In response to this notice appellant, through authorized representatives, filed protest, and, on May 24, 1927, a brief in support of this protest of the deficiency determined, and the additional tax proposed for 1924. This brief was filed by W. H. Kilbourne. May 10 and June 27, 1927, conferences were held in the office of the Commissioner with appellant's representatives, Kilbourne and Love. As a result of these negotiations, and a consideration of evidence presented, the overassessment for 1925 was allowed to stand and the deficiency for 1924 was reduced to $3,647.35. The agreement form, consenting to the determination of the tax, and the immediate assessment of the deficiency in this amount, was signed by Kilbourne as appellant's representative. At the trial appellant stated that Love and Kilbourne had authority to act for him the same as if he were acting for himself with regard to matters pertaining to his tax liability for the years 1924 and 1925, and that they had authority to execute any agreements signed in connection with this matter.

Thereafter, September 8, 1927, the Commissioner advised appellant that "the revised deficiency of $3,647.35 will be assessed on the next assessment list for your district on the basis of the consent agreement signed by your representative Mr. W. H. Kilbourne." In November, 1927, this deficiency was accordingly assessed, and, November 16, 1927, a certificate of overassessment in the sum of $12,123.10 was issued and mailed to the taxpayer. An account was stated crediting this deficiency, amounting, with interest, to $4,120.78, against said overassessment of $12,123.10, and showing a balance of $8,002.32. On the same

date this balance was refunded to appellant by check, with interest in the sum of $860.14. Appellant accepted this refund check, cashed it, and retained the proceeds.

Nearly four years later, it appears, appellant filed a claim for refund of this sum of $4.120.78. The date of filing does not appear, and the nature of the claim, which was not produced, is gathered only from correspondence. The Commissioner denied the claim, and on June 6, 1932, appellant filed this suit. The district court held that he was not entitled to recover, and this appeal followed.

The character of the suit filed is thus stated by appellant in his brief:

"This action was instituted for the recovery of an overpayment of income taxes for the year 1925, of $4.120.78, as evidenced by an implied contract based on the issuance and delivery by appellee to appellant of a certificate of the Commissioner of Internal Revenue."

Examination of the complaint convinces that such is the gist of the action. It is true that alleged errors in determining the deficiency for the year 1924 are argued, but, inasmuch as the suit is based upon the alleged implied contract evidenced by the issuance of the Commissioner's certificate as heretofore stated, the validity or invalidity of the items originally considered by the Commissioner in computing the deficiency is immaterial and need not be discussed here. That certificate does not stand alone, but forms a part of an account stated and settled, after consideration of the evidence, and repeated conferences between the Commissioner and authorized representatives of appellant. After having accepted this settlement and the benefits thereof, without objection for the period, at least, from November 16, 1927, to some time in the spring of 1931, appellant seeks to recover this balance of the overassessment for the year 1925, the agreement of settlement to the contrary notwithstanding.

This contention of appellant seems to be based mainly, if not entirely, upon the decision of the Supreme Court in *Bonwit Teller & Co.* v. *United States* (283 U. S., 258 [Ct. D. 334, C. B. X–1, 328]). In that case the Commissioner had finally determined that the taxpayer had overpaid its tax in a stated amount, and had withheld a refund for alleged failure of the taxpayer to comply with the terms of the statutes relating to waiver. The Government further urged that the claim was barred by limitation under the provisions of section 3226, R. S., as amended. The court held:

"The action is not for the overpayment of the tax in 1919, but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought." (L. c., page 265.)

Here, as there, the suit was not brought for the recovery of an internal revenue tax alleged to have been erroneously collected, but upon the subsequent determination of the Commissioner. The crucial difference between the Bonwit Teller & Co. case and that here under consideration is that, in the former, there was an account stated, while in the instant case, there is an account settled. In our opinion, this wide distinction is decisive of this controversy.

In *Stearns Co.* v. *United States* (291 U. S., 54 [Ct. D. 780, C. B. XIII–1, 321]), the Supreme Court held:

"To constitute an account stated, 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.

"Mere rendition to the taxpayer of a certificate of overassessment did not evince a promise to refund, when by his request the overpayment was to be applied against another tax, and this was subsequently and in due course accomplished, and the results accepted by him. *Bonwit Teller & Co.* v. *United States* (283 U. S., 258) distinguished."

In the body of the opinion Mr. Justice Cardozo says:

"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.)"

While there the taxpayer paid, instead of accepting payment, in silence, and without objection, the principle controlling the two cases is identical.

In *Daube* v. *United States* (289 U. S., 367, 370 [Ct. D. 677, C. B. XII–1, 346]), we find the following significant language:

"The Commissioner did not inform the taxpayer that the tax had been overpaid in a determinate amount. The taxpayer did not give assent either expressly or by silence to the outcome of the audit. The essentials of an account stated in any strict or proper sense are lacking altogether."

In the case before us, all the essentials are present, not only of an account stated, but of an account settled. The Commissioner did inform the taxpayer, and the taxpayer did expressly give assent to the outcome of the audit, as well as by accepting the cash settlement without objection and by silence for years thereafter. That, to set aside such an account settled, it is incumbent upon a party to act promptly in carrying the burden of proving substantial and sufficient facts in support of his contention is established by abundant authority. The Court of Claims has recently so held.

"The plaintiff received the check for the balance shown to be due by the account, and cashed it without making any objection thereto until almost six years later when this suit was commenced. Instead of being an account stated in favor of the plaintiff, it was really an account settled. (Cf. *Stearns Co.* v. *United States*, supra.)" (*Holmes Mfg. Co., Inc.*, v. *United States*, 6 Fed. Supp., 438.)

"In this particular case, the account showed a balance of a certain amount in favor of plaintiff for which it received a check issued in settlement. No complaint having been made with reference thereto for over five years, it must be considered an account settled." (*Pratt & Whitney Co.* v. *United States*, 6 Fed. Supp., 574.)

The lapse of time is thus stressed as establishing assent and, thereby, the consummation of a contract of settlement. Here, in addition thereto, we have the agreement signed by appellant's duly authorized agent. We perceive no reason why such principles should not apply with equal force to dealings with government in the field of taxation, as to transactions between private parties in the ordinary course of trade. Appellant suggests that the trial court failed to meet the requirements of section 764, title 28, U. S. C. A., in filing opinion, findings, and conclusions in this suit against the United States. That section reads as follows:

"Opinion, findings, and conclusions in suit against United States. It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."

While the arrangement and title of the court's findings are somewhat informal, an examination of the contents discloses that the facts are set out quite fully, covering nearly four pages of the printed record. Thereafter follows an exhaustive discussion of facts and issues, with citation of authorities in opinion form, in the course of which the court found that "the simple recital of the undisputed facts irresistibly leads one to the conclusion that plaintiff is now estopped to contend that the adjustment and compromise of the 1924 and 1925 tax years was not final." This recital and discussion concludes thus:

"The court adopts the foregoing as its findings of fact and conclusions of law, the court finds: (1) That plaintiff take nothing by its cause of action herein and that the same be dismissed. (2) Let judgment be entered accordingly."

Formal compliance with this section has not been rigidly exacted where the filing expressly or impliedly finds the necessary facts, enables the public and the appellate court to find on the record the reasons for such findings, and gives

judgment accordingly. (*United States* v. *Swift*, 139 F., 225; *United States* v. *Hyams*, 146 F., 15; *United States* v. *Tinsley*, 68 F., 433.)

While we do not approve, as a general practice, the informality of the opinion, findings and conclusions filed in this case, we do not consider it so serious as to require reversal. It follows from what has been said that the judgment appealed from should be affirmed, and it is so ordered.

ARTICLE 1351: Suits for recovery of taxes erroneously collected.

REVENUE ACTS OF 1917, 1918, AND 1926.

Credit of overassessment against additional taxes claimed to have created a new cause of action. (See Ct. D. 955, page 350.)

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XIV-19-7484 Ct. D. 960

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

ASSESSMENT—AFFILIATED CORPORATIONS—ALLOCATION OF TAX.

Where a parent company, which owned 80 per cent of the stock of a subsidiary (and whose officers and directors were practically the same as those of the subsidiary), filed consolidated returns for 1921 and 1923 and paid the tax out of its own funds without contribution by the subsidiary, and where the Commissioner later ruled that the two corporations were not affiliated and allocated to the subsidiary, without assessment, a portion of the tax reported on the consolidated return, the parent may not recover the amount allocated to the subsidiary on the ground that no assessment had been made against the subsidiary. Under the circumstances, it was not necessary to assess the subsidiary, and the parent, having voluntarily agreed to assume and pay a tax which the law did not compel it to pay, can not invoke the aid of the courts to get its money back.

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Charles Dorrance and Reynolds Bedford, Receivers of the Temple Coal Co., v. *David W. Phillips, Collector of Internal Revenue, Twelfth District of Pennsylvania.*

[December 29, 1934.]

OPINION.

This is an action by the receivers of the Temple Coal Co. against the collector of internal revenue seeking the recovery of taxes for the years 1921 and 1923 alleged to have been erroneously retained by the collector in satisfaction of the tax liability of the Lackawanna Coal Co. for said years.

On March 14, 1922, and March 15, 1924, the Temple Coal Co. filed consolidated income tax returns on Forms 1120 on behalf of itself, the Mount Lookout Coal Co. and the Lackawanna Coal Co. for the years 1921 and 1923, respectively. Neither return disclosed information on the separate income of the several companies. The consolidated return for the year 1921 disclosed a total tax due in the amount of $95,928.84, which was paid in 1922 by the Temple Coal Co. out of its own funds. The consolidated return for the year 1923 disclosed a total tax due in the amount of $149,627.21, which was paid in 1924 by the Temple Coal Co. out of its own funds.

The Commissioner of Internal Revenue later ruled that the Temple Coal Co. and the Mount Lookout Coal Co. were affiliated for the years involved but

that the Lackawanna Coal Co. was not affiliated with the group and that the tax of the Lackawanna Coal Co. should be determined separately.

In January, 1926, waivers were filed on behalf of the Temple Coal Co. and the Lackawanna Coal Co. and the time for assessment and collection of their respective taxes was finally extended to December 21, 1927.

On March 13, 1926, the Temple Coal Co. filed a claim for a refund in the amount of $95,928.34 for 1921 taxes "for the reason that a redetermination of the liability for the years 1917 to 1920 has been made resulting in a changed basis for invested capital, depletion, depreciation and inventories which will operate to reduce the liability for the year 1921, * * *."

On March 10, 1927, the Temple Coal Co. filed with the collector a claim for refund in the amount of $149,627.21 for 1923 taxes and assigned the following reasons therefor:

"1. For the reasons set forth in the revenue agent's report of examination dated February 24, 1927, showing an overassessment for this period of $21,980.42.

"2. For the reason that adjustments in prior years for depletion, depreciation, capital accounts, etc., require a revision of the original return filed.

"3. For the reason that the necessary adjustment for the years 1921 and 1922 may produce 'net losses' applicable to the year 1923.

"4. For the reason that this claim is required for the protection of the interests of the taxpayer as provided in section 284 of the Revenue Act of 1926."

The final determinations of the taxes were shown in a certificate of overassessment for each of the said years, which were allowed on a schedule signed by the Commissioner on January 4, 1928. The certificate of overassessment for 1921 allowed a refund of $34,255.16 with interest of $10,861.55, and the certificate of overassessment of 1923 allowed a refund of $3,945.90 with interest of $723.23, which amounts were paid to the Temple Coal Co. The said certificates evidenced action on the claims for refund and a partial disallowance thereof. The said certificates showed $5,466.58 and $24,877.04 as the tax of the Lackawanna Coal Co. for the years 1921 and 1923, respectively, which amounts were less than the tax of the Lackawanna Coal Co. originally reported and paid. These amounts were allocated to the Lackawanna Coal Co.'s tax out of the tax reported, assessed and paid on the basis of the consolidated return. No assessment was made against the Lackawanna Coal Co. for this tax.

In November, 1929, this suit was brought by the Temple Coal Co., now in receivership, to recover the sum of $5,466.58 and $24,877.04 with interest, for the reason that since the Lackawanna Coal Co. was eliminated from the aforesaid affiliation and a separate determination of tax liability was made against it, it became the duty of the defendant and the collector of internal revenue to make a separate assessment against the Lackawanna Coal Co. for the years 1921 and 1923, and collect the tax directly from it, and that the deduction of the amount allocated to the Lackawanna Coal Co. from the refunds to the Temple Coal Co. was improper.

Section 240 of the Revenue Act under which the consolidated returns in question were filed provides as follows:

"In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each * * *."

The regulations of the Treasury Department provide that a consolidated return shall among other things show the name and address of each subsidiary and a schedule showing the proportionate amount of the total which it is agreed among them is to be assessed upon each affiliated corporation. The regulations further provide that each subsidiary shall file Form 1122, which states in part:

"8. The Department prefers that the entire tax shown on a consolidated return be paid by the parent or principal reporting corporation, instead of being apportioned among the corporations composing the affiliated group.

"If apportionment is made, state the amount of the income tax for the taxable period to be assessed against the subsidiary or affiliated corporation making the return ——— $———."

The consolidated returns filed by the Temple Coal Co. did not contain any of the above information nor was there sufficient information therein to determine the proper amount of the consolidated income properly assignable to the subsidiaries; neither was Form 1122 filed by the subsidiaries.

The evidence discloses that 80 per cent of the stock of the Lackawanna Coal Co. was owned by the Temple Coal Co. during the years in question and that during the same period the officers and directors of the said companies were practically the same and the officers were at the same address. The only income tax returns for the two companies were filed by the Temple Coal Co. and the taxes of the said two companies were paid by the Temple Coal Co. out of its own funds without contribution by the Lackawanna Coal Co. These payments were intended to cover the tax on the Lackawanna Coal Co.'s income. The officers who made the returns and paid the tax were officers of both companies. On August 1, 1928, Norman R. Brown, who was treasurer of the Temple Coal Co. at that time wrote a letter to the Commissioner of Internal Revenue, concerning the 1921 and 1923 taxes in question, which letter, in part, is as follows:

"In accordance with the arrangements between this company and its subsidiaries the total tax for each of the said years was assessed against and paid by the Temple Coal Co. without apportionment to the several companies, the entire liability having been assumed by the Temple Coal Co. as the parent company."

In a later letter of January 7, 1929, addressed to the deputy commissioner by the said Norman R. Brown, it was denied that there was any sort of an agreement between the Temple Coal Co. and its subsidiaries. However, a consideration of the entire evidence in the light of the surrounding circumstances leads this court to the conclusion that the Temple Coal Co. assumed and paid the 1921 and 1923 taxes of the Lackawanna Coal Co. and the Commissioner was so advised by the said letter dated August 1, 1929. (*Freeport Texas Co.* v. *Bowers*, 6 F. Supp., 423. *In re Temptor Corn & Fruit Products Co.*, 299 F., 326, 329.) Accordingly the Commissioner properly assessed the taxes against the corporation which assumed the payment of the taxes. It was not necessary, under such circumstances, to assess the Lackawanna Coal Co.

The Temple Coal Co. having voluntarily agreed to assume and pay a tax which the law did not compel it to pay, can not invoke the aid of the courts to get its money back. (*Wourdack* v. *Becker, Collector of Internal Revenue*, 55 Fed. (2d), 840; *Clift & Goodrich, Inc.*, v. *United States*, 56 F. (2d), 751 [Ct. D. 538, C. B. XI-2, 400].)

The plaintiffs contend that the Commissioner should have made an assessment against the Lackawanna Coal Co. In Mather Paper Co. (3 B. T. A., 1), a case whose facts are similar in many respects to the case at bar, it was held that the failure to assess the subsidiary, which was ruled to be nonaffiliated, was a ministerial error subject to correction at any time. In the Mather case, contribution of its share of taxes to the parent was made by the subsidiary, while in this case the taxes of the subsidiary were assumed and paid by the parent. Taxes may be and often are collected without assessment (*Meyersdale Fuel Co.* v. *United States*, 44 F. (2d), 437), and can not be recovered solely because it was not assessed (*Muir* v. *United States*, 3 Fed. Supp., 619 [Ct. D. 737, C. B. XII-2, 229]).

And now, December 29, 1934, upon due consideration, judgment is directed to be entered for the defendant.

ARTICLE 1351: Suits for recovery of taxes erroneously collected.

REVENUE ACTS OF 1918 AND 1921.

Suit brought within five years of payment of tax but more than two years after denial of claim. (See Ct. D. 971, page 305.)

SECTION 1116.—INTEREST ON REFUNDS AND CREDITS.

ARTICLE 1371: Interest on refunds and credits. XIV-20-7498
Ct. D. 964

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1918 AND 1926—DECISION OF COURT.

CLAIM FOR REFUND—INTEREST UPON OVERPAYMENT—COMPUTATION.

The taxpayer on September 20, 1926, paid an additional tax for 1920, with interest from February 26, 1926, at the rate prescribed by section 283(h) of the Revenue Act of 1926, and on September 24, 1926, paid the last two installments of the original tax for 1920, with interest from September 15, 1921 (payment having been stayed by an abatement claim). On consideration of a claim for refund based upon sections 327 and 328 of the Revenue Act of 1918, an overassessment was allowed, together with a refund of interest on a portion of the original tax. The Commissioner correctly determined that the amount to be refunded as an overpayment of interest should be computed upon that portion of the overassessment in excess of the additional tax and interest (paid September 20, 1926), from September 15, 1921, to September 24, 1926, which latter dates correspond to those used in computing the interest paid upon the balance of the original tax.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Libbey-Owens-Ford Glass Co., plaintiff, v. *The United States of America, defendant.*

[October 15, 1934.]

MEMORANDUM OPINION.

HAHN, J.: This is an action by Libbey-Owens-Ford Glass Co., hereinafter referred to as the taxpayer, for a refund claimed to be due the taxpayer as interest upon overpayments resulting from the payment by it under protest of income and excess profit taxes for the year 1920.

The taxpayer filed a corporation income and profits tax return for the year 1920, which return showed a tax due in the amount of $1,672,382.96. Two quarterly installments of this tax were paid when due, a part of the third and the entire fourth installment payable September 15, 1921, were not paid. The unpaid balance amounted to $400,719.83, for which sum the taxpayer filed a claim for abatement praying special relief under sections 327 and 328 of the Revenue Act of 1918, and seeking a recomputation of its tax.

On March 23, 1926, the Commissioner of Internal Revenue denied this claim, and on March 28, 1926, assessed an additional tax alleged to be due by reason of deductions improperly taken by the taxpayer in the amount of $129,506.02, together with interest of $3,927.76. This interest was computed from February 26, 1926, the date specified in the Revenue Act of 1926, section 283(h) of which provides as follows (U. S. C. A., Title 26, chapter 19, section 1064(h)):

"In cases within the scope of subdivision (e), (f), or (g) in computing the amount which should be collected, interest upon the amount determined by the Commissioner, or by the decision of the Board which has become final, to be the amount of the deficiency, shall be included at the rate of 6 per centum per annum from February 26, 1926, up to the date of notice and demand from the collector, or, in the case of a waiver under section 1048(b) of this title, to the thirtieth day after the filing of such waiver or to the date of notice and demand whichever is the earlier. The interest provided in this subdivision shall be included only in cases where no other interest for the same period is provided by law."

Demands having been made by the collector for the deficiency so assessed and for the unpaid original balance of the tax on September 10, 1926, and September 15, 1926, respectively, the taxpayer paid the sum of $133,433.78 on September 20, 1926, being the amount of the additional assessment with

interest; and on September 24, 1926, it paid the sum of $525,443.88, being the original unpaid balance of $400,719.83 with interest at ½ of 1 per cent per month from September 15, 1921, aggregating $124,924.05. Both payments were made under protest. The Commissioner having found that the claim for abatement had been made in good faith, the interest upon the unpaid original balance was computed under the provisions of section 250(e) of the Revenue Act of 1918 (40 Stat., 1082), which provides:

"If any tax remains unpaid after the date when it is due, and for 10 days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month."

On September 9, 1927, the taxpayer filed a claim for refund in the sum of $688,877.06, based upon sections 327 and 328 of the Revenue Act of 1918. The Commissioner determined upon this claim that the taxpayer had been overassessed in the sum of $167,699.77, and on November 2, 1928, a schedule containing this overassessment was approved by the Commissioner. An additional refund was allowed in the sum of $10,326.94 on account of the payment by the taxpayer of interest amounting to $124,724.05 on the original unpaid balance. The interest allowed to the taxpayer on the overassessment and refund was as follows:

Amount refunded.	Interest allowed.		Interest.
	From—	To—	
$167,669.77	Sept. 25, 1926	Dec. 1, 1928	$21,962.44
10,326.94	Sept. 25, 1926	Dec. 1, 1928	1,352.69
			23,315.13

Thus interest was paid upon the full amount of the refund from the date of the payment of the tax in full to the date of the refund. The Government, in arriving at the figure representing the interest refund, deducted from the overassessment of $167,669.77 the sum of $133,433.78 (the amount of the additional assessment plus interest), leaving a balance of $34,235.99, and computed interest thereon from September 15, 1921, to September 24, 1926, which dates correspond to those used in computing the interest paid by the taxpayer upon its $400,719.82 payment.

On September 23, 1929, the taxpayer filed a claim for refund in the amount of $29,520.27, its contention being that additional interest upon the refund in the above amount was due to it upon the refund of $167,669.77. In the very able and exhaustive brief filed on behalf of the taxpayer this amount of additional interest is claimed to be $24,114.89.

Defensively the United States of America asserts two defenses: First, that the taxpayer claimed to be entitled to special assessment under sections 327 and 328 of the Revenue Act of 1918, that it invoked the discretionary power vested in the Commissioner by said sections, and that this court is without jurisdiction to review the action of the Commissioner in the exercise of such discretionary power. I think I need not determine the validity of this defense for I think the second defense of the Government is well taken. (See *Williamsport Wire Rope Co.* v. *United States*, 277 U. S., 551 [T. D. 4172, C. B. VII-2, 323]; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S., 386, 78 L. Ed., 541 [Ct. D. 803, C. B. XIII-1, 393]; *Cleveland Automobile Co.* v. *United States* (C. C. A. 5), 70 F (2d), 365; and *Joseph Joseph & Bros. Co.* v. *United States* (C. C. A. 6), 71 F. (2d), 389.)

The second defense of the Government is that interest for the full amount to which the taxpayer was entitled has already been paid to it and there is no further amount due to the taxpayer either as interest or otherwise.

Clearly no interest is due the taxpayer upon an overpayment of tax unless such overpayment when made in an installment, results in the payment of the tax actually due in full. (*Blair* v. *Birkenstock*, 271 U. S., 348 [T. D. 3886, C. B. V-1, 142].) The payment of $133,433.78 on September 20, 1926, did not accomplish this result. It was not until September 24, 1926, when the $525,443.88 payment was made, that an overpayment of the 1920 tax occurred. Hence, interest upon such overpayment must be computed from that date.

It is also clear that interest is properly computable upon the unpaid installment of the tax ultimately paid under protest on September 24, 1926, from September 15, 1921, the due date of this installment. By virtue of section 250(e) of the Revenue Act of 1918 this is an overdue installment, which bears interest at ½ of 1 per cent per month, the Commissioner having found the claim for abatement to have been made in good faith, thus eliminating the penalty provided in that section. Section 250(e) is not modified or rendered inoperative by section 283(h) of the Revenue Act of 1926, which provides that interest on a deficiency finally determined shall bear interest only from February 26, 1926. Under section 273 of the Revenue Act of 1926 (U. S. C. A., Title 26, chapter 19, section 1047) a "deficiency" is defined as follows:

"As used in this chapter, in respect of a tax imposed by this chapter the term 'deficiency' means—

"(1) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

"(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax."

This definition embraces the additional tax of $129,506.02 imposed by the Commissioner, and upon which interest was assessed only from February 26, 1926, but can not be construed as embracing the $400,719.83 which the taxpayer had failed to pay by reason of its claim for abatement, since that amount was "shown as the tax by the taxpayer upon his return." Hence, as to this sum the amount of the tax imposed did not exceed the amount shown on the return, and no deficiency as defined above can be said to exist.

It therefore remains only to determine the amount which should have been refunded to the taxpayer as an overpayment of interest resulting from the payment on September 24, 1926, of $124,924.05, interest on $400,719.83. It is the contention of the taxpayer that this computation should have been made by applying the special rate ultimately fixed by the Commissioner under sections 327 and 328 of the Revenue Act of 1918 proportionately to the original tax as shown by the return and the deficiency found by the Commissioner. It is the contention of the Government that the interest payment made by the taxpayer exceeded the interest actually due only by an amount represented by the interest on the difference between the overassessment and the additional assessment.

The taxpayer paid interest on $400,719.83 from the date due to the date of payment. It was ultimately determined that an overpayment had been made by the taxpayer, in the amount of $167,669.77. No other facts appearing, the taxpayer would be entitled to interest upon this sum from the date the $400,719.83 less $167,669.77 was due.

Had it not been for the fact that an additional assessment of $133,433.78 had been made and paid, the overpayment by the taxpayer would have amounted only to $34,235.99. The taxpayer did not pay interest on the additional tax from the date the original tax was due (September 15, 1921), but only from February 26, 1926. To adopt the taxpayer's contention would be to allow interest on the additional assessment from September 15, 1921.

The computation of the Government assumes that interest is payable under section 250(e) of the Revenue Act of 1918 only upon the amount ultimately determined to be due after the claim for abatement has been allowed. This claim would, in the absence of the additional assessment of $133,433.78 have been sustained to the extent of $34,235.99. The additional assessment amounted

to $129,506.02, which had been separately paid by the taxpayer under protest, with interest amounting to $3,927.76. The computation of the Government includes the refund of these sums in full, with interest thereon from the date of payment. To allow interest upon any part of the $167,669.77 in excess of the difference between this amount and the $133,433.78 so refunded would be to place the taxpayer in a better position by reason of the additional assessment than it would have been had no such additional assessment been made. There appears to be no logical reason why such a benefit should accrue to the taxpayer, nor can any statute or decision be found which would appear to indicate that such benefit might accrue. On the contrary, the taxpayer is required by virtue of section 283(b) of the Revenue Act of 1926 to pay interest on a deficiency only from February 26, 1926. It is required by virtue of section 250(e) of the Revenue Act of 1918 to pay interest on the unpaid tax for which a claim for abatement had been made, from the date due (September 15, 1921) to the date of payment, at ½ of 1 per cent per month. A distinction thus clearly appears between the overassessment and the claim for abatement under sections 327 and 328 of the Revenue Act of 1918. This distinction was apparently recognized by the taxpayer when it made the two separate payments, the additional assessment of $133,433.78 on September 20, 1926, and the unpaid original tax with interest ($525,443.88) on September 24, 1926. The liability for interest being thus differentiated, the corollary benefits must similarly be differentiated, and that so much of the ultimately determined overassessment as is attributable to the additional assessment made must first be deducted before a refund can be computed for the interest paid upon the tax originally determined overdue as of September 15, 1921. This method was adopted by the Government in allowing interest upon the full overpayment from September 24, 1926, and upon the sum of $34,235.99 from September 15, 1921.

The Government's computation gave to the taxpayer, I think, the full relief to which it was entitled. An order may be entered dismissing the petition at the costs of the taxpayer, with such exceptions to the taxpayer as it may desire to note.

SECTION 1118.—PAYMENT OF AND RECEIPTS FOR TAXES.

ARTICLE 1391: Payment of tax by Treasury certificates of indebtedness and Treasury notes. XIV-23-7536 Mim. 4338

Instructions as to acceptance of Treasury notes of Series A-1935 for income and profits taxes.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 4, 1935.

Collectors of Internal Revenue and Others Concerned:

In connection with any tender of Treasury notes maturing June 15 in payment of taxes, the attention of collectors is called to paragraph 19 of the appendix to Regulations 86 and particularly to the last sentence thereof reading as follows: "The amount, at par, of Treasury certificates of indebtedness or Treasury notes presented by any taxpayer in payment of income and profits taxes must not exceed the amount of the taxes to be paid by him, and collectors shall in no case pay interest on the certificates or notes, or accept them for an amount less or greater than their face value." Collectors must follow exactly the provisions of such paragraph 19 and the further rules and regulations hereby prescribed by the Secretary of the Treasury and the Commissioner of Internal Revenue: "Treasury notes of Series A-1935 were issued in denominations of $100, $500, $1,000,

$5,000, $10,000, and $100,000 and will be payable in such amounts on June 15, 1935. Collectors shall accept such notes duly tendered in payment of income and profits taxes at such par or face amounts. If any such notes are offered in payment of income or profits taxes subject to any condition or qualification whatsoever, or for any greater amount, they will not be deemed to be duly tendered and the collectors shall refuse any such offers, return the notes to the taxpayers immediately, advise the Commissioner that they have done so, giving full particulars and forwarding the taxpayers' returns and all related data, including results of any investigations, in order that the same may be gone over carefully and assessments and specific instructions issued to collectors by the Commissioner. Further action by collectors will be delayed pending receipt of such instructions."

GUY T. HELVERING, *Commissioner.*

Approved June 4, 1935.

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

ESTATE AND GIFT TAX RULINGS.

TITLE III.—GIFT TAX. (1932)

SECTION 501.—IMPOSITION OF TAX.

REGULATIONS 79, ARTICLE 2: Transfers reached. XIV-21-7517
T. D. 4550

Gift tax on transfers of bonds, notes, bills and certificates of indebtedness of the United States or its agencies.

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

To Collectors of Internal Revenue and Others Concerned:

Article 2 of Regulations 79, relating to the gift tax, is amended by inserting the following immediately after the second sentence:

Various statutory provisions, which exempt bonds, notes, bills and certificates of indebtedness of the Federal Government or its agencies and the interest thereon from taxation, are not applicable to the gift tax since this tax is an excise tax on the transfer, and is not a tax on the subject of the gift. A gift of a bond, note, or certificate of indebtedness issued by the Federal Government, if made by a nonresident alien, not engaged in business in the United States, is not subject to the tax.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 21, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 79, ARTICLE 3: Transfers in trust. XIV-2-7245
E. T. 6

A transfer of property under an irrevocable trust agreement providing for the payment of certain annuities and the distribution of the corpus of the trust to a charitable institution upon the death of the annuitants, the trustor reserving the right to increase the payments to annuitants out of trust income, or corpus if necessary, is a transfer by gift subject to the gift tax, without any deduction for charitable gift.

Inquiry is made whether the transfer of property in trust under the conditions hereinafter set forth constituted a transfer of property by gift within the meaning of section 501 of the Revenue Act of 1932.

On December 30, 1932, A transferred securities to a trustee without consideration. The trust instrument provides that the trustee shall pay from the net income of the trust and, if necessary, from the corpus thereof, specified annuities; that the net income not required for the annuities shall be paid annually to a charitable institution named in the trust instrument; and that upon the death of all the annuitants the corpus shall be paid to the charitable institution. It is further provided that any or all of the annual payments may be increased by the trustor by written notice to the trustee during his lifetime or in his will. The trust is irrevocable.

Section 501 of the Revenue Act of 1932 provides in part as follows:

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply 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; * * *.

Article 3 of Regulations 79 reads in part as follows:

* * * Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, * * *.

The trust being irrevocable, it is clear that the trustor did not reserve the power to revest in himself title to any interest in the trust property. However, in view of his right to increase the annual payments, it was possible for him to increase such payments to the extent that they would wipe out entirely the corpus which otherwise would go to the charitable institution upon the death of all of the annuitants. This element of uncertainty makes it impossible to determine the value of the corpus, if any, to be paid to the charitable institution upon the death of the annuitants.

In view of the fact that the trustor did not reserve the power to revest in himself title to any interest in the trust property, that the charitable institution may never receive any part of the corpus, and that it is impossible to determine the value of the corpus, if any, which might under certain conditions be paid to the charitable institution, it is held that the transfer in question constituted a gift of *all* the property involved within the meaning of section 501 of the Revenue Act of 1932, and article 3 of Regulations 79, without any deduction under section 505(a)2 of such Act.

REGULATIONS 79, ARTICLE 3: Transfers in trust. XIV-16-7445
E.T.7

Where a gift consists of a transfer of property in trust, the amount of the gift for the purpose of computing gift tax is the value of the property at the date of transfer undiminished by trustees' commissions.

The question is presented whether trustees' commissions paid or to be paid for receiving and disbursing the corpus of a trust should

be deducted from the value of the property transferred in trust in arriving at the amount of the taxable gift.

Section 501 of the Revenue Act of 1932 provides in part as follows:

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise * * *.

Section 506 of that Act reads as follows:

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

The value of the property transferred as of the date of transfer constitutes the amount of the gift. The tax, being imposed upon the transfer by the donor, must be computed upon the value of the property passing from the donor. The fact that the value received by the donee may be less than that passing from the donor does not alter the basis of computation. Where the gift consists of a transfer of property in trust, expenses incident to the administration of the trust do not diminish the value of the property transferred or the amount of the gift for gift tax purposes. It is accordingly held that where a gift consists of a transfer of property in trust, the amount of the gift, for gift tax purposes, is the value of the property at the date of transfer undiminished by trustees' commissions for receiving and disbursing the trust property.

TITLE III.—ESTATE TAX. (1926)

SECTION 302.

REGULATIONS 70(1929), ARTICLE 17: General (transfers intended to take effect in possession or enjoyment at or after death). XIV-24-7550 Ct. D. 977

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

GROSS ESTATE—TRANSFER IN TRUST—INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH.

The decedent in 1922 transferred certain securities in trust, the trust deed providing that a fixed amount of the income should be paid annually to the decedent's sister during her life (any balance of income at the end of each year to be paid either to himself or to others), and reserving to the donor the right to add to or withdraw from the trust corpus, to amend the deed of trust, or to revoke it, at any time before April 1, 1927, and also providing that, after termination of the life estate, the principal of the trust should be transferred to the donor, if then living, or, if not living, then to others. The life beneficiary survived the decedent, who died on January 1, 1931. Under these facts, the transfer of the decedent's remainder interest was intended to take effect in possession or enjoyment at or after his death, within the meaning of section 302(c) of the Revenue Act of 1926, and the value of such interest, computed by subtracting from the whole value of the trust property the present value of the life estate of the beneficiary, was properly included in the decedent's gross estate.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Herbert F. Schwarz and Frederick A. O. Schwarz, as Executors of the Last Will and Testament of George Frederick Schwarz, Deceased, respondents.*

Petition to review a decision of the Board of Tax Appeals. Determination reversed.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[January 7, 1935.]

OPINION.

MANTON, Circuit Judge: This appeal involves the Federal estate tax under the Revenue Act of 1926, section 302(c) (44 Stat., 9). The Board of Tax Appeals held that the trust, here considered, should not be taxed as part of the corpus of the estate of the decedent. The Commissioner petitions for a review pursuant to sections 1001–1003 of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 109, 110), as amended by section 1101 of the Revenue Act of 1932 (ch. 209, 47 Stat., 169).

On June 7, 1922, decedent, George F. Schwarz, executed a deed of trust transferring certain securities to a trustee and giving authority to invest and reinvest the trust funds, collect the income, and after deducting all proper charges and expenses, to pay an income of $2,500 annually at stated periods from the 1st of April, 1922, and ending with the death of the settlor [donor's sister[1]], to his sister, Anna C. F. Schwartz, and the "balance of the net income for each such calendar year, promptly after the end of such year, to the donor, if he be living on the last day of such year, to wit, the 31st day of December, or, if he be not living, in equal shares, to such of his * * * named sisters and brothers as shall be then living, * * * and if neither the donor nor any of his said sisters or brothers be then living, to the said Anna C. F. Schwarz." The trust further provided that at the death of his sister, Anna C. F. Schwarz, "the trustee shall pay, transfer, and deliver the principal of the said trust fund * * * to the donor, if then living, and if not then living, in equal shares, *per stirpes*, to his descendants then living, and if neither he nor any descendant of his be then living, in equal shares to such of his brothers and sisters as shall be then living," and he named his brothers and sisters. He reserved the right to transfer additional property to the trust at any time, and also the right to withdraw any of the trust property at any time, or from time to time, before the 1st of April, 1927, and to receive the property so withdrawn as his absolute property, free and discharged from the aforesaid trust. He reserved also the right to amend his deed of trust at any time or from time to time before the 1st of April, 1927, and the right to revoke and terminate the trust before that day provided that such amendments of revocation and termination be made in writing, signed by the donor or his nominees duly authorized.

George F. Schwarz died January 1, 1931, leaving his sister, Anna C. F. Schwarz, surviving. The respondents, as executors, in filing the tax return, failed to include as part of the decedent's gross estate, the value of the decedent's interest in the property held in trust. The petitioner determined a deficiency in the Federal estate tax resulting from including in the gross estate of the decedent, the value of the decedent's remainder interest in the property thus held in trust. The value of decedent's interest was computed by subtracting from the whole value of the trust property, the present value of the life interest of the beneficiary, Anna C. F. Schwarz. The Commissioner found a retention by the donor of an interest in the property by virtue of which its possession and enjoyment were withheld from any other until his death. The trust fund amounted to $49,290.77. The tax is sought to be imposed pursuant to section 302(c) of the Revenue Act of 1926 (44 Stat., 9).

This case is to be distinguished from the class of cases where property is transferred in trust with remainders over to persons other than the grantor and where no remainder is reserved in the grantor. In such cases, the death of the grantor is not the event which effects the transfer of the remainder interest in the property held in trust. Here the decedent transferred property in trust, a fixed amount of the income from which was to be paid annually to his sister during her life. Up to April 1, 1927, the trust could have been revoked, but was not revoked nor amended by him at any time before his death. By the

[1] Words in brackets inserted to correct error.

terms of the trust instrument, he reserved to himself a remainder over after termination of the life estate, and if his death occurred prior to the termination of the life estate, the decedent's remainder interest went to his descendants. Since he died prior to the termination of the life estate, it was proper to include in his gross estate, subject to the Federal estate tax, the value of the remainder interest which passed at his death to his descendants. (*Klein* v. *United States*, 283 U. S., 231 [Ct. D. 333, C. B. X–1, 462]; *Commissioner* v. *City Bank Farmers Trust Co.*, decided December 17, 1934 (C. C. A. 2); *Union Trust Co.* v. *United States*, 54 Fed. (2d), 152; *Sargent* v. *White*, 50 Fed. (2d), 410 (C. C. A. 1).)

The death of this grantor was the indispensable and intended event which effected a transmission of a remainder interest from the dead to the living (*Klein* v. *United States*, supra), and the grant of the remainder interest in the trust fund was necessarily "intended to take effect in possession or enjoyment at or after" decedent's death within the meaning of the statute (302(c)). Thus the value of the remainder interest in the trust fund should be included in the gross estate. The life estate should be valued and deducted from the full amount of the trust corpus and the remainder taxed. (*Lit* v. *Commissioner*, 72 Fed. (2d), 556.)

Cases such as *Reinecke* v. *Northern Trust Co.* (278 U. S., 339 [T. D. 4261, C. B. VIII–1, 305]), *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX–1, 382]), *McCormick* v. *Burnet* (283 U. S., 784), and *Wallace* v. *Commissioner* (71 Fed. (2d), 1002), are distinguishable. There the remainders were in form or substance vested to persons other than the grantors and not as here contingent on the time of his death. In *Helvering* v. *Duke* (290 U. S., 591), the trust instrument provided for the creation of a trust for the benefit of the grantor's daughter, her children and their descendants during her life, and for a further period of 21 years, at which time the corpus was to be distributed to the childen and their descendants. In the event that the beneficiary died prior to the death of the grantor, or in the event that she died subsequent to his death and left no children or descendants of children surviving, the corpus would revert to the grantor or her estate. It was held that this mere possibility of reverter did not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. In the instant case, the trust was created for the purpose of providing a fixed annual income to a beneficiary for life. The grantor clearly parted with no larger interest in the trust corpus. His death effected the transmission of his remainder interest to his heirs. Under authoritative decisions, that remainder constituted a part of his taxable gross estate.

Order reversed.

REGULATIONS 70, ARTICLE 22: Property held jointly or as tenants by the entirety.

XIV–15–7426
Ct. D. 947

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

GROSS ESTATE—PROPERTY HELD AS JOINT TENANTS AND TENANTS BY ENTIRETY.

The value of properties owned by the decedent and his wife as joint tenants and as tenants by the entirety was properly included in the decedent's gross estate under the provisions of section 302(e) of the Revenue Act of 1926, in the absence of any evidence to show that the wife contributed any part of the purchase price of the properties and that the services rendered by her in managing the property and assisting in the decedent's business were ever considered or valued in money or money's worth.

COURT OF CLAIMS OF THE UNITED STATES.

B. Frank Bushman, Administrator, Estate of James H. Pound, Deceased, v. *The United States.*

[November 5, 1934.]

OPINION.

WHALEY, Judge, delivered the opinion of the court.

This is a suit for the recovery of additional estate taxes which were assessed under the Revenue Act of 1926 and paid by plaintiff, as administrator of the estate of James H. Pound, deceased, who was a resident of Detroit, Mich.

Upon an audit of the return made by the administrator for the estate, the Commissioner of Internal Revenue increased the gross estate from $400,361.76 to $871,821.30 and assessed a deficiency tax of $21,132.36 after certain adjustments which are not in question. The additional tax was paid, a refund claim filed and duly rejected. In arriving at the value of the estate the Commissioner included at full value certain real estate owned by the decedent and his wife, as tenants by the entirety and certain personal property owned jointly with the right of survivorship, as he was required to do under section 302(e) of the Revenue Act of 1926 (44 Stat., 9, 70, 71), which reads as follows:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: * * *."

The plaintiff contends that the surviving spouse owned one-half of the property, that the property was acquired by their equal and joint efforts and that the valuable services rendered by the wife constitute "money's worth" which entered into the purchase consideration.

We do not find it necessary or enlightening to enter into a lengthy discussion of these questions. The law is well settled since the case of *Tyler* v. *United States* (281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383]), in which it was said:

"Before the death of the husband (to take the Tyler case, No. 428), the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect."

This case was followed by *Gwinn* v. *Commissioner* (287 U. S., 224 [Ct. D. 617, C. B. XII–1, 360]), in which it was held:

"The clear language of the 1924 statute repels the notion that it has no application to joint tenancies created prior to September 8, 1916. (*Nichols* v. *Coolidge*, 274 U. S., 531" [T. D. 4072, C. B. VI–2, 351].)

And at page 228:

"Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed, since under the State laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution. * * * The right to effect these changes in the estate was not terminated until the cotenant's death. Cessation of this power after

enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights."

(See also *Third National Bank & Trust Co.* v. *White, Collector*, 45 Fed. (2d), 911 [Ct. D. 312, C. B. X–1, 457]; *Robinson* v. *Commissioner*, 63 Fed. (2d), 652.)

The plaintiff contends, under the proviso of section 302(e) of the 1926 Act, which reads:

"* * * *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: * * *"—

that it is permissible to show the value of services rendered to the decedent by the surviving spouse and that it is to be considered as entering into the purchase price of the property. But, even admitting this contention, which we do not, the plaintiff's position is not improved. It is too elementary for the necessity of citation of authority that, where the Commissioner of Internal Revenue has made a decision, the burden of proof is on the plaintiff to overcome the presumption of the correctness of his decision. The law required the Commissioner to include all the property at its full value for the purposes of taxation of the estate and the burden was on the surviving tenant by the entirety, or joint tenant, to prove what part of the consideration of the purchase price was paid by the survivor.

We have studiously examined the evidence in this case and although its sentimental features appeal strongly to our sympathies, we nevertheless can find nothing in the testimony to show that the surviving spouse contributed any part of the consideration which entered into the purchase of the property which was held in joint tenancy or by the entirety. Nor does the evidence disclose that services rendered by the surviving spouse were ever considered, valued, or estimated by either the decedent or the wife, during the more than four decades of their married life, which formed part of the consideration of purchase, in money or money's worth. The wife's services to her husband, during their long married life, in managing the property and assisting him in his law practice, may have been, and doubtless were, of inestimable value to him, but from the record it is clear that the only compensation in her mind was the love and affection of her husband. The testimony of the surviving spouse fails to show that she contributed to the purchase price of the properties, and, if her services during all these years are to be compensated, her redress is from the estate for services rendered.

The plaintiff has failed to sustain the burden of proof, and therefore the decision of the Commissioner is sustained.

The petition is dismissed. It is so ordered.

Regulations 70(1926), Article 24: General Rules. XIV–8–7332 Ct. D. 923

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF SUPREME COURT.

1. Gross Estate—General Power of Appointment.

Where the decedent, the donee of a general power of appointment, provided by her will that the property subject to the power should go to her two sisters (who would have been entitled to it under the will of the donor of the power in default of appointment by the decedent), and the appointees renounced their right to receive under the decedent's will and elected to take under the will of the donor, the property did not pass under the general power of appointment and was not a part of the decedent's gross estate within the meaning of section 302(f) of the Revenue Act of 1926.

2. Decision Affirmed.

Decision of the Circuit Court of Appeals (70 Fed. (2d), 705) affirmed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *E. Morgan Grinnell, as Executor of the Estate of Annie Stone.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 4, 1935.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

In 1876, John O. Stone died a resident of New York. He left a will by which he created for the benefit of his daughter, the decedent, Annie Stone, a trust fund, the income from which was to be paid to her during her life. The will provided that upon her death her share of the estate should go and be applied to such persons and such uses as she might appoint by last will and testament; but in default of such appointment, her share of the estate should go and belong to her children or issue, respectively, by right of representation; or, in default of such issue, to her next of kin. Surviving John O. Stone, were his widow and three daughters—namely, this decedent, and Ellen J. Stone and Sarah J. Grinnell. These constituted his only heirs at law and next of kin. The widow died many years before the death of Annie Stone. Annie Stone, the decedent, died September 24, 1927, unmarried, without issue, and leaving as her sole next of kin her two sisters just named. Her will provided "that what property or money I am allowed to dispose of by will under the will of my dear father, the late Dr. John O. Stone, of the city of New York, I give, devise, and bequeath in equal shares to my dear sisters Ellen J. Stone and Sarah J. Grinnell, * * *." After the death of Annie Stone, the two sisters in writing renounced their right to receive the property under this paragraph of her will and elected to take the property under the provisions of the will of their father, John O. Stone.

The Commissioner of Internal Revenue declared a tax deficiency of several thousand dollars in the Federal estate tax on the estate of Annie Stone, upon the theory that the property derived from the estate of her father was required to be included in her gross estate in virtue of the fact that she had exercised a power of appointment in respect thereof. The Board of Tax Appeals, on review, sustained the Commissioner. The order of the Board of Tax Appeals based on this holding was reversed by the court of appeals (70 F. (2d), 705), upon the ground that the property did not *pass* under the exercise of the power; and consequently, an essential condition of section 302 of the Act of 1926 was not present.

Section 302 (ch. 27, 44 Stat., 9, 70, 71) provides:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *."

The crucial words are "property passing under a general power of appointment exercised by the decedent by will." Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the property, it could not well be said that the property had *passed* under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative.

The contention of the Government is that the tax is imposed "upon the power to transmit or the transmission of property by death; the shifting of the economic benefits in property is the real subject of the tax. * * * the property in question passed to the sisters under the general power of appointment exercised by the decedent by will within the meaning of the statute." But this involves the obviously self-destructive conclusion that an unsuccessful attempt to effectuate a thing required by the statute is the same as its consummation. The tax here does not fall upon the mere shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method—namely, by their "*passing* under a general power of appointment," and not otherwise. Acceptance of the Government's contention would strip the italicized word of all meaning.

The Government relies upon *Chase National Bank* v. *United States* (278 U. S., 327 [Ct. D. 40, C. B. VIII–1, 308]), and *Tyler* v. *United States* (281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383]). In neither of these cases was the court concerned with the meaning of the Act. In the first case (page 334) the court said the tax was plainly imposed by the explicit language of the statute, and that there was no question as to its construction. The sole question for determination was as to the constitutional validity of the Act. The same is true in respect of the second case. Neither case sheds any light upon the question here involved, namely, the meaning and application of the statutory provision.

The court below leaned confidently upon the decision of the New York Court of Appeals in the *Matter of Lansing* (182 N. Y., 238). That well-considered case and this in principle can not be distinguished. We think the reasoning of the New York court as to the meaning and application of the State law equally applies to the Federal statute here in question. There, as here, the contention of the taxing authorities (there under the State act, here under the Federal act) was that the appointee named in the will of the donee of the power took her property thereunder and not under the will of the creator of the power, notwithstanding the property had been given to her by the will of the former subject to the power of appointment. But the State court answered that the power gave the appointee nothing and took nothing away from her; that she had the right of election and could refuse to take under the appointment and still hold the property, since her title without was as good as it was with the power; that she treated the exercise of the power as a mere attempt and not as an effective execution of it; and that it sufficiently appeared that she elected to reject title from that source.

"Her rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. * * * Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance."

The opinion, page 244, points out that the power might have been exercised so as to have left the appointee with no title at all; but that in fact it was exercised so as to leave her the same title that she would have had if the power had not been exercised. The same is true here.

"An appointee under a power," the court continued, "has the right of election, the same as a grantee under a deed. * * * He can accept the title tendered or reject it in his discretion. It can not be forced upon him against his will. He can not be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where it was before."

We granted the writ of certiorari in this case because of an alleged conflict with *Wear* v. *Commissioner* (65 F. (2d), 665) and *Lee* v. *Commissioner* (57 F. (2d), 399). The reasoning and conclusions of those courts and of the court below can not be reconciled. We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right, and we hold accordingly.

Judgment affirmed.

REGULATIONS 70 (1926), ARTICLE 24: General rule. XIV-18-7470
Ct. D. 957

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—POWERS OF APPOINTMENT—PRESUMPTION OF INTENT TO EXERCISE—COMPROMISE AGREEMENT.

Where the decedent, the donee of powers of appointment over certain trust funds under a deed of trust and the will of his father, made no specific reference in his will to the powers of appointment but devised "all my property, of whatever kind and wherever situated, owned by me at the time of my death," that language was sufficient to create a presumption, under the local law, that he intended to exercise the powers of appointment, and the absence of any suggestion in the will that the decedent had in mind the powers of appointment over the trust funds is not sufficient to rebut that presumption. The powers were exercised and the property passing thereunder was includible in the decedent's gross estate. A compromise agreement resulting from a contest of the will does not affect the rights of the Government under the Federal taxing statute.

2. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (29 B. T. A., 677) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Old Colony Trust Co. of Boston, Executor, petitioner for review, v. *Commissioner of Internal Revenue.*

Appeal from Board of Tax Appeals.

Before BRIGHAM, WILSON, and MORTON, JJ.

[December 1, 1934.]

OPINION.

MORTON, J.: This is a petition by the Massachusetts executor of Vredenburgh Minot to review a decision by the Board of Tax Appeals which affirmed the Commissioner's action in holding certain trust funds taxable as part of the decedent's estate.

The question is whether a residuary bequest in common form in Minot's will operated as an execution of powers of appointment which he held over two trust funds. The executor's first contention is that the powers were not exercised and the corpus of the funds did not pass as part of the estate. In the settlement of the estate this same controversy, whether the powers had been exercised, arose and was settled by an agreement between the interested parties. The executor's second contention is that in any event only so much of the trust fund should be taxed as was recognized by this settlement agreement as being part of the estate. On both points the Commissioner decided against the executor.

The decedent was a resident of California at the time of his death and his estate was probated there. Whether the powers were exercised by him is however to be determined by the law of Massachusetts where the donor was domiciled, where the trusts were established by deed and by will, and where the trustees were and are resident. (*Russell* v. *Joys*, 227 Mass., 263 at 267; *Hogarth-Swann* v. *Weed*, 274 Mass., 125.) For many years it has been the settled law in Massachusetts "that a general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention." (C. Allen, J., *Cumston* v. *Bartlett*, 149 Mass., 243 at 248.) See, too, *Russell* v. *Joys*, supra, where the rule is restated. "The rule that a general devise may constitute an exercise of a power of appointment is limited to cases where there is nothing in the will to show a contrary intention." (Carroll, J., *Ames* v. *Ames*, 244 Mass., 381 at 390.) "* * * the question is in every case a question of

the intention of the donee of the power, taking into consideration not only the terms of the will, but the circumstances surrounding him at the time of its execution. * * *" (Gray, J., *Sewall* v. *Wilmer*, 132 Mass., 131, 134.) So the precise question is whether it appears from the will when read in the light of its surrounding circumstances that the decedent did not intend to exercise the powers. Vredenburgh Minot died in 1928 domiciled as has been said in California. In 1900 his father William Minot, whose domicile was in Massachusetts, conveyed certain property to trustees there on trust to pay the income to his children for life, with the right to each child to appoint by will his or her share of the trust fund. Later in the same year the father died and by his will left the residue of his estate in trust upon substantially the same terms except that as to this testamentary trust the trustees were authorized in their discretion to withhold the income of any child and add it to his share of the principal. Both trusts were duly set up and are those here in question. This was the situation in 1918 when the decedent made the will in question. He was then 30 years old and does not appear to have had any substantial amount of property except his interest in the trust funds.

The pertinent provisions of the will are as follows:

"Secondly,—I give, bequeath, and devise one-half (½) of *all my property of whatever kind, and wherever situated, owned by me at the time of my death*, to my wife, Hazel Sheldon Minot; except that I give and bequeath to my wife Hazel Sheldon Minot *all* personal property in the way of clothing, household furnishings, books, musical instruments, printed music sheets and volumes, pictures, photographs, and the like, situated at Lomaland, Point Loma, Calif., and which may be owned by me at the time of my death.

"Thirdly,—If the total value of all personal property and real estate, of whatever kind and wherever situated, owned by me at the time of my death, shall equal the monetary value of not less than one hundred thousand dollars ($100,000), I give and bequeath to my Aunt Gertrude Wyckoff Van Pelt of Point Loma, San Diego County, Calif., the sum of five thousand dollars ($5,000); to my sister, Katherine Minot Channing of Wareham, Mass., $1,000; to my brother William Minot, of Wareham, Mass., $1,000; to my brother Sedgwick Minot, of Wareham, Mass., $1,000.

"Fourthly,—I give, bequeath, and devise, after all my just debts and expenses of administration have been paid, *all the rest, residue and remainder of my property, of whatever kind and wherever situated, owned by me at the time of my death*, and which has not already been given, bequeathed, and devised by and under this will, to Katherine Tingley, of Point Loma, San Diego County, Calif." [Italics supplied.]

It will be noticed that the testator twice refers to "all my property of whatever kind and wherever situated owned by me at the time of my death." This language is obviously sufficient to create a presumption under Massachusetts law that he intended to exercise the powers of appointment. Cases supra. It strongly suggests that he intended the will to operate on all property which he had power to dispose of. The condition with which the third clause begins may indicate that he had not the trust funds in mind, as the executor contends; or it may have been inserted to safeguard the legatees named in the second and fourth clauses against shrinkage of the estate. Its bearing on the question before us is too equivocal for it to have much weight. The entire absence of any suggestion in the will that the testator had in mind his power to dispose of the very substantial sums in the trust funds is not sufficient to rebut the presumption. Where the power is expressly referred to there is, of course, no occasion to invoke the rule. The case is perhaps not without an element of doubt; but we do not think that sufficient appears to warrant us in holding that the presumption has been rebutted and a lack of intent shown. It follows that the will was an exercise of the powers of appointment.

This being so, the property passing under the powers was taxable under the statute. (Revenue Act 1926, ch. 27; 44 Stat., 9; 26 U. S. C. A., section 1094.) The agreement which the parties made in settlement of the controversy does not affect the rights of the Government under the taxing statute. (*Wear* v. *Commissioner*, 65 Fed. (2d), 665 (C. C. A. 3).)

The decision of the Board of Tax Appeals is affirmed.

TITLE III. PART I.—ESTATE TAX. (1924)

REGULATIONS 68, ARTICLE 16: Nature of transfer (in contemplation of death). XIV-22-7524 Ct. D. 972

ESTATE TAX—GIFT TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. ESTATE TAX—GROSS ESTATE—TRANSFER MADE IN CONTEMPLATION OF DEATH.

In September, 1924, the decedent, 76 years of age and retired from active business, conveyed his real estate, which constituted a material part of his property, to his wife and children. Although afflicted with hardening of the arteries, he was in good health until an attack of influenza, followed by apoplexy which caused his death on August 26, 1925. Under the circumstances the transfer was made in contemplation of death, in the absence of an affirmative showing to the contrary, and the value of the property conveyed was properly included in the gross estate for Federal estate tax purposes.

2. GIFT TAX—TRANSFER OF REAL ESTATE—CONSIDERATION.

Decedent, a resident of California, in September, 1924, conveyed one-half of his real estate to his wife and one-half to his children in equal shares, the wife joining in the deeds, which were not recorded until the day before the decedent's death on August 26, 1925. The wife's community estate is a statutory substitute for dower and falls within the provisions of the taxing Act, and where the evidence indicates that both husband and wife regarded the conveyances as gifts when they were made and there is no evidence that the wife exacted a consideration for her signatures, or that either she or her husband intended that her signature to the deeds to the children should serve as a valuable consideration for the deed to herself, the conveyance to the wife constituted a taxable gift under the provisions of the Revenue Act of 1924.

3. DECISION AFFIRMED.

Decision of the Board of Tax Appeals (27 B. T. A., 1002) affirmed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Wendell W. Fish and Neil H. Marsh, Executors of the Estate of H. H. Fish, Deceased, petitioners, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Wendell W. Fish et al., Beneficiaries, Estate of H. H. Fish, petitioners, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On petition for review of decision of the United States Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[December 31, 1934.]

OPINION.

HITZ, Associate Justice: These two appeals, consolidated for trial both here and below, come from the Board of Tax Appeals, where deficiencies in estate and gift taxes were found against the taxpayer. Petitioners are the son and son-in-law of H. H. Fish, late a resident of Alameda County, Calif., of whose will they are executors.

Mr. Fish, senior, died on August 26, 1925, leaving a widow and six children, all adults. The evidence shows that 18 years before his death Mr. Fish retired from active business, and though in 1920 his physician advised him that his arteries were hardening, he enjoyed good health at 76 years of age until an attack of influenza followed by three strokes of apoplexy caused his death.

Having indicated to his wife and children his wish that they should share his real estate among themselves, in September, 1924, Mr. and Mrs. Fish joined in conveying 6/12 thereof to herself and 1/12 to each of the children, the value being $300,000.

Without recording these deeds Mr. Fish placed them in his safe-deposit box, to which his wife and daughter had access as well as himself, and where they remained until the day before his death, when he was in extremis, and when his wife had them recorded.

From the execution of these deeds until prevented by his illness, Mr. Fish collected the income of the property, which he deposited in bank and drew upon.

From time to time he gave certain moneys to his wife and children, but the evidence is too indefinite as to amounts and recipients to indicate a division of that income.

From a decision by the Board that the property was subject to both estate and gift taxes, we have these appeals, where it is contended that the conveyances were not made in contemplation of death within the purview of the statute, and that the deed to the wife was for a valuable consideration and not a gift subject to tax. The controlling statute is the Revenue Act of 1924, which provides that—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death * * *;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to February 26, 1926, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this chapter; * * *." (U. S. Code Annotated, Title 26, paragraph 1094.)

This decedent did transfer a material part of his property within two years of his death, and, consequently, within the Act unless the contrary be affirmatively shown.

And the petitioners undertook to show both that the conveyances were not made in contemplation of death in the sense of the statute, and that the conveyance to the wife was made for a fair consideration in money's worth, on the theory that she relinquished her community interest in the half of the property conveyed to the children in return for the conveyance made to herself.

Whether the conveyance was made in contemplation of death is an issue of fact presented on evidence and decided by the Board against the petitioners. Such decisions are rarely reversed by the courts, even where the opinion of the judges may differ from the Board as to the weight of the evidence. (1003, Act February, 1926, ch. 27, 44 Stat., 110, evidence. (*Henderson Iron Works* v. *Blair*, 58 App. D. C., 114; *Rosenberg* v. *Lucas*, 37 F. (2d), 808, 59 App. D. C., 178; *Avery* v. *Commissioner Internal Revenue* (C. C. A.), 22 F. (2d), 6 [T. D. 4116, C. B. VII-1, 155]; *Royal Packing Co.* v. *Commissioner Internal Revenue* (C. C. A.), 22 F. (2d), 536; *Naiman Marcus Co.* v. *Lucas*, 41 F. (2d), 300, 59 App. D. C., 328.)

But this record contains an approved statement of evidence which we have examined to determine whether the law when applied to the facts sustains the petition. (*Frick Co.* v. *Blair*, 26 F. (2d), 540.) And we find this matter adds little to the case as we have stated it, and that our opinion as to the weight of the evidence does not differ from that of the Board.

It is argued that the petitioners presented five witnesses, while the respondent presented none, but it makes no difference from which side the persuading evidence comes, if the Board considers all evidence introduced on all sides.

In respect of the gift tax laid upon the interest conveyed to Mrs. Fish, it is to be observed that while the deed to her was recorded on the day before her husband died, it was executed nearly a year before, and she contends that since she gave in return her community interest in the property then passing to her children, the conveyance to her was not a gift but a sale for valuable consideration.

The California Code provides that all property acquired after marriage by either husband or wife, or both, including real property situated in the State * * * is community property; * * *. (Section 164.)

The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein * * * is sold, conveyed, or encumbered: * * *. (Section 172a.)

Upon the death of either husband or wife, one half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, * * *. (Section 1401.)

Exactly what interest a wife has in real estate during her husband's life under that and similar statutes in California has been much litigated in that State, and we find it difficult to ascertain from the cases to which we have been referred.

From the later cases it appears to be an expectancy plus, but to what extent plus is not clear.

And we do not stand alone in this difficulty, for in a recent decision of the Supreme Court it is said, "Elaborate argument was devoted to the question whether the interest of a wife in community property has the relatively substantial character in California that it has in some other States. That she has vested right has been determined by this Court with reference to some jurisdictions, and the Treasury Department has carried those rights to the point of allowing a division in the return of community income in other States where the community system prevails. Its adoption of a different rule for California was based, we presume, upon the notion that in that State a wife had a mere expectancy while the husband was alive.

"If on the whole this notion seems to us to be adopted by the California courts it is our duty to follow it, so far as material, even if contrary expressions should be found here or there in the books; and it is no concern of ours whether the prevailing decision is a legitimate descendant from its parent the Spanish law or otherwise. We can see no sufficient reason to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than 60 years, and shows that *Arnett* v. *Reade* (220 U. S., 311) would not be followed in that State."

Since that decision, and in 1926, the situation has been elaborately reviewed by the Supreme Court of California in *Stewart* v. *Stewart* (199 Cal., 318), where it was decided that the wife was not "the owner of an undivided one-half present vested interest," as had been held below; yet that her estate was much more definite and present than that of an heir; and that California was as much entitled as New Mexico or Texas or Washington to adopt its own interpretation of the meaning of Spanish and Mexican laws relating to a wife's interest in community property.

While the Circuit Court of Appeals for the Ninth Circuit, sitting in California, soon announced that the ground of decision given in the Stewart case does not materially distinguish a wife's community interest in California from her inchoate right of dower elsewhere. (*Talcott* v. *United States*, 23 F. (2d), 900 [T. D. 4137, C. B. VII–1, 319].)

But whatever else it may be, her community estate is certainly a statutory substitute for dower, and, consequently, falls within the expressed provisions of the taxing Act controlling this matter.

"Our statute has done away with the common law right of dower, and substituted in place a half interest in the community property." (*Beard* v. *Knox*, 5 Cal., 252–256.)

Though the California substitute is, perhaps, more liberal to the wife, than the usual dower estate, by the conveyances here in question Mrs. Fish received the very interest she claims to have given. And in a State where the law of dower prevails a husband may make a gift of real property to his wife, or, if she joins in the deed, to another.

For her signature to such a deed, a wife may—and she frequently does—exact a consideration, but there is no evidence in this record that Mrs. Fish did so, or that either she or her husband intended that her signature to the deed to their children should serve as a valuable consideration for the deed to herself.

On the contrary, the evidence indicates that both husband and wife regarded the conveyances as gifts when they were made, and we are of opinion that the decision of the Board of Tax Appeals was right in respect of both taxes, and it is therefore affirmed.

Affirmed.

SALES TAX RULINGS.

TITLE IV.—EXCISE TAXES. (1934)

SECTION 602½.—PROCESSING TAX ON CERTAIN OILS.

REGULATIONS 48, ARTICLE 1: Definitions. XIV–12–7387
S. T. 800

Taxability under section 602½ of the Revenue Act of 1934 of the filtration and clarification of crude cocoanut oil. S. T. 758 (C. B. XIII–2, 390) is modified.

The question is presented whether the use of bone char, bone coal, nuchar, fuller's earth, or other similar agent by the original crusher of copra for the purpose of filtering and clarifying crude cocoanut oil expressed by such crusher in the United States is subject to the tax imposed by section 602½ of the Revenue Act of 1934 upon the first domestic processing of cocoanut oil and certain other oils.

Such filtering or clarifying treatment does not constitute "the first domestic processing" of cocoanut oil within the scope of section 602½ of the Revenue Act of 1934 where bone char, bone coal, nuchar, fuller's earth, or other similar substance is used as a filtering or clarifying agent by the original crusher of copra as a step in the continuous course of expressing crude cocoanut oil from copra in the United States, and such filtering or clarifying does not remove more than 1 per cent of the free fatty acids or otherwise change the general character of the crude cocoanut oil.

Such filtering or clarifying treatment does constitute "the first domestic processing" of crude cocoanut oil within the scope of section 602½ of the Revenue Act of 1934 where (*a*) crude cocoanut oil (whether imported into the United States, or prepared here from copra) is subjected in the United States to the filtering and clarifying treatment as a distinct and separate process rather than as part of the continuous process of expressing cocoanut oil from copra; or, (*b*) such treatment (whether or not a part of a continuous process of expressing cocoanut oil from copra) removes more than 1 per cent of the free fatty acids or otherwise changes the general character of the crude cocoanut oil.

S. T. 758 (C. B. XIII–2, 390) is modified to accord with the conclusions reached herein.

REGULATIONS 48, ARTICLE 1: Definitions. XIV–20–7499
S. T. 808

Filtration and clarification of crude cocoanut oil by use of bone char, bone coal, nuchar, fuller's earth, or similar agent does not constitute "the first domestic processing" under section 602½ of the Revenue Act of 1934.

S. T. 758 (C. B. XIII–2, 390) and S. T. 800 are revoked.

Reconsideration is requested of S. T. 758 (C. B. XIII–2, 390), as modified by S. T. 800 (above), involving the question

whether the filtering and clarifying of crude cocoanut oil by the use of bone char , bone coal, nuchar, fuller's earth, or similar agent is "the first domestic processing" of such oil within the scope of section 602½ of the Revenue Act of 1934.

In S. T. 758 it was held that the elimination of dirt from crude cocoanut oil by a cleaning process involving the use of any of the above-mentioned agents, which results in the removal of a part of the color and produces an article marketable under a recognized trade name, constitutes "the first domestic processing" of the crude cocoanut oil within the meaning of section 602½. In S. T. 800 it was held that the filtering or clarifying treatment does not constitute "the first domestic processing" of crude cocoanut oil under section 602½ where such treatment is part of a continuous course of expressing crude cocoanut oil from copra in the United States and does not remove more than 1 per cent of the free fatty acids or otherwise change the general character of the crude cocoanut oil. S. T. 800 provides, however, that such treatment does constitute "the first domestic processing" of crude cocoanut oil either where it is a distinct and separate process rather than a part of the continuous course of expressing cocoanut oil from copra or where (whether or not a part of a continuous process of expressing cocoanut oil from copra) it removes more than 1 per cent of the free fatty acids or otherwise changes the general character of the crude cocoanut oil.

Upon reconsideration it is now held that the filtering or clarifying of crude cocoanut oil by the use of the above-mentioned agents does not constitute "the first domestic processing" of crude cocoanut oil within the meaning of section 602½ of the Revenue Act of 1934, regardless of whether such filtering or clarifying is part of a continuous process of expressing cocoanut oil from copra within the United States or is a distinct and separate process of treating crude cocoanut oil which was either imported into the United States or was previously expressed from copra in the United States.

S. T. 758 and S. T. 800 are revoked.

SECTION 604.—PRODUCERS' TAX ON CRUDE PETROLEUM.

REGULATIONS 49, ARTICLE 10: Definitions. (Also Article 17.) XIV–13–7403 G. C. M. 14582

Applicability of the tax imposed by section 604 of the Revenue Act of 1934 on crude petroleum sold by the producer thereof to crude petroleum produced from lands of members of the Five Civilized Tribes and from State school lands.

An opinion is requested whether the tax imposed by section 604 of the Revenue Act of 1934 on the sale of crude petroleum by the producer thereof applies to crude petroleum produced from lands belonging to the members of the Five Civilized Tribes and from State schools lands.

Section 604 of the Revenue Act of 1934 reads in part as follows:

(f) For the purposes of this section—

* * * * * *

(2) the term "producer" means the person owning crude petroleum or having any interest in or title to crude petroleum at the time of its production.

I.

With respect to the lands of the Five Civilized Tribes, the lessees thereof are taxable on the production therefrom to the extent that they are the producers of the crude petroleum, within the meaning of section 604(f)2 of the Revenue Act of 1934, irrespective of the nature of any tax exemptions attached to the lands in favor of the Indian allottees. (*Heiner* v. *Colonial Trust Co.*, 275 U. S., 232.) The leases covering the lands of the Five Civilized Tribes, which have been made through the Department of the Interior on the departmental form of oil and gas lease prescribed therefor, uniformly provide that the Indian lessor shall be paid as his royalty a specified percentage of the gross proceeds from the sale of the oil extracted. Where the lessor's royalty interest consists solely of the right to a percentage of the *cash proceeds from the sale* of the oil produced by the lessee, the lessor is not a "producer" of crude petroleum within the meaning of the Act. Under such a lease, the lessee is the sole owner at the time of its production of the *entire* production of crude petroleum and is liable for the tax imposed by section 604.

Where leases covering the lands of the Five Civilized Tribes provide that the royalty shall be paid by the delivery in kind to the lessor, or to a pipe line to his credit, of a portion of the oil produced, the lessor is a "producer," within the meaning of the law, to the extent of his proportionate share of the oil produced. In that case, such exemptions from taxation of the allotments of Indians as are now in effect extend to the royalty oil. (Compare *Carpenter* v. *Shaw*, 280 U. S., 363.) The exemptions specified by the allotment Acts may be summarized as follows:

The *homestead* allotments of the Creek Tribe were made nontaxable for 21 years from the dates of the patents issued therefor (section 7, Act of March 1, 1901, 31 Stat., 861, 863, and section 16, Act of June 30, 1902, 32 Stat., 500, 503); the *homestead and surplus allotments* of the Choctaws and Chickasaws were made nontaxable while the title remained in the original allottee, but not to exceed 21 years from the dates of the patents therefor (section 29, Act of June 28, 1898, 30 Stat., 495, 507, as modified by the Act of July 1, 1902, 32 Stat., 641); the *homesteads* of the Cherokees were made nontaxable during the time held by the original allottee (Act of July 1, 1902, 32 Stat., 716); and the *homestead* allotments of the Seminole Indians were made "nontaxable as a homestead in perpetuity" (Act of July 1, 1898, 30 Stat., 567, 568). This Seminole exemption has been construed strictly and is treated as being terminated upon the sale of the land by the Indian allottee or his heirs. (*United States* v. *Bean* (C. C. A. 8), 253 Fed., 1, 5.) Of the foregoing exemptions, those applicable to the Creeks, Choctaws, and Chickasaws expired before the enactment of the Revenue Act of 1934. Only a small portion of the Cherokee homestead lands are within the oil-producing area, and of such allotments only a negligible number (which may or may not be oil producing) are still held by the original allottees. As to the Seminole homesteads (other than the restricted allotments under the supervision of the Interior Department, the lessors of which are not "producers"), many of them are no longer held as *homesteads* within the meaning of the Indian land laws. In general, the taxability as a "producer" of a

lessor of lands of the Five Civilized Tribes under section 604 of the Revenue Act of 1934 depends upon whether the lessor has such an interest in the crude petroleum at the time of its production as to require his classification as a "producer." The exemption from the tax of such a lessor who is a "producer" must be determined in accordance with the facts of the particular case.

II.

With respect to the taxability of crude petroleum produced from State school lands, oil and gas leases covering such lands must be divided into two groups, one of which is governed by the decision of the Supreme Court of the United States in *Group No. 1 Oil Corporation* v. *Bass* (283 U. S., 279) and the other by the decision of that Court in *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393). Under the first group, the oil and gas lease is to be treated as a conveyance of the title to some portion or to all of the oil in place before its production. (See *Theisen* v. *Robison*, 117 Tex., 489, 8 S. W. (2d), 646, and *Texas Co.* v. *Daugherty*, 107 Tex., 226, 176 S. W., 717.) Where the lease is to be given such effect, the title to some portion or all of the oil in place is treated as having been transferred to the lessee by sale before production. After such sale, the oil in the hands of the lessee is no longer to be considered property which is protected from Federal taxation as a Government instrumentality. (*Group No. 1 Oil Corporation* v. *Bass*, supra.) The lessee under such a lease is not immune from the tax imposed by section 604 of the Revenue Act of 1934. If under the terms of the lease, the ownership of royalty oil is at the time of its production vested in the State, then to that extent the State is the "producer" and that portion of the crude petroleum produced under the lease is exempt from the tax imposed by section 604.

It has been held in Texas (where an oil and gas lease may be treated as a conveyance of oil in place before production) that, if under the royalty provisions of the lease the lessee *at his option* may pay the stipulated royalty in oil or in cash, the lease confers on the lessee the essentials of complete ownership of all the crude petroleum produced under the lease and that the lessee may be taxed accordingly for the purpose of local property taxes (*Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex., 160, 254 S. W., 290); but that where, under the lease, it is stipulated that the lessee shall "deliver to the lessor, free of charge, in the pipe line to which said lease may be connected, the equal one-eighth (⅛) part of all the oil and gas produced on said premises," the lessor retains the ownership of the royalty oil (together with the power of disposition and the right to receive possession thereof) and the lessor may be taxed accordingly for local property tax purposes. (*Waggoner Estate* v. *Wichita County*, 273 U. S., 113.)

In view of the foregoing, it is the opinion of this office that tax liability under section 604 of the Revenue Act of 1934, in the case of oil and gas leases governed by *Group No. 1 Oil Corporation* v. *Bass*, supra, should be determined in accordance with the following rules:

(1) If, under the lease, the State is entitled only to a cash royalty (i. e., a percentage of the gross proceeds from the sale of oil produced from the leased premises), or if the lessee *at his option* may

pay to the State the stipulated royalty in oil or in cash, the lessee should be treated as the owner, at the time of its production, of all the crude petroleum produced from the leased premises. The lessee in such a case is the " producer " and is liable for the tax on the sale of the entire production.

(2) If, under the lease, it is stipulated that the lessee must deliver to the lessor, either actually or by delivery to his credit into a pipe line, an equal fractional part of all the oil produced, the lessee is not the producer of the royalty oil within the meaning of the law. The lessee is liable for the tax on the remainder of the production. The royalty oil, being property of the State at the time of its production, is exempt from the tax imposed by section 604.

In the case of oil and gas leases covering State school lands governed by *Burnet* v. *Coronado Oil & Gas Co.*, supra (applicable in States which do not recognize the rule that there may be a conveyance of title to oil and gas in place), the lessee of such State school lands, in producing oil and gas from such lands, is deemed to be an instrumentality of the State engaged in the exercise of an essential governmental function, namely, the maintenance of schools, and, therefore, may not be subjected to a Federal tax on benefits derived from such operations. In such a case, the entire production of oil and gas is exempt from the tax imposed by section 604 of the Revenue Act of 1934.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

REGULATIONS 49, ARTICLE 10: Definitions. (Also Article 17.)

XIV-13-7404
G. C. M. 14585

Liability of lessor and lessee for the tax imposed by section 604 of the Revenue Act of 1934 on crude petroleum sold by the producer thereof.

Applicability of the tax with respect to royalties paid by the lessee on crude petroleum produced from restricted homestead allotments of Osage and Seminole Indians.

An opinion is requested whether the tax imposed by section 604 of the Revenue Act of 1934 on the sale of crude petroleum by the producer thereof applies to royalties paid by the lessee on crude petroleum produced from the restricted homestead allotments of the Osage and Seminole Indians.

The pertinent portions of section 604 are as follows:

(a) There is hereby imposed on crude petroleum sold by the producer thereof, a tax of one-tenth of 1 cent per barrel of 42 gallons, to be paid by the producer. * * *

(b) Every person purchasing crude petroleum from the producer thereof, and taking delivery thereof at the premises where produced, shall collect the tax imposed by subsection (a) from the producer. Every such purchaser, and every producer liable for any tax under this section not so collected from him, shall make monthly returns under oath and pay such taxes to the collector for the district in which are located the premises where such crude petroleum was produced. * * *

(c) Every purchaser required to collect any tax under this section shall make such collection by deducting and withholding the amount of such tax from any payments made by such purchaser to the producer. * * *

* * * * * * *

(f) For the purposes of this section—

* * * * * * *

(2) The term "producer" means the person owning crude petroleum or having any interest in or title to crude petroleum at the time of its production.

The term "producer" as used in section 604 is defined in article 10 of Regulations 49 as follows:

The term "producer" includes any person who, *at the time of production*, (1) owns the crude petroleum, (2) has any interest in it, or (3) has any title to it; and includes all property owners, lease holders, or royalty owners, where joint ownership exists in the title to or interest in the crude petroleum produced. * * * [Italics supplied.]

I.

It is deemed advisable to consider the application of the tax imposed by section 604 of the Revenue Act of 1934 to the royalty interests of lessors under oil and gas leases generally before considering the application of the tax to leases covering restricted homestead allotments of Osage and Seminole Indians.

The words, "time of production," as used in the law and regulations, undoubtedly have reference to the time when the crude oil is brought to the surface, since produced oil is generally understood to refer to oil when brought to the surface. (*Tedrow* v. *Schaffer* (Ohio), 155 N. E., 510.)

As to the ownership of oil and gas, the general rule recognized in Oklahoma (and certain other States), based upon *Ohio Oil Co.* v. *Indiana* (177 U. S., 190), was summarized by the Supreme Court of Oklahoma in *Rich* v. *Doneghey* (177 Pac., 86) as follows: The owner of the land has a qualified ownership of oil and gas in place, which interest may be stated more accurately to consist of the exclusive right within the limits of his surface boundaries to explore for, to take therefrom and reduce to possession the oil and gas found, and thus to acquire absolute title as personal property to the oil and gas produced; that this right is the proper subject of sale and may be granted or reserved; and that the owner by his oil and gas lease grants to his lessee a vested interest in the land which consists of the right to explore, mine and operate, and extract from the land and reduce to *his possession as his personal property* such oil as may be found. This result under the general rule recognized in Oklahoma and certain other States as to the ownership of crude oil when brought to the surface is similar to the result which obtains under the general rule recognized in Texas and other States where an oil and gas lease may be considered to convey title to oil and gas in place (*Texas Co.* v. *Daugherty* (Tex.), 176 S. W., 717); that is, that crude oil at the time of its production is the personal property of the lessee.

While the foregoing sets forth the general rule, the ownership of produced oil may, nevertheless, be "subject to the terms of the lease," as was indicated in *Fairbanks* v. *Warrum* (Ind.), (104 N. E., 983). If the provisions of the lease require the payment to the lessor of a royalty consisting of a specified part of the gross amount of moneys or gross proceeds from the sale of the crude oil produced and saved, such oil at the time of its production is the property of the lessee and is sold as such. (*Coalinga Pac. Oil & Gas Co.* v. *Associated*

Oil Co. (Cal.), 116 Pac., 1107.) The case just cited was relied upon in *Eureka Development Co.* v. *Clements* (Idaho) (258 Pac., 371) as authority for the proposition that the mineral product belonged to the lessee at the time of its production where the agreement provided that the rent or royalty was not to be *paid in kind*, but the lessee was to operate the mine, recover the ore, sell it, and pay a certain percentage of the proceeds to the lessor as such rent or royalty. The court in that case held that title to the ore mined vested in the lessee as soon as removed from its original place and in the course of its discussion said:

* * * This is a clear agreement to pay an acknowledged indebtedness out of certain proceeds. A promise to pay out of certain proceeds, however solemn the promise may be, is a personal obligation and does not bind the property from which the proceeds are to flow. It takes something more than that to give rise to an equitable lien. (*In re Clark Realty Co.* (C. C. A.), 234 F., 576; *Silent Friend Min. Co.* v. *Abbott*, 7 Colo. App., 73, 42 P., 318; *Coalinga Pac. Oil & Gas Co.* v. *Associated Oil Co.*, 16 Cal. App., 361, 116 P., 1107; *Smith* v. *Rainey*, 9 Ariz., 362, 83 P., 463.)

Where the lease provides that the *lessee* may, *at his option*, pay to the lessor the stipulated royalty in oil or in cash, the Supreme Court of the United States in *Waggoner Estate* v. *Wichita County* (273 U. S., 113) held that there is conferred on the lessee the essentials of ownership to all of the oil; that is, possession with unrestricted power of appropriation and disposition of the oil, and under such circumstances the lessee is properly taxable upon the entire production, including the royalty oil. (Compare *Adams* v. *Petroleum Midway Co.*, 205 Cal., 221, 270 Pac., 668.)

It appears, however, that the courts have held that there is a joint ownership or cotenancy in crude oil at the time of its production where the lease provides that the lessee shall deliver to the credit of the lessor, free of cost, into a pipe line to which he shall connect his wells, the equal one-eighth (or some other specified fractional part) of all the oil produced and saved from the leased premises. In this connection, the court in *Coalinga Pac. Oil & Gas Co.* v. *Associated Oil Co.*, supra (decided in June, 1911), suggested by way of dictum that where the relationship between the parties is that of landlord and tenant—

* * * there must be some appropriate words in the lease to indicate that the product of the land is to be held in cotenancy "or such conclusion will not be reached. If there is nothing to indicate that intention, then the products to be delivered to the landlord after the harvest by the tenant will be deemed to be the property of the tenant until that time, and treated as rent to be then paid." (*Clarke* v. *Cobb*, 121 Cal., 597, 54 Pac., 75 [which case had to do with an agricultural lease].) If the title to the oil is in the tenant until it is produced and delivered, the right to sell it would follow as a necessary incident * * *.

However, the court did not find it necessary to turn the case on that point.

But in *Smith* v. *Linden Oil Co.* (W. Va.) (71 S. E., 167, decided in March, 1911), the court took the view that royalty oil under such a royalty provision can not be likened to a share of a grain crop to be paid to the landlord and that there is joint ownership until the delivery of the crude oil to the pipe line. Subsequent decisions proceed upon the latter basis. (*Waggoner Estate* v. *Wichita County* (U. S. Sup. Ct.), supra; *Evans et al.* v. *Mills et ux.*, 67 Fed. (2d), 840; *Shreveport-El Dorado Pipe Line Co.* v. *Bennett* (Ark.), 290 S. W.,

929; *Russell* v. *Producers' Oil Co.* (La.), 83 So., 773; *Clark* v. *Slick Oil Co.* (Okla.), 211 Pac., 496; *Elliott, Jones & Co.* v. *Waurika Oil Association* (Tex.), 253 S. W., 601; *Homestake Exploration Corporation* v. *Schoregge* (Mont.), 264 Pac., 388.)

In view of the foregoing, it is the opinion of this office that—

1. (*a*) Where an oil and gas lease provides for the payment to the lessor as a royalty of a percentage of the gross amount of moneys received (or gross proceeds) from the sale of crude petroleum produced and saved, the lessor is not a "producer" of crude petroleum within the meaning of section 604(f) of the Revenue Act of 1934 and article 10 of Regulations 49. In such a case, the lessee (or his assigns) is the "producer" of the entire amount of the crude petroleum produced under such a lease and is liable for the full amount of the tax imposed upon the sale thereof by section 604(a) of the Revenue Act of 1934.

(*b*) Where the lease provides that the *lessee* may, *at his option*, pay to the lessor the stipulated royalty in crude petroleum or in cash, the lessee is the "producer" of the entire production of crude petroleum and is liable for the tax thereon.

2. (*a*) Where the lease provides that the lessee shall deliver to the lessor (or deliver to the credit of the lessor into a pipe line) as a royalty a specified percentage of the crude petroleum produced, the crude petroleum, at the time of its production, must be treated as being jointly owned by the lessor and lessee within the meaning of the law and regulations. In such cases, both the lessor and lessee are "producers" and are liable for the tax imposed by section 604(a) of the Revenue Act of 1934 according to their respective proportions of the crude petroleum produced.

(*b*) If the lease provides for the payment as a royalty to the lessor of a specified percentage of the gross proceeds of the crude petroleum produced, or, *at the lessor's option*, for the delivery of a designated amount of crude petroleum in kind as a royalty, the lessor is a "producer" of crude petroleum only during the effective period of his election to take his royalty in kind.

II.

The decision as to the application of the tax imposed by section 604 of the Revenue Act of 1934 in the case of the lessor's royalty interest under oil and gas leases which cover restricted homestead allotments of Osage and Seminole Indians must be approached from the standpoint of the foregoing conclusions.

The making of oil and gas leases covering the restricted homestead allotments of the Seminole Indians is under the supervision and control of the Secretary of the Interior. The form of oil and gas lease prescribed by him for use in the leasing of lands of the Five Civilized Tribes provides that the lessee shall pay to the lessor as royalty for the lease a certain percentage of the gross proceeds from the sale of all crude oil extracted from the land and does not provide an option to the lessor to take oil as royalty in kind. All sums due as royalty are made a lien on all implements, tools, machinery, etc., and upon unsold oil held by the lessee. Accordingly, it is the opinion of this office that, under the terms of the oil and gas leases covering the homestead allotments of restricted Seminole Indians,

the lessors are not " producers " of crude petroleum for the reason that they have no ownership of, title to, or interest in specific crude petroleum at the time of its production. The ownership of the crude petroleum produced from such allotments under such leases is vested entirely in the lessee at the time of its production. The lessee is, therefore, liable for the tax imposed upon the sale of such crude petroleum by section 604 of the Revenue Act of 1934.

The leasing for oil and gas purposes of all the lands of the Osage Indians is under the supervision and control of the Secretary of the Interior. The form of oil and gas lease prescribed by him for use in the leasing of Osage lands provides for the payment by the lessee to the Osage Tribe, as lessor, of a percentage of the gross proceeds realized from the sale of the oil produced, with similar lien provisions to secure payments as in the case of the leases of allotments of the Five Civilized Tribes. Such leases provide in addition that, at the option of the Osage Tribal Council, the royalty may be taken in oil, in which case the lessee is to furnish free storage for the royalty oil for a period not exceeding 30 days.

This office is of the opinion that where the Osage Tribe takes as its royalty a percentage of the gross proceeds from the sale of the crude petroleum produced, it is not a " producer " of crude petroleum within the meaning of section 604 of the Revenue Act of 1934; that under such circumstances the lessee is the sole owner of the crude petroleum at the time of its production; and that the tax on the sale thereof imposed by section 604 falls entirely upon the lessee. If, however, the Osage Tribe elects to take its royalty in kind, the tribe is a " producer " of crude petroleum within the meaning of the law. The election to take royalty in kind should be deemed to apply and take effect at the time of production of the oil involved—that is, when the oil is brought to the surface. The lessee is liable for the tax on his proportionate share determined accordingly.

The question remains whether the royalty oil in such case, being the property of an Indian tribe, may be subjected to the tax imposed by section 604.

The Osage tribal lands were allotted in severalty to the members of the tribe under the Act of June 28, 1906 (34 Stat., 539). The homestead and surplus allotments so made to the members were made nontaxable for stated periods of time. However, by section 2, paragraph 7, of that Act the minerals underlying the tribal lands were reserved to the use of the tribe for 25 years and the royalty was made payable to the tribe for distribution to its members according to the official rolls of the tribe. This reservation of the mineral interest has twice been extended and under existing law will terminate on April 8, 1958, unless further extended by Congress. (Act of March 2, 1929, 45 Stat., 1478.) There has never been any express exemption from taxation in any Act of Congress of the mineral interest thus reserved to the Osage Tribe. (See I. T. 1834, C. B. II–2, 62; *Appeal of Leah Brunt*, 5 B. T. A., 134; and *Mary Blackbird* v. *Commissioner*, 14 B. T. A., 1247.) None of the express provisions for exemption from taxation of allotted interests in the allotment deeds to the members, whether homestead or otherwise, can be deemed to apply to the reserved mineral interest of the tribe as a whole.

The taxability of the Osage Tribe in respect of mineral production depends upon the will of the Congress, which has plenary authority over Indian affairs and Indian tribal property. (*Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 565.) While it was held in *Gillespie* v. *Oklahoma* (257 U. S., 501) that the State of Oklahoma could not subject the oil production owned by either the Osage Indians or their lessees to its gross production tax without the sanction of Congress, it was indicated in *Heiner* v. *Colonial Trust Co.* (275 U. S., 232) that this did not mean that the Indians' property may not be subjected to a Federal tax. In *Blackbird* v. *Commissioner* (38 Fed. (2d), 976) (C. C. A. 10), the court adopted the view that the mineral interests reserved to the Osage Tribe are not within the purview of a general Federal taxing Act unless there is specific language in the Act which expresses the intention to subject Indian tribal property to the tax; but in *Choteau* v. *Burnet* (283 U. S., 691), in referring to the taxability as a fund of the undistributed Osage royalties in the possession of the Government in trust for the tribe, the Supreme Court stated:

* * * It does not follow, however, that they can not be subjected to a Federal tax. *The intent to exclude* must be definitely expressed, where, as here [income tax, Revenue Act of 1918], the general language of the Act laying the tax is broad enough to include the subject matter * * *. [Italics supplied.]

The term "producer" (as defined in section 604(f)2 of the Revenue Act of 1934) "means the person owning crude petroleum or having any interest in or title to crude petroleum at the time of its production" and is broad enough to include the share of oil taken by the Osage Tribe as a royalty *in kind*. Accordingly, it is held that the tax imposed on sales of crude petroleum by the producer applies to the sales of such royalty oil by or on behalf of the Osage Tribe. The purchaser of such oil should, therefore, deduct and withhold, as provided in section 604(c) of the Revenue Act of 1934, the amount of the tax from the payments made by such purchaser to the Osage Tribe.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)

SECTION 601(c)1 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS), AND BY SECTION 603(a) OF THE REVENUE ACT OF 1934.

REGULATIONS 44(1934), ARTICLE 40: Use of terms. (Also Article 43.) XIV–16–7446 S. T. 803

Petrolatum is not taxable as lubricating oil.

Inquiry is made whether the product known as petrolatum, which is an amorphous wax obtained as a by-product from the dewaxing of residual petroleum oil in the manufacture or production of lubricating oils, is subject to tax as lubricating oil.

Petrolatum is not a lubricating oil. It is sold principally for use in the manufacture of cosmetics or pharmaceutical preparations, or as a softening, plasticising, swabbing, or rust preventing agent, or for other nonlubricating purposes.

It is, therefore, held that the product known as petrolatum is not taxable as lubricating oil under section 601(c)1 of the Revenue Act of 1932, as amended, and that the manufacturer of such product will not be required to obtain from the purchasers thereof the exemption certificates prescribed by article 43 of Regulations 44 (1934).

SECTION 602.—TIRES AND INNER TUBES.

REGULATIONS 46, ARTICLE 19: Scope of tax. XIV-24-7551
S. T. 812

Taxability of retreaded and rebuilt tires.

Inquiry is made with respect to the effect, if any, of the decision of the District Court for the Southern District of Ohio, Western Division, in *Skinner* v. *United States* (8 Fed. Supp., 999), upon S. T. 648 (C. B. XII-1, 384), relating to the taxability of retreaded and rebuilt tires under section 602 of the Revenue Act of 1932.

Section 602 imposes a tax upon the sale by the manufacturer, producer, or importer of tires made wholly or in part of rubber at the rate of 2¼ cents a pound on total weight (exclusive of metal rims or rim bases). Article 4 of Regulations 46 reads in part as follows:

* * * As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

S. T. 648, supra, reads in part as follows:

The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. *It is held that where the identity of the old tire is lost in the process the manufacture of a taxable tire results.* [Italics supplied.]

The issue in the Skinner case was whether sales of retreaded tires were taxable as sales of tires wholly or in part of rubber within the meaning of section 602 of the Revenue Act of 1932. The record in that case shows that the retreading process used by the taxpayer did not obliterate the name of the original manufacturer of the tire. In the findings of fact the court stated that the "Tire retreading as the plaintiff performs the process does not materially change the product so that it loses its identity." The court held that section 602 of the Revenue Act of 1932 did not apply to such retreaded tires, and that the taxpayer was not a manufacturer or producer of tires within the meaning of that section. Since in the Skinner case the retreading process did not destroy the identity of the tires, it is held that the decision in that case does not require a modification of S. T. 648, supra.

The question has been raised whether the retreading or rebuilding of used tires by the following processes results in the loss of the identity of the tires so processed:

(1) The rubber remaining on the tread (the portion of the tire that comes in contact with the road) is removed down to the fabric and is replaced with new rubber. The side wall of the tire is not rebuilt and the name of the original manufacturer and the other original markings remain thereon. Additional markings such as "retreaded," "rebuilt," etc., may or may not be used.

(2) In addition to replacing the tread, as in (1) above, the side wall of the tire is roughened by buffing or otherwise and a thin layer of new rubber is vulcanized thereon without obliterating the name of the original manufacturer or other original markings. Additional markings may or may not be used.

(3) All of the rubber on the outside of the tire is removed down to the fabric and is replaced with new rubber. The name of the original manufacturer and other original markings are destroyed.

In the processes outlined in (1) and (2), above, the identity of the tire is not lost. Accordingly, it is held that such processes are not manufacturing processes and that the processor in either of such situations is not a producer or manufacturer of tires within the meaning of section 602 of the Revenue Act of 1932 and article 4 of Regulations 46. In the process set forth in (3), above, the identity of the tire is lost. Consequently, the person who makes such changes in the tire is a producer or manufacturer of tires within the meaning of section 602 of the Revenue Act of 1932 and article 4 of Regulations 46.

SECTION 603.—TAX ON TOILET PREPARATIONS, ETC.

REGULATIONS 46, ARTICLE 22: Scope of tax. XIV–22–7525
Ct. D. 973

MANUFACTURER'S EXCISE TAX—REVENUE ACT OF 1932—DECISION OF COURT.

TOILET PREPARATION—MOUTH WASH—HEXYLRESORCINOL SOLUTION.

Hexylresorcinol Solution, commonly known as S. T. 37, which is widely advertised and sold as a mouth wash, although also used as an antiseptic for wounds, etc., is subject to manufacturer's excise tax as a toilet preparation, under the provisions of section 603 of the Revenue Act of 1932.

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Sharp & Dohme, Inc., v. *Albert H. Ladner, Jr., Collector of Internal Revenue.*

[March 5, 1935.]

OPINION.

WELSH, J.: There are many questions raised by the pleadings in this case but it is not necessary to discuss them at length or even to refer to them in this opinion. The first and principal question raised is as to whether or not the article is a mouth wash for toilet purposes. Should this be decided in negative the other numerous questions referred to in the argument would become relevant. Should that question be decided in the affirmative, that it *is* a mouth wash, nothing else would remain for our decision.

At the argument it was brought out that the article in question was widely advertised and widely sold as a mouth wash. There was exhibited a carton,

or box in which the individual bottles were sold to the trade. The label contains the following language, which is self-explanatory:

"A powerful nonpoisonous antiseptic for open wounds, burns, scalds and the hygienic care of mouth and throat. Kills bacteria almost instantly on contact."

"MOUTH WASH, GARGLE OR THROAT SPRAY: Use full strength or dilute with one to three parts of warm water. Odorless, pleasant to taste. Use twice daily."

"DENTAL USES: The use of Hexylresorcinol Solution S. T. 37 after each brushing of the teeth is recommended."

The taxpayer can not blow both hot and cold at the same time. We feel in view of the language used above, and the facts gleaned from the oral argument that the taxed article was a mouth wash and that it was used for toilet purposes and that it, therefore, does not come within one of the exceptions or exemptions contained in the Act. We, therefore, make no further reference to the other questions so ably dwelt upon by counsel on both sides of the case.

Judgment may therefore be entered for the defendant in accordance with this opinion.

SECTION 605 OF THE REVENUE ACT OF 1932 AND SECTION 609 OF THE REVENUE ACT OF 1934.—JEWELRY, ETC.

REGULATIONS 46, ARTICLE 30: Pearls, precious and semiprecious stones, and imitations thereof. XIV-5-7293 S. T. 797

Taxability of sales of diamonds in lots.

Section 605 of the Revenue Act of 1932, as amended by section 609 of the Revenue Act of 1934, imposes a tax equivalent to 10 per cent of the price for which pearls, precious and semiprecious stones, and imitations thereof are sold by the manufacturer, producer, or importer on or after May 11, 1934, if the selling price is $25 or more.

In the case of diamonds sold in lots, where the average selling price per diamond is less than $25 but the selling price of one or more of the diamonds, if sold separately, would be $25 or more, it was held in S. T. 745 [C. B. XIII-2, 404] that the tax attaches to the price for which the lot is sold, if sold for $25 or more; that the average price per diamond may not be used as the basis for determining whether the sale is taxable; and that, under the provisions of the law, the separate sale of any diamond or diamonds for less than $25 is not subject to the tax.

Where a number of stones are sold in bulk for a lump sum of $25 or more, and one or more of the stones, if sold separately, would sell for $25 or more, and one or more of the stones, if sold separately, would sell for less than $25, the tax will attach to the lump sum sale price unless the vendor shows on the invoice as separate and distinct items those stones which would sell for $25 or more and those which would sell for less than $25, if sold separately. Where the stones are invoiced as separate and distinct items as indicated, the tax will attach only to the sale of those stones in the lot which would sell for $25 or more, if sold separately. In order to avoid the invoicing of each stone separately where each stone in the lot would sell for less than $25, if sold separately, a signed statement in the following form may be affixed to the invoice:

I (We) hereby certify that no one of the stones covered by this invoice would sell for $25 or more if sold separately.

Where the foregoing statement appears on the invoice, the tax imposed by section 605 of the Revenue Act of 1932, as amended by section 609 of the Revenue Act of 1934, will not attach.

SECTION 609.—SPORTING GOODS.

REGULATIONS 46, ARTICLE 53: Scope of tax. XIV-22-7526
S. T. 811

Taxability of certain types of shoes under section 609 of the Revenue Act of 1932.

The question is presented whether certain types of shoes having either rubber soles, one sole of leather and one sole of rubber, combination of rubber and leather soles, or crepe soles are subject to the tax on sporting goods imposed by section 609 of the Revenue Act of 1932.

That section imposes a tax upon the sale by the manufacturer, producer, or importer of specified articles, including certain types of shoes, and all similar articles commonly or commercially known as sporting goods, equivalent to 10 per centum of the price for which so sold.

Article 53 of Regulations 46 reads in part as follows:

The term "sporting goods" includes all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The shoes in question are manufactured in high and oxford styles, with lace-to-toe or closed-toe construction. Some of them are so designed that they can be used for ordinary wear.

It is held that the following types of shoes are articles commonly or commercially known as sporting goods, within the meaning of the law and regulations, and are, therefore, taxable under section 609:

(1) Rubber soled shoes with cleats made of rubber or leather, or otherwise so designed or constructed as to limit their use to a specific sport.

(2) Shoes constructed with a cleated or caulked heel and/or sole, regardless of the material with which soled, normally used as golf shoes.

(3) Shoes constructed with one sole of leather and one sole of rubber, or with a sole made of a combination of rubber and leather, ordinarily used as bowling shoes.

The following types of shoes are not considered articles commonly or commercially known as sporting goods, and are not, therefore, subject to tax under section 609:

(1) Rubber soled shoes with leather or canvas uppers, in either high or oxford styles, with lace-to-toe or closed-toe construction, unless they are designed or constructed with some feature which distinguishes them as adapted to a specific sport.

(2) Ordinary shoes with rubber or crepe soles but without a cleated or caulked heel and/or sole.

SECTION 610.—FIREARMS, SHELLS, AND CARTRIDGES.

REGULATIONS 46, CHAPTER X: Firearms, shells, and cartridges. XIV-6-7296 T. D. 4521

Chapter X of Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Chapter X of Regulations 46, approved June 18, 1932, is hereby amended to read as follows:

CHAPTER X.

FIREARMS, SHELLS, AND CARTRIDGES.

Section 610 of the Revenue Act of 1932.

There is hereby imposed upon firearms, shells, and cartridges, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold. * * *

ART. 58. *Scope of tax.*—Section 610 of the Revenue Act of 1932 imposes a tax on sales by the manufacturer of (1) firearms and (2) shells and cartridges.

The term "firearms" as used in the Act includes all portable weapons, such as rifles, carbines, machine guns, shotguns, and fowling pieces, from which a shot, bullet, or projectile may be discharged by an explosive.

The terms "shells" and "cartridges" include all combinations of projectile, explosive, and container which are designed, assembled, and ready for use without further manufacture in portable firearms, including pistols and revolvers.

EXEMPTIONS.

Section 610 of the Revenue Act of 1932.

* * * The tax imposed by this section shall not apply (1) to articles sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (2) to pistols and revolvers.

Section 15 of the National Firearms Act, approved June 26, 1934.

The taxes imposed by paragraph (a) of section 600 of the Revenue Act of 1926 (U. S. C., Supp. VII, title 26, section 1120) and by section 610 of the Revenue Act of 1932 (47 Stat., 169, 264), shall not apply to any firearm on which the tax provided by section 3 of this Act has been paid.

ART. 59. *Exempt sales.*—The tax does not apply in the case of sales of firearms and cartridges where such articles are sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia. In order to be exempt from the tax the articles specified must be sold for the use of a Government or governmental agency. Firearms, shells, and cartridges sold to officers of a State or municipality in their private capacity or for their private use are not exempt from the tax.

Sales of pistols and revolvers are specifically exempt from the tax imposed under section 610 of the Revenue Act of 1932, but are subject to the tax imposed under section 600 of the Revenue Act of 1926, which remains in effect. (See Regulations 47, revised October, 1928, relative to excise taxes on sales by the manufacturer of pistols and revolvers.)

The tax imposed under section 610 of the Revenue Act of 1932 also does not apply in the case of the sale by the manufacturer, producer, or importer of any firearm of the type included in the National Firearms Act if the tax imposed under the National Firearms Act has been paid by such manufacturer, producer, or importer on such sale.

The term "possession of the United States" includes the Philippine Islands, the Panama Canal Zone, the Virgin Islands, Guam, Puerto Rico, Tutuila, Wake, and Palmyra.

Any manufacturer claiming exemption from the tax imposed under section 610 of the Revenue Act of 1932 on sales of firearms, shells, and cartridges, (1) for the use of the United States, etc., or (2) on sales of firearms on which he has paid tax under the National Firearms Act, must maintain such records (see article 69), and be prepared to produce such evidence as will clearly establish the right to exemption.

ART. 60. *Rate of tax.*—The tax imposed under section 610 of the Revenue Act of 1932 is payable by the manufacturer at the rate of 10 per cent of the sale price as outlined in articles 8 to 15, inclusive.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 4, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 617, AS AMENDED BY SECTION 211(b) OF THE NATIONAL INDUSTRIAL RECOVERY ACT AND BY SECTION 603 OF THE REVENUE ACT OF 1934.—GASOLINE.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States. XIV–4–7278 S. T. 796

Sales of gasoline by the producer or importer to cooperative and self-help associations receiving Federal funds are subject to tax.

Advice is requested whether sales of gasoline by the producer or importer to cooperative and self-help associations which receive aid from the Federal Emergency Relief Administration are exempt from the tax imposed by section 617 of the Revenue Act of 1932, as amended by section 211(b) of the National Industrial Recovery Act and by section 603 of the Revenue Act of 1934, on the ground that the sales are made to governmental agencies of States or political subdivisions.

Article 24 of Regulations 44 (1934) reads in part as follows:

* * * During the period June 21, 1932, to June 30, 1933, both dates inclusive, all sales of taxable articles by the manufacturer to States or political subdivisions thereof, other than direct sales by the manufacturer for use in the exercise of essential governmental functions, are taxable. On and after July 1, 1933, no tax attaches to articles sold by the manufacturer direct, or for resale by the vendee direct, to a State of the United States, or political subdivision of such State, for use in the exercise of an essential governmental function, if the exempt character of the sale is established as required by these regulations. * * *

Under subdivision (c) of section 4 of the Federal Emergency Relief Act of 1933, the Federal Administrator is empowered "to aid in assisting cooperative and self-help associations for the barter of goods and services." The "manual of rules and policies concerning self-help and nonprofit nonstock cooperatives eligible to Federal aid," promulgated by the Federal Emergency Relief Administration, provides for Federal grants to these organizations. Such grants are made on condition that title to all the property bought with Federal funds shall be taken in the name of the cooperative and/or self-help association and held to the use and benefit

of the Federal Emergency Relief Administration. Upon approval by the Federal Emergency Relief Administration of a request by a State relief administration for Federal funds to establish a cooperative or self-help association, the funds are forwarded to the State relief administration to be held for the specific purpose of aiding the cooperative or self-help association. The associations are privately organized for the benefit of and are controlled by their members.

It is held that the cooperative and/or self-help associations in question are not agencies of the States or political subdivisions but are organizations of individuals banded together for the purpose of mutual aid and assistance. Accordingly, sales of gasoline by the producer or importer to such associations are not exempt from the tax imposed by section 617 of the Revenue Act of 1932, as amended.

REGULATIONS 44(1934), ARTICLE 30: Use of terms. XIV-21-7511
S. T. 810

A person who blends alcohol with gasoline is a producer of gasoline within the meaning of section 617 of the Revenue Act of 1932, as amended.

Inquiry is made whether a person who blends alcohol with gasoline is a producer of gasoline within the meaning of section 617 of the Revenue Act of 1932, as amended.

The tax imposed by that Act, as amended, attaches to the sale or use of gasoline by the producer or importer thereof, or by any producer of gasoline, regardless of when or whether such gasoline was produced by him. Subdivision (c)(1) of section 617 provides that as used in that section the term "producer" includes a blender. Subdivision (c)(2) of that section, as amended, defines the term "gasoline" as meaning certain articles specified therein, including any liquid used as a fuel for the propulsion of motor vehicles, etc.

Article 30 of Regulations 44(1934) reads in part as follows:

* * * The term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as an actual producer. The term "producer" also includes any person (not included in the preceding sentence) to whom gasoline is sold tax free for any purpose on or after June 21, 1932, but such person is considered a "producer" only with respect to the gasoline purchased tax free.

It is held that a person who blends alcohol with gasoline is a producer of gasoline within the meaning of section 617 of the Revenue Act of 1932, as amended, and article 30 of Regulations 44(1934), and is required to register and give bond as provided in articles 8 and 9 of Regulations 44(1934). As a producer of gasoline, he is liable for the tax on the sale or use of the product, regardless of whether the gasoline content is purchased tax-free or tax-paid from the producer thereof. Where the gasoline content is purchased tax-paid, the tax paid by the prior producer or producers of the gasoline may be credited against the tax due on the sale or use of the blended product, provided the evidence outlined in article 84 of Regulations 44(1934) is submitted.

REGULATIONS 44(1934), ARTICLE 31: Scope of tax. XIV-19-7486 S. T. 807

Where gasoline is lost in transit by a pipe line carrier and the shipper is indemnified by the carrier for the loss, a taxable sale does not result.

The question is presented whether the tax imposed upon the sale of gasoline by the producer or importer thereof by section 617 of the Revenue Act of 1932, as amended, attaches to gasoline lost through evaporation, leakage, etc., while in the possession of a pipe line carrier for delivery to the shipper (producer or importer) at a designated pipe line terminal, where the shipper is indemnified by the carrier for such loss.

When the gasoline is tendered by the producer or importer thereof to the pipe line carrier for transportation and delivery to the producer or importer at a designated pipe line terminal, the gasoline is gauged and tested by the pipe line carrier in its tanks prior to acceptance for transportation. The pipe line carrier undertakes to deliver to the shipper the entire amount of gasoline so accepted. Due to losses through evaporation, leakage, etc., while in its possession, the pipe line carrier is unable to deliver the entire quantity of gasoline accepted for transportation. At the end of each month the pipe line carrier determines the amount of gasoline so lost and indemnifies the shipper for the loss.

It is held that the transaction between the producer or importer (shipper) and the pipe line carrier whereby the shipper is indemnified for the loss does not constitute a sale of gasoline within the meaning of section 617 of the Revenue Act of 1932, as amended.

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).—TAX-FREE SALES.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States. XIV-2-7246 S. T. 795

Taxability of sales of articles to a State for the use of the National Guard.

Advice is requested whether sales of articles to a State for the use of the National Guard are subject to the taxes imposed by Title IV of the Revenue Act of 1932.

Section 620 of the Revenue Act of 1932, effective June 21, 1932, as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), effective July 1, 1933, 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—

* * * * * * *

(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 24 of Regulations 44 (1934) reads in part as follows:

* * * During the period June 21, 1932, to June 30, 1933, both dates inclusive, all sales of taxable articles by the manufacturer to States or political subdivisions thereof, other than direct sales by the manufacturer for use in the exercise of essential governmental functions, are taxable. On and after July 1, 1933, no tax attaches to articles sold by the manufacturer direct, or for resale by the vendee direct, to a State of the United States, or political subdivision of such State, for use in the exercise of an essential governmental function, if the exempt character of the sale is established as required by these regulations. Articles sold by the manufacturer, whether direct to or for resale to a State or political subdivision thereof, for use in the exercise of any function other than one essentially governmental, are taxable. The manufacturer claiming the exemption must establish by competent evidence that the articles are actually purchased for use in the exercise of an essential governmental function.

The maintenance of the National Guard constitutes the exercise by the State of an essential governmental function. Accordingly, upon compliance with the above-quoted provisions of the law and regulations, sales of articles to a State for the use of the National Guard are exempt from the taxes imposed by Title IV of the Revenue Act of 1932.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States. (Also Article 17, Regulations 46.)

XIV-8-7333
S. T. 798

Taxability of sales of articles to a State or political subdivision thereof for use by the State emergency relief administration.

Advice is requested whether sales of articles to a State or political subdivision thereof for use in connection with the activities of the State emergency relief administration are subject to the taxes imposed by Title IV of the Revenue Act of 1932, as amended.

With the exception of the States of North Dakota and Massachusetts, and the State of Oklahoma prior to February 15, 1935 (on which date that State assumed the administration of emergency relief work), State emergency relief administrations are agencies of the several States or political subdivisions. Funds are furnished to these agencies by the Federal Emergency Relief Administration, which are used in connection with activities which constitute essential governmental functions.

With respect to sales of articles covered by Title IV of the Revenue Act of 1932, section 620 of that Act, as amended by 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—

* * * * * * *

(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 24 of Regulations 44, revised September, 1934, reads in part as follows:

* * * During the period June 21, 1932, to June 30, 1933, both dates inclusive, all sales of taxable articles by the manufacturer to States or political

subdivisions thereof, other than direct sales by the manufacturer for use in the exercise of essential governmental functions, are taxable. On and after July 1, 1933, no tax attaches to articles sold by the manufacturer direct, or for resale by the vendee direct, to a State of the United States, or political subdivision of such State, for use in the exercise of an essential governmental function, if the exempt character of the sale is established as required by these regulations. Articles sold by the manufacturer, whether direct to or for resale to a State or political subdivision thereof, for use in the exercise of any function other than one essentially governmental, are taxable. The manufacturer claiming the exemption must establish by competent evidence that the articles are actually purchased for use in the exercise of an essential governmental function.

Under the provisions of the law and regulations, sales (by the manufacturer direct, or on or after July 1, 1933, by the manufacturer through not more than one intervening vendee) of articles enumerated in Title IV of the Revenue Act of 1932, as amended, to a State or a political subdivision thereof (except the States of North Dakota and Massachusetts, and the State of Oklahoma prior to February 15, 1935) for use in connection with the exercise of essential governmental functions by the State emergency relief administration are exempt from the taxes imposed by Title IV. Sales by the manufacturer of articles covered by Title IV to the Federal Emergency Relief Administration for use in the States of North Dakota and Massachusetts, and in the State of Oklahoma prior to February 15, 1935, are taxable as sales to a Federal agency, regardless of the purposes for which the articles are used.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States. XIV-15-7428 S. T. 801

Taxability of sales of lubricating oil and gasoline to a State or political subdivision thereof for use in the construction and/or maintenance of a commercial airport.

Inquiry is made whether sales of lubricating oil and gasoline to a State or political subdivision thereof for use in the construction and/or maintenance of a commercial airport are taxable.

Under the provisions of section 620 of the Revenue Act of 1932, as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), and under article 24 of Regulations 44 (1934), sales made by the manufacturer direct at any time, or sales made on or after July 1, 1933, by the manufacturer through not more than one intervening vendee, of articles enumerated in Title IV of the Revenue Act of 1932, as amended, to a State or a political subdivision thereof for use in the exercise of an essential governmental function are exempt from the taxes imposed by Title IV.

It is held that the construction and/or maintenance of a commercial airport by a State or political subdivision thereof does not constitute the exercise of an essential governmental function within the meaning of section 620, as amended. Accordingly, sales of lubricating oil and gasoline to a State or political subdivision thereof for such use are not exempt from the taxes imposed by sections 601(c)1 and 617 of the Revenue Act of 1932, as amended.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States.
(Also Article 17, Regulations 46.)

XIV-20-7500
S. T. 809

Sales of articles enumerated in Title IV of the Revenue Act of 1932, as amended, to the Federal Emergency Relief Administration for use in relief work in a State are taxable.

Where the Federal Emergency Relief Administration assumes complete control of the administration of relief in a State, sales made to it on and after the effective date of such control by the manufacturer, producer, or importer of articles enumerated in Title IV of the Revenue Act of 1932, as amended, are taxable, regardless of the purpose for which the articles are to be used.

REGULATIONS 44(1934), ARTICLE 24: Sales to States or political subdivisions thereof and to the United States.
(Also Article 17, Regulations 46.)

XIV-19-7485
S. T. 806

Sales of articles to a State or political subdivision for use in the construction by it of sewers or other instrumentalities employed in the exercise of an essential governmental function are not subject to the taxes imposed by Title IV of the Revenue Act of 1932, as amended.

Advice is requested whether sales of articles enumerated in Title IV of the Revenue Act of 1932 to a State or political subdivision thereof for use in the construction by it of sewers or other instrumentalities employed in the exercise of an essential governmental function are exempt from tax.

Under the provisions of article 24 of Regulations 44(1934), sales (by the manufacturer direct, or on or after July 1, 1933, by the manufacturer through not more than one intervening vendee) of articles enumerated in Title IV of the Revenue Act of 1932, as amended, to a State or political subdivision thereof for use in the exercise of an essential governmental function are exempt from the taxes imposed by Title IV.

Certain operations carried on by a State or political subdivision constitute the exercise of essential governmental functions. (See generally Mim. 3838, C. B. IX-2, 137.) So far as the exercise of an essential governmental function is concerned, there is no material difference between the operation of a governmental instrumentality and the construction thereof by a State or political subdivision. Both transactions are essentially governmental in their scope. Where the State or political subdivision does the construction work, it is merely exercising its right to provide the means by which it will carry out its essential governmental powers. Accordingly, it is held that sales of articles enumerated in Title IV of the Revenue Act of 1932 to a State or political subdivision thereof for use in the construction by it of sewers or other instrumentalities employed in the exercise of an essential governmental function, when made by the manufacturer direct, or on or after July 1, 1933, by the manufac-

turer through not more than one intervening vendee, are not subject to the taxes imposed by Title IV of the Revenue Act of 1932, if the exempt character of the sale is established as required by article 24 of Regulations 44(1934).

REGULATIONS 44 AND 46. XIV–15–7427
G. C. M. 14526

Sales by a subsidiary on or after June 21, 1932, of articles subject to tax under Title IV of the Revenue Act of 1932 which were acquired from the manufacturer (parent corporation) shortly before that date by a colorable sale are taxable as sales by the manufacturer.

An opinion is requested whether sales by a subsidiary on or after June 21, 1932, of articles enumerated in Title IV of the Revenue Act of 1932, which were acquired shortly before that date from the parent corporation, the manufacturer, under the circumstances hereinafter stated, should be taxed as sales by the manufacturer.

The taxes under Title IV of the Revenue Act of 1932 are imposed upon the sale of certain articles by the manufacturer, producer, or importer on or after June 21, 1932.

The M Company, the parent corporation, for a number of years prior to June, 1932, was engaged in the manufacture of certain articles enumerated in Title IV of the Revenue Act of 1932. All of its capital stock was owned by A and B, president and secretary, respectively. Shortly before June 21, 1932, A and B caused to be incorporated the N Company, all the capital stock of which was issued to A and B, president and treasurer, respectively. On the same day the N Company was incorporated, the M Company transferred to it practically its entire stock of goods which had been manufactured by the M Company. The sale was made on open account for a sum greatly in excess of the assets of the N Company, which consisted solely of a small amount of cash paid in by A and B for its capital stock. The N Company on and after June 21, 1932, sold the goods so acquired. The M Company's office space and sales force were used in part by the N Company. The N Company maintained its own books of account and bank account and made collections in its own name. At all times both corporations were under the absolute control of A and B.

It is obvious from the record in the case that the foregoing plan was executed for the sole purpose of escaping tax liability on the sale of the goods in question by the N Company, after the effective date of the Act, to the customers of the M Company and that it was not intended that the N Company should make a *bona fide* purchase of the stock of merchandise from the M Company.

The sale was entirely artificial. If there had been no question of tax liability involved, the transaction undoubtedly would not have been consummated. The entire scheme was a "colorable sham" and not a *bona fide* transaction effected in the normal and usual conduct of the business of the companies involved.

The statute imposes a tax on the sale of certain articles by the manufacturer, producer, or importer. The statute should not be

construed with superficial regard for its language and without proper consideration for its true intent and purpose. In other words, the sales taxable under the law are *bona fide* sales. Where a transaction is not in the normal and ordinary course of business, but is adopted as an arrangement to avoid taxes, as in the instant case, the character and substance of the real transaction (not the mere form) must be ascertained and the tax must be levied on the real and not a fictitious basis. Also, where such a transaction is entered into with a subsidiary corporation (whose entire capital stock is owned by the same persons or interests that own all the stock of the parent corporation) for no other purpose than to circumvent the statute and avoid taxation, the subsidiary, even though a separate legal entity, will be deemed to be a mere agency or instrumentality of the parent corporation.

It is evident in the instant case that the N Company was used by the M Company as an agent to assist in circumventing the taxing statutes and that nothing else was contemplated. Since in the administration of the taxing statutes regard must be had for the substance rather than the form, it is the opinion of this office that sales of the goods in question by the N Company on or after June 21, 1932, were in effect sales made by that company as the agent of the M Company, the manufacturer, and, therefore, are taxable under Title IV of the Revenue Act of 1932.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

REGULATIONS 44 AND 46. XIV-17-7458
S. T. 804

Sales by a subsidiary on or after June 21, 1932, of articles subject to tax under Title IV of the Revenue Act of 1932 which were acquired from the manufacturer (parent corporation) shortly before that date by colorable sales are taxable as sales by the manufacturer.

Advice is requested whether sales by a subsidiary on or after June 21, 1932, of articles enumerated in Title IV of the Revenue Act of 1932, which were acquired shortly before that date from the parent corporation, the manufacturer, under the circumstances hereinafter stated, should be taxed as sales by the manufacturer.

The taxes under Title IV of the Revenue Act of 1932 are imposed upon the sale of certain articles by the manufacturer, producer, or importer on or after June 21, 1932.

The M Company, the parent corporation, for a number of years prior to June, 1932, was engaged in the manufacture of certain articles enumerated in Title IV of the Revenue Act of 1932. Shortly before June 21, 1932, the M Company entered into two contracts with the N Company, a subsidiary. Under the first contract, the M Company sold and transferred to the N Company for a nominal consideration all property and equipment used in certain stores operated by the M Company. The M Company also assigned to the N Company all leases, sales, and other contracts pertaining to the operation and maintenance of the stores, and the N Company assumed

all of the obligations connected therewith. The second contract was in the form of a bill of sale by which the M Company sold to the N Company, at cost plus x per cent, all of the manufactured articles owned by the M Company. The contract also provided for the sale and transfer by the M Company to the N Company of all like articles manufactured and/or acquired by the M Company on or after the date of the contracts. On the effective date of the Revenue Act of 1932, an additional contract was executed whereby the foregoing contracts were rescinded. This contract provided for the consignment by the M Company to the N Company for sale by the latter company of certain taxable articles, title to remain in the M Company until sale by the N Company. This contract covered the consignment by the M Company to the N Company of only such articles as were manufactured on or after June 21, 1932. All of the foregoing contracts were signed by A, the vice president of the M Company, and by B, the vice president of the N Company, and were performed substantially in accordance with their terms. All bookkeeping involved in these intercompany transactions was done by an officer of the M Company who alone had knowledge of the exact relative status of the respective companies. The affairs of the N Company were controlled by the M Company through one of its principal officers.

The underlying facts in this case are substantially the same as those considered in G. C. M. 14526 (page 417, this Bulletin). In that case the subsidiary to which the taxable articles were transferred was formed as the selling agency of the manufacturer just before the Revenue Act of 1932 became effective, whereas in the instant case the subsidiary which acted as the selling agency had been in existence for several years prior to the passage of that Act. However, the principle forming the basis of that ruling is also applicable to the facts here involved. In both cases the circumstances warrant the conclusion that the subsidiary was not acting independently in making sales but operated as the selling agent of the parent organization, the manufacturer. Accordingly, it is held that, for reasons substantially the same as those embodied in G. C. M. 14526, supra, the sales of the articles in question made by the subsidiary on and after the effective date of the Revenue Act of 1932 are taxable under the provisions of Title IV of that Act as sales made by the manufacturer.

TITLE IV OF THE REVENUE ACT OF 1932, AS AMENDED BY SECTION 5 OF THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).—MANUFACTURERS' EXCISE TAXES.

SECTION 630.—EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

REGULATIONS 44(1934), ARTICLE 28: Exemption of certain supplies for certain vessels. XIV-15-7429 S. T. 802

Taxability of sales of lubricating oil and gasoline by the manufacturer for use in airplanes which are a part of the legitimate equipment of vessels of war of the United States.

Inquiry is made whether sales of lubricating oil and gasoline for use in airplanes which constitute a part of the legitimate equipment of vessels of war of the United States are subject to tax under section 601(c)1 of the Revenue Act of 1932, as amended, and section 617 of that Act, as amended, respectively.

Section 630 of the Revenue Act of 1932, as added to Title IV of that Act by section 5 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 upon any article sold for use as fuel supplies, ships' stores, sea stores or legitimate equipment on vessels of war of the United States * * *.

Where the airplanes constitute a part of the legitimate equipment of vessels of war of the United States, sales of lubricating oil and gasoline by the manufacturer thereof for use in such airplanes are held to be sales for use as ships' stores on vessels of war of the United States, within the meaning of section 630 of the Revenue Act of 1932, as added by section 5 of the Act of June 16, 1933, supra. Such sales are, therefore, exempt from the taxes imposed by section 601(c)1 of the Revenue Act of 1932, as amended, and section 617 of that Act, as amended, when made in accordance with the provisions of article 28 of Regulations 44 (revised September, 1934).

Sales of lubricating oil and gasoline for use in Navy airplanes assigned to shore duty or stations are not within the specific exemption and are, therefore, taxable.

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 BY SECTION 711(a) OF THE REVENUE ACT OF 1932; AND SECTION 500(a)5 OF THE REVENUE ACT OF 1926.—ADMISSIONS.

REGULATIONS 43, ARTICLE 10: Basis, rate, and computation of tax. (Also Article 1.) — XIV–11–7374 S. T. 799

> Computation of tax on admissions to cabarets, etc. is modified. — S. T. 726

Where a minimum charge for entertainment, and/or refreshment, service, or merchandise is made for each person admitted to a cabaret, etc., and each person is entitled to order refreshment, service, or merchandise totaling the minimum charge, such charge is not taxable under section 500(a)1 of the Revenue Act of 1926, as amended, as an amount paid for admission, but should be included in the total bill in computing the "cabaret" tax under section 500(a)5 of the Revenue Act of 1926.

S. T. 726 (C. B. XIII–1, 431) is modified accordingly.

SECTION 501 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 413 OF THE REVENUE ACT OF 1928.

REGULATIONS 43, ARTICLE 37: Athletic or sporting clubs. XIV-13-7405 Ct. D. 942

TAX ON DUES—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

SOCIAL, ATHLETIC, OR SPORTING CLUB—CHARACTER OF ORGANIZATION.

Where a corporation was organized to construct, own, and operate a golf club for the use and benefit of the general public and to operate a restaurant, locker rooms, garage, and amusements in connection therewith, and where the playing members, limited in number, formed a distinct class by themselves to enjoy the special privileges and facilities of the golf course (which were not available to the general public) and also stood in a distinct relation to each other and subjected themselves to rules and regulations affecting the use of the course, the sporting features were not merely incidental, but absolutely essential, to the existence of the club, and under the facts shown the organization is a social, athletic, or sporting club whose initiation fees and dues are taxable.

COURT OF CLAIMS OF THE UNITED STATES.

Bunker Hill Country Club, a Corporation, v. *The United States.*

[December 3, 1934.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

This is an action to recover the sum of $22,944 with interest, the principal sum being the amount paid by plaintiff from May 31, 1927, to December 31, 1930, as a tax on initiation fees and dues, and for which a claim of refund was filed and rejected.

The facts established by the evidence are different from those in any other case that we have had before us, and, so far as we know, from those considered by any other court. The issue to be determined is new, although it is quite likely that similar facts exist in many instances where no legal controversy has arisen.

The plaintiff is a corporation organized under the statute of Illinois in relation to corporations for pecuniary profit. The declared purpose of this organization was to construct, own, and operate a golf club for the use and benefit of the public generally, also to operate a clubhouse restaurant, locker rooms, and garage in connection therewith, and to conduct amusement enterprises in all of the branches pertaining thereto. The provisions of its numerous by-laws so far as material to a decision of the case are set out in finding 2 and will be summarized further on in this opinion.

It is contended on behalf of plaintiff that although it bore the name of a club, the corporation was not in fact a club, but merely a profit-seeking concern. This is true if we consider the corporation in the abstract and the corporate entity by itself and alone, but this fact does not settle the case. The tax is not upon the corporation, but, as we said in effect in *Congressional Country Club* v. *United States* (71 C. Cls., 161, 44 Fed. (2d), 266), upon a privilege, and it applies to dues or membership fees required of the members of a club or organization. We need not determine whether there was a club in the strict sense of the term as it is sufficient if there was an organization and upon that point we think the evidence leaves no doubt. It is not easy to make a comprehensive and exact definition of the words "organize" and "organization." Even the dictionary gives us definitions only in very general terms, and we shall not attempt to define the words. Yet we have no doubt that there was an organization as the term is generally understood and as

Congress intended to use it. The playing members formed a distinct class by themselves separate from the general public who had no right to use the golf course or any of its facilities or any other right pertaining thereto. They also stood in a distinct relation to each other and made themselves subject to rules and regulations affecting the use of the golf course. They had the special privilege of using the golf course which was made the more valuable by limiting the membership to 300 members with the obvious purpose that the golf course should not be overcrowded. The president, Andresen, appointed a membership committee from the playing members which under the by-laws as amended was charged with the duty of passing on the applications for membership, but Andresen seems to have largely controlled the matter. It was in fact an exclusive club or organization, although not so exclusive as some. The fact that the playing members seldom or never exercised all of their rights and privileges is immaterial. They were associated together for the common purpose of engaging in a sport with special privileges and facilities which made its exercise more agreeable. The fact that they had no property rights in connection with the corporation does not affect the question now before us.

It must also be said that the sporting features connected with the "club" were not merely incidental but were absolutely essential to the existence of the club and the by-laws or regulations to which the playing members submitted themselves were necessary to make it attractive.

Under all of the circumstances recited above, we are clear that the dues and initiation fees in question were taxable and that as plaintiff collected them it was liable for the tax.

It might also be said that while there is no evidence of any purpose to evade taxation in the plan and scheme under which the club was operated, if plaintiff's contention should be sustained it would seem that the plan adopted afforded an easy method of escaping the tax.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

CAPITAL STOCK TAX RULINGS.

TITLE V.—CAPITAL STOCK AND EXCESS-PROFITS TAXES. (1934)

REGULATIONS 64, ARTICLE 63: Adjusted declared value. XIV-22-7527
T. D. 4552

Adjusted declared value foreign corporations.—Article 63 of Regulations 64, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 63 of Regulations 64, approved August 27, 1934, is hereby amended by eliminating paragraph (*b*) appearing under that article and substituting therefor the following:

(*b*) *Year subsequent to first taxable year.*—The adjusted declared value for the taxable year following the first taxable year is the original declared value adjusted to reflect the increases or decreases in the capital employed in the transaction of business in the United States. The adjustments which are to be made must reflect the changes taking place during the income-tax taxable year ending at or prior to the close of the taxable year. For example: A foreign corporation, which makes its Federal income tax returns on a calendar year basis, filed a capital stock tax return for the taxable year ended June 30, 1934, and declared the value of its capital employed in the transaction of its business in the United States as of December 31, 1933. To this value adjustments must be made to reflect the changes taking place during the year ended December 31, 1934. The net amount will constitute the adjusted declared value on which will be computed the capital stock tax for the taxable year ending June 30, 1935. This adjusted declared value, to the extent that it is true and correct, will constitute the base for computing the adjusted declared value for the taxable year ending June 30, 1936.

Ordinarily and unless the circumstances of the case require otherwise, the adjustment shall be made on the basis of the values disclosed by the books of account and records. In making the adjustment, transitory capital shall be considered separately from the nontransitory or all other capital. For this purpose, transitory capital means tangible personal property, such as a ship, train, motor bus, or other means of conveyance, employed in the regular operation of transportation services between points in the United States and points outside the United States. The term does not include such assets within the United States as working capital (cash, inventories, etc.) or equipment used normally at terminal points, such as machinery for loading and unloading, or tugboats for towing, etc.

Adjustment of the nontransitory or all other capital, shall be made without any proration, whether because of a time factor or otherwise, on the basis of the increase or decrease during the applicable income-tax taxable year of the gross assets in the United States. For example, if at the end of the applicable income-tax taxable year the amount of the gross assets in the United States exceeds the amount thereof at the beginning of such year, the amount of the excess shall be added as the increase of the nontransitory capital. If, instead, the amount of the gross assets in the United States at the end of the applicable income-tax

taxable year was less than the amount at the beginning of such year, the amount of the reduction shall be deducted as the decrease of the nontransitory capital.

Adjustment of the transitory capital shall be made for the following increases and decreases:

(1) An addition or a deduction, as the case may be, shall be made for the proportionate value of each unit added to or definitely withdrawn from the transitory capital. For example, if during the applicable income-tax taxable year a ship having a value of $1,000,000 is entered in the service of the business in the United States under a schedule which will normally require that one-fifth of its time be spent within the territorial limits of the United States, one-fifth of the value of such ship ($200,000) shall be added to reflect the resultant increase in the transitory capital. If, instead, such a ship had been in the service of the business in the United States and was definitely withdrawn therefrom during the applicable income-tax taxable year, a deduction of $200,000 should be made to reflect the resultant decrease in the transitory capital.

(2) An addition or a deduction, as the case may be, shall be made for the increase or decrease in the proportionate value of each unit of transitory capital which by reason of a change during the applicable income-tax taxable year becomes employed in the transaction of business in the United States for a greater or lesser period than prior to such change. For example, if on the basis of a schedule requiring that one-fifth of its time be spent within the territorial limits of the United States $200,000 represents the proportionate value of a ship worth $1,000,000 employed in the transaction of business in the United States, and if during the applicable income-tax taxable year a change in schedule is made so that the time spent within United States territorial limits becomes increased to one-fourth, an addition of $50,000 shall be made to reflect the increase of the proportionate value of such ship from $200,000 to $250,000. If, instead, the schedule had been changed so that only one-tenth of the time would be spent within the territorial limits of the United States, a deduction of $100,000 should be made to reflect the decrease of the proportionate value of the ship from $200,000 to $100,000.

The sum of the transitory capital and the nontransitory or all other capital, both adjusted as above outlined, shall constitute the adjusted declared value for the taxable year. Such value, to the extent that it is true and correct, will constitute the base for computing the adjusted declared value for the succeeding taxable year.

(*c*) Application for permission to make the adjustment on the basis of some other method will be considered by the Commissioner in the case of any foreign corporation, where by reason of the facts and circumstances in the particular case the method prescribed in paragraph (*b*) will not fairly reflect the changes in the capital employed in the transaction of its business in the United States, and where, in good faith and unaffected by considerations of tax liability, the corporation desires to make the adjustment on the basis of such other method. In such case the application should be made in the form of an affidavit setting forth all the facts and containing a full explanation of the method sought to be used.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 23, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

SECTION 701.—CAPITAL STOCK TAX.

SECTION 701.

REVENUE ACT OF 1934.

Regulations with respect to the use of original returns and furnishing copies of returns. (See T. D. 4504, page 86.)

MISCELLANEOUS TAX RULINGS.

TITLE V.—MISCELLANEOUS TAXES. (1932)

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 35: Sales or transfers not subject to tax. XIV–17–7459 S. T. 805

Transfer of stock from the name of a guardian to the name of the ward in Pennsylvania is not subject to stamp tax.

Advice is requested whether the transfer of stock from the name of a guardian for a minor to the name of the ward upon the latter becoming of age, both being residents of Pennsylvania, is subject to the stamp tax imposed by Schedule A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932, upon the sale or transfer of legal title to shares or certificates of stock.

The taxability of the transfer of stock from the name of a guardian for a minor to the name of the ward upon the latter becoming of age depends upon whether, under the laws of the jurisdiction, legal title to the stock remained in the ward or vested in the guardian at the time of his appointment. (MS. 42, C. B. IV–1, 338.) If under the laws of the jurisdiction legal title to the stock remained in the ward, there is no transfer of legal title when the stock is transferred from the name of the guardian to the name of the ward upon the latter reaching his majority.

There appears to be no Pennsylvania statute specifically applicable to the question. The supreme court of that State has held, however, that legal title to personalty, such as stocks, etc., is in the ward and not in the guardian. (*Brisbane* v. *Harrisburg Bank*, 4 Watts, 92.)

In view of the foregoing, it is held that the transfer of stock from the name of the guardian to the name of the ward in the instant case does not effect any transfer of legal title and, consequently, is not subject to stamp tax.

REGULATIONS 71, ARTICLE 35: Sales or transfers not subject to tax. XIV–25–7556 S. T. 813

Transfers of stock from the name of a guardian to the name of the ward in Ohio, Missouri, North Carolina, and the District of Columbia are not subject to stamp tax.

Advice is requested whether the transfer of stock from the name of a guardian to the name of the ward under the circumstances set forth hereinafter is subject to the stamp tax imposed by Schedule

A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932.

That Act imposes a stamp tax on all transfers of *legal title* to shares or certificates of corporate stock. In all such cases the tax is levied on the act of transfer. (*Goodyear Tire & Rubber Co.* v. *United States*, 273 U. S., 100.)

The transactions under consideration are as follows:

(1) Transfer of stock from the name of a guardian of a minor to the name of the minor upon the latter becoming of age, both being residents of Ohio.

(2) Transfer of stock from the name of a guardian of the estate of an insane person to the name of the ward upon the latter being declared sane, and transfer of stock from the name of a curator of a minor's estate to the name of the minor upon the latter becoming of age, all of the parties being residents of Missouri.

(3) Transfer of stock from the name of a guardian for a minor to the name of the ward, the guardian and ward being residents of North Carolina or the District of Columbia.

The taxability of the transfer of stock in such cases depends upon whether, under the laws of the jurisdiction, legal title to the stock remained in the ward or vested in the guardian at the time of his appointment. (MS. 42, C. B. IV–1, 338.) If under the laws of the jurisdiction legal title to the stock remained in the ward, there is no transfer of legal title when the stock is transferred from the name of the guardian to the name of the ward. (S. T. 805, page 425, this Bulletin.)

The decisions of the Ohio courts indicate that the general rule that a guardian does not have title to his ward's (minor's) estate prevails in that State. (*State* v. *Commissioners*, 39 Ohio St., 58, 62; *Mack* v. *Brammer*, 28 Ohio St., 509.) This view was upheld in *Toledo Traction Co.* v. *Cameron* (137 Fed., 48, 52), wherein the court said:

> * * * The guardian is a mere protector of the plaintiff's [a minor's] interest, differing in this respect from an administrator or trustee in whom the legal title is vested. * * *

The courts of Missouri have held that the guardian of an insane person does not take title to the property of his ward. (*Gibson* v. *Shull*, 251 Mo., 480, 158 S. W., 322; *Redmond* v. *Quincy, etc., R. Co.*, 225 Mo., 721, 126 S. W., 159; *Webb* v. *Hayden*, 166 Mo., 39, 65 S. W., 760.) In *Webb* v. *Hayden*, supra, the court said in part:

> * * * A curator can not, in his own name as such, maintain a suit to recover money or property due or belonging to his ward. In this respect a curator differs from an administrator. Title to the personal property of an intestate's estate vests in the administrator * * *. But no title vests in a curator. He has only the care and management of his ward's property. The title is in the ward. * * *

Title to personal property of a minor does not vest in his guardian or curator. (*Seilert* v. *McAnally*, 223 Mo., 505, 122 S. W., 1064.)

In *Cross* v. *Craven* (120 N. C., 331, 26 S. E., 940), it was held that a guardian does not hold legal title to the real estate of his ward. While this decision does not relate specifically to personal property, it does not appear to be limited in its application to real property. The decision apparently is based upon the court's conception of the common law rule as to the ownership of property generally in North

Carolina, and, therefore, may be regarded as stating the rule applicable in that State to both real and personal property.

In the District of Columbia, the "guardian has neither the right nor the title in the premises" with respect to either personal or real property. (*The Baltimore & Potomac Railroad Co.* v. *Taylor*, 6 App. D. C., 259.)

Inasmuch as the transfers in question were merely nominal and without any transfer of legal title, none of them is subject to stamp tax under the provisions of Schedule A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932.

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 84: What constitutes real property determinable by law of State where located. XIV–7–7318 G. C. M.-14348

Taxability of a conveyance of oil, gas, and coal leases, and mining equipment in West Virginia.

The question is presented whether a deed conveying oil, gas, and coal leases covering land in West Virginia, and mining equipment is subject to the stamp tax on conveyances 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, 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.

For stamp tax purposes, the law of the State in which the property is situated determines what constitutes "lands, tenements, or other realty." (Article 84, Regulations 71.)

The Supreme Court of West Virginia in *Steelsmith* v. *Gartlan et al.* (29 S. E., 978) held that an oil and gas lease, which granted to the lessee the right to explore for oil and gas for a period of five years and for such longer period as oil and gas were found in paying quantities, amounted to nothing more than the privilege of searching for oil and gas, and, if they were found in paying quantities, then an oil and gas tenancy vested in the lessee for the period of five years or until exhaustion. In *Smith* v. *Root et al.* (W. Va.) (66 S. E., 1005), it was held that an oil and gas lease of like terms vested no title in the lessees to the oil and gas in place, but simply gave them the exclusive right to make explorations upon the leased land for oil and gas; and that such right was simply an inchoate right and not a vested estate in land. The following more recent West Virginia cases are to the same effect: *Pittsburg & West Virginia Gas Co.* v. *Ankrom et al.* (W. Va.) (97 S. E., 593); *Musgrave* v. *Musgrave et al.* (103 S. E., 302); and *Fisher* v. *Teter et al.* (109 S. E., 896). In West Virginia, therefore, as stated in *Steelsmith* v.

Gartlan, supra, an oil and gas lease in the usual form "amounts to nothing more than the privilege of searching for oil and gas, and, if they be found in paying quantities, then vests an oil and gas tenancy in the lessee * * *."

The rule is different where oil and gas in place are conveyed. As stated in *Chandler* v. *French et al.* (W. Va.) (81 S. E., 825), "* * * There is a clear legal distinction between an absolute conveyance of the mineral in place, and the grant of a mining right to enter upon the land and convert the mineral into personalty and dispose of it. In one case there is a severance of the title to the realty; in the other there is not, although the mining right entitles the lessee to extract every particle of the mineral. * * *" While this case involved coal, the rule is the same as to minerals generally. Oil and gas are included within the general designation of "minerals." (*Waugh et al.* v. *Thompson Land & Coal Co. et al.*, 137 S. E., 895; *Sult* v. *A. Hochstetter Oil Co. et al.*, 61 S. E., 307.) Oil and coal in place are a part of the land. (*Williamson et al.* v. *Jones et al.*, 27 S. E., 411.) In *Bankers' Pocahontas Coal Co.* v. *Central Pocahontas Coal Co. et al.* (W. Va.) (166 S. E., 491), it was held (syllabus):

Where owner grants exclusive right to mine coal in specified boundary and obligates grantee to mine or pay for all coal, actual sale of coal in place results.

In view of the foregoing, it is the opinion of this office that in so far as the oil and gas leases covered by the deed in question merely granted the right to extract oil and gas, the deed did not convey realty and is not subject to stamp tax. With respect to the so-called leases covered by the deed which actually conveyed title to the oil, gas, or coal in place, or obligated the "lessee" to extract or pay for all the oil, gas, or coal obtainable from the property, the deed to the extent of such "leases" is a conveyance of realty and is subject to stamp tax. Since there is no segregation of the total consideration received for the property, which includes personalty, the tax should be based upon such part of the total consideration as the value of the realty is of the whole value of the property conveyed. The burden of establishing the portion of the total consideration which is not subject to tax rests upon the parties to the deed.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

TITLE VIII.—STAMP TAXES. (1926)

SECTION 801 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 441 OF THE REVENUE ACT OF 1928.

XIV-9-7345
G. C. M. 14129

Bonds issued by the M Irrigation District in California are not subject to stamp tax.

An opinion is requested whether the exemption provided in section 801 of the Revenue Act of 1926, as amended by section 441 of the

Revenue Act of 1928, is applicable to bonds issued by the M Irrigation District organized pursuant to the laws of California. (Act 3854, Deering's General Laws, 1931, volume 2, page 1948.)

Section 801 of the Revenue Act of 1926, as amended by section 441 of the Revenue Act of 1928, reads in part as follows:

> There shall not be taxed under this title any bond, note, or other instrument, issued by * * * any * * * municipal or other corporation exercising the taxing power; * * *.

The question is twofold in scope—first, whether the M Irrigation District is a "municipal or other corporation," and, second, whether it is "exercising the taxing power."

The courts of California have held that irrigation districts and reclamation districts, as well as sanitary districts, are corporations created for municipal purposes, and those courts usually refer to irrigation districts and reclamation districts as public corporations.

In *Central Irrigation District* v. *De Lappe et al.* (79 Cal., 351; 21 Pac., 825, 826) the Supreme Court of California said:

> * * * It is settled that reclamation districts are public corporations (*Dean* v. *Davis*, 51 Cal., 410, 411; *People* v. *Reclamation District*, 53 Cal., 348; *People* v. *Williams*, 56 Cal., 647; *Hoke* v. *Perdue*, 62 Cal., 546; *People* v. *La Rue*, 67 Cal., 528, 8 Pac. Rep., 84); and we think that irrigation districts must be held to be so to the same extent. * * *

A more recent case (and probably the most frequently cited California authority on the point) is the decision rendered by the Supreme Court of California in *In re Bonds of Madera Irrigation District* (92 Cal., 296; 28 Pac., 272, 276), from which the following extracts are quoted:

> * * * Whenever a special district of the State requires special legislation therefor, it is competent for the legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district.
>
> * * * * * * *
>
> That an irrigation district, organized under the act in question, becomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the State. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. "Where a corporation is composed exclusively of officers of the Government, having no personal interest in it, or with its concerns, and only acting as organs of the State in effecting a great public improvement, it is a public corporation." (Ang. & A. Corp., section 32. * * *)

See also *People* v. *Selma Irrigation District* (98 Cal., 206; 32 Pac., 1047), *Quint* v. *Hoffman et al.* (103 Cal., 506; 37 Pac., 777), and *In re Werner* (129 Cal., 567; 62 Pac., 97).

In view of the foregoing, this office is of the opinion that the M Irrigation District is a public corporation and belongs to the general type of organizations included within the term "municipal or other corporation" as used in section 801.

There remains the question whether the M Irrigation District is "exercising the taxing power." Dillon in his work on Municipal Corporations, Volume IV, page 2312, states:

> The taxing power of the State consists in its authority to levy and collect taxes and assessments. * * * Taxes (including, in the term, assessments) are burdens or charges imposed by the legislature, or under its authority, upon persons and property, to raise money for public, as distinguished from private purposes, or to accomplish some end or object public in its nature.
>
> * * * * * * *
>
> That such special assessments are an exercise of the taxing power is now generally recognized and established. Whatever doubt may at one time have existed has long since been removed.

McQuillin in his work on Municipal Corporations, Volume V, page 568, states that "local assessments or special taxes * * * commonly prevail and are generally sustained under the exercise of the power of taxation." The Supreme Court of California recognized that the levy of special assessments constitutes an exercise of the taxing power in the case of *In re Bonds of Madera Irrigation District*, supra, wherein, in speaking of the Madera Irrigation District, which was organized under the same act as the M Irrigation District, it said:

> * * * For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. * * *

For other decisions by the Supreme Court of California to the same effect, see *Engebretsen* v. *Gay et al.* (158 Cal., 30; 109 Pac., 880); *Los Angeles Olive Growers' Ass'n* v. *Pozzi* (167 Cal., 454; 140 Pac., 581); and *Los Angeles County Flood Control District* v. *Hamilton* (177 Cal., 119; 169 Pac., 1028).

The Supreme Court of the United States in *Bauman* v. *Ross* (167 U. S., 548), in discussing section 15 of the Act of March 2, 1893 (chapter 197), entitled "An Act to provide for a permanent system of highways in that part of the District of Columbia lying outside of cities" (27 Stat., 532), which section deals with the assessment of benefits having a public improvement purpose and made with the object of raising funds to pay for lands taken or damaged by condemnation proceedings, said:

> The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court.
>
> * * * * * * *
>
> The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby. (*Davidson* v. *New Orleans*, 96 U. S., 97; *Hagar* v. *Reclamation District*, 111 U. S., 701; *Spencer* v. *Merchant*, 125 U. S., 345, 355, 356; *Walston* v. *Nevin*, 128 U. S., 578, 582; *Lent* v. *Tillson*, 140 U. S., 316, 328; *Illinois Central Railroad* v. *Decatur*, 147 U. S., 190, 198, 199; *Paulsen* v. *Portland*, 149 U. S., 30.) This authority

has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. (*Willard* v. *Presbury*, 14 Wall., 676; *Mattingly* v. *District of Columbia*, 97 U. S., 687; *Shoemaker* v. *United States*, 147 U. S., 282, 286, 302.)

In *Fallbrook Irrigation District* v. *Bradley* (164 U. S., 112, 176), the Supreme Court of the United States, in discussing a situation substantially the same as the one under consideration, said:

> Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. * * *

To the same effect, see *French* v. *Barber Asphalt Paving Co.* (181 U. S., 324) and *Wagner* v. *Baltimore* (239 U. S., 207, 218).

Based upon the decisions cited, it is the opinion of this office that the M Irrigation District in making assessments is exercising the taxing power. Inasmuch as the M Irrigation District is a "municipal or other corporation exercising the taxing power" and as the instruments involved in this case are bonds (section 801), it is the opinion of this office that such bonds are within the specific exemption accorded such instruments by section 801 of the law and are not, therefore, subject to the stamp tax.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

REGULATIONS 71 (1926), ARTICLE 34: Sales and transfers subject to tax. XIV-25-7557 Ct. D. 980

STAMP TAX—REVENUE ACT OF 1926—DECISION OF COURT.

TRANSFER OF RIGHT TO RECEIVE STOCK.

Where a corporation agreed to issue and deliver to two other corporations, or upon their order, a certain amount of its capital stock in consideration for the business and assets of the latter, and, pursuant to the directions of the selling corporations, the certificates of stock were issued directly to their common stockholders, there was, in substance, a transfer by the selling corporations of their right to receive the shares which was subject to the stamp tax imposed by section 800, Schedule A-3, of the Revenue Act of 1926.

COURT OF CLAIMS OF THE UNITED STATES.

Raybestos-Manhattan, Inc., v. *United States.*

[March 4, 1935.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

The question in this case arises as a result of the issuance by plaintiff of a certain number of shares of its capital stock as a consideration for the business and assets of the Raybestos company and the United States Asbestos Co. All the liabilities of each company were assumed by the plaintiff.

In connection with these transactions a merger was effected under the laws of New Jersey between plaintiff and the Manhattan Rubber Manufacturing Co., both being New Jersey corporations, by which plaintiff acquired all the assets of the Manhattan company. No tax question growing out of the stock issued by plaintiff from that transaction is involved in this case.

Section 800, Schedule A–3, of the Revenue Act of 1926 provides as follows:

"SEC. 800. 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 taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

* * * * * * *

"SCHEDULE A—STAMP TAXES.

* * * * * * *

"3. Capital stock, sales or transfer: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: * * *."

The important facts are not in dispute. The transactions in question involve a consolidation of the properties and businesses of the two corporations mentioned in the findings with the property and business of the plaintiff, a New Jersey corporation. While the tax in question does not depend upon the question whether a reorganization took place, the facts show that neither transaction was a reorganization of either of the corporations within itself. By separate letters of September 9, 1929, each corporation proposed to the plaintiff that it would "transfer, deliver, and assign all (its) assets, business, and good will, subject to its liabilities" to plaintiff in consideration of the issuance and delivery "to the company or upon its order" of certificates for a specified number of shares of stock of the plaintiff, which certificates it was further proposed should be issued directly to the holders of the common stock of the company making the offer upon the basis therein specified. Each offer, as made, was accepted by plaintiff and the transactions were carried out as agreed.

Schedule A–3 of section 800 provides, in addition to the tax of 5 cents a share on an original issue, for a tax of 2 cents a share on all "transfers of legal title to shares of certificates of stock." It is not questioned that had the Raybestos company and the United States Asbestos Co. received the stock in question and carried out their clearly avowed purpose to distribute such stock by transfers to their stockholders, the payment of a tax of 2 cents a share here imposed would have been required. We think the liability for such a tax can not be avoided by an arrangement for the issuance of such stock directly to the stockholders of the selling corporations. The statute imposes a tax upon not only "transfers of legal title to shares of stock" but also upon "other documents, instruments, matters, and things mentioned and described in Schedule A," and Schedule A requires that the tax be exacted where there has been a transfer of "rights to receive such shares or certificates."

The sole purpose of the section was to raise revenue and its language is very broad. Liability for the payment of the tax is imposed upon the transferor, the transferee, and the corporation whose stock is the subject of the transfer. The language of the section discloses a recognition that if the tax were confined to technical transfers of "legal title to shares" much of the revenue sought to be raised from this source would be lost through arrangements to accomplish the same end by one transaction instead of two. The tax was therefore laid upon the substance of the transaction rather than the form by making transfers of rights to receive such shares the equivalent of an actual transfer thereof. The exemptions allowed are definite and specific, and emphasize the broad purpose of the statute to impose the tax upon transactions such as are involved in this case. This was not a transaction whereby plaintiff acquired the stock of the stockholders of the Raybestos company and the United States Asbestos Co. but it took over the assets of those companies in exchange for its stock. The selling corporations were the ones who had the right to receive the consideration (stock) for their assets and business sold to plaintiff and these corporations, when they transferred their assets to plaintiff, directed that the stock of the plaintiff be delivered "to the company or upon its order." They directed that the stock of plaintiff to be issued in exchange for the assets and business be issued and delivered to their stockholders. This, we think, was clearly a transfer of legal title to the shares and the transfer of their rights to receive such shares within the meaning of the statute in question. This was the substance of the transaction although it took the form of a direct issuance of the stock to the stockholders of the selling corporations. Plaintiff has cited a number of decisions in support of its argument that the tax was illegally exacted, which we have considered, but we think they are not controlling here and, therefore, we deem it unnecessary to discuss them in detail. It is also contended that the proceedings resulting in the formation and activities of plaintiff involved no sale or transfer of legal title to shares or certificates of stock, that merely the evidences of legal title to capital interests, or to shares not actually sold but retained by their owners, entered into the transaction, and they required exchanging of certificates to disclose properly the capital interest of each share owner after the merger of separate businesses into a single enterprise; that the right to receive the certificates of plaintiff's no par value shares evidencing the individual capital interests when merged, given in replacement of certificates evidencing the same capital interests before the merger, belonged to the owners of such capital interests, the individual stockholders, and to assume otherwise is to recognize shadow or semblance for substance or reality. We think, however, that there was an outright purchase by plaintiff of the business and assets of the two corporations mentioned and that such corporations were the ones legally entitled to receive plaintiff's shares in the transaction, and that, in substance, there was a transfer by them of their right to receive such shares to their stockholders. (*United States* v. *Brown Fence & Wire Co.*, D. C. N. D. Ohio, January 31, 1935; C. C. H. Tax Service, volume 3, par. 9144; P.-H. Tax Service, volume 1, par. 869.) Since the statute lays the tax upon the substance of the transaction, we are of opinion that the Commissioner correctly exacted the payment of the documentary stamp tax of 2 cents a share in question.

The petition must be dismissed, and it is so ordered.

REGULATIONS 71(1926), ARTICLE 34: Sales and transfers subject to tax. XIV-25-7558 Ct. D. 981

STAMP TAX—REVENUE ACT OF 1926—DECISION OF COURT.

TRANSFER OF RIGHT TO RECEIVE STOCK.

Where, under a plan of reorganization, a Minnesota corporation caused a new corporation to be formed under the laws of Delaware and exchanged all of its assets for all of the capital stock of the new corporation, and, in pursuance of the resolutions of the two corporations, the stock of the Delaware corporation was issued directly to the stockholders of the Minnesota corporation, there was a transfer by the latter corporation of its right to receive the shares which was subject to the stamp tax imposed by section 800, Schedule A-3, of the Revenue Act of 1926.

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION.

George A. Hormel & Co., a Corporation, plaintiff, v. *United States, defendant.*

[March 12, 1935.]

MEMORANDUM OPINION.

The above-entitled cause having been regularly placed upon the November, 1934, general term calendar, came on for hearing before the undersigned, one of the judges of the above-named court, on a stipulation of facts, a jury having been waived.

NORDBYE, Judge: This matter was submitted on a stipulation of facts. There is but one issue to be determined, namely, the right of the defendant to tax a transaction which it contends was a "transfer of a right to receive shares or certificates of stock as provided for in section 800 of the Revenue Act of 1926 (26 U. S. C. A., section 901, Schedule A-3)." Briefly, the facts as disclosed by the stipulation may be stated as follows:

George A. Hormel & Co., a Minnesota corporation, on or about September 1, 1928, caused a notice to be sent to its stockholders of a corporate meeting on September 18, 1928, for the purpose of considering a plan of reorganization. Attached to such notice was a resolution of the board of directors of the company stating, among other things, that in order to maintain the present rights and values of the holders of the stock in the company, it was deemed expedient to organize a new corporation under the laws of another State, to which all the property rights, privileges and franchises of the Minnesota corporation could be transferred pursuant to a plan of reorganization. On the 18th day of September, 1928, the stockholders of the Minnesota corporation met and duly considered the plan of reorganization that was submitted. The stockholders passed a resolution approving and accepting the plan. Inter alia, the plan provided for the organization of a new corporation under the laws of Delaware to take over the assets of the Minnesota corporation; transfer by the Minnesota corporation of all its assets to the Delaware corporation in exchange for all the capital stock of the Delaware corporation, and distribution of the common stock of the Delaware corporation to holders of the common stock of the Minnesota corporation, either in exchange or distribution without surrender of any stock.

It was further provided that the Minnesota corporation might purchase stock of the Delaware corporation from the distributees, or any one or more of them, and that the preferred stock of the Delaware corporation should be distributed to the holders of the preferred stock of the Minnesota corporation. Apparently the value of the stock was not to be relatively changed. The stockholders in approving the plan authorized the officers and directors to transfer all of the assets to the Delaware corporation "in consideration of the insurance of all of the common and preferred capital stock of that company." Thereafter, the board of directors of the Minnesota corporation adopted a resolution which provided:

"Whereas, in such reorganization this corporation will receive all the capital stock of said Delaware corporation immediately to be issued,

"Now, therefore, be it resolved that as part of such plan of reorganization the officers hereof require such Delaware corporation to issue to it in exchange for its net assets as of the close of business as of October 27, 1928, the following shares of its capital stock, * * *."

The resolution further provided:

"Be it resolved that the common stock of the Delaware corporation to be received by this corporation pursuant to its plan of reorganization, be distributed to the holders of class A common stock of this corporation as the same appear of record at the close of business on October 27, 1928, * * *."

Thereafter, on September 21, 1928, the Delaware corporation passed a resolution wherein it provided, among other things:

"* * * this corporation will acquire the net assets of Geo. A. Hormel & Co.; that in exchange therefor there be issued to the order of said Minnesota corporation the following shares of capital stock of this corporation * * *."

On October 27, 1928, the Delaware corporation passed a resolution which provided in part as follows:

"* * * that subsequent to the transfer to this corporation of certain assets of said Minnesota corporation, in consideration of this corporation agreeing to assume and pay the liabilities of said Minnesota corporation, thereupon this corporation acquire and receive all the remaining assets of said Minnesota corporation of every kind, nature and description whatsoever and wheresoever located, real, personal and mixed, tangible and intangible, and the issuance of fully paid and nonassessable stock of this corporation in consideration therefor of the classes and in the amounts heretofore agreed upon between the two corporations, is hereby authorized, ratified, approved, and confirmed."

In pursuance of the resolution of the two corporations, the Delaware corporation issued its stock in consideration for the transfer of the assets of the Minnesota corporation direct to the stockholders of the latter company. The issuance tax for the stock issued by the Delaware corporation was paid by the Delaware corporation, but, in addition, the Commissioner of Internal Revenue determined that the Minnesota corporation, by the plan or proposal, had the right to receive the stock of the Delaware corporation as a consideration for the transfer of its assets, and that by the plan adopted, the Minnesota corporation transferred this right to receive the stock to the Minnesota stockholders, and as a transfer of such right, it was liable for the tax of 2 cents a share on the stock so issued. The tax in the sum of $8,897.32 was so levied, assessed and paid under protest. The tax was apparently paid by the Delaware corporation for and on behalf of the Minnesota corporation, and evidently it is conceded that if the tax was erroneously exacted, the plaintiff is entitled to a refund.

Defendant contends that liability exists for the tax under the provisions of the section above cited, which provides in part as follows:

"On all * * * transfers of legal titles to shares or certificates of stock * * * or to rights * * * to receive such shares or certificates * * * whether entitling the holder in any manner to benefit of such stock * * * or rights or not * * * 2 cents * * * on each share * * *."

Plaintiff contends that the transaction was a mere reorganization of the Minnesota corporation, and in effect an exchange by its stockholders of their stock for the Delaware corporation stock, which represented substantially the same interest in the transferred assets which they owned before the transfer. It is also urged that there was no change in the officers or management, nor any change of stockholders, and that their rights were in all respects similar and the same.

The statute in question as applied to similar transactions has been considered by the courts in a number of cases, and there is an apparent conflict in the authorities. One senses a hesitancy on the part of some courts to apply what seems to be the plain intendment of the statute. It is recognized that the statute is sweeping in its character and applies to a varied type of transfers and sales of stock and rights to stock. It is elementary that one can not read into the statute any exceptions or exemptions merely because the sales or transfers may be termed technical or formal. Apparently Congress did recognize that certain types of sales and transfers should not be subject to the tax, and it will be observed that certain exceptions are specifically noted, namely:

"That it is not intended by this chapter to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock, nor upon the return of stock so loaned; provided, further, that the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased the same."

The nature of the exemptions above quoted tends to emphasize the intention of Congress to exact a tax on all transfers and sales of stock or rights to stock, not only in the realm of barter and sale, but also all other transfers whether formal or otherwise. It will not suffice to urge that the sole purpose of the organization of the Delaware corporation and the transfer of the property by

the Minnesota corporation was merely to provide for a continuation of the business without any change in the stockholders or their relative interests. A reorganization of this type and the transfer of stock from the new to the old corporation in consideration of the transfer of the assets might well have been exempted, but the language of the statute is unambiguous. The statute states that the transfer of a right to receive certificates of shares of stock is taxable. There is nothing obscure or doubtful about the language employed. Courts must construe a statute literally and where there is a plain statement by the law-making body, the courts are not at liberty to depart from it, even though it would appear that the construction adopted may result in an apparent hardship to the taxpayer.

"If the words and phrases of a statute are not obscure or ambiguous, its meaning and the intention of the legislature must be determined from the language employed, and where there is no ambiguity in the words, there is no room for construction." (Black on Interpretation of Laws, Second Edition, page 141.)

In *Crooks* v. *Harrelson* (282 U. S., 55 [Ct. D. 271, C. B. X–1, 469]), the court was considering an estate tax question, and stated (page 59):

"It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the Act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in *Holy Trinity Church* v. *United States* (143 U. S., 457); but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. (Compare *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S., 438, 451–452.) And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. (*Treat* v. *White*, 181 U. S., 264, 268.)

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principles so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. (*Monson* v. *Chester*, 22 Pick., 385, 387.) It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law-making authority, and not with the courts. (See *In re Alma Spinning Co.*, L. R., 16 Ch. Div., 681, 686; *King* v. *Commissioner*, 5 A. & E., 804, 816; *Abley* v. *Dale*, L. J. (1851), N. S., part 2, volume 20, 233, 235. And see generally *Chung Fook* v. *White*, 264 U. S., 443, 445; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S., 310, 313.)

"In support of the claim that a literal construction is not admissible, it is said that by other provisions of section 402 certain interests in real property, such as dower, etc., are made subject to the tax without regard to the conditions set forth in subdivision (a), and that this results in an incongruity amounting to an absurdity. But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction. In any event, conceding that the conditions assailed have produced the incongruous results complained of, they fall far short of that degree of absurdity contemplated by the Holy Trinity Church case, or by any other decision of this court."

It is generally recognized that a corporation and its stockholders are separate and distinct in tax matters. Concededly, a stockholder can not convey or withdraw any part of the corporate assets. He has merely an indivisible interest in the entire property belonging to the corporation. The reorganization plan of the Minnesota corporation, by reason of the fundamental principles of corporate powers, was necessarily consummated by that company as distin-

guished from its stockholders. The latter could authorize and approve the plan, but the transfer of the assets and the receipt of the consideration was a corporate matter. This was clearly recognized and followed in the various resolutions that were adopted in furtherance of the so-called plan. The consideration of the transfer of the assets from the Minnesota corporation to the Delaware corporation was the issuance of all the common and preferred stock. The right to receive this consideration rested in the Minnesota corporation, and no one else. True, the Minnesota corporation might transfer this right to its stockholders, as it did, and avoid a formal transfer of the stock from the Minnesota corporation to the stockholders. But one exalts the form over substance if the direct transfer of the stock from the Delaware corporation to the old stockholders is held to preclude the Government from construing the entire transaction as a transfer by the Minnesota corporation of its right to receive the shares. The Delaware corporation could not transfer the stock direct to the stockholders without the acquiescence and consent of the Minnesota corporation, and when the plan of direct transfer was consented to by the Minnesota corporation, it thereby transferred its right to receive the stock and became amenable to the tax under the statute.

The court in *Shreveport-El Dorado Pipe Line Co.* v. *McGraw* (63 Fed. (2d), 202) concluded that Congress did not intend to tax a transfer of stock, or the transfer of right to stock, which may take place in furtherance of a reorganization plan where the transactions do not effect a change of ownership. But there is no provision or implication in the Act whereby the right to tax is limited or restricted to any designated type of transfer. It can not be urged that Congress does not have the right to tax a transfer of stock or rights to stock in a reorganization matter, as well as a transfer in a consolidation, for instance. In fact, Schedule A–2 of the Act specifically requires a tax on each original issue of shares of stock, whether on organization or reorganization. There is no particular difference or distinction between the transfer of rights to stock which may occur in a merger or consolidation and the transfer that may take place where a corporation is organized under the laws of another State to take over the assets under a plan of reorganization. True, there may be an element of barter and sale, so to speak, in a consolidation, and the receipt by the stockholder of a different interest than that possessed prior to the consolidation; nevertheless, there is nothing in the Act which justifies the application of the statute to one transaction and not to the other. The fact that a different interest or holding is involved does not affect the ultimate question of the right of the Government to tax a transfer of stock. Unless Congress has made or implied a distinction, the courts can not do so. The statute assumes to tax transfers of stock or rights to stock and is entirely silent as to any distinction that should be made between transfers involving changes in stock ownership and transfers made as a part of a reorganization plan. It may be that the Act is entirely too comprehensive and sweeping. The construction of its unambiguous provisions may lead to impositions of an onerous and burdensome tax, which, in light of the issue tax provided for in Schedule A–2, seems to invoke a hardship, but the court is powerless to avoid the situation, and manifestly can not add to the text certain exceptions and exemptions which Congress did not see fit to add. True, in a case of doubt, the construction should be in favor of the taxpayer, but in the instant case, the doubt arises on account of the apparent injustice in imposing additional burdens upon a reorganized corporation, and not from the words of the statute. It is significant that all courts, save in the case of *Shreveport-El Dorado* v. *McGraw*, recognize that the tax must be paid if the old corporation actually transferred the rights to the shares. (*Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed., 197 [T. D. 3219, ST. C. B. 1921, 55]; *Minnesota Mining & Mfg. Co.* v. *Willcuts*, 2 Fed. Supp., 789; *Westmoreland Coal Co.* v. *MacLaughlin*, 8 Fed. Supp., 963; *United States of America* v. *Brown Fence & Wire Co.*, D. C. N. D. Ohio, E. D., decided January 18, 1935 [Ct. D. 982, on page 438].) But the following cases assume to find the statute inapplicable to the particular form which was adopted by the particular plan of reorganization under consideration: *Minnesota Mining & Mfg. Co.* v. *Willcuts*, supra; *Westmoreland Coal Co.* v. *MacLaughlin*, supra.

Without attempting to discuss or distinguish the decisions, it must be evident that any short cut adopted by a corporation in consummating the plan can not defeat the ultimate right of the Government to exact the tax. If it is conceded that the tax would have to be paid in the event the Minnesota corporation herein had formally transferred the right to receive the stock to the

individual stockholders, it necessarily follows that the plan or scheme adopted herein does not escape the tax. A literal construction of the statute will permit no other conclusion, and if the court is bound to adhere to the words of the statute, the defendant must be sustained in its collection of the tax.

Let this memorandum be made a part of the foregoing findings of fact and conclusions of law.

REGULATIONS 71(1926), ARTICLE 34: Sales and transfers subject to tax. XIV-25-7559 Ct. D. 982

STAMP TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. TRANSFER OF RIGHT TO RECEIVE STOCK.

Where an Ohio corporation transferred all of its assets to a Delaware corporation under an agreement whereby the latter was to issue its capital stock in payment therefor direct to the stockholders of the Ohio corporation, there was a transfer from the Ohio corporation to its stockholders of the legal right to receive the stock of the Delaware corporation which was subject to the stamp tax imposed by section 800, Schedule A-3, of the Revenue Act of 1926.

2. SUIT AGAINST TRANSFEREE.

Where a dissolving corporation transferred its assets to another in consideration of the assumption of all its liabilities and indebtedness by the transferee, the United States has the right to sue the transferee for payment of the tax.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

United States of America, plaintiff, v. *Brown Fence & Wire Co., defendant.*

[January 31, 1935.]

OPINION.

JONES, J.: This is a case in which the United States seeks to recover of the defendant, stamp taxes, liability for which is imposed by Schedule A-3, section 800 of the Revenue Act of 1926. A jury was waived by written stipulation and the issues of fact and law heard and submitted to the court upon stipulated facts. It is not thought necessary to restate here the stipulated facts, with which the parties are familiar. It will be sufficient to state briefly the considerations upon which conclusion has been reached.

By the agreement between the two corporations, the Ohio company clearly transferred to its shareholders the right to receive the shares and stock certificates of the Delaware corporation. The stamp tax, which otherwise would have been exacted, may not thus be escaped. The implications of such liability are inherent in the agreement to issue the new shares and certificates directly to the shareholders of the old corporation. The Delaware corporation did not agree to buy the stock of the Ohio corporation by an exchange of its shares; it agreed to buy the property of the Ohio corporation with shares of its stock to be issued to the shareholders of the Ohio corporation. This contemplated a transfer of the right to receive the consideration for the sale of the old corporation's property from the old corporation to its shareholders.

I do not interpret the contract between the two corporations as a reorganization, because so called. In view of the express language of the contract itself, it constituted a sale and transfer of "assets, properties, business, franchises and good will as a going concern."

In the unreported case of *Westmoreland* v. *MacLaughlin*, relied upon by the defendant, the court concedes that if the stock had been issued by the new corporation to the old corporation as consideration for the transfer of assets, the case would have been controlled by *Marconi Wireless Telegraph Co.* v. *Duffy* (273 Fed., 197 [T. D. 3219, ST. C. B. 1921, 55].)

Providing for the issuances of stock directly to the shareholders of the old corporation is a shorter and more convenient method of delivering the stock to its ultimate owner, but I see no difference in respect of the application of the rule and of the tax.

The defendant raises the question of the right of the United States to sue the Delaware corporation for the payment of the tax. One of the considerations for the transfer of assets was the assumption of all liabilities and indebtedness of the Ohio corporation by the Delaware corporation, and the Ohio corporation has been dissolved. I see no obstacle to the bringing of the suit directly against the Delaware corporation for the collection of the tax.

Upon the stipulations of facts, original and supplemental, I find that there was a transfer of the legal right to receive shares of the Delaware corporation from the Ohio corporation to the shareholders of the latter, and conclude that the defendant is liable for the stamp tax. Motion of plaintiff for judgment sustained, with exceptions to the defendant.

Plaintiff's requests for special findings of fact will be granted, and those submitted will be approved and adopted.

SCHEDULE A-1. BONDS OF INDEBTEDNESS.

REGULATIONS 71 (1926), ARTICLE 34: Sales and transfers subject to tax. XIV-15-7430 Ct. D. 948

STAMP TAX—REVENUE ACT OF 1926—DECISION OF COURT.

CORPORATE SECURITIES—CERTIFICATES OF PARTICIPATION.

Certificates of participation issued by a trust company to purchasers of real estate mortgages held by it are taxable as instruments known generally as corporate securities within the meaning of Schedule A-1 of section 800 of the Revenue Act of 1926.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Dauphin Deposit Trust Co., petitioner, v. *United States of America, defendant.*

[January 5, 1935.]

OPINION.

JOHNSON, D. J.: This is a suit by the Dauphin Deposit Trust Co. to recover $2,251.03 and interest, paid by it under protest for internal revenue stamps which the collector required it to attach to certificates of participation drawn in a form set forth. The case was submitted to the court on a stipulation of facts.

The question is whether the certificates are taxable as corporate securities under the provisions of the Revenue Act of 1926, section 800, Schedule A-1, or more narrowly stated, whether they are known generally as corporate securities.

Requests for findings of fact and conclusions of law are answered and filed herewith. The material facts, briefly are as follows. The banking department of the petitioner loaned money, mostly to individuals, on the security of a single bond accompanied by a mortgage on real estate, with interest at 6 per cent per annum. Many of petitioner's customers who desired to invest money would come to it and the latter would explain what mortgages it held. If satisfied with a specified mortgage, the customer would pay a specified sum to the trust department of the petitioner for the whole or a part thereof. The trust department would then buy the specified amount of the mortgage from the banking department and issue the certificates of participation. The mortgages and certificates were handled by the petitioner in the same manner as its fiduciary accounts. The certificates are in the following form:

CERTIFICATE OF PARTICIPATION NO. ------

_____, 19__.

THIS IS TO CERTIFY, that the following described mortgage:

Mortgagor_____
For _____
Dated_____ Payable_____
Interest payable_____
Recorded _____
Property _____

Although standing in the name of Dauphin Deposit Trust Co., Harrisburg, Pa., is not entirely the property of the company, but that of the mortgage is held by the company in trust for_____
And that as the interest is paid to us, we will remit 5½ per cent on this amount from _____

Dauphin Deposit Trust Co. does not agree to repurchase this certificate except upon payment of the mortgage.

DAUPHIN DEPOSIT TRUST CO.,
By _____
(Trust Officer.)
_____
(Vice President.)
(Asst. Treasurer.)

$------

The repurchase clause at the end of the certificate was not contained in the certificates issued prior to December 7, 1929, but was inserted as above in the certificates issued thereafter. Principal and interest were not guaranteed but payment thereof was made when and as it was received from the mortgagor. The petitioner charged for its services ½ per cent per annum on the principal, payable when and as interest was collected.

The Act under which the tax was collected is as follows: "On all bonds, debentures, or certificates of indebtedness issued by any corporation, 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 * * *." (26 U. S. C. A., section 901(1).)

An analogous situation to the case at bar was before the United States Supreme Court in *Lederer* v. *Fidelity Trust Co.* (267 U. S., 17 [T. D. 3674, C. B. IV-1, 339]). There the Fidelity Trust Co. agreed to furnish and let to the Interstate Railroad Co. certain railroad equipment and the lessee agreed to make such rental payments as would amortize the entire cost of the equipment at the end of a designated period, plus interest on the unpaid portion. The trust company thereupon issued certificates providing for the periodical payment by the trust company out of rentals, under the lease of certain interest plus a portion of the principal. The essential features of this trust were that the bearer or registered holder of a certificate was entitled to one share in an equipment trust in accordance with the agreement and that the trust company held the lease and title to the railroad equipment in trust for the holders of these equipment trust certificates. Mr. Justice Holmes held that these certificates were generally known as corporate securities, and in the opinion of the Court said: "As a matter of common speech, to which the statute refers, we have no doubt that these instruments would be known as corporate securities. They would be called so more accurately than some other documents which we believe also would be known generally by that name. Their purpose, as stated in the agreement of the trustee with the railroad, is to secure payment to the holder with interest. They do nothing else. We do not regard the precise limits 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. But the counsel for the company seemed not prepared to argue that the company could not put the money received from the railroad into its general account without a breach of trust, and give the certificate holder cash or a check for his interest or principal. But be the undertaking greater or less, the security better or worse, we can not regard these certificates as anything but corporate securities by general understanding and in fact."

It is a question of fact whether a corporate instrument comes within the above quoted Act. In *Fidelity Investment Association* v. *United States* (5 F. Supp., 19), Judge Whaley, in a well-considered opinion said: "The Act plainly makes the nature and character of the corporate instrument a question of fact. This fact can be established in two ways. If the instrument is plainly and patently on its face a secured corporate indebtedness, oral evidence would be superfluous, but where the instrument is doubtful in its characteristics and appearance, then oral evidence of its true nature given by those who are familiar with such papers, and who buy and sell corporate securities, is necessary to determine its actual character." The certificate in question is plainly on its face a secured corporate instrument so oral evidence of its nature is unnecessary.

And now, January 5, 1935, upon due consideration, judgment is directed to be entered in favor of defendant.

MISCELLANEOUS RULINGS.

XIV–10–7359
Op. A. G. 8

There resides in the Treasury Department no discretion to review on the merits the action of the Attorney General in accepting an offer in compromise in a case which is under his control.

DEPARTMENT OF JUSTICE,
Washington, D. C., November 5, 1934.

MY DEAR MR. SECRETARY:

I beg to acknowledge your letter of October 30, 1934, concerning the duties and responsibilities of the Treasury Department with respect to cases which have been referred to the Department of Justice since Executive Order No. 6166 of June 10, 1933, became effective.

In order to remove all doubt and confusion as to the duties and responsibilities of our respective departments with respect to a case which has been settled by the Department of Justice, you request my opinion on the following question:

What discretion, if any, resides in the Treasury to approve or disapprove, accept or reject, such settlements, and what duty, if any, rests upon the Treasury to inquire into the merits of such settlements before executing the direction of the Attorney General?

It is my understanding that your question relates only to cases wherein your Department is called upon to make tax refunds after settlements have been agreed upon by this Department, and my answer to your question will be limited in its application to cases of that character.

A proper discussion of your question requires consideration of the authority of the Attorney General to make the settlements in question, and the effect thereof upon the Government and its officers.

Section 5 of Executive Order No. 6166 provides in part as follows:

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

The effect of the above-quoted provision is to vest in the Attorney General exclusive control of any case after it has been referred to his department. It should be observed, however, that the provision did not in any way curtail the Attorney General's prior and plenary power. It merely withdrew from all other officers such power and

authority as they theretofore held, leaving the Attorney General in plenary control of any case once it has been referred to the Department of Justice.

The primary broad power of the Attorney General is in part inherent, appertaining to the office, and in part derived from various statutes and decisions. This power is plenary and carries with it the authority to make it effective, including authority to consider all matter germane to any case over which the Attorney General has obtained jurisdiction. See my supplemental opinion of October 2, 1934, and the authorities therein discussed and cited. He may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper so to do. It follows that he may compromise any case on such terms as he sees fit, including cases of the character involved herein. (23 Op. A. G., 507; 29 id., 217, 223.)

An offer in compromise which has been accepted in accordance with law is binding on the United States and its officers as well as on the taxpayer. (*Walker* v. *Alamo Foods Co.*, 16 F. (2d), 694; *Ely & Walker Dry Goods Co.* v. *United States*, 34 F. (2d), 429; *Du Puy* v. *United States*, 67 C. Cls., 348.) Thus, where a taxpayer compromises his suit against the Government to recover an overpayment of taxes, the compromise is mutually binding and bars a second suit to recover further amounts for the same period. (*Second National Bank of Saginaw* v. *Woodworth*, 66 F. (2d), 170; *Reynolds* v. *Gnichtel*, 1 Fed. Supp., 606.)

It is well established that the duty of one executive officer to carry into effect the discretionary acts of another is ministerial. (*Miguel* v. *McCarl*, 291 U. S., 442, 451; *McCarl* v. *United States ex rel. Societa Ligura Di Armamento et al.*, 58 App. D. C., 319.) It is likewise in the case of a judgment. (See *Blair* v. *Union Pacific R. R. Co.*, 6 F. (2d), 484 (App. D. C.).) In that case the taxpayer had recovered a final judgment against the collector of internal revenue in a United States district court and had filed a claim for credit of the said judgment upon a current installment of his income taxes, which the Commissioner of Internal Revenue refused to allow. In sustaining the taxpayer's petition for a writ of mandamus, the court, at page 486, said:

> * * * The duty imposed upon the respondent, according to the conceded facts in the case, was mandatory, not discretionary; * * *.

The acceptance of an offer in compromise by the Attorney General in a case of this character is somewhat analogous to a decision of the Board of Tax Appeals, which has been declared by Congress to be an independent agency of the executive branch of the Government and so held by the Supreme Court. (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716, 725.) Sections 321 and 322 of the Revenue Act of 1932 (ch. 209, 47 Stat., 169; U. S. C., Supp. VII, title 26, sections 321 and 322) clearly show that the duty of making refunds due in those cases is mandatory.

It is, of course, elementary that there must be an appropriation available for the purpose of paying tax refunds. I understand, however, that there is an appropriation available for that purpose when it has been lawfully established that a taxpayer is entitled to a refund and that the Treasury Department is charged with the duty

of making disbursements from that appropriation. See Treasury Appropriation Act of March 15, 1934 (ch. 70, 48 Stat., 425, 430).

The above considerations lead me to the conclusion that the Attorney General has ample power to terminate suits of the character involved by the acceptance of offers in compromise; that when he has so terminated such a suit his action is final and binding on all other executive officers of the Government as to the merits thereof and that such further duties as are necessary in connection with the cases are ministerial in character. I am constrained to advise you, therefore, that, in my opinion, there resides in the Treasury Department no discretion to review on the merits the action of the Attorney General in accepting an offer in compromise in a case which is under his control.

I desire to add in a spirit of cooperation that while responsibility for the exercise of discretion in these cases rests with this department I do not understand that it was intended by Executive Order No. 6166 that the combined efforts of both departments might not be availed of where it would be beneficial to the United States from the standpoint of the work as a whole. I also feel, just as is the case with respect to our relations with other departments in connection with compromise matters, that it would be not only highly desirable but most helpful to continue to receive the views and recommendations of your department. After all, both departments are serving the same interests and have a common end in view.

Respectfully,

HOMER CUMMINGS,
Attorney General.

The Honorable,
THE SECRETARY OF THE TREASURY,
Washington, D. C.

XIV–19–7488
Op. A. G. 9

The Treasury Department is authorized by law to accept offers in compromise in cases (other than cases under the jurisdiction of the Department of Justice) involving the forfeiture of vehicles seized for violation of the internal revenue laws.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 7, 1935.

MY DEAR MR. SECRETARY:

I have the honor to acknowledge your letter of February 19, 1935, relating to your authority, under the provisions of section 3229 of the Revised Statutes, to compromise cases involving the forfeiture of vehicles which have been seized for violation of the internal revenue laws.

You state that in cases of automobiles which have been seized for violation of the internal revenue laws, wherein there is usually no apparent uncertainty as to the liability of the automobiles to forfeiture, interested parties frequently offer in compromise amounts apparently larger than the net amounts which, after payment of storage and other charges, could be realized by the United States if

the automobiles should be forfeited and sold at public auction. You further state that it has been the established practice of the Treasury Department for more than 50 years to compromise cases of this character on the basis above indicated.

In view of the conclusions reached in my opinions addressed to you on October 24, 1933 [Op. A. G. 6, C. B. XIII–2, 442], and October 2, 1934 [Op. A. G. 7, C. B. XIII–2, 445], to the effect that your power to compromise under the provisions of section 3229 of the Revised Statutes of the United States exists only in cases in which there is uncertainty as to liability or collection, you apparently entertain some doubt as to whether you may lawfully continue the above practice and request my opinion as to whether, in considering these offers in compromise, you may lawfully treat the inability of the Government to obtain more from a sale of the vehicle than the amount offered in compromise as an "uncertainty as to collection," within the meaning of that term as used in my opinions above mentioned.

Section 3229 of the Revised Statutes provides as follows:

> 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; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. 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 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 language of the above-quoted section is broad and authorizes the compromise of any *civil or criminal case* arising under the internal revenue laws. It clearly includes forfeiture cases arising under those laws.

The question whether uncertainty as to collection exists in the class of cases which you have presented is dependent upon the nature and extent of the Government's interest in a vehicle which has been seized and forfeited for violation of its laws. The primary object of the Government in forfeiting a vehicle is clearly to punish the violator by depriving him of his property. It is true that a forfeiture proceeding is *in rem* and that by a legal fiction the property is held guilty and condemned as though it were conscious instead of inanimate and insentient. (See *Various Items* v. *United States*, 282 U. S., 577, 581.) But that fiction, resorted to for the purpose of upholding the Government's right to forfeit the vehicle as against persons other than the violator, is not determinative of the question as to whether the Government's sole interest in forfeiting the vehicle is that of removing it from the possession of others or whether its interest is also of a fiscal nature.

Under the laws and procedure governing the disposal of property forfeited under the laws of the United States, vehicles and other property, except that which is prohibited, must be sold at public sale, and after payment of the expenses of the forfeiture

and sale, the remainder of the proceeds must be covered into the Treasury. These laws clearly demonstrate that the United States, notwithstanding any other interest, is interested in the value of forfeited vehicles. That is, it is interested in obtaining the greatest amount possible when it disposes of the vehicle.

There are various other laws which lend support to the view that the Government has a fiscal interest in forfeited property, among which is section 3459 of the Revised Statutes, providing that perishable property seized for tax evasion may be sold before forfeiture if the claimant fails to give a bond and take delivery. This statute is designed to preserve the value of the property and clearly indicates that the United States has a financial interest therein. The tariff laws are also analogous in that they provide for the release of seized property upon payment of the appraised value thereof or the giving of a substitute bond. Section 614, Tariff Act of 1930; section 938, Revised Statutes.

The United States having a fiscal interest in the vehicles seized, it necessarily follows that it is interested in the amount which it will be able to obtain from a sale of such vehicles. It is obvious, therefore, that it would be in the financial interest of the United States to accept an offer in compromise in any case which would bring into the Treasury more money than could be obtained from a sale of the vehicle after deducting the expenses attending the forfeiture and sale thereof.

In view of the conclusion I have reached that it would be clearly in the interest of the United States to accept offers in compromise in cases of the character and on the basis stated by you and in view of the long established practice of the Treasury Department in accepting offers in compromise on that basis I can not, at this late date, advise you to disregard the apparent interests of the United States in deference to the principle that the interest of the Government in the vehicle itself is paramount to its interest in the value thereof.

Accordingly, it is my opinion that in the consideration of offers in compromise submitted to you in cases involving the forfeiture of vehicles seized for violation of the internal revenue laws, the inability of the Government in any case to obtain from a sale of the vehicle, after deducting the expenses of forfeiture and sale, as much as the amount offered, may be properly treated by you as *uncertainty as to collection* within the meaning of that term as used in my opinions of October 24, 1933, and October 2, 1934, above mentioned. I assume, of course, that your request for my opinion does not relate to cases which have been referred to this Department for the institution of forfeiture proceedings or otherwise. Perhaps I should also state that I deal herein only with the question of power, the exercise of which is discretionary and may depend upon considerations other than monetary.

Respectfully,

HOMER CUMMINGS,
Attorney General.

Hon. HENRY MORGENTHAU, Jr.,
Secretary of the Treasury,
Washington, D. C.

NATIONAL INDUSTRIAL RECOVERY ACT.

SECTION 215.—CAPITAL STOCK TAX.

SECTION 215.

Regulations with respect to the use of original returns and furnishing copies of returns. (See T. D. 4504, page 86.)

SECTION 216.—EXCESS-PROFITS TAX.

SECTION 216.

Regulations with respect to the use of original returns and furnishing copies of returns. (See T. D. 4504, page 86.)

AGRICULTURAL ADJUSTMENT ACT.

SECTION 9, AS AMENDED BY THE ACT OF APRIL 7, 1934 (PUBLIC, NO. 142, SEVENTY-THIRD CONGRESS).

REGULATIONS 81, ARTICLE 5: Measure of the tax. XIV-23-7538
P. T. 27

Proper method for determining the "farmers' stock weight" of peanuts.

The processing tax of 1 cent per pound, "farmers' stock weight," imposed upon the first domestic processing of peanuts became effective on October 1, 1934. The regulations with respect to peanuts, promulgated on September 25, 1934, by the Secretary of Agriculture, with the approval of the President, define the term "farmers' stock weight" as follows:

> Farmers' stock weight is the weight of peanuts in the shell, not including unattached foreign materials, which have been removed from the vine and are in that condition which is usual and customary when delivered by the grower.

See Treasury Decision 4489 (C. B. XIII-2, 493).

Processors of peanuts who are equipped to weigh the peanuts immediately before processing, whether in bulk or in bags, are permitted to determine "farmers' stock weight" by deducting an arbitrary tolerance allowance of 5 per cent to cover unattached foreign materials from the actual accurate scale weight of the peanuts at the time they are put in process (not including the weight of the bags).

Where peanuts are stored in bulk by processors who are not equipped to weigh the peanuts immediately before processing, the weight at that time may be determined by deducting from the weight of the peanuts at the time of purchase an arbitrary allowance, to cover shrinkage, of 1½ per cent for the first full month during which the peanuts were stored, plus one-half of 1 per cent for each subsequent

full month, provided, however, that in no event shall such shrinkage allowance exceed 3 per cent. "Farmers' stock weight" may be ascertained by deducting from the weight thus determined an arbitrary tolerance allowance of 5 per cent to cover unattached foreign materials.

SECTION 9.—PROCESSING TAX.

REGULATIONS 81, ARTICLE 6: Rate of tax. XIV–6–7303
(Also Article 31: Credit and refund.) P. T. 20

Conversion factors with respect to the product known as "sausage," but which is not composed wholly or in chief value of pork.

Inquiry is made as to the conversion factors which should be used in determining the amount of tax applicable or the amount of credit or refund allowable with respect to the product known in the packing industry as "sausage," but which is not composed wholly or in chief value of pork.

The term "sausage" is defined by Hog Regulations, Series 1, No. 1, page 6, approved October 29, 1934, effective November 1, 1934, as follows:

* * * 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.

Paragraph B of the regulations reads in part as follows:

* * * In the event that any taxpayer or person entitled to a refund establishes that any or all of the 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 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.

The foregoing provisions of the regulations relate only to sausage which is processed wholly or in chief value from pork. The product known in the packing industry as "sausage," but which is not composed wholly or in chief value of pork, is not sausage as defined by the regulations. The conversion factor to be used with respect to this product is prescribed by paragraph D of the regulations, which reads as follows:

* * * *When any edible product for which no specific conversion factor is prescribed in these regulations (1) is wholly or partly of pork and is subject to the payment of a compensating tax or with respect to which a refund of tax is allowable upon exportation or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (2) is wholly or in chief value of pork and is subject to the payment of a floor stocks tax or with respect to which a credit or refund of tax upon floor stocks is allowable, such tax shall be paid or such credit or refund shall be allowed with respect to the said product on the amount of the pork content*

thereof, according to the conversion factor prescribed for each cut from which the pork contained in such product was derived.

The conversion factor to be used with respect to the product known in the packing industry as "sausage," but which is not composed wholly or in chief value of pork, is the prescribed conversion factor for the cut from which the product was derived. For example, if the pork content of the product consists wholly of chopped or ground trimmings, the conversion factor prescribed for pork trimmings should be applied to the amount of the pork content (trimmings) of the product.

SECTION 15.—EXEMPTIONS AND COMPENSATING TAXES.

REGULATIONS 81, ARTICLE 9: Exemptions from processing tax. XIV–3–7260 P. T. 19

The processing of peanuts by or for the producer for his own use as seed is not taxable.

The question is presented whether processing tax is payable with respect to the processing of peanuts by or for the producer for his own use as seed.

Section 15(b) of the Agricultural Adjustment Act provides in part 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 processing of peanuts by or for the individual producer thereof for his own use as seed will be considered to be processing for consumption by the producer. The person who does such processing will not be required to pay tax with respect to the peanuts processed for such use, provided a producer's affidavit or certificate on P. T. Form 29 is secured from the producer and filed with the monthly return in accordance with article 9(a)1 of Regulations 81.

REGULATIONS 81, ARTICLE 32: Refund of, or credit for, tax paid with respect to products delivered for charitable distribution or use. XIV–2–7247 P. T. 18

A State or Federal penal or correctional institution is not a "State or Federal welfare organization" within the meaning of the credit and refund provisions of section 15(c) of the Agricultural Adjustment Act, as amended by the Act of June 16, 1934 (48 Stat., 973, Public, No. 367, Seventy-third Congress).

REGULATIONS 83, CHAPTER III. XIV–21–7512 T. D. 4547

Processing of tobacco into products for use as sea stores without payment of tax imposed by the Agricultural Adjustment Act, as amended.

Chapter III of Regulations 83, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Chapter III of Regulations 83, approved September 11, 1934, is hereby amended by adding the following new article at the end thereof:

ART. 24½. *Tax-free processing of tobacco into products for use as sea stores.*—The processing of tobacco into manufactured tobacco, snuff, cigars or cigarettes for use as sea stores under section 317 of the Tariff Act of 1930 without the payment of a processing tax shall be subject to the provisions in Regulations 76 with respect to the shipment or delivery of manufactured tobacco products without payment of a stamp tax and to the following supplemental provisions:

1. *Processors.*—The processor of tobacco into products intended for use as sea stores without payment of a processing tax shall submit a rider on Form 551 for attachment to the bond, Form 549–A, required by Regulations 76. Such Form 551 must be executed and submitted in the same manner as the bond, Form 549–A.

Upon the proposed withdrawal of manufactured tobacco products for use as sea stores without payment of a processing tax, whether the shipment or delivery is to be made direct to the vessel or to a bonded sea stores warehouse, the processor shall file P. T. Form 26–A in addition to the application on Form 550–A required by Regulations 76. Such P. T. Form 26–A shall be prepared in duplicate and shall be given the same serial number as the application Form 550–A. The original shall be attached to the original Form 550–A covering the same shipment. The duplicate shall be held by the processor and transmitted by him with his processing tax return made for the month during which the shipment was withdrawn from the factory.

2. *Proprietors of sea stores warehouses.*—The proprietors of bonded sea stores warehouses shall submit a rider on Form 552 for attachment to the bond Form 549–B, required by Regulations 76. Such Form 552 must be executed and submitted in the same manner as the bond, Form 549–B.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 16, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–5–7290
T. D. 4518

Processing and other taxes with respect to hogs under the Agricultural Adjustment Act.

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. Section 9(d)7, Agricultural Adjustment Act, as amended, provides:

In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change in the form of the commodity or its preparation for distribution or use, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

PAR. E. 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 revised, and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated October 29, 1934, provide:

(1) 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.

(2) 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 the slaughter of hogs for market; except that (*a*) in the case of a producer or feeder who shall distribute the carcass or any edible hog product directly to a consumer, the term "first domestic processing" means the preparation of the carcass or any edible hog product for sale, transfer, or exchange or for use by the consumer, and only the edible product or products so sold, transferred, exchanged or distributed by or for the producer or feeder shall be deemed to

have been processed, and (*b*) in the case of a producer or feeder who shall sell, transfer, or exchange any carcass or edible hog product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character, the term "first domestic processing" means the inital act of such person, restaurant, hotel, club, hospital, institution, or establishment which involves the preparation of the carcass or any edible hog product for further distribution or use.

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 the live weight in the meaning of these regulations, provided the hogs are slaughtered within three (3) days after the date of such weighing. When any primal part or edible portion of the viscera has been condemned as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food, the equivalent live weight of such condemned part shall not be included in the live weight subject to the processing tax; provided, however, that the processor of such condemned part shall show by his affidavit the actual weight thereof; the actual weight so shown shall be restored to a live-weight basis by using the conversion factor prescribed for such part in the tables of conversion factors herein, except that the conversion factor for the edible portion of condemned viscera sets shall be 50 per cent.

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 shoulder.—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 jawbones 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 forepart 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 cervelates, 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.

Feeder.—The term "feeder" means any individual or individuals, actively and regularly engaged in the fattening of hogs for market, or in farming operations, a part of which is the fattening of hogs, except retailers, wholesalers, or distributors of meat, butchers, abattoirs, slaughterhouses, packers, factors, or commission merchants.

Producer.—The term "producer" means the individual or individuals who own the hog at the time of farrowing.

Preparation of the carcass of any edible hog product.—The term "preparation of the carcass or any edible hog product" means the preparation, conversion, and/or delivery of any hog carcass or any edible hog product, including, but not limited to, any operation connected with receiving, handling, storing, wrapping, cutting, trimming, and/or rendering any hog carcass or any edible hog product.

Primal parts.—The term "primal parts" means the commercially so-designated sections, cuts, or parts of the dressed carcass (including, but not limited to, such parts as shoulders, hams, bellies, tongues, livers, and heads) before they have been cut, shredded, or otherwise subdivided as a preliminary to use in the manufacture of meat products.

Green weight.—The term "green weight" means the weight of any hog product in its fresh state, after chilling and before any manufacturing operation (including, but not limited to, such operations as freezing, curing, cooking, or drying) has been performed.

II. Conversion Factors.

(3) 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:

A. 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.		
Carcass:	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
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, briskets	180	180	171	191	243
Jowl	80	80	76	85	108
Head	60	60	58	63	81
Trimmings	80	80	76	85	108
Neckbones	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 oaf, head cheese, souse, and sandwich meat)	76	76	72. 20	81. 75	106. 40
Inedible offal	0	0	0	0	0

B. In the event that any taxpayer or person entitled to a refund establishes that any or all of the 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 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.

C. 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 directly to the consumer by the producer or feeder 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

D. When any edible product for which no specific conversion factor is prescribed in these regulations (1) is wholly or partly of pork and is subject to the payment of a compensating tax or with respect to which a refund of tax is allowable upon exportation or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (2) is wholly or in chief value of pork and is subject to the payment of a floor stocks tax or with respect to which a credit or refund of tax upon floor stocks is allowable, such tax shall be paid or such credit or refund shall be allowed with respect to the said product on the amount of the pork content thereof, according to the conversion factor prescribed for each cut from which the pork contained in such product was derived.

III. Exemptions.

(4) In my judgment, the imposition of the processing tax upon hogs processed by the producer thereof who sells directly to or exchanges directly with the consumer 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 sells directly to or exchanges directly with the consumer 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 sells directly to or exchanges directly with the consumer during any marketing year, products derived therefrom in excess of three hundred (300) pounds, but does not sell or exchange 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 as provided herein in paragraphs C and D under the heading "II. Conversion factors." *Provided further,* That if the producer 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 processed, 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 processing. To restore the hog products sold to a live-weight basis, the producer shall use the conversion factors prescribed as provided herein in paragraphs C and D under the heading "II. Conversion factors."

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 by or for the producer thereof for consumption by his own 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 (or 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 his own family, employees, or household and the actual or estimated weight thereof; and the live weight of hogs processed by or for the producer thereof, his own family, employees, or household, together with the name and address of the processor thereof.

The provisions of these regulations shall take effect as of November 1, 1934.

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 15(e) of the Agricultural Adjustment Act, as amended, provides in part:

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. 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 are hereby prescribed:

ARTICLE 1. *General.*—(*a*) A processing tax on the first domestic processing of hogs became effective at the earliest moment of November 5, 1933. A com-

pensating tax became effective with respect to all articles processed or manufactured *wholly or in chief value* from hogs, and imported on or after November 5, 1933. A compensating tax became effective with respect to all articles processed or manufactured *wholly or partly* from hogs, and imported after 11.23 a. m., eastern standard time, May 9, 1934. See section 15(e) of the Agricultural Adjustment Act as amended by the Act approved May 9, 1934 (48 Stat., 670), quoted in paragraph G, above.

The present rate of processing tax is given in article 2 of these regulations. The present compensating tax on each pound of the various hog products is given in article 4 of these regulations.

(*b*) For regulations relating to the processing tax and compensating tax consult Regulations 81 and for regulations relating to exportation under section 17 of the Act consult Regulations 83, September, 1934, edition, which are general regulations under the Agricultural Adjustment Act, as amended. Regulations 81 and Regulations 83, September, 1934, edition, are supplemented by the regulations contained in this Treasury decision.

(*c*) With respect to hogs, and articles processed therefrom, the date, November 5, 1933, when the processing tax with respect to hogs first took effect, is the "effective date" as defined and used in Regulations 81 and Regulations 83, September, 1934, edition. See paragraph E(1), above, for the dates subsequent to November 5, 1933, when increased rates of processing tax became effective.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph E(2), above, are hereby made a part of these regulations.

ART. 2. *Processing tax.*—(A) The rate of procesing tax on the first domestic processing of hogs, in force since the earliest moment of March 1, 1934, is $2.25 per hundredweight, live weight.

(B) Within the meaning of the term "first domestic processing of hogs" as defined in paragraph E(2) there are three classes of persons who may be liable for the processing tax on hogs, namely:

Class 1. A person, other than a producer or a feeder, who slaughters hogs for market;

Class 2. A person who receives, by sale, transfer, or exchange, from a producer or feeder the carcass of a hog, or any edible hog product, and who prepares such carcass or product for further distribution or use. As so used, the term "person" means any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such product for market (including, but not limiting to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), and includes any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character; and

Class 3. A producer or feeder with respect to a hog carcass or other edible hog product sold directly to, or exchanged directly with, consumers.

The form prescribed for return of processing tax by a processor in class 1, is P. T. Form 4A; in class 2, P. T. Form 4B; and in class 3, P. T. Form 4X. Returns on these forms must be filed in duplicate with the collector for the district in which the principal place of business of the processor is located *on or before* the last day of the month following the month in which the processing is done. The amount of tax shown to be due on each such return must be paid at the time when the return is filed, or if the time for payment be postponed, then at the time or times designated for payment in such postponement.

(C) *Processors in class 1.*—Each processor in class 1 (other than a producer or feeder) who slaughters hogs for market shall file for each calendar month a return on P. T. Form 4A in accordance with the instructions printed on the form and in accordance with these regulations. Such processor shall attach to and make a part of his return when filed, a statement, in duplicate, with respect to the parts of hogs condemned during the month, showing (1) the name of each such part, (2) the actual weight thereof, (3) the conversion factor applicable for determination of the equivalent live weight, and (4) the equivalent live weight of such part. For applicable conversion factors see paragraph E(3), above. Credit may be taken only for a primal part or edible portion of the viscera which has been condemned, as a result of the first postmortem inspection made prior to the cutting of the carcass into parts, by any Federal, State, county, or municipal authority, as being unfit for human food. See definition of live weight in paragraph E(2). If the viscera set of a hog is

condemned and the weight of the edible portions thereof can not be ascertained by actual weighing, 2½ per cent of the weight of the live hog from which such viscera set was derived may be considered as the equivalent live weight of such edible portions.

Each processor in class 1 shall keep a record showing for each calendar month, (1) the number and live weight of hogs on hand at the beginning of the month, (2) the number and live weight of hogs received during the month, (3) the number and live weight of hogs shipped or delivered during the month, (4) the number and live weight of hogs destroyed or otherwise disposed of during the month, (5) the number and live weight of hogs on hand at the end of the month, and (6) the number and live weight of hogs put in process during the month. The live weight must be ascertained by actual weighing on accurate scales and not by estimation. Such person shall also keep a record of the products of such processing, and preserve accurate accounts of all transactions involved in any way in any claim for refund, for abatement, or for credit, and of processing exempt from tax.

(D) *Processors in class 2.*—Each processor in class 2, with respect to hog carcasses or other edible hog products received from a producer or feeder, and prepared for further distribution or use, shall report each such product so prepared in monthly return on P. T. Form 4B. Each such person who is also a processor of hogs in class 1 shall execute P. T. Form 4A and P. T. Form 4B in accordance with the instructions printed thereon and in accordance with these regulations. The total tax shown to be due on P. T. Form 4B shall be entered on line 11 of P. T. Form 4A and included with the total tax shown by that return to be due. The original and duplicate copies of P. T. Form 4B shall be securely attached to the respective original and duplicate copies of P. T. Form 4A and made a part of such return.

Each processor in class 2 shall keep a record showing for each calendar month (1) the date of receipt of the carcasses or other edible hog products from a producer or feeder, (2) the name and address of the producer or feeder from whom such products were received, (3) an exact description of each such product conforming with the description thereof in paragraph E(3), above, and (4) the actual weight of each such product.

(E) *Processors in class 3.*—Each producer-processor or feeder-processor of hogs in class 3 who sells directly to, or exchanges directly with, consumers, carcasses or other edible hog products derived from hogs processed by him, or who shall sell, transfer, or exchange any such product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market, or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar character, shall file for the month of November, 1934, and for each subsequent calendar month a return of such transactions on P. T. Form 4X in accordance with instructions printed thereon. Only such products sold directly to, or exchanged directly with, consumers by the producer or feeder shall be deemed to have been processed by the producer or feeder. See subdivision (F), below, and paragraph E(4), above, relative to exemption in the case of a producer-processor with respect to sales directly to, or exchanges directly with, consumers.

(F) *Exemption.*—(*a*) A producer who processes hogs *produced* by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers 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 below. This exemption is applicable only with respect to hogs owned by the producer from the time they were farrowed. *A feeder-processor is not entitled to, and may not claim, any exemption* with respect to sales, transfers, or exchanges of hog products made by him.

(*b*) A producer who processes hogs produced by him and who, during any marketing year, sells directly to, or exchanges directly with, consumers, 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.

(*c*) When two or more individuals produce a hog, the exemption as to 300 pounds shall be apportioned between the joint producers thereof on the basis of their respective shares.

(*d*) A producer who processes hogs produced by him and who sells directly to, or exchanges directly with, consumers 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 first 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 since the beginning of the marketing year. 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 include the 300 pounds which would have been exempt except for such excess.

(*e*) For the purpose of determining the amount of tax to be paid, the producer shall use the conversion factors set forth below to restore to a live-weight basis the hog products sold or exchanged:

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

(*f*) Each producer or feeder shall keep a written record showing: (1) the date on which the hogs were slaughtered; (2) the number of hogs slaughtered; (3) 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); (4) the hog products sold or exchanged; (5) the weight thereof; (6) the date of the sale or exchange; (7) the name and address of the person to whom sold or exchanged, and if to persons other than consumers, the business of each such persons. Such record shall be retained on the premises of the producer, and shall be open for inspection by any internal revenue officer.

ART. 3. *Compensating tax on imported articles.*—A compensating tax became effective with respect to all articles processed or manufactured wholly or in chief value from hogs, and imported on and after November 5, 1933, 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. A compensating tax became effective with respect to articles processed wholly or partly from hogs, and imported after 11.23 a. m., May 9, 1934. The tax applicable to such articles is given in article 4 of these regulations. For detailed regulations as to this tax consult Chapter IV of Regulations 81, as amended by Treasury Decision 4501, approved December 4, 1934 [C. B. XIII–2, 524].

ART. 4. *Rates of tax or of refund with respect to articles processed from hogs.*—(*a*) Effective March 1, 1934, the rates of compensating tax or of refund, with respect to articles processed from hogs, are as follows:

[Rates of tax shown are cents per pound.]

Article.	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. 00
Head included, leaf removed	3. 01	3. 01	2. 85	3. 19	4. 07
Head removed, leaf included	3. 10	3. 10	2. 94	3. 28	4. 18
Head and leaf removed	3. 12	3. 12	2. 97	3. 30	4. 23
Wiltshire side	3. 26	3. 26	3. 10	3. 46	4. 41
Cumberland side	2. 97	3. 97	2. 81	3. 15	4. 00

[Rates of tax shown are cents per pound.]

Article.	Fresh, frozen, in cure, or barreled pork	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
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. 00	7. 65
Rough shoulder	1. 91	1. 91	1. 82	2. 02	2. 58
Regular shoulder	2. 00	2. 00	1. 93	2. 11	2. 70
Skinned shoulder	2. 11	2. 11	2. 00	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. 90
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. 90	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. 00
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. 80	1. 80	1. 71	1. 91	2. 43
Head	1. 35	1. 35	1. 30	1. 41	1. 82
Neck bones and feet	. 42	. 42	. 40	. 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. 80	1. 80	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
Sausage, pork content [1]	1. 80	1. 80	1. 71	1. 91	. 39 2. 52

[1] (1) If the taxpayer or person entitled to refund can show to the satisfaction of the Commissioner that any or all of the 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 conversion factor prescribed therefor, then for each pound of pork, green weight, which said sausages are shown to contain, the rate of tax applicable in such case shall be the respective rate for pork sausage shown in the schedule above. The whole (actual) weight, as well as the total pork content, shall be reported.

(2) In the case of an edible product not named above, which (*a*) is wholly or partly of pork, and is subject to the payment of a compensating tax, or with respect to which a refund of tax is allowable upon exportation, or with respect to which a credit or refund of tax is allowable by reason of the delivery thereof for charitable distribution or use, or (*b*) is wholly or in chief value of pork, with respect to which a credit or refund of tax upon floor stocks is allowable, the amount of tax to be paid, or credit or refund to be allowed, shall be based upon the pork content thereof at the rate given above for each cut from which the pork contained in such product was derived. With respect to each such product there shall be entered on the claim (*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) The establishment of the pork content of products as provided in (1) and (2), above, shall be substantiated by authentic records or other satisfactory proof.

ART. 5. *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, or Regulations 83 (September, 1934, edition), 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 4A	Return of processor of hogs—other than a producer or feeder who slaughters for market—class 1.	Article 2(*c*), above.
P. T. Form 4B	Return of processor of hogs—class 2.	Article 2(*d*), above.
P. T. Form 4X, revised.	Return of producer-processor or feeder-processor of hogs—class 3.	Article 2(*e*), above.
P. T. Form 24	Claim for refund of taxes illegally collected.	Regulations 81, article 31(*a*).
P. T. Form 24C	Claim for refund of, or credit for, tax paid with respect to articles delivered for charitable distribution or use.	Regulations 81, article 32, as amended.
P. T. Form 27	Claim for refund of tax paid with respect to articles exported.	Regulations 83, revised.
P. T. Form 28	Claim for credit, on return, of overpayment.	Regulations 81, article 31(*b*).

ART. 6. *Effective date.*—Treasury Decision 4425, approved March 20, 1934 [C. B. XIII–1, 459], shall remain in force and effect in so far as it relates to liability for tax incurred and refund accrued prior to November 1, 1934, except that it shall not remain in force and effect in so far as it relates to compensating tax incurred and refund of compensating tax and export refund accrued after 11.23 a. m., eastern standard time, May 9, 1934. These regulations shall be in force and effect as of the earliest moment of November 1, 1934, except that they shall be in force and effect as of 11.23 a. m., eastern standard time, May 9, 1934, in so far as they relate to liability for compensating tax incurred and to refund of compensating tax and export refund accrued after that time.

CHAS. T. RUSSELL,
Acting Commissioner of Internal Revenue.

Approved January 25, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–21–7516
T. D. 4549

Processing and other taxes with respect to sugar beets or sugarcane under the Agricultural Adjustment Act, as amended.

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 sugarcane, 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 sugarcane, 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 sugarcane 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 sugarcane, 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 1.

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 sugarcane—

(A) The term "first domestic processing" means each domestic processing, including each processing of successive domestic processings, of sugar beets, sugarcane, 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 sugarcane, 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.

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 posssessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of

[1] Amendment approved May 9, 1934.

sugar beets and sugarcane, 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. The proclamation of the President dated September 11, 1934, provides in part as follows:

AND WHEREAS I find it necessary in order to effectuate the declared policy of the aforesaid Agricultural Adjustment Act to make the provisions of Title I thereof applicable to the Philippine Islands in the case of sugar beets and sugarcane:

NOW, therefore, I, FRANKLIN D. ROOSEVELT, President of the United States of America, under and by virtue of the authority vested in me by section 10(f) of the Agricultural Adjustment Act, as amended, do hereby proclaim that the provisions of the Agricultural Adjustment Act, as amended, are extended and made applicable to the Philippine Islands in the case of sugar beets and sugarcane, effective as of September 12, 1934.

PAR. F. 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 sugarcane, 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. G. 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. H. 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.

* * * * * * *

[1] Amendment approved May 9, 1934.

(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. * * *

(c) (1) Any sugar, imported prior to the effective date of a processing tax on sugar beets and sugarcane, 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, sugarcane, 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. I. 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 sugarcane, basic agricultural commodities.

PAR J. 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. K. The regulations with respect to sugar beets and sugarcane, 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 February 19, 1935, provide:

(1) 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 sugarcane 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 sugarcane, 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 sugarcane, 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 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 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 sugarcane, 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 501 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 sugarcane, 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 sugarcane 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 sugarcane, sirup of cane juice, and edible molasses or in the depression of the farm price of sugarcane. 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 sugarcane, 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 sugarcane, sirup of cane juice, and edible molasses, or in the depression of the farm price of sugarcane.

DEFINITIONS.

(2) 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, sugarcane, 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 sugarcane, 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 a sirup any sucrose sugar which has been at any time wholly or partially crystallized (including also, but not limited to, any intermediate or final molasses [often called refiners' sirup] obtained in the process of refining raw sugar which contains more than 90 per cent [90%]

of the total solids therein in the form of total sugars, when used for human consumption).

Cane sirup and sirup of cane juice.—The terms "cane sirup" and "sirup of cane juice" mean sirup made by the evaporation of the juice of the sugarcane or by the solution of sugarcane 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, and centrifugal sugar.—The terms "washed sugar," "clarified sugar," "plantation white sugar," "turbinado," and "centrifugal sugar," mean the commercially so-designated or so-described different products produced from sugarcane.

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 sugarcane industry, when used for human consumption (including, when used for human consumption, first molasses, second molasses, any intermediate or final molasses [often called refiners' sirup] obtained in the process of refining raw sugar which does not contain more than 90 per cent [90%] of the total solids therein in the form of total sugars, and other molasses not included within the terms of any other definition in these regulations).

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.

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' blackstrap.—The term "refiners' blackstrap" means the final molasses obtained in the process of refining raw sugar when not used for human consumption.

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 sugarcane.

Muscovado sugar.—The term "muscovado sugar" means the dark, moist, sticky, impure sugar product obtained by the process of boiling the first cane sirup to a crystal in open kettles and then running the crystallized mass into kegs, hogsheads, molds, or other containers, the bottoms of which are filled with small holes which, when opened, allow the molasses to drain off.

FORMULÆ FOR TRANSLATING SUGAR INTO TERMS OF "RAW VALUE."

(3) 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, since there is 1 pound of sugar raw value per pound of sugar testing by the polariscope 96 sugar degrees, the pounds of sugar raw value to be added to 1 pound for each degree (and fractions of a degree in proportion) of polarization, from 96 degrees to 100 degrees, is to be determined by the formula $\frac{1.07-1}{100-96}$ and is 0.0175 pound, and that, similarly, the pounds of sugar raw value to be subtracted from 1 pound for each degree (and fractions of a degree in proportion) of polarization from 96 degrees to 92 degrees is to be determined by the same formula and is 0.0175 pound.

I find that the most accurate method for translating any quantity of sugar testing by the polariscope less than 92 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 92 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.

(4) The following table fixes the amount of sugar, in terms of pounds of sugar raw value, with respect to 1 pound, net weight, or 1 gallon of the following listed articles:

	Pounds of sugar raw value per pound of article.
A. Beet sugar; 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 confectioner's sugar, testing by the polariscope 99.8 sugar degrees or above	1.07
B. Direct-consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, muscovado sugar, refiners' soft sugar, sugar mixtures, sirups, and molasses (except sirup of cane juice, edible molasses, and refiners' blackstrap), testing by the polariscope:	
99° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 99° but less than 99.8°)	1.0525
98° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 98° but less than 99°)	1.0350
97° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 97° but less than 98°)	1.0175
96° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 96° but less than 97°)	1.0000
95° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 95° but less than 96°)	.9825
94° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 94° but less than 95°)	.9650
93° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 93° but less than 94°)	.9475
92° (plus proportionate part of 0.0175 pound for any additional fraction of a degree above 92° but less than 93°)	.9300

C. Direct-consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, muscovado sugar, refiners' soft sugar, sugar mixtures, sirup and molasses (except sirup of cane juice, edible molasses, and refiners' blackstrap), testing by the polariscope less than 92 degrees; the poundage of the total sugar content of each pound of the article divided by 0.972, equals the poundage of sugar raw value per pound of the article.

	Pounds of sugar raw value per gallon of article.
D. Sirup of cane juice	7. 5600
E. Edible molasses	7. 3600
F. Refiners' blackstrap	0. 0000

G. In the event that the Commissioner of Internal Revenue, or any taxpayer, or any person entitled to refund, shall establish that any product or by-product, wholly derived from the processing of sugar beets or sugarcane, does not come within any of the above classifications and has had no conversion factor established for it, or does come within any of the above classifications but contains more or less total sugar expressed in terms of raw value than is represented by the listed conversion factor, then the amount of tax or refund with respect to such product or by-product shall be computed at the rate of the processing tax on the basis of the amount of the total sugar content, expressed in terms of raw value, established to be actually contained therein.

H. The amount of tax or refund with respect to any article partly derived from the processing of sugar beets, sugarcane and/or any product or by-product thereof, shall be computed at the rate of the processing tax on the basis of the amount of sugar, expressed in terms of raw value, established to have been used in the processing of the said article.

EXEMPTIONS.

(5) 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 sugarcane, 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 sugarcane 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 exchanges 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 sugarcane 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

sugarcane produced by him, and together with his family, employees or household, finally prepared 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 sugarcane.

In my judgment, the payment of the processing tax upon the processing of sugarcane by or for the producer thereof for sale by him, where such processing directly results in muscovado sugar and where such muscovado sugar is sold by the said producer as direct-consumption sugar, is unnecessary to effectuate the declared policy of the Act. Accordingly, I do hereby exempt from the payment of the processing tax the processing of sugarcane by or for the producer thereof for sale by him, where such processing directly results in muscovado sugar and where such muscovado sugar is sold by the said producer as direct-consumption sugar.

The provisions of these regulations shall take effect as of March 1, 1935.

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.

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*) There became effective at the earliest moment of June 8, 1934, (1) a processing tax on the first domestic processing of sugar beets or sugarcane; (2) a compensating tax on all articles processed or manufactured wholly or partly from sugar beets or sugarcane, and imported on or after said date; (3) a tax on floor stocks of certain articles processed from sugar beets or sugarcane which, on said date, were held for sale or other disposition. These taxes became effective in the Philippine Islands at the earliest moment, Manila time, of September 12, 1934, by virtue of the proclamation[1] of the President which made the provisions of the Agricultural Adjustment Act, as amended, applicable to the Philippine Islands in the case of sugar beets and sugarcane.

The present rates of processing tax are given in article 2 of these regulations. The present rates of compensating tax are given in article 3 of these regulations. The rates of tax with respect to floor stocks are given in article 3 of Treasury Decision 4441, approved June 20, 1934 [C. B. XIII–1, 501].

(*b*) For regulations relating to the processing tax and compensating tax consult Regulations 81, for regulations relating to the tax with respect to floor stocks consult Regulations 82, and for regulations relating to exportation under section 17 of the Act consult Regulations 83, September, 1934, edition, which are general regulations under the Agricultural Adjustment Act, as amended. Regulations 81, Regulations 82, and Regulations 83, September, 1934, edition, are supplemented by the regulations contained in this Treasury decision.

(*c*) The "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, September, 1934, edition, and as used in these regulations, that is, the date when the processing tax with respect to sugar beets and sugarcane became effective, is June 8, 1934, in the United States

[1] See paragraph E.

(including Hawaii and Alaska) and Puerto Rico, and September 12, 1934, in the Philippine Islands.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph K (2), above, are hereby made a part of these regulations.

ART. 2. *Processing tax.*—(*a*) The rate of tax applicable to the direct-consumption sugar, resulting from the first domestic processing (as herein defined) of sugar beets or sugarcane, is 0.5 cent per pound of sugar raw value except that the rate of processing tax with respect to sirup of cane juice and edible molasses resulting from the first domestic processing of sugarcane is 0.125 cent per pound of the total sugar content thereof translated into terms of raw value. For amounts of processing tax with respect to direct-consumption sugar see article 3.

(*b*) The form prescribed for return of processing tax is P. T. Form 8, revised March, 1935. Returns for March, 1935, and for subsequent months shall be filed on or before the last day of the month following the month in which the processing is done. The amount of tax shown to be due on each such return must be paid at the time when the return is filed, or, if the time for payment be postponed, then at the time or times designated for payment in such postponement. See article 5 for list of prescribed forms.

(*c*) Each person engaged in successive domestic processings of sugar beets or sugarcane or raw sugar, which directly results in direct-consumption sugar, shall keep a written record showing with respect to sugar beets or sugarcane, or any product thereof, (1) the quantity on hand at the beginning of the month, (2) the quantity received during the month, (3) the quantity shipped or delivered during the month, (4) the quantity sold or otherwise disposed of during the month, (5) the quantity on hand at the end of the month, and (6) the quantity put in process during the month. These quantities must be ascertained by actual weighing on accurate scales or, in the case of sirup of cane juice and edible molasses, by actual measurement in gallons, and not by estimation.

(*d*) When a shipment of raw sugar, as defined, is made from the place of processing, the processor shall execute P. T. Form 8A in duplicate. Such form shall show the date of shipment, the kind of article, the polariscopic test if 92° or above, or if less than 92° the total sugar content, the actual quantity shipped, the name and address of the person to whom shipment is made, and the name and address of the shipper. The original P. T. Form 8A covering each shipment shall be forwarded to the processor to whom shipment is made. Such processor shall enter the date of receipt of the shipment on this form and transmit it (and similar forms covering imported raw sugar received[2]) with his return on P. T. Form 8 for the month in which such shipment was received. The duplicate P. T. Form 8A shall be filed by the processor who made the shipment with his return on P. T. Form 8 for the month in which the shipment was made.

(*e*) *Exemption.*—(1) The term "producer" as used in this subdivision of this article means the grower of the sugarcane.

(2) For the purposes of exemption from processing tax, the processing of sugarcane, or the sale or exchange of sirup of cane juice derived from sugarcane, by any member of the family or household, or by an employee, of the producer of the sugarcane shall be deemed to have been done by the producer himself.

(3) If the producer processes, or has processed for him, sugarcane 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, sugarcane 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

[2] See article 4(*c*).

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, sugarcane 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 sugarcane.

(7) Products of the processing of sugarcane which are retained for consumption by the producer shall be deemed to have been processed for that purpose and not for sale or exchange.

(8) Each processor of sugarcane into sirup of cane juice shall keep a written record showing: (*a*) the date when the sugarcane was processed; (*b*) the quantity, in gallons, of sirup of cane juice produced; (*c*) the quantity, in gallons, of sirup of cane juice processed for the producer of the sugarcane, (1) for consumption by himself, his family, employees, or household, (2) for sale directly to, or exchange directly with, consumers, or sale to, or exchange with, persons for sale to, or exchange with, consumers, without further improving in quality or further preparing for distribution or use, exempt from tax (first 200 gallons exempt only if total sales or exchanges during crop year do not exceed 500 gallons), and (3) to be further improved in quality or further prepared for distribution or use, based on producer's affidavits or certificates. Such record shall be retained on the premises of the processor and shall be open for inspection by any internal revenue officer.

(9) P. T. Form 8X, revised March, 1935, is prescribed as the form of monthly processing tax return of a processor of sugarcane into sirup of cane juice. Return on this form must be made by each such processor for March, 1935, and for each subsequent calendar month during the crop year in which he processes sugarcane into sirup of cane juice.

(10) The processing of sugarcane by or for the producer thereof for sale by him, where such processing directly results in muscovado sugar and where such muscovado sugar is sold by the producer of the sugarcane as direct-consumption sugar is exempt from tax on and after March 1, 1935.

ART. 3. *Rates of tax or refund.*—(*a*) The amounts of tax imposed and of refund (or credit) allowable with respect to articles processed from sugar beets or sugarcane, as determined on the basis of conversion factors prescribed by the Secretary of Agriculture in his regulations, set forth in paragraph K (4), above, are as follows:

Amounts of tax on the first domestic processing of sugar beets and sugarcane on and after March 1, 1935; rates of compensating tax on articles processed or manufactured wholly or partly from sugar beets or sugarcane and imported on and after March 1, 1935; amounts of refund or credit allowable with respect to articles processed on and after March 1, 1935, from sugar beets or sugarcane.

Articles.	Rates of tax.
(A) Beet sugar; 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 confectioner's sugar testing by the polariscope 99.8 sugar degrees or above	*Cent per pound.* 0.535
(B) Direct-consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, muscovado sugar, refiners' soft sugar, sugar mixtures, sirups, and molasses (except sirup of cane juice, edible molasses, and refiners' blackstrap), testing by the polariscope:	
99° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 99° but less than 99.8°)	.52625
98° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 98° but less than 99°)	.51750

Amounts of tax on the first domestic processing of sugar beets, etc.—Continued

Articles.	Rates of tax.
(B) Direct-consumption sugar, including washed sugar, centrifugal sugar, etc.—Continued.	
97° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 97° but less than 98°)	*Cent per pound* 0. 50875
96° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 96° but less than 97°)	. 50000
95° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 95° but less than 96°)	. 49125
94° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 94° but less than 95°)	. 48250
93° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 93° but less than 94°)	. 47375
92° (plus proportionate part of 0.00875 cent for any additional fraction of a degree above 92° but less than 93°)	. 46500
(C) Direct-consumption sugar, including washed sugar, centrifugal sugar, clarified sugar, turbinado, plantation white sugar, muscovado sugar, refiners' soft sugar, sugar mixtures, sirup and molasses (except sirup of cane juice, edible molasses, and refiners' blackstrap), testing by the polariscope less than 92 degrees; the poundage of the total sugar content of each pound of the article divided by 0.972 equals the poundage of sugar raw value per pound of the article	[1]
	Cent per gallon.
(D) Sirup of cane juice	0. 945
(E) Edible molasses	. 92
(F) Refiners' blackstrap	. 000

[1] The poundage of sugar, raw value, per pound of the article, multiplied by 0.5 cent is the per pound tax with respect to the article.

(G) In the event that the Commissioner of Internal Revenue, or any taxpayer, or any person entitled to refund, shall establish that any product or by-product, wholly derived from the processing of sugar beets or sugarcane, does not come within any of the above classifications and has had no conversion factor established for it, or does come within any of the above classifications but contains more or less total sugar expressed in terms of raw value than is represented by the listed conversion factor, then the amount of tax or refund with respect to such product or by-product shall be computed at the rate of the processing tax on the basis of the amount of the total sugar content, expressed in terms of raw value, established to be actually contained therein.

(H) The amount of tax or refund with respect to any article partly derived from the processing of sugar beets or sugarcane or from any product or by-product thereof, shall be computed at the rate of the processing tax on the basis of the amount of sugar, expressed in terms of raw value, established to have been used in the processing of the said article.

(*b*) 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).

(*c*) Any return or credit of tax, made pursuant to the provisions of section 15(c), or any refund made under the provisions of section 17(a) of the Act, shall be made only on the following basis:

(1) If the tax paid was a compensating tax, or a tax with respect to floor stocks, 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 refund shall be determined in accordance with the rate of processing tax in effect at the time of the first domestic processing of the sugar beets or sugarcane from which the delivered or exported product was processed and in accordance with the proper conversion factor in effect at that time.

ART. 4. *Compensating tax on imported articles.*—(*a*) A compensating tax is effective with respect to all articles processed or manufactured wholly or

partly from sugar beets or sugarcane, and imported on and after June 8, 1934, into the United States (including Hawaii and Alaska) and Puerto Rico from any foreign country, or from any possession of the United States to which the Act does not apply, or imported on or after September 12, 1934, into the Philippine Islands from any foreign country or from any possession of the United States to which the Act does not apply. The tax applicable on and after March 1, 1935, to such articles is given in article 3 of these regulations. Detailed regulations as to the compensating tax are contained in Chapter IV of Regulations 81, as amended by Treasury Decision 4501, approved December 4, 1934 [C. B. XIII–2, 524]. Chapter IV of Regulations 81, as amended by Treasury Decision 4501, shall not be applicable in the Philippine Islands.

(*b*) The compensating tax with respect to all articles processed or manufactured wholly or partly from sugar beets or sugarcane and imported into the Philippine Islands from any foreign country or from any possession of the United States to which the Act does not apply, will be collected by the collector of internal revenue, Baltimore, Md., through a deputy stationed at Manila, P. I.

(*c*) Raw sugar which is to be further refined (or improved in quality, or further prepared for distribution or use) is not subject to compensating tax. The person making an entry or withdrawal of imported raw sugar (as defined) shall execute P. T. Form 8A in duplicate. Such form shall show the number and date of the customs entry, the kind of article, the polariscopic test if 92 degrees or above, or if less than 92 degrees the total sugar content, and the actual quantity entered or withdrawn, together with the name and address of the person to whom shipment will be made and the name and address of the person making the entry or withdrawal. Both original and duplicate P. T. Forms 8A, covering each transaction, shall be presented prior to the release of the sugar to the collector of customs, who, after stamping both copies to show the date and office of receipt, shall return the original P. T. Form 8A to the person making the entry or withdrawal with the customs permit of delivery. This copy shall be forwarded by such person to the person to whom the shipment is made, and the latter shall file it as provided in article 2(*d*). The duplicate P. T. Form 8A will be retained by the collector of customs until the close of the month and then will be transmitted to the Commissioner of Internal Revenue. The provisions of this subdivision of this article do not apply to sugar coming into the United States from the Philippine Islands.

ART. 5. *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 83, September, 1934, edition, or these regulations, 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 sugarcane are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 8, revised March, 1935.	Processing tax return	Regulations 81, article 11.
P. T. Form 8A	Invoice of sugar products to be further refined, etc.	Articles 2(*d*) and 4(*c*) of these regulations.
P. T. Form 8–X, revised March, 1935.	Processing tax return of processor of sugarcane into sirup of cane juice.	Regulations 81, article 11. Article 2(*e*) of these regulations.
P. T. Form 24	Claim for refund of overpayment under Agricultural Adjustment Act.	Regulations 81, article 31(*a*).
P. T. Form 24C	Claim for refund of, or credit for, tax paid with respect to articles delivered for charitable distribution or use.	Regulations 81, article 32, as amended.
P. T. Form 27	Claim for refund of tax paid with respect to articles exported.	Regulations 83 (September, 1934, edition).
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(*b*).

ART. 6. *Effective date.*—Treasury Decision 4441, approved June 20, 1934 [C. B. XIII–1, 501], shall remain in force and effect in so far as it relates to liability for tax incurred and refund accrued prior to March 1, 1935. With respect to its applicability in the Philippine Islands such Treasury decision is hereby amended as follows: (*a*) Wherever the date of June 8, 1934, appears, the date with respect to the Philippine Islands shall be September 12, 1934; (*b*) wherever the dates June 30, 1934, and July 31, 1934, appear in article 2, such dates with respect to the Philippine Islands shall be September 30, 1934, and October 31, 1934, respectively; (*c*) wherever the dates June 7, 1934, and August 7, 1934, appear in article 4, such dates with respect to the Philippine Islands shall be September 11, 1934, and November 11, 1934, respectively. These regulations shall be in force and effect as of the earliest moment of March 1, 1935, in the United States (including Hawaii and Alaska) and in Puerto Rico, and shall be in force and effect as of the earliest moment (Manila time) on March 1, 1935, in the Philippine Islands.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 21, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–11–7377
T. D. 4530

Processing and other taxes with respect to tobacco under the Agricultural Adjustment Act.

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. A proclamation of the Secretary of Agriculture, dated August 10, 1933, provides:

I, REXFORD G. TUGWELL, Acting 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 cigar-leaf tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 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 Maryland tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 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 Burley tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 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 fire-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 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 fire-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 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 dark air-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

PAR. C. Section 9(b) of the Agricultural Adjustment Act, as amended, provides in part:

The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that any such result will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. * * *

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. Section 15(e) of the Agricultural Adjustment Act, as amended, provides in part:

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. F. Section 16 of the Agricultural Adjustment Act, as amended, provides in part:

(C) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which the existing rate of the processing tax is to be increased, or decreased, that on the date such increase, or decrease, first takes effect with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, and upon the production of any article from a commodity in process on the date on which the rate of the processing tax is to be increased or decreased, there shall be made a tax adjustment as follows:

(1) Whenever the rate of the processing tax on the processing of the commodity generally or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, or as to any class of products, is decreased, there shall be credited or refunded to such person an amount equivalent to the difference between the rate of the processing tax payable or paid at the time immediately preceding the decrease in rate and the rate of the processing tax which would have been payable with respect to the commodity from which processed, if the processing had occurred on such date: *Provided, however*, That no such credit or refund shall be made unless the rate of the processing tax immediately preceding said decrease is equal to, or less than, the rate of the processing tax in effect on the date on which any floor stocks tax was paid prior to the adoption of this amendment.

(2) Whenever the rate of the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, or as to any class of products, is increased, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the difference between the rate of the processing tax payable or paid at the time immediately preceding the increase in rate and the rate of the processing tax which would be payable with respect to the commodity from which processed, if the processing had occurred on such date. * * *

PAR. G. The regulations with respect to cigar-leaf tobacco, and with respect to Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco, made by the Secretary of Agriculture, with the approval of the President, dated September 14, 1933, as revised and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated June 30, 1934, September 27, 1934, and January 19, 1935, provide:

I. MARKETING YEAR.

(1) I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for cigar-leaf, Maryland, Burley, flue-cured, fire-cured and dark air-cured tobacco shall begin October 1, 1933.

II. RATES OF TAX.

(2) A. *Cigar-leaf tobacco.*—I do hereby find that the rate of tax as of October 1, 1933, which equals the difference between the current average farm price of cigar-leaf tobacco, farm sales weight, and the fair exchange value of cigar-leaf tobacco, farm sales weight, 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 cigar-leaf tobacco, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of cigar-leaf tobacco, or products thereof, or in the depression of the farm price of cigar-leaf tobacco. I do accordingly hereby determine, as of October 1, 1933, that the rate of the processing tax on the first domestic processing of cigar-leaf tobacco shall be three (3) cents per pound, unsweated, farm sales weight, which rate will prevent such accumulation of surplus stocks and depression of the farm price of cigar-leaf tobacco.

I do hereby establish the following measures of tax for sweated cigar-leaf tobacco, to be effective on and after February 1, 1935: Whenever sweated cigar-leaf tobacco from which stem has not been removed is processed, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be three and seventy-five hundredths (3.75) cents, except that when the cigar-leaf tobacco so processed is of the kind classified in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, as fire-cured tobacco, the measure of tax shall be three and twenty-five hundredths (3.25) cents; whenever sweated cigar-leaf tobacco from which stem has been removed is processed, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be five (5) cents, except that when the cigar-leaf tobacco so processed is of the kind classified in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, as fire-cured tobacco, the measure of tax shall be four and three-tenths (4.3) cents. The above amounts are in accordance with the respective weight relationships determined to exist between cigar-leaf tobacco in such states and the farm sales weight of unsweated cigar-leaf tobacco.

I do hereby find, as of February 1, 1935, 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 at the rate determined by the Secretary of Agriculture as of October 1, 1933, to equal the difference between the current average farm price and the fair exchange value of cigar-leaf tobacco, on the processing of cigar-leaf tobacco manufactured into scrap chewing and/or smoking tobacco, will cause such reduction in the quantity of cigar-leaf tobacco manufactured into scrap chewing and/or smoking tobacco, domestically consumed, as to result in the accumulation of surplus stocks of cigar-leaf tobacco, or of scrap chewing and/or smoking tobacco produced therefrom, or in the depression of the farm price of cigar-leaf tobacco. I do hereby, accordingly, determine, as of February 1, 1935, that the processing tax on the first domestic processing of cigar-leaf tobacco used in the manufacture of scrap chewing and/or smoking tobacco shall be at the rate of two (2) cents per pound, unsweated, farm sales weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of cigar-leaf tobacco, scrap chewing and/or smoking tobacco produced therefrom, and depression of the farm price of cigar-leaf tobacco. Whenever sweated cigar-leaf tobacco from which stem has not been removed is processed in the manufacture of scrap chewing and/or smoking tobacco, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be two and five-tenths (2.5) cents; whenever sweated cigar-leaf tobacco from which stem has been removed is processed in the manufacture of scrap chewing and/or smoking tobacco, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be three and three-tenths (3.3) cents; these amounts being in accordance with the respective weight relationships determined to exist between cigar-leaf tobacco in such states and the farm sales weight of unsweated cigar-leaf tobacco.

(3) B. *Maryland tobacco.*—In order to effectuate the declared policy of the Act, I find it necessary to adjust the rate of the processing tax on Maryland tobacco to conform to such rate as will equal the difference between the current average farm price and the fair exchange value of Maryland tobacco as of October 1, 1934. I do accordingly determine as of October 1, 1934, that the processing tax on the first domestic processing of Maryland tobacco shall be at the rate of zero (0) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for Maryland tobacco and the fair exchange value of Maryland tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

(4) C. *Burley tobacco.*—In order to effectuate the declared policy of the Act, I find it necessary to adjust the rate of the processing tax on Burley tobacco to conform to such rate as will equal the difference between the current average farm price and the fair exchange value of Burley tobacco as of October 1, 1934. I do accordingly determine as of October 1, 1934, that the processing tax on the first domestic processing of Burley tobacco shall be at the rate of six and one-tenth (6.1) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for Burley tobacco and the fair exchange value of Burley tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever Burley tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be seven (7) cents per pound of such tobacco; whenever Burley tobacco in processing order from which stem has been removed is processed, the measure of tax shall be nine and five-tenths (9.5) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between Burley tobacco in such states and the farm sales weight of Burley tobacco.

I do hereby find, as of February 1, 1935, 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 at the rate determined by the Secretary of Agriculture as of October 1, 1934, to equal the difference between the current average farm price and the fair exchange value of Burley tobacco, on the processing of Burley tobacco manufactured into chewing tobacco, will cause such reduction in the quantity of Burley tobacco manufactured into chewing tobacco, domestically consumed, as to result in the accumulation of surplus stocks of Burley tobacco, or of chewing tobacco produced therefrom, or in the depression of the farm price of Burley tobacco. I do hereby, accordingly, determine, as of February 1, 1935, that the processing tax on the first domestic processing of Burley tobacco used in the manufacture of chewing tobacco shall be at the rate of two and five-tenths (2.5) cents per pound, farm sales weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of Burley tobacco, chewing tobacco produced therefrom, and depression of the farm price of Burley tobacco; whenever Burley tobacco in processing order, from which stem has not been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and nine-tenths (2.9) cents per pound of such tobacco; whenever Burley tobacco in processing order, from which stem has been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be three and nine-tenths (3.9) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between Burley tobacco in such states and the farm sales weight of Burley tobacco.

(5) D. *Flue-cured tobacco.*—I do hereby determine as of October 1, 1933, that the processing tax on the first domestic processing of flue-cured tobacco shall be at the rate of four and two-tenths (4.2) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for flue-cured tobacco and the fair exchange value of flue-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever flue-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be four and seven-tenths (4.7) cents per pound of such tobacco; whenever flue-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be six and one-tenth (6.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between flue-cured tobacco in such states and the farm sales weight of flue-cured tobacco.

I do hereby find, as of February 1, 1935, 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 at the rate determined by the Secretary of Agriculture as of October 1, 1933, to equal the difference between the current average farm price and the fair exchange value of flue-cured tobacco, on the processing of flue-cured tobacco manufactured into chewing tobacco, will cause such reduction in the quantity of flue-cured tobacco manufactured into chewing tobacco, domestically consumed, as to result in the accumulation of surplus stocks of flue-cured tobacco, or of chewing tobacco produced therefrom, or in the depression of the farm price of

flue-cured tobacco. I do hereby, accordingly, determine, as of February 1, 1935, that the processing tax on the first domestic processing of flue-cured tobacco used in the manufacture of chewing tobacco shall be at the rate of two (2) cents per pound, farm sales weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of flue-cured tobacco, chewing tobacco produced therefrom, and depression of the farm price of flue-cured tobacco; whenever flue-cured tobacco in processing order, from which stem has not been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and three-tenths (2.3) cents per pound of such tobacco; whenever flue-cured tobacco in processing order, from which stem has been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and nine-tenths (2.9) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between flue-cured tobacco in such states and the farm sales weight of flue-cured tobacco.

(6) E. *Fire-cured tobacco.*—I do hereby determine as of October 1, 1933, that the processing tax on the first domestic processing of fire-cured tobacco shall be at the rate of two and nine-tenths (2.9) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for fire-cured tobacco and the fair exchange value of fire-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever fire-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be three and two-tenths (3.2) cents per pound of such tobacco; whenever fire-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be four and one-tenth (4.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between fire-cured tobacco in such states and the farm sales weight of fire-cured tobacco.

I do hereby find, as of February 1, 1935, 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 at the rate determined by the Secretary of Agriculture as of October 1, 1933, to equal the difference between the current average farm price and the fair exchange value of fire-cured tobacco, on the processing of fire-cured tobacco manufactured into chewing tobacco, will cause such reduction in the quantity of fire-cured tobacco manufactured into chewing tobacco, domestically consumed, as to result in the accumulation of surplus stocks of fire-cured tobacco, or of chewing tobacco produced therefrom, or in the depression of the farm price of fire-cured tobacco. I do hereby, accordingly, determine, as of February 1, 1935, that the processing tax on the first domestic processing of fire-cured tobacco used in the manufacture of chewing tobacco shall be at the rate of two (2) cents per pound, farm sales weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of fire-cured tobacco, chewing tobacco produced therefrom, and depression of the farm price of fire-cured tobacco; whenever fire-cured tobacco in processing order, from which stem has not been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and two-tenths (2.2) cents per pound of such tobacco; whenever fire-cured tobacco in processing order, from which stem has been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and nine-tenths (2.9) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between fire-cured tobacco in such states and the farm sales weight of fire-cured tobacco.

(7) F. *Dark air-cured tobacco.*—I do hereby determine as of October 1, 1933, that the processing tax on the first domestic processing of dark air-cured tobacco shall be at the rate of three and three-tenths (3.3) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for dark air-cured tobacco and the fair exchange value of dark air-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever dark air-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be three and eight-tenths (3.8) cents per pound of such tobacco; whenever dark air-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be five and one-tenth (5.1) cents per pound of such tobacco,

these amounts being in accordance with the respective weight relationships determined to exist between dark air-cured tobacco in such states and the farm sales weight of dark air-cured tobacco.

I do hereby find, as of February 1, 1935, 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 at the rate determined by the Secretary of Agriculture as of October 1, 1933, to equal the difference between the current average farm price and the fair exchange value of dark air-cured tobacco, on the processing of dark air-cured tobacco manufactured into chewing tobacco, will cause such reduction in the quantity of dark air-cured tobacco manufactured into chewing tobacco, domestically consumed, as to result in the accumulation of surplus stocks of dark air-cured tobacco, or of chewing tobacco produced therefrom, or in the depression of the farm price of dark air-cured tobacco. I do hereby, accordingly, determine, as of February 1, 1935, that the processing tax on the first domestic processing of dark air-cured tobacco used in the manufacture of chewing tobacco shall be at the rate of two (2) cents per pound, farm sales weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks of dark air-cured tobacco, chewing tobacco produced therefrom, and depression of the farm price of dark air-cured tobacco; whenever dark air-cured tobacco in processing order, from which stem has not been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be two and three-tenths (2.3) cents per pound of such tobacco; whenever dark air-cured tobacco in processing order, from which stem has been removed, is processed in the manufacture of chewing tobacco, the measure of tax shall be three and one-tenth (3.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between dark air-cured tobacco in such states and the farm sales weight of dark air-cured tobacco.

III. Definitions.

(8) The following terms, as used in these regulations, shall have the meanings hereby assignd to them:

First domestic processing.—The first domestic processing of cigar-leaf tobacco is the fabricating of the product to be used by the consumer. The acts of stemming, sweating or fermenting, and conditioning shall not be deemed processing.

(*a*) In the case of cigars, stogies, cheroots, or small cigars, it is the fabricating of cigar-leaf tobacco into the form to which no tobacco is added and from which no tobacco is subtracted; all scrap, cuttings, and clippings not left in such products shall be deemed not to have been processed.

(*b*) In the case of scrap chewing and/or smoking tobacco, it is the preparing of any form of cigar-leaf tobacco for consumption as scrap chewing and/or smoking tobacco.

The first domestic processing of Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco is the fabricating of the product to be used by the consumer. In the case of cigarettes, smoking tobacco, chewing tobacco, and snuff, it is the fabricating of any one or more of the above kinds of tobacco into the articles to be consumed.

Cigar-leaf tobacco.—Cigar-leaf tobacco is leaf tobacco, classified in United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, in classes 4, 5, 6, and 8, and any tobacco of other grades or types of leaf tobacco (including, but not limited to, Maryland, Burley, flue-cured, fire-cured and dark air-cured tobacco), used in the manufacture or fabrication of cigars, stogies, cheroots, small cigars, scrap chewing tobacco, and/or scrap smoking tobacco.

Maryland.—Maryland tobacco is the kind of air-cured tobacco classified as type 32 in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, except such tobacco so classified as is specifically included in the above definition of cigar-leaf tobacco. It shall be deemed to include also all the other domestic light air-cured tobacco excepting Burley when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

Burley.—Burley tobacco is the kind of air-cured tobacco classified as type 31, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, except such tobacco so

classified as is specifically included in the above definition of cigar-leaf tobacco.

Flue-cured.—Flue-cured tobacco is the kind of tobacco classified as types 11, 12, 13, 14, and 90 in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, except such tobacco so classified as is specifically included in the above definition of cigar-leaf tobacco. It shall be deemed to include also all other flue-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

Fire-cured.—Fire-cured tobacco is the kind of tobacco classified as types 21, 22, 23, and 24, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, except such tobacco so classified as is specifically included in the above definition of cigar-leaf tobacco. It shall be deemed to include also all other domestic fire-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

Dark air-cured.—Dark air-cured tobacco is the kind of tobacco classified as types 35, 36, and 37, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, except such tobacco so classified as is specifically included in the above definition of cigar-leaf tobacco. It shall be deemed to include also all other domestic dark air-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

Processing order.—Processing order is the state of Maryland, Burley, flue-cured, fire-cured, and/or dark air-cured tobacco at the time of processing thereof.

Cigarettes.—Cigarettes are rolls of tobacco wrapped in paper.

Snuff.—Snuff is tobacco that has been cut, ground, or pulverized into small particles for use in sniffing, dipping, or chewing.

Smoking tobacco.—Smoking tobacco is tobacco of different kinds prepared for use principally for smoking purposes.

(*a*) *Granulated smoking tobacco.*—Granulated smoking tobacco is tobacco that is cut, threshed, or broken into small particles suitable particularly for pipe smoking or hand-rolled cigarettes.

(*b*) *Other smoking tobacco.*—Other smoking tobacco is tobacco not granulated which is prepared for use principally for pipe smoking.

Chewing tobacco.—Chewing tobacco is tobacco of different kinds prepared for use principally for chewing purposes.

(*a*) *Plug chewing tobacco.*—Plug chewing tobacco is chewing tobacco manufactured and pressed into flat cakes.

(*b*) *Twist.*—Twist is the type of chewing tobacco manufactured in the form of a twist.

(*c*) *Other chewing tobacco.*—Other chewing tobacco is tobacco prepared for use principally for chewing.

Leaf tobacco.—Leaf tobacco is tobacco in the forms in which it appears between the time it is stripped from the stalk, or primed and cured, and the time it enters into a manufacturing process.

Leaf tobacco from which stem has not been removed:

Unstemmed.—Unstemmed leaf tobacco is leaf tobacco from which stem or mid-rib has not been removed, including both whole leaf and leaf-scrap.

Leaf-scrap.—Leaf-scrap is leaf tobacco consisting of loose and tangled whole and/or broken leaves.

Leaf tobacco from which stem has been removed:

Stemmed or strips.—Stemmed or strips are leaf tobacco from which stem or mid-rib has been removed.

Strip-scrap.—Strip-scrap is leaf tobacco consisting of loose and tangled portions of stemmed or strips.

Shredded filler.—Shredded filler is leaf tobacco commonly known as such and usually consisting of strip-scrap of two or more types of tobacco.

Cuttings.—Cuttings are portions of cigar-wrapper and/or cigar binder strips.

Clippings.—Clippings are small portions of strips, frequently including small portions of wrapper, binder, and filler strips.

By-products:

Siftings.—Siftings are particles of leaf tobacco salvaged from the residue of tobacco after processing.

Dust.—Dust is the residue of tobacco resulting from processing, after siftings have been salvaged.

Sweating.—Sweating is the handling of leaf tobacco as it passes through one or more fermentations.

Order.—Order is the state of tobacco with respect to its moisture content.

Sweated.—Sweated is the condition of cigar-leaf tobacco which has passed through one or more seasonal fermentations or which has reached a corresponding degree of fermentation.

Fermenting.—See Sweating.

Conditioning.—Conditioning is the preparing of cigar-leaf tobacco for storage.

Unsweated.—Unsweated is the condition of unfermented cigar-leaf tobacco.

Cigars—Stogies—Cheroots.—Cigars, stogies, and cheroots are rolls of tobacco wrapped with tobacco.

Small cigars.—Small cigars are cigars weighing not more than three (3) pounds per thousand (1,000).

Scrap chewing and/or smoking tobacco.—Scrap chewing and/or smoking tobacco is tobacco prepared for chewing or smoking purposes from scraps, cuttings, or clippings resulting from the manufacture of cigars, or from tobacco leaves primarily of the types classified in classes 4, 5, 6, and 8 in the United States Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, cut or broken into small pieces but not shredded or granulated, to which flavoring or sweetening may or may not have been added.

Farm sales weight.—The farm sales weight of leaf tobacco is the weight of leaf tobacco in its unstemmed form and in the order it is usually delivered by the grower.

IV. Conversion Factors.

(9) A. I do hereby establish the following conversion factors for articles processed from cigar-leaf tobacco, 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 cigar-leaf tobacco with respect to a pound of the following articles processed wholly, partly, or in chief value from cigar-leaf tobacco:

	Per cent.
Cigars, stogies, cheroots, small cigars	167
Siftings and/or dust	0

In the computation of the weight of cigars, stogies, cheroots, or small cigars for the purposes of the application of the above table of conversion factors, in order to compute the tax adjustment on floor stocks, 1,000 cigars, stogies, or cheroots shall be deemed to weigh seventeen and one-half (17½) pounds, if the taxpayer so elects, and 1,000 small cigars shall be deemed to weigh two and seventy-five hundredths (2.75) pounds, if the taxpayer so elects.

I do hereby establish (as of February 1, 1935) the following conversion factor for scrap chewing and/or smoking tobacco processed wholly, partly, or in chief value, from cigar-leaf tobacco, to determine the amount of tax imposed or refunds to be made with respect thereto:

Article.	Unit.	Conversion factor.
Scrap chewing and/or smoking tobacco.	Pound	110 per cent of the per pound processing tax on cigar-leaf tobacco used in the manufacture of scrap chewing and/or smoking tobacco.

B. I do hereby establish the following conversion factors for articles processed from Burley, flue-cured, fire-cured and/or dark air-cured tobacco to determine the amount of tax imposed or refunds to be made with respect thereto, except taxes and refunds on floor stocks:

Article.	Unit.	Conversion factor.
Cigarettes	1,000	183 per cent of the per pound processing tax on flue-cured tobacco, plus 122 per cent of the per pound processing tax on Burley tobacco, plus 8 per cent of the per pound processing tax on Maryland tobacco.
Smoking tobacco: (1) Granulated smoking tobacco.	Pound	88 per cent of the per pound processing tax on flue-cured tobacco, plus 29 per cent of the per pound processing tax on Burley tobacco.
(2) Smoking tobacco other than granulated.	Pound	59 per cent of the per pound processing tax on Burley tobacco, plus 7 per cent of the per pound processing tax on dark air-cured tobacco, plus 6 per cent of the per pound processing tax on flue-cured tobacco, plus 1 per cent of the per pound processing tax on fire-cured tobacco.
Chewing tobacco: (1) Plug chewing tobacco.	Pound	45 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco, plus 33 per cent of the per pound processing tax on flue-cured tobacco used in the manufacture of chewing tobacco, plus 21 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco.
(2) Twist chewing tobacco.	Pound	70 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco, plus 61 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco, plus 5 per cent of the per pound processing tax on fire-cured tobacco used in the manufacture of chewing tobacco.

Article.	Unit.	Conversion factor.
Chewing tobacco—Con.		
(3) Other chewing tobacco.	Pound---	50 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco, plus 23 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco, plus 10 per cent of the per pound processing tax on fire-cured tobacco used in the manufacture of chewing tobacco.
Snuff	Pound---	102 per cent of the per pound processing tax on fire-cured tobacco, plus 5 per cent of the per pound processing tax on dark air-cured tobacco, plus 1 per cent of the per pound processing tax on Burley tobacco.
Siftings and dust	Pound---	0

In the event that any taxpayer, the Commissioner of Internal Revenue, or any person entitled to a refund establishes that any article processed wholly or partly from Maryland, Burley, flue-cured, fire-cured, and/or dark air-cured tobacco (in case of chewing tobacco, see following paragraph) on which a tax is imposed (other than a tax on floor stocks) or which may be the subject of a claim for refund (other than a refund on floor stocks), which is included in the above list is processed wholly or partly from a kind or kinds of tobacco other than those listed above for such article, or contains more or less of the kinds of tobacco so listed than represented by the listed conversion factors, the conversion factor shall be:

(*a*) 144 per cent of the per pound processing tax on Maryland tobacco for each pound of Maryland tobacco said article is established to contain, plus

(*b*) 155 per cent of the per pound processing tax applicable to the Burley tobacco used in the manufacture of said product for each pound of Burley tobacco said article is established to contain, plus

(*c*) 145 per cent of the per pound processing tax applicable to the flue-cured tobacco used in the manufacture of the said product for each pound of flue-cured tobacco said article is established to contain, plus

(*d*) 143 per cent of the per pound processing tax on fire-cured tobacco for each pound of fire-cured tobacco said article is established to contain, plus

(*e*) 156 per cent of the per pound processing tax on dark air-cured tobacco for each pound of dark air-cured tobacco said article is established to contain.

In the event that any taxpayer, the Commissioner of Internal Revenue, or any person entitled to a refund establishes that any chewing tobacco processed wholly or partly from Maryland, Burley, flue-cured, fire-cured, and/or dark air-cured tobacco on which a tax is imposed (other than a tax on floor stocks), or which may be the subject of a claim for refund (other than a refund on floor stocks), which is included in the preceding list is processed wholly or partly from a kind or kinds of tobacco other than those listed herein for such chewing tobacco, or contains more or less of the kinds of tobacco so listed than represented by the listed conversion factors, the conversion factor shall be:

(*a*) 144 per cent of the per pound processing tax on Maryland tobacco for each pound of Maryland tobacco said chewing tobacco is established to contain, plus

(*b*) 155 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco for each pound of Burley tobacco said chewing tobacco is established to contain, plus

(*c*) 145 per cent of the per pound processing tax on flue-cured tobacco used in the manufacture of chewing tobacco for each pound of flue-cured tobacco said chewing tobacco is established to contain, plus

(*d*) 143 per cent of the per pound processing tax on fire-cured tobacco used in the manufacture of chewing tobacco for each pound of fire-cured tobacco said chewing tobacco is established to contain, plus

(*e*) 156 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco for each pound of dark air-cured tobacco said chewing tobacco is established to contain.

C. I do hereby establish the following conversion factors for articles processed from Burley, flue-cured, fire-cured and/or dark air-cured tobacco to determine the amount of tax imposed on floor stocks or refunds to be made with respect to floor stocks:

Article.	Unit.	Conversion factor.
Cigarettes	1, 000	183 per cent of the per pound processing tax on flue-cured tobacco.
Smoking tobacco:		
(1) Granulated smoking tobacco.	Pound	88 per cent of the per pound processing tax on flue-cured tobacco.
(2) Smoking tobacco other than granulated.	Pound	59 per cent of the per pound processing tax on Burley tobacco.
Chewing tobacco:		
(1) Plug chewing tobacco.	Pound	45 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco.
(2) Twist chewing tobacco.	Pound	70 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco.
(3) Other chewing tobacco.	Pound	50 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco.
Snuff	Pound	102 per cent of the per pound processing tax on fire-cured tobacco.
Siftings and dust	Pound	0.

In the event that any taxpayer, the Commissioner of Internal Revenue, or any person entitled to a refund establishes that any article processed wholly or in chief value from Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco (in case of chewing tobacco, see following paragraph) on which a tax on floor stocks is imposed or which may be the subject of a claim for refund on floor stocks, which is included in the above list is processed wholly or in chief value from a kind of tobacco other than that listed above for such article, or contains more or less of the kind of tobacco so listed than represented by the listed conversion factor, the conversion factor for such article shall be:

(*a*) If processed wholly or in chief value from Maryland tobacco, 144 per cent of the per pound processing tax on Maryland tobacco for each pound of Maryland tobacco said article is established to contain.

(*b*) If processed wholly or in chief value from Burley tobacco, 155 per cent of the per pound processing tax applicable to the Burley tobacco used in the manufacture of said product for each pound of Burley tobacco said article is established to contain.

(*c*) If processed wholly or in chief value from flue-cured tobacco, 145 per cent of the per pound processing tax applicable to the flue-cured tobacco used in the manufacture of the said product for each pound of flue-cured tobacco which said article is established to contain.

(*d*) If processed wholly or in chief value from fire-cured tobacco, 143 per cent of the per pound processing tax on fire-cured tobacco, for each pound of fire-cured tobacco which said article is established to contain.

(*e*) If processed wholly or in chief value from dark air-cured tobacco, 156 per cent of the per pound processing tax on dark air-cured tobacco, for each pound of dark air-cured tobacco which said article is established to contain.

In the event that any taxpayer, the Commissioner of Internal Revenue, or any person entitled to a refund establishes that any chewing tobacco processed wholly or in chief value from Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco, on which a tax on floor stocks is imposed or which may be the subject of a claim for refund on floor stocks, which is included in the preceding list is processed wholly or in chief value from a kind of tobacco other than that listed herein for such chewing tobacco, or contains more or less of the kind of tobacco so listed than represented by the listed conversion factor, the conversion factor for such article shall be:

(*a*) If processed wholly or in chief value from Maryland tobacco, 144 per cent of the per pound processing tax on Maryland tobacco for each pound of Maryland tobacco said chewing tobacco is established to contain.

(*b*) If processed wholly or in chief value from Burley tobacco, 155 per cent of the per pound processing tax on Burley tobacco used in the manufacture of chewing tobacco for each pound of Burley tobacco said chewing tobacco is established to contain.

(*c*) If processed wholly or in chief value from flue-cured tobacco, 145 per cent of the per pound processing tax on flue-cured tobacco used in the manufacture of chewing tobacco for each pound of flue-cured tobacco said chewing tobacco is established to contain.

(*d*) If processed wholly or in chief value from fire-cured tobacco, 143 per cent of the per pound processing tax on fire-cured tobacco used in the manufacture of chewing tobacco for each pound of fire-cured tobacco said chewing tobacco is established to contain.

(*e*) If processed wholly or in chief value from dark air-cured tobacco, 156 per cent of the per pound processing tax on dark air-cured tobacco used in the manufacture of chewing tobacco for each pound of dark air-cured tobacco said chewing tobacco is established to contain.

The provisions of these regulations shall take effect as of February 1, 1935.

PAR. H. 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. I. 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. J. 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*) A processing tax on the first domestic processing of cigar-leaf tobacco, Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco became effective at the earliest moment of October 1, 1933. When the processing tax became effective, a compensating tax also became effective with respect to all articles processed or manufactured wholly or in chief value from any type or kind of tobacco named above, and imported on or after October 1, 1933. A compensating tax became effective with respect to all articles processed or manufactured wholly or *partly* from any of the above types or kinds of tobacco, and imported after 11.23 a. m., eastern standard time, May 9, 1934.

The respective rates of processing tax are given in article 2 of these regulations. The respective rates of compensating tax, tax on floor stocks, or of refund, are given in article 4 of these regulations.

(*b*) By virtue of the proclamations 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, September, 1934, edition, relating to exportation, which are general regulations under the Agricultural Adjustment Act, became applicable to the types and kinds of tobacco referred to in such proclamations. These

regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83, September, 1934, edition.

(*c*) The "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83, September, 1934, edition, is:

(1) October 1, 1933, with respect to the above market classifications of tobacco, and articles or products processed or manufactured wholly or in chief value therefrom;

(2) August 1, 1934, with respect to the reduction in the rate of tax on the processing of flue-cured tobacco used in the manufacture of plug chewing tobacco or twist tobacco;

(3) October 1, 1934, with respect to the increase in the rate of tax on the processing of Burley tobacco and the reduction in the rate of tax on the processing of Maryland tobacco;

(4) February 1, 1935, with respect to the reduction in the rate of tax on the processing of cigar-leaf tobacco in the manufacture of scrap chewing or smoking tobacco, the revision of the measure of tax applicable to the processing of cigar-leaf tobacco of the kind classified in United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements, No. 118, as fire-cured tobacco used in the manufacture of cigars, and the reduction in the rate of tax on the processing of Burley, flue-cured, fire-cured, and dark air-cured tobacco in the manufacture of chewing tobacco.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph G, above, are hereby made a part of these regulations.

ART. 2. *Processing taxes.*—(*a*) Regulations 81 should be consulted for detailed regulations with respect to processing tax. The form prescribed for return of the tax on the processing of cigar-leaf tobacco is P. T. Form 6A, revised February, 1935. The form prescribed for return of tax on the processing of Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco, is P. T. Form 6B, revised February, 1935. The amount of tax shown on each such return must be paid at the time the return is filed, or if the time of payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

(*b*) The respective rates of tax on the processing of cigar-leaf tobacco, Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco are as follows:

Market classification of tobacco.	Effective date.	Rates of tax per pound.		
		Unsweated, farm sales weight.	Applicable to—	
			Stem not removed.	Stem removed.
Cigar-leaf of any kind except that classified in United States Department of Agriculture, B. A. E., Service and Regulatory Announcements, No. 118, as fire-cured tobacco, used in the manufacture of cigars or small cigars	Oct. 1, 1933	$0.03	*Sweated.* $0.0375	*Sweated.* $0.05
Cigar-leaf of the kind classified in United States Department of Agriculture, B. A. E., Service and Regulatory Announcements, No. 118, as fire-cured tobacco, used in the manufacture of cigars or small cigars	Feb. 1, 1935	.03	.0325	.043
Cigar-leaf of any kind used in the manufacture of scrap chewing or smoking tobacco	Feb. 1, 1935	.02	.025	.033

Market classification of tobacco.	Effective date.	Rates of tax per pound.		
		Unsweated, farm sales weight.	Applicable to—	
			Stem not removed.	Stem removed.
			In processing order.	
Maryland	Oct. 1, 1934	$0.00	$0.00	$0.00
Burley:				
Used in manufacture of—				
Chewing tobacco	Feb. 1, 1935	.025	.029	.039
Other articles [1]	Oct. 1, 1934	.061	.07	.095
Flue-cured:				
Used in manufacture of—				
Chewing tobacco	Feb. 1, 1935	.02	.023	.029
Other articles [1]	Oct. 1, 1933	.042	.047	.061
Fire-cured:				
Used in manufacture of—				
Chewing tobacco	Feb. 1, 1935	.02	.022	.029
Other articles [1]	Oct. 1, 1933	.029	.032	.041
Dark air-cured:				
Used in manufacture of—				
Chewing tobacco	Feb. 1, 1935	.02	.023	.031
Other articles [1]	Oct. 1, 1933	.033	.038	.051

[1] Except cigars and scrap chewing or smoking tobacco.

(*c*) *Scrap chewing or smoking tobacco.*—With respect to all cigar-leaf tobacco in process on February 1, 1935, and manufactured into scrap chewing or smoking tobacco, the first domestic processing of which was not completed prior to that date, and on which processing tax attached at the rate in effect prior to that date, the processor will be entitled to credit or refund of the difference between the rate in effect prior to, and the rate effective February 1, 1935. The rate of credit or refund is 1 cent per pound, unsweated farm sales weight, or with respect to such tobacco, sweated, 1.25 cents per pound if stem has not been removed, or 1.7 cents per pound if stem has been removed. Claim for such credit should be executed on P. T. Form 28 and attached to the monthly return upon which such credit is claimed. Claim for refund of such tax should be made on P. T. Form 24, which shall affirmatively state that the claim is not for the refund of taxes illegally or erroneously collected, but is for the refund of taxes with respect to tobacco in process on February 1, 1935.

(*d*) *Chewing tobacco.*—With respect to all flue-cured, fire-cured, and dark air-cured tobacco in process on February 1, 1935, and manufactured into chewing tobacco, the first domestic processing of which was not completed prior to that date, and on which processing tax attached at the rate in effect prior to that date, the processor will be entitled to credit or refund of the difference between the rate in effect prior to, and the rate effective February 1, 1935. The rates of credit or refund with respect to each pound of such tobacco are:[1]

Market classification of tobacco.	Farm sales weight.	In processing order.	
		Stem not removed.	Stem removed.
Flue-cured:			
Used in manufacture of—			
Plug chewing or twist	$0.013	$0.014	$0.019
Other chewing	.022	.024	.032
Fire-cured	.009	.01	.012
Dark air-cured	.013	.015	.02

[1] Since the rate of tax in effect immediately preceding February 1, 1935, with respect to the processing of Burley into chewing tobacco, was neither equal to nor less than the rate in effect with respect thereto prior to June 26, 1934, no refund or credit will be allowed with respect to Burley tobacco in process of manufacture into chewing tobacco on February 1, 1935, or with respect to any chewing tobacco manufactured wholly or in chief value from Burley and held on February 1, 1935. (See proviso section 16(C)1 of the Act, paragraph F.)

Claim for such credit should be executed on P. T. Form 28 and attached to the monthly return on which such credit is claimed. Claim for refund of such tax should be made on P. T. Form 24 which shall affirmatively state that the claim is not for the refund of taxes illegally or erroneously collected, but is for the refund of taxes with respect to tobacco in process on February 1, 1935.

(*e*) Each processor of the market classifications of tobacco covered by these regulations shall keep, for each calendar month, a record as respects each market classification of tobacco, 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 as waste 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.

(*f*) The processing of tobacco used in the production of insecticides or fertilizers is exempt from the tax.

ART. 3. *Compensating tax on imported articles.*—A compensating tax became effective with respect to articles processed wholly or in chief value from any market classification of tobacco, and imported on or after October 1, 1933, into the United States or any possession to which the Act applies, from any foreign country or any possession of the United States to which the Act does not apply. A compensating tax became effective with respect to articles processed wholly *or partly* from any of the market classifications of tobacco, and imported after 11.23 a. m., eastern standard time, May 9, 1934. The respective rates of tax applicable to such articles, effective February 1, 1935, are given in article 4 of these regulations. For detailed regulations as to this tax consult Chapter IV of Regulations 81, as amended by Treasury Decision 4501, approved December 4, 1934 [C. B. XIII–2, 524].

ART. 4. *Rates of tax or of refund with respect to articles processed from tobacco.*—(*a*) Effective February 1, 1935, the rates of compensating tax, or of refund or credit, with respect to articles processed from any market classification of tobacco, designated as a commodity, exported or delivered for charitable distribution or use, are as follows:

Articles.	Rate of tax or of refund.
Cigars, stogies, cheroots—per pound	$0. 0501
Small cigars—do	. 0501
Scrap chewing or smoking tobacco—do	. 022
Cigarettes—per 1,000	. 15128
Smoking tobacco:	
Granulated—per pound	. 05465
Other than granulated or scrap—do	. 04111
Chewing tobacco:	
Plug—do	. 02205
Twist—do	. 03025
Other than plug, twist, or scrap—do	. 0191
Snuff—do	. 03184
Siftings and dust—do	. 0

If the taxpayer or person entitled to refund can establish that any article included in the above list, on which a tax is imposed, or which may be the subject of a claim for refund (other than a refund with respect to floor stocks), is processed from a kind or kinds of tobacco other than those listed with respect to the article in paragraph G, above, or contains more or less of the kind of tobacco than represented by the conversion factor prescribed therefor, the respective rate of tax given below shall be used with respect to the quantity of each kind of tobacco content. The election must be made

at the time when the customs entry or claim is filed, in which case the customs entry and invoice or claim must show: (1) the kind or kinds of tobacco from which the article has been processed, and (2) the actual quantity of each kind of tobacco contained in the article. The applicable rates of tax or of refund are:

Kind of tobacco contained in the article.	Rate per pound of content of such tobacco.
Maryland	$0.00
Bur'ey:	
(1) Used in the manufacture of chewing tobacco	.03875
(2) Used in the manufacture of other articles	.09455
Flue-cured:	
(1) Used in the manufacture of chewing tobacco	.029
(2) Used in the manufacture of other articles	.0609
Fire-cured:	
(1) Used in the manufacture of chewing tobacco	.0286
(2) Used in the manufacture of other articles	.04147
Dark air-cured:	
(1) Used in the manufacture of chewing tobacco	.0312
(2) Used in the manufacture of other articles	.05148

ART. 5. *Refund or credit on floor stocks of chewing tobacco.*—(*a*) Any person who, at the earliest moment of February 1, 1935, held for sale or other disposition any chewing tobacco, or scrap chewing or smoking tobacco, with respect to which a tax had been paid or is payable under the provisions of the Agricultural Adjustment Act, is (except in the case of articles processed wholly or in chief value from Burley tobacco)[2] entitled to refund (or credit against any tax due under the Act) of the difference between the amount of tax paid with respect to the article and the amount of tax that would have been payable with respect thereto if the processing of the commodity had occurred on February 1, 1935. Rates of such refund or credit are as follows:

Article.	Tobacco component of chief value.	Rate per pound of the article.
Scrap chewing or smoking tobacco	Cigar-leaf	$0.011
Twist chewing tobacco	Dark air-cured	.0091

Except with respect to scrap chewing or smoking tobacco and twist chewing tobacco, the amount of credit or refund which may be allowed, with respect to chewing tobacco, is based on the rate of tax applicable to that kind of tobacco (other than Burley)[2] from which such chewing tobacco is processed wholly or in chief value. The claimant is required to show on his claim for credit or refund: (1) the brand name of such chewing tobacco, (2) the factory number and district where manufactured, (3) the net weight of the article, (4) the kind of tobacco from which the article was processed wholly or in chief value, and (5) the weight of that kind of tobacco contained in the article. In the case of twist chewing tobacco, which is processed wholly or in chief value from flue-cured or fire-cured tobacco, the rate of credit or refund allowable is based on the quantity

[2] For exception as to Burley tobacco, see footnote to article 2(*d*).

of that kind of tobacco from which the article is processed wholly or in chief value. The applicable rates of credit or refund are:

Kind of tobacco from which chewing tobacco was processed wholly or in chief value.	Rate per pound of content of such tobacco.
Flue-cured	$0. 01885
Fire-cured	. 01287
Dark air-cured	. 02028

The term "person" and the term "sale or other disposition" shall have the same meanings in these regulations as given respectively in article 1(*c*) and 1(*i*) of Regulations 82.

(*b*) The claim for credit or refund referred to in (*a*) above shall be made on P. T. Form 24D, revised January, 1935. The form shall be fully and accurately filled out in accordance with the instructions printed thereon, and in accordance with these regulations.

(1) The claim shall show with respect to each class of products inventoried thereon (*a*) the amount of tax paid or payable with respect to the products listed in the inventory, credit or refund of which tax is claimed, (*b*) the kind of tax paid or payable, that is, processing tax, tax on floor stocks, or compensating tax, (*c*) to which collector the tax was paid, and (*d*) if credit or refund of processing tax is claimed, the month and year in which the processing of the commodity occurred which resulted in the product listed in the inventory.

(2) The claimant shall, as of the beginning of business on February 1, 1935, make or cause to be made an inventory of such of the articles enumerated in (*a*) above, as were held by him, at that time, for sale or other disposition. The same rules as to ownership or title and as to the inventory as are contained in articles 5 and 11, respectively, of Regulations 82 shall be applicable with respect to claims filed hereunder, including claims with respect to retail stocks. This inventory shall be set forth on the form mentioned above in paragraph (*b*) of this article.

(3) Each claim shall be supported by evidence satisfactory to the Commissioner that the tax, for credit or refund of which the claim is made, was actually paid to a collector of internal revenue.

(4) The claim shall be signed by the claimant, and shall be sworn to by him if an individual, or, if a corporation or firm, by a duly authorized officer or member thereof.

(5) The claim, if it is for refund, should be filed promptly with the collector of internal revenue of the district in which the claimant has his principal place of business (or, if he has no principal place of business in the United States, with the collector at Baltimore, Md.). A claim for credit on this form must be attached to the return on which such credit is claimed, when such return is filed with the collector.

(*c*) Any person who files a claim for credit or refund, as provided in (*a*) above, shall preserve for four years thereafter, a complete and detailed record of the facts upon which the claim, including the inventory, was based. Such person shall also retain a true copy of the inventory on the premises where the articles were held on the effective date. The books, records, papers, documents, etc., upon which such claim was based shall be open for inspection by any internal revenue officer. The records shall be kept in such manner, and shall contain such information, as will enable the Commissioner to determine the accuracy of the inventory and the validity of the claim.

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 tobacco are hereby prescribed:

Form No	Designation.	Required by—
P. T. Form 6A, revised February, 1935.	Return of processor of cigar-leaf tobacco.	Regulations 81, article 11, and article 2(*a*), above.
P. T. Form 6B, revised February, 1935.	Return of processor of tobacco, other than cigar-leaf.	Regulations 81, article 11, and article 2(*a*), above.
P. T. Form 24	Claim for refund of taxes illegally collected.	Regulations 81, article 31(*a*).
P. T. Form 24C	Claim for refund of, or credit for, tax paid with respect to articles delivered for charitable distribution or use.	Regulations 81, article 32, as amended (T. D. 4454 [C. B. XIII-2, 479]).
P. T. Form 24D, revised January, 1935.	Claim for refund of, or credit for, tax paid with respect to chewing tobacco, and scrap chewing or smoking tobacco.	Article 5, these regulations.
P. T. Form 27	Claim for refund of tax paid with respect to articles exported.	Regulations 83 (September, 1934, edition).
P. T. Form 28	Claim for credit on return, of overpayment.	Regulations 81, article 31(*b*).

ART. 7. Treasury Decision 4395, approved September 30, 1933 (C. B. XII-2, 466), shall remain in force and effect only in so far as it relates to liability for tax incurred and to refund (except tax incurred or refund accrued during the period beginning August 1, 1934, and ending September 30, 1934, with respect to plug chewing tobacco and twist tobacco made from flue-cured tobacco) accrued prior to October 1, 1934.

Treasury Decision 4494, approved November 8, 1934 [C. B. XIII-2, 500], shall remain in force and effect only in so far as it relates to liability for tax incurred, and right to refund accrued during the period October 1, 1934, to January 31, 1935; and to tax incurred or refund accrued beginning August 1, 1934, and ending September 30, 1934, with respect to plug chewing tobacco and twist tobacco made from flue-cured tobacco. These regulations shall be in force and effect as of the earliest moment of February 1, 1935, in so far as they relate to liability for tax incurred or refund accrued, on and after that date.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 8, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

COTTON CONTROL ACT (APPROVED APRIL 21, 1934, PUBLIC, NO. 169, SEVENTY-THIRD CONGRESS).

SECTION 14.—GENERAL AND PENAL PROVISIONS.

REGULATIONS 84, ARTICLE 16: Transportation, purchase, or sale of lint cotton. XIV-7-7319 P. T. 23

Bale tags must be attached to bales of lint cotton delivered by a standing-rent tenant to his landlord in payment of rent.

Advice is requested whether bale tags must be attached to bales of lint cotton delivered by a standing-rent tenant to his landlord in payment of rent.

The tax imposed by the Cotton Control Act, approved April 21, 1934 (Public, No. 169, Seventy-third Congress), attaches upon the ginning of the cotton and must be paid by the ginner, except where payment is postponed as provided in section 4(f) of the Act.

Section 14(b) of the Cotton Control Act reads in part 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: * * * (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

Article 16 of Regulations 84, as amended by Treasury Decision 4468 (C. B. XIII–2, 535), reads in part as follows:

No person shall purchase or sell a bale of lint cotton unless there is attached thereto a bale tag issued under the Act, and unless the seller of the cotton delivers to the purchaser at the time of the sale a certificate of tagging: * * *.

The term "standing-rent tenant" applies to any person who rents land as a tenant and pays as rent a fixed quantity of cotton, irrespective of the quantity produced. The term "share tenant" applies to any person engaged in the production of cotton who pays rent for the land he farms by delivering to his landlord (1) a share of the crop produced on such land or (2) a share of the proceeds of the crop so produced. Under these circumstances both the landlord and the tenant are producers.

A delivery of bales of lint cotton by a standing-rent tenant to his landlord in payment of rent constitutes a transfer of property for a consideration and is a sale of the cotton within the meaning of section 14(b) of the Act and article 16 of Regulations 84.

In view of the foregoing, it is held that a bale tag must be attached to each bale of lint cotton delivered by a standing-rent tenant to his landlord in payment of rent. Where a lien card is attached to a bale of lint cotton, the standing-rent tenant may not deliver such cotton to his landlord in payment of rent until such tenant obtains and attaches a bale tag thereto, as required by article 21 of Regulations 84. In such cases, bale tags can not be issued until the tenant surrenders tax-exemption certificates or pays the tax to the collector of internal revenue based upon the net weight of lint cotton in each bale.

SECTION 20.—REFUNDS.

REGULATIONS 84, ARTICLE 36: Credit and refund. XIV–18–7472
P. T. 24

Refunds of tax paid under the Cotton Act approved April 21, 1934, where the producer was not in possession of tax-exemption certificates when the cotton was ginned.

Inquiry is made whether a refund of the tax paid under the Cotton Act, approved April 21, 1934 (Public, No. 169, Seventy-third Congress), is allowable in the following cases:

(1) Where a producer found it necessary to have his cotton ginned before he could obtain the tax-exemption certificates to which he

was entitled under the Cotton Act, paid the equivalent of the tax to the ginner, and later obtained such certificates and delivered them to the ginner.

(2) Where a producer paid the equivalent of the tax to the ginner at the time cotton produced by him in excess of his allotment was ginned, and subsequently delivered to the ginner surplus tax-exemption certificates which he had purchased.

The Cotton Act (approved April 21, 1934) imposes a tax on the ginning of cotton harvested during the crop year with respect to which the Act is in effect. The tax is payable by the ginner, except where the payment of the tax is postponed as provided in section 4(f) of the Act and article 13 of Regulations 84. Section 4(c)2 provides that no tax shall be imposed with respect to an amount of cotton harvested in any crop year from each farm equal to its allotment. Section 9(a) provides for the issuance of tax-exemption certificates by the Secretary of Agriculture to producers under certain conditions. Section 9(d) provides that any and all certificates of exemption may be transferred or assigned in whole or in part in such manner as the Secretary of Agriculture may prescribe. The Secretary of Agriculture, through the Agricultural Adjustment Administration, has set up a national pool for the sale of tax-exemption certificates turned into the pool by producers who produced less than their allotted amounts of cotton. Producers who produced cotton in excess of their allotments can purchase these surplus tax-exemption certificates and use them in securing exemption from tax with respect to the ginning of surplus cotton produced by them, provided the certificates are in their possession when the cotton is ginned.

In cases coming within (1) above, it is held that the ginner, upon compliance with the provisions of section 20 of the Act and article 36 of Regulations 84, is entitled to a refund of the tax paid on the ginning of the cotton in question where it is conclusively shown that the cotton ginned was harvested during a crop year with respect to which the Act was in effect and was within the allotment of the farm. The ginner should submit with his claim the proper tax-exemption certificates.

In cases coming within (2) above, it is held that the tax was not erroneously or illegally assessed or collected within the meaning of section 3220 of the Revised Statutes, as amended, and that delivery of tax-exemption certificates in such cases after the cotton is ginned does not warrant refund of the taxes paid.

SILVER PURCHASE ACT.

SCHEDULE A–10 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS ADDED BY SECTION 8 OF THE SILVER PURCHASE ACT OF 1934.—SILVER, AND SO FORTH, SALES AND TRANSFERS.

REGULATIONS 85, ARTICLE 31: Scope. XIV–2–7248
Sil. 4

A transfer of an interest in silver bullion by or to a corporation organized under the China Trade Act (1922) is subject to tax under the Silver Purchase Act of 1934.

The question is presented whether a transfer of an interest in silver bullion by or to a corporation organized under the China Trade Act, 1922 (42 Stat., 849), is subject to the tax imposed by Schedule A–10 of Title VIII of the Revenue Act of 1926, as added by section 8 of the Silver Purchase Act of 1934, where the silver bullion is outside the United States and the transfer thereof is wholly effected outside the United States.

The tax imposed by Schedule A–10 of the Revenue Act of 1926, as added by section 8 of the Silver Purchase Act of 1934, upon the transfer of any interest in silver bullion attaches to all such transfers "outside the United States if either party thereto is a resident of the United States * * *."

Section 2 of the Revenue Act of 1926 provides in part as follows:

(a) When used in this Act—

* * * * * * *

(3) The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States * * *.

The term "resident" includes a domestic corporation. (Article 20(e), Regulations 85.) A corporation organized under the China Trade Act, 1922, is a corporation "created or organized in the United States or under the law of the United States," and is, therefore, a domestic corporation within the meaning of section 2(a)3 of the Revenue Act of 1926. Since under article 20(e) of Regulations 85 the term "resident" includes a domestic corporation, it follows that a corporation so organized is a resident of the United States within the meaning of the law and regulations.

In view of the foregoing, it is held that a transfer of an interest in silver bullion under the circumstances stated by or to a corporation organized under the China Trade Act, 1922, is subject to the tax imposed by Schedule A–10 of the Revenue Act of 1926, as added by section 8 of the Silver Purchase Act of 1934.

TOBACCO ACT, APPROVED JUNE 28, 1934 (PUBLIC, NO. 483, SEVENTY-THIRD CONGRESS).

XIV–6–7304
P. T. 21

Liability for the tobacco sale tax where tobacco is destroyed by fire.

The question is presented whether liability for the tobacco sale tax imposed by the Tobacco Act, approved June 28, 1934 (Public, No. 483, Seventy-third Congress), is incurred with respect to tobacco destroyed by fire.

The tax imposed by the Tobacco Act applies to the first *bona fide* sale of certain tobacco harvested subsequent to June 28, 1934, and prior to May 1, 1935, except "Maryland tobacco, Virginia sun-cured tobacco, and cigar leaf tobacco." (T. D. 4452, C. B. XIII–2, 555.) Since the tax is imposed on the first *bona fide* sale of the tobacco, no liability for the tax is incurred with respect to tobacco destroyed prior to the first *bona fide* sale thereof. The destruction of tobacco subsequent to the first *bona fide* sale does not relieve the seller from liability for the tax.

XIV-6-7305
P. T. 22

Taxability of sale of "leaf scrap" tobacco by a warehouseman.

A ruling is requested whether the sale by an auction warehouseman of "leaf scrap" tobacco which becomes detached from various lots of leaf tobacco while in a warehouse is subject to the tobacco sale tax imposed by the Tobacco Act, approved June 28, 1934 (Public, No. 483, Seventy-third Congress).

The tax imposed by the Tobacco Act applies to the first *bona fide* sale of certain tobacco harvested subsequent to June 28, 1934, and prior to May 1, 1935, except "Maryland tobacco, Virginia sun-cured tobacco, and cigar leaf tobacco." (T. D. 4452, C. B. XIII-2, 555.) The sale of "leaf scrap" tobacco by an auction warehouseman is subject to the tax imposed by the Tobacco Act unless such sale is a "resale." If its "resale" character is established by affidavit on T. A. Form 112 showing prior sale and payment of the tax, the "resale" is not subject to the tax.

XIV-10-7360
G. C. M. 14462

Statutory period for filing claims for refund of taxes paid pursuant to the Tobacco Act of June 28, 1934.

An opinion is requested as to the statutory period within which claims must be filed for the refund of taxes paid pursuant to the provisions of the Tobacco Act, approved June 28, 1934 (Public, No. 483, Seventy-third Congress).

Under authority granted in section 3 of that Act, the Secretary of Agriculture, by proclamation dated July 3, 1934, prescribed a tax of 25 per centum of the sale price of certain tobacco harvested subsequent to June 28, 1934, and prior to May 1, 1935, on the first bona fide sale thereof.

A method for collection of the tax is not expressly prescribed by the Act. However, section 6(b) makes applicable to the tax "insofar as * * * not inconsistent with the provisions of this Act," all provisions of law applicable with respect to the taxes imposed by section 600, Title VI, of the Revenue Act of 1926. Among the provisions so made applicable is section 1119 of the Revenue Act of 1926, which provides that any tax imposed by Title VI of that Act may, under regulations, be collected by stamp. Collection by stamp of the tax under the Tobacco Act on tobacco sales made on and after August 1, 1934, is provided by Treasury Decision 4452 (C. B. XIII-2, 555). The Act of May 12, 1900, as amended by section 1013(a) of the Revenue Act of 1924, provides that no claim for the redemption of or allowance for stamps shall be allowed unless presented within four years after the purchase of the stamps from the Government. Section 11(a) of the Tobacco Act provides:

> No refund of any tax, penalty, or interest paid under this Act shall be allowed unless claim therefor is presented within six months after the date of payment of such tax, penalty, or interest.

The question is presented whether claims for the recovery of taxes paid under the Tobacco Act by the use of tobacco sale tax stamps are

to be considered as claims for refund subject to the 6-month period of limitation provided in that Act, or as claims for redemption of stamps subject to the 4-year period of limitation provided in the Act of May 12, 1900, as amended.

Since section 1119 of the Revenue Act of 1926 authorizes collection of the tax imposed by section 600 of that Act by stamps, and since the Act of May 12, 1900, as amended, applies to taxes paid by stamps, the latter Act may be regarded as applicable with respect to the taxes imposed by section 600 and, therefore, likewise applicable ("insofar as * * * not inconsistent") with respect to the taxes imposed by the Tobacco Act.

The Act of May 12, 1900, as amended, appears inconsistent with section 11(a) of the Tobacco Act, unless the latter contemplates the distinction, elsewhere recognized in the internal revenue laws, between claims covering taxes paid in cash and those covering taxes paid by stamps, the latter being characterized as claims for redemption of stamps. There appears to be no reason for allowing persons paying taxes in cash only six months within which to file claims, and allowing a 4-year period to those making payment by stamps. Presumably, Congress did not so intend. The language of section 11(a) is broad enough to cover taxes paid by stamps as well as taxes paid in cash, and it should be applied to both. Accordingly, claims for the redemption of stamps which have been used for the payment of the taxes imposed by the Tobacco Act are claims for refund within the intent of section 11(a) of the Act and, therefore, are subject to the 6-month period of limitation therein prescribed.

The foregoing reasoning does not apply to claims covering unused stamps. Such claims are not for the refund of taxes actually paid and, therefore, are not within the scope of section 11(a). They are claims for redemption of unused stamps and are governed by the Act of May 12, 1900, as amended.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

XIV–18–7473
P. T. 25

Taxability of sales of "leaf scrap" tobacco by a warehouseman.
(Tobacco Act, approved June 28, 1934.)

A ruling is requested whether the sale by a warehouseman of "leaf scrap" tobacco collected from the driveways and unloading platforms prior to any sale thereof is subject to the tobacco sale tax imposed by the Tobacco Act, approved June 28, 1934 (Public, No. 483, Seventy-third Congress).

The tax imposed by the Tobacco Act applies to the first *bona fide* sale of certain tobacco harvested subsequent to June 28, 1934, and prior to May 1, 1935, except "Maryland tobacco, Virginia sun-cured tobacco, and cigar leaf tobacco." (T. D. 4452, C. B. XIII–2, 555.) The sale of the "leaf scrap" tobacco in question by the warehouseman constitutes the first *bona fide* sale thereof. The warehouseman must collect and weigh such "leaf scrap" tobacco each day and he must either keep a record of the weight of such tobacco collected or

store and sell the same separately from any accumulation of "leaf scrap" tobacco collected from the warehouse floor. (For taxability of "leaf scrap" tobacco collected from the warehouse floor, see P. T. 22, page 497, this Bulletin.) The warehouseman is required to execute a memorandum of sale on T. A. Form 112, covering all sales of such "leaf scrap" tobacco on any one day and pay the tax due thereon. T. A. Form 112 must be attached to the monthly information return on T. A. Form 111 to be filed with the collector of internal revenue as provided in article 5(a) of Treasury Decision 4452, supra.

XIV–23–7539
P. T. 26

Sales of tobacco by the producer who subjects the tobacco to a manufacturing process before sale are subject to the tax imposed by the Tobacco Act, approved June 28, 1934, measured by the price for which the manufactured tobacco is sold.

Inquiry is made relative to the taxability under the Tobacco Act, approved June 28, 1934, of sales of tobacco where the producer subjects the tobacco to a manufacturing process and sells it through the mails in manufactured form.

The Tobacco Act, approved June 28, 1934 (Public, No. 483, Seventy-third Congress), imposes a tax upon the first *bona fide* sale of tobacco harvested subsequent to June 28, 1934, and prior to May 1, 1935, except "Maryland tobacco, Virginia sun-cured tobacco, and cigar leaf tobacco." (T. D. 4452, C. B. XIII–2, 555.)

Where the producer of tobacco, the sale of which is taxable under the Tobacco Act, subjects the tobacco to a manufacturing process before sale and sells it in manufactured form, whether by mail or otherwise, the sale is taxable under the Tobacco Act, approved June 28, 1934, as the first *bona fide* sale, and the tax is measured by the price for which the manufactured tobacco is sold.

TITLE II OF THE LIQUOR TAXING ACT OF 1934.

XIV–4–7280
T. D. 4516

Amending paragraph 7 of Treasury Decision 4418 [C. B. XIII–1, 522], as amended by Treasury Decision 4429 [C. B. XIII–1, 527], relating to 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, District Supervisors, and Others Concerned:

Paragraph 7 of Treasury Decision 4418, approved January 27, 1934, as amended by Treasury Decision 4429, approved April 25, 1934, is further amended so as to read as follows:

PAR. 7. (*a*) Except as provided in paragraph 8, collectors will sell the stamps upon application therefor, only to (1) registered distillers, rectifiers, importers,

and proprietors of industrial alcohol plants, concentration, general and special bonded warehouses and (2) to wholesale dealers engaged in packaging alcohol for industrial use [1] in containers having a capacity in excess of 1 and less than 5 wine gallons. 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, and proprietor of an industrial alcohol plant, concentration, general or special bonded warehouse, and wholesale dealer engaged in packaging alcohol for industrial use, who purchases stamps from the collector of internal revenue, will render a report each month 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 two copies to the district supervisor, on or before the 5th day of the month following the month for which the report is rendered, and the district supervisor shall forward one copy to the Commissioner. One copy must be retained in the files of the person rendering the report.

These regulations shall become effective on April 15, 1935.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 22, 1935.

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

XIV–9–7347
T. D. 4526

Strip stamps to be attached to bottles of imported distilled spirits.

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

Collectors of Internal Revenue, District Supervisors, Collectors of Customs, and Others Concerned:

(1) Strip stamps, required by the Liquor Taxing Act of 1934 to be attached to bottles of distilled spirits, may in accordance with the procedure prescribed herein, be purchased by importers to be affixed to the bottles by the producer or exporter in the foreign country.

(2) The importer, or his duly authorized agent, will make requisition on Internal Revenue Form 428, in duplicate, for strip stamps to be sent to the foreign producer or exporter, and will attach thereto a statement under oath in the following form:

PORT OF _____.

I solemnly swear (or affirm) that the stamps requested on the Form 428 to which this statement is attached, are required, and will be used, for the quantities of the brands and kinds of distilled spirits listed below which will be imported by _____, holder of ABI Permit No. _____
(Name and address of the importer.)
issued by the Federal Alcohol Control Administration, from _____
(Name and address
_____, through the ports of _____
of the foreign producer or exporter.) (Ports at which ware-
_____, to supply existing orders and/or anticipated
house or consumption entries will be filed.)
requirements within 30 days from this date.

[1] See Federal Alcohol Control Administration regulations relating to nonindustrial use of distilled spirits and wine, General Regulations, Series 4.

Number of bottles.	Size of bottles.	Brands.	Kinds.

Subscribed and sworn to before me this_____day of_____, 193__

_____

_____

_____

The Form 428, in duplicate, together with the sworn statement, will be submitted to the collector of customs of the district in which the place of business of the importer, or his duly authorized agent, is located. The collector of customs will approve the Form 428 if he is satisfied that the importer is the holder of an ABI permit issued by the Federal Alcohol Control Administration, and that the stamps are required for distilled spirits to be imported to supply existing orders and/or anticipated requirements within 30 days from the date of the requisition. The importer, or his duly authorized agent, will submit the original of the approved Form 428 to the collector of internal revenue, who will sell him the strip stamps applied for, and the collector of customs will attach the duplicate Form 428 to the sworn statement to be retained in his files.

(3) The importer, or his duly authorized agent, shall have indelibly overprinted in plain and legible letters and figures on each of the strip stamps, at his expense, the name and address of the importer and the brand and kind of distilled spirits contained in the bottles, which shall, for example, be as follows: "John Doe & Co., Baltimore, Md., Gold Medal Irish Whiskey." The importer, or his duly authorized agent, shall submit the strip stamps to the collector of customs, who will verify the overprinting and make an indorsement showing the verification on the sworn statement submitted with Form 428. After verification and indorsement on the sworn statement, the collector of customs will deliver the strip stamps to the importer, or his duly authorized agent, for transmission to the producer or exporter abroad. The collector will transmit a copy of the sworn statement to the collector of customs at each of the ports at which warehouse or consumption entries will be filed.

(4) The foreign producer or exporter will plainly and legibly mark the following legend on each case containing bottles of spirits to which strip stamps are attached:

The stamps required by the United States Liquor Taxing Act of 1934 are affixed to the bottles contained in this case, consisting of_____bottles,
(Number.)

each containing_____.
(Net contents of bottles.)

_____.
(Name of producer or exporter.)

(5) Upon arrival of the distilled spirits in this country, warehouse entries and consumption entries shall have indorsed thereon by the importer, or his duly authorized agent, the following legend:

Strip stamps required by the Liquor Taxing Act of 1934 were affixed abroad. The stamps were purchased by _____ upon a requisition approved by the collector of customs at _____, on _____.
(Name of purchaser.) (Port where Form 428 was approved.) (Date of approval of Form 428.)

(6) The collector of customs of the port at which warehouse or consumption entries are filed shall promptly notify the collector of customs who approved the requisition on Form 428, of the number and denomination of strip stamps shown by the usual customs examination to have been attached to the containers. The collector of customs who approved the requisition will credit such strip stamps against the number purchased under the Form 428 described in the indorsement on the entry referred to in paragraph 5.

(7) In the event of diversion of all or part of the spirits to a port other than that specified in the sworn statement filed with Form 428, the importer shall request the collector of customs who approved the Form 428 to transmit a copy of the statement to the collector of customs at the port to which the spirits are diverted. The collector of customs at the port to which the spirits were diverted shall promptly notify the collector of customs who approved the Form 428 of the number and denomination of strip stamps shown by the usual customs examination to have been attached to the containers.

(8) In case any irregularities or discrepancies are found, the collector of customs at the port of entry shall make demand for redelivery of unexamined packages, and shall not release examination or redelivered packages until satisfactory explanation and/or proper corrections have been made.

(9) Any breach of these regulations, or failure to use the strip stamps within a reasonable time for the purpose for which they were procured, not satisfactorily explained to the collector of customs, will be grounds for denial of approval of further requisitions for purchase of strip stamps for affixing abroad under these regulations.

(10) Collectors of customs will furnish the Bureau of Customs on April 1, July 1, October 1, and January 1 of each year a consolidated report showing the name of the importer, number of stamps, and denomination of stamps purchased on requisitions on Form 428, approved by them, not used within 90 days from the date of approval.

(11) The procedure established herein may be followed, at the option of the importer, in lieu of that prescribed in Treasury Decisions 4464 [C. B. XIII–2, 425], 4473 [C. B. XIII–2, 426], and 4496 [C. B. XIII–2, 423].

GUY T. HELVERING,
Commissioner of Internal Revenue.
FRANK DOW,
Acting Commissioner of Customs.

Approved February 21, 1935.

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

XIV-18-7471
Ct. D. 958

SPECIAL EXCISE TAXES—REVISED STATUTES—LIQUOR TAXING ACT OF 1934—DECISION OF COURT.

1. RETAIL AND WHOLESALE LIQUOR DEALERS—IMMUNITY OF STATE—GOVERNMENTAL FUNCTION—POLICE POWER.

A State which, pursuant to authority granted by its legislature, operates wholesale and retail liquor stores under a State liquor control board is not performing a governmental function nor exercising the police power of the State, and is not exempt from the tax imposed by section 205 of Title 26 of the United States Code (Revised Statutes, section 3244, as amended).

2. LIQUOR FLOOR TAX—CONSTITUTIONALITY.

The floor tax imposed by the Liquor Taxing Act of 1934 is not unconstitutional as a direct tax upon property of the State, but is an excise tax and need not be apportioned.

3. STATE AS A "PERSON."

When a State becomes a dealer in intoxicating liquors it divests itself, so far as its transactions in that private business are concerned, of its sovereign character and falls within the reach of the Federal tax as a "person," within the meaning of section 11 of Title 26 of the United States Code (Revised Statutes, section 3140) and section 241(a) of Title 26 of the United States Code (Liquor Taxing Act of 1934).

DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Commonwealth of Pennsylvania ex rel. William A. Schnader, Attorney General, v. *Alvin F. Fix, David L. Lawrence, and Leo C. Mundy, Collectors of Internal Revenue.*

[December 28, 1934.]

OPINION.

WATSON, J.: This action was brought in the Court of Common Pleas of Dauphin County against Alvin F. Fix, David L. Lawrence, and Leo C. Mundy, collectors of internal revenue, and the case was thereafter removed to this court on petition of the defendants. Subsequently, William J. Kyle, acting collector of internal revenue for the first district of Pennsylvania, and James L. O'Toole, Jr., collector of internal revenue for the twenty-third district of Pennsylvania were substituted as defendants in place of Alvin F. Fix and David L. Lawrence, respectively.

The defendants have moved this court to dismiss the bill of complaint for the reason, among others, that the bill sets forth no facts which, if true, would entitle the complainant to the relief prayed for.

The bill alleges that the defendants are collectors of internal revenue for the first, twelfth, and twenty-third revenue districts, which include the entire area of the Commonwealth of Pennsylvania; that, on November 29, 1933, the State legislature passed an act designated as "Pennsylvania liquor control act"; that, by virtue of the authority of said act, the Commonwealth of Pennsylvania is engaged in the operation of Pennsylvania liquor stores, and, in connection therewith, buys, possesses, and sells alcoholic, spirituous, vinous, and fermented liquors and other alcoholic beverages and combinations of liquors for beverage purposes; that the plaintiff operates 239 retail liquor stores and also 5 warehouses from which sales are made at wholesale; that said Pennsylvania liquor control act is an exercise of the police power of the Commonwealth of Pennsylvania for the protection of the public welfare, health, peace, and morals, and to prohibit the return of the saloon; that it constitutes a complete system for control of the importation, sale, and distribution of alcoholic liquors (except malt liquors) in the Commonwealth; that the operation of said liquor stores and warehouses by the Commonwealth is an integral

part of said system or control; that, for the supervision and management of Pennsylvania liquor stores and warehouses, and generally for the administration of its liquor laws, plaintiff created the Pennsylvania Liquor Control Board by the act of November 29, 1933; that the plaintiff, acting through the Pennsylvania Liquor Control Board, has employed various managers, assistant managers, and other persons to assist in the management and operation of the several Pennsylvania liquor stores and warehouses and of other facilities used in connection therewith; that, on January 12, 1934, the Commonwealth of Pennsylvania held and was the owner, for purposes of sale, of approximately 1,000,000 gallons of wines, spirits, and liquors; that the defendants, purporting to act under the revenue laws of the United States, have demanded that the Commonwealth pay certain liquor license fees on account of each of its stores and warehouses, and also a floor tax on liquors owned and possessed by the Commonwealth on the effective date of the Federal Liquor Taxing Act of 1934; that defendants have demanded that plaintiff register and make returns as retail and wholesale liquor dealers for purposes of special taxes, and have demanded that plaintiff pay all of said special taxes for its liquor stores and warehouses; that defendants have threatened to proceed to enforce against the plaintiff collection of said special taxes, and to invoke against it and its officers, agents, and employees the penalties provided by the law in case plaintiff fails to make payment of the tax; that defendants have likewise notified plaintiff that they consider it liable to pay the floor tax imposed by the Liquor Taxing Act of 1934, and have declared their intention to enforce collection from and penalties against the plaintiff in case plaintiff fails to make payment of the taxes; that the plaintiff is not subject to the designated statutes of the United States and is immune from any tax imposed thereby, and that the Acts of Congress which imposed such taxes do not by their terms include a State, or its officers or employees, and were not intended to do so. The bill prays for an injunction restraining the defendants from taking any steps to collect said taxes. For present purposes, the provisions of the State act set forth in the bill to which I 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. 3140; February 27, 1877, ch. 69, section 1, 19 Stat., 248):

"* * * 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."

U. S. C., Title 26, 254–a (January 11, 1934, ch. 1, Title I, section 10(a), 48 Stat., 315):

"Upon all distilled spirits produced in or imported into the United States upon which the internal-revenue tax imposed by law has been paid, and which, on January 12, 1934, are held by any person and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the amount if any, by which the tax provided for under this title exceeds the tax so paid, not including in the computation of the tax so paid the 30 cent tax imposed by section 254 of this title."

U. S. C., Title 26, section 451–a (January 11, 1934, ch. 1, Title I, section 10(b), 48 Stat., 315):

"Upon all articles specified in section 442 or 450 of this title produced in or imported into the United States upon which the internal-revenue tax imposed by law has been paid, and which, on January 12, 1934, are held by any person and intended for sale or for use in the manufacture or production

of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the amount, if any, by which the tax provided for under such sections of this title exceeds the tax so paid, not including in the computation of the tax so paid the 30 cent tax imposed by section 254 of this title."

U. S. C., Title 26, section 451–b (January 11, 1934, ch. 1, Title I, section 10(c), 48 Stat., 315):

"Upon all wines held by the producer thereof upon January 12, 1934, and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the amount, if any, by which the tax provided for under section 443 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine."

U. S. C., Title 26, section 254–b (January 11, 1934, ch. 1, Title I, section 10(d), 48 Stat., 315):

"The person required by sections 254–a, 451–a, and 451–b of this title to pay any floor tax shall, within 30 days after January 12, 1934, make return under oath in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Payment of the tax shown to be due may be extended to a date not exceeding seven months after January 12, 1934, upon the filing of a bond for payment in such form and amount and with such sureties as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. All provisions of law (including penalties) applicable in respect of internal-revenue taxes on distilled spirits or wines shall, in so far as applicable and not inconsistent with said sections be applicable in respect of the taxes imposed by said sections."

U. S. C., Title 26, section 241–a (January 11, 1934, ch. 1, Title I, section 10(e), 48 Stat., 315):

"As used in sections 254–a, 254–b, 267 to 270, 273, and 451–a of this title, the term 'person' includes an individual, a partnership, an association, and a corporation."

U. S. C., Title 26, section 242–a (January 11, 1934, ch. 1, Title I, section 10(e), 48 Stat., 315):

"As used in sections 254–a, 254–b, and 267 to 273 of this title, the term 'distilled spirits' includes products produced in such manner that the person producing them is a rectifier within the meaning of section 204 of this title."

The preliminary questions raised by the defendants were decided by this court in dismissing plaintiff's petition to remand the case to the Court of Common Pleas of Dauphin County, Pa., where it was held that the cause is within the jurisdiction of this court.

The State challenges the validity of the tax, and that is the fundamental question here involved. The plaintiff seeks to invoke a principle resulting from our dual system of government, which is that "the instrumentalities, means and operations, whereby the States exercise the governmental powers belonging to them are * * * exempt from taxation by the United States." This principle has frequently been announced by the Supreme Court of the United States and is firmly established. (*Collector* v. *Day*, 11 Wall., 113; *McCulloch* v. *Maryland*, 4 Wheat., 316; *Indian Motocycle Co.* v. *United States*, 283 U. S., 570, 575 [Ct. D. 354, C. B. X–1, 439].) But this rule, by its terms, indicates that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business. In *South Carolina* v. *United States* (199 U. S., 437), it was held that "It is reasonable to hold that while the National Government may do nothing by taxation in any form to prevent the full discharge by the State of its governmental functions, yet 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.

"It is contended that the buying and selling of liquor by the State is a proper exercise of the police power of the State and is the performance of a governmental function. It is argued that the police power may be developed and changed to meet changing conditions. While this is true, 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."

(*South Carolina* v. *United States*, supra; *Rippe* v. *Becker*, 36 Minn., 100, 111–112, 57 N. W., 331.)

In the case of *Ohio* v. *Helvering* (292 U. S., 360), it was held that: "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, 323; *Briscoe* v. *Bank of Kentucky*, 11 Pet., 257, 323–326; *Curren* v. *Arkansas*, 15 How., 304, 309.)"

The decisions in the South Carolina case and in the Ohio case sustain the identical tax provisions involved in the present case excepting the floor tax provisions. I, therefore, follow those decisions as controlling, and hold that since the State was not exempt from the tax the statute reached the individual sellers who acted as disposers for the State.

It is insisted that the floor tax is unconstitutional as applied to Pennsylvania; that it is a tax upon the property of the State; that there can be no distinction between the liquor owned by the State and other property owned by the State. The question is, what is the nature of the tax. Obviously, the tax was intended by Congress as an excise tax.

The Constitution, Article I, section 8, provides: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

In Blackstone, Volume I, page 318, an excise is defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." Cooley in his work on Taxation, page 3, defines it as "An inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Webster's New International calls it: "A tax on the inland manufacture, sale, or consumption of commodities or for licenses to follow certain occupations, and these taxes are usually known as internal revenue taxes."

In the case of *Patton* v. *Brady, Executrix* (184 U. S., 608), it was held that the tax on manufactured tobacco is a tax on an article manufactured or for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article, and that such tax is an excise. In that case, Mr. Justice Brewer, in the opinion, said: "Ever since the early part of the Civil War there has been a body of legislation, gathered in the statutes under the title Internal Revenue, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the Nation, but are among its comforts and luxuries. The first of these Acts, passed on July 1, 1862 (12 Stat., 432), in terms provided for 'the collection of internal duties, stamp duties, licenses, or taxes imposed by this Act,' and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the Act of 1890 reducing it to 6 cents a pound. Then came the Act in question, which, for the purpose of providing means for the expenditures of the Spanish War, increased the charge to 12 cents a pound, specifying distinctly that it was to be 'in lieu of the tax now imposed by the law.' Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term."

I conclude, therefore, that the floor tax which is levied by this Act is not a tax upon property of the State as such, but is an excise and properly so called.

It is also contended that the floor tax is a direct tax, which must be apportioned among the States according to population. In *Pollock* v. *Farmers Loan & Trust Co.* (156 U. S., 429) it was held: "That direct taxes, within the meaning

of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." As I have already held that the floor tax is an excise as such, it need not be apportioned.

I can not agree with the 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 of that title, and as used in U. S. C., Title 26, section 354–a, and U. S. C., Title 26, section 451–a, U. S. C., Title 26, section 254–b, and defined in U. S. C., Title 26, section 241–a. In *Ohio* v. *Helvering*, supra, it was said: "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, 48 Pac., 8; *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 Tex., 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. (*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."

When a State engages in private business, it divests itself, so far as its transactions in that private business are concerned, of its sovereign character and takes that of a private citizen. Instead of communicating to that private business its privileges and prerogatives, it descends to the level of a private citizen. As to the transactions in such private business, it can not claim the privileges or immunities of a sovereign.

Great dangers would menace the revenues of the United States if the immunities from Federal taxation here claimed should be indulged. These dangers are well stated by Justice Brewer in *South Carolina* v. *United States*, supra: "Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenue. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government."

The Acts in controversy, so far as the charges upon the plaintiff are concerned, are constitutional. The State itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax as a person. The bill fails to set forth facts which would entitle the complainant to the relief prayed for.

Now, December 28, 1934, plaintiff's bill of complaint as amended is dismissed, and the preliminary injunction granted January 31, 1934, is dissolved.

XIV–23–7543
T. D. 4557

Sales of distilled spirits by distillers.

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

To District Supervisors and Others Concerned:

Pursuant to the Liquor Taxing Act of 1934 (sections 201 and 205, Title II), and H. J. Res. 370, approved June 18, 1934, and for the protection of the revenue of the United States, distillers shall sell or dispose of distilled spirits in the containers only prescribed by Regulations No. 13, as amended, except in case of sales to rectifiers or blenders, or to dispensaries or other agencies operated and maintained by any State or political subdivision thereof, or for export,

or for shipment in bond. None of the provisions of this Treasury decision shall apply to sales of anhydrous or tax-free alcohol, or restrict the purchase or sale of warehouse receipts covering distilled spirits in Government bonded warehouses.

These regulations shall be effective immediately.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 3, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV-23-7544
T. D. 4558

Sales of distilled spirits by rectifiers.

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

To District Supervisors and Others Concerned:

Pursuant to section 605, Revenue Act of 1918 (section 255, Title 26, U. S. C.), and the Liquor Taxing Act of 1934 (sections 201 and 205, Title II), and H. J. Res. 370, approved June 18, 1934, and for the protection of the revenues of the United States, rectifiers shall sell or dispose of distilled spirits in the containers only prescribed by Regulations No. 13, as amended, except in case of sales to rectifiers or blenders, or to dispensaries or other agencies operated and maintained by any State or political subdivision thereof, or for export. None of the provisions of this Treasury decision shall apply to sales of anhydrous or tax-free alcohol, or restrict the purchase or sale of warehouse receipts covering distilled spirits in Government bonded warehouses.

These regulations shall be effective immediately.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 3, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

LIQUOR CONTROL ACT OF 1934.

REGULATIONS 15, ARTICLE XXIII: Bottling of rectified spirits and products. (Also Article XXIV.)

XIV-2-7249
T. D. 4506

Amendment to Regulations 15—Bottling of wines and certain cordials and liqueurs at rectifying plants.

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

To District Supervisors and Others Concerned:

Rectifiers who bottle wines and certain cordials and liqueurs that require bottling from the original package or from the container in

which compounded, may provide, in lieu of a locked bottling tank, a room in the rectifying plant within which the wines, cordials or liqueurs may be placed under Government seal lock, pending approval of Forms 230 or 237, payment of the tax, if due, and bottling.

Such room must be secure and of substantial construction, and the door or doors or any other openings thereof must be equipped for locking with Government locks.

When it is desired to bottle such wines, cordials or liqueurs, the packages containing same will be placed in the room and gauged, Form 230 or Form 237, as the case may be, prepared and submitted for approval and payment of tax, if due, in accordance with the procedure set forth in Regulations 15.

Upon approval of Form 230 or Form 237, as the case may be, and the payment of tax, if due, the wines, cordials or liqueurs may be bottled from the original packages or the containers in which compounded. The approved Form 230 or Form 237, as the case may be, will be attached to the door of the room while the wines, cordials and liqueurs are being bottled, instead of being attached to the bottling tanks as provided in Articles XXIII and XXIV of Regulations 15.

Approval of such room and bottling must be obtained from the district supervisor, who will authorize bottling of only those wines, cordials and liqueurs which it is impracticable to bottle from the prescribed locked bottling tank.

Regulations 15 are amended accordingly.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 3, 1935.

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

TAX ON FERMENTED MALT LIQUORS.

REGULATIONS 18, ARTICLE XVII: Cancellation and affixing of stamps. XIV-3-7266 T. D. 4513

Cancellation of beer stamps.

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

To District Supervisors and Others Concerned:

Subparagraph (b) of paragraph 20, Article XVII, Regulations 18, relating to the manufacture and tax-payment of fermented malt liquors, is amended to read as follows:

PAR. 20. (b) Unless the Commissioner shall, in any case, authorize the cancellation of stamps in some other manner, the brewer must, prior to affixing the stamp to the package, cancel it by perforating therein the name under which he conducts business, or some suitable abbreviation thereof to be approved by the supervisor, and the date when canceled. If the initials of a brewer are adequate for identification, the supervisor may, in his discretion, approve the use of such initials for the perforation of beer stamps. When beer stamps are perforated with the initials of the brewer, the permit number,

if any, must also be perforated in the stamps. The date of cancellation may, if preferred, be indicated by numerals, signifying the number of the month, the day of the month, and the last two figures of the number of the current year, as, for example, 3-21-33, meaning March 21, 1933. The perforations must appear on the right or left margin of the stamp at a sufficient distance from the central portion to prevent obliteration of the perforations when the spigot is driven through the stamp.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 15, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 18, ARTICLE XXI: Marks, brands, and labels. XIV-11-7378 T. D. 4531

Rebranding beer barrels.

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

To District Supervisors and Others Concerned:

Subparagraph (b) of paragraph 24, Regulations 18, relating to the manufacture and tax payment of fermented malt liquors, is hereby amended to read as follows:

PAR. 24. (b) 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 was originally so branded on the barrel or keg shall not be deemed to be a rebranding; and, *Provided further*, That where barrels or kegs are sold by one brewer to another, the brands on such barrels or kegs may, upon application to, and approval of, the district supervisor, be scraped and the barrels or kegs rebranded by the purchasing brewer.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved March 5, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 18, PARAGRAPHS 11(d), 12(b), 21, 22(a), 22(b), 37(b), 40(a), 40(b), 44(a), 44(b), 45, 47(d), 48(f), 51(d). XIV-18-7475 T. D. 4544

Meter readings.

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

To District Supervisors and Others Concerned:

Paragraphs 11(d), 12(b), 21, 22(a), 22(b), 37(b), 40(a), 40(b), 44(a), 44(b), 45, 47(d), 48(f), and 51(d) of Regulations 18, relating

to the manufacture and tax payment of fermented malt liquors, are hereby amended, effective immediately.

The district supervisor is authorized in paragraph 11(d), as amended, to furnish brewers with one key to the continuous counter of each meter, the amended paragraph to read as follows:

PAR. 11. (d) One key to each meter will be kept at the brewery in a cabinet designated the "Government cabinet" which will be secured with a Slaight seal lock. The brewer will be furnished with one key to each meter.

In paragraph 12(b), as amended, manufacturers are prohibited from delivering meter keys to anyone except the district supervisor. The amended paragraph reads as follows:

PAR. 12. (b) On the date a meter is shipped to a brewery, the manufacturer shall so advise the supervisor of the district wherein the brewery is located, stating the date of shipment and the manufacturer's serial number of the meter. The manufacturer shall at the same time forward to the district supervisor two keys for each meter. Under no circumstances shall meter keys be sent or delivered by the manufacturer to the brewer or to any person other than the district supervisor. The district supervisor will furnish the brewer with one meter key when meter installation has been completed. The manufacturer's seals on the meter must remain intact until removed by an inspector and replaced with Government cap seals.

Brewers are authorized in paragraph 21, as amended, to take daily readings from the continuous counter instead of the set back counter of the meter and to omit the accounting for fractional parts of a barrel in reporting their daily removals of beer by pipe line for tax payment. The amended paragraph reads as follows:

PAR. 21. At such time each day when no more beer is to be run through the meter on that day for bottling, the brewer will note the present and last previous readings of the meter on Form 139, prepared in triplicate, also the quantity in whole barrels that has passed through the meter since his last previous reading as shown by the continuous counter thereof and will cancel on the margin of each, in the manner prescribed for the cancellation of stamps for barrels or kegs of fermented malt liquor, the corresponding number of beer stamps. The set back counter may be used by the brewer for checking continuous counter readings and upon completion of the day's run for bottling and cancellation of stamps it must be set at zero. The brewer will immediately attach the canceled stamps to one copy of Form 139 to be delivered to the inspector at such time as an inspector, assigned by the district supervisor, visits the brewery to take the meter reading. One copy of each Form 139 will be attached to Form 103 and transmitted to the district supervisor. The third copy will be retained by the brewer as a part of his Government record. The inspector having satisfied himself by an inspection of the stamps that they are sufficient to cover the tax due on the beer passed through the meter as indicated by Forms 139 and that they have been properly canceled by the brewer will in the presence of the brewer further cancel and deface the stamps so delivered, by driving through them a die or punch, in such manner as to cut from the center of each stamp a piece thereof not less than one-half inch square.

In paragraph 22(a), as amended, inspectors are authorized to discontinue the reporting of fractional parts of a barrel as shown by the continuous counter and are instructed in detail as to the procedure to be followed in reading the meters at the time of their inspectional visits. The amended paragraph reads as follows:

PAR. 22. (a) The district supervisor will assign inspectors to visit each brewery as necessary where beer is being transferred by pipe line to the bottling house for the purpose of reading the meter or meters. A report on Form 138, in duplicate, shall be made by the inspector as to meter reading at the brewery. The inspector shall note the last previous and present meter readings on Form 138, also the quantity in *whole* barrels that has passed through the meter

since the last inspectional reading, as shown on the continuous counter thereof. In the event the inspector arrives at the brewery before any beer has passed through the meter on that particular day, or at a time during the day when beer is passing through, he will give the date of his reading as of the previous day. To determine, in the latter event, the quantity to be noted on Form 138 as having passed through the meter since the last inspectional reading, he will deduct from the present actual whole barrel reading, as indicated by the continuous counter, the quantity in whole barrels as shown by the set back counter. If beer has been transferred through the bottling house by pipe line free of tax for exportation, the inspector will determine the total number of barrels, including the fractional parts of a barrel, so transferred, by examination of Forms 127. In the event cereal beverage is removed through meters the inspector shall execute a certificate in triplicate stating that it was removed in accordance with paragraph 51 (d) and (e); attach one copy to Form 138 and give two copies to the brewer who will submit one copy with Form 103 to which Forms 139 are attached and retain the third copy for his files. The inspector will deduct such quantity from the total number of whole barrels that has passed through the meter since the last inspectional reading, the difference in whole barrels being the taxable quantity. Having completed the reading of the meter, the inspector will procure from the brewer his retained copies of Form 139 made out since the last inspectional reading of the meter and will examine same for the purpose of determining the sufficiency of tax payments reported by the brewer. For any underpayment of tax thereby disclosed, the inspector will procure from the brewer Form 139, together with sufficient stamps to cover the tax on whole barrels. Upon completion of his examination and comparison, the inspector shall append to his report on Form 138 the Forms 139 to which the canceled stamps are attached and forward them to the district supervisor, together with his daily report on Form 1494. One copy of each report, Form 138, will be forwarded to the district supervisor as indicated above and the other copy will be placed in the Government cabinet at the brewery for reference when the meter is again read by the inspector.

In paragraph 22(b) provision is made for the retention by the district supervisor of canceled beer stamps in his office and for the rendering by him of a monthly report of transactions at breweries on Form 185. The amended paragraph reads as follows:

PAR. 22. (b) The district supervisor shall after audit, and on or before the last day of the month, succeeding the rendition thereof, forward to the Commissioner the returns on Form 103, rendered by the respective brewers, accompanied by Forms 139. The copies of Form 139 to which the canceled stamps are attached will be retained by the district supervisor. Care will be taken to see that the returns, Form 139, of each brewer are attached to the proper Form 103.

A monthly report on Form 185, by States, will be rendered each month by the district supervisor, summarizing the transactions as to all breweries in his district.

A typographical error in the number of the form to be used by inspectors in reporting meter readings of beer removed for exportation has been corrected in paragraph 37(b), as amended. The amended paragraph reads as follows:

PAR. 37. (b) It will be the duty of the inspector to supervise the packaging of the fermented liquor, and he will make the necessary notations of meter readings to determine definitely that the shipment contains the exact kind and quantity of fermented malt liquor specified in the application. The inspector will report on Form 138 the quantity of beer run through the meter for export. Proper notation will be made on this form to show that the beer was removed for export.

Paragraphs 40(a) and 40(b) are amended, in order to provide that brewers shall make application, Form 127, in triplicate, instead of in duplicate, to remove fermented malt liquor for export and that the inspector shall place one copy of each application in the "Gov-

ernment cabinet" at the brewery. The amended paragraphs read as follows:

PAR. 40. (a) Brewers shall use Form 127, in triplicate, in making application to district supervisors for permission to remove fermented malt liquors for bottling, in packages or by way of pipe line or conduit, tax-free for exportation. Request shall also be made on such form for the attendance of an inspector to superintend the transfer.

PAR. 40. (b) Upon receipt of such application, an inspector, to be designated by the district supervisor, shall proceed to the brewery and superintend the transfer of the fermented malt liquor to the bottling house. Before permitting the transfer of the fermented malt liquor by pipe line, the inspector shall take the reading of the continuous counter of the meter, noting the quantity of liquor in the tank or tanks to determine that it agrees with the quantity specified in the application, Form 127, and at the same time shall note thereon the reading of the continuous counter of the meter. Upon completion of transfer and bottling he shall again record the reading of the continuous counter of the meter and thereupon execute part 2 of the brewer's application, Form 127, certifying therein the total quantity of fermented malt liquor received for bottling, as disclosed by the meter, and the quantity actually bottled, and shall report for assessment of tax (computed under section 3339, R. S.) any deficiency between the two quantities. Both such readings must include fractional parts of barrels. The inspector shall place one copy of the completed Form 127 in the "Government cabinet" at the brewery for reference in subsequent readings of the meter and shall immediately transmit two copies of completed Form 127 to the district supervisor.

Paragraphs 44(a), 44(b), 45, 47(d), and 48(f) are amended to provide for the discontinuance of the submission to the deputy commissioner of reports covering the exportation of beer except in cases where losses occur involving the assessment of tax, in which latter event all reports covering such exportation will be retained by the district supervisor until evidence of landing is received when they will be forwarded to the Commissioner with reports proposing assessment of tax on the deficiency. The amended paragraphs read as follows:

PAR. 44. (a) The district supervisor receiving from the collector of customs at the port of exportation the executed application and entry on Form 550, and, upon examination and comparison of same with the report of the inspector, covering the removal for exportation, finding that the entry has been properly certified as to inspection, lading and clearance for the foreign port and that no shortage has been reported in transit for export, shall note on Form 550 the actual quantity cleared for exportation and shall retain same in his office pending the receipt by him of evidence of foreign landing. Upon receipt of satisfactory evidence of foreign landing, and there being no shortage in exportation, he shall enter appropriate credit in the account kept with the export bond.

PAR. 44. (b) If a shortage is reported the district supervisor shall enter credit for the actual quantity, if any, received at the foreign port as indicated by the evidence of landing and shall report for assessment at once the amount of the tax due on any such shortage disclosed.

PAR. 45. The supervisor shall keep an account with each brewer covering the exportation of fermented malt liquors which shall reflect the following:

(*a*) The name and address of the brewer;
(*b*) Date of exportation;
(*c*) Amount of tax liability involved in such exportation;
(*d*) The name of foreign purchaser;
(*e*) Date, term, and penal sum of export bond; and
(*f*) The amount of tax liability debited and credited against the bond.

A statement of the status of any export bond as to tax liability shall be furnished to the Commissioner on Form 128 as and when required.

PAR. 47. (d) The landing certificate shall be filed with the district supervisor with whom the entry for exportation was filed.

PAR. 48. (f) The district supervisor receiving such application and evidence shall examine same and indorse thereon his approval or disapproval and if satisfied as to its validity will enter proper credit in the account kept with the bond.

In paragraph 51(d), as amended, provision is made for inspectors to report on Form 138 meter readings of cereal beverage removed by pipe line. The amended paragraph reads as follows:

PAR. 51. (d) Cereal beverages removed to the bottling house must pass through the beer line and meter used for the transfer of fermented liquor. Such transfers of cereal beverages must be conducted under the immediate supervision of an inspector assigned for that purpose. The inspector shall report on Form 138, prepared in duplicate, the quantity of cereal beverage in whole barrels and fractional parts of a barrel passed through the meter, noting thereon the continuous counter readings of the meter before and after the removal thereof. One copy of the form will be placed in the "Government cabinet" and one copy will be forwarded immediately to the district supervisor.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 23, 1935.

L. W. ROBERT, Jr.,
Acting Secretary of the Treasury.

BOTTLING DISTILLED SPIRITS IN BOND.

REGULATIONS 6. XIV-17-7462
T. D. 4542

Size of bottles for distilled spirits bottled in bond.

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

To District Supervisors, Collectors of Internal Revenue, and Others Concerned:

Sections 7, 8, and 13 of Regulations 6, "Bottling of Distilled Spirits in Bond under the Acts of March 3, 1897, and February 17, 1922," as amended by Treasury Decision 11 [Pro.], approved April 25, 1933, are hereby further amended to read as follows:

SEC. 7. Spirits may be bottled in bond either before or after tax payment in 1-quart, ⅘-quart (⅕ gallon), 1-pint, ½-pint, ¼-pint, or ⅛-pint bottles, and in no other sizes. The amount of spirits contained in any bottle shall not vary from the amount intended or stated to be contained in such bottle more than 2 per cent. (See section 22.)

SEC. 8. *Case and strip stamps.*—Case stamps for distilled spirits bottled in bond for domestic sale or use will be printed in six denominations: 3 gallons for cases containing 12 bottles of 1 quart each; 2.4 gallons for cases containing 12 bottles of ⅘ quart (⅕ gallon) each; 3 gallons for cases containing 24 bottles of 1 pint each; 3 gallons for cases containing 48 bottles of ½ pint each; 3 gallons for cases containing 96 bottles of ¼ pint each; and 3 gallons for cases containing 240 bottles of ⅛ pint each.

The strip stamps will be marked "Bottled in Bond" and will bear the following data:

The real name of the actual bona fide distiller; the number of the distillery and internal revenue collection district in which the spirits were produced; the proof of the spirits; the distilling season—whether Spring or Fall; the bottling season; the kind and number of warehouse and district in which the spirits are bottled.

The stamps will be bound in books of 20 case stamps to which are attached the required number of strip stamps.

SEC. 13. *Capacity and numbering of cases.*—Spirits bottled in bond shall be packed in cases to contain the following number of bottles: 12 bottles containing 1 quart each; 12 bottles containing ⅘ quart (⅕ gallon) each; 24

bottles containing 1 pint each; 48 bottles containing ½ pint each; 96 bottles containing ¼ pint each; and 240 bottles containing $\frac{1}{10}$ pint each.

All cases filled as above set forth shall contain 3 gallons of spirits each, except cases filled with 12 bottles of ⅘ quart (⅗ gallon) capacity, which shall contain 2.4 gallons of spirits each.

Each case filled will be given a serial number. Where a distillery, general or special bonded warehouse has a bottling warehouse already established, the series in use will be continued without regard to the owner or producer of the spirits. At warehouses hereafter established, the cases bottled will be numbered serially, beginning with No. 1 for the first case filled. When the serial numbers of cases bottled at any warehouse, whether established before or after the issuance of these regulations, have reached the number 999999 the proprietor may, if he so desires, begin a new series commencing with No. 1 as originally.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 17, 1935.

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

DISTILLED SPIRITS, ETC.

XIV–10–7364
T. D. 4528

Disposition to be made of forfeited distilled spirits (including alcohol), wines and fermented malt liquors.

TREASURY DEPARTMENT AND
DEPARTMENT OF JUSTICE,
OFFICES OF THE SECRETARY OF THE TREASURY
AND THE ATTORNEY GENERAL,
Washington, D. C.

To District Supervisors, Collectors of Internal Revenue, United States Marshals, and Others Concerned:

1. The following procedure shall govern the disposition of distilled spirits (including alcohol), wines and fermented malt liquors forfeited under any provision of internal revenue laws:

2. Liquors available for use by governmental agencies:

The requirements that forfeited liquors be sold or destroyed, as hereinafter provided, shall not apply to (*a*) distilled spirits subject to such disposition as may be made by the Commissioner of Internal Revenue pursuant to the direction of the Secretary of the Treasury (section 3450, R. S.), and (*b*) distilled spirits (including pure and denatured alcohol) and wines forfeited under section 3460, R. S., and subject to destruction under paragraph 9 hereof, which are reported to the Director of Procurement, Treasury Department, and disposed of on his order as provided by regulations governing the operation of the Procurement Division, Branch of Supply. Any such spirits or other liquors so reported to, and not ordered disposed of by, the Director of Procurement shall be subject to sale or destruction as hereinafter provided.

3. Preparation for sale:

(*a*) Distilled spirits shall be sold in the containers in which seized, but shall not be released to the purchaser until they have been transferred by the purchaser to kegs, barrels, or similar containers, of a

capacity of 5 wine gallons or greater, nor until the empty containers and the stamps, labels, and all coverings shall have been destroyed by the purchaser.

(*b*) If, upon inspection, it is apparent that the spirits are not salable, for the reason that they are unfit for human consumption or for industrial purposes, they shall not be subjected to chemical tests as hereinafter provided, but shall be destroyed.

4. Tests:

(*a*) Representative samples of distilled spirits shall be taken from the containers in which seized, and shall be analyzed by the nearest Government chemists.

(*b*) After sale of the distilled spirits and their transfer to kegs, barrels, or similar containers, and prior to their release to the purchaser, a composite sample of not less than 1 pint taken from each keg or barrel, shall be analyzed by the nearest Government chemist and the report of analysis retained in the files of the selling officer.

(*c*) If the report of analysis of samples taken before or after sale discloses the spirits are not fit for human consumption or for industrial purposes, they shall be destroyed.

5. Method of disposition:

(*a*) Advertisement for sale—

(1) Advertisements for sale shall conform to existing laws, and to existing regulations except as hereinafter provided, and shall contain a statement that the Government reserves the right to destroy the liquor if, on reanalysis after sale, liquors are found unfit for human consumption or industrial purposes.

(2) Advertisements for sale shall also contain a statement that only distillers, rectifiers, importers, and wholesale liquor dealers qualified to bottle spirits, or private individuals desiring to purchase such spirits for personal use, will be entitled to bid thereon; and that all other bids will not be considered: *Provided*, That as to spirits suitable for industrial purposes only, the advertisements shall state that bids will be accepted from, and the spirits sold only to, proprietors of industrial alcohol plants for denaturation, or redistillation and denaturation, without the payment of the internal revenue tax thereon.

(3) Except where sales are to be made of spirits suitable for industrial purposes only, as provided in paragraph 4(a)2, advertisements shall also contain a statement that the purchaser will be required to pay internal revenue tax imposed on the spirits at the rate of $2 per proof gallon, or wine gallon if below 100° proof, and affix internal revenue stamps to kegs or barrels before release.

(*b*) Sale:

(1) The spirits shall be sold to the highest qualified bidder.

(2) Spirits shall be released to the purchaser only when internal revenue stamps have been purchased and affixed to each keg or barrel where such stamps are required.

(3) If spirits are sold to private individuals for personal use an affidavit that such spirits are purchased for personal use and will not be resold, shall be required of such individuals before the release of the spirits.

6. Wines:

(*a*) A sufficient number of bottles or containers in each lot of the same kind, brand, and production shall be opened and inspected for

the purpose of determining the classification for internal revenue taxes, and that the contents are potable and conform with the labels and marks on the containers thereof.

(*b*) If upon inspection, the officer is satisfied the wines are not potable, the wines and containers (except kegs and barrels) shall be destroyed.

(*c*) If he is satisfied that the wines are potable, but if any marks, labels, or brands on the containers (but not on the corks) do not correctly represent the contents or bear any trade mark or trade name, such marks, labels, or brands shall be removed, as far as may be practicable, without destroying the contents or containers. If a trade mark or trade name is blown in the bottle or other container, or is otherwise not practicably removable, the contents will be removed, where practicable, without destruction, to another appropriate container, and the original container shall be destroyed. If such marks, labels, or brands on the containers (but not on the corks) are not removable, and it is impracticable to transfer the contents, the containers and contents shall be destroyed.

(*d*) If the officer is in doubt as to potability or identity of the wines in any lot, he shall take representative samples thereof and submit them to the nearest Government chemist for analysis.

(*e*) The procedure upon report of analysis shall conform to the requirements of paragraph 5(*c*).

(*f*) Wines shall be sold to the highest bidder pursuant to advertisement as required by law, and the advertisement shall contain the statement that the wines are to be sold subject to the payment of the internal revenue tax.

(*g*) The internal revenue tax shall be payable and paid before release of the wines in the manner provided by existing regulations pertaining thereto.

7. Fermented malt liquors (beer, ale, porter, sake, etc.):

(*a*) Inspection, analysis, advertisement, sale, and destruction of fermented liquors shall be accomplished in the same manner as herein provided for wines.

(*b*) Since stamps may not be obtained for the purpose of paying the tax, the tax shall be paid to the collector of internal revenue, who will issue receipt therefor on Form 1, and enter the amount on his assessment list as an advance collection. The selling officer in each such case shall notify the collector of internal revenue, in writing, of the name and address of the purchaser, the number and kind of containers, and the quantity of fermented malt liquors purchased, and the receipt when issued shall bear notation corresponding with such notice. The purchaser shall exhibit the receipt to the selling officer before release.

8. Labeling:

The following certificate shall be placed on all kegs, barrels, drums, cases or any other outer containers of liquors sold:

I hereby certify that on the ____ day of _____, 1935, at _____,
(City and State.)
_____ of _____ contained herein were
(Quantity in gallons.) (Kind of liquor.)
sold to _____
(Name and address of purchaser.)

(Signed) _____
District Supervisor, or the United States Marshal.
(As the case may be.)

Containers of spirits suitable for industrial use only shall also bear an additional certificate signed by the selling officer to the effect that the spirits are sold for denaturation or redistillation and denaturation only. These certificates shall remain on the container to which they are attached until the liquor is removed therefrom, whereupon they shall be effaced and obliterated.

The purchaser of spirits shall comply in all respects with the applicable provisions of the regulations relating to labeling spirits acquired at Government sales issued by the Federal Alcohol Control Administration. (Misbranding Regulations, Series 1, Revision 1, issued August 10, 1934, promulgated to customs officers in Bureau of Customs Circular Letter 1260, dated August 21, 1934.) (See Appendix A, attached hereto.)

9. All liquors offered for sale and not sold at the sale advertised or any adjournment thereof, shall be destroyed, unless disposed of as provided by paragraph 2 hereof: *Provided*, That such action does not conflict with any order of the court: *And provided further*, That if, in the opinion of the selling officer, the failure to sell is not sufficient indication of unsalability, such liquor may be reoffered.

10. Sale shall not be made in violation of State or local laws; and the receipt of an affidavit of the purchaser that he has complied and will comply with all State and local laws in connection with the purchase, and the availability to State and local enforcement officers of the records of sale, shall be deemed to be compliance with this provision.

H. MORGENTHAU, Jr.,
Secretary of the Treasury.
HOMER CUMMINGS,
Attorney General.

FEBRUARY 27, 1935.

APPENDIX A.

FEDERAL ALCOHOL CONTROL ADMINISTRATION MISBRANDING REGULATIONS, SERIES 1, REVISION 1, ISSUED AUGUST 10, 1934. SUPPLEMENT II, RELATING TO DISTILLED SPIRITS ACQUIRED AT GOVERNMENT SALES.

SEC. 16. Notwithstanding the foregoing provisions of these regulations, distilled spirits acquired by members of the distilled spirits industry, distilled spirits rectifying industry, alcoholic beverages importing industry, or alcoholic beverage wholesale industry, at any sale conducted by the United States Government subsequent to the date of promulgation of these regulations (i. e., August 10, 1934), shall be labeled as hereinafter in this supplement provided.

SEC. 17. Distilled spirits acquired at such Government sales shall not be sold or otherwise introduced into commerce by members of such industries in the bottles in which so acquired, unless prior thereto (1) the labels appearing on such bottles at the Government sale have been removed, and (2) the written consent of the owner of a trade mark or brand name blown into such bottles has been obtained.

SEC. 18. Distilled spirits acquired at such Government sales shall not be sold or otherwise introduced into commerce in bottles by members of such industries, unless prior thereto such distilled spirits have been labeled or relabeled as follows:

(*a*) If the distilled spirits are rectified (otherwise than by purification or bottling) following purchase at the Government sale, then the labeling shall be in conformity with sections 2 to 13, inclusive, of these regulations.

(*b*) If the distilled spirits are not rectified, or are rectified only by purification or bottling, following purchase at the Government sale, then the label-

ing shall be in conformity with such sections, but subject to the modifications thereof specified in section 19 below.

SEC. 19. The modifications hereinbefore referred to shall be as follows:

(*a*) The brand label shall conspicuously state the following:

(1) A distinctive brand name belonging to the purchaser or the person for whom bottled, rebottled, or relabeled.

(2) "Purchased from United States Government after seizure."

(3) The name and address of the purchaser or the person for whom bottled, rebottled, or relabeled.

(4) The class and type of distilled spirits, e. g., rye whisky, bourbon whisky, Scotch whisky, rum, gin, cordial, etc. This statement shall conform with the report of the Government, but shall be subject to the limitations of (*g*) below.

(5) The brand label or an additional label may state information obtained from the report of the Government chemist, which does not conflict with the provisions of this section, but such statement shall be subject to the limitations of (*g*) below.

(*b*) The year and, if desired, the month of seizure may be stated.

(*c*) No representation shall be made as to the age of the distilled spirits, except that distilled spirits aged in wood for any period after seizure may state on the label that such distilled spirits have been aged in wood for such period.

(*d*) Whiskys shall not be qualified as straight, blended, or spirit, but if imitation whisky, the brand label shall so state.

(*e*) No statement shall be made as to bottling in bond or under supervision of any Government.

(*f*) The statements required as to percentage of straight whisky, neutral spirits or neutral whisky, flavoring and coloring matter, and distilled or compound gin, may be omitted.

(*g*) The labeling of distilled spirits acquired at such Government sales shall not (1) directly or indirectly or by inference create the impression that any statement on the new label appeared on the original labels, if any, at time of Government sale, or is derived from a report of a Government chemist, or (2) except as specifically authorized by (*a*) (5) of this section, make any statement as to the original source, producer, or place of manufacture, or as to the character of the distilled spirits.

SEC. 20. Pursuant to the provisions of Article VI of the Code of Fair Competition for the Distilled Spirits Rectifying Industry, as amended, distilled spirits may be acquired in bulk or in bottles by members of the distilled spirits rectifying industry, at sales conducted by the United States Government.

REGULATION OF THE TRAFFIC IN CONTAINERS OF DISTILLED SPIRITS.

REGULATIONS 13, ARTICLE 1: Definitions. XIV–4–7281
T. D. 4517

Amendment of paragraphs (*c*), (*e*), and (*i*), article 1, of Regulations No. 13, under the provisions of joint resolution approved June 18, 1934, entitled "Joint resolution to protect the revenue by regulation of the traffic in containers of distilled spirits."

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

To District Supervisors and Others Concerned:

Paragraphs (*c*), (*e*), and (*i*), article 1, of Regulations No. 13, under the provisions of joint resolution approved June 18, 1934, entitled "Joint resolution to protect the revenue by regulation of the traffic in containers of distilled spirits," are amended to read as follows:

(*c*) "Distilled spirits" shall mean (*a*) ethyl alcohol, hydrated oxide of ethyl, and spirits of wine, from whatever source derived or by whatever process produced, and (*b*) any alcoholic distillate fit for beverage purposes, such as whisky, brandy, gin, rum, liqueurs, cordials and bitters, and all compounds, by whatever name called, containing distilled spirits and fit for beverage purposes, but shall not include wine containing 24 per centum or less of alcohol by volume.

(*e*) "Liquor bottle" shall mean any glass container for packaging distilled spirits for sale at retail, of a capacity of one-half pint or greater, conforming to these regulations and to the regulations prescribed by the Federal Alcohol Control Administration, the regulations in that regard heretofore promulgated by the Federal Alcohol Control Administration being hereby adopted as a part of these regulations.[1]

(*i*) "Distiller" shall mean any person operating a registered distillery under the internal revenue laws, and shall include the proprietor of an industrial alcohol plant engaged in bottling, for nonindustrial use,[2] ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source derived or by whatever process produced.

These regulations shall become effective on April 15, 1935.
Approved January 22, 1935.

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

APPENDIX B, REVISED.

DIGEST OF CERTAIN PORTIONS OF REGULATIONS OF THE FEDERAL ALCOHOL CONTROL ADMINISTRATION RELATING TO STANDARD BOTTLES.

1. The standard bottles prescribed by regulations of the Federal Alcohol Control Administration are bottles of such size that they hold distilled spirits in an amount equal to one of the standards of fill set forth in paragraph 2, with a head space not in excess of 5 per centum of the total capacity of the bottle after closure.

2. (*a*) The standards of fill with certain tolerances not here set forth, are as follows (fills in amounts less than ½ pints omitted):

A. PERMANENT STANDARDS.

For all distilled spirits, whether domestically manufactured, domestically bottled, or imported:

1 gallon.
½ gallon.
1 quart.
⅘ quart.
1 pint.
½ pint.

In addition, for Scotch and Irish whisky and Scotch and Irish type whisky of domestic manufacture; and for brandy and rum, whether domestically manufactured, domestically bottled, or imported:

⅘ pint.

3. As used with reference to standard bottles, the term "gallon" means United States gallon of 231 cubic inches of alcoholic beverages at 68° F. (20° C.), and all other units of liquid measure are subdivisions of the gallon as so defined.

4. Copies of the regulations of the Federal Alcohol Control Administration relating to standards of fill for bottled distilled spirits (Misbranding Regulations, Series 2), and those relating to nonindustrial use of distilled spirits and wine (General Regulations, Series 4) may be obtained from the Federal Alcohol Control Administration, Department of Justice Building, Washington, D. C.

---

[1] Digest of pertinent portions of the regulations of the Federal Alcohol Control Administration will be found in Appendix B, Revised.

[2] See Federal Alcohol Control Administration regulations relating to nonindustrial use of distilled spirits and wine, General Regulations, Series 4.

REGULATIONS 13, ARTICLE 1: Definitions. XIV-22-7530
T. D. 4554

Amendment of paragraph (*c*), article 1, of Regulations No. 13, as amended by Treasury Decision No. 4517 [page 519, this Bulletin], issued under the joint resolution approved June 18, 1934, entitled "Joint resolution to protect the revenue by regulation of the traffic in containers of distilled spirits."

TREASURY DEPARTMENT,
OFFICE OF SECRETARY OF THE TREASURY,
Washington, D. C.

To District Supervisors and Others Concerned:

Paragraph (*c*), article 1, of Regulations No. 13, as amended by Treasury Decision No. 4517, approved January 22, 1935, issued pursuant to the provisions of joint resolution approved June 18, 1934, entitled "Joint resolution to protect the revenue by regulation of the traffic in containers of distilled spirits," is amended to read as follows:

"Distilled spirits" shall mean (*a*) ethyl alcohol, hydrated oxide of ethyl, and spirits of wine, from whatever source derived or by whatever process produced, and (*b*) any alcoholic distillate fit for beverage purposes, such as whisky, brandy, gin, rum, liqueurs, cordials and bitters, and all compounds, by whatever name called, containing distilled spirits and fit for beverage purposes, but shall not include wine containing 24 per centum or less of alcohol by volume: *Provided*, That this definition shall not apply to or include anhydrous alcohol, and alcohol withdrawn for tax-free purposes, pursuant to Title III of the National Prohibition Act and regulations thereunder.

Approved May 24, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 13, ARTICLE 2: Manufacture and sale of bottles for packaging distilled spirits. XIV-25-7562
T. D. 4560

Amendment of articles 2 and 5, Regulations No. 13, to provide for the labeling of liquor bottles, and other containers, in which distilled spirits are packaged or imported.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

To District Supervisors and Others Concerned:

Regulations No. 13, prescribed July 1, 1934, as amended, are hereby further amended:

By adding to article 2 a new paragraph numbered (4) as follows:

(4) Liquor bottles, and other containers, authorized by this article, in which distilled spirits are packaged for sale at retail, shall also bear labels with the following brands and marks thereon:

(*a*) Brand name, kind, and alcoholic content of the distilled spirits, by proof, except that the alcoholic content may be stated in percentage, by volume, in the case of liqueurs, cordials, bitters, cocktails, gin fizzes, or other such specialties.

(*b*) Net contents of such bottles or containers, unless the statement of the net contents is legibly blown therein.

(*c*) Name and address of the distiller or rectifier, by or for whom the spirits are bottled, except that the name and address of a dealer may be substituted for the name and address of the distiller or rectifier, if such name and address are preceded by the words "Bottled for_____" or "Bottled expressly for_____."

(*d*) If whisky, not blended or rectified, the age thereof, but this statement shall not be required as to Scotch, Irish, or Canadian whisky, or whisky bottled in bond.

(*e*) If blended or rectified whisky, the age of the youngest whisky therein, but this statement shall not be required as to Scotch, Irish, or Canadian whisky; and the respective percentage, by volume, of whisky, or whiskies, and neutral spirits.

(*f*) A statement of the percentage, by volume, of coloring matter, if such coloring matter is present in the distilled spirits in excess of 2½ per cent by volume, except that this requirement shall not apply to liqueurs, cordials, bitters, cocktails, gin fizzes, or other such specialties.

* * * * * * *

REGULATIONS 13, ARTICLE 3: Use of bottles for packaging distilled spirits. XIV–3–7263 T. D. 4509

Amendment of paragraph (1) of article 3 of Regulations No. 13, under the provisions of joint resolution approved June 18, 1934, as amended by Treasury Decision 4498, approved November 28, 1934 [C. B. XIII–2, 564].

TREASURY DEPARTMENT,
OFFICE OF SECRETARY OF THE TREASURY,
Washington, D. C.

To District Supervisors and Others Concerned:

Treasury Decision 4498, approved November 28, 1934, amending paragraph (1) of article 3, of Regulations No. 13, under the provisions of joint resolution approved June 18, 1934, is amended by adding thereto the following:

And provided further, That upon application by any distiller, rectifier, or wholesale liquor dealer, the supervisor of the district in which the plant of such distiller, rectifier, or wholesale liquor dealer is located may, by the issuance of an appropriate permit, authorize (*a*) the use, until March 15, 1935, for packaging distilled spirits generally, of glass containers not marked as required by these regulations where such containers were manufactured for such distiller, rectifier, or wholesale liquor dealer prior to July 13, 1934, and have blown therein the name or trade-mark, or a brand name, of such distiller, rectifier, or wholesale liquor dealer, and/or (*b*) the use until March 15, 1935, for packaging liqueurs, cordials, bitters, gin fizzes, and such other specialties as may be specified from time to time by the Commissioner, of glass containers of distinctive shape or design not marked as required by these regulations, where such containers were procured by such distiller, rectifier or wholesale liquor dealer prior to July 13, 1934.

Approved January 11, 1935.

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

REGULATIONS 13, ARTICLE 5: Imports and exports. XIV–25–7563 T. D. 4560

* * * * * * *

Regulations No. 13, * * * are hereby further amended:

By adding to article 5 a new paragraph numbered (7) as follows:

(7) Liquor bottles, and other containers, authorized by this article, in which distilled spirits are imported for sale at retail, shall also bear labels with the following marks and brands thereon:

(*a*) Brand name, kind, and alcoholic content of the distilled spirits, by proof, except that the alcoholic content may be stated in percentage, by volume, in the case of liqueurs, cordials, bitters, cocktails, gin fizzes, or other such specialties.

(*b*) Net contents of such bottles or containers, unless the statement of the net contents is legibly blown therein.

(*c*) Name and address of the importer, or exclusive agent, or sole distributor, or other person responsible for the importation.

(*d*) If whisky, not blended or rectified, the age thereof, but this statement shall not be required as to Scotch, Irish, or Canadian whisky.

(*e*) If blended or rectified whisky, the age of the youngest whisky therein, but this statement shall not be required as to Scotch, Irish, or Canadian whisky; and the respective percentage, by volume, of whisky, or whiskies, and neutral spirits.

(*f*) A statement of the percentage, by volume, of coloring matter, if such coloring matter is present in the distilled spirits in excess of 2½ per cent by volume, except that this requirement shall not apply to liqueurs, cordials, bitters, cocktails, gin fizzes, or other such specialties.

These regulations shall be effective immediately.

Approved June 15, 1935.

L. W. ROBERT, Jr.
Acting Secretary of the Treasury.

INDUSTRIAL ALCOHOL.

REGULATIONS 3 (Alcohol), ARTICLE 10: Application for a permit. XIV–19–7489 T. D. 4545

Amending Treasury Decision 4485 [C. B. XIII–2, 568, 569] and relating to Forms 27–A, 27–B, 27–C, 27½, and 1431.

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

To District Supervisors, Collectors of Internal Revenue, and Others Concerned:

Treasury Decision 4485 and instructions on Forms 27–A, 27–B, 27–C, and 27½ are hereby amended to provide that the quarterly filing of Forms 27–A, 27–B, 27–C, 27½, and 1431 be discontinued on and after the effective date of this Treasury decision, but such notices shall be filed at the commencement of business and annually thereafter as of July 1, or the nearest dividend date within 60 days thereof, giving all the information required in the forms and in the instructions thereon: *Provided, however*, That such notices, with any additional information desired, shall be filed as otherwise provided by law and regulations and whenever specifically required in writing by the Commissioner of Internal Revenue.

In the case of corporations and similar legal entities, a list of stockholders and a statement showing the number of shares of stock or voting trust certificates authorized, and outstanding, the par value, and the voting rights of the owners thereof, shall be filed on separate sheets accompanied by an affidavit as to the correctness thereof, which affidavit shall be executed by the proprietor or by some person

duly authorized to execute the same on behalf of the corporation or other legal entity.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 3, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 3 (Alcohol), ARTICLE 117: Sale and use of completely denatured alcohol. XIV–2–7250 T. D. 4507

Amending article 117 of Regulations No. 3, relative to production, tax payment, etc., of industrial alcohol, and the manufacture, sale, and use of denatured alcohol, effective April 1, 1931, as amended.

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

To District Supervisors and Others Concerned:

Paragraphs 12 and 13 of article 117 of Regulations No. 3, relative to production, tax payment, etc., of industrial alcohol, and the manufacture, sale and use of denatured alcohol, effective April 1, 1931, as amended by Treasury Decision No. 9 [Pro.], effective June 3, 1932, and Treasury Decision No. 16 [Pro.], effective August 2, 1933, are hereby rescinded, and the following substituted in lieu thereof:

Containers of products other than completely denatured alcohol shall not be branded as such, nor shall such products be advertised, shipped, sold, or offered for sale as completely denatured alcohol.

Supervisors shall instruct all field officers under their direction to warn proprietors of garages, paint shops, hardware stores, and other retail dealers guilty of such practices, to immediately discontinue the same, and that anyone failing to do so shall be reported to the proper United States attorney for prosecution.

CHAS. T. RUSSELL,
Acting Commissioner of Internal Revenue.

Approved January 5, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 3 (Alcohol), ARTICLE 117: Sale and use of completely denatured alcohol. XIV–22–7528 T. D. 4553

Revoking completely denatured alcohol formula No. 5.

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

To District Supervisors, Chemists in Charge, Authorized Chemists, and Others Concerned:

Effective June 1, 1935, completely denatured alcohol formula No. 5 is hereby revoked and alcohol shall not be denatured in accordance with this formula after that date.

Stocks of completely denatured alcohol formula No. 5 made prior to June 1, 1935, which are in the hands of producers or controlled by them, must be disposed of by January 1, 1936.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 24, 1935.
T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 3 (Alcohol), ARTICLE 146: General provisions governing use. XIV-8-7335 T. D. 4524

Sale and shipment of proprietary solvents.

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

To District Supervisors and Others Concerned:

Article 146 of Regulations No. 3, as amended by Treasury Decision 16 [Pro.], dated August 2, 1933, is further amended by adding after the third paragraph thereof a new paragraph as follows:

Proprietary solvents manufactured from specially denatured alcohol, formula No. 1, may be sold by the manufacturers only to users, or to dealers for resale, for solvent or manufacturing purposes, and only in metal packages bearing embossed serial numbers such as prescribed by article 111, as amended by Treasury Decision No. 9, with respect to completely denatured alcohol, and bearing the embossed permit number or symbol of the manufacturer: *Provided*, That upon written authorization of the Commissioner, shipments of such solvents may be made by the manufacturer in railroad tank cars, or in tank wagons or tank trucks owned and operated by the manufacturer, to actual users for solvent or manufacturing purposes and not for resale, conditioned (1) that such users shall maintain records of the receipt and actual use of such solvents, and (2) that such records shall be available for inspection by internal revenue officers.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 16, 1935.
T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 3 (Alcohol). ARTICLE 146: General provisions governing the use of specially denatured alcohol. XIV-17-7461 T. D. 4541

Authorizing a new specially denatured alcohol formula for use in the manufacture of rubbing alcohol compounds, and revising the second paragraph of article 146, Regulations No. 3, pertaining to the manufacture and sale of rubbing alcohol compounds.

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

To District Supervisors, Chemists in Charge, Authorized Chemists, and Others Concerned:

Effective June 1, 1935, specially denatured alcohol formula No. 23-A may no longer be withdrawn for the manufacture of rubbing

alcohol compounds. The following new specially denatured alcohol formula No. 23–G is hereby authorized for the manufacture of rubbing alcohol compounds and all preparations coming under the general classification of rubbing alcohol:

To every 100 gallons of ethyl alcohol add 10 gallons of acetone U. S. P. and 4.25 avoirdupois pounds of sucrose octa acetate.

SPECIFICATIONS FOR SUCROSE OCTA ACETATE.

Sucrose octa acetate is an organic acetylation product being a white nonhygroscopic powder having an intensely bitter taste.

Melting point.—It shall have a melting point of not less than 69° C. or not more than 72° C.

Reduction with copper salts.—It shall give a red precipitate when tested with Benedict's solution in the following manner:

Add 1 gram of the sample to 100 cc. of distilled water in 500 cc. Erlenmeyer flask, and to this mixture add 1.5 cc. of concentrated hydrochloric acid solution. Transfer to a reflux condenser, allow the mixture to come to a boil and boil for 10 minutes to insure complete hydrolysis of the sample. Measure out 10 cc. of the resulting solution, add 10 cc. of Benedict's solution and heat in boiling water for 10 minutes. A red precipitate indicates the presence of sucrose octa-acetate.

Benedict's solution.—Dissolve 17.3 grams of copper sulphate ($CuSO_4.5H_2O$), 173 grams of sodium citrate and 100 grams of anhydrous sodium carbonate in distilled water and dilute to 1,000 cc. with distilled water.

Free acid as acetic acid.—The free acid as acetic acid shall not be greater than 0.15 per cent by weight when tested in the following manner:

Dissolve a 1-gram sample in 50 cc. of neutral alcohol, and titrate with N/10 sodium hydroxide solution using phenolphthalein as an indicator.

$$\text{Per cent acid as acetic acid} = \frac{\text{cc. NaOH used} \times \text{normality} \times 6}{\text{Weight of sample}}$$

Sucrose octa-acetate content.—It shall contain not less than 98 per cent sucrose octa-acetate by weight when tested according to the following method:

Weigh a 1.50 gram sample, and transfer to a 500 cc. Erlenmeyer flask containing 100 cc. of neutral ethyl alcohol and exactly 50 cc. of N/2 sodium hydroxide solution. Attach the Erlenmeyer flask to a reflux condenser, reflux the material for one hour, cool and titrate the excess sodium hydroxide with N/2 sulphuric acid solution using phenolphthalein as an indicator.

$$\text{Per cent sucrose octa-acetate} = \frac{(\text{cc. NaOH used} \times \text{normality} - \text{cc. } H_2SO_4 \text{ used} \times \text{normality}) \times 8.478}{\text{Weight of sample}}$$

Insoluble matter.—It shall contain not more than 0.30 per cent insoluble matter.

In addition to the above chemical and physical properties, any material furnished under these specifications must have the same denaturing properties as the standard sample of sucrose octa acetate on file with the Alcohol Tax Unit.

Where this compound is furnished in sealed containers to denaturing plants by reputable manufacturers guaranteed to comply with the above specifications it will not be necessary to submit samples to the authorized chemists for examination and approval.

On and after June 1, 1935, all rubbing alcohol compounds or preparations coming under the general classification of rubbing alcohols must be manufactured with specially denatured alcohol formula No. 23–G, and they must contain 70 per cent absolute ethyl alcohol by volume, or as near 70 per cent as is practicable to be obtained by the ordinary commercial methods used for compounding alcoholic preparations. In order that the finished products shall contain 70 per cent absolute ethyl alcohol by volume the manufacturer should use 103.7 fluid ounces of specially denatured alcohol formula No. 23–G, to which must be added any two of the following ingredients in the quantities indicated and then made up to 1 gallon with water:

Zinc sulphocarbolate U. S. P. IX	grains	512
Boric acid U. S. P. X	do	640
Tincture of quassia U. S. P. IX	minims	256
Diethylphthalate not less than 99 per cent pure	fluid ounces	1.28

In addition to the above ingredients the manufacturer may also add such odorous constituents as is desired, provided they are shown in the formula submitted for approval.

Supervisors should notify all permittees manufacturing rubbing alcohol compounds to make application to amend their basic permits authorizing them to obtain specially denatured alcohol formula No. 23–G for use in the manufacture of rubbing alcohol compounds that have been approved for manufacture with specially denatured alcohol formula No. 23–A.

Permittees manufacturing rubbing alcohol compounds in accordance with formulæ approved by the Bureau, which conform with the methods of manufacture and formula set forth in this Treasury decision, will not be required to submit new formulæ on Form 1479–A in quadruplicate for approval, and will only be required to amend their basic permit to provide for the withdrawal and use of specially denatured alcohol formula No. 23–G.

No application for the withdrawal of specially denatured alcohol formula No. 23–A for the manufacture of rubbing alcohol compounds or any preparations coming under the classification of rubbing alcohols should be approved after May 31, 1935, and the failure of any permittee to comply with the requirements of this Treasury decision will constitute bad faith on the part of the permittee and grounds for the revocation of his permit.

Effective June 1, 1935, the second paragraph of article 146 of Regulations No. 3 is hereby amended to read as follows:

Any product manufactured with specially denatured alcohol formula No. 23–G under permit issued pursuant to these regulations and labeled and sold as a rubbing alcohol compound must be put up and sold by the manufacturer thereof in containers or packages in which it is to be delivered to the ultimate consumer. Such containers or packages shall not exceed 1 pint in capacity, and must be labeled to show name and address of the manufacturer. Where rubbing alcohol compounds are manufactured and bottled under the name of a dealer for resale to the legitimate trade, the manufacturer must place his name and address or his permit number on the labels of the containers in type of sufficient size to be clearly legible. No misleading statement will be permitted on labels which would give the impression that the product is

pure alcohol, and a product which is not marketed under a trade name must be labeled RUBBING ALCOHOL COMPOUND, in type of the same size and color. A caution notice must also be placed on each label to the effect that the preparation is for external use only and is medicated so that if taken internally serious gastric disturbance will result. Labels or facsimiles thereof must be submitted for approval before use. The sales of this product must be confined to persons legitimately engaged in a bona fide drug trade, or to hospitals, sanitariums, turkish baths or other establishments or stores where such compounds have customarily been sold, or used for massage or other external purposes. Failure to comply with these requirements and to confine sales to such persons, or the making of sales to such persons in quantities in excess of their reasonable requirements will constitute bad faith on the part of the permittee and grounds for the revocation of his permit.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved April 17, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

REGULATIONS 3 (ALCOHOL), ARTICLE 146: General provisions governing the use of specially denatured alcohol. XIV-22-7529 T. D. 4555

Treasury Decision 4541 [page 525, this Bulletin] amended.

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

To District Supervisors, Chemists in Charge, Authorized Chemists, and Others Concerned:

The effective date of Treasury Decision 4541, authorizing a new specially denatured alcohol formula for use in the manufacture of rubbing alcohol compounds, and revising the second paragraph of article 146, Regulations No. 3, pertaining to the manufacture and sale of rubbing alcohol compounds, is hereby extended from June 1, 1935, to July 1, 1935.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 24, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

HARRISON NARCOTIC LAW, AS AMENDED BY SECTION 432 OF THE REVENUE ACT OF 1928.

XIV-15-7432
Mim. 4306

Registration and taxation of departments of chemistry, medicine, dentistry, veterinary, and pharmacy, in schools, colleges, and universities.—Mimeograph 4156 (C. B. XIII-1, 539) amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., March 22, 1935.

Collectors of Internal Revenue and Others Concerned:

1. Paragraph 6 of Mimeograph 4156, dated February 27, 1934, is hereby amended to read as follows:

6. (A) The registration and taxation of schools, colleges, and universities under the Harrison narcotic law, as amended, are based principally upon their use, or uses, of narcotic drugs. Colleges of medicine and pharmacy, therefore, should ordinarily be registered in Class IV. The higher special tax liability in Class I, however, will apply to such of these institutions as are engaged in analytical and/or experimental work and all other educational institutions having departments which are registered to obtain narcotics solely for research or experimental purposes.

(B) In order that no misunderstanding in this connection may arise regarding universities, colleges, and schools which have pharmacy, chemistry, or other scientific departments, the following instructions are given:

(1) Pharmacy, chemistry, and other scientific schools, colleges, or universities (other than those which are exempt) using narcotic drugs primarily in experimental, analytical, and/or research work are properly classified as "compounders" (Class I), subject to registration and tax at $24 per annum.

(2) Medical, dental, and veterinary schools, colleges, or universities (other than those which are exempt) using narcotic drugs primarily in the treatment of patients (human beings, animals, and/or birds), although experimental, analytical, and/or research work is nominal or incidental thereto, are properly classified as "practitioners" (Class IV), subject to registration and tax at $1 per annum.

(3) If, however, medical, dental, and veterinary schools, colleges, or universities (other than those which are exempt) use narcotic drugs primarily in experimental, analytical, and/or research work, i. e., not directed to the treatment of patients, or where the treatment of patients is only nominal or incidental to the experimental, analytical, and/or research work, they are properly classified as "compounders" (Class I), subject to registration and tax at $24 per annum.

(4) If universities, colleges, and schools (other than those which are exempt) have a department, or departments, which are properly classified under the foregoing as "practitioners" (Class IV) and also have another department, or departments, which are properly classified under the foregoing as "compounders" (Class I), each such university, college, or school (taxable entity) is subject to registrations and taxes at $1 and $24, respectively, per annum, or a total annual tax liability of $25. A university, college, or school which is a narcotics taxpayer may, accordingly, be subject to more than one tax if its use of narcotic drugs is properly described under more than one of the four classes named in Regulations 5, article 9; but a university is a unit and constitutes only one taxable entity or taxpayer even though it has several "colleges" and "schools" which are located within close proximity of each other and are merely departments. However, where a taxpayer is engaged in the same class of narcotic drug activity or business at locations entirely separate and distinct from each other, he is subject to a separate registration and tax with respect to each such location (see second sentence, article 9, and article 18, Regulations 5), inasmuch as the tax, being based on narcotic drug activities, is business or occupational.

2. Correspondence relative to this mimeograph should refer to the number and to the symbols MT:ST.

GUY T. HELVERING,
Commissioner.

THE VINSON ACT (PUBLIC, NO. 135, SEVENTY-THIRD CONGRESS).

SECTION 3. XIV-7-7321
I. T. 2861

Charges involved in the determination of the costs of performing a naval contract under section 3 of the Vinson Act (48 Stat., 503).

Advice is requested relative to certain charges of the M Company involved in the determination of costs of performing Navy contracts under section 3 of the Vinson Act, approved March 27, 1934 (Public, No. 135, Seventy-third Congress, H. R. 6604, 48 Stat., 503).

It is not intended that established accounting procedure shall be disrupted or interfered with where such procedure is reasonably complete and sufficiently detailed to permit, without difficulty, adjustment of the book costs where necessary for purposes of section 3 of the Vinson Act. Subject to the condition that the costs claimed are found reasonably to appertain to the performance of a Navy contract and to the verification of the facts and figures involved, no objection is made to the methods used by the M Company in accounting for the costs of contracts which may be entered into between it and the Navy Department under the Vinson Act, except in the following particulars:

(1) Schedule A(11) property insurance; Schedule A(12) liability insurance; Schedule B(6) unemployment insurance.

The M Company carries its own insurance risks on materials, supplies, and manufacturing facilities, to meet compensation paid to employees for injuries received in the performance of their duties, and for unemployment in any State where such insurance is required, accounting for the risks and transactions through the medium of a reserve account to which are credited allowances at varying rates, the allowances being assessed against its various operations. The company states that the "expenses" thus determined and charged are lower than the premium rates quoted by insurance companies and that it intends to produce accruals which are approximately equal to the actual charges to the reserve account during the current year, which charges are understood to be its actual losses. Such a method is nearly tantamount to the use of the amount of actual losses in computing its cost of "self-insurance." It is held, however, that the allowable cost under section 3 of the Vinson Act of "self-insurance" for any particular period of time during which a Navy contract is performed is the amount of the actual losses suffered during such period from the insurable risks assumed in connection with the contract; and in determining the profits derived from the contract, the book cost of such "self-insurance" will be adjusted in accordance with the facts as they appear upon completion or other termination of the contract.

(2) Schedule A(19)—general administrative (bad debts).

Losses on account of bad debts are not, generally speaking, related to or a cost of performing a Navy contract; therefore, they are unallowable for purposes of section 3 of the Vinson Act.

(3) Schedule B—general expenses. (Item 2—State income tax. Item 3—Federal income tax.)

Further consideration has been given to the contentions for the allowance of State and/or Federal income taxes as costs of per-

forming a Navy contract, but the conclusion has been reached that I. T. 2821 (C. B. XIII–2, 580), which holds that such taxes are not allowable as costs, is correct.

(4) Schedule A(16)—amortization (of special equipment).

Inasmuch as it is not reasonably certain until a Navy contract is completed or otherwise terminated whether special equipment necessarily acquired to perform it will be used in performing other contracts or works, the determination of a proper allowance under section 3 of the Vinson Act for obsolescence (other than normal and in addition to ordinary exhaustion, wear and tear, of such equipment in connection with a particular contract) must await the completion or other termination of the contract and be based upon relevant conditions then extant. (Cf. articles 201, 202, 204, 206, 209, and article 205, as amended by T. D. 4422, C. B. XIII–1, 58, of Regulations 77.)

The views herein stated have been approved by the Secretary of the Treasury and concurred in by the Secretary of the Navy.

MISCELLANEOUS.

REGULATIONS 2(PRO.), SECTION 1220: Withdrawals for use of United States. XIV–6–7309 T. D. 4520

Amending section 1220, Regulations 2, dispensing with receipts for liquor withdrawn for Government use prior to delivery to Government officers.

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

To District Supervisors and Others Concerned:

Paragraph 1 of section 1220, Regulations 2, is amended by striking therefrom the words "after signing the receipt on its reverse side" in the twelfth line of said paragraph.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved February 4, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–12–7392
T. D. 4534

Cabinet for Government property and control of strip stamps.

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

To District Supervisors and Others Concerned:

Paragraphs 1 and 4, Treasury Decision 4527, approved February 25, 1935 [below], are amended to read as follows:

In order to safeguard the keys to Government locks, to facilitate the transfer of such keys from one officer to another, and to provide a secure place for

keeping other Government property, such as seals, stamps, records, etc., the proprietor of each distillery (including grain, molasses and fruit distilleries), distillery bonded warehouse, general and special bonded warehouse, concentration warehouse, industrial alcohol plant, industrial alcohol bonded warehouse, denaturing plant, rectifying plant, and brewery, will provide a metal cabinet of adequate strength and size, equipped with staples for the insertion of a lock. Each cabinet must be approved by the district supervisor as to construction, location, and security, and shall be installed on or before *April 1, 1935.*

On and after *April 1, 1935*, or prior thereto, if a cabinet for Government officers is installed and approved, rectifiers and proprietors of internal revenue bonded warehouses intending to bottle distilled spirits after tax payment may purchase stamps indicating tax payment of distilled spirits in bottles, required by Title II, of the Liquor Taxing Act of 1934, in anticipation of their need. Requisition for such stamps on Form 428 will be submitted to the district supervisor, who will write thereon the name and address of the storekeeper-gauger in charge of the rectifying plant or internal revenue bonded warehouse and will return the form to the applicant. The applicant will then forward the Form 428, with remittance for the stamps, to the collector of internal revenue. The collector will forward the stamps by registered mail to the storekeeper-gauger named on the Form 428, who will immediately place them in the Government cabinet. *In instances where it is impractical to ship large quantities of strip stamps by registered mail it is permissible to ship same by express, provided that a return receipt is procured in each case.* The expense of forwarding the stamps by registered mail *or express* to the storekeeper-gauger will be borne by the applicant.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 14, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–9–7349
T. D. 4527

Cabinet for Government property and control of strip stamps.

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

To District Supervisors, Collectors of Internal Revenue, and Others Concerned:

PARAGRAPH 1. In order to safeguard the keys to Government locks, to facilitate the transfer of such keys from one officer to another, and to provide a secure place for keeping other Government property, such as seals, stamps, records, etc., the proprietor of each distillery (including grain, molasses and fruit distilleries), distillery bonded warehouse, general and special bonded warehouse, concentration warehouse, industrial alcohol plant, industrial alcohol bonded warehouse, denaturing plant, rectifying plant, and brewery, will provide a metal cabinet of adequate strength and size, equipped with staples for the insertion of a lock. Each cabinet must be approved by the district supervisor as to construction, location, and security, and shall be installed on or before March 1, 1935.

(2) Where a cabinet or other secure place for the safe-keeping of keys, seals, stamps, records, etc., has previously been provided, which, in the opinion of the district supervisor, affords adequate protection for the keys, seals, etc., the supervisor may authorize

the continued use of such cabinet or other secure place of safe-keeping in lieu of the cabinet specified above.

(3) The cabinet shall be locked with a slaight seal lock, the key to which shall remain at all times in the possession of the Government officer assigned to duty at the plant, or the district supervisor. Government officers must not leave the cabinet open, except in their immediate presence, nor give the key thereof to anyone, except another Government officer authorized to receive it.

(4) On and after March 1, 1935, or prior thereto, if a cabinet for Government officers is installed and approved, rectifiers and proprietors of internal revenue bonded warehouses intending to bottle distilled spirits after tax payment may purchase stamps indicating tax payment of distilled spirits in bottles, required by Title II of the Liquor Taxing Act of 1934, in anticipation of their need. Requisition for such stamps on Form 428 will be submitted to the district supervisor, who will write thereon the name and address of the storekeeper-gauger in charge of the rectifying plant or internal revenue bonded warehouse and will return the form to the applicant. The applicant will then forward the Form 428, with remittance for the stamps, to the collector of internal revenue. The collector will forward the stamps by registered mail to the storekeeper-gauger named on the Form 428, who will immediately place them in the Government cabinet. The expense of forwarding the stamps by registered mail to the storekeeper-gauger will be borne by the applicant.

(5) At the beginning of business under this procedure, inventory of all stamps on hand will be made jointly by the storekeeper-gauger and the rectifier or proprietor of the internal revenue bonded warehouse. The stamps will be delivered to the storekeeper-gauger, who will give the rectifier or proprietor a receipt therefor. As spirits are bottled, the storekeeper-gauger will deliver to the proprietor of the establishment the required stamps for affixing to the bottles of spirits that have been tax paid.

(6) The storekeeper-gauger will keep a detailed daily record of stamps in record book No. 2115. The storekeeper-gauger will enter in the book the number of each denomination delivered to him by the proprietor, as required by paragraph 5, the number of each denomination received during the month, by dates, and the number of each denomination used during the month, showing the dates on which they were used.

(7) At the close of each month, or within five days thereafter, the storekeeper-gauger will prepare a report on Form 182, in triplicate, showing the number of each denomination on hand at the beginning of the month, the number of each donomination received during the month, the number of each denomination used during the month and the number of each denomination on hand at the end of the month. One copy of the report will be immediately forwarded to the district supervisor, one copy will be furnished to the proprietor of the establishment, and the storekeeper-gauger will retain one copy on file in the Government cabinet.

(8) If the proprietor employs a commercial printing concern to print the data required to be placed on the stamps, the storekeeper-gauger will, upon written request of the proprietor, deliver to him

the number of each denomination requested for such purpose. The request must show the name and address of the printing concern to whom they are to be sent. The storekeeper-gauger will keep a record of all stamps delivered to the proprietor for printing. The record must show the number of each denomination, the date, name and address of the printer, and upon return to him after printing, the storekeeper-gauger will enter the date thereof, noting whether the proper number of each denomination has been returned to him.

(9) Strip stamps denoting taxpayment may be stored in the cabinet used by proprietors of internal revenue bonded warehouses for the custody of bottled in bond strip stamps, provided that the cabinet is always located on the bonded premises and is convenient and accessible to the Government officer.

(10) Rectifiers who are authorized to bottle distilled spirits after tax payment, and who have fully complied with these and other applicable regulations, may, in the discretion of the district supervisor, be authorized to complete the bottling operations after sundown, provided that such authorization is confined to bottling of spirits which have been tax-paid and released from bottling tanks under the supervision of a Government officer, and that such spirits shall not be removed from the premises until the following morning.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 25, 1935.

L. W. ROBERT, JR.,
Acting Secretary of the Treasury.

XIV–15–7434
T. D. 4537

Amendment of Regulations No. 7, revised July 10, 1914, and Regulations No. 7, effective May 1, 1930.

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

To District Supervisors and Others Concerned:

1. Regulations No. 7, concerning the tax on distilled spirits, revised July 10, 1914, are amended as follows:

By striking from line 3, paragraph 2, page 75, the word "July" and substituting therefor the word "May."

2. Regulations No. 7, relative to the production, fortification, tax payments, etc., of wine and the production of grape brandy for fortification, effective May 1, 1930, are amended as follows:

By striking from line 2, paragraph 412, the word "July" and substituting therefor the word "May."

3. Persons engaged in business as distillers, using materials other than fruit, and operating a distillery (not concentration) warehouse, who continue in such business subsequent to April 30, 1935, must give a new distiller's annual warehousing bond, Form 359, on May 1, 1935, covering spirits to be deposited in the warehouse during the ensuing year, unless the spirits thereafter deposited each month are covered by distiller's monthly warehousing bond, Form 80. A

new annual warehousing bond (Form 359) must be filed on the 1st day of May in each succeeding year, if the distiller continues to deposit spirits in the warehouse, or monthly warehousing bonds (Form 80) may be given in lieu of the annual warehousing bond.

4. Where a distiller of fruit brandy has established a distillery bonded warehouse for the storage of brandy and the business of distilling and operation of the distillery bonded warehouse are to be continued subsequent to April 30, 1935, a new fruit distiller's annual warehousing bond, Form 79, must be filed on May 1, 1935, covering the brandy to be deposited in the warehouse during the period for which the bond is given, and on the 1st day of May in each succeeding year that the distiller continues to deposit brandy in the warehouse.

5. A distiller's annual warehousing bond, Form 359 or 79, filed on May 1, 1935, will cover spirits or brandy, as the case may be, entered for deposit in the distillery warehouse on said date, as well as the spirits or brandy deposited therein during the ensuing year. Distillers' annual warehousing bonds (359 and 79) filed July 1, 1934, will remain liable for payment of the tax imposed by law on all spirits or brandy deposited in the distillery warehouse during the period from July 1, 1934, to April 30, 1935, and will continue in force until all such spirits or brandy have been lawfully removed from the warehouse.

6. Until revised forms have been prepared and distributed, bond forms (359 and 79) now in use should continue to be accepted with the necessary alterations to conform to the regulations as amended.

7. These regulations do not apply to or affect the filing of distillers' production bonds, Forms 30 and 30½, concentration warehouseman's bond, Form 1521, and transportation and warehousing bond, Form 1522, required under the provisions of section 3260, United States Revised Statutes, and the Act providing for the concentration of distilled spirits.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 8, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–13–7406
T. D. 4536

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. Treasury Decision 4432 [C. B. XIII–1, 534], section 2, paragraph (*d*) which reads as follows:

(*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;

is amended by striking out, "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."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 22, 1935.

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

XIV–8–7326
T. D. 4525

Reports of plants and warehouses.

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

To District Supervisors and Others Concerned:

1. Paragraph 3, Treasury Decision 4479, approved October 4, 1934 [C. B. XIII–2, 574], is amended to read as follows:

One transcript only of wholesale liquor dealers' book, 52, rendered on Forms 52A, 52B, 370 (52C), and 338, will be submitted to the district supervisor.

2. This regulation shall become effective March 1, 1935.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 19, 1935.

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

XIV–11–7379
T. D. 4532

Reports of plants and warehouses.

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

To District Supervisors and Others Concerned:

Effective immediately, paragraph 2, Treasury Decision 4479, approved October 4, 1934 [C. B. XIII–2, 574], is amended to read as follows:

After auditing such reports, the following must be stamped thereon and signed by the auditing clerk:

"Audited:

---------- (Clerk) ---------- (Date)."

After audit, and not later than the last day of the month succeeding that for which the reports are rendered, the supervisor will transmit the Commis-

sioner's copies of such reports, so stamped, with the supervisor's monthly accounts, to the Deputy Commissioner, Alcohol Tax Unit, Washington, D. C.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 12, 1935.

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

XIV–4–7277
T. D. 4515

Winemakers' bonds.

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

To District Supervisors and Others Concerned:

1. A new winemaker's bond, Form 700, which combines the terms of winemakers' bonds, Forms 256, 699, and 699–A, has been adopted.

2. Bond on Form 700 must be in a penal sum sufficient to cover the tax at the rate provided by law for each gallon of wine, and each proof gallon of brandy withdrawn for fortification of wine, possessed at any one time at the bonded winery, and brandy in transit to the bonded winery, and fortified wines in transit therefrom to other bonded premises; and shall be not less than $500 nor more than $50,000 for a single bonded winery.

3. The penal sum of the bond, Form 700, filed by proprietors of bonded wineries, who are not engaged in the production of fortified wines, or proprietors of bonded wine storerooms, must be sufficient to cover the tax at the rate provided by law for each gallon of wine to be possessed at any one time at such establishments, and in transit therefrom to other bonded premises; and shall not be less than $500, nor more than $50,000 for a single winery or storeroom.

4. Bond on Form 700 shall be a continuing obligation and shall be in multiples of $100.

5. If the same person, firm, or corporation operates two or more bonded wineries, whether wines are or are not fortified therein, or bonded wine storerooms, a single blanket bond, Form 700, may be filed in lieu of the separate bond, or bonds. The penal sum of such blanket bond shall be equal to the total of the penal sums required for the separate establishments, but in no case shall the penal sum of the bond exceed $100,000.

6. Winemakers' bonds, Forms 256, 699, and 699–A in force and effect, need not be replaced by bonds on Form 700 at this time. However, where winemakers desire to file new bonds, Form 700, such bonds, if approved, shall be in lieu of, and not in addition to, the bonds theretofore filed. Winemakers continuing the business of fortifying wines during the next fiscal year must replace bonds on Forms 256 and 699–A by bonds on Form 700 not later than July 1, 1935.

7. Bond on Form 700 may be given with approved corporate surety, or by individual sureties (of which there must be two), or by the deposit of proper collateral.

8. The provisions of Regulations 18, Article XII, paragraph 15(*g*), *et seq.*, relating to the manufacture and tax payment of fer-

mented malt liquors, approved October 25, 1934, so far as applicable, are hereby extended to the execution (including the execution by one or more sureties), approval, disposition, relief of sureties, and release as to future liability of winemakers' bonds, Form 700.

9. A winemaker producing wine of an alcoholic content in excess of 3.2 per centum of alcohol by weight and wine containing not more than 3.2 per centum of alcohol by weight under the Act of March 22, 1933 (48 Stat., 16), may file consent of surety on Form 1533 extending the terms of his bond covering production of wine of the higher alcoholic content to cover production of wine of the lower alcoholic content, or the winemaker may file a separate permit bond on Form 109 to cover production of wine of such lower alcoholic content. A permit bond on Form 109 may not be accepted of a winemaker producing wine of the higher and lower alcoholic content to the exclusion of bonds on Forms 699, 699–A, or 700.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 18, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–20–7502
T. D. 4546

Fruit distillers' and winemakers' bonds.

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

To District Supervisors and Others Concerned:

1. A fruit brandy distiller, not operating a distillery bonded warehouse, who also operates a bonded winery, or wineries, or bonded storerooms, whether the establishments be in one or more districts, may furnish bond security for all such operations by filing fruit distiller's bond (Form 30½) with sureties (corporate or individual) or security, and winemaker's bond (Form 700) each in the maximum penal sum of $100,000, the winemaker's bond (Form 700) being given without sureties or security and supported by the consent of the obligors on the fruit distiller's bond (Form 30½) executed on Form 1533. The consent, in such case, must also contain a provision that, in the event the fruit distiller's bond (Form 30½) is for any reason suspended or rendered inoperative during its term, liability thereunder shall continue so as to support the winemaker's bond (Form 700). When the fruit distiller's bond (Form 30½) is renewed on May 1 of each year, a new consent of the obligors thereon must be executed to support the winemaker's bond (Form 700).

2. If a fruit brandy distiller, operating a distillery bonded warehouse, gives fruit distiller's annual warehousing bond (Form 79) with sureties or security in a penal sum not less than $500 nor more than $100,000 to cover his distillery warehouse, and production bond (Form 30½) in the maximum penal sum of $100,000 with sureties or security, he may, with the consent of the obligors on the production bond, as provided in the first paragraph hereof, support his winemaker's bond (Form 700).

3. Fruit brandy distillers who desire to take advantage of either of the above privileges, effective as of May 1, 1935, may do so by substituting the bonds and consents described for their present bonds.

4. Except as modified by this Treasury decision, the provisions of prior regulations shall remain in force and effect.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 14, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV-7-7322
Mim. 4286

Application of Federal Alcohol Control Administration general regulations relating to the nonindustrial use of distilled spirits, series 4, and Treasury Decisions 4516 [page 499, this Bulletin] and 4517 [page 519, this Bulletin].

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 31, 1935.

District Supervisors, Collectors of Internal Revenue, and Others Concerned:

Section 3(a)1 of Federal Alcohol Control Administration general regulations relating to nonindustrial use of distilled spirits, series 4, defines the industrial use of alcohol, other distilled spirits and wine to include certain manufacturing uses, where the resulting products are unfit for beverage purposes. These uses are, among others, the manufacture by retail druggists of medicinal, pharmaceutical, and antiseptic products, and the compounding of physicians' prescriptions. Section 4(b) of such regulations places a limitation upon the capacity of the container in which nonindustrial spirits may be packaged, limiting such capacity to a gallon or less.

Heretofore alcohol, except as it was used in the production of beverage liquors, was, in the absence of a definite pronouncement by the Federal Alcohol Control Administration on the subject, dealt with by this Bureau as a chemical raw material and its use as industrial. The packaging of alcohol in any container was permitted, and no distinction was made as to the classes of persons who might receive alcohol in bulk, repackage it, and obtain stamps under Title II of the Liquor Taxing Act of 1934 (section 7, Treasury Decision 4418 [C. B. XIII-1, 522], as amended).

To bring alcohol for nonindustrial uses under the Treasury Department's regulations requiring the packaging of spirits in marked bottles, Regulations 13 have been extended by Treasury Decision 4517 to include alcohol, and to permit proprietors of industrial alcohol plants, among others, to obtain marked liquor bottles for packaging alcohol. Treasury Decision 4418 was also further amended by Treasury Decision 4516, by striking from section 7 (a) and (b) the phrase "and retail druggists and wholesale dealers authorized to bottle and sell alcohol for nonbeverage purposes" and by inserting in lieu thereof (in 7(a)) the phrase "to wholesale dealers engaged in packaging alcohol for industrial use in containers having a capac-

ity in excess of 1 and less than 5 wine gallons." The words "industrial alcohol plants, and" were also inserted after the words "proprietors of" in these subdivisions of section 7.

The effect of these amendments is (1) to permit proprietors of industrial alcohol plants, and rectifiers, and wholesale dealers authorized to bottle spirits, who engage in packaging alcohol for nonindustrial use, to obtain marked bottles and red strip stamps; (2) to prevent retail druggists, and wholesale dealers who are not rectifiers, from packaging alcohol in containers having a capacity of 1 gallon or less; and (3) to permit the procurement of such stamps by wholesale dealers and proprietors of industrial alcohol plants engaged in packaging alcohol for industrial purposes in containers of a capacity in excess of 1 and less than 5 wine gallons. As such latter containers, it is understood, are not now used commercially, strip stamps of the proper denominations are not available at present. Until such stamps are issued, gallon stamps may be obtained for the purpose and changed to state the exact quantity of alcohol in the containers in the manner provided by Treasury Decision 4420 [C. B. XIII–1, 526]. Containers of alcohol for industrial use, of a capacity of 5 wine gallons, or greater, will bear the stamps now provided by law and regulations.

Proprietors of industrial alcohol plants, and others included by Regulations 13, must use the same symbols and warning for alcohol bottles as they are now using for bottles of other spirits.

The effective date of both Treasury Decisions 4516 and 4517 is April 15, 1935. The period between January 22, 1935 (the date of issuance of the Treasury decisions) and April 15 was allowed for trade readjustments, including the packaging of alcohol in unmarked containers and the disposition of alcohol already packaged. This does not mean that the Federal Alcohol Control Administration regulations, which went into effect immediately, are postponed, or that, prior to April 15, alcohol for nonindustrial purposes may not be packaged in marked bottles, or strip stamps obtained for industrial alcohol packages.

Correspondence relative to the instructions set forth herein should refer to the number of this mimeograph and to the symbol AT.

GUY T. HELVERING,
Commissioner.

XIV–15–7435
T. D. 4538

Duties of storekeeper-gaugers and distillers at whisky, rum, and gin distilleries.

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

To District Supervisors and Others Concerned:

1. Except with the express approval of the Deputy Commissioner, Alcohol Tax Unit, not more than one storekeeper-gauger (exclusive of the storekeeper-gauger in charge, where one is assigned) will be assigned to any whisky, rum, or gin distillery for each 8-hour shift

for the immediate supervision of the operations of the still house, fermenting room, and meal room.

2. Distillers will weigh, or measure (in the case of molasses), all materials received on the distillery premises and all materials used for the production of mash, wort, beer, or distilled spirits, recording such data (on Forms 12 and 13) as prescribed by section 3303, R. S. (26 U. S. C. A., 314). They will prepare weight (or quantity) slips for all materials received and used, at the time of weighing or measuring, and furnish signed copies to the storekeeper-gauger. Distillers will also determine and record in book Form 25, in accordance with the provisions of such section, the time of the day when any yeasting or other composition is put into any mash or beer for the purpose of exciting fermentation; the quantity of mash in each tub; the number of dry inches; the gravity and temperature of the beer at the time of filling, at 12 o'clock noon on every day thereafter, and at the time of emptying; and the time when any fermenting tub is emptied of ripe mash or beer.

3. No materials shall be received on the premises of any whisky, rum, or gin distillery, or used for the production of distilled spirits, or for any other purpose, except when the storekeeper-gauger is present on the distillery premises. Storekeeper-gaugers assigned to such distilleries, however, will not be required personally to weigh or measure materials received upon such premises or materials used for the production of distilled spirits. The storekeeper-gauger in charge will unlock the material room and hoppers at the commencement of each day's operations, and lock them at the close of business each day, giving employees of the distillery access to materials during the day under his general supervision.

4. Similarly, storekeeper-gaugers assigned to such distilleries will not be required to determine the temperature and gravity of the mash or beer in fermenting tubs, or ascertain the number of dry inches, or to record such items in book Form 17, "Record of storekeeper-gaugers at registered distilleries," or Form 88, "Storekeeper-gauger's monthly abstract." They will, however, make such spot tests of materials in fermenting tubs as may be necessary to determine the accuracy of the distiller's entries in book Form 25.

5. The storekeeper-gauger in charge will see that distillers maintain and keep current the records above referred to. He will make such inspections and tests of the distiller's records and operations as may be necessary to insure that they are complete and accurate. He will exercise general supervision over all operations and transactions conducted by the distiller and his employees.

6. Storekeeper-gaugers will record all materials received on the distillery premises (but not the data as to the conveyances by which such materials are delivered), and all materials used for the production of mash, wort, beer, or distilled spirits (in part 1 of book Form 17) as prescribed by section 3302, R. S. (26 U. S. C. A., 365). Information as to materials received will be obtained from the weight slips and compared with the distiller's commercial records and book Form 12. Information as to materials used will be obtained from the weight slips and compared with the distiller's record, book Form 13.

7. Storekeeper-gaugers will record in part 2 of book Form 17, "Record of yeasting, gravity, temperature, dry inches and the

quantity of mash or beer in fermenting tubs in distillery," the time when any fermenting tub is emptied of ripe mash or beer, and the number of each tub. These items will be entered in the columns designated "Number of tub," "At time tubs are emptied," "Date," and "Hour." No other entries in part 2 will be required.

8. Storekeeper-gaugers will submit on monthly report Form 88 only the items required on page 1 (but not the column designated "Slop or spent beer"), and the items on the last page (but not the summary statement "Beer account"). No entries will be made on page 2.

9. This Treasury decision will become effective on May 1, except that the provisions of paragraph 8 shall be effective for the month of April.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved April 9, 1935.
H. MORGENTHAU, Jr.
Secretary of the Treasury.

XIV–21–7518
T. D. 4551

Form 1477 to be filed annually.

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

To District Supervisors and Others Concerned:

Form 1477, Application for permit to procure specially denatured alcohol, by persons holding permits on Form 1476 or Form 1481, will hereafter be approved by district supervisors for one year. Not more than one-twelfth of the amount of specially denatured alcohol authorized by a permit Form 1477 may be procured in any one calendar month, and withdrawals must be so regulated that the permittee will not have on hand, in transit and unaccounted for, during any calendar month, more than the quantity fixed in his basic permit, Form 1476 or Form 1481.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 21, 1935.
T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–25–7560
T. D. 4559

Regulations concerning Forms 27–A, 27½, 27–B, 27–C, and 1431.

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

To District Supervisors and Others Concerned:

1. Form 27–A (Notice by distillers) and Form 27½ (Fruit distiller's notice) shall be filed by proprietors of distilleries before

engaging in the business of distillation and thereafter as of May 1 each year by those continuing in said business.

2. Form 27–B (Notice by rectifiers) and Form 27–C (Notice by brewers) shall be filed by the rectifier or brewer before commencing business. The filing of new notices (Forms 27–B and 27–C) annually will not be required.

3. Form 1431 (Application for permit to operate industrial alcohol plant, bonded warehouse, and denaturing plant, under Title III of the National Prohibition Act, and Regulations 3) shall be filed by persons desiring to obtain original permits to operate such establishments, and applications (Form 1431) for renewal of permits under said Act and regulations shall be filed with district supervisors not later than September 15 of each year.

4. The Commissioner or the district supervisor may at any time require the filing of new notices or applications on the forms mentioned, with any additional information desired.

5. In the case of corporations and similar legal entities, there shall be filed, on separate sheets, at the commencement of business and annually thereafter as of May 1, or the nearest dividend date within 60 days thereof, a list of stockholders, and a statement under the seal, if any, of the corporation or other legal entity, showing the number of shares of stock or voting trust certificates authorized and outstanding, the par value thereof and the voting rights of the owners, accompanied by an affidavit as to the correctness of such list and statement, which affidavit shall be executed by some official of the corporation or other legal entity duly authorized to execute the same.

6. All rulings and decisions not in harmony with the foregoing are hereby rescinded.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 13, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV–4–7276
T. D. 4514

Requiring, in certain cases, return of income, war-profits, and excess-profits, in connection with property which is or has been in the custody of the United States under the Trading with the Enemy Act; amending Treasury Decision 4168.

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

To Collectors of Internal Revenue and Others Concerned:

Article III(h) of Treasury Decision 4168 (C. B. VII–2, 413), approved June 21, 1928, is hereby amended to read as follows:

(h) *Returns.*—It should be noted that in many cases allowance of deductions and credits will be contingent upon the making of a return in accordance with the applicable Revenue Act. The submission of evidence in accordance with subdivision (f), above, will be considered as the making of the return required by any such Revenue Act only (1) for any taxable period ending on or before December 31, 1934, during which all or part of the property of the

taxpayer was held by the Attorney General or the Alien Property Custodian, or (2) for any taxable period ending within one year from the date of the first release to the taxpayer, under section 9 [exclusive of subdivisions (9) and (10) of subsection (b)] of the Trading with the Enemy Act, as amended by the Settlement of War Claims Act of 1928, of property held by the Attorney General or the Alien Property Custodian, whichever period ends later. In all other cases a return will be required in accordance with the applicable Revenue Act and the applicable income tax regulations.

WRIGHT MATTHEWS,
Acting Commissioner of Internal Revenue.

Approved January 18, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV-7-7320
T. D. 4522

Elimination of requirement for receipts in connection with credits claimed on Form 630. Treasury Decision 1565 revoked.

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

To Collectors of Internal Revenue and Other Officers and Employees Concerned:

Treasury Decision 1565, dated November 22, 1909, provides as follows:

By reason of the requirements of the Auditor for the Treasury Department, hereafter each claim for allowance in stamp account on Form 630 must be accompanied by a receipt from each party to whom a stamp covered by the claim is issued. This receipt should be dated, and should give the name, number, and value of each stamp.

The above mentioned Treasury decision is hereby revoked, effective March 1, 1935.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved February 7, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

XIV-17-7460
Mim. 4317

Issuance of new green cards entitling attorneys and agents to practice before the Treasury Department.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 3, 1935.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, District Supervisors, Deputy Commissioners, and Other Officers and Employees Concerned:

The Bureau is in receipt of a memorandum from the secretary, Committee on Enrollment and Disbarment of the Treasury Depart-

ment, which is quoted below for the information and guidance of all concerned:

The new green cards entitling attorneys and agents to practice before the Treasury Department will be mailed by the Committee on Enrollment and Disbarment April 1, 1935. Thirty days will be allowed for getting these into the hands of the entire enrolled membership. Until May 1, 1935, either the white or green permanent card may be recognized. After that date, only the green card is to be recognized. Temporary cards will continue to be white.

Officials and employees of the Bureau will be governed by the instructions contained in the above-quoted memorandum, and after May 1, 1935, will not recognize any attorney or agent who is not able to present for their inspection either a new green permanent card or a white temporary card. The white temporary card is effective for a period of six months from the date of issuance.

Correspondence with respect to the instructions contained in this mimeograph should be addressed to the Commissioner of Internal Revenue, attention Pub. Rel.

GUY T. HELVERING,
Commissioner.

XIV-23-7541
T. D. 4556

Bureau of Internal Revenue.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., May 29, 1935.

To Commissioner of Internal Revenue, Commissioner of Narcotics, Internal Revenue and Narcotic Officials, and Other Officials and Employees of the Treasury Department Concerned:

1. Section 4 of the Act entitled "An Act of Congress to create a Bureau of Customs and a Bureau of Prohibition in the Department of the Treasury," approved March 3, 1927 (U. S. C., title 5, section 281c), reads as follows:

SEC. 4. (a) The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of beverages, intoxicating liquors, or narcotic drugs, or by the National Prohibition Act, as amended, or any other law relating to the enforcement of the eighteenth amendment, are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury.

(b) The Secretary of the Treasury is authorized to confer or impose any of such rights, privileges, powers, and duties upon the Commissioner of Prohibition, or any of the officers or employees of the Bureau of Prohibition, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

2. Section 3(b) of the Act of Congress entitled "An Act to create in the Treasury Department a Bureau of Narcotics, and for other purposes," approved June 14, 1930, prescribes as follows:

(b) The Secretary of the Treasury is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs enumerated in subdivision (a) of section 4 of the Act entitled "An Act to create a Bureau of Customs and a Bureau of Prohibition in the Department

of the Treasury," approved March 3, 1927 (U. S. C., title 5, section 281c), upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics.

3. (A) In conformity with, and under authority conferred by, the above sections, the Secretary of the Treasury on July 1, 1930, issued an order (Treasury Decision 2—Bureau of Narcotics) prescribing the duties and powers of the Commissioner and other employees of the Bureau of Narcotics, including the field service, and transferring certain personnel, records, and property from the Bureau of Prohibition in the Treasury Department to the Bureau of Narcotics. Section VIII of such order reserved the right to revoke such order or any provision thereof at any time.

(B) Section III, paragraph (1)(h) of the order of July 1, 1930, conferred and imposed the following rights, privileges, powers, and duties upon the Commissioner of Narcotics:

(h) The compromise of any criminal or civil case arising under either of the above laws, in accordance with section 3229 of the Revised Statutes of the United States, and the determination, assertion, and compromise of liability for internal revenue taxes and penalties under either of the above laws, except that all moneys shall be received and accounted for by collectors of internal revenue, under the direction of the Commissioner of Internal Revenue.

4. Pursuant to the provisions of section 4(b) of the Act of Congress approved March 3, 1927, and section 3(b) of the Act of Congress approved June 14, 1930, quoted herein, and in the exercise of authority conferred upon me by these laws, Section III, paragraph (1)(h) of the order (Treasury Decision 2—Bureau of Narcotics) is hereby amended to read as follows, such amendment to become effective immediately upon the approval of this order:

III.

RIGHTS, PRIVILEGES, POWERS, AND DUTIES CONFERRED AND IMPOSED UPON THE COMMISSIONER OF NARCOTICS.

(1) * * *

(h) The compromise of any criminal liability (except as relates to delinquency in registration and delinquency in payment of tax) arising under either of the above laws, in accordance with section 3229 of the Revised Statutes of the United States, and the recommendation for assessment of civil liability for internal revenue taxes and ad valorem penalties under either of the above laws.

5. The rights, privileges, powers, and duties conferred and imposed upon the Commissioner of Internal Revenue by Section V of the order (Treasury Decision 2—Bureau of Narcotics), are hereby extended to include (1) the compromise of any civil liability involving delinquency to registration, delinquency in payment of tax, and ad valorem penalties, and of any criminal liability incurred through delinquency in registration and delinquency in payment of tax, in connection with the said Acts of January 17, 1914, and December 17, 1914, as amended, in accordance with section 3229 of the Revised Statutes of the United States, (2) the determination of liability for and the assessment and collection of special taxes imposed by the said Acts of January 17, 1914, and December 17, 1914, as amended, (3) the determination of liability for and the assessment and collection of the ad valorem penalties imposed by section 3176 of the Revised Statutes of the United States, as amended, for delinquency in

registration, and (4) the determination of liability for and the assertion of the specific penalty imposed by the said Act of December 17, 1914, as amended, for delinquency in registration and payment of tax.

In any case where a general offer is made in compromise of civil and criminal liability ordinarily compromisable hereunder by the Commissioner of Internal Revenue and of criminal liability ordinarily compromisable hereunder by the Commissioner of Narcotics, the case may be jointly compromised by these officers, in accordance with section 3229 of the Revised Statutes of the United States.

6. The right to amend or supplement this order or any provision thereof from time to time, or to revoke this order or any provision thereof at any time, is hereby reserved.

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

XIV–11–7375
Mim. 4298

Symbols for use in correspondence.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 23, 1935.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, District Supervisors, Deputy Commissioners, and Other Officers and Employees Concerned:

The following directions supersede those contained in Mimeograph 4071 [C. B. XII–2, 493] and all other instructions in conflict herewith. Also, section 66, Part I, of the Internal Revenue Manual is amended to conform to the following:

Every letter prepared in the Bureau in Washington will bear in the upper left-hand corner of the first page, and immediately below the instructions "Address reply to," etc., a symbol that will indicate the office of origin: *Provided*, That this practice will not apply to congressional correspondence or to letters prepared for signature by others than officials of this Bureau.

Every letter addressed to the Bureau by a field office, if it is in reply to a communication from the Bureau, will bear immediately above the body of the letter and near the center of the sheet the symbol that appears in the communication that is being answered; thus, "Attention: IT:AR:B3:STK." If the letter is not in reply to a Bureau communication, the symbol of the unit, division, or section in the Bureau concerned will be indicated in the same manner, provided there is no question as to the proper symbol; *if any doubt exists, no symbol whatever will be used.*

Where a field office uses a system of symbols in conducting its correspondence, the symbol used in this connection will be placed in the upper left-hand corner of the first sheet of each letter addressed to the Bureau just below the instructions "In reply refer to." The Bureau letter, if any, replying to such communication will show the field office symbols above the body of the letter in the same manner as is prescribed in the next preceding paragraph.

Envelopes with printed or typewritten address will be used by field offices in transmitting mail to the Bureau rather than window envelopes. Also, every such envelope or wrapper will bear in the lower left-hand corner of the face thereof the same symbol that is quoted in the communication which it incloses. There is no objection to forwarding in one envelope a number of communications intended for the same unit or division of the Bureau; in fact, this is desirable. Under no circumstances, however, should correspondence pertaining to the work of one unit be inclosed in an envelope addressed to another unit.

Information which will assist the field officer in determining the destination of correspondence that is not in reply to Bureau letters may be obtained by directing an inquiry to the Administrative Division, Communication Section.

Only one subject will be treated in any one letter.

The following represents the organization and symbols used:

OFFICE OF THE COMMISSIONER.

Ad—Administrative Division.
Ad: C—Communication Section.
Ad: PB—Printing and Binding Section.
Ad: SL—Space and Lease Section.
Ad: SE—Supplies and Equipment Section.
P—Personnel Division.
Pub. Rel.—Public Relations Division.
SD—Special Deputy Commissioner.
SD: Tn—Training Division.
TS—Technical Staff.

ACCOUNTS AND COLLECTIONS UNIT.

A & C: DC—Deputy Commissioner.
A & C: AD—Assistant Deputy Commissioner.
A & C: D—Disbursement Accounting Division.
A & C: Col—Collection Accounting Division.
A & C: PES—Collectors' Personnel, Equipment, and Space Division.

ALCOHOL TAX UNIT.

AT: 1—Deputy Commissioner.

LEGAL DIVISION.

AT: 2—Legal Advisor.

ADMINISTRATIVE.

AT: 3—Assistant to Deputy Commissioner.
AT: 31—Procedure Division.
AT: 32—Field Inspection.
AT: 33—Personnel and Supply Division.
AT: 34—Statistical Section.

ENFORCEMENT.

AT: 4—Assistant Deputy Commissioner (Enf.).
AT: 41—Chief of Enforcement Division.
AT: 42—Case Report Section.
AT: 43—Sugar and Molasses Section.
AT: 44—Pardon and Parole Section.
AT: 45—Enforcement Files Section.

PERMISSIVE.

AT:5—Assistant Deputy Commissioner (Perm.).
AT:51—Laboratory Division.
AT:52—Chief of Audit Division.
AT:53—Bonded Accounts Section.
AT:54—Tax Section.

OFFICE OF THE ASSISTANT GENERAL COUNSEL.

GC:A—Appeals Division.
GC:C—Civil Division.
GC:C:C—Compromise Section.
GC:I—Interpretative Division.
GC:L & R—Legislation and Regulations Division.
GC:P—Penal Division.
GC:R—Review Division.
GC:Ad—Administrative Division.
Mails and Records Section.
Library and Manuscript Section.
Reorganization Section.

INCOME TAX UNIT.

IT:E—Deputy Commissioner.
Assistant Deputy Commissioner.
IT:E:Aj—Special Adjustment Section.
IT:E:C—Conference Section.
IT:E:RR—Rules & Regulations Section.
IT:E:Sr—Service Section.
IT:E:F—Field Procedure Division.

AUDIT REVIEW DIVISION.

IT:AR—Head of Division.
IT:AR:A—Section A.
IT:AR:B—Section B.
IT:AR:C—Section C.
IT:AR:D—Section D.
IT:AR:E—Section E.
IT:AR:RU—Review Unit.

CLEARING DIVISION.

IT:C—Head of Division.
IT:C:CC—Claims Control Section.
IT:C:P—Proving Section.
IT:C:St—Statistical Section.

RECORDS DIVISION.

IT:R—Head of Division.
IT:R:F—Files Section.
IT:R:S—Sorting Section.

VALUATION DIVISION.

IT:V—Head of Division.
IT:V:Ap—Appraisal Section.
IT:V:M—Mining Section.
IT:V:OG—Oil & Gas Section.
IT:V:Se—Securities Section.
IT:V:T—Timber Section.

INTELLIGENCE UNIT.

SI—Chief, Intelligence Unit.

MISCELLANEOUS TAX UNIT.

MT: DC—Deputy Commissioner.
MT: CST—Capital Stock Tax Division.
MT: ET—Estate Tax Division.
MT: PT—Processing Tax Division.
MT: ST—Sales Tax Division.
MT: Sil—Silver Tax Division.
MT: T—Tobacco Division.

WRIGHT MATTHEWS,
Acting Commissioner.

PUBLIC, NO. 373, APPROVED JUNE 18, 1934.

REGULATIONS 17, ARTICLE I: Definitions. XIV–12–7388
T. D. 4533

Amending Article I, Article II, and Article III of Regulations No. 17, approved September 11, 1934.

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

To District Supervisors and Others Concerned:

Paragraph (d) of Article I, of Regulations No. 17, is amended to read as follows:

(d) "Substance" shall mean cane molasses of the grade commonly known as blackstrap molasses; dehydrated molasses; corn sugar, beet sugar, and cane sugar; hydrol; sugar sirup, i. e. any known corn derivative containing more than 60 per cent reducing sugar calculated as dextrose on a dry basis; yeast; cider; malt; oak chips, charred and not charred.

* * * * * * *

REGULATIONS 17, ARTICLE II: Returns. XIV–12–7389
T. D. 4533

* * * * * * *

The first paragraph of Article II [of Regulations 17] is amended to read as follows:

Every person in the United States who consigns, sells or otherwise disposes of any substance, as defined in paragraph (d) of Article I of these regulations, shall, when required in writing by the Commissioner or supervisor, render in writing a correct return under oath showing (1) the date of the consignment, sale, or other disposition of the substance; (2) the quantity and kind of the substance consigned, sold, or otherwise disposed of; (3) the name and complete address of the purchaser, or person to whom disposition is made, and if the sale or disposition is made by or through any other person, the name and complete address of such other person; (4) the name and complete address of the consignee; (5) the date and method of shipment or delivery, such as by truck, or other conveyance, and the State or city registration number of such truck, or other conveyance, if any; (6) the name and complete address of the driver of such truck, or other conveyance, as shown by the driver's operator's license, if any, giving the number of the license and the date of issuance; (7) the name and complete address of the person to whom actual delivery has been, or is to be, made; and (8) the exact date of such delivery, or proposed delivery. Where shipment is made by a common carrier, such as a railroad, trucking company, steamboat line, etc., the information required by subdivisions (5) and (6) of this article need not be reported, but in lieu thereof there shall be furnished the complete routing of the shipment.

* * * * * * *

REGULATIONS 17, ARTICLE III: Records. XIV–12–7390
T. D. 4533

* * * * * * *

Article III [of Regulations 17] is amended by inserting therein, after the word "packages" appearing at the end of subdivision (c), the following:

(*d*) 100 gallons cider; (e) 250 pounds malt; (f) 300 pounds of dehydrated molasses; (g) 250 gallons of hydrol or sugar sirup.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 14, 1935.

T. J. COOLIDGE,
Acting Secretary of the Treasury.

H. R. 4304. PUBLIC, NO. 3, SEVENTY-FOURTH CONGRESS.

XIV–9–7346

AN ACT To amend the Second Liberty Bond Act, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Second Liberty Bond Act, as amended, is further amended as follows:

* * * * * * *

SEC. 6. The Second Liberty Bond Act, as amended, is further amended, by adding a new section, as follows:

SEC. 22. (a) The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, bonds of the United States to be known as "United States Savings Bonds." The proceeds of the Savings Bonds shall be available to meet any public expenditures authorized by law and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the Savings Bonds shall be in such forms, shall be offered in such amounts within the limits of section 1 of this Act, as amended, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b) and (c) hereof, and including any restriction on their transfer, as the Secretary of the Treasury may from time to time prescribe.

(b) Each Savings Bond shall be issued on a discount basis to mature not less than 10 nor more than 20 years from the date as of which the bond is issued, and provision may be made for redemption before maturity upon such terms and conditions as the Secretary of the Treasury may prescribe: *Provided*, That the issue price of Savings Bonds and the terms upon which they may be redeemed prior to maturity shall be such as to afford an investment yield not in excess of 3 per centum per annum, compounded semiannually. The denominations of Savings Bonds shall be in terms of their maturity value and shall not be less than $25. It shall not be lawful for any one person at any one time to hold Savings Bonds issued during any one calendar year in an aggregate amount exceeding $10,000 (maturity value).

(c) The provisions of section 7 of this Act, as amended (relating to the exemptions from taxation both as to principal and as to interest of bonds issued under authority of section 1 of this Act, as amended), shall apply as well to the Savings Bonds; and, for the purposes of determining taxes and tax exemptions, the increment in value represented by the difference between

the price paid and the redemption value received (whether at or before maturity) shall be considered as interest. The Savings Bonds shall not bear the circulation privilege.

SEC. 7. Section 1126 of the Revenue Act of 1926 is amended by adding at the end thereof the following: "In order to avoid the frequent substitution of securities such rules and regulations may limit the effect of this section, in appropriate classes of cases, to bonds and notes of the United States maturing more than a year after the date of deposit of such bonds as security. The phrase 'bonds or notes of the United States' shall be deemed, for the purposes of this section, to mean any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States."

Approved February 4, 1935.

XIV–18–7474

H. R. 6359. PUBLIC, NO. 40, SEVENTY-FOURTH CONGRESS.

An Act To amend certain provisions relating to publicity of certain statements of income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 55(b) of the Revenue Act of 1934 relating to filing and making public certain income statements is amended to read as follows:

(b) (1) All income returns filed under this title for any taxable year beginning after December 31, 1934 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in paragraph (2). The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection on behalf of such official, body, or commission. The inspection shall be made in such manner, and at such times and places, as shall be prescribed by regulations made by the Commissioner with the approval of the Secretary.

(2) Any information thus secured by any official, body, or commission of any State may be used only for the administration of the tax laws of such State, except that upon written request of the governor of such State any such information may be furnished to any official, body, or commission of any political subdivision of such State, lawfully charged with the administration of the tax laws of such political subdivision, but may be furnished only for the purpose of, and may be used only for, the administration of such tax laws. Any officer, employee, or agent of any State or political subdivision, who divulges (except as authorized in this subsection, or when called upon to testify in any judicial or administrative proceeding to which the State or political subdivision, or such State or local official, body, or commission, as such, is a party) any information acquired by him through an inspection permitted him or another under this subsection shall be guilty of a misdemeanor and shall upon conviction be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or both.

Approved April 19, 1935.

OLEOMARGARINE.

XIV–1–7234
MS. 158

Schedule of oleomargarine produced and materials used during the month of November, 1934, as compared with November, 1933.

	November, 1934.	November, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 28,638,793	[2] 23,724,099
Total withdrawn tax-paid	28,085,152	22,798,520
Ingredient schedule for uncolored oleomargarine:		
Butter	100	477
Cocoanut oil	12,745,834	14,242,567
Corn oil		40,805
Cottonseed oil	7,277,559	1,909,316
Derivative of glycerine	63,775	62,187
Lecithin	991	304
Milk	6,506,383	5,703,204
Neutral lard	344,051	788,755
Oleo oil	1,724,445	1,743,154
Oleo stearine	217,584	269,116
Oleo stock	159,283	40,965
Palm oil	13,550	51,435
Peanut oil	356,557	261,790
Salt	1,718,024	1,382,855
Soda (benzoate of)	10,671	9,854
Sugar		11,517
Vegetable oil	739	
Total	31,139,546	26,521,301
Total production of colored oleomargarine	[3] 169,755	218,559
Total withdrawn tax-paid	57,962	39,540
Ingredient schedule for colored oleomargarine:		
Butter	35	57
Cocoanut oil	41,645	64,125
Color	137	204
Cottonseed oil	45,066	29,098
Derivative of glycerine	154	302
Milk	45,541	61,686
Neutral lard	13,109	13,254
Oleo oil	39,942	65,086
Oleo stearine	510	1,762
Oleo stock	780	315
Palm oil	300	8,200
Peanut oil	2,813	1,849
Salt	11,324	17,248
Soda (benzoate of)	21	15
Sugar		15
Vegetable oil	75	
Total	201,452	263,216

[1] Of the amount produced, 24,794 pounds were reworked.
[2] Of the amount produced, 4,552 pounds were reworked.
[3] Of the amount produced, 537 pounds were reworked.

XIV–6–7306
MS. 159

Schedule of oleomargarine produced and materials used during the month of December, 1934, as compared with December, 1933.

	December, 1934.	December, 1933.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 30,346,741	[2] 21,045,338
Total withdrawn tax-paid	29,769,335	20,798,767
Ingredient schedule for uncolored oleomargarine:		
Butter	150	35
Cocoanut oil	13,730,137	12,920,437
Corn oil		11,965
Cottonseed oil	7,513,696	1,729,576
Derivative of glycerine	71,808	56,595
Lecithin	733	232
Milk	6,843,414	5,009,851
Neutral lard	405,117	667,026
Oleo oil	2,051,074	1,187,742
Oleo stearine	283,565	216,064
Oleo stock	171,356	35,512
Palm oil	2,525	33,650
Peanut oil	316,160	244,264
Salt	1,799,543	1,228,876
Soda (benzoate of)	10,487	7,895
Soya bean oil	24,413	
Sugar		7,471
Vegetable oil	175	
Total	33,224,353	23,357,191
Total production of colored oleomargarine	123,137	340,474
Total withdrawn tax-paid	57,334	34,772
Ingredient schedule for colored oleomargarine:		
Butter	35	
Cocoanut oil	41,047	108,062
Color	101	304
Cottonseed oil	19,384	55,855
Derivative of glycerine	271	405
Milk	36,634	96,639
Neutral lard	10,453	28,509
Oleo oil	29,446	79,268
Oleo stearine	140	8,926
Oleo stock	395	4,638
Palm oil	200	
Peanut oil	1,190	1,606
Salt	8,596	27,226
Soda (benzoate of)	3	3
Sugar		29
Total	147,895	411,480

[1] Of the amount produced, 28,931 pounds were reworked.
[2] Of the amount produced, 4,839 pounds were reworked.

XIV–10–7361
MS. 160

Schedule of oleomargarine produced and materials used during the month of January, 1935, as compared with January, 1934.

	January, 1935.	January, 1934.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 33,338,513	[2] 17,626,472
Total withdrawn tax-paid	33,126,541	18,388,960
Ingredient schedule for uncolored oleomargarine:		
Butter	368	1,575
Cocoanut oil	14,351,756	10,468,150
Corn oil		600
Cottonseed oil	8,980,979	1,494,492
Derivative of glycerine	88,875	44,166
Lecithin	1,326	288
Milk	7,636,998	4,242,931
Neutral lard	415,534	815,841
Oleo oil	2,199,924	1,176,943
Oleo stearine	240,842	257,852
Oleo stock	229,085	23,565
Palm oil		31,124
Peanut oil	383,683	219,995
Salt	1,951,698	1,026,892
Soda (benzoate of)	15,846	7,030
Soya bean oil	6,931	
Sugar		9,228
Total	36,503,848	19,820,582
Total production of colored oleomargarine	[3] 293,785	[4] 243,885
Total withdrawn tax-paid	68,052	32,150
Ingredient schedule for colored oleomargarine:		
Butter	25	
Cocoanut oil	76,405	90,224
Color	172	199
Cottonseed oil	34,057	41,737
Derivative of glycerine	273	134
Milk	94,191	69,590
Neutral lard	17,412	20,355
Oleo oil	95,042	42,978
Oleo stearine	4,475	7,050
Oleo stock	1,780	305
Peanut oil	4,567	1,276
Salt	21,041	21,274
Soda (benzoate of)	12	2
Sugar		60
Sunflower oil	13,750	
Total	363,202	295,184

[1] Of the amount produced, 8,513 pounds were reworked.
[2] Of the amount produced, 12,244 pounds were reworked.
[3] Of the amount produced, 12 pounds were reworked.
[4] Of the amount produced, 10 pounds were reworked.

XIV–14–7417
MS. 161

Schedule of oleomargarine produced and materials used during the month of February, 1935, as compared with February, 1934.

	February, 1935.	February, 1934.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 41,551,563	[2] 21,339,483
Total withdrawn tax-paid	41,599,445	21,648,593
Ingredient schedule for uncolored oleomargarine:		
Butter	600	950
Cocoanut oil	17,187,775	12,670,156
Corn oil		500
Cottonseed oil	12,121,444	1,849,016
Derivative of glycerine	165,241	54,624
Lecithin	1,308	451
Milk	9,512,070	4,971,649
Neutral lard	491,331	889,846
Oleo oil	2,512,820	1,492,919
Oleo stearine	213,727	246,015
Oleo stock	309,668	25,289
Palm oil		16,732
Peanut oil	613,714	192,676
Salt	2,448,348	1,173,343
Soda (benzoate of)	20,796	7,994
Soya bean oil	26,022	
Sugar		10,410
Vegetable oil	39,805	
Total	45,664,669	23,602,570
Total production of colored oleomargarine	[3] 343,027	232,739
Total withdrawn tax-paid	120,946	34,922
Ingredient schedule for colored oleomargarine:		
Butter	44	
Cocoanut oil	94,104	74,906
Color	286	177
Cottonseed oil	49,869	40,382
Derivative of glycerine	492	83
Milk	109,824	69,563
Neutral lard	13,972	21,819
Oleo oil	103,077	48,603
Oleo stearine	3,107	5,740
Oleo stock	6,260	175
Peanut oil	424	1,836
Salt	24,731	19,061
Soda (benzoate of)	21	9
Sugar		49
Sunflower oil	7,750	
Total	413,961	282,403

[1] Of the amount produced, 30,369 pounds were reworked.
[2] Of the amount produced, 4,435 pounds were reworked.
[3] Of the amount produced, 12 pounds were reworked.

XIV–17–7464
MS. 162

Schedule of oleomargarine produced and materials used during the month of March, 1935, as compared with March, 1934.

	March, 1935.	March, 1934.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 33,907,010	[2] 23,278,526
Total withdrawn tax-paid	33,668,036	21,722,510
Ingredient schedule for uncolored oleomargarine:		
Butter	289	695
Cocoanut oil	14,475,864	13,496,211
Corn oil		700
Cottonseed oil	9,818,353	2,093,284
Derivative of glycerine	121,978	52,779
Lecithin	1,680	392
Milk	7,647,073	5,583,433
Neutral lard	364,248	1,077,727
Oleo oil	1,687,587	1,753,973
Oleo stearine	224,021	293,295
Oleo stock	215,576	28,756
Peanut oil	378,218	270,057
Salt	1,915,780	1,348,510
Sesame oil	7,238	
Soda (benzoate of)	15,102	8,738
Soya bean oil	118,206	
Sugar		14,496
Total	36,991,213	26,023,046
Total production of colored oleomargarine	[3] 292,543	[4] 337,942
Total withdrawn tax-paid	89,748	58,976
Ingredient schedule for colored oleomargarine:		
Butter	15	
Cocoanut oil	84,300	103,099
Color	258	357
Cottonseed oil	35,527	64,412
Derivative of glycerine	343	362
Milk	53,339	98,350
Neutral lard	9,810	29,928
Oleo oil	88,359	70,432
Oleo stearine	4,080	12,137
Oleo stock	4,025	1,050
Peanut oil	333	2,814
Salt	20,372	28,666
Soda (benzoate of)	15	15
Sugar		60
Sunflower seed oil	12,250	
Total	313,026	411,682

[1] Of the amount produced, 20,491 pounds were reworked.
[2] Of the amount produced, 6,746 pounds were reworked.
[3] Of the amount produced, 1,824 pounds were reworked.
[4] Of the amount produced, 19 pounds were reworked.

XIV–21–7515
MS. 163

Schedule of oleomargarine produced and materials used during the month of April, 1935, as compared with April, 1934.

	April, 1935.	April, 1934.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 37, 177, 814	[2] 17, 773, 926
Total withdrawn tax-paid	37, 159, 911	18, 870, 176
Ingredient schedule for uncolored oleomargarine:		
Butter	296	380
Cocoanut oil	15, 864, 015	10, 488, 100
Corn oil		700
Cottonseed oil	10, 962, 009	2, 027, 865
Derivative of glycerine	174, 309	42, 291
Lecithin	3, 493	200
Milk	8, 584, 149	4, 147, 911
Neutral lard	321, 857	589, 549
Oleo oil	1, 663, 749	1, 055, 131
Oleo stearine	160, 296	236, 296
Oleo stock	217, 943	22, 016
Peanut oil	496, 171	212, 378
Salt	2, 161, 022	1, 014, 329
Sesame oil	5, 410	
Soda (benzoate of)	19, 041	6, 725
Soya bean oil	156, 979	
Sugar		9, 490
Vegetable oil	408	
Total	40, 791, 147	19, 853, 361
Total production of colored oleomargarine	[3] 241, 673	248, 588
Total withdrawn tax-paid	100, 937	37, 442
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	80, 538	70, 600
Color	227	307
Cottonseed oil	42, 824	44, 893
Derivative of glycerine	412	326
Lecithin	7	
Milk	60, 871	77, 370
Neutral lard	12, 717	25, 115
Oleo oil	59, 061	50, 012
Oleo stearine	1, 330	8, 630
Oleo stock	3, 660	661
Peanut oil	587	2, 840
Salt	21, 989	21, 021
Soda (benzoate of)	58	14
Soya bean oil	64	
Sugar		54
Sunflower seed oil	4, 750	
Total	289, 095	301, 843

[1] Of the amount produced, 31,459 pounds were reworked.
[2] Of the amount produced, 13,606 pounds were reworked.
[3] Of the amount produced, 181 pounds were reworked.

TOBACCO.

XIV–1–7235
T. 6

Statement of manufactured tobacco produced, by classes, during the month of October, 1934, showing the increase or decrease in each class as compared with the previous month.

Class.	Pounds.	Increase.	Decrease.
		Pounds.	*Pounds.*
Plug	5,517,732	512,252	
Twist	426,637	59,195	
Fine cut chewing	378,330	25,915	
Scrap chewing	3,565,782	397,349	
Smoking	17,792,319	2,455,785	
Total	27,680,800	3,450,496	

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

XIV–6–7307
T. 7

Statement of manufactured tobacco produced, by classes, during the month of November, 1934, showing the increase or decrease in each class as compared with the previous month.

Class.	Pounds.	Increase.	Decrease.
		Pounds.	*Pounds.*
Plug	4,878,830		638,902
Twist	443,883	17,246	
Fine cut chewing	241,328		137,002
Scrap chewing	3,463,579		102,203
Smoking	16,141,488		1,650,831
Total	25,169,108		2,511,692

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

XIV–10–7362
T. 8

Statement of manufactured tobacco produced, by classes, during the month of December, 1934, showing the increase or decrease in each class as compared with the previous month.

Class.	Pounds.	Increase.	Decrease.
		Pounds.	*Pounds.*
Plug	4,159,842		718,988
Twist	370,551		73,332
Fine-cut chewing	211,651		29,677
Scrap chewing	3,057,694		405,885
Smoking	13,152,883		2,988,605
Total	20,952,621		4,216,487

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

XIV–14–7418
T. 9

Statement of manufactured tobacco produced, by classes, during the month of January, 1935, showing the increase or decrease in each class as compared with the previous month.

Class.	Pounds.	Increase.	Decrease.
		Pounds.	*Pounds.*
Plug	5,108,497	948,655	
Twist	450,252	79,701	
Fine-cut chewing	252,919	41,268	
Scrap chewing	3,769,493	711,799	
Smoking	16,431,140	3,278,257	
Total	26,012,301	5,059,680	

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

XIV–19–7487
T. 10

Statement of manufactured tobacco produced, by classes, during the months of January and February, 1935, as compared with January and February, 1934.

	January, 1935.	January, 1934.	February, 1935.	February, 1934.
	Pounds.	*Pounds.*	*Pounds.*	*Pounds.*
Plug	5,108,497	5,139,500	4,710,520	5,551,834
Twist	450,252	417,430	441,442	426,268
Fine-cut chewing	252,919	281,612	191,817	242,735
Scrap chewing	3,769,493	4,063,403	3,169,622	3,561,411
Smoking	16,431,140	16,192,546	14,657,768	15,479,003
Total	26,012,301	26,094,491	23,171,169	25,261,251

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

XIV–23–7540
T. 11

Statement of manufactured tobacco produced, by classes, during the month of March, 1935, as compared with March, 1934.

	March, 1935.	March, 1934.		March, 1935.	March, 1934.
	Pounds.	*Pounds.*		*Pounds.*	*Pounds.*
Plug	4,907,117	6,210,018	Smoking	15,424,215	17,250,408
Twist	430,334	443,785			
Fine-cut chewing	367,678	220,733	Total	24,613,441	27,841,985
Scrap chewing	3,484,097	3,717,041			

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

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 before the Treasury Department of the following-named attorneys and agents:

Name.	Address.	Date of disbarment.	Cause.
Allen, W. S.	Los Angeles, Calif.	Mar. 30, 1934	Charged with having been convicted in State court for misappropriation of funds. Charges found proved.
Brown, Clyde A.	Roanoke, Va.	Aug. 16, 1934	Charged with knowingly preparing a false income tax return for a taxpayer. 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.
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.
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.
Dyke, L. M.	Dallas, Tex.	Sept. 6, 1934	Charged with making a false income return for himself. 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.
Etling, Clifford A.	Hammond, Ind.	June 14, 1934	Charged with feloniously misapplying funds of banking corporation. Charges found proved.
French, Frederick W.	Formerly North East, Pa., later Redwood City, Calif., now Tampa, Fla.	Aug. 3, 1934	Charged with issuing and obtaining money on worthless checks, and with having been convicted on such charges in a State court. Charges found proved.
Gorham, Fred A., Jr.	Grand Rapids, Mich.	Mar. 6, 1935	Charged with gross negligence in failing to file income tax returns which he was employed to prepare and file, and with unjustifiable failure to surrender upon request records of taxpayer. 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.
Hoffmann, Arthur J.	11 West Forty-second Street, New York, N.Y.	Apr. 30, 1935	Charged with having been convicted of larceny, in State court. Charges found proved.
Kent, Robert C., Jr.	Beacon, N. Y.	Mar. 6, 1935	Charged with having been convicted of secreting a person with intent to extort money and pecuniary gain. Charges found proved

[1] This ruling (7561) includes also rulings Nos. 7237, 7251, 7264, 7279, 7291, 7308, 7323, 7336, 7348, 7363, 7376, 7391, 7407, 7419, 7433, 7448, 7463, 7476, 7490, 7501, 7513, 7531, 7542, and 7552. 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, 1935, and all suspensions in effect during the 6-month period January 1–June 30, 1935, inclusive. It does not include those barred from practice by reason of disapproval of their application for enrollment.

Name.	Address.	Date of disbarment.	Cause.
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.
Landreau, Norman B.	Washington, D. C	Mar. 6, 1935	Charged with having been convicted of embezzlement. Charges found proved.
Leavitt, Benjamin D.	Chicago, Ill.	Mar. 6, 1935	Charged with knowingly preparing a false income tax return for a taxpayer. Charges found proved.
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.
Manning, Anthony Beronious.	Formerly New York, N. Y., later Houlton, Maine.	Aug. 24, 1934	Charged with knowingly preparing a false Federal income tax return for a taxpayer. 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 knowlege 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 proven.
Posner, Jacob D.	New York, N. Y.	June 14, 1934	Charged with having been convicted for fraudulent use of the United States mails. Charges found proved.
Rosewater, H. W.	Cleveland, Ohio.	Aug. 2, 1934	Charged with preparing false returns for two years for a taxpayer, and with conviction in United States district court on such charges. 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.
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.
Smith, Roy L.	Greensboro, N. C.	Sept. 4, 1934	Charged with knowingly preparing false returns for taxpayers. 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.
Tinkoff, Paysoff.	Chicago, Ill.	Nov. 23, 1934	Charged with having been indicted and convicted in the United States district court for knowingly preparing a fraudulent income tax return. 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.
Blanchard, Charles E.	Columbus, Ohio	1 year, from July 13, 1934.	Found guilty of gross negligence for filing erroneous personal income tax returns.
Kirtley, Fred H	Formerly Washington, D. C., now Miami, Fla.	5 years, from Aug. 3, 1934.	Charged with failing to file income tax returns for the years 1925 to 1930, inclusive. Charges found proved.
Ruppa, Nathan	Formerly 5156 Plankinton Building, Milwaukee, Wis., now Mariner Tower, 606 West Wisconsin Avenue, Milwaukee, Wis.	6 months, from Nov. 6, 1934.	Charged with improper delay in paying to the Government money received from client for payment of income tax. Charges found proved.

DISBARMENT TERMINATED.

By direction of the Secretary of the Treasury, the order of disbarment entered against the following-named person was terminated as indicated below:

Name.	Address.	Remarks.
Brown, Clyde A	Roanoke, Va	Disbarment ordered August 16, 1934; rehearing granted; order of disbarment annulled and rescinded March 25, 1935.

RESIGNATIONS FROM ENROLLMENT TO PRACTICE BEFORE THE TREASURY DEPARTMENT.

The following-named persons have tendered their resignations from enrollment to practice before the Treasury Department. The Committee on Enrollment and Disbarment has accepted their resignations and ordered their names stricken from the roll of attorneys and agents enrolled to practice before the Treasury Department. They are therefore no longer entitled to practice before the Treasury Department.

Name.	Address.	Designation.	Date of acceptance.
Archer, Tobias R	Los Angeles, Calif	Attorney	Jan. 11, 1935
Bate, Charles W	Formerly Miami, Fla., now Kalamazoo, Mich.	Agent	May 20, 1935
Bonanuo, James J	Far Rockaway, N. Y	Agent	May 23, 1935
Brouner, Samuel B	New York, N. Y	Agent	May 20, 1935
Caddick, William Andrew	Pittsburgh, Pa	Agent	May 20, 1935
Carter, Leo M	Okmulgee, Okla	Agent	Mar. 21, 1935
Charles, Milton C	Formerly New York, N. Y., now Yonkers, N. Y.	Agent	May 20, 1935
Chodosch, David S	New York, N. Y	Agent	May 23, 1935
Cohen, Morris	New York, N. Y	Agent	May 20, 1935
Cooperman, Jacob	New York, N. Y	Agent	May 20, 1935
Epstein, Daniel	Philadelphia, Pa	Attorney	May 20, 1935
Gumbiner, Martin J	New York, N. Y	Agent	May 20, 1935
Lees, Philip	New York, N. Y	Agent	May 23, 1935
Moser, Louis Seymour	Chicago, Ill	Agent	May 20, 1935
O'Brien, Thos. F	Boston, Mass	Agent	May 20, 1935
Picon, Saul	Paterson, N. J	Agent	May 23, 1935
Rentschler, Walter M	Memphis, Tenn	Agent	May 23, 1935
Rice, Silas P	Beverly Hills, Calif	Agent	Jan. 31, 1935
Rosenberg, Louis	New York, N. Y	Agent	May 20, 1935
Tatt, Isidore	New York, N. Y	Agent	May 20, 1935
Woolley, Ernest S	Formerly Kansas City, Mo., now New York, N. Y.	Agent	Mar. 21, 1935

INDEX.

	Ruling No.	Page.
A.		
Accounting methods, changes in, regulations, 1934 Act	7252	75
Admissions tax. (*See* Miscellaneous taxes.)		
Affiliated corporations:		
Agreement as to tax allocation, evidence	7317	327
Amortized bond discount, deduction	7232	332
	7233	332
Dealings by subsidiary in parent's stock, income	7372	338
Losses, burden of proof	7244	335
Net losses	7258	226
Agencies of a State. (*See* State.)		
Agents, preparation of returns, affidavit requirements	7396	84
	7422	86
Airplanes on United States vessels of war, gasoline and lubricating oil sold for use in	7429	419
Airports, construction and/or maintenance not essential governmental function	7428	415
Alaska, liens for Federal taxes, notices	7507	239
Alcohol:		
Amendment of Treasury Decision 4485 and instructions on Forms 27–A, 27–B, 27–C, 27½, and 1431	7489	523
Beverages tax, Maryland	7255	60
Blending with gasoline	7511	412
Denatured—		
Manufacture, sale, and use of	7250	383
Proprietary solvents, sale and shipment, regulations amended	7335	525
Industrial, production, tax payments, etc	7250	524
Tax Unit, establishment and jurisdiction	7406	535
Alien Property Custodian, income and profits taxes, returns	7276	543
Amendments:		
Forms 27–A, 27–B, 27–C, 27½, and 1431	7489	523
Mimeograph 4156	7432	528
Regulations 2 (Pro.), section 1220	7309	531
Regulations 3 (Alcohol)—		
Article 117	7250	524
Article 146	7335	525
	7461	525
Regulations 6, sections 7, 8, and 13	7462	514
Regulations 7—		
May 1, 1930, edition	7434	534
July 10, 1914, revision	7434	534
Regulations 13—		
Article 1	7281	519
	7530	521
Article 2	7562	521
Article 3	7263	522
Article 5	7563	522
Regulations 15	7249	508
Regulations 17—		
Article I	7388	550
Article II	7389	550
Article III	7390	551

	Ruling No.	Page.
Amendments—Continued.		
Regulations 18—		
Article XVII	7266	509
Article XXI	7378	510
Paragraphs 11(d), 12(b), 21, 22(a), 22(b), 37(b), 40(a), 40(b), 44(a), 44(b), 45, 47(d), 48(f), 51(d)	7475	510
Regulations 46, Chapter X	7296	410
Regulations 64, article 63	7527	423
Regulations 74, article 63	7431	141
Regulations 77—		
Article 63	7431	141
Article 221(g)	7447	70
Regulations 79, article 2	7517	381
Regulations 83, Chapter III	7512	449
Regulations 86—		
Article 23(m)-1(g)	7447	70
Article 143-2	7393	118
Article 143-3	7393	118
Article 144-1	7393	118
Regulations governing reports of plants and warehouses	7379	536
Revenue Act of 1934, section 55(b)	7474	552
Second Liberty Bond Act, Revenue Act of 1926, section 1126	7346	551
Treasury Decisions—		
2 (Narcotics)	7541	545
4168, Article III(h)	7276	543
4418, paragraph 7	7280	499
4432, section 2, paragraph (*d*)	7406	535
4460	7238	122
4478	7238	122
4479—		
Paragraph 2	7379	536
Paragraph 3	7326	536
4485	7489	523
4527, paragraphs 1 and 4	7392	531
4541	7529	528
Amortization, bonds, expenses incidental to issuance of	7368	47
Annuities:		
Employees' retirement, treatment of employees' contributions	7478	50
Railroad employees' retirement fund	7226	43
Taxability of, 1934 Act	7437	50
Teachers' retirement, contributions by university in part payment	7381	49
Assessments:		
Labor union, deduction	7466	54
Taxes. (*See* Taxes.)		
Assignments, future income	7468 7509	279 280
Attorneys and agents:		
Disbarments and suspensions	7561	561
Fees, business expense deduction	7497	292
Practice requirements before Treasury Department, issuance of new green cards	7460	544
Preparation of returns, affidavit requirements	7396 7422	84 86
Awards, condemnation, involuntary conversion, gain or loss	7257	195
B.		
Bale tags. (*See* Cotton.)		
Bankruptcy, property turned over to trustee, loss deduction	7546	70
Banks:		
Commissions on real estate loans, income, when reported	7496	183
Deposit accounts, sale of, capital loss	7284	110

	Ruling No.	Page.
Banks—Continued.		
Discounts and commissions, when reported	7493	73
Income transferred to trustees, taxability	7521	140
Interest on debentures issued to Reconstruction Finance Corporation, deduction	7409	57
Stockholders' assessment liability, deduction	7227	77
Beer:		
Cancellation of stamps, regulations amended	7266	509
Import duties, deduction	7240	57
Rebranding of barrels, regulations amended	7378	510
Bonds:		
Discount, amortization of, affiliated corporations, deduction	7232 7233	332 332
Exchange of, gain or loss	7520	96
Fruit distillers and winemakers	7502	538
Incidental issuance expenses, amortization deduction	7368	47
Interest. (*See* Interest: Bonds.)		
Irrigation district, California, exemption	7345	428
Purchase and retirement, capital gains and losses	7241	112
Put and call transactions, loss deduction limitation	7300	147
Winemakers'	7277	537
Withholding of tax on interest. (*See* Withholding of tax at source.)		
Bonuses, advance, oil and gas lease, depletion deduction	7230	303
Brokers:		
Information returns	7262 7285	128 128
Ownership certificates, dividends, use of Form 1087	7298	127
Bureau of Internal Revenue:		
Alcohol Tax Unit, establishment and jurisdiction	7406	535
Commissioner of Narcotics, rights, duties, etc., conferred and imposed upon	7541	545
Correspondence symbols	7375	547
Business expenses:		
Attorney's fee	7497	292
Corporation's contributions to community chest	7233	332
Employers, Wisconsin unemployment reserves and compensation act, deduction	7339	54
Labor union dues and assessments	7466	54
Operating expenses, oil and gas wells	7330	176
Premiums, insurance. (*See* Insurance.)		
Railroads, rehabilitation of properties previously under Federal control	7358	322
C.		
Cabarets, admissions tax, minimum charge for refreshments, etc.	7374	420
California:		
Community property and income	7399	261
Irrigation district bonds	7345	428
Capital expenditures:		
Advance payments by railroad lessee, previously deducted as operating expense	7358	322
Corporate payments to life beneficiary of former real estate owner	7548	178
Oil and gas, operating expenses	7330	176
Capital gains and losses:		
Bond purchase and retirement	7241	112
Exchange of municipal bonds under refunding plan	7520	96
Husband and wife, joint return, loss deduction limitation	7352	111
Regulations, 1934 Act	7261	107

	Ruling No.	Page
Capital gains and losses—Continued.		
Sales, bank deposit account, loss deduction limitation	7284	110
Trust company, sale of stock, deduction limitation	7228	111
Capital stock tax:		
Accrual date, 1934 Act	7254	58
Foreign corporations, adjusted declared value, regulations amended	7527	423
Inspection of returns, etc., regulations	7236	86
Cemetery company, distributions to holders of trust certificates, taxability	7275	240
Charitable contributions, deduction by partnership	7286	130
China Trade Act, 1922, transfer of silver bullion to or by China Trade Act corporation	7248	495
Closing agreements, execution by Acting Commissioner, validity	7243	236
Cocoanut oil. (*See* Processing taxes.)		
Code authorities, exemption	7412	95
Colorable sale by manufacturer (parent corporation) to a subsidiary	7427 7458	417 418
Commissions:		
Bank loans, income, when reported	7493 7496	73 183
Trustees', gift of trust property	7445	382
Community property and income, California	7399	261
Compensating taxes, credit or refund, penal, etc., institutions	7247	449
Compensation:		
Additional—		
Federal employees, foreign service, allowances for quarters, etc	7450 7492	44 45
Living allowances—		
Customs Agency Service members	7492	45
Foreign Commerce Service members	7450	44
Nonresident alien employees of wine and liquor concerns, taxability	7353	113
Railroad employees' retirement fund, contributions to, income	7226	43
State officers and employees. (*See* State.)		
Compromise of taxes:		
Cases involving forfeiture of seized vehicles	7488	444
Finality, duress not shown	7444	341
Review of Attorney General's settlements	7359	442
Condemnation awards:		
Involuntary conversion, gain or loss	7257	195
Year taxable	7549	425
Consolidated net income, amortization of bond discount, deduction	7232 7233	332 332
Consolidated returns. (*See* Returns.)		
Constructive receipt:		
Future income, assignment of	7468 7509	279 280
Interest coupons, uncollected	7415	269
Royalties collected under trust agreement	7425	272
Contracts:		
Casing-head gas, depletion deduction	7523	305
Naval, Vinson Act, excess profits	7321	529
Contributions:		
Charitable—		
Deduction limitation, husband and wife returns	7369	71
Partnership deduction	7286	130
Community chest, corporation's business expense deduction	7233	332
University's payments toward purchase of teachers' annuities exemption	7381	49
Conveyances. (*See* Miscellaneous taxes: Stamp taxes.)		
Cooperative associations, sales of gasoline to	7278	411

	Ruling No.	Page.
Corporations:		
Affiliated, net loss deduction, intercompany transactions	7258	226
Contributions to community chest, business expense deduction	7233	332
Exemption. (*See* Exempt corporations.)		
Foreign, adjusted declared value, regulations amended	7527	423
Railroad, returns, Form 1090 revised	7297	84
Correspondence symbols, Bureau of Internal Revenue	7375	547
Cotton:		
Bale tags, cotton delivered to landlord by standing-rent tenant	7319	493
Ginning tax, deduction	7467	65
Cotton Act (April 21, 1934), refunds, exemption certificates furnished after cotton was ginned	7472	494
Court decisions:		
Ahles Realty Corporation v. *Commissioner*	7355	245
American Steamship Co. v. *Wickwire Spencer Steel Co*	7386	355
American Textile Woolen Co. v. *Commissioner*	7317	327
Anderson v. *Madsen Investment Co*	7243	236
Atkinson v. *United States*	7416	370
Bandes v. *Commissioner*	7257	195
Beaumont v. *Helvering*	7331	217
Breene et al. v. *United States*	7469	350
Brown v. *Commissioner*	7301	267
Brown Fence & Wire Co.; United States v	7559	438
Bull v. *United States*	7510	310
Bunker Hill Country Club v. *United States*	7405	421
Bushman v. *United States*	7426	385
Cem Securities Corporation v. *Commissioner*	7341	221
Central Republic Trust Co.; Commissioner v	7496	183
Chicago Junction Railways et al. v. *United States*	7522	156
Coastwise Transportation Corporation; Commissioner v	7289	319
Commissioner; Ahles Realty Corporation v	7355	245
Commissioner; American Textile Woolen Co. v	7317	327
Commissioner; Bandes v	7257	195
Commissioner; Brown v	7301	267
Commissioner; Cem Securities Corporation v	7341	221
Commissioner v. *Central Republic Trust Co*	7496	183
Commissioner v. *Coastwise Transportation Corporation*	7289	319
Commissioner; Cummings et al. v	7454	209
Commissioner; Denman v	7401	289
Commissioner; Donnelley et al. v	7302	298
Commissioner v. *General Gas & Electric Corporation*	7372	338
Commissioner; Hartley v	7535	250
Commissioner; Heinz v	7354	231
Commissioner; Herring v	7230	303
Commissioner v. *Highway Trailer Co*	7385	293
Commissioner; Hopkins v	7288	247
Commissioner; Horner v	7287	171
Commissioner; Iowa Guarantee Mortgage Corporation v	7414	187
Commissioner; Hendrick Coal & Dock Co. v	7482	360
Commissioner v. *Krein Chain Co. and Cleveland Chain & Manufacturing Co*	7373	348
Commissioner; Marquette Oil Distribution Co. v	7425	272
Commissioner; McGuirl, Inc., v	7549	185
Commissioner v. *McKey*	7496	183
Commissioner v. *Murphy*	7259	286
Commissioner; Old Colony Trust Co. of Boston v	7470	390
Commissioner v. *Schwarz et al*	7550	383
Commissioner; Seiberling Rubber Co. v	7315	257
Commissioner; Smith v	7275	244
Commissioner; Snyder v	7508	164
Commissioner; Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263, v	7534	158

	Ruling No.	Page.
Court decisions—Continued.		
Commissioner; Titsworth v	7442	205
Commissioner; Van Wart v	7497	292
Commissioner; Vinton Petroleum Co. of Texas v	7330	176
Commissioner; Wood v	7468	279
Corbett Investment Co. v. *Helvering*	7548	178
Cummings et al. v. *Commissioner*	7454	209
Dauphin Deposit Trust Co. v. *United States*	7430	439
Denman v. *Commissioner*	7401	289
Donnelley et al. v. *Commissioner*	7302	298
Dorrance et al. v. *Phillips*	7484	373
Douglas; Willcuts v	7274	228
Duggan; Sun-Herald Corporation v	7452	190
Faris v. *Helvering*	7342	242
Fish et al., beneficiaries, v. *Helvering*	7524	392
Fish et al., executors, v. *Helvering*	7524	392
Fix et al.; Schnader v	7471	503
General Gas & Electric Corporation; Commissioner v	7372	338
Giant Furniture Co. v. *United States*	7537	296
Gregory v. *Helvering*	7273	193
Grinnell; Helvering v	7332	287
Gulf, Mobile & Northern R. R. Co. v. *Helvering*	7232	332
Hartley v. *Commissioner*	7535	559
Heinz v. *Commissioner*	7354	231
Helvering; Beaumont v	7331	217
Helvering; Corbett Investment Co. v	7548	178
Helvering; Faris v	7342	242
Helvering; Fish et al., beneficiaries, v	7524	392
Helvering; Fish et al., executors, v	7524	392
Helvering; Gregory v	7273	193
Helvering v. *Grinnell*	7332	387
Helvering; Gulf, Mobile & Northern R. R. Co. v	7232	332
Helvering; Hyman v	7314	213
Helvering v. *Inter-Mountain Life Insurance Co*	7443	339
Helvering v. *Kendrick Coal & Dock Co*	7483	365
Helvering; McDonald v	7509	280
Helvering; New York, Chicago & St. Louis Railroad Co. v	7358	322
Helvering; Old Mission Portland Cement Co. v	7233	332
Helvering v. *Post & Sheldon Corporation*	7258	226
Helvering v. *Rankin*	7504	160
Helvering v. *Security Savings & Commercial Bank*	7402	300
Helvering; Shaw Printing Co. v	7370	174
Helvering v. *Taylor*	7272	168
Helvering v. *Twin Bell Oil Syndicate*	7229	253
Helvering v. *Wheeling Mold & Foundry Co*	7344	352
Herring v. *Commissioner*	7230	303
Highway Trailer Co.; Commissioner v	7385	293
Hopkins v. *Commissioner*	7288	247
Hormel & Co. v. *United States*	7558	433
Horner v. *Commissioner*	7287	171
Howbert v. *Norris*	7384	264
Hurley v. *United States*	7523	305
Hyman v. *Helvering*	7314	213
Inter-Mountain Life Insurance Co.; Helvering v	7443	339
Iowa Guarantee Mortgage Corporation v. *Commissioner*	7414	187
Jackson v. *Price*	7481	316
Kendrick Coal & Dock Co. v. *Commissioner*	7482	360
Kendrick Coal & Dock Co.; Helvering v	7483	365
Krein Chain Co. and Cleveland Chain & Manufacturing Co.; Commissioner v	7373	348
Ladner; Sharp & Dohme, Inc., v	7525	407
Libbey-Owens-Ford Glass Co. v. *United States*	7498	376

	Ruling No.	Page.
Court decisions—Continued.		
Loose v. *United States*	7415	269
Madsen Investment Co.; Anderson v	7243	236
Marquette Oil Distribution Co. v. *Commissioner*	7425	272
McDonald v. *Helvering*	7509	280
McGuirl, Inc., v. *Commissioner*	7549	185
McKey; Commissioner v	7496	183
McLaughlin v. *Pacific Lumber Co*	7244	335
Murphy; Commissioner v	7259	286
New York, Chicago & St. Louis Railroad Co. v. *Helvering*	7358	322
Norris; Howbert v	7384	264
Old Colony Trust Co. of Boston v. *Commissioner*	7470	390
Old Mission Portland Cement Co. v. *Helvering*	7233	332
Pacific Lumber Co.; McLaughlin v	7244	335
Philadelphia Rapid Transit Co. v. *United States*	7334	284
Phillips; Dorrance et al. v	7484	373
Post & Sheldon Corporation; Helvering v	7258	226
Price; Jackson v	7481	316
Rankin; Helvering v	7504	160
Raybestos-Manhattan, Inc., v. *United States*	7557	431
Schnader v. *Fix et al*	7471	503
Schwarz et al.; Commissioner v	7550	383
Security Savings & Commercial Bank; Helvering v	7402	300
Seiberling Rubber Co. v. *Commissioner*	7315	257
Sharp & Dohme, Inc., v. *Ladner*	7525	407
Shaw Printing Co. v. *Helvering*	7370	174
Smith v. *Commissioner*	7275	240
Snyder v. *Commissioner*	7508	164
Staten Island Hygeia Ice & Cold Storage Co. v. *United States*	7444	341
Stern Bros. v. *United States*	7455	234
Stevens Manufacturing Co. v. *United States*	7400	259
Sun-Herald Corporation v. *Duggan*	7452	190
Superintendent of Five Civilized Tribes, for Sandy Fox, Creek No. 1263, v. *Commissioner*	7534	90
Taylor; Helvering v	7272	168
Titsworth v. *Commissioner*	7442	205
Twin Bell Oil Syndicate; Helvering v	7229	253
United States; Atkinson v	7416	370
United States; Breene et al. v	7469	350
United States v. *Brown Fence & Wire Co*	7559	438
United States; Bull v	7510	310
United States; Bunker Hill Country Club v	7405	421
United States; Bushman v	7426	385
United States; Chicago Junction Railways et al. v	7522	156
United States; Dauphin Deposit Trust Co. v	7430	439
United States; Giant Furniture Co. v	7537	296
United States; Hormel & Co. v	7558	433
United States; Hurley v	7523	305
United States; Libbey-Owens-Ford Glass Co. v	7498	376
United States; Loose v	7415	269
United States; Philadelphia Rapid Transit Co. v	7334	284
United States; Raybestos-Manhattan, Inc., v	7557	431
United States; Staten Island Hygeia Ice & Cold Storage Co. v	7444	341
United States; Stern Bros. v	7455	234
United States; Stevens Manufacturing Co. v	7400	259
Van Wart v. *Commissioner*	7497	292
Vinton Petroleum Co. of Texas v. *Commissioner*	7330	176
Wheeling Mold & Foundry Co.; Helvering v	7344	352
Wickwire Spencer Steel Co.; American Steamship Co. v	7386	355
Willcuts v. *Douglas*	7274	228
Wood v. *Commissioner*	7468	279
Courts, circuit, power to make findings of fact, remand of case	7504	160

	Ruling No.	Page.
Credit or refund:		
Claims, refund, statutory period for filing (Tobacco Act)	7360	497
Conversion factors, "sausage"	7303	448
Estate tax overpayment applied against income tax paid on same profits	7510	310
Interest on overpayment, computation	7498	376
Processing tax, penal, etc., institutions	7247	449
Refunds, Cotton Act (April 21, 1934). (*See* Cotton Act.)		
Suits. (*See* Suits: Recovery of taxes.)		
Credits:		
Against net income—		
Earned income credit	7271 7295	72 72
Interest on United States obligations, husband and wife, separate computation	7295	72
Foreign taxes. (*See* Credits: Taxes.)		
Personal exemption, husband and wife, election	7242	148
Processing tax, penal, etc., institutions	7247	449
Taxes—		
Foreign—		
Great Britain, similar credit requirement	7313	115
Mexico absenteeism tax	7440	114
Payment by foreign subsidiary of domestic company	7231	326
Crude petroleum. (*See* Miscellaneous taxes.)		
Customs agency service, members' allowances for quarters, etc., exemption	7492	45
D.		
Deeds. (*See* Miscellaneous taxes: Stamp taxes—Conveyances.)		
Deficiency, estate tax, extension of time for payment	7441	133
Definitions, "substance" as used in Regulations 17	7388	550
Denatured alcohol:		
Completely, formula No. 5 revoked	7528	524
Form 1477, filed annually	7518	542
New formula for use in manufacture of rubbing alcohol compounds	7461 7529	525 528
Depletion:		
Casing-head gas contracts	7523	305
Oil and gas—		
"Gross income from the property," regulations amended	7447	70
Leases—		
Advance royalty or bonus	7230	303
Apportionment between lessee, assignor, and lessor	7229	253
Bonus payment, percentage basis	7383	98
Properties, percentage basis, computation	7330	176
Property in hands of executor, gain or loss basis	7535	250
Depreciation:		
Property in hands of executor, gain or loss basis	7535	250
Transferee's deduction	7370	174
Diamonds sold in lots	7293	408
Disbarments. (*See* Attorneys and agents.)		
Discount:		
Bank loans, when reported	7493	73
Bonds, amortization of, affiliated corporations	7232 7233	332 332
Distilled spirits:		
Application of Federal Alcohol Control Administration regulations	7322	539
Bottled in bond, size of bottles	7462	514
Imported, strip stamps attached to bottles	7347	500
(Including alcohol), wines, and liquors forfeited, procedure	7364	515

	Ruling No.	Page.
Distilled spirits—Continued.		
In bottles	7280	499
Labeling liquor bottles and other containers	7562	521
	7563	522
Regulations—		
Of traffic in containers of	7281	519
	7530	521
Relating to nonindustrial use of	7322	539
7, amended	7434	534
Sales by distillers and rectifiers	7543	507
	7544	508
Use of bottles for packaging, regulations amended	7263	522
	7281	519
Withdrawn for Government use, receipts for, dispensed with	7309	531
Distillers:		
Forms 27–A and 27½, regulations concerning	7560	542
Fruit brandy, bonds	7502	538
Sales of distilled spirits	7543	507
	7544	508
Storekeeper-gaugers and distillers at whisky, rum, and gin distilleries, duties of	7435	540
Dividends:		
Bank's distribution on preferred stock issued to Reconstruction Finance Corporation	7409	57
Cancellation or redemption stock	7314	213
Cemetery company operating under trust agreement	7275	240
Earned surplus distribution	7342	242
Foreign corporation, withholding or information returns	7494	119
Intercompany, deduction	7315	257
Life insurance proceeds	7454	209
Net income determination, earned income credit	7271	72
Preferred stock exchanged for gold notes	7423	151
Withholding tax at source, regulations amended	7393	118
Dues and assessments, labor union, deduction	7466	54
Dues and initiation fees. (*See* Miscellaneous taxes.)		
Duties, import, on spirits, wines, etc., deduction	7240	57
E.		
Earned income credit:		
Husband and wife—		
Joint return	7395	81
Separate computation	7295	72
Net income determination, dividend inclusion	7271	72
Nonresident citizen, exemption	7331	217
Emergency relief administration:		
Federal or State	7333	414
State, officers and employees, compensation	7312	101
State relief assumed by Federal Emergency Relief Administration	7500	416
Estate tax:		
Deficiency, extension of time for payment	7441	133
Gross estate—		
General power of appointment	7332	487
Joint tenants and tenants by entirety	7426	385
Power of appointment, presumption of intent to exercise, effect of compromise agreement	7470	390
Transfer—		
In contemplation of death	7524	392
In trust, to take effect at death	7550	383
Overpayment applied against income tax	7510	310

	Ruling No.	Page.
Estoppel:		
Accrual method employed by taxpayer accepted by Commissioner	7537	296
Assertion of claim for overpayment	7455	234
Change in basis for computing income, benefits received	7400	259
Credit of overassessment against additional taxes, waivers	7469	350
Evasion of surtax by incorporation	7413	150
Excess profits, naval contracts, Vinson Act	7321	529
Excess-profits tax, returns:		
Fiscal year begun in 1933 and ended in 1934, separate basis	7329	115
Railroad corporations, affiliated groups	7365	138
Exchange rates, foreign	7327	73
Exchanges:		
Gain or loss. (*See* Gain or loss: Exchanges.)		
Notes for stock, accrued interest and dividend, treatment of	7423	151
Exempt corporations:		
Code authorities	7412	95
Holding company, "organized" and "operated" distinguished	7452	190
Exempt income:		
Allowances for quarters, etc.—		
Customs Agency Service members	7492	45
Foreign Commerce Service members	7450	44
Annuities and old-age pensions	7437 7478	50 50
Contributions by university toward purchase of teachers' annuities	7381	49
Earned income, nonresident citizens	7331	217
Indians. (*See* Indians.)		
Interest, bond, Home Owners' Loan Corporation	7382	51
Public utility corporation	7334	284
State officers and employees. (*See* State.)		
Extension of time:		
Estate tax deficiency	7441	133
Filing of returns—		
Mutual insurance companies, calendar year 1934	7457 7514	83 83
Personal holding companies and mutual insurance companies, calendar year 1934	7366	82
Payment of tax—		
Deficiencies in and installments of, rules governing applications for	7441	133
Mutual insurance companies, calendar year 1934	7457	83
Personal holding companies and mutual insurance companies, calendar year 1934	7366	82
F.		
Federal Emergency Relief Administration:		
Sales to	7333	414
State relief assumed by, sales to	7500	416
Fees, attorney's, busines expense deduction	7497	292
Fiduciary returns, regulations, 1934 Act	7292	116
Fire:		
Insurance, proceeds, year of accrual	7479	181
Losses, not compensated for by insurance, when deductible	7385	293
Firearms, shells, and cartridges. (*See* Manufacturers' Excise taxes.)		
Foreign:		
Commerce Service members, allowances for quarters, etc., exemption	7450	44

	Ruling No.	Page.
Foreign—Continued.		
Corporations—		
Adjusted declared value, regulations amended	7527	423
Dividends, information returns	7494	119
Wine and liquor concerns, sales contracts and employees' compensation, income	7353	113
Withholding tax at source. (*See* Withholding tax at source.)		
Exchange, rates prevailing December 31, 1934	7327	73
Forms:		
27–A, 27½, 27–B, 27–C, and 1431, regulations concerning	7560	542
630, receipts in connection with credits claimed on, requirement eliminated	7320	544
1087, ownership certificate, dividends	7298	127
1090, statement of income, and profits and loss accounts, revised	7297	84
1477, denatured alcohol	7518	542
G.		
Gain or loss:		
Exchanges—		
Bonds, municipal, under refunding plan	7520	96
Notes for stock, accrued interest and dividend	7423	151
Involuntary conversion of property	7257 7453 7456	195 197 519
Reorganization, transfer made to avoid tax	7273	193
Sales—		
Basis, property in hands of executor	7535	250
Contract to cut and remove timber, when profits reported	7301	267
Partnership assets contributed in kind, basis	7424	208
Property—		
Acquired by bequest, basis	7288	247
Acquired in reorganization, basis	7355	245
Transmitted at death	7505 7506	202 205
Real property, reorganization, cost to transferor	7355	245
Stock	7287	171
Acquired in reorganization, basis	7442	205
Acquired upon exchange for partnership interest	7342	242
Marginal transactions, "first-in, first-out" rule	7504 7508	160 164
Termination of trust, donor's basis	7371	201
Gambling transactions, losses. (*See* Losses.)		
Gasoline. (*See* Manufacturers' excise taxes.)		
Gift tax:		
Transfers—		
Bonds, notes, etc., of United States or its agencies	7517	381
In trust, corpus to charitable institution	7245	381
Real estate, husband and wife, California	7524	392
Trustees' commissions, trust property	7445	382
Governmental function:		
Construction and/or maintenance of an airport	7428	415
Construction of sewers, etc., by State or political subdivision	7485	416
Government property, cabinet for, and control of strip stamps	7349 7392	532 531
Great Britain, taxes, similar credit requirement	7313	115
Guardian, transfer of stock to ward:		
District of Columbia, Missouri, North Carolina, Ohio	7556	425
Pennsylvania	7459	425

	Ruling No.	Page.
H.		
Harrison narcotic law, registration of schools, etc. (Mim. 4156 amended)	7432	528
Hogs (Agricultural Adjustment Act). (*See* Processing taxes.)		
Home Owners' Loan Corporation, interest on bonds of, taxability	7382	51
Husband and wife:		
Capital loss, joint return, deduction limitation	7352	111
Charitable contributions, deduction limitation	7369	71
Credit for interest on United States obligations, separate computation	7295	72
Earned income credit—		
Joint return	7395	81
Separate computation	7295	72
Joint—		
Returns	7395	81
Tenants, Wisconsin, tax deduction in separate returns	7256	142
Personal exemption	7242	148
I.		
Import duties on spirits, wines, etc., deduction	7240	57
Improvements by lessees, regulations amended	7431	141
Income from sources within United States, foreign wine and liquor concerns, sales contracts and employees' compensation	7353	113
Indians:		
Creek, income from restricted allotment	7534	158
Crude petroleum—		
Five Civilized Tribes and State school lands	7403	397
Homestead allotments, Osage and Seminole Indians	7404	400
Individual returns. (*See* Returns.)		
Information at source:		
Ownership certificates, dividends, use of Form 1087 by brokers and nominees	7298	127
Returns, foreign corporation, dividend payments	7494	119
Information returns. (*See* Returns.)		
Inspection of returns. (*See* Returns.)		
Installment sales:		
Personal property, automobile financing corporation	7414	187
Retroactive provisions of 1926 Act, use of, to escape tax	7384	264
Insurance:		
Premiums, deduction, insurance as loan security	7338, 7343	52, 291
Proceeds, fire insurance, year of accrual	7479	181
Insurance companies:		
Life, reserves against matured coupons, deductions	7443	339
Mutual (other than life), extension of time, filing returns, payment of tax, calendar year 1934	7366, 7457	82, 83
Interest:		
Accrued, notes exchanged for preferred stock	7423	151
Bank debentures issued to Reconstruction Finance Corporation, deduction	7409	57
Bonds—		
Home Owners' Loan Corporation, exemption	7382	51
Withholding. (*See* Withholding of tax at source.)		
Corporate payments to life beneficiary of former real estate owner	7548	178
Coupons, uncollected, constructive receipt	7415	269
Overpayments. (*See* Interest: Refunds.)		
Refunds, overpayment, computation	7498	376
United States obligations, credit for, husband and wife	7295	72

	Ruling No.	Page.
Involuntary conversion of property:		
Condemnation award, gain or loss	7257	195
Gain or loss	7453	197
	7456	519
Irrigation district, bonds, exemption	7345	428
J.		
Joint:		
Returns, husband and wife, classification	7395	81
Stock land banks, interest on bonds of, ownership certificates	7397	123
Tenants, Wisconsin, real estate tax, deduction	7256	142
K.		
Kentucky sales tax	7410	62
	7411	64
L.		
Labor union, dues and assessments, deduction	7466	54
Leases:		
Oil and gas, depletion—		
Advance royalty or bonus	7230	303
Apportionment between lessee, assignor, and lessor	7229	253
Oil, gas, and coal, conveyance of. (*See* Miscellaneous taxes: Stamp taxes.)		
Liberty Bond Act, second, amendments	7346	551
Liens, Federal taxes, filing of notices, Alaska	7507	239
Limitation period:		
Assessment of taxes—		
Commencement date, individual and consolidated returns	7373	348
Transferee	7386	355
Claims for refund, redemption of unused tobacco sales tax stamps	7360	497
Collection of taxes, waivers, dissolved corporation, estoppel	7469	350
Credit or refund, estate tax overpayment applied against income tax paid on same profits	7510	310
Returns, sufficiency	7341	221
Suits, recovery of taxes, construction of section 3226, Revised Statutes	7523	305
Liquor:		
Bottling of wines, cordials and liqueurs at rectifying plants, regulations amended	7249	508
Dealers—		
Reports of plants and warehouses	7326	536
State immunity and police power, "person" classified	7471	503
Fermented malt, meter readings, regulations amended	7475	510
Floor tax, constitutionality	7471	503
State stores—		
Retail, taxability of profits	7316	103
Taxability of profits	7439	103
Loans, bank, commissions, income, when reported	7493	73
	7496	183
Losses:		
Advance payments by railroad lessee, previously deducted as operating expense	7358	322
Affiliated corporations, burden of proof	7244	335
Article lost in transit, shipper indemnified by carrier	7486	413
Bank—		
Purchasing stock and assets in other bank, liquidating dividends	7402	300
Stockholders' assessment liability, deduction	7227	77

	Ruling No.	Page.
Losses—Continued.		
Bankrupt, property turned over to trustee	7546	70
Fire, not compensated for by insurance, when deductible	7385	293
Gambling transactions, evidence	7331	217
Securities, offset against personal gains	7495	148
Stock—		
Forced sales, deduction limitation	7533	144
Offset against partnership gains	7299	145
Put and call transactions, deduction limitation	7300	147
Wash sales	7480	225
Stockholders, liquidation of corporation, when deductible	7311	68
Voluntary payment to creditors, deduction	7302	298
Lubricating oil. (*See* Manufacturers' excise taxes.)		
M.		
Manufacturers' excise taxes:		
Colorable sale by manufacturer (parent corporation) to a subsidiary	7427 7458	417 418
Diamonds sold in lots	7293	408
Emergency relief administration, Federal or State, sales to	7333	414
Firearms, shells, and cartridges, Chapter X, Regulations 46, amended	7296	410
Gasoline—		
Lost in transit by pipe line carrier; shipper indemnified	7486	413
Producer, blender of alcohol and gasoline	7511	412
Sales—		
For use in airplanes on United States vessels of war	7429	419
State, construction and/or maintenance of an airport	7428	415
To cooperative and self-help associations	7278	411
Lubricating oil—		
Petrolatum	7446	405
Sales—		
For use in airplanes on United States vessels of war	7429	419
To a State, construction and/or maintenance of an airport	7428	415
Sales—		
By subsidiary taxable as sales by the parent corporation	7427 7458	417 418
State, taxable articles used in construction of sewers, etc	7485	416
To State for use of National Guard	7246	413
Sporting goods, games, taxability of certain shoes	7526	409
State relief assumed by Federal Emergency Relief Administration, sales to	7500	416
Tires and inner tubes, retreaded and rebuilt tires	7551	406
Toilet preparations, hexylresorcinol solution, mouth wash, etc	7525	407
Maryland, alcoholic beverages tax, deduction	7255	60
Massachusetts, public administrator, compensation	7351	102
Meter readings, malt liquor brewers, regulations amended	7475	510
Mexico absenteeism tax, credit for	7440	114
Mining equipment, conveyance of. (*See* Miscellaneous taxes: Stamp taxes.)		
Miscellaneous taxes:		
Admissions, cabarets, etc., minimum charge for refreshment, etc	7374	420
Crude petroleum—		
Produced from lands of Five Civilized Tribes and State school lands	7403	397
Restricted homestead allotments, Osage and Seminole Indians	7404	400

	Ruling No.	Page.
Miscellaneous taxes—Continued.		
Dues and initiation fees, sporting club	7405	421
Liquor dealers, State immunity and police power, "person" classified	7471	503
Stamp taxes—		
Bonds, irrigation district, California, exemption	7345	428
Certificates of participation taxed as corporate securities	7430	439
Conveyances—		
Leases, oil, gas and coal, West Virginia	7318	427
Mining equipment, West Virginia	7318	427
Realty and personalty	7318	427
Redemption of unused tobacco sales tax stamps, statutory period	7360	497
Silver bullion, sales and transfers—		
Tax on, deduction	7553	67
To or by a China Trade Act corporation	7248	495
Stock, transfer of right to receive	7557 7558 7559	431 433 438
Tobacco Act of 1934—		
Claims for refund (Tobacco Act), statutory period for filing	7360	497
Destruction by fire (Tobacco Act)	7304	496
"Leaf scrap"—		
Collected from loading platform, etc. (Tobacco Act)	7473	498
Sale of (Tobacco Act)	7305	497
Tobacco manufactured and sold by the producer	7539	499
Transfer of stock from guardian to ward—		
District of Columbia, Missouri, North Carolina, Ohio	7556	425
Pennsylvania	7459	425
Transferee's liability	7559	438
Missouri:		
Property taxes, accrual date	7438	64
Public administrator, compensation	7356	288
Montana:		
Public administrator, compensation	7357	288
State retail liquor stores profit, taxability	7316	103

N.

Narcotic law. (*See* Harrison narcotic law.)		
National Guard, sales of articles for use of	7246	413
National Industrial Recovery Act, returns, regulations respecting use of original and furnishing copies of	7236	86
Nebraska, property taxes, accrual date	7268	60
Net income:		
Bases of computation, regulations, 1934 Act	7252	75
Computation, change in basis, estoppel	7400	259
Consolidated, dealings by subsidiary in parent's stock	7372	388
Net losses:		
Affiliated corporations	7315	257
Intercompany transactions	7258	226
Successor corporation's deduction	7341	221
Nonresident aliens:		
Earned income	7331	217
Wine and liquor concerns, sales contracts and employees' compensation, income	7353	113
Notes, serial, purchase and retirement, income	7289	319

	Ruling No.	Page.
O.		
Ohio sales tax	7421	64
Oil and gas:		
Depletion allowance. (*See* Depletion.)		
"Gross income from the property," regulations amended	7447	70
Oleomargarine:		
Schedule of production and materials used—		
November, 1934 and 1933	7234	553
December, 1934 and 1933	7306	554
January, 1935 and 1934	7361	555
February, 1935 and 1934	7417	556
March, 1935 and 1934	7464	557
April, 1935 and 1934	7515	558
Osage Indians, crude petroleum from restricted homestead allotments	7404	400
Ownership certificates:		
Bonds—		
Interest, joint stock land banks	7397	123
Tax-free covenant, interest withholding	7238	122
Dividends, use of Form 1087 by brokers and nominees	7298	127
P.		
Partnerships:		
Charitable contributions by, deduction	7286	130
Distributive shares—		
Accounting periods of firm and members different	7555	131
Estate of deceased partner, income	7510	310
Losses on securities offset against personal gains	7495	148
Personal stock losses offset against partnership gains	7299	145
Sale of asset contributed in kind, gain or loss	7424	208
Peanuts. (*See* Processing tax.)		
Pensions, old-age, taxability	7437	50
Permit application (Form 1431) for operating industrial alcohol, bonded warehouse, and denaturing plants	7560	542
Personal exemption. (*See* Credits against net income.)		
Personal expenses, attorney's fees	7497	292
Personal holding companies:		
Extension of time, filing returns, payment of tax, calendar year 1934	7366	82
Surtax on, payment by stockholders on pro rata shares	7398	137
Pipe line carrier, gasoline lost in transit, shipper indemnified	7486	413
Practice requirements before Treasury Department. (*See* Attorneys and agents.)		
Processing taxes:		
Cocoanut oil—		
Filtering, etc	7387	396
Filtration and clarification, S. T. 758 and S. T. 800 revoked	7499	396
Credit or refund, penal, etc., institutions	7247	449
Hogs—		
Conversion factors, "sausage"	7303	448
Regulations	7290	450
Peanuts—		
"Farmers' stock weight"	7538	447
Processing for producer's use as seed	7260	449
Sugar beets or sugarcane, regulations governing	7516	462
Tobacco—		
Products for use as sea stores	7512	449
Regulations governing	7377	475
Producer of gasoline. (*See* Manufacturers' excise taxes: Gasoline.)		
Property taxes. (*See* Taxes: State—Property taxes.)		

	Ruling No.	Page.
Public administrators, compensation, exemption	7351 7356 7357	102 288 288
Public utility corporation, income, exemption	7334	284
Publicity returns:		
Certain statements of income	7474	552
Income tax, statement of items on	7283 7328 7350 7547	92 94 93 90
Purchase and retirement of serial notes, income	7289	319
Q.		
Quarters, allowances for:		
Foreign Commerce Service employees	7450	44
Foreign Customs Agency Service employees	7492	45
R.		
Railroads:		
Affiliation, excess-profits tax returns	7365	138
Compensation, Federal control period, deduction for rehabilitation expenditures	7358	322
Employees' retirement fund, contributions to, income	7226	43
Rates of exchange, foreign	7327	73
Receipts for credits claimed on Form 630, requirement eliminated	7320	544
Records, under provisions of Public, No. 373, when required, regulations amended	7390	137
Rectifiers:		
Forms 27–B and 27–C, regulations concerning	7560	542
Sales of distilled spirits	7544	508
Refunds. (*See* Credit or refund.)		
Registration of schools, etc., under Harrison narcotic law (Mim. 4156 amended)	7432	528
Regulations. (*See* Amendments: Regulations.)		
Reorganization:		
Gain or loss, transfer made to avoid tax	7273	193
Property acquired in, gain or loss basis	7355	245
Reserves:		
Freight allowances and cash discounts	7537	296
Life insurance company	7443	339
Retirement annuities, railroad employees, taxability	7226	43
Returns:		
Affidavit of attorney or agent preparing	7396 7422	84 86
Consolidated—		
Agreement as to tax allocation	7317	327
Fiscal years begun in 1933 and ended in 1934, election	7329	115
Excess-profits tax, affiliated groups of railroad corporations	7365	138
Extension of time for filing, calendar year 1934:		
Mutual insurance companies	7457 7514	83 83
Personal holding companies and mutual insurance companies	7366	82
Fiduciary, regulations, 1934 Act	7292	116
Husband and wife, joint return:		
Capital loss, deduction limitation	7352	111
Classification	7395	81
Income and profits taxes, property in custody of Alien Property Custodian	7276	543
Income, capital stock, and excess-profits tax, regulations respecting use of original and furnishing copies	7236	86
Individuals, regulations, 1934 Act	7265	79

	Ruling No.	Page.
Returns—Continued.		
Information—		
Brokers	7262 7285	128 128
1934 and subsequent calendar years	7324	124
Information at source. (*See* Information at source.)		
Inspection of, Special Committee Investigating the Munitions Industry, United States Senate	7554	90
Joint returns, husband and wife, classification	7395	81
Publicity—		
Certain statements of income	7474	552
Statement of items on	7283 7328 7350 7547	92 94 93 90
Railroad corporations—		
Affiliated groups, excess-profits tax	7365	138
Form 1090 revised	7297	84
Stamps, claims (Form 630), T. D. 1565 revoked	7320	544
Sufficiency, statute of limitation	7341	221
Under provisions of Public, No. 373	7389	550
Revocation, Treasury Decision 1565	7320	544
Royalties, oil and gas leases, advance royalties, depletion deduction	7230	303
S.		
Sales:		
Colorable, by manufacturer (parent corporation) to a subsidiary	7427 7458	417 418
Gain or loss—		
Basis, property in hands of executor	7535	250
Bequest property, basis	7288	247
Contract to cut and remove timber, when profits reported	7301	267
Property transmitted at death	7505 7506	202 205
Stock—		
Acquired in reorganization, basis	7442	205
Marginal transactions, "first-in, first-out" rule	7504	160
Termination of trust, donor's basis	7371	201
Installment. (*See* Installment sales.)		
Securities, partnership losses offset against personal gains	7495	148
Stock—		
Acquired upon exchange for partnership interest	7342	242
Apportionment cost of preferred and common	7272	168
Gain or loss	7287	171
Losses from forced sales, deduction limitation	7533	144
Personal losses offset against partnership gains	7299	145
Unidentified shares, conclusiveness of Board's finding	7354	231
Wash sales, losses	7480	225
Stock and bond, put and call transactions, loss deduction limitation	7300	147
Tax. (*See* Taxes.)		
Wash sales, stock acquired through rights	7480	225
School lands, State, crude petroleum produced from	7403	397
Scrip in payment of interest on bonds, withholding	7340	152
Second Liberty Bond Act, amendments	7346	551
Self-help associations, sales of gasoline to	7278	411
Seminole Indians, crude petroleum from restricted homestead allotments	7404	400
Sewers, construction by a State, etc	7485	416
Silver bullion. (*See* Miscellaneous taxes: Stamp taxes.)		
South Dakota:		
Gross income tax	7270	62
Property taxes, accrual date	7269	61

	Ruling No.	Page.
Spirits, import duties, deduction	7240	57
Sporting goods. (*See* Manufacturers' excise taxes.)		
Stamps:		
Strip, control of	7349 7392	532 531
Taxes. (*See* Miscellaneous taxes.)		
State:		
Agencies, cooperative and self-help associations	7278	510
As liquor dealer, immunity and police power, "person" classified	7471	503
Construction and/or maintenance of an airport by	7428	415
Construction of sewers, etc., by	7485	416
Emergency relief administration, sales to	7333	414
Officers and employees, compensation—		
Attorney employed for single litigation	7259	286
Emergency Relief Administration	7312	101
Manager of municipally owned waterworks	7401	289
Public administrators	7351 7356 7357	102 288 288
Virginia liquor stores	7439	103
Relief assumed by Federal Emergency Relief Administration, sales	7500	416
School lands, crude petroleum produced from	7403	397
Taxes. (*See* Taxes: State.)		
Stock:		
Dividends. (*See* Dividends.)		
Marginal transactions, trade or business, burden of proof	7508	164
Put and call transactions, loss deduction limitation	7300	147
Redemption or cancellation, distribution in	7314	213
Sales—		
Apportionment cost of preferred and common	7272	168
Forced, deduction limitation	7533	144
Gain or loss	7287	171
Personal losses offset against partnership gains	7299	145
Trust company, capital losses, limitation	7228	111
Unidentified shares, conclusiveness of Board's finding	7354	231
Sugar beets or sugarcane. (*See* Processing taxes.)		
Suits:		
Recovery of taxes—		
Account stated, account settled	7416	370
Allocated to subsidiary, no assessment	7484	373
Claim for refund, res judicata	7522	156
Limitation period. (*See* Limitation period: Suits.)		
Overassessment credited against additional taxes, new cause of action	7469	350
Stamp tax, transferee's liability	7559	438
Surtax:		
Corporation utilized for evasion of	7413	150
Personal holding companies, payment by stockholders on pro rata shares	7398	137
Suspensions. (*See* Attorneys and agents.)		
Symbols, correspondence, Bureau of Internal Revenue	7375	547
Syndicate, distributive share of profits, when included in income	7354	231
T.		
Taxes:		
Alcoholic beverages, Maryland	7255	60
Assessment—		
Affiliated corporations, allocation of tax	7484	393
Limitation period. (*See* Limitation period.)		
Capital stock tax, accrual date	7254	58
Cotton ginning, deduction	7467	65
Credit for. (*See* Credits.)		

	Ruling No.	Page.
Taxes—Continued.		
Extension of time for payment—		
Personal holding companies and mutual insurance companies, calendar year 1934	7366	82
Rules governing applications for	7441	133
Final determination and assessment, closing agreement, signed by acting officials, validity	7243	236
Foreign, credit for. (*See* Credits.)		
Gross income, South Dakota	7270	62
Import duties on spirits, wines, etc	7240	57
Kentucky sales tax	7410 7411	62 64
Liquor floor, constitutionality	7471	503
Ohio sales tax	7421	64
Payment—		
Allocation agreement of affiliated group	7317	327
Treasury notes, Series A–1935, instructions	7536	379
Property—		
Nebraska	7268	60
South Dakota	7269	61
Real estate, Wisconsin, deduction by joint tenants	7256	142
Silver bullion transfers, deduction	7553	67
State—		
Property tax, Missouri	7438	64
Transfer tax, payment by estate, by whom deductible	7481	316
Timber, contract to cut and remove, when profits reported	7301	267
Tires and inner tubes. (*See* Manufacturers' excise taxes.)		
Tobacco:		
Processing of. (*See* Processing tax.)		
Regulations, processing tax, etc	7377	475
Sales Tax Act of 1934. (*See* Miscellaneous taxes; Stamp taxes; Tobacco Act.)		
Statement of manufactured, produced, by classes—		
October, 1934	7235	559
November, 1934	7307	559
December, 1934	7362	559
January, 1935	7418	560
January and February, 1935 and 1934	7487	560
March, 1935 and 1934	7540	560
Toilet preparations, etc. (*See* Manufacturers' excise taxes.)		
Transferee, liability for stamp tax	7559	438
Transferred assets, claims against:		
Agreement to pay lawful debts, whether including taxes	7344	352
Assessment limitation, transferee's waivers, estoppel	7386	355
Treasury notes, Series A–1935, acceptance for tax payment, instructions	7536	379
Trust companies, sale of stock, capital losses, limitation	7228	111
Trusts:		
Associations distinguished	7275	240
Income—		
Distributable shares, taxable to beneficiaries	7481	316
Payment in lieu of alimony, grantor's tax liability	7274	228
U.		
United States Board of Tax Appeals:		
Conclusiveness of finding, sales of unidentified shares of stock	7354	231
Decisions of—		
List of acquiescences and nonacquiescences	7545	1–41
Res judicata, indentity of issues	7386	355
Denial of rehearing	7315	257
Findings of fact, evidence	7482 7483	360 365
United States obligations, interest on, credit, husband and wife	7295	72

	Ruling No.	Page.
V.		
Vinson Act, naval contracts under, excess profits	7321	529
Virginia, State liquor stores, profit, taxability	7439	103
W.		
Wash sales, stock acquired through rights, losses	7480	225
Winemakers, bonds	7277	537
	7502	538
Wines, import duties, deduction	7240	57
Wisconsin:		
Real estate taxes, deduction by joint tenants	7256	142
Unemployment reserves and compensation act, employers' contributions to	7339	54
Withholding tax at source:		
Dividends, regulations amended	7393	118
Foreign corporations, dividend payment	7494	119
Interest, bond—		
Joint stock land banks, ownership certificates	7397	123
Tax-free covenant	7238	122
Liability of bondholders' committee as assignee	7451	154
Scrip issued in payment of bond interest	7340	152

○